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ILLINOIS BUSINESS LAW JOURNAL

RAGE AGAINST THE VOTING MACHINE: DOMINION'S DEFAMATION LAWSUIT AGAINST SIDNEY POWELL

❖ Article ❖

*Dr. Michael Conklin**

I. INTRODUCTION

On January 8, 2021, Dominion Voting Systems, Inc., filed a defamation lawsuit against Sidney Powell.¹ The 124-page complaint—drafted by the law firm of noted libel attorney Tom Clare—is based on Powell's claims that Dominion rigged the 2020 presidential election.² This Article examines the relevant issues of false statement of fact, damages, causation, and actual malice. Additionally, a unique privilege that may be available to Powell is considered.

II. FALSE STATEMENT OF FACT

Some of Powell's statements could be dismissed as either opinion or partial truths. Her claim that "there's no way there was anything but widespread election fraud"³ could be classified as opinion since the word "widespread" is highly subjective and "election fraud" can refer to different occurrences. Additionally, recounts in Georgia did find discrepancies in the originally reported totals.⁴ So in a literal sense, the exact vote tallies originally reported were incorrect. However, the discrepancies

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1. Complaint, *US Dominion, Inc. v. Powell*, No. 1:21-cv-00040 (D.D.C. Jan. 8, 2021).

2. *Id.*

3. *Id.* at 26.

4. Joe Walsh, *Recount Trims Biden's Lead in Georgia by over 1,000 Votes*, FORBES (Nov. 17, 2020, 5:37 PM), <https://www.forbes.com/sites/joewalsh/2020/11/17/recount-trims-bidens-lead-in-georgia-by-over-1000-votes/?sh=4d9080df9b84>.

were not large enough to substantiate Powell's claims that Trump was the rightful winner.⁵ And furthermore, these discrepancies were the result of human error and not any actions by Dominion.⁶

Some of Powell's other statements are likewise outside the realm of a factual claim. For example, she stated that the 2020 presidential election was the "greatest crime of the century if not the life of the world."⁷ This could be dismissed as hyperbole. And the reference to "crime" could be dismissed as hyperbole similar to when someone claims the results of a sporting event or awards show were "criminal."

Dominion also accuses Powell of presenting "cherry-picked" information.⁸ For example, Powell presented statements made by Princeton professor Andrew W. Appel regarding a decades-old voting machine not created by Dominion and not used in any of the states in question in the 2020 election.⁹ Powell presented the Appel statement in a manner that implicates Dominion, but it does not.¹⁰ Despite the popular notion that truth is an absolute defense to defamation,¹¹ there is case law to suggest that factually accurate statements presented in a misleading manner nonetheless implicate defamation liability.¹² An assessment would need to be made as to what the "gist" of the communication was.¹³

The potentially non-defamatory nature of the previously mentioned statements is largely a moot point, however, because Powell also made objectively false statements of fact. She falsely accused Dominion of paying kickbacks to Georgia Republicans.¹⁴ She falsely claimed to be in possession of a video of Dominion's founder bragging about how he could "change a million votes, no problem at all."¹⁵ And she falsely asserted that Dominion was "created in Venezuela at the direction of Hugo Chávez to make sure he never lost an election."¹⁶

"Substantial truth" is a defense to a defamation claim.¹⁷ But when the contexts of Powell's communications are considered, it becomes clear that this defense would

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5. *See id.*
 6. *Id.*
 7. Complaint, *supra* note 1, at 48.
 8. *Id.*
 9. *Id.* at 34.
 10. *Id.* at 34–35.
 11. 50 AM. JUR. 2D LIBEL AND SLANDER § 252 (2020).
 12. Dallas Morning News, Inc. v. Tatum, 554 S.W.3d 614, 628 (Tex. 2018).
 13. *Id.*
 14. Complaint, *supra* note 1, at 36–39.
 15. *Id.* at 20.
 16. *Id.* at 21–22.
 17. 50 AM. JUR. 2D *Libel and Slander* § 253 (2020) ("[S]ubstantial truth [is] an absolute defense.").

not be successful. The totality of her statements is more than just a “slight discrepancy of facts” or only false based on a “semantic hypertechnicality.”¹⁸

III. DAMAGES

As evidenced by the \$1.3 billion request, Dominion is claiming it suffered “enormous” harm.¹⁹ Dominion’s damages, however, were largely either incurred by its employers or are speculative. Some employees working at Dominion have received threatening tweets, voicemails, and emails.²⁰ Dominion will likely not be able to recover compensation on behalf of its employees—defamation is a personal right that cannot be asserted by third parties.²¹ Even if the defamatory statement “indirectly inflicts some injury upon the party seeking recovery,” such a plaintiff is nevertheless barred from recovering for the defamation of another.²² There is no exception to this principle for corporations suing on behalf of their employees.²³

Dominion estimates that it has incurred reputational harm that will result in lost profits of \$200 million.²⁴ But this amount is largely speculative. The only itemized damages provided in the complaint are \$565,000 spent on private security.²⁵ Plaintiffs may seek compensation for prospective damages in defamation cases if the future injury is more than speculative or remote.²⁶ Dominion points out that many state legislators have stated their intent to reassess existing Dominion contracts.²⁷ One Congressman even said he was actively drafting legislation to ban the use of Dominion voting machines in his home state of Arizona.²⁸ Dominion claims that “elected officials, insurers, and potential investors have been deterred from dealing with Dominion, putting Dominion’s contracts in more than two dozen states and hundreds of counties and municipalities in jeopardy and significantly hampering Dominion’s ability to win new contracts.”²⁹

18. Reed v. Gallagher, 204 Cal. Rptr. 3d 178, 193 (Cal. Ct. App. 2016).

19. Complaint, *supra* note 1, at 49.

20. *Id.* at 57–58.

21. Morgan v. Hustler Mag., Inc., 653 F. Supp 711, 719 (N.D. Ohio 1987).

22. Johnson v. KTBS, Inc., 889 So. 2d 329, 333 (La. Ct. App. 2004).

23. R. H. Bouligny, Inc. v. United Steelworkers of Am., 154 S.E.2d 344, 353 (N.C. 1967)

(“Of course, a corporation may not maintain an action for damages for libel or slander of its stockholders, officers, employees or representatives.”).

24. Complaint, *supra* note 1, at 60.

25. *Id.* at 58.

26. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 289 (2020).

27. See, e.g., Complaint, *supra* note 1, at 59.

28. *Id.*

29. *Id.* at 60.

But when confronted, the Dominion CEO could not produce an example of a jurisdiction deciding to no longer use Dominion voting machines.³⁰ Given the infrequent nature of selecting voting machines after an election with false accusations of voter fraud, it is difficult to predict a jury's determination on the probability of these future damages materializing.

Dominion provides evidence that false claims have led to its brand name acquiring a negative connotation.³¹ In just a three-hour period on December 21, 2020, the terms “dominion” and “fraud” were tweeted out together by more than 2,200 users who had almost 9 million followers.³² Given this negative association, even assuming that every state politician knows Powell's claims against Dominion are false, it may nevertheless be rational behavior to choose a Dominion competitor. This is because doing so would avoid potential issues from the politician's constituents who believe Powell's accusations. Furthermore, as time goes on people may misremember the Powell–Dominion incident. They may only recollect a vague notion that Dominion was in some way associated with fraud.³³ This association could result in damages, but it is presently unclear if this will ultimately be the case.

Although not mentioned in the complaint, Dominion could make the related claim that this negative publicity will likely result in difficulty hiring employees in the future. After all, a potential employee who googles Dominion will easily find the reports of how its employees are harassed and require private security to ensure their safety.³⁴

IV. CAUSATION

Dominion attempts to connect Powell's false claims of how the Dominion voting systems rigged the election to public support for the notion.³⁵ However, a close examination demonstrates the tenuous nature of this claim. Dominion asserts that the expenses it incurred are “a direct result of the viral disinformation campaign” from

30. *Dominion Voting Systems Sues Ex-Trump Lawyer over False Claims*, NPR (Jan. 12, 2021), <https://www.npr.org/2021/01/12/955938741/dominion-voting-systems-sues-ex-trump-lawyer-over-false-claims> (hereinafter *Dominion Voting Systems*).

31. Complaint, *supra* note 1, at 50.

32. *Id.*

33. See, e.g., Ian Skyrnik, Carolyn Yoon, Denise C. Park & Norbert Schwarz, *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RSCH. 713 (2005).

34. See, e.g., Olivia Rubin, Lucien Bruggeman & Matthew Mosk, *Dominion Employees Latest to Face Threats, Harassment in Wake of Trump Conspiracy*, ABC NEWS (Nov. 19, 2020, 4:17 AM), <https://abcnews.go.com/Politics/dominion-employees-latest-face-threats-harassment-wake-trump/story?id=74288442>.

35. Complaint, *supra* note 1, at 58.

Powell.³⁶ It also points to polls that find high levels of agreement with the claim that the election was “rigged.”³⁷ While these polls were conducted after Powell began promoting her false claims, that does not necessarily prove causation. Additionally, high levels of support for the notion of a rigged election are not uncommon by the losing side of a presidential election. Yes, as Dominion points out, 68% of Republicans stated that they are concerned the election was rigged.³⁸ But following the 2016 election, 66% of Democrats voiced support for the notion that Russia switched vote tallies.³⁹ Such evidence supports the notion that these partisan beliefs following an election are the norm rather than an anomaly caused by Powell. Additionally, measuring public support for belief in a rigged election is not per se evidence that the public believes Dominion voting systems were actively involved.

An issue that is likely to emerge regarding causation is that Powell was not the first—and far from the only—person making false accusations about Dominion. Even Dominion acknowledges that Powell “[a]ct[ed] in concert with allies and media outlets that were determined to promote a false preconceived narrative about the 2020 election”⁴⁰ And Dominion seems to acknowledge that it does not know who is ultimately responsible for spreading misinformation about the company.⁴¹ The CEO of Dominion stated, “One of the goals of our legal action is to really understand where the impetus behind these lies originated from”⁴² Journalistic accounts of the issue provide a wide range of culprits for voter fraud misinformation.⁴³ In an interview with the Dominion CEO, journalist Noel King stated that it was President Trump who “launched this attack on [Dominion].”⁴⁴ Another source claimed it was J. Christian Adams, Hans von Spakovsky, and Kris Kobach—three former members of the Presidential Advisory Commission on Election Integrity—who enabled Trump’s voter fraud lies.⁴⁵ Still others claim that the voter fraud lies were the result of a deliberate

36. *Id.*

37. *Id.* at 56.

38. *Id.*

39. Kathy Frankovic, *Russia’s Impact on the Election Seen Through Partisan Eyes*, YOUTOV (Mar. 9, 2018, 9:00 AM), <https://today.yougov.com/topics/politics/articles-reports/2018/03/09/russias-impact-election-seen-through-partisan-eyes>.

40. Complaint, *supra* note 1, at 122.

41. *See id.*

42. *Dominion Voting Systems*, *supra* note 30.

43. *Id.*

44. *Id.*

45. Sam Levine & Spenser Mestel, *Just Like Propaganda’: The Three Men Enabling Trump’s Voter Fraud Lies*, GUARDIAN (Oct. 26, 2020, 9:00 AM), <https://www.theguardian.com/us-news/2020/oct/26/us-election-voter-fraud-mail-in-ballots>.

strategy implemented by Republicans years ago, long before Powell first made her claims.⁴⁶

Dominion also accuses Powell of inciting the attack on the Capitol Building on January 6, 2021.⁴⁷ It is unclear what the purpose of including this in the complaint is, as Dominion cannot seek damages for the Capitol attack. This may be an attempt by Dominion to establish the context used to point out that even “Trump loyalist” Mitch McConnell acknowledged Powell’s accusations are “sweeping conspiracy theories” made “without any evidence.”⁴⁸ The context of the Capitol riot may also function to paint Powell in a negative light, as she continued to promote her false narrative even after the riot.⁴⁹

As this section demonstrates, this case contains potential issues of causation. Furthermore, the Dominion complaint could have been worded differently to more clearly connect Powell’s false statements with Dominion’s damages. Regardless, Powell’s false accusations are certainly the kind of accusations that caused Dominion harm and there is precedent for imposing joint and severable liability for defamatory statements.⁵⁰

V. ACTUAL MALICE

Actual malice is required for a defamation suit not just against a public official, but also against public figures.⁵¹ Determining what entities qualify as public figures has been described as “trying to nail a jellyfish to the wall.”⁵² State courts and lower federal courts have implemented increasingly divergent standards for determining when a corporation qualifies as a public figure.⁵³ This ambiguous determination is moot in the present case, however, because Powell’s behavior likely satisfies actual malice. Therefore, even if Dominion is considered a public figure for defamation purposes, the additional requirement is satisfied.

46. Sam Levine, *How the Republican Voter Fraud Lie Paved the Way for Trump to Undermine Biden’s Presidency*, GUARDIAN (Jan. 18, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/jan/18/trump-republican-voter-fraud-lie-biden-presidency>.

47. Complaint, *supra* note 1, at 66.

48. *Id.*

49. *Id.* at 66–67.

50. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 173 (2020) (“As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are personally responsible for the publication, and may be sued jointly or severally.”).

51. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967).

52. *Rosanova v. Playboy Enters, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

53. Matthew D. Bunker, *Corporate Chaos: The Muddled Jurisprudence of Corporate Public Figures*, 23 COMM’N L. & POL’Y 1, 2 (2017).

Actual malice requires the publication be made “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁵⁴ Powell is an accomplished attorney. She was accepted to the University of North Carolina Law School at the age of nineteen, was a federal prosecutor, and founded her own appellate firm.⁵⁵ While an accomplished career in a demanding field does not prove one is immune to false conspiracy theories, it does suggest that Powell would have a difficult time proving ignorance. And the fact that Powell was explicitly notified that her statements were false but nevertheless continued to promote them⁵⁶ at least shows a “reckless disregard” for the truth, which also satisfies the actual malice requirement.⁵⁷ Powell’s use of doctored evidence and lies about the existence of evidence also support either a knowledge of falsity or reckless disregard for the truth.⁵⁸

VI. POTENTIAL IMMUNITY AS TRUMP’S ATTORNEY

One potential affirmative defense that Powell could assert is that her statements are protected by privilege because of her legal representation of President Trump. Many states recognize a privilege whereby an attorney announcing the position of her client cannot be held liable in defamation law for such communication.⁵⁹ Therefore, the issue of whether Powell was making statements on behalf of herself or on behalf of her client Donald Trump and the Trump campaign is relevant.

On November 14, 2020, Donald Trump tweeted that Powell, among others, was part of “a truly great team, added to our other wonderful lawyers and

54. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (quoting *Sullivan*, 376 U.S. 254, 279–80 (1964)).

55. Keith Kloor, *The #MAGA Lawyer Behind Michael Flynn’s Scorched-Earth Legal Strategy*, POLITICO (Jan. 17, 2020, 5:09 AM), <https://www.politico.com/news/magazine/2020/01/17/maga-lawyer-behind-michael-flynn-legal-strategy-098712>.

56. Complaint, *supra* note 1, at 5. Powell responded to the notice by saying that she “retracts nothing.” *Id.* at 60–61.

57. See *Zimmerman v. Al Jazeera America, LLC*, 246 F. Supp. 3d 257, 280–81 (D.D.C. 2017) (“A defendant acts with reckless disregard if ‘the defendant in fact entertained serious doubts as to the truth of his publication[.]’ or acted ‘with a high degree of awareness of probable falsity.’” (alteration in original) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968))).

58. Complaint, *supra* note 1, at 36–38, 20.

59. Colin Kalmbacher, *Legal Experts Explain Defamation Lawsuit Threat Made by Dominion Voting Systems Against Sidney Powell*, L. & CRIME (Dec. 17, 2020, 4:54 PM), <https://lawandcrime.com/2020-election/legal-experts-explain-defamation-lawsuit-threat-made-by-dominion-voting-systems-against-sidney-powell/>.

representatives!”⁶⁰ And on November 19, 2020, Powell stated in a press conference that Rudy Giuliani (who was present) and herself were “representing President Trump and we’re representing the Trump campaign.”⁶¹ However, just three days later the Trump campaign issued a statement saying, “Sidney Powell is practicing law on her own. She is not a member of the Trump Legal Team.”⁶² Powell continued to make her false claims after it was clear she was not working for the Trump campaign. Therefore, it is unlikely that a court would find all of Powell’s statements privileged.

VII. CONCLUSION

The Dominion lawsuit against Powell brings up interesting issues involving defamation jurisprudence. Predicting the outcome of such a case is complicated by the novel nature of predicting future reputational harm to a voting machine company. Additionally, the political undertones of such a case add uncertainty. Regardless, a neutral assessment of applicable case law suggests that Powell is liable for defamation. The outcome of this lawsuit could have far-reaching ramifications. For example, the discovery process could uncover damning communications between Powell and either the Trump campaign or conservative media outlets. And this lawsuit could be the first of many. Dominion is considering similar legal action against others, including Donald Trump.⁶³ Dominion has already sent document-retention letters to Rudy Giuliani and Fox News.⁶⁴ The ramifications of such subsequent lawsuits could be even greater if they reach the Supreme Court and it takes the opportunity to revisit *Sullivan*, as recently advocated for by Justice Thomas.

60. Complaint, *supra* note 1, at 20 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 14, 2020, 10:11 PM), <https://twitter.com/realdonaldtrump/status/1327811527123103746>).

61. *Id.* at 21.

62. *Id.* at 25.

63. *Dominion Voting Systems*, *supra* note 30.

64. Jacob Shamsian, *Dominion Is Ramping Up Its Defamation Lawsuits for Election Conspiracy Theories. Trump and His Right-Wing Media Allies Could Be Their Next Target*, BUS. INSIDER (Jan. 11, 2021, 11:01 AM), <https://www.businessinsider.com/dominion-trump-fox-news-newsmax-oan-sidney-powell-defamation-lawsuits-2021-1>.

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MARKET MANIPULATION OR JUST DUMB MONEY? THE GAMESTOP
STOCK SPIKE AND WHAT HAPPENS NEXT

❖ Note ❖

*Samuel Barder**

I. INTRODUCTION

On December 9, 2019, GameStop Corp. revealed a troubling third quarter earnings report.¹ Net sales had dropped 30% compared to the same time in 2019, and the company was operating at a \$63 million loss for the quarter.² The next day GameStop shares (“GME”) tumbled by 20% to close at \$13.66 per share.³ On January 27, 2021, the stock closed at \$347.51 per share, a 1,735% increase from since the beginning of the year.⁴ Two days before GME peaked at \$483.00 per share during morning trading.⁵ How did this happen?

The rapid rise in GME shares pitted pros against joes as institutional players, hedge funds, and investment professionals lined up on one side and retail investors, online

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1. Catherine Thorbecke, *Gamestop Timeline: A Closer Look at the Saga that Upended Wall Street*, ABC NEWS (Feb. 13, 2021, 5:00 AM), <https://abcnews.go.com/Business/gamestop-timeline-closer-saga-upended-wall-street/story?id=75617315>.

2. *Id.*

3. *Id.*

4. Philip van Doorn, *Here Are the Biggest Short Squeezes in the Stock Market, Including GameStop and AMC*, MARKETWATCH (Feb. 1, 2021, 9:02 AM), <https://www.marketwatch.com/story/here-are-the-biggest-short-squeezes-in-the-stock-market-including-gamestop-and-amc-11611842270>.

5. Matt Phillips, *GameStop Craters Again as the ‘Meme Trade’ Unravels*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/business/gamestop-stock.html>.

traders and small brokerages, on the other.⁶ One prominent investor said the retail investors, often labeled “dumb money” by Wall Street professionals,⁷ were playing a “loser game” and didn’t “have any idea what they [were] doing.”⁸

When the dust settled and GME closed at \$53.50 per share on February 4, the picture became clearer: Wall Street investors had shorted the stock, betting on its price to drop below its already dismal December price.⁹ Retail investors, spurred by a Reddit forum called “Wall Street Bets,” and celebrities like Elon Musk, had continued to buy shares.¹⁰

The spike in GME prices has reportedly opened a probe into potential market manipulation.¹¹ On March 5, 2021, the House Financial Services Committee convened a hearing on the events, and the stock trading app Robinhood, which halted trades at one point during the trading frenzy, faced questioning.¹²

This note will argue the GameStop spike did not involve market manipulation, and further, that retail investors should not lose access to Reddit and other forums as they continue to find and exploit stock market vulnerabilities. Part II discusses Wall Street Bets, the forum that sparked GME’s rise, the dynamics of a short squeeze, and why investment professionals bet on stocks to plummet further. Part III will analyze the legal and regulatory landscape of market manipulation, Congressional Hearings in February of 2021, and the unique position of Robinhood within this saga. Part IV will argue the SEC should not use the GameStop spike to increase regulation of retail investors, and instead professional investors should choose their own course of action, either by altering their trading habits, or continuing to make higher risk financial decisions; government should not be on either side of this new battle. Part V will conclude.

6. Matt Phillips & Taylor Lorenz, *‘Dumb Money’ Is on Gamestop, Beating Wall Street at Its Own Game*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/01/27/business/gamestop-wall-street-bets.html>.

7. *Id.*

8. Hannah Knowles, *Billionaire Blasts Robinhood Market as Jon Stewart, Others Herald GameStop Stock Rebellion*, WASH. POST (Jan. 29, 2021, 5:00 AM), <https://www.washingtonpost.com/business/2021/01/29/leon-cooperman-gamestop/>.

9. Phillips, *supra* note 5.

10. Phillips & Lorenz, *supra* note 6.

11. Ben Winck, *GameStop Rally Is Reportedly Under Federal Investigation for Possible Market Manipulation—and Robinhood Has Been Subpoenaed*, MARKET INSIDER (Feb. 11, 2021, 2:54 PM), <https://markets.businessinsider.com/news/stocks/reddit-gamestop-stock-rally-investigation-market-manipulation-robinhood-regulation-gme-2021-2-1030074397>.

12. Nathaniel Popper, *Grilled in the Hearing, Robinhood’s Chief Apologizes for Limiting GameStop Trades*, N.Y. TIMES (Mar. 5, 2021, 11:40 AM), <https://www.nytimes.com/live/2021/02/18/business/stock-market-today>.

II. BACKGROUND

A. *Wall Street Bets*

GME's rise combined the boredom many felt during the COVID-19 pandemic,¹³ stimulus checks that needed spending,¹⁴ and collective rallying around a single "meme stock" to create an effective short squeeze.¹⁵

The GME spike can be traced back to a single post on the Reddit forum Wall Street Bets.¹⁶ In mid-2019, a user on the forum, Keith Gill (aka Roaring Kitty), posted his \$53,000 investment in GME stock.¹⁷ In Twitter posts and YouTube videos that followed, he continued to promote the stock until, eventually, others on the forum caught on.¹⁸

Wall Street Bets has been called "4chan with a Bloomberg terminal."¹⁹ The forum had fewer than 500,000 subscribers from 2010 until 2018; in 2020 it crossed the million-subscriber mark, and today it has over 9.9 million subscribers.²⁰ Prior to the GME surge, the forum was rife with risky trading, bragging about using the entirety

13. Sydney Ember, *The Boredom Economy*, N.Y. TIMES (Feb. 20, 2021), <https://www.nytimes.com/2021/02/20/business/gamestop-investing-economy.html>.

14. Jonathan Garber, *GameStop Stock Surge Fueled by Stimulus: Billionaire Gundlach*, FOX BUS. (Jan. 29, 2021), <https://www.foxbusiness.com/markets/gamestop-stock-stimulus-checks-gundlach>.

15. Matt Levine, *The GameStop Game Never Stops*, BLOOMBERG OPINION (Jan. 25, 2021, 12:34 PM), <https://www.bloomberg.com/opinion/articles/2021-01-25/the-game-never-stops?sref=1kJVNqnU>.

16. Kellen Browning & Nathaniel Popper, *The 'Roaring Kitty' Rally: How a Reddit User and His Friends Roiled the Masses*, N.Y. TIMES (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/technology/roaring-kitty-reddit-gamestop-markets.html?name=styl-n-gamestop&action=click&pgtype=Article&state=default&module=styl-n-gamestop®ion=MAIN_CONTENT_1&context=styl-n-gamestop-catchup®ion=TOP_BANNER%E2%96%88=storyline_menu_recirc&action=click&pgtype=Article&impression_id=93a52690-624d-11eb-b665-799c127e9d6a&variant=show.

17. *Id.*

18. *Id.*

19. Jon Sarlin, *Inside the Reddit Army That's Crushing Wall Street*, CNN BUS. (Jan. 30, 2021, 7:10 AM), <https://www.cnn.com/2021/01/29/investing/wallstreetbets-reddit-culture/index.html>. For the uninitiated, 4chan is a controversial and largely unmoderated discussion forum. See Sara Ashley O'Brien, *4Chan, a Popular Hub for Offensive Posts, Shows Signs of Distress*, CNN BUS. (Oct. 5, 2021, 7:10 AM), <https://money.cnn.com/2016/10/05/technology/4chan-shutting-down/index.html>.

20. *Wall Street Bets*, REDDIT, <https://www.reddit.com/r/wallstreetbets/> (last visited Mar. 25, 2021).

of one's capital, and a general lack of education on how to successfully trade stocks as a retail investor.²¹

But Roaring Kitty and another user, “u/dfv,” insisted GME was worth buying and contributed sound financial analysis to back up their positions.²² Gamestop, dragging in the midst of COVID-19, had taken on a new billionaire investor, and scores of “institutional investors” had bet on GameStop going bankrupt.²³ They were “shorting” the shares—betting that the price was overvalued and would continue to fall.²⁴

Investors short stocks by borrowing shares of the company (often from a broker) and then selling the borrowed shares into the market, expecting the share price to fall, at which time the investor buys back the shares at a lower price, returning the borrowed shares to their lender, and profiting on the difference.²⁵ Before the GME rally, shares were shorted over 100%, “implying more shares were shorted than were available to trade.”²⁶ Because the settlement of a short stock sale takes two days to clear, the stock can continue to be lent out, sometimes more than once.²⁷ This allows for a stock to be more than 100% shorted.²⁸ GameStop's “peak short interest was 141.8%” of its total shares available for trading, as calculated by financial analytics firm S3.²⁹

Multiple hedge funds are in the business of shorting stocks—betting on their demise to turn a profit. Melvin Capital, a hedge fund, began 2021 with \$12.5 billion and lost 53% of that in the GME fiasco.³⁰ These funds have a “systematic advantage.”³¹

21. John Egan, *Wall Street Bets: The Story of How a Mob Became a Movement, and the Anti-Heroes of the Digital Age. Part 1—Diamond Hands*, FORBES (Feb. 2, 2021, 5:14 PM), <https://www.forbes.com/sites/johnnegan/2021/02/02/smoothbrainsthe-story-of-how-a-mob-became-a-movement-and-a-group-of-smooth-brained-apes-on-the-internet-became-the-anti-heroes-of-the-digital-age/?sh=362562525a89>.

22. *Id.*

23. *Id.*

24. Rafael Nam, *So What Is Short Selling? An Explainer*, NPR (Jan. 28, 2021, 5:21 PM), <https://www.npr.org/2021/01/28/961619848/so-what-is-short-selling-an-explainer>.

25. *Id.*

26. John McCrank, *Explainer: How Were More Than 100% of GameStop's Shares Shorted*, REUTERS (FEB. 18, 2021, 10:15 AM), <https://www.reuters.com/article/us-retail-trading-shortselling-explainer/explainer-how-were-more-than-100-of-gamestops-shares-shorted-idUSKBN2AI2DD>.

27. *Id.*

28. *Id.*

29. *Id.*

30. Juliet Chung, *Melvin Capital Lost 53% in January, Hurt by GameStop and Other Bets*, WALL STREET J. (Jan. 31, 2021, 6:54 PM), <https://www.wsj.com/articles/melvin-capital-lost-53-in-january-hurt-by-gamestop-and-other-bets-11612103117>.

31. John Egan, *Wall Street Bets: How the Saga Will Shape the Next Decade of Digital Community and Activism. Part 3—Self Aware Wolves*, FORBES (Feb. 12, 2021, 5:29 AM), <https://www.forbes.com/sites/johnnegan/2021/02/12/wall-street-bets-how-the-saga-will-shape-the-next-decade-of-both-digital-community-and-activism-part-3self-aware-wolves/?sh=4ed98f9b2b94>.

But here they had gone too far, and “got caught.”³² As retail investors rallied around GME, raising its price, hedge funds shorting the stock were forced to buy back their shares and swallow their losses.³³ In the process, the stock price kept going up as the short sellers bought back stock.³⁴ Analyst Jim Cramer posited Wall Street Bets had focused on these heavily shorted stocks purposefully.³⁵ Hedge funds were overextended on their short positions, and Wall Street Bets took advantage.³⁶ Since the GME spike, some large investors have decreased their short positions in the market.³⁷

B. Robinhood

Robinhood likes to say it “democratized” trading, opening up financial markets to all.³⁸ It charges zero commissions to retail investors who trade on the app.³⁹ Previously, brokerages like Charles Schwab, TD Ameritrade, and E-Trade charged fees to trade stocks on their platforms.⁴⁰ Robinhood forced their hand; these large brokerages knew they would lose customers charging \$6.95 per trade when Robinhood was free; this forced them to conform.⁴¹

In 2020, amidst the disbursement of COVID-19 stimulus checks, Robinhood added over three million accounts in the first nine months of the year; the company’s revenues were up 250% from 2019.⁴² Robinhood had altered the commission structure

32. Christopher Schelling, *Hedge Funds Always Win*, INST. INV. (Feb. 5, 2021), <https://www.institutionalinvestor.com/article/b1qfm3mlgby1v/Hedge-Funds-Always-Win>.

33. *Id.*

34. Levine, *supra* note 15.

35. CNBC, *Jim Cramer: Reddit’s ‘WallStreetBets’ Is Targeting Short Positions, the GameStop Game Never Stops*, YOUTUBE (Jan. 25, 2021), <https://www.youtube.com/watch?v=aZHTm0N59Rc>.

36. *Id.*

37. Julie Steinberg & Juliet Chung, *GameStop Resurgence Reinforces New Reality for Hedge Funds*, WALL STREET J. (Feb. 26, 2021, 5:30 AM), <https://www.wsj.com/articles/gamestop-resurgence-reinforces-new-reality-for-hedge-funds-11614335400>.

38. *Our Mission*, ROBINHOOD, <https://robinhood.com/us/en/support/articles/our-mission/> (last visited Mar. 23, 2021).

39. Shawn Tully, *No Such Thing as a Free Trade: How Robinhood and Others Really Profit from ‘PFOF’—and Why It Harms the Market*, FORTUNE (Mar. 1, 2021, 8:00 PM), <https://fortune.com/2021/03/01/robinhood-trading-app-free-trades-pfof-stock-market/>.

40. Paul R. La Monica, *Online Stock Trading is Free Now. What That Means for E-Trade and Charles Schwab*, CNN BUS. (Oct. 8, 2019, 10:23 AM), <https://www.cnn.com/2019/10/07/investing/online-brokers-zero-commissions/index.html>.

41. *Id.*

42. Jeff Kauflin & Antoine Gara, *The Inside Story of Robinhood’s Billionaire Founders, Option Kid Cowboys, and the Wall Street Sharks that Feed on Them*, FORBES (Aug. 19, 2020, 6:30 AM), <https://www.forbes.com/sites/jeffkauflin/2020/08/19/the-inside-story-of-robinhoods->

and now was gaining market share. In the second quarter of 2020, the trading volume at Robinhood grew by 139% from the first quarter, far outpacing its competitors E-Trade and Schwab.⁴³ The company's valuation rose to \$11.2 billion.⁴⁴

After eliminating trade commissions, Robinhood still needed to make money. It does so by selling its customer's trading orders to large investment firms who then buy and sell the stocks Robinhood users are trading using computer algorithms.⁴⁵ These firms turn a profit on the "spread between the bid and offer prices."⁴⁶ The more the price fluctuates in a single day, hour, or minute, the more Robinhood stands to make. While a retail investor may not worry if he bought the stock for \$25.00 or \$25.05, Robinhood, and the large investors they sell user data to, profit on this five-cent spread by "capturing those pennies tens of millions of times."⁴⁷ Robinhood made \$271 million in the first six months of 2020 selling this "payment for order flow," known as PFOF.⁴⁸

During the GME saga, users began to realize that Robinhood may be less on the side of the retail investor, and more on the side of the institutional firm, like Citadel Securities (to whom Robinhood sells its PFOFs).⁴⁹ This realization set in when Robinhood restricted trading amidst the GME surge.⁵⁰

As GME's price skyrocketed Robinhood (and other retail trading firms) cited "extreme volatility" and refused to allow customers to buy GME stock, instead allowing them only to sell their existing positions.⁵¹ Robinhood quickly became the villain of the GME saga, especially during Congressional hearings in February.⁵²

billionaire-founders-option-kid-cowboys-and-the-wall-street-sharks-that-feed-on-them/?sh=7545a801268d.

43. *Id.*

44. *Id.*

45. *Id.*

46. Michael Braga & Jessica Menton, *Critics Say Robinhood More Aligned with the Wealthy than Average Investors*, USA TODAY (Aug. 19, 2020, 3:34 PM), <https://www.usatoday.com/story/money/2021/02/18/robinhood-stock-wealthy-traders-gamestop-hearing-roaring-kitty/4442330001/>.

47. *Id.*

48. *Id.*

49. Roger Parloff, *Robinhood in a Tough Position as It Faces a Wave of Lawsuits over GameStop Saga*, YAHOO FIN. (Feb. 1, 2021), <https://finance.yahoo.com/news/robinhood-faces-a-wave-of-lawsuits-over-game-stop-saga-135106878.html>.

50. *Id.*

51. Roger Huang, *As Robinhood Shuts Down GameStop Shares, Demand Emerges for Decentralized, Censorship-Resistant Trading*, FORBES (Jan. 28, 2021, 3:00 PM), <https://www.forbes.com/sites/rogerhuang/2021/01/28/as-robinhood-shuts-down-gamestop-shares-demand-emerges-for-decentralized-censorship-resistant-trading/?sh=3a36be555028>.

52. Nathaniel Popper & Matt Phillips, *In GameStop Saga, Robinhood Is Cast as the Villain*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/18/business/gamestop->

Lawmakers on the House Financial Services Committee sought answers as to why Robinhood barred retail investors from trading.⁵³ It seemed to many that the company was valuing its partnership with Citadel over the trader at home.⁵⁴ In addition, the trading halt may have come too late; GME's price had moved well beyond its fundamental financial outlook when Robinhood banned trading.⁵⁵ Some argued Robinhood halted trades to avoid SEC ire; considering the site's ballooning popularity during COVID-19 it may have hoped to avoid government scrutiny.⁵⁶ Robinhood blamed the trading halt on a dearth of capital because of GME's high trade volume.⁵⁷ CEO Vlad Tenev denied Robinhood faced a liquidity issue, saying the "[l]iquidity issue' means you can't meet your capital . . . or your deposit requirements and you're essentially dead. That was not the case with Robinhood."⁵⁸ They were forced to borrow between \$500 and \$600 million to meet lending requirements from the country's central "clearing facility" for stock trades, the Depository Trust & Clearing Corporation.⁵⁹ On January 28, 2021, Robinhood failed to meet a \$3 billion collateral call from the clearinghouse.⁶⁰ By halting trading, the \$3 billion bill reduced to the \$500 to \$600 million figure that Robinhood could afford to raise from investors and pay up front.⁶¹ The company faced criticism and some users sued for losses incurred

robinhood-

hearing.html?name=stylngamestop®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&impresson_id=&variant=1_Show.

53. *Id.*

54. Brian Barrett, *Robinhood Restricts GameStop Trading—in a Bid to Save Itself*, WIRED (Jan. 28, 2021, 5:30 PM), https://www.wired.com/story/robinhood-gamestop-stock/?code=OQa5SYegc7j6qteo9sYgGR8SazaVtAhU0HDTuTbXmSm&state=%7B%22redirectURL%22%3A%22https%3A%2F%2Fwww.wired.com%2Fstory%2Frobinhood-gamestop-stock%2F%3Futm_source%3DWIR_REG_GATE%22%7D&utm_source=WIR_REG_GATE.

55. *Id.*

56. *Id.*

57. Kate Kelly, Erin Griffith, Andrew Ross Sorkin & Nathaniel Popper, *Robinhood, in Need of Cash, Raises \$1 Billion from Its Investors*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/01/29/technology/robinhood-fundraising.html>.

58. Kim Khan, *Robinhood's Tenev Tells Barstool's Portnoy Liquidity Necessitated Trading Limits*, SEEKING ALPHA (Feb. 21, 2021, 9:12 AM), <https://seekingalpha.com/news/3665510-robinhoods-tenev-tells-portnoy-liquidity-was-issue>.

59. Kelly, et al., *supra* note 56.

60. Paul Kiernan & Peter Rudegeair, *Robinhood, Citadel CEOs Grilled by Lawmakers in Wake of GameStop Saga*, WALL STREET J. (Feb. 18, 2021, 6:43 PM), https://www.wsj.com/articles/robinhood-citadel-others-prepare-for-the-gamestop-spotlight-in-washington-11613655854?mod=article_inline.

61. *Id.*

due to the trading halt.⁶² Other brokerages including Charles Schwab, TD Ameritrade, and Webull also halted trading in GME.⁶³

C. Congressional Hearings and Government Action

On February 18, 2021, the House Financial Services Committee convened to consider the recent market volatility, question Robinhood's move to halt trading, and contemplate the role hedge funds play in driving market prices.⁶⁴ Congress inquired into Robinhood's business model—was the company profiting by encouraging its users to make risky investments, and making money off of their trades in the process?⁶⁵ Republicans on the Committee insisted this not be a reason for more regulation of retail investors.⁶⁶ Lawmakers of both parties agreed short selling should be regulated to protect smaller players.⁶⁷

Subsequently, the Senate Banking Committee held a hearing on March 9, 2021.⁶⁸ Chairman Sherrod Brown (D-OH), said that GME's rise shows "the stock market is detached from the economy and the reality of most American's lives."⁶⁹ PFOF was criticized during the hearing, but elimination of the practice would likely mark the end of zero-commission trading.⁷⁰ Pat Toomey (R-PA) lauded this era of retail investing saying, "[t]oday, a person of modest means can invest in the stock market at zero or minimal cost."⁷¹

Meanwhile, the SEC is reported to be considering greater transparency of short selling and the processes behind it.⁷² The SEC was ordered to increase transparency in

62. Kelly, et al., *supra* note 56.

63. Spencer Israel, *Here's Which Brokerages, Platforms Have Blocked Trading in Volatile Stocks*, BENZINGA (January 28, 2021, 1:36 PM), <https://www.benzinga.com/news/21/01/19376058/heres-which-brokerages-platforms-have-blocked-trading-in-volatile-stocks>.

64. Kate Kelly & Matthew Goldstein, *Wall Street's Most Reviled Investors Worry About Their Fate*, N.Y. TIMES (Feb. 8, 2021), https://www.nytimes.com/2021/02/08/business/wall-street-short-sellers-game-stop.html?name=stylinggamestop®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&impression_id=&variant=1_Show.

65. Popper & Phillips, *supra* note 52.

66. Kiernan & Rudegeair, *supra* note 60.

67. *Id.*

68. Chris Matthews, *Senate Probes Robinhood Business Model at GameStop Hearing*, MARKETWATCH (Mar. 9, 2021, 1:04 PM), <https://www.marketwatch.com/story/senate-probes-robinhood-business-model-at-gamestop-hearing-11615305505>.

69. *Id.*

70. *Id.*

71. *Id.*

72. Dave Michaels & Dawn Lim, *GameStop Frenzy Prompts SEC to Weigh More Short Sale Transparency*, WALL STREET J. (Feb. 17, 2021, 5:13 PM),

the practice eleven years ago under the Dodd-Frank Act but failed to implement increased regulation of short selling.⁷³ Some SEC officials have argued greater transparency into short sellers may worsen the trading environment as others copy the shorts, raising costs to borrow stock for all short sellers.⁷⁴ Short sells are seen by some as a check on share prices that hold prices to fair value; when a stock is overvalued, short sellers attack.⁷⁵

III. ANALYSIS

A. *Market Manipulation*

In the wake of the GME surge, questions arose around possible fraudulent behavior involved in GME's price spike.⁷⁶ But former SEC Chairman Jay Clayton said he believed GME's quick spike was not a pump-and-dump scheme completed using social media.⁷⁷ A pump-and-dump scheme is another way to describe market manipulation.⁷⁸ These schemes occur when investors spread false information to create a "buying frenzy," according to the SEC.⁷⁹ This "pumps" up the stock price, and then those who created the frenzy sell their shares at the inflated prices.⁸⁰ The SEC admits such "false or misleading information" can be spread using social media and "Internet chat rooms."⁸¹

https://www.wsj.com/articles/gamestop-frenzy-prompts-sec-to-weigh-more-short-sale-transparency-11613593827?mod=article_inline.

73. *Id.*

74. *Id.*

75. *Id.*

76. Benjamin Bain & Daniel Avis, *SEC Hunts for Fraud in Social-Media Posts Hying GameStop*, BLOOMBERG (Feb. 3, 2021, 3:16 PM), <https://www.bloomberg.com/news/articles/2021-02-03/sec-hunts-for-fraud-in-social-media-posts-that-drove-up-gamestop?sref=WD5fEjzY>.

77. Kevin Stankiewicz, *Ex-SEC Chief: Reddit-fueled GameStop Frenzy Was Not a Modern-day Pump-and-Dump Scheme*, CNBC (Feb. 19, 2021, 9:29 AM), <https://www.cnbc.com/2021/02/19/jay-clayton-reddit-fueled-gamestop-frenzy-not-a-pump-and-dump-scheme.html>.

78. *Market Manipulation ("Pump and Dump") Fraud*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/market-manipulation-pump-and-dump-fraud#:~:text=Market%20manipulation%20fraud%E2%80%94commonly%20referred,controlled%20by%20the%20fraud%20perpetrators> (last visited Apr. 18, 2021).

79. *Pump and Dump Schemes*, U.S. SEC. & EXCH. COMM'N, <https://www.investor.gov/introduction-investing/investing-basics/glossary/pump-and-dump-schemes> (last visited Mar. 25, 2021).

80. *Id.*

81. *Id.*

The SEC, which regulates and investigates stock manipulation, issued a statement on January 29, 2021 regarding the recent market volatility.⁸² The SEC said it was “closely monitoring” the price volatility as GME bounced up and down during trading.⁸³ They also said they will “act to protect retail investors when the facts demonstrate abusive or manipulative trading activity that is prohibited by federal securities laws” and warned “market participants should be careful to avoid such activity.”⁸⁴

The SEC has warned about the use of social media and its potential to promote fraudulent investment activity.⁸⁵ The SEC warns that those pumping the stock price may be “company insiders or paid promoters who stand to gain by selling their shares after the stock is ‘pumped’ up due to their activity.”⁸⁶ The SEC also warns newsletters can be used to tout and pump-up stock prices, though admits many newsletters are “legitimate.”⁸⁷ Specifically, the SEC tells investors to check if the newsletter’s disclosure is nonexistent or vague as a sign it may be fraudulent.⁸⁸

Under 15 U.S.C. § 78j, it is illegal to “use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”⁸⁹ The SEC will act if the investors are “lying, cheating, or stealing” in connection with a stock trade.⁹⁰ But, when it comes to *how* people invest their money, and whether they pick stocks randomly or complete extensive research before purchasing, the SEC can only recommend they do the latter.⁹¹ As a former SEC investigator said, “[y]ou can buy a

82. Allison Herren Lee, Hester M. Peirce, Elad L Roisman & Caroline A. Crenshaw, *Statement of Acting Chair Lee and Commissioners Peirce, Roisman, and Crenshaw Regarding Recent Market Volatility*, U.S. SEC. & EXCH. COMM’N (Jan. 29, 2021), <https://www.sec.gov/news/public-statement/joint-statement-market-volatility-2021-01-29>.

83. *Id.*

84. *Id.*

85. *Updated Investor Alert: Social Media and Investing—Avoiding Fraud*, U.S. SEC. & EXCH. COMM’N, <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/updated-11> (last visited Apr. 18, 2021).

86. *Id.*

87. *Investor Alert: Investment Newsletters Used as Tools for Fraud*, U.S. SEC. & EXCH. COMM’N, <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/updated-11> (last visited Apr. 18, 2021).

88. *Id.*

89. 15 U.S.C. § 78j.

90. Bruce Brumberg, *Reddit and GameStop Lessons: Former SEC Enforcement Chief Explains Stock Manipulation and How to Avoid Trouble*, FORBES (Feb. 4, 2021, 10:00 AM), <https://www.forbes.com/sites/brucebrumberg/2021/02/04/reddit-and-gamestop-lessons-former-sec-enforcement-chief-explains-stock-manipulation-and-how-to-avoid-trouble/?sh=75f663228590>.

91. *Id.*

stock for whatever reason you want—except you can’t buy a stock as part of a scheme to artificially distort the market for a security.”⁹²

15 U.S.C. § 78i (Section 9(a)(2)) notes:

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange . . . (1) for the purpose of creating a false or misleading appearance in active trading in any security . . . or a false or misleading appearance with respect to the market for any such security . . . to enter an order . . . for the purchase of such security with the knowledge that any order or orders of substantially the same size, at substantially at the same time, at substantially at the same price, for the sale of any such security has been or will be entered by or for the same or different parties.⁹³

This, coupled with SEC regulation 17 CFR § 240.10b-5 (“Rule 10b-5”), which states “it shall be unlawful for any person . . . to employ any device scheme or artifice to defraud, . . . make any untrue statement of material fact . . . in connection with the purchase or sale of any security,” would be the primary basis for any litigation against GME traders.⁹⁴ Rule 10b-5 is a more common basis for manipulation litigation than Section 9(a)(2).⁹⁵

B. Market Manipulation Applied: Keith Gill and Wall Street Bets

The economic concerns of a defendant class action may lead to a lack of suits against the Reddit community en masse.⁹⁶ It is hard to know the financial status of these Reddit traders and the size of the GME transactions may vary from portions of a share to thousands of shares. Plaintiff asset managers, like the hedge funds who lost big during the GME spike, would then need to allow discovery into their internal procedures and pay legal fees, all to collect from defendants with varied financial statuses.⁹⁷

92. *Id.*

93. 15 U.S.C. § 78j.

94. 17 CFR § 240.10b-5 (1934).

95. Alexander H. Southwell et al., *The GameStop Short Squeeze—Potential Regulatory and Litigation Fall Out and Considerations*, GIBSON DUNN (Feb. 1, 2021), <https://www.gibsondunn.com/the-gamestop-short-squeeze-potential-regulatory-and-litigation-fall-out-and-considerations>.

96. *Id.*

97. *Id.*

Roaring Kitty was sued by an investor from Washington state, and others similarly situated who suffered “enormous losses” during GME’s spike.⁹⁸ The suit also named Gill’s former employer, MassMutual.⁹⁹ Gill worked for MassMutual as a “Financial Wellness Director” from March 2019 until January 28, 2021.¹⁰⁰ The complaint alleges Gill “influenced” purchases of GME shares.¹⁰¹ The complaint details his posts on Reddit, YouTube, and Twitter to drum up support for GME.¹⁰² Plaintiffs allege a “deceptive promotion” of Gamestop stock by Gill that was “intentionally designed to induce other persons” to buy stock.¹⁰³ Gill is charged with violations of both Rule 10b-5 and 9(a)(2).¹⁰⁴

Gill’s videos included a disclaimer saying viewers “should not treat any opinion expressed on this YouTube channel as a specific inducement to make a particular investment.”¹⁰⁵ Gill often posted screenshots to his current financial positions with Gamestop.¹⁰⁶ Though Wall Street Bets is a forum that Reddit users subscribe to, it is fully accessible to the public, as were the news reports of the short squeeze as it occurred in real time.¹⁰⁷ Users on the forum brought attention to the sheer volume of short interest against GME.¹⁰⁸ Even as the price rose, short sellers continued to short the stock.¹⁰⁹ But Roaring Kitty was ahead of the Gamestop curve; he began his GME crusade in mid-2019.¹¹⁰ He aired his opinion on what he thought was a great Wall

98. Complaint at 4, *Iovin v. Keith Patrick Gill, et al.*, No. 3:21-CV-10264 (D. Mass. filed Feb. 16, 2021).

99. *Id.* at 1.

100. *Id.* at 5.

101. *Id.* at 7.

102. *Id.* at 4.

103. *Id.* at 20.

104. *Id.* at 6. This suit also discusses MassMutual’s duties because of Gill’s status as a former employee which are beyond the scope of this Note. *Id.*

105. Matthew Goldstein, *A GameStop Evangelist’s Videos Draw a Regulator’s Attention*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/business/roaring-kitty-gamestop.html>.

106. Complaint at 9, *Iovin v. Keith Patrick Gill, et al.*, No. 3:21-CV-10264 (D. Mass. filed Feb. 16, 2021).

107. Brian Cromwell, Eric Frick, Alonzo Llorens & Jaelyn Miller, *What Just Happened? The GameStop Frenzy, Legal Questions, and Lessons for Companies*, JD SUPRA (Feb. 4, 2021), <https://www.jdsupra.com/legalnews/what-just-happened-the-gamestop-frenzy-2892854/>.

108. Elizabeth Lopatto, *How R/Wallstreetbets Gamed the Stock of GameStop*, VERGE (Jan. 27, 2021), <https://www.theverge.com/22251427/reddit-gamestop-stock-short-wallstreetbets-robinhood-wall-street>.

109. Katherine Greifeld & Bailey Lipschultz, *GameStop Short-Sellers Reload Bets After \$6 Billion Loss*, BLOOMBERG (Jan. 25, 2021, 4:24 PM), <https://www.bloomberg.com/news/articles/2021-01-25/gamestop-short-sellers-reload-bearish-bets-after-6-billion-loss?sref=M8H6LjUF>.

110 Popper & Browning, *supra* note 16.

Street bet on Twitter, YouTube, and Reddit.¹¹¹ The comments sections to his videos were littered with analysis of Gamestop's financial filings.¹¹² Gill may have created awareness of a stock he saw as ripe for investment. Was he any different than a CNBC host promoting or downplaying a stock?¹¹³ The difference may be that others decided to believe him, had access to capital, and were users on a trading app—Robinhood—to complete the trades. Further, how attenuated can one's connection to Mr. Gill's advice be? Is Gill responsible for each investor who bought in during the weeklong spike? Just the subscribers on Wall Street Bets? Or just the commentators on his videos?

In the past, the SEC has brought criminal charges against individuals using social media to commit securities fraud.¹¹⁴ None is directly applicable to the GME case. In *SEC v. Craig*, defendant James Alan Craig was charged with securities fraud “by making false statements about publicly traded companies in order to manipulate the price of these companies’ exchange traded securities.”¹¹⁵ He made Twitter profiles with names similar to “established securities research firms Muddy Waters and Citron Research.”¹¹⁶ He sent out multiple false tweets, including one saying that the company he targeted, Audience Inc., was under investigation by the Department of Justice.¹¹⁷ The price fell rapidly and the volume of shares traded on the day of his tweets was ten times the volume traded the previous day.¹¹⁸ Craig failed to make a large profit because he did not act quickly enough on the price drop he catalyzed,¹¹⁹ but the SEC filed suit because he “caused market disruption” and “tremendous intangible harm to the U.S. markets.”¹²⁰ Craig paid a final judgment of \$217.¹²¹

In *SEC v. McKeown*, the SEC won a permanent injunction and ordered McKeown and other named defendants pay \$3.794 million in disgorgement for profits.¹²² McKeown and her partner Ryan, “used their website (PennyStockChaser), Facebook, and Twitter to pump up the stock of microcap companies, and then

111. *Id.*

112. *Id.*

113. *See, e.g.,* CNBC, *Jim Cramer: Reddit's 'WallStreetBets' Is Targeting Short Positions, the GameStop Game Never Stops*, YOUTUBE (Jan. 25, 2021), <https://www.youtube.com/watch?v=aZHTm0N59Rc>.

114. *See e.g.,* Complaint, SEC v. Craig, No. 3:15-CV-05076 (N.D. Cal. Nov. 5, 2015).

115. Complaint at 1, SEC v. Craig, No. 3:15-CV-05076 (N.D. Cal. Nov. 5, 2015).

116. *Id.* at 3.

117. *Id.* at 4.

118. *Id.*

119. SEC v. James Alan Craig, Litigation Release No. 24481, 2019 WL 2296502 (May 28, 2019).

120. Complaint at 6, SEC v. Craig, No. 3:15-CV-05076 (N.D. Cal. Nov. 5, 2015).

121. SEC v. James Alan Craig, Litigation Release No. 24481, 2019 WL 2296502 (May 28, 2019).

122. SEC v. McKeown, 2011 WL 13250547, at *2 (S.D. Fla. 2011).

profited by selling shares of those companies.”¹²³ The couple received shares of stocks they were touting, then predicted when the price in these stocks would “massively increase” and sold when they did.¹²⁴

The GME spike is distinguishable from both of these precedent cases.¹²⁵ It would be difficult to charge anyone other than Gill and a few other outspoken GME boosters. Even if Gill was charged by the SEC, the evidence against him is not at the level of *Craig* or *McKeown*.¹²⁶ He did not create any false social media accounts, and thus far it is unclear if anything he said or did would amount to a fabrication or deception. Further, even if other Wall Street Bets users who pumped up the price through their posting were identified, it would be difficult to prove they misled anyone, considering the volume of posts were so large on Wall Street Bets. The posts on Wall Street Bets, from users who may or may not have been actually investing, are a far cry from *McKeown* where the stocks defendants drummed up support for were ones they had been given as compensation.¹²⁷

If the SEC attempts to regulate social media platforms they would inevitably be playing whack-a-mole as they tried to find the next forum traders are gathered on. Wall Street Bets functioned as the loudest stock tip in human history. Unless Roaring Kitty or any other Reddit user had inside information, Reddit is a public, online forum; information spread rapidly.

C. Robinhood

Claims of market manipulation arose when Robinhood restricted trading on GME and other “meme stocks” in the midst of GME’s spike.¹²⁸ These claims are unlikely to hold up in court. Robinhood’s terms of service says it can “at any time and without prior notice to me, prohibit or restrict trading in certain securities.”¹²⁹ In order for Robinhood to meet consumer demand, they can choose to restrict certain trading.¹³⁰

123. SEC. & EXCH. COMM’N, *supra* note 85.

124. *Id.*

125. See sources cited, *supra* notes 121–22.

126. See Complaint at 4, SEC v. Craig, No. 3:15-CV-05076 (N.D. Cal. Nov. 5, 2015) (detailing the fake Twitter account created by defendant Craig).

127. Complaint at 7, SEC v. McKeown, No. 10-80748 (S.D. Fla. 2010).

128. Cromwell, et al., *supra* note 107.

129. Bruce Brumberg, *Investigations into GameStop Trading and Reddit: Former SEC Enforcement Chief Provides Insights*, FORBES (Feb. 9, 2021, 10:00 AM), <https://www.forbes.com/sites/brucebrumberg/2021/02/09/investigations-into-gamestop-trading-and-reddit-former-sec-enforcement-chief-reveals-insights/?sh=4b126b585efe>.

130. Chris Dolmetsch, Christopher Yasiejko, & Christian Berthelsen, *Robinhood Users Suing over Trade Limits Face High Legal Bar*, BLOOMBERG (Jan. 28, 2021, 10:02 PM),

Brendon Nelson, a Robinhood user, filed a class action on behalf of himself and others similarly situated against the corporation on January 28, 2021.¹³¹ He alleged Robinhood violated the Financial Industry Regulatory Authority's ("FINRA") Rule 5310 which says Robinhood must make every effort to execute a marketable customer order that it receives promptly and fully."¹³² Nelson brought claims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and breach of fiduciary duty.¹³³ Nelson could have a claim if he (and the class) were treated differently than other Robinhood users, wherein some users were not restricted from buying GME shares.¹³⁴ But, the trading ban affected all app users.¹³⁵

The broad discretion offered to trading platforms in these situations is likely to doom Nelson's claims.¹³⁶ The broker is not forced to accept a trade order (and Robinhood's terms and conditions expressly say as much).¹³⁷ By accepting these orders Robinhood then has a duty to execute them according to financial regulations.¹³⁸ The larger question is whether brokerages should be allowed to include these contract provisions and how future price spikes will be dealt with by Robinhood and other trading apps.

IV. RECOMMENDATION

A. Wall Street Bets

Courts, regulators, and legislators should not restrict Wall Street Bets, or any other forum that allows retail investors to disseminate information. Though it is tempting to see the GME spike as coordinated market manipulation, these events should lead institutional investors to change their trading practices, and not discourage retail investors from entering the stock market.

<https://www.bloomberg.com/news/articles/2021-01-28/robinhood-customers-sue-over-removal-of-gamestop>.

131. Complaint at ¶ 1, *Brendon Nelson v. Robinhood Financial LLC Robinhood Securities, LLC Robinhood Markets, Inc.*, 2021 WL 306441 (S.D.N.Y.).

132. *Id.* at ¶ 21.

133. *Id.* at ¶ 31.

134. Dolmetsch, et al., *supra* note 130.

135. Julia Alexander, *After Buy Ban, GameStop Hypebeasts Are Looking for a Robinhood Alternative*, VERGE (Jan. 28, 2021, 2:57 PM), <https://www.theverge.com/2021/1/28/22254168/robinhood-gamestop-ban-amc-nokia-public-webull-ameritrade-stock-buy-trade>.

136. Dolmetsch, et al., *supra* note 130.

137. *Id.*

138. *Id.*

As regulators considered their initial response to the GME spike, two usual foes joined forces to object to Robinhood's GME trading restrictions.¹³⁹ Alexandria Ocasio Cortez and Ted Cruz both asked for hearings on the matter.¹⁴⁰ Senator Elizabeth Warren called for increased regulation of Wall Street and said the stock market is "less about the value of business and more and more like casino gambling," while labeling the GME surge a "systemic problem."¹⁴¹

Only 55% of Americans said they owned stock when asked in 2020.¹⁴² This trend has been consistent since 2010.¹⁴³ Keith Gill had the financial capital to make a \$53,000 initial investment into Gamestop.¹⁴⁴ Some Reddit traders mentioned the 2008 bailout as an extra reason to stick it to the hedge funds as GME rose.¹⁴⁵ The idea that large banks received bailouts while ordinary investors saw their stock gains halted by Robinhood left investors and politicians unsettled.¹⁴⁶

Retail investors should not see their trading restricted simply because they are making large sums of money quickly. Though not every trader has Gill's capital, they are searching for trading advice just like anyone who turns on CNBC or reads the Wall Street Journal. The difference, of course, is their coordinated action after hearing a "good" tip. Though the GME surge is seen as coordinated action, it would be more accurately described as a train that kept picking up passengers. Gill posted about the stock in mid-2019.¹⁴⁷ The stock did not begin to soar until late January of 2021.¹⁴⁸ Gill's videos showed a thorough understanding of the short positions piling up against GME that he believed weren't born out in the stock's fundamentals. Gill was simply taking the opposite side from the hedge funds, and others believed his side was the right play.

Reddit serves as a new platform for the exchange of investing information—regulating it is unnecessary. It would also only be a temporary band-aid as investors flock to the next app or website to communicate if Reddit is shut down. Regulation

139. Lisa Lerer & Astead W. Herndon, *When Ted Cruz and A.O.C. Agree: Yes, the Politics of GameStop Are Confusing*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/politics/gamestop-robinhood-democrats-republicans.html>.

140. *Id.*

141. *Id.*

142. Lydia Saad, *What Percentage of Americans Owns Stock*, GALLUP (Sep. 13, 2019), <https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx>.

143. *Id.*

144. Lerer & Herndon, *supra* note 139.

145. *Id.*

146. *Id.*

147. Browning & Popper, *supra* note 16.

148. *GameStop Corp.*, GOOGLE FIN., <https://www.google.com/finance/quote/GME:NYSE?sa=X&ved=2ahUKEwimpq-Ko-bvAhWUAp0JHV4MB3UQ3ecFMAB6BAGKEBo> (last visited Mar. 30, 2021).

will only return us to hedge fund dominance. Melvin Capital, which needed a cash infusion from another large hedge fund to survive the GME spike, rebounded in February to gain 22%, eight times the return of the S&P 500.¹⁴⁹ Though the fund is not yet back in its position before the GME surge, it did receive an extra \$250 million from investors who believed in their ability to rally back. It seems, for the time being, both retail investors and large industry players can both find ways to win. That said, hedge funds have retreated from short positions this year.¹⁵⁰ But like in any bear market, eventually the price is low enough for someone to hop in.¹⁵¹

The SEC could, in theory, go after individual users posting financial opinions on a market manipulation theory. Those users could flock to more private social media networks like Discord to discuss trading opportunities.¹⁵² If the GME saga is replicated, the SEC could seek to avoid market disruption. The difficulty will come in locating users or effectively regulating forums that promote the surging stock. Instead, the regulators may look to the vehicles that allows these stock purchases to happen, like Robinhood, to avoid these sudden price hikes and mass buying events.

B. Robinhood

Robinhood should not be allowed to restrict trading in moments of volatility once their capital needs meet clearinghouse standards. Doing so severely disadvantages retail investors who have no access to the market, especially those who currently have a position in the stock. Though trading volume was nearly eight times the usual amount

149. Katherine Burton & Hema Parmar, *Melvin Capital Dusts Off from GameStop Fiasco with 22% Gain*, BLOOMBERG (Mar. 4, 2021, 8:26 AM), <https://www.bloomberg.com/news/articles/2021-03-03/melvin-capital-surged-22-in-february-after-gamestop-disaster>.

150. Brian Scheid & Gaurang Dholakia, *S&P 500 Short Interest Retreats Further as Hedge Funds Remain Weary*, S&P GLOB. (Mar. 2, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/s-p-500-short-interest-retreats-further-as-hedge-funds-remain-wary-62934129>.

151. See, e.g., *An Overview of Bull and Bear Markets*, INVESTOPEDIA, <https://www.investopedia.com/insights/digging-deeper-bull-and-bear-markets/> (last visited Mar. 23, 2021) (explaining bear markets exist in “an economy that is receding, where most stocks are declining in value”).

152. Julie Jargon, *The Dark Side of Discord, Your Teen’s Favorite Chat App*, WALL STREET J. (June 11, 2019, 6:07 PM), <https://www.wsj.com/articles/discord-where-teens-rule-and-parents-fear-to-tread-11560245402>.

during the GME spike,¹⁵³ Robinhood should let the people trade, as their now infamous tweet suggested in 2016.¹⁵⁴

That said, it is important users become aware of the clearinghouse obligations these apps face when trading volume skyrockets. The idea of a “run on the banks” (or more accurately, a “run on Robinhood”) is not farfetched when you consider the trading volume during the GME spike; clearinghouses help to stabilize markets by taking the opposite position of traders in the market.¹⁵⁵ Clearinghouses have established financial requirements for members (like Robinhood) and mandate deposit requirements.¹⁵⁶ Robinhood explained that its deposit mandates increased “ten-fold” during the GME spike.¹⁵⁷ Robinhood was forced to either restrict trading in those stocks as it sought to meet deposit requirements.¹⁵⁸

Robinhood should have capital on hand to meet extreme volatility when trading. Their “democratizing” of stock trading can lead to instantaneous trades en masse. In instances where Robinhood still can’t meet capital requirements, the stock price should freeze; selling should be restricted along with buying, so as to not advantage short sellers who may see the price decrease if and when only selling is allowed. The SEC, in a January 29 press release, stated they “will work to protect investors, to maintain fair, orderly, and efficient markets and to facilitate capital formation,” and said they would “act to protect retail investors.”¹⁵⁹ It is hard to see how retail investors are protected when they are restricted only to selling stocks, simply because they are being traded too frequently or have high price volatility.

Though necessitating Robinhood and other companies meet capital requirements before trading is a noble goal, it severely disadvantages retail investors who see their buying power evaporate as the brokerages scrap together capital. The lesson of the GameStop spike should be to ensure stock trading services can meet capital

153. Ethan Wolff-Mann, *Robinhood and Others Halt Buying of GameStop and Other Hot Stocks Infuriating Users*, YAHOO (Jan. 28, 2021), <https://www.yahoo.com/entertainment/robinhood-bars-users-from-buying-game-stop-stock-infuriating-its-users-144007484.html>.

154. Robinhood, (@RobinhoodApp), TWITTER, (Mar. 23, 2016), https://twitter.com/RobinhoodApp/status/712708069369782272?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E712708069369782272%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Ffinance.yahoo.com%2Fnews%2Frobinhood-bars-users-from-buying-game-stop-stock-infuriating-its-users-144007484.html (“Let the people trade.”).

155. John Hyatt, *What Is a Clearinghouse? A Simple Explanation for Investors*, NASDAQ, (Feb. 5, 2021, 11:41 AM), <https://www.nasdaq.com/articles/what-is-a-clearinghouse-a-simple-explanation-for-investors-2021-02-05>.

156. *What Happened This Week*, ROBINHOOD (Jan. 29, 2021), <https://blog.robinhood.com/news/2021/1/29/what-happened-this-week>.

157. *Id.*

158. *Id.*

159. Lee, et al., *supra* note 82.

requirements, and not force retail investors to be disadvantaged if Robinhood, or other brokerages, do not plan ahead.¹⁶⁰

V. CONCLUSION

The Gamestop saga taught hedge funds and retail investors how trading has changed following the rise of no-fee trading apps and dedicated social media platforms. In its aftermath, regulators and elected officials should not restrict retail investors' ability to involve themselves in the stock market—Robinhood and other no-fee apps should be forced to prepare for volatility if they would like to continue to serve as brokerages.

160. See Jeff John Roberts, *The Real Story Behind Robinhood's Decision to Restrict GameStop Trading—and That 4 a.m. Call to Put Up \$3 Billion*, FORTUNE (Feb. 2, 2021, 5:00 PM), <https://fortune.com/2021/02/02/robinhood-gamestop-restricted-trading-meme-stocks-gme-amc-vlad-tenev-nsc/> (explaining Robinhood negotiated their clearinghouse payment down from \$3 billion to \$1.4 billion by halting trading hours after receiving the \$3 billion demand).

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PROPOSITION 22 AND WORKERS' RIGHT TO CHOOSE: LEARNING
FROM CALIFORNIA'S EFFORTS TO CLASSIFY INDEPENDENT
CONTRACTORS

❖ Note ❖

*Kaelin Sanders**

I. INTRODUCTION

In the 2020 general election, California voters approved Proposition 22, a statewide ballot initiative that classifies app-based drivers (Uber or Lyft drivers, for example) as independent contractors rather than as employees.¹ The culmination of over \$200 million in political spending—largely by ride-share companies Uber, Lyft, Postmates, Doordash, and Instacart—the initiative was approved by 58% of voters.² Since its passage, the initiative has been met with regular criticism.³ Many observers first say that classifying app-based drivers (“drivers”) as independent contractors was fundamentally wrong from a worker’s rights perspective, especially in light of state court decisions and legislation that preceded the initiative and established a new

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1. Jeong Park, *Uber, Lyft Win Approval of California Gig Worker Measure*, SACRAMENTO BEE (Nov. 4, 2020, 2:25 PM), <https://www.sacbee.com/news/politics-government/election/article246814727.html>.

2. *Id.*

3. See, e.g., Greg Bensinger, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/opinion/prop-22-california-labor-law.html?action=click&module=Opinion&pgtype=Homepage>; Michael Sainato, *‘I Can’t Keep Doing This’: Gig Workers Say Pay Has Fallen After California’s Prop 22*, GUARDIAN (Feb. 18, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california>.

standard for making this very decision.⁴ Further, there are reports that businesses are now firing their employee-status delivery drivers and hiring cheaper app-based drivers in their stead; that drivers are earning considerably less under the initiative than was purported by its advocates; and that ride-share companies are now taking away features from drivers that gave them greater control over their earnings.⁵ Because this initiative has been floated as a model for the rest of the United States, it is important to examine Proposition 22 with an eye to the future.⁶ Additionally, the story of Proposition 22 also provides insight into the challenges of enacting sweeping legislation governing worker status.

This Note's Part II will review the context of Proposition 22's passage. Part III will examine the initiative's key provisions that provide how it determines worker status and how the initiative may be amended in the future. Part IV suggests legislative recommendations for future iterations of this issue that are likely to arise, one that pertains to ride-share legislation specifically and one that pertains to independent contractor legislation broadly. Part V concludes.

II. BACKGROUND

The history behind Proposition 22 is considerable and begins with *Dynamex Operations West, Inc., v. The Superior Court of Los Angeles County*, a 2018 landmark unanimous decision from the Supreme Court of California. In *Dynamex*, the court adopted the "ABC" test as the standard for determining whether a worker is an employee or independent contractor.⁷ The court described the "ABC" test as follows:

Under this test, a worker is properly considered an independent contractor . . . only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the

4. See, e.g., Terri Gerstein, *What Happened in California Is a Cautionary Tale for Us All*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/opinion/prop-22-california-gig-workers.html>. See also *Dynamex Operations West, Inc., v. The Superior Court of Los Angeles Cty.*, 416 P.3d 1, 8 (Cal. 2018); Assemb. B. 5, Cal. Leg. 2019-2020, Reg. Sess. (Cal. 2019).

5. Joshua Bote, *Safeway to Replace Delivery Workers with Doordash Drivers—But Says It's Not Tied to Prop. 22*, S.F. GATE (Jan. 5, 2021, 12:37 PM), <https://www.sfgate.com/bayarea/article/Safeway-will-replace-delivery-workers-with-15847851.php>; Sainato, *supra* note 3; Driver Announcements, *Upcoming Changes to the Driver App*, UBER BLOG (Apr. 8, 2021), <https://www.uber.com/blog/california/upcoming-changes-to-the-driver-app/>.

6. Josh Eidelson, *Election Day Gave Uber and Lyft a Whole New Road Map*, BLOOMBERG (Nov. 8, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-11-08/prop-22-gives-uber-and-lyft-a-new-model-for-gig-economy-workers>.

7. *Dynamex Operations West, Inc.*, 416 P.3d at 5.

performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.⁸

If any one of the test's three factors are not met, then the worker should be classified by law as an employee rather than an independent contractor.⁹ The court viewed this test as the most appropriate method for making a decision that carried big implications:

On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.¹⁰

California's laws governing minimum wage, overtime, workplace safety, and retaliation, for example, apply to employees but not to independent contractors.¹¹ Further, employees can seek redress for violations of these laws with state agencies such as the Labor Commissioner's Office, while independent contractors cannot.¹² Following the *Dynamex* decision, the California legislature codified the new standard in Assembly Bill 5 ("AB-5"), a 2019 bill that added the "ABC" test into the state's Labor Code with the intention of ensuring "that all workers who meet its criteria

8. *Id.*

9. Celine McNicholas & Margaret Poydock, *How California's AB5 Protects Workers from Misclassification*, ECON. POL'Y INST. (Nov. 14, 2019), <https://www.epi.org/publication/how-californias-ab5-protects-workers-from-misclassification/>.

10. *Dynamex Operations West, Inc.*, 416 P.3d at 8.

11. STATE OF CAL. DEP'T OF INDUS. REL., INDEPENDENT CONTRACTOR VERSUS EMPLOYEE (2021), https://www.dir.ca.gov/dlse/faq_IndependentContractor.html.

12. *Id.*

receive the basic rights and protections guaranteed to employees under California law.”¹³

In turn, this legislation quickly drew the attention of ride-share companies and their drivers, with many wondering what impact the legislation might have on drivers' worker status.¹⁴ Prior to *Dynamex* and AB-5, drivers were largely treated as independent contractors.¹⁵ Following passage, the dominant view was that drivers would now be classified as employees under the new “ABC” standard.¹⁶ Many, including California governor, Gavin Newsom, thought further that this would be a positive change for drivers, conferring them with much needed legal benefits and protections.¹⁷ Ride-share companies resisted this view, however, and refused to automatically reclassify drivers as employees, arguing instead that drivers benefit more by being classified as independent contractors.¹⁸ For example, Uber CEO, Dara Khosrowshahi, claimed that “drivers overwhelmingly” prefer the flexibility of their independent contractor status, and that the company would have to cut 926,000 drivers (75% of Uber's drivers) if the company were forced to adhere to AB-5.¹⁹

Perhaps predictably, this discourse escalated into litigation when, in May 2020, the state filed an action in the Superior Court of California in which the State asked the court to enjoin ride-share companies Uber and Lyft from classifying their drivers as independent contractors.²⁰ With respect to the State's claim that Uber and Lyft were misclassifying drivers as independent contractors in defiance of AB-5's “ABC”

13. Assemb. B. 5, Cal. Leg. 2019-2020, Reg. Sess. (Cal. 2019); *People of the State of Cal. v. Uber Tech., Inc.*, 20 WL 5440308 at *1 (Cal. Sup. Ct., 2020).

14. See, e.g., Shirin Ghaffary & Alexia Fernández Cambell, *A Landmark Law Disrupted the Gig Economy in California. But What Comes Next For Uber Drivers?*, VOX (Oct. 2, 2019, 2:30 PM), <https://www.vox.com/recode/2019/10/4/20898940/uber-lyft-drivers-ab5-law-california-minimum-wage-benefits-gig-economy-disrupted>.

15. Valerio De Stefano, *The Rise of the 'Just-in-Time' Workforce: On-Demand Work, Crowdsourcing, and Labor Protection in the 'Gig-Economy'*, 37 COMPAR. LAB. L. & POL'Y J. 471, 478 (2016).

16. See, e.g., Joel Rosenblatt, *Uber's Future May Depend on Convincing the World Drivers Aren't Part of Its 'Core Business'*, TIME (Sep. 12, 2019, 9:37 AM), <https://time.com/5675637/uber-business-future/>; N. Lee, *Uber and Lyft Had Time to Comply With the Law. They Did Not.*, ENGADGET (Aug. 21, 2020), <https://www.engadget.com/uber-lyft-ab5-gig-economy-130000612.html>.

17. Rosenblatt, *supra* note 16; Gavin Newsom, *On Labor Day, Let's Pledge to Protect Workers and Create Paths to Union Membership*, SACRAMENTO BEE (Sep. 2, 2019, 4:10 PM), <https://www.sacbee.com/opinion/article234624897.html>.

18. See Tony West, *Update on AB5*, UBER NEWSROOM (Sept. 11, 2019), <https://www.uber.com/newsroom/ab5-update/>.

19. Dara Khosrowshahi, *The High Cost of Making Drivers Employees*, UBER NEWSROOM (Oct. 5, 2020), <https://www.uber.com/newsroom/economic-impact/>.

20. *People v. Uber Tech., Inc.*, 20 WL 5440308 at *1 (Cal. Sup. Ct., 2020).

standard, the court's response was blunt. "It's this simple: [Uber and Lyft] drivers do not perform work that is 'outside the usual course' of [the companies'] businesses."²¹ The state's motion for a preliminary injunction was granted by the court, an order that was affirmed by the California Court of Appeals.²²

Rather than acquiescing to the courts, ride-share companies sought "to persuade the voters to change the law."²³ This effort culminated in Proposition 22, which California voters approved in the 2020 general election. First, it allowed ride-share companies to circumvent AB-5.²⁴ Second, it allowed ride-share companies to establish their own standards for determining driver status.²⁵ Finally, Proposition 22 erected strong amendatory provisions that would protect key provisions of the initiative from future changes.²⁶ Part III will examine the standards and beliefs incorporated into Proposition 22 along with the implications of the amendatory provisions.

III. ANALYSIS

This analysis focuses of two aspects of Proposition 22. First, it examines the notion that Proposition 22 benefits drivers by preserving their flexibility and right to choose an independent contracting relationship. As will be shown, Proposition 22's key provisions are not necessarily as flexible and driver-friendly as many were led to believe. Given this fact, Proposition 22's amendment provisions are also significant because they make amending the initiative incredibly difficult.

A. Proposition 22 Presumptions and Independent Contractor Provisions

Upon Proposition 22's passage, the Protect App-Based Drivers and Services Act ("Act") was added to the California Business and Professions Code.²⁷ The Act opened with "findings and declarations."²⁸ Chief among these findings were that drivers are "choosing to work as independent contractors" rather than employees.²⁹ Rather than

21. *Id.* at *3; Assemb. B. 5, Cal. Leg. 2019-2020, Reg. Sess. (Cal. 2019).

22. *People v. Uber Tech., Inc.*, 20 WL 5440308 at *18 (Cal. Sup. Ct., 2020); *People v. Uber Technologies, Inc.*, 270 Cal. Rptr. 3d 290, 317 (Cal. Ct. App. 2020).

23. *People v. Uber Technologies, Inc.*, 20 WL 5440308 at *1 (Cal. Sup. Ct., 2020).

24. *See* CAL. BUS. & PROF. CODE §7451 (West 2020) ("Notwithstanding any other provision of law...an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met...").

25. *Id.*

26. *Id.* § 7465.

27. *Id.* div. 3 ch. 10.5.

28. *Id.* § 7449.

29. *Id.* § 7449(a).

individuals who are seeking traditional employment, drivers are people such as “parents who want to work flexible schedules while children are in school; students who want to earn money in between classes; retirees who rideshare or deliver a few hours a week . . . and families struggling with California’s high cost of living that need to earn extra income.”³⁰ Moreover, “recent legislation has threatened to take away the flexible work opportunities of [drivers] . . . taking away their ability to make their own decisions about the jobs they take and the hours they work.”³¹ Thus, the Act’s overriding purpose was to “protect[] the ability of [drivers] to work as independent contractors throughout the state using app-based rideshare and delivery platforms.”³²

The Act appears to achieve this purpose in its second article.³³ Article 2 establishes that “an app-based driver is an independent contractor,” “notwithstanding any other provision of law,” as long as companies meet the following conditions:

- (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company’s online-enabled application or platform.
- (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company’s online-enabled application or platform.
- (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
- (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.³⁴

Simply put, this provision exempts drivers from classification as employees under AB-5 as long as ride-share companies meet the above standard, which largely reflects the way the industry already operates. Arguably, though, this provision does more than merely protect drivers’ right to choose an independent contracting relationship. More accurately, the language stating that “an app-based driver *is* an independent contractor” reflects the reality that the Act now classifies all drivers as independent contractors even if some would actually prefer to be employees.³⁵

One assumption requiring questioning is the notion put forth by Proposition 22 proponents that drivers would lose independence and flexibility if they were forced to

30. *Id.* § 7449(b).

31. *Id.* § 7449(d).

32. *Id.* § 7449(e).

33. *Id.* div. 3 ch. 10.5 art. 2.

34. *Id.* § 7451.

35. *Id.*

be classified as employees.³⁶ They argue that classifying drivers as employees may result in such changes such as drivers having to wear uniforms, work set hours, or work at a specified location.³⁷ But others counter that such changes are not mandated by employment law and would be imposed by the companies themselves.³⁸

But even if the argument that most drivers are better served by independent contractor classification was credible prior to the Act's passage, it is becoming less so following its passage. Ironically, this is due in part to the Act itself. Following the Act's passage, several corporations announced that they were laying off their full-time, employee-status drivers and opting to use cheaper app-based drivers instead.³⁹ Unless these employee-status drivers are able to find other corporations willing to hire them as employees, it may be that they end up having to work as app-based drivers on an independent-contractor basis. Thus, while the Act purported "to protect the basic legal right of drivers to *choose* to work as independent contractors," it may have the actual consequence of forcing all drivers into independent contractor relationships, whether or not they desired such an arrangement.⁴⁰

Additionally, there are concerns that supposed wage protections provided by the Act are not as strong as proponents purported. The Act provides that drivers will earn a rate equal to "120 percent of the applicable minimum wage."⁴¹ But drivers will only earn this rate for "engaged time," which starts when a driver accepts a request and ends when the driver completes that request.⁴² It does not include idle waiting time, or time lost due to customer cancellations.⁴³ A 2019 University of California, Berkeley study estimated that these provisions in effect guaranteed an hourly wage of only \$5.64 an hour.⁴⁴ More recent reporting has indicated that post-Prop 22 wages are indeed falling well short of what drivers were led to believe they would earn.⁴⁵

36. Recent Legislation, *Labor and Employment Law—Worker Status—California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors*, 133 HARV. L. REV. 2435, 2440–41 (2020).

37. *Id.*

38. *Id.* at 2441.

39. Levi Sumagasy, *Albertson's Vons Shifting to Third-Party Grocery Delivery in California, Elsewhere*, MARKETWATCH (Jan. 4, 2021, 8:51 PM), <https://www.marketwatch.com/story/albertsons-vons-shifting-to-third-party-grocery-delivery-in-california-elsewhere-11609811463>; Bote, *supra* note 5.

40. BUS. & PROF. § 7450(a).

41. *Id.* § 7453(d)(4)(A).

42. *Id.* §§ 7453(d)(4)(A), 7463(j).

43. *Id.* § 7463(j).

44. Ken Jacobs and Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, UC BERKELEY LAB. CTR. (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>.

45. Sainato, *supra* note 3.

Finally, ride-share companies are beginning to reverse course on measures they implemented to give drivers increased control and flexibility over their work. For instance, in 2020, prior to the vote of Proposition 22, Uber gave drivers the ability to set their own price, a move giving drivers significantly more control over the wages they received.⁴⁶ In April 2021, however, after the passage of Proposition 22, Uber removed this feature.⁴⁷ Such actions indicate Proposition 22 proponents made a concerted effort to exaggerate the benefits drivers receive by remaining classified as independent contractors.

B. Amendment Provisions

The consequences of the Act highlighted above makes a strong case for building some degree of flexibility into legislation governing worker status given the complexity of the topic. The Act, however, has been made inflexible through its provisions governing amendment. First, the Act can only be amended by a seven-eighths majority vote of the legislature.⁴⁸ This seven-eighths vote requirement for amendments is the highest requirement in current California statutory law.⁴⁹ In contrast, AB-5 was passed by a simple majority vote and was amended by a two-thirds vote.⁵⁰ And even if the legislature is able to reach such a level of agreement, there are further limitations on what provisions can be amended.⁵¹ Section 7465(a) of the Act stipulates that any amendments must be “consistent with, and further[] the purpose(s)” of the Act, as described by the Act’s first article.⁵² This requires that any amendment bears the burden of proving its consistency with the Act’s declarations, even if those declarations have been proven unsound.

Even more limiting is that amendment of section 7451 of the Act is expressly prohibited.⁵³ Recall that section 7451 is the section that exempts app-based drivers from all relevant state legislation, and instead determines their worker status by a test other than the “ABC” test established by the California Supreme Court and codified

46. Driver Announcements, *supra* note 5.

47. *Id.*

48. BUS. & PROF. § 7465(a).

49. Matt Urban & Kylie Zaechelein, *Proposition 22: Protect App-Based Drivers and Services Act*, 2020 CAL. INITIATIVE REV. 122, 126 (2020).

50. Assemb. B. 5, Cal. Leg. 2019-2020, Reg. Sess. (Cal. 2019); Assemb. B. 2257, Cal. Leg. 2019-2020, Reg. Sess. (Cal. 2020).

51. BUS. & PROF. § 7465(a).

52. *Id.*

53. *Id.* § 7465(c)(2) (“Any statute that amends Section 7451 does not further the purposes of this chapter.”).

by the legislature.⁵⁴ Therefore, even if the legislature agreed that the Act's test was no longer appropriate or contained pitfalls, it would be powerless to amend the test.

Finally, the Amendment provisions go even further by requiring that completely distinct legislation could be considered an amendment that is subject to the Act's amendment provisions.⁵⁵ Section 7465(c)(3) provides that any statute the legislature passes that poses "unequal regulatory burdens upon app-based drivers based on their classification status, constitutes an amendment of this chapter and must be enacted in compliance with the procedures governing amendments . . . set forth in subdivisions (a) and (b)."⁵⁶ One must first consider what the word "unequal" means in this context. Arguably, a plain reading suggests that "unequal" could be construed to mean any legislation that regulates app-based drivers specifically. Accepting this reading, any effort by the California legislature to enact further legislation regulating drivers in any way would automatically be brought into the Act's amendment provision and subject to its limitations.

This analysis reflects two possible realities following Proposition 22's approval. First, while the ostensible goal may have been protecting drivers' ability to work as independent contractors should they choose to do so, the true consequence may be that they have no choice but to work as independent contractors. Second, the limiting nature of the Act's amendment provisions may deprive the Act of the necessary flexibility to respond to future problems. Part IV suggests recommendations to address these issues.

IV. RECOMMENDATION

With the benefit of hindsight, it is increasingly clear that Proposition 22 may not confer the benefits on drivers they both expected and deserved. For this reason, it's important to consider how future iterations of the Act could be improved. Any such attempts should focus on providing greater flexibility. Concerning ride-share legislation specifically, future acts should ensure that drivers do in fact have the right to choose their working arrangement. More generally, sweeping independent contractor legislation should provide for the creation provisional independent contractor standards on an as-needed basis to provide added flexibility for the legislation.

54. *Id.* § 7451.

55. *Id.* § 7465(c).

56. *Id.* § 7465(c)(3).

A. Protecting Drivers' Right to Choose

Any law that purports to protect drivers' right to choose to work as an independent contractor should do just that—let the driver choose. With respect to any forthcoming legislation pertaining to drivers specifically, this right to choose may be obtained through a slight change in statutory language. In the provisions directly stipulating the standards that determine whether a driver is an independent worker, legislatures should consider using the words “retains the right to be” instead of “is.” To use the provision controlling drivers in California as an example, consider again the relevant language: “an app-based driver *is* an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met...”⁵⁷ If “retains the right to be” replaced “is” in this provision, it would add much needed leeway that would give drivers the actual right to choose their status. It could still be the case that, as Dara Khosrowshahi argued, that the vast majority of drivers—the moms, the college students, the retirees—wish to remain independent contractors with ample flexibility.⁵⁸ This proposed language would still allow that. But it would also allow for the limited number of drivers more inclined to full-time work—grocery delivery drivers, or luxury/high-end drivers—to pursue employee-status arrangements. Indeed, the companies may themselves find that for these more specialized driving tasks, they may prefer drivers that can provide a higher level of professionalism and consistency. Importantly, the “retains the right to be” language will leave sufficiently flexibility such that the parties are left to reach an agreement on their own, rather than being forced into an unwanted arrangement by legislation.

B. Making Independent-Contractor Legislation More Flexible

AB-5 was a bold effort by California's legislature to enact a sweeping change in the way worker status was determined. Maybe it was too sweeping. While it is questionable that ride-share companies' foremost concern in light of AB-5 was the right of their workers to choose, it's unquestionable that AB-5 posed substantial economic implications for those companies.⁵⁹ As a result, ride-share companies successfully lobbied for legislation of their own that provides them incredibly strong protections

57. *Id.* § 7451.

58. *Id.* § 7449 (1)(b); Khosrowshahi, *supra* note 19.

59. *See, e.g.*, Thomas O'Connell, *AB 5 Could Have an Unintended Impact on the Franchise Industry*, PRESS-ENTERPRISE (May 22, 2020, 5:01 AM), <https://www.pe.com/2020/05/22/ab-5-could-have-an-unintended-impact-on-the-franchise-industry/>.

and that also undermines AB-5.⁶⁰ Yet, the fact that AB-5 itself has been amended to add exceptions shows the difficulty in enacting sweeping bright-line rules governing worker status.⁶¹ An alternative solution states should consider when adopting new tests and standards for determining worker status broadly is to include statutory language creating provisional standards for specific situations.

For example, if AB-5 had such a feature, companies like Uber could instead apply for a provisional standard that would be used to determine drivers' worker status in lieu of the "ABC" test which they felt is inappropriate. The standard could look like the very one that was codified following the passage of Proposition 22, or it could be an alternative standard that the state considers more appropriate. Additionally, rather than being enacted as permanent, nearly unamendable legislation, the provisional standards could be approved for a finite amount of time. Such a tool would give states tremendous flexibility to experiment with standards for determining worker status. Moreover, it would encourage companies to work with states and find standards that are in fact good for workers as well. Because the State would have the power not to extend a provision if it ends up being too favorable to a company, there would be incentives for companies to seek standards that are fair to workers and thus likely to be extended following the initial observation period. This would also preserve the integrity of the state's sweeping standard such as the "ABC" test because that standard would still be applied in all situations where the state itself hasn't opted to grant a company or industry a provisional standard.

This solution would certainly come with added administrative costs. States could mitigate these costs by placing limitations on how the licenses may be procured. States could only accept applications during a specified time window; the number of companies that seek a provisional license could be restricted by the size of the company as measured by revenues or the number of workers; and companies whose applications are denied could be prohibited from re-applying for a certain amount of time. This final limitation may also have the benefit of encouraging companies to seeking standards that are more worker-friendly and thus more likely to be accepted.

An additional benefit is that allowing provisional standards can result in standards that are easier for companies to implement than a bright-line rule which is applied categorically. Any provisional standard will be created specifically with the company that is applying for it in mind. Just as ride-share companies consider Proposition 22's test more workable than the ABC test, other provisional standards created with a

60. BUS. & PROF. div. 3 ch. 10.5; Michael Hiltzik, *Column: With Prop. 22, Uber and Lyft Used Their Wealth to Reshape Labor Law in Their Sole Interest*, L.A. TIMES (Nov. 4, 2020, 12:26 PM), <https://www.latimes.com/business/story/2020-11-04/uber-lyft-proposition-22>.

61. Assemb. B. 2257, Cal. Leg. 2019-2020, Reg. Sess. (Cal. 2020).

specific company or industry in mind are likely to be much more narrowly tailored and thus more easily implemented.

Finally, initial administrative costs may be further outweighed by a lack of subsequent administrative costs if a provisional standard proves to be ineffective. In contrast to Proposition 22, which would require tremendous efforts to alter no matter how problematic it proves to be, a faulty provisional standard may simply expire at the end of its duration without further action being necessary. Moreover, as a state gains more experience creating provisional standards and working with companies, it is likely to acquire efficiencies over time.

V. CONCLUSION

California's enactment of the "ABC" standard and the response by ride-sharing companies to push for the passage of Proposition 22 highlight the challenges and pitfalls of enacting sweeping standards for determining worker status. Other states should take note. When pursuing changes of their own, states should take great effort to ensure that workers truly retain the right to choose their working arrangement and that legislation remains flexible enough to address its shortcomings as they become apparent.

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REPLACING WHAT WORKS WITH WHAT SOUNDS GOOD: THE
ELUSIVE SEARCH FOR WORKABLE SECTION 230 REFORM

❖ Note ❖

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I. INTRODUCTION

Section 230 of the Communications Decency Act of 1996 was a tiny and overlooked fragment of a behemoth bill Congress passed to crack down on the pervasiveness of obscene and indecent communications online.¹ Yet, in the quarter-century since it was passed Section 230 has proven to be the only lasting piece of the Communications Decency Act and, indeed, the most important piece of legislation ever passed with respect to the internet.²

By emancipating interactive service providers (ISPs) from the whip hand of publisher's liability, Section 230 became the liberating force that jolted the massive and sustained growth of the internet marketplace and the free and robust exchange of ideas online.³ Since Section 230's conception at law, critics of the legislation have been chipping away at its free market and free speech protections as slowly and surely as water erodes rock.⁴ This Note intends to offer a counterpoint to that trend.

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1. 47 U.S.C. § 230.

2. *Reno v. Am. C.L. Union*, 521 U.S. 844, 873–85 (1997) (holding all the anti-indecency provisions of the Communications Decency Act unconstitutional as an abridgment of freedom of speech but leaving Section 230 intact).

3. See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET*, 3–4 (Cornell Univ. Press, 2019).

4. See, e.g., Allow State and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 47 U.S.C. § 230(e)(5) (eliminating liability protections for material that promotes or facilitates prostitution)); Fair Hous. Council of San

Part II of this Note will discuss the background against which Section 230 was enacted and subsequent developments which have affected the way Section 230 is interpreted. Part III of this Note will analyze the concerns Republicans and Democrats have about the law and how eliminating Section 230's liability shield would hurt internet companies and constrict online free speech. Part IV of this Note will recommend that to maximize online free speech and ensure the continued growth of the digital marketplace, ISPs be considered common carriers and conferred total immunity against lawsuits arising from third-party content posted on their forums, except as already exempted by the current version of Section 230.

II. BACKGROUND

Section 230 of the Communications Decency Act of 1996 was enacted against the background of a Second Circuit case—*Stratton Oakmont, Inc. v. Prodigy Services Co.*⁵ In *Stratton Oakmont*, a New York trial court awarded partial summary judgment for a defamation claim brought against PRODIGY, an internet service provider (“ISP”).⁶ At issue was whether PRODIGY could be subject to publisher liability for its policy of moderating user posts for content that violated its conditions-of-use guidelines.⁷ The court held that PRODIGY, by moderating its forums, exercised “editorial control,” and was, therefore, subject to publisher’s liability for defamatory content posted on its forums.⁸

The *Stratton Oakmont* decision stood in sharp contrast to another online defamation case from the Second Circuit, *Cubby, Inc. v. CompuServe, Inc.*⁹ The issue was identical to that in *Stratton Oakmont*, except that CompuServe declined to moderate its forums for content.¹⁰ Since CompuServe did not moderate content on their forums, the *Cubby* court ruled that CompuServe was not a publisher, but instead a distributor, and subject to a more lenient liability standard.¹¹ The difference in

Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008) (interpreting Section 230 as not offering liability protections to companies who contribute to the development of unlawful content); Exec. Order No. 13925, 85 FR 34079 (May 28, 2020) (ordering the “Secretary of Commerce, in consultation with the Attorney General,” to “file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify” the narrow breadth of Section 230 immunity protections).

5. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

6. *Id.*

7. *Id.* at *1.

8. *Id.* at *4.

9. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

10. *Id.* at 137.

11. *Id.* at 140.

outcome between *Stratton Oakmont* and *Cubby* created an odd situation in which “[a]ny online service provider who made an effort to restrict or edit user-submitted content . . . faced a much higher risk of liability if it failed to eliminate all tortious material than if it simply did not try to control or edit the content of third parties at all.”¹²

Hence, Section 230 was born.¹³ Recognizing the chilling impact publisher liability would have on the growth of the internet marketplace and online free speech, Congressmen Christopher Cox and Ron Wyden introduced Section 230 as an amendment to the Communications Decency Act of 1996.¹⁴ They reasoned that if ISPs were free from the fear of liability for third-party content posted on their forums, ISPs would be incentivized to moderate that content in good faith, promoting forums conducive to the civil and thoughtful exchange of ideas as well as the growth of the digital market.¹⁵

Section 230 is characterized by its brevity. Its key language reads in full: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁶ Though consisting of only twenty-six short words, courts construed Section 230 as conferring broad immunity to ISPs hosting third-party content.

In *Zeran v. America Online, Inc.*, a Fourth Circuit District Court posited that the role of a publisher and that of a distributor were inseparable.¹⁷ The court held that once an ISP is put on notice of defamatory content being distributed on its forum, it must make a decision as whether to “publish, edit, or withdraw” the content and is thereby thrust into the role of a publisher, and immunized from liability under Section 230.¹⁸ Other courts quickly followed suit, extending publisher immunity to websites¹⁹ and re-affirming that Section 230’s protections did not merely apply to un-moderated content, but also to ISPs exercising their “editorial and self-regulatory functions.”²⁰ Essentially, courts interpreted Section 230 as granting “broad federal immunity to any

12. KOSSEFF, *supra* note 3, at 55 (quoting David Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. A. L. REV. 373, 409–10 (2010)).

13. See 47 U.S.C. § 230.

14. See KOSSEFF, *supra* note 3, at 2.

15. See *id.* at 2-3.

16. 47 U.S.C. § 230(c)(1).

17. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

18. *Id.*

19. See *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003) (concluding that Section 230 does not protect just internet service providers).

20. *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (citing *Zeran*, 129 F.3d at 331).

cause of action that would make service providers liable for information originating with a third-party user of the service.”²¹ Then, the rollback began.

In the face of increasingly disturbing claims,²² courts began re-evaluating the breadth of Section 230 immunity.²³ In *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, an ISP solicited information about sex, sexual orientation, nationality, and other classes of people protected under the Fair Housing Act to help individuals find compatible roommates.²⁴ Concluding that Section 230 did not cover the alleged violation, the Ninth Circuit reasoned that Section 230 immunity did not extend to a website who “contributes materially to the alleged illegality of the conduct[]” by “help[ing] to develop unlawful content[.]”²⁵ However, in *Jones v. Dirty World Entertainment Recordings LLC*, where an online tabloid solicited untrue and embarrassing stories about private citizens, the court held that merely soliciting defamatory content did not constitute a material contribution to the development of that content and, therefore, did not abrogate Section 230 immunity.²⁶ Thus, the broad immunity outlined in *Zeran* seemed to be pared back some, but not too much.²⁷

Then, in 2017, Congress stepped in. Responding to the increasing awareness that sex traffickers were using the internet to sell their victims, Congress passed, and President Trump signed into law, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“SESTA-FOSTA package”).²⁸ The law created a carve out to Section 230 liability protections, now holding ISPs responsible for third-party prostitution ads appearing on their forums.²⁹

Most recently, Justice Thomas has authored a statement respecting the denial of certiorari and a concurring opinion signaling a willingness to interpret Section 230

21. Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran, 129 F.3d at 330).

22. See, e.g., J.S. v. Vill. Voice Media Holdings, LLC, 184 Wash. 2d 95, 359 P.3d 714 (2015) (involving, among other claims, sexual assault and battery and the sexual exploitation of children); Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398 (6th Cir. 2014) (involving a defamation claim concerning the solicitation of embarrassing and untrue gossip).

23. Fair Hous. Council of San Fernando Valley, 521 F.3d 1157 (interpreting Section 230 as not offering liability protections to companies who contribute to the development of unlawful content); Jones, 755 F.3d 398 (applying the interpretation set forth in *Roommates.com*).

24. Fair Hous. Council of San Fernando Valley, 521 F.3d 1157.

25. *Id.* at 1168.

26. See Jones, 755 F.3d at 416 (relying on *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (holding that merely steering content creation did not constitute development)).

27. See Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997).

28. Allow State and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 47 U.S.C. § 230(e)(5)).

29. 47 U.S.C. § 230(e)(5).

differently than previous courts have.³⁰ In *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, Justice Thomas argued that, from a purely textualist perspective, ISPs are not protected from distributor liability—only publisher liability—rejecting the *Zeran* court’s conclusion that the two forms of liability could not be separated.³¹ In *Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al.*, Justice Thomas authored a concurring opinion positing that social media forums could be considered common carriers, which would restrict an ISP’s right to exclude users from its services, and that “colorable” first amendment arguments could be made about the control over speech that tech companies exercise.³²

In the aftermath of Congressional rollback and Justice Thomas’s statement respecting the denial of certiorari in *Enigma* and his concurring opinion in *Knights*, the central issues to be resolved are first, whether Section 230 should continue to be interpreted as providing broad liability protections to ISPs and second, what, if anything, can or should be done about tech companies moderating speech on their forums.

III. ANALYSIS

If Section 230 protections were pared back, it would have adverse effects on the internet marketplace and online free speech. To understand the impact proposed Section 230 reforms would have, it is vital to understand the dual functions of Section 230.

Section 230 provides ISPs with both a shield and a sword. Section 230’s shield is the broad immunity from publisher and distributor liability it provides to ISPs for third-party content posted on their forums.³³ Section 230’s sword, on the other hand, is the grant of striking power it gives ISPs to moderate that same third-party content.³⁴ These dual functions have allowed ISPs to improve their user-forums by allowing them to screen for inappropriate, false, or criminal content and either label or remove it.³⁵

30. See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15-16, 208 L. Ed. 2d 197 (2020).

31. See *id.*

32. See *Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al.*, 141 S. Ct. 1220, 1221–27 (2021).

33. See Emily Stewart, *Ron Wyden Wrote the Law that Built the Internet. He Still Stands by It—and Everything It’s Brought with It*, VOX (Mar. 16, 2019, 9:50 AM) <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality>.

34. See *id.*

35. See *id.*

The narrow carve-outs to the protections Section 230 confers on ISPs is that ISPs can be held liable for criminal content and material promoting prostitution posted on their forums.³⁶ Currently, however, political forces would like to further whittle down Section 230 protections.

There is bipartisan support to reform (or scrap) Section 230.³⁷ Each side of the political aisle worries that a few tech giants have amassed monopoly power, cornering the market and giving them too much control over what people see and hear.³⁸ To get after what politicians regard as unaccountable tech-monopolies, both Republicans and Democrats would diminish the liability protections tech companies currently enjoy.³⁹ That, however, is where the agreement ends.

Republicans and Democrats are bitterly divided over the second of Section 230's dual functions—the sword function. Democrats worry that tech companies—particularly social media companies—are too lax in regulating their forums, not doing enough to combat the spread of misinformation.⁴⁰ Republicans, on the contrary, are concerned that big tech is doing too much to regulate speech on their forums, and unfairly censoring conservative voices.⁴¹ Essentially, the difference between the Republican and Democratic positions is that while Democrats would sharpen Section 230's sword, Republicans would dull it. While Section 230 reform is in fashion politically,⁴² in most cases the proposed reforms would have the opposite of their intended effects, resulting in more monopoly and less free speech.

36. 47 U.S.C. § 230(e)(1), (5).

37. See Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html>.

38. See Matthew Feeney, *Big Tech and Free Speech*, CATO INST. (Jan./Feb. 2020), <https://www.cato.org/policy-report/january/february-2021/big-tech-free-speech>.

39. *Id.*

40. See *Why Big Tech Should Fear Amy Klobuchar*, N.Y. TIMES (Mar. 29, 2021), https://www.nytimes.com/2021/03/29/opinion/sway-kara-swisher-amy-klobuchar.html?auth=login-google&campaign_id=9&emc=edit_nn_20210329&instance_id=28597&nl=the-morning®i_id=92782340&segment_id=54399&te=1&user_id=607a204d17a0fed3011ce21aa261f087.

41. See Mack DeGeurin, *Majority of Republicans Think Tech Companies Are Censoring Them*, N.Y. MAG. (June 29, 2018), <https://nymag.com/intelligencer/2018/06/republicans-think-tech-companies-censor-political-speech.html>; *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15–16 (2020).

42. See, e.g., H.R. 285 117th Cong. (2021); H.R. 874, 117th Cong. (2021); S. 299 117th Cong. (2021). There are over a dozen other proposed bills that could be included in this footnote.

A. *The Shield*

Breaking the liability shield would call into question the very viability of digital companies whose business model is based largely or wholly on third-party content. Litigation costs alone could prove fatal to tech companies.

The price tag of litigating one single lawsuit can exceed \$700,000.⁴³ Even a pre-trial motion for summary judgment can range between \$15,000 and \$150,000.⁴⁴ While multibillion-dollar tech giants might be able to bear the burden of these litigation costs, it would surely prove a death sentence for smaller, resource-pinchd tech companies. This is especially true since the incentive to sue even smaller tech companies, despite these companies not having deep pockets, would still remain, as the cost of settling these lawsuits would be less than the cost of bringing them through trial.⁴⁵ In other words, the claimants would still get a payout even if their claims have no merit. As one Ninth Circuit court observed, it would mean “death by ten thousand duck bites.”⁴⁶ Considering that most lawsuits concerning third-party content are meritless,⁴⁷ subjecting tech companies to liability for these claims would create a perverse situation in which small, innovative tech start-ups are driven out of business by frivolous lawsuits. The risk of devastating legal fees would force tech companies to change their business models. The aftermath of SESTA-FOSTA provides a convenient case study.

After the SESTA-FOSTA package narrowed Section 230 liability protections, Reddit and Craigslist took down parts of their websites which might prospectively violate the new laws.⁴⁸ They did so not because those parts of their websites were in fact violating SESTA-FOSTA by “promoting ads for prostitutes, but because policing them against the outside possibility that they might was just too hard.”⁴⁹ If social media companies could be held liable for any illegal or defamatory third-party content appearing on their forums, they similarly would have three possible courses of action: first, shut down completely; second, open the floodgates to litigation; or third, and most likely, try to preemptively moderate all third-party content.

43. ENGINE, SECTION 230: COST REPORT, <https://www.engine.is/intermediary-liability> (last visited Apr. 10, 2021).

44. *Id.*

45. *Id.* (comparing the cost of settling a Section 230 lawsuit to the cost of litigating one through trial).

46. ENGINE, SECTION 230: COST REPORT, <https://www.engine.is/intermediary-liability> (last visited Apr. 10, 2021) (quoting Fair Hous. Council of San Fernando Valley, 521 F.3d at 1174).

47. *Id.*

48. See Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

49. *Id.*

Trolls will troll.⁵⁰ The odds of anonymous weirdos defaming others or uploading illegal content via the internet are, as everyone's experience will confirm, a near mathematical certainty. To avoid the flood waters of litigation, internet companies would have to screen all content before they allowed it to appear on their forums. The New York Times ("NYT") already does this.⁵¹ Almost needless to say, doing so necessarily requires a great deal of resources, as thousands of reader comments are posted to the site daily.⁵² The process is time-consuming, as each individual comment needs to be reviewed by NYT's in-house censors and approved for publication before posting.⁵³ While doing all that is possible for a large media company like the New York Times, it would be impossible for many smaller news sites who simply do not have the resources or manpower to patrol their comment sections. It would likely be exponentially more difficult for companies like Twitter and Facebook because of the sheer volume of content posted on those websites every day.⁵⁴

Social media deals primarily in instant gratification. 6,000 tweets are posted every second and around 500 million tweets are posted every day.⁵⁵ Likewise, there are 'more than 100 billion of pieces of content posted' to Facebook in any given 24-hour period.⁵⁶ Despite employing around 15,000 people and using artificial intelligence to moderate its forums, Facebook still struggles to screen user-generated content effectively.⁵⁷ It would be humanly impossible to review all that data pre-publication online. Social media companies would have to employ far more advanced forms of artificial intelligence than they now do to screen that vast amount of data for illegal or defamatory content.⁵⁸ It would be a tremendous burden. While deep-pocketed tech companies are best situated to develop that technology, in the meantime, if it took an

50. *Troll*, THE MERRIAM-WEBSTER DICTIONARY (2021).

51. *Comments*, N.Y. TIMES, <https://help.nytimes.com/hc/en-us/articles/115014792387-Comments> (last visited Apr. 18, 2021).

52. See Lucia Moses, *How The New York Times Moderates 12,000 Comments a Day*, DIGIDAY (June 19, 2017), <https://digiday.com/media/new-york-times-moderates-12000-comments-day/>.

53. *Comments*, NY TIMES, <https://help.nytimes.com/hc/en-us/articles/115014792387-Comments> (last visited Apr. 18, 2021).

54. See Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, VICE (Aug. 23, 2018, 12:15 PM), <https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works>.

55. *Twitter Usage Statistics*, INTERNET LIVE STATS., <https://www.internetlivestats.com/twitter-statistics/> (last visited Apr. 13, 2021).

56. See Scott Lincicome, *Fine, Let's Talk about Section 230*, DISPATCH (Oct. 20, 2020), <https://capitolism.thedispatch.com/p/fine-lets-talk-about-section-230>.

57. See *id.* (citing Jeff Horowitz, *Facebook Has Made Lots of New Rules This Year. It Doesn't Always Enforce Them*, WALL STREET J. (Oct. 15, 2020) (noting that content violating Facebook's content guidelines is often not removed from the site)).

58. See Koebler & Cox, *supra* note 54.

average of even an hour or thirty minutes to review tweets before posting, it would destroy social media's instant gratification business model. In the worst-case scenario, it might even mean the end of social media altogether and, along with it, the end of what may be called the hashtag revolution.

#BringBackOurGirls.⁵⁹ This hashtag, first shared on Twitter by a Nigerian lawyer,⁶⁰ started a worldwide movement to rescue 276 Nigerian schoolgirls who were captured by the Islamic terrorist group Boko Haram in 2014.⁶¹ This simple hashtag was eventually shared millions of times,⁶² including by former first lady Michelle Obama,⁶³ to raise awareness of the kidnapping of the young girls by Boko Haram. Just days after the hashtag began trending, several major western powers, including the United States, committed resources to Nigeria to help find the stolen schoolgirls.⁶⁴

It is fair to argue that hashtag activism has not saved those 276 schoolgirls. It would be obtuse, however, to say that Twitter did not play an important role bringing this atrocity to the attention of the global community and generate worldwide support, including in the West Wing, for the girls' plight. It is this much needed awareness and support which has spurred freedom activists in hundreds of oppressed regions around the world to take to Twitter and other social media to spread their message. One ongoing struggle is that of the Burmese people.

59. See Anne-Marie Tomchak, *#BBCTrending: The Creator of #BringBackOurGirls*, BBC (May 7, 2014), <https://www.bbc.com/news/blogs-trending-27315124>.

60. *Id.*

61. See Nina Storchlic, *Six Years Ago, Boko Haram Kidnapped 276 Schoolgirls. Where Are They Now?*, NAT'L GEOGRAPHIC MAG. (Mar. 2020), <https://www.nationalgeographic.com/magazine/article/six-years-ago-boko-haram-kidnapped-276-schoolgirls-where-are-they-now>.

62. See BBC Trending, *#BBCTrending: Five Facts about #BringBackOurGirls*, BBC (May 13, 2014), <https://www.bbc.com/news/blogs-trending-27392955>.

63. Michelle Obama (@FLOTUS44), TWITTER, (May 7, 2014), https://twitter.com/FLOTUS44/status/464148654354628608?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E464148654354628608%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fblog.twitter.com%2Fen_us%2Fa%2F2014%2Fmichelle-obama-tweets-to-bringbackourgirls.html.

64. See Caitlin Dewey, *#Bringbackourgirls, #Kony2012, and the Complete, Divisive History of 'hashtag activism'*, WASH. POST (May 8, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/05/08/bringbackourgirls-kony2012-and-the-complete-divisive-history-of-hashtag-activism/>.

#SaveMyanmar.⁶⁵ #HearTheVoiceOfMyanmar.⁶⁶ #RespectOurVotes.⁶⁷ In recent months, these three Twitter hashtags, along with others, have all been trending in response to the military coup overthrowing the democratically elected government in Burma.⁶⁸ Understanding the power a people determined to be free possess when they can share ideas and coordinate their movements, the new military dictatorship banned Twitter, Facebook, and Instagram as part of a crackdown on the democratic resistance.⁶⁹ Those who discount the power of 280 characters to subvert evil regimes and evil deeds need look no further than every oppressive dictatorship across earth which has banned social media and other forms of internet communications to realize just how egregiously wrong they are.⁷⁰ The hashtag revolution is real. It is a boon to all those weary people yearning for freedom in the dark and oppressed corners of the world. Of course, just as the power of social media can be used for good, it can also be used for evil.

B. The Sword

Section 230 gives tech companies the ability to moderate their forums by removing content that violates their content rules and guidelines.⁷¹ As noted above, how tech companies exercise this power has divided Republicans and Democrats, with Republicans arguing tech companies exercise this power too much and Democrats arguing tech companies exercise it too little.⁷²

To illustrate their point, Democrats have often cited the events leading up to the capital insurrection.⁷³ January 6, 2021 will be regarded by posterity as the darkest day for the republic of the United States of America since succession gripped the nation and tore her asunder. The capital insurrection itself was but the culminating event of a long and coordinated misinformation campaign cooked up by a conniving and

65. *Myanmar Military Rulers Order Block on Twitter, Instagram 'Until Further Notice'*, CNBC (Feb. 5, 2021, 3:54 PM), <https://www.cnbc.com/2021/02/05/myanmar-military-rulers-order-block-on-twitter-instagram-.html>.

66. *Id.*

67. *Id.*

68. *Id.*

69. See Rishi Iyengar, *Myanmar Blocks Twitter and Instagram*, CNN (Feb. 5, 2021), <https://www.cnn.com/2021/02/05/tech/myanmar-blocks-twitter-instagram/index.html>.

70. See, e.g., Bloomberg News, *The Great Firewall of China*, BLOOMBERG (Nov. 5, 2018, 5:36 PM), <https://www.bloomberg.com/quicktake/great-firewall-of-china>; Robyn Dixon, *Why Russia Is Tightening Its Grip on Social Media*, WASH. POST (Mar. 12, 2021, 11:06 AM), <https://www.washingtonpost.com/world/2021/03/12/russia-social-media-putin-opposition/>.

71. 47 U.S.C. § 230(2).

72. See Feeney, *supra* note 38.

73. See *Why Big Tech Should Fear Amy Klobuchar*, *supra* note 38.

demagogic President and his groveling henchmen, whose purpose was to sow distrust in the results of a democratically held and fairly administered election.⁷⁴ Much of that misinformation was spread over Twitter and other social media.

It is in this context that Democratic calls for increased regulation of third-party content on social media forums are most compelling. An informed and assertive citizenry is the best defense against usurping government.⁷⁵ If misinformation is permitted to spread through media bubbles, unchallenged and unabated, the events of January 6 could repeat themselves wearing another face in another context. Therefore, Democrats reason, something must be done to rein in the spread of false information. Requiring tech companies to police the content on their forums more stringently is one possible solution.

Justice Thomas, however, along with much of the political right, has voiced concern that tech companies are exercising too much control over speech, potentially running afoul of First Amendment protections.⁷⁶ Despite tech companies not being government actors themselves, there is caselaw to support that concern.⁷⁷

In *Marsh v. Alabama*, the plaintiff—a Jehovah’s witness—was arrested for distributing “religious literature on the premises of a company-owned town contrary to the wishes of the town’s management.”⁷⁸ Holding that the plaintiff’s actions were protected by the First Amendment, the court reasoned, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”⁷⁹ The Court, referring to the fact that the town’s streets and businesses were held open to the whole public, remarked, “[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.”⁸⁰ There is, at least, an argument to be made that this same line of reasoning could be applied to tech companies like Twitter.

For one thing, Twitter holds itself out to the public for the public’s benefit: “The mission we serve as Twitter, Inc. is to give everyone the power to create and share ideas and information instantly without barriers. Our business and revenue will always

74. See Anita Kumar and Gabby Orr, *Inside Trump’s Pressure Campaign to Overturn the Election*, POLITICO (Dec. 21, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486>.

75. According to the internet, although I was unable to independently verify this, William F. Buckley Jr. once said, “The best defense against usurpatory government is an assertive citizenry.” Whether Buckley actually said this or not, the point remains valid.

76. Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al., 141 S. Ct. 1220, 1221–27 (2021); Feeney, *supra* note 38.

77. See, e.g., *Marsh v. State of Alabama*, 326 U.S. 501, 502, (1946).

78. *Id.*

79. *Id.* at 506.

80. *Id.*

follow that mission in ways that improve—and do not detract from—a free and global conversation.”⁸¹ While sharing free speech is by no means Twitter’s only function—it also mines user data to sell to other companies and sells ads to its users—free speech is inextricable from Twitter’s business model. President Trump certainly used that model to great effect, even employing Twitter’s forum to speak in an official capacity.⁸² It is arguable that Trump’s twitter threads were “essentially a public function . . . subject to state regulation,”⁸³ and, therefore, protected as speech under the First Amendment. Additionally, considering the sheer volume of speech on its platform, Twitter could, if so inclined, potentially exercise a great deal of control over a great deal of speech. As the hashtag revolution should demonstrate, there is a public interest or concern in the speech published on Twitter—enough so, perhaps, that Twitter’s own rights to exercise control over its forum should be circumscribed by the rights of the people who use its services.

Could the #MeToo movement have existed without Twitter? It is difficult to say. However, #MeToo only became a global movement ten years after Tarana Burke coined the phrase when actress Alyssa Milano used it on Twitter to expose the sex crimes of Harvey Weinstein.⁸⁴ It is at least fair to argue that Twitter provided a good platform for the movement to take-off. In an alternate universe, however, Twitter could have decided to use all its power to stop the #MeToo movement. It would be simple enough to create an algorithm to recognize the hashtag and remove the posts that use it. While #MeToo may have been an idea whose time had come, Twitter, if it were so inclined, could have dampened its impact by silencing its message. It is that exercise of power over speech which is a legitimate cause for concern.

Even if the first amendment argument does not bear out—and it may well not—Congress could still pass a law deeming ISPs common carriers. Doing so would mean simply that Twitter, Facebook, Amazon, et cetera would be restricted in their right to exclude users from their platforms. This would eliminate the possibility that a few large tech companies, who can exercise control over so much speech, would abuse that control to stamp out unpopular or dissenting voices. The common carrier approach has the added benefit of being a simple enough change that it would not totally upend

81. *Investor Relations*, TWITTER, <https://investor.twitterinc.com/contact/faq/default.aspx#:~:text=The%20mission%20we%20serve%20as,a%20free%20and%20global%20conversation> (last visited May 22, 2021).

82. *See* Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al., 141 S. Ct. 1220, 1221–27 (2021).

83. *See Marsh*, 326 U.S. at 506.

84. *See* Gurvinder Gill & Imran Rahman-Jones, *Me Too Founder Tarana Burke: Movement Is Not Over*, BBC (July 9, 2020), <https://www.bbc.com/news/newsbeat-53269751#:~:text=Tarana%20began%20using%20the%20phrase,Harvey%20Weinstein%20of%20sexual%20assault>.

the internet as it exists and has existed for the last quarter of a century. Put differently, it might be a change that, though it certainly will not sound good to everyone, could work.

IV. RECOMMENDATION

Section 230 is deceptively tricky. Even though the statute is so short, any small change to it carries profound implications for the tech marketplace and online free speech. Unfortunately, many of the proposed Section 230 reforms would create a world in which free speech can be stifled with impunity and the very existence of thousands of tech companies put in jeopardy by an ill-considered imposition of liability for content those tech companies had no hand in creating. To ensure the continued viability of the free and open exchange of ideas online, Congress should pass legislation designating ISPs as common carriers, restricting tech companies' ability to exclude third-party users of their services. Furthermore, to guarantee the survival of tech companies and a tech marketplace in which small as well as large companies can compete, Section 230 liability protections should be construed as granting outright immunity from any litigation except as already set out in Section 230(e).⁸⁵

The first and last consideration must be free speech. The people of any free society should be weary that a few large companies can exercise control over such an immeasurably large amount of speech online. When Amazon, which accounts for almost 90% of all eBook sales and nearly 50% of all paper book sales online,⁸⁶ decides to block a listing, that decision will have a dramatic, chilling effect on the sales of the blocked book. It will stifle speech. Likewise, when Twitter blocked President Trump from its platform, it restricted his ability to communicate with his 89 million followers. While Twitter may have had valid reasons for permanently suspending President Trump's account, it is just as easy to imagine a world in which those who have so much power over so much speech will exercise that power arbitrarily to smother dissenting and unpopular voices.

Censorship, in this context like any other, is a question of trust. Who can the people of a free society trust to censor—or moderate—online speech? A large part of American society may not trust a few giant tech companies to decide what speech is acceptable any more than they would trust the government to make those decisions. It

85. See 47 U.S.C. § 230(e) (providing that Section 230 immunity from liability does not affect criminal law, intellectual property law, state law, communications privacy law, or sex trafficking law).

86. See Joseph R. Biden, Jr., President of the United States, et al. v. Knights First Amendment Institute at Columbia University, et al., 141 S. Ct. 1220, 1225 (2021) (citing Matt Day & Jackie Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG (March 27, 2019), <https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/>).

would be better to give the devil himself the benefit of free and uncensored speech, to give him leave to try to seduce the upright and the good, than to travel down the road of censorship. Robert Bolt, at a poignant moment in his seminal play *A Man for All Seasons*, taught this lesson well.⁸⁷ After being confronted by what Christopher Hitchens described as a “witch-hunting prosecutor”⁸⁸ for recognizing a corrupt man’s rights, the witch-hunter said to Sir Thomas More:

[Witch-hunter]: So now you’d give the Devil benefit of law!

[More]: Yes. What would you do? Cut a great road through the law to get after the Devil?

[Witch-hunter]: I’d cut down every law in England to do that!

[More]: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast . . . and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.⁸⁹

Irrespective of whether any court would hold that the first amendment reaches online communications hosted by private companies, the principle remains the same—speech should not be silenced for any reason in any circumstances. Giving someone, anyone, the power of the censor is to give him the power to decide what the truth is. The very idea is repugnant to any free and open society. Therefore, to defend free speech and protect the free and unhindered exchange of ideas online, Congress should pass legislation deeming ISPs common carriers.

The other consideration is whether ISPs, if they are to be recognized as common carriers, should be considered publishers, who play an active role in printing or broadcasting information created by others, or distributors, who merely distribute information created by others.

ISPs should be considered publishers. Since operating as common carriers ISPs would not be allowed to remove most third-party content, they should be granted total immunity from lawsuits arising out of any third-party content posted on their forums. Traditionally, out of concerns for fairness, governments have “sometimes given common carriers special government favors,” such as immunity from certain types of lawsuits.⁹⁰ If textualist jurists, like Justice Thomas, do not square Section 230’s protections against publisher liability as granting total immunity from lawsuits arising

87. See generally ROBERT BOLT, *A MAN FOR ALL SEASONS* (Vintage International, A Division of Random House, Inc.) (1962).

88. CandaEH, *Christopher Hitchens Defending Free Speech Full Debate*, YOUTUBE (Nov. 17, 2016) https://www.youtube.com/watch?v=H_ohvc_ZqzA.

89. BOLT, *supra* note 87, at 66.

90. See *Biden v. Knights First Amendment Institute*, 141 S. Ct. at 1223.

from third-party content, then Congress should amend Section 230(c)(1) to say, “No provider or user of an interactive computer service *shall be held liable*⁹¹ for any information provided by another information content provider.” Of course, as already noted, and as is provided for in another part of Section 230,⁹² that immunity would not affect certain, other defined areas of the law as it applies to ISPs. While this would assuage Republican fears that conservative voices are being unfairly censored by big tech companies, it would do little to address Democratic concerns of the rampant spread of misinformation over the internet.

Misinformation can be dangerous. While Democrats, and most Americans for that matter, are correctly concerned that Twitter and other social media can act as conduits for the widespread dissemination of misinformation, and, as the insurrection of January 6 demonstrates, the spread of misinformation can be a threat to republican government itself, they are wrong in their Section 230 reform prescription. The people who believe the election was stolen, despite all the evidence to the contrary,⁹³ would likely have believed the same even in the absence of social media. And while some websites—like 4chan and its ilk⁹⁴—made it easier for them to organize,⁹⁵ it is still possible they would have stormed the capitol building without the help of Twitter or Facebook. Opening social media companies up to liability for the content posted by the capitol rioters would not solve the problem. It would merely drive these people to darker, more conspiratorial parts of the web.

Social media is not the cause of misinformation. Human beings are the cause of misinformation. Though social media is one means by which false information is spread, it is also a means by which true information is spread. The best way to fight false information is by injecting true information into people’s media bubbles. Of

91. This language replaces the language in Section 230(c)(1) which reads, “shall be treated as the publisher or speaker...”

92. 47 U.S.C. § 230(e).

93. See, e.g., Hope Yen, Alie Swenson & Amanda Seitz, *FACT CHECK: Trump’s Claims of Vote Rigging Are All Wrong*, DENVER POST (Dec. 3, 2020, 10:31 AM), <https://www.denverpost.com/2020/12/03/trump-vote-rigging-fact-check/>; Jon Ward & Andrew Romano, *The 2020 Election Wasn’t ‘Stolen.’ Here Are All the Facts that Prove It*, YAHOO! NEWS (November 12, 2020), <https://www.yahoo.com/now/the-2020-election-wasnt-stolen-here-are-all-the-facts-that-prove-it-184623754.html>; Melissa Quinn, *Sidney Powell Tells Court “No Reasonable Person” Would Take Her Voter Fraud Claims as Fact*, CBS NEWS (March 23, 2021, 12:32 PM), <https://www.cbsnews.com/news/sidney-powell-dominion-defamation-lawsuit-voter-fraud/>.

94. Oscar Gonzales, *8chan, 8kun, 4chan, Endchan: What You Need to Know*, C|NET (Nov. 7, 2019, 2:45 PM) <https://www.cnet.com/news/8chan-8kun-4chan-endchan-what-you-need-to-know-internet-forums/>.

95. Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html> <https://www.cbsnews.com/news/sidney-powell-dominion-defamation-lawsuit-voter-fraud/>.

course, that will be hard to do with social media platforms, whose algorithms are designed to expose people only to information they want to see. Nevertheless, tweaking algorithms to expose people to a greater diversity of political views would be far more simple and far more desirable than a form of Orwellian-esque censorship. Freedom of speech must eclipse concerns about the spread of misinformation. A few elitists in tech or government must not be empowered to decide what the truth is. The determination of what is true and what is false should not be left to big tech censors, but instead to every individual in his capacity as a thinking human being.

V. CONCLUSION

Section 230, for the most part, works. Turning tech companies into common carriers is one simple reform that will maximize free speech online without destroying the platforms based primarily on third-party content. Exempting internet companies from liability has fostered a market revolution, creating millions of new jobs, spurring the creation of some of the world's largest companies, connecting the several billion inhabitants of this planet, and undermining totalitarian regimes all over the earth. While concerns over monopoly and the spread of misinformation are real, eliminating liability protections or subjecting social media posts to preemptive review to remove false or unpleasant information would kill everything about the internet that works and replace it with what sounds good. The best trade-off available is to turn ISPs into common carriers, eliminating the possibility of censorship of unpopular voices online, and maintain broad liability protections, saving small tech start-ups from being sued into oblivion and guaranteeing their ability to compete in the digital marketplace. Common carrier status, in conclusion, would be the keeper of the internet and everything about it that is good.

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DO NOT PASS GO, DO NOT COLLECT \$200: EXPLORING THE NCAA'S
MONOPOLY ON ATHLETE COMPENSATION BEHIND THE 'PAY THE
PLAYERS' DEBATE

❖ Note ❖

*SY Yaw**

I. INTRODUCTION

On February 2, 2021, EA Sports made an announcement that excited college sports fans everywhere—the NCAA football game that many had grown to love before its discontinuation in 2014 would be returning in 2023.¹ Along with this excitement came a reignited debate about whether student-athletes should be paid for the use of their name, image, and likeness (“NIL”); an issue that contributed to the game’s discontinuation.² Despite the profit made by the video game franchise, the National Collegiate Athletic Association’s (“NCAA”) longstanding prohibition on student-athletes receiving any compensation beyond their athletic scholarships precluded featured players from receiving compensation.

This Note will explore the intricacies of the debate about whether college athletes should be compensated for their services, primarily using revenue generating sports as a point of examination. Part II will introduce the backdrop of the debate, discussing the “players” in college athletics and the stake that each has in the resolution of this debate. Part III will analyze the current guidelines regulating the compensation—or lack thereof—of student-athletes. Part IV will propose a solution that pleases both

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1. Michael Rothstein, *EA Sports to Do College Football Video Game*, ESPN (Feb. 2, 2021), https://www.espn.com/college-football/story/_/id/30821045/school-plan-ea-sports-do-college-football.

2. See Jason Kirk, *EA Sports Halting College Football Video Games Series After All*, SBATION (Sept. 26, 2013, 4:29 PM), <https://www.sbnation.com/college-football/2013/9/26/4774556/ea-sports-college-football-video-game-series>.

sides, while keeping in mind the best interests of the most important players, student-athletes. Part V will conclude.

II. BACKGROUND

To understand why the “pay the players” debate has been heated and ongoing, it is first important to understand what is at stake for those involved. This section will discuss the NCAA and university athletic conferences, their media counterparts, and student-athletes.

A. *The NCAA*

In 1906, in response to the rampant violence in collegiate football and threats to cut the sport altogether, then-President Theodore Roosevelt, along with college football representatives, formed what later became known as the NCAA.³ The original goal of the NCAA was to prevent the exploitation of student-athletes.⁴ Since then, the NCAA has become the authority on all collegiate athletics: regulating play and sanctioning schools or teams who violate said regulations. One of the most foundational principles of the NCAA is the association’s focus on the distinction between amateurism and professionalism.⁵ According to Article 2.9 of the NCAA Division I Manual, “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is avocation, and student-athletes should be protected from exploitation”⁶ This quote demonstrates how the NCAA views intercollegiate athletics—as a voluntary activity where student-athletes are not to be viewed as professionals.

The NCAA encompasses several university conferences, typically divided by region. While there are ten football conferences in total, there are five major conferences—known as the autonomous conferences or the Power Five (“P5”)—that really hold much of the power within the NCAA, especially regarding revenue streams

3. Dan Treadway, *Why Does the NCAA Exist?*, HUFFPOST, https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985 (Dec. 6, 2017).

4. *Id.*

5. NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-2021 NCAA DIVISION I MANUAL CONST., Art. 2.9 (2020), available at <http://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx>.

6. *Id.*

that come from media rights.⁷ This power was demonstrated when COVID-19 threatened to end fall sports championships in 2020, which threatened the P5's cash cow—the College Football Playoff (“CFP”).⁸ Because the CFP is not sponsored by the NCAA, the P5 conferences flexed their power by threatening to hold their own championships for all fall sports.⁹ This move would have justified keeping the CFP afloat during the COVID-19 pandemic, solidifying the autonomy of the conferences moving forward.¹⁰ In the end, two Power Five powerhouses faced off in the lucrative college football playoff despite earlier concerns of a potential cancellation.¹¹

B. The Media

Another major player in the collegiate athletics debate is major media conglomerates. Prior to the Supreme Court's 1984 ruling in *NCAA v. Board of Regents of the University of Oklahoma*—which held that the NCAA's control over television contracts was a violation of the Sherman Act—the NCAA had full control over the media rights related to its member institutions.¹² Because of the freedom that the *Board of Regents* decision gave NCAA conferences and member institutions, four of the five autonomous conferences now have their own dedicated channels.¹³ In 2012, ESPN reached an agreement to broadcast the CFP, including the championship game—that had its inaugural game in 2014—for \$7.3 billion over twelve years.¹⁴ This does not even account for the revenue made for each conferences' regular season games,

7. David Broughton, *Power Five: An \$8.3 Billion Revenue Powerhouse*, SPORTS BUS. J. (Aug. 17, 2020), https://www.sportsbusinessjournal.com/Journal/Issues/2020/08/17/Colleges/Revenue.aspx?ana=register_free_form_2_filled.

8. Ross Dellenger & Pat Forde, *Power 5 Leaders Exploring Possibility of Staging Their Own Fall Sports Championships*, SPORTS ILLUSTRATED (Aug. 1, 2020), <https://www.si.com/college/2020/08/01/power-5-exploring-staging-own-fall-sports-championships-2020>.

9. *Id.*

10. *Id.*

11. Ralph D. Russo, *No. 1 Alabama Wins National Title 52-24 over No. 3 Ohio State Championships*, CHI. TRIBUNE (Jan. 12, 2021, 12:10 AM), <https://www.chicagotribune.com/sports/college/ct-alabama-ohio-state-national-championship-20210112-wspbv4lzhofdbvk2ww2fdga4-story.html>.

12. *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 85–136 (1984).

13. Andrew Weiss, Note, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L. REV. 259, 263 (2020).

14. Allen R. Sanderson & John J. Siegfried, *The Role of Broadcasting in National Collegiate Athletic Association Sports*, 52 REV. INDUS. ORG. 305, 308 (2017).

many of which are broadcasted on ESPN, ESPNU, and conference specific networks.¹⁵ While college football is the largest revenue generator for much of the P5, media broadcasting revenue from college basketball is no small amount.¹⁶ In 2017, CBS and Turner Broadcasting, the broadcasting company with rights to the collegiate basketball tournament known as March Madness, generated an ad revenue of \$1.285 billion from broadcasting the tournament.¹⁷

These media revenue streams are so important that conferences have aligned to ensure an increase in media revenue.¹⁸ While never stated officially, in 2014 the Big Ten—which is a predominantly midwestern conference—realigned to include Maryland (a former Atlantic Coast Conference school) and Rutgers (a former Big East school).¹⁹ By adding these two schools, the Big Ten cast its net beyond the rust belt and gained access to a much larger east coast market, a move that significantly increased media revenue for the conference.²⁰ This move was a win-win situation for the schools and the conference—the conference got expand its reach within the media market, and the schools were able to join a more lucrative conference allowing for more resources for their athletic programs.²¹

C. Student-Athletes

Arguably the most important players in collegiate athletics are the players themselves—without them, there would be no NCAA. At the center of the “pay the players” debate are almost 500,000 student-athletes that dedicate their time to their sports each year.²² Many opponents of compensating student-athletes, including the NCAA itself, argue that the tuition-free academic experience should be compensation

15. Broughton, *supra* note 7 (approximating NCAA TV Broadcast Revenue at \$827 million and NCAA Expenses Attributed to Division I Members at \$246.28 million).

16. Mike Ozanian, *March Madness Is Most Profitable Postseason TV Deal in Sports*, (Mar. 19, 2019, 9:24 AM), <https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/?sh=30d051951795>.

17. *Id.*

18. Brett McMurphy & Dana O’Neil, *Maryland Accepts Big Ten Invite*, ESPN (Nov. 19, 2012), https://www.espn.com/college-sports/story/_/id/8651934/maryland-terrapins-join-big-ten-rutgers-scarlet-knights-join-well-sources-say.

19. *Id.*

20. Steve Berkowitz, *Big Ten Conference Revenues Rise 33% in One Year*, USA TODAY, <https://www.usatoday.com/story/sports/college/2016/05/18/big-ten-revenue-jim-delany-pay-salary-compensation-television/84553752/>.

21. McMurphy & O’Neil, *supra* note 18.

22. Amy Wimmer Schwab, *Number of NCAA College Athletes Reaches All-Time High*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 10, 2018, 2:00 PM), <https://www.ncaa.org/about/resources/media-center/news/number-ncaa-college-athletes-reaches-all-time-high>.

enough for the athletes' participation in their sport.²³ This ignores the fact that according to the NCAA, between Division I and Division II sports, 180,000 student-athletes receive athletic scholarships, which pales in comparison to the almost 500,000 student-athletes that compete each year.²⁴

This is compounded by the fact that these athletes have a very small chance of ever playing their sport professionally.²⁵ According to NCAA statistics, in 2019, 73,712 athletes competed in collegiate football and of the 16,380 players that were eligible for the NFL draft, 254 (or 1.6%) were drafted.²⁶ In comparison to the 18,816 athletes that competed in collegiate basketball—4,181 of which were draft eligible—only 52 (1.2%) of athletes were drafted from the NCAA.²⁷ Despite the fact that the NCAA fights to maintain the rigid demarcation between amateurism and professionalism, so few athletes will compete at the professional level that the collegiate level is the end of the road for them. This means that student-athletes who work an average of forty hours a week toward their sport,²⁸ on top of the average amount of hours necessary to remain academically eligible to compete are using their “lucrative” years generating millions in revenue yet playing for free.²⁹

III. ANALYSIS

The pay-the-players debate at the heart of this Note is not a new one; proponents and opponents of compensation for participation in collegiate athletics have argued the merits of compensation models for decades.³⁰ On one side, proponents

23. Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, Bleacher Report (Apr. 3, 2013), <https://bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes>.

24. *Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/student-athletes/future/scholarships> (last visited Mar. 19, 2021).

25. *Estimated Probability of Competing in Professional Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Mar. 19, 2021).

26. *Id.*

27. *Id.*

28. Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 10:44 AM) <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>.

29. *Finances of Intercollegiate Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Mar. 19, 2021) (noting that in 2019 the revenue reported among all NCAA athletics departments was \$18.9 billion).

30. Jon Solomon, *The History Behind the Debate over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> (Discussing the origin of the NCAA's use of the term “student-athlete” in response to the

argue that there exists a grave injustice where student-athletes meet the high demands of participating in collegiate athletics and garnering billions in revenue for universities without being compensated.³¹ While on the other side, opponents of compensation models argue that student-athletes are already given much in the way of compensation via free tuition and cost-of-living stipends.³²

A. The Case for Compensation

The first argument that many proponents of compensating student-athletes is the discrepancy between the amount of money generated by these athletes' athletic performance, and what they receive in return. This discrepancy is particularly unjust when the increase in revenue is considered in comparison to the increase in tuition over about the same period of time. For example, in 1981 the March Madness tournament generated about \$9 million, while in 2017, the tournament brought in \$1 billion.³³ On the other hand, the average annual tuition cost grew by 260% in the same period, a number dwarfed by the increase in revenue generated by the annual March Madness tournament.³⁴ If the NCAA is to stand by the argument that tuition-free education is compensation for athletic participation, student-athletes are still being severely underpaid. Another injustice that proponents argue justifies compensating players for their participation is the exorbitant salaries of coaching staffs in revenue generating sports. For instance, in 2013 the median salary for head football coaches was \$1.9 million, while the average head basketball coach's salary was \$1.2 million.³⁵

potential for worker's compensation claims by the family of a deceased NCAA football player who sustained a critical head injury during play).

31. Sarah Lytal, *Comment: Ending the Amateurism Façade—Pay College Athletes*, 9 HOUS. L. REV. 158, 159 (2019).

32. Paul Daugherty, *College Athletes Already Have Advantages and Shouldn't Be Paid*, SPORTS ILLUSTRATED (Jan. 20, 2012), <https://www.si.com/more-sports/2012/01/20/no-pay>.

33. Mike Gilleran, Ron Katz & Issac Vaughn, *Should College Athletes Be Paid?*, DISCUSSION F. INST. SPORTS L. & ETHICS SANTA CLARA UNIV. (July 15, 2013), <https://law.scu.edu/sports-law/should-college-athletes-be-paid/>. See also Andrew Lisa, *The Money Behind the March Madness NCAA Basketball Tournament*, YAHOO! ENT. (Mar. 9, 2020), <https://www.yahoo.com/entertainment/money-behind-march-madness-ncaa-194402803.html>.

34. Abby Jackson, *This Chart Shows How Quickly College Tuition Has Skyrocketed Since 1980*, BUS. INSIDER (July 2015, 2:24 PM), <https://www.businessinsider.com/this-chart-shows-how-quickly-college-tuition-has-skyrocketed-since-1980-2015-7#:~:text=The%20average%20annual%20increase%20in,to%20the%20Department%20of%20Education>.

35. Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSP. 115 (2015), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.29.1.115> (citing Daniel L. Fuls, *NCAA Division I Intercollegiate Athletics Programs Report, 2004–2013: Revenues and*

Looking at these numbers, it is hard to advocate for a position that allows college coaches to continue to see an increase in salary while the players who generate the NCAA and its member institutions' revenue, are supposed to accept free tuition in return for the revenue they generate each year. Lastly, those in favor of compensating student-athletes argue that if the NCAA is going to perpetuate the idea that athletes should be content with free tuition because they are "students first," they should only demand of athletes what they would of the average student. While the NCAA's twenty-hour rule seems reasonable considering the fact that almost half of full-time undergraduate students are employed for approximately the same amount of hours each week, this rule is a little deceptive.³⁶ While the rule is that student-athletes can spend a maximum of twenty-hours a week on athletic related activities, the exceptions to this rule mean that in practice the average student athlete is actually spending approximately forty hours a week on athletic activities.³⁷ By exempting team travel, compliance meetings, recruiting activities, team-building activities, and a host of other required activities from being counted toward the twenty hours a week rule, the NCAA creates a loophole where student-athletes are working in excess of twenty hours a week on athletics-related activities.³⁸ If the NCAA wants to stand by its "student-first" approach, it must address the realities that student-athletes are rarely able to focus primarily on their studies when what is demanded of them is above and beyond what is demanded of the average student.

B. The Case Against Compensation

While to some compensating college athletes seems like the fair and logical thing to do, the idea of compensating student-athletes has also faced its fair share of opposition. Opponents often argue that student-athletes should be treated no differently than other students and that receiving a free education is compensation enough for their contributions to the program.³⁹ Not only do student-athletes receive a free education, they receive free medical care, and "a national stage to audition for a

Expenses, NAT'L COLLEGIATE ATHLETIC ASS'N: INDIANAPOLIS, IND. (2014),

<http://www.ncaapublications.com/p-4344-division-i-revenues-and-expenses-2004-2013.aspx>).

36. *Bylaw 17.1.7.1*, NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL (2020);

College Student Employment, NAT'L CTR. EDUC. STAT.,

[\(https://nces.ed.gov/programs/coe/indicator_ssa.asp#:~:text=In%202018%2C%20the%20percentage%20of,time%20students%20\(43%20percent\)](https://nces.ed.gov/programs/coe/indicator_ssa.asp#:~:text=In%202018%2C%20the%20percentage%20of,time%20students%20(43%20percent))) (May 2020).

37. Jacobs, *supra* note 28.

38. *Id.*

39. Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, BLEACHER REP. (Apr. 3, 2013), <https://bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes>.

job in the professional ranks,” opportunities that are not afforded to the average college student.⁴⁰ These opponents also argue that while the revenue generated by the NCAA each year is exorbitant, it is misleading because 96% of that revenue generated is distributed to its member institutions.⁴¹ Additionally, opponents argue that while the compensation that college coaches receive may seem excessive given the lack of compensation for athletes, these salaries account for the differences in contractual responsibilities between college coaches and athletes.⁴² While athletes are expected to perform to the best of their athletic ability, and maintain academic eligibility, coaches are expected to shape an entire program that often leads to more recruits and the bottom line, winning.⁴³ When coaches sign their contracts, they are promising the institution not only years of their careers, but they are also promising the most lucrative deliverable, wins.⁴⁴ Coaches who don’t win, don’t work—it is not uncommon for losing coaches to be on the proverbial hot seat.⁴⁵ This is in stark contrast to student athletes who commonly transfer to other schools, and in sports like men’s basketball it is increasingly rare for elite players to stay in college once they’ve reached the age of 19, the NBA’s minimum age under the “one-and-done rule.”⁴⁶ Lastly, many opponents argue that allowing for unlimited NIL payments would cause its own host of issues. First and foremost, unlimited NIL payments run the risk of emulating an employment relationship between member institutions and student-athletes which comes with its own host of issues including vicarious liability and Title IX issues.⁴⁷

40. *Id.*

41. *Id.*

42. Martin J. Greenberg, *Symposium: College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS. L. REV. 127, 151 (2001) (discussing the most common contractual responsibilities for coaches).

43. *Id.* at 242.

44. *Id.*

45. Randall S. Thomas & R. Lawrence Van Horn, *Article: College Football Coaches’ Pay and Contracts: Are They Overpaid and Unduly Privileged?*, 91 IND. L.J. 189, 192 (noting that the connection between coaching performance and compensation often means that poorly performing coaches will be terminated). *See also* Brad Shepard, *Way-Too-Early College Football Head Coach Hot-Seat Predictions*, BLEACHER REP. (Jan. 19, 2021), <https://bleacherreport.com/articles/2926862-way-too-early-college-football-head-coach-hot-seat-predictions> (speculating about the college football coaches that must win in order to stay with their programs and noting that “[a] contract extension means little if the on-field production is not up to snuff.”).

46. Rachel Stark-Mason, *The One-and-Done Dilemma*, NCAA CHAMPION MAG., Fall 2018 <https://www.ncaa.org/static/champion/the-one-and-done-dilemma/>.

47. David Bayard, *After Further Review: How the NCAA’s Division I Should Implement Name, Image, and Likeness Rights to Save Themselves and Best Preserve the Integrity of College Athletics*, 47 S.U. L. REV. 229, 244 (2020); Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006)

C. Representative Litigation

In 2009, former UCLA national championship winner Ed O'Bannon and other similarly situated plaintiffs filed a class action lawsuit against the NCAA for a violation of antitrust laws.⁴⁸ O'Bannon's case was primarily based on the NCAA's prohibition of athletes being compensated for the use of their name, image, and likeness.⁴⁹ O'Bannon's case was spurred by the use of his likeness in an EA sports video game that was created well after his graduation,⁵⁰ but due to the NCAA's prohibition on allowing players to be paid for the use of their NIL, O'Bannon was still uncompensated for this use.⁵¹ The Court relied on the district court's that "the NCAA's compensation rules were an unlawful restraint of trade," in violation of Section 1 of the Sherman Antitrust Act.⁵² The court also that without a prohibition on NIL compensation there would be a competitive market for schools to offer recruits different NIL compensation models, which the court deemed an antitrust violation.⁵³ This case quite literally changed the game, signaling a move to a more just compensation system for student-athletes.

In 2015, shortly before the *O'Bannon* decision—and perhaps after seeing the writing on the wall—the P5 conferences voted to move to a full cost-of-attendance model of student compensation.⁵⁴ This means that the expenses associated with living would be covered beyond the former student athletic scholarship amount.⁵⁵ In addition to the effort by conferences to compensate student-athletes more justly for their participation, states have now stepped in to do the same.⁵⁶ While California's SB 206—known as the "Fair Pay to Play Act"⁵⁷—is the most well-known of these acts,

(discussing the origin of the term Student-Athlete in response to the potential for an employment relationship between universities and athletes).

48. O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015).

49. *Id.*

50. *Former College Basketball Star Who Sued the NCAA Says California's Fair Pay Bill is 'Changing the Game'*, CNN (Sept. 14, 2019, 1:19 PM), <https://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd>.

51. Harmeet Kaur, *Former College Basketball Star Who Sued the NCAA Says California's Fair Pay Bill is 'Changing the Game'*, CNN (Sep. 14, 2019, 1:19 PM), <https://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd>.

52. *Supra* note 48, at 1052–53. *See also* Sherman Antitrust Act, 15 U.S.C. § 1.

53. *Supra* note 48, at 1070.

54. Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan. 17, 2015), https://www.espn.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.

55. *Id.*

56. *See* S.B. 206, 2019 Leg. Reg. Sess. (Cal. 2019); Fla. H.B. 7051; Colo. S.B. 20-123.

57. S.B. 206, 2019 Leg. Reg. Sess. (Cal. 2019).

likely due to the several professional athletes that demonstrated their support for the act,⁵⁸ other states such as Florida and Colorado have enacted similar legislation.⁵⁹ On September 27, 2020, Governor Gavin Newsom signed the Fair Pay to Play Act which will take effect on January 1, 2023.⁶⁰ The bill will allow student-athletes at all California colleges and universities to earn money from third-party sources for the use of their NIL.⁶¹ Included in the bill are several provisions to protect student-athletes and universities alike from being penalized for NIL compensation.⁶² One provision prevents the NCAA—and other athletic associations, conferences, or organizations—from prohibiting student-athletes from monetizing their NIL.⁶³ The bill further protects universities by preventing them from being penalized because a player has been compensated for their NIL.⁶⁴ These provisions also prevent universities, associations, and organizations from compensating prospective players for their NIL.⁶⁵ In sum, these provisions prevent the NCAA from prohibiting athletes from exercising their NIL rights and penalizing universities for their athletes doing so. The NIL legislation in Florida and Colorado are largely the same, the common thread being a desire to protect student-athletes hoping to exercise their NIL rights without fear of being penalized.⁶⁶ Though the Fair Pay to Play Act has been touted as the most equitable solution to the problem of student-athletes working for free, with about two years left until the legislation takes effect, the NCAA seems intent on throwing a wrench in California's plans.⁶⁷

If there was any doubt about how the NCAA felt about NIL legislation, the NCAA's responses to the Fair Pay to Play Act have eliminated those doubts. In September 2019, prior to the act being signed by Governor Newsom, the NCAA sent a letter to the Governor expressing its concerns with the implications of the Act.⁶⁸ In that letter, the NCAA took issue with two foreseeable consequences of the Act: first, by allowing individual states to draft their own NIL legislation, the NCAA will lack

58. See The Shop: Uninterrupted, *Gavin Newsom Signs California's 'Fair Pay to Play Act' with LeBron James & Mav Carter*, YOUTUBE (Sept. 30, 2019), <https://www.youtube.com/watch?v=7bfBgjxVgTw>.

59. See Fla. H.B. 7051; Colo. S.B. 20-123 (effective January 1, 2023).

60. S.B. 206, 2019 Leg. Reg. Sess. (Cal. 2019).

61. *Id.*

62. *Id.*

63. *Id.* at §2(2).

64. *Id.* at §2(3).

65. *Id.* at §2(3)(b).

66. See Fla. H.B. 7051; Colo. S.B. 20-123 (effective January 1, 2023).

67. Stevie Baker-Watson, et al., *NCAA Responds to California Senate Bill 206*, NAT'L COLLEGIATE ATHLETIC ASS'N (Sept. 11, 2019, 10:08 AM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206>.

68. *Id.*

the cohesion that athletes have come to expect; and second, that the distinction between amateurism and professionalism⁶⁹ at the heart of the NCAA would be eliminated by such legislation.⁷⁰ Then in July 2020, Mark Emmert—the President of the NCAA—attended a Senate Judiciary Committee hearing to request federal legislation regulating NIL compensation.⁷¹ There, Emmert reiterated the NCAA’s fear that allowing states to individually legislate NIL compensation will disrupt the cohesion of the NCAA.⁷²

NCAA v. Alston is the most recent litigation addressing whether there is an appropriate structure for student-athletes to be compensated has just reached the Supreme Court, and the Court has yet to rule on the issue.⁷³ What the Court has offered though provides some insight into the thinking of the Justices when deciding the case. Most notably, Justice Thomas was very vocal about his stance that the NCAA is relying on antiquated ideas about amateurism to continue to undercompensate student-athletes.⁷⁴ While the outcome of *Alston* promises to be impactful, what’s at issue is whether NCAA and its member *institutions* may compensate student-athletes *not* whether third parties are able to compensate athletes for the use of their NIL and what role, if any, the NCAA may play in regulating such compensation.⁷⁵

D. Current Recommendations

Along with this constantly reignited debate has come legal scholarship proposing policy recommendations. These recommendations have ranged from developing trust accounts for athletes in which their NIL payments will be

69. Jake New, *More Money . . . If You Can Play Ball*, INSIDE HIGHER EDUC. (Aug. 12, 2015), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>.

70. Baker-Watson, *supra* note 67.

71. Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (Jul. 23, 2020, 4:39 PM), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/>.

72. *Id.*

73. *NCAA v. Alston*, 141 S.Ct. 1043 (2021).

74. Transcript of Oral Argument at 10–11, *NCAA v. Alston*, 141 S.Ct. 1043 (2021) (No. 20-512).

75. *Id.* at 4–5.

deposited,⁷⁶ to the NCAA adopting the amateurism model used by the Olympics,⁷⁷ and everything in between.

The first recommendation involves establishing a trust account for each athlete and “[a]fter a player receives an NIL payment, he or she would need to deposit the check with the athletic department or face consequences.”⁷⁸ This check would then be deposited into the athlete’s trust account after the university completes federal and state withholding.⁷⁹ This recommendation is based on the NCAA working group’s goal to “[a]ssure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.”⁸⁰ This recommendation fails to account for the working group’s other principles, namely the goal to “[r]eaffirm that student-athletes are students first and not employees of the university.”⁸¹ The payment scheme proposed in this recommendation is encroaching on an employment relationship between athletes and universities. Additionally, by allowing universities to play the middleman between student-athletes and third parties, universities gain more control over the NIL process than is necessary.⁸²

The second recommendation would have the NCAA adopt the amateurism model used by the Olympics.⁸³ This recommendation, while practical, is not without its issues. The recommendation properly addresses the fact that other amateur athletes—Olympic athletes in this case—are able to benefit from their NIL while still maintaining amateur status.⁸⁴ On the other hand though, the Olympics and the NCAA differ in very significant ways. First, while the Olympic model is referred to as an “amateur” model, one has to look no further than the U.S Men’s Basketball roster to see why that label is absurd.⁸⁵ The roster for the 2019-21 Men’s National Team is composed of some of the NBA’s best and brightest, including hall of fame coaches.⁸⁶

76. Bayard, *supra* note 47, at 24.

77. Dave Wilson, *Massachusetts at the Forefront: How to Protect the Most Vulnerable Group in a Post-Legal Sports Betting World—NCAA Student-Athletes*, 15 U. MASS. L. REV. 124, 162.

78. Bayard, *supra* note 75.

79. *Id.*

80. REPORT OF THE NCAA BOARD OF GOVERNORS OCT. 29, 2019 MEETING 3, NAT’L COLLEGIATE ATHLETIC ASS’N (2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf [hereinafter OCT. 29, 2019 MEETING REPORT].

81. *Id.*

82. Bayard, *supra* note 75 at 236–40.

83. Wilson, *supra* note 76.

84. *Id.*

85. *U.S. Men’s Olympic Team Finalists Roster*, USA BASKETBALL, <https://www.usab.com/mens/national-team/roster.aspx> (last visited Apr. 13, 2021).

86. *Id.*

Second, while the Olympic athletes are not directly compensated for their participation, many countries provide their athletes with “medal bonuses,” which incentivizes participation.⁸⁷ To implement this model within the world of collegiate sports would mean that member institutions should not only allow for third-party NIL compensation, but also incentivize athletes for winning performances in some of the sports world’s biggest events and tournaments. Because of the NCAA’s staunch stance on never compensating athletes for their performance due to amateurism, this recommendation is unlikely to be implemented within college sports.

IV. RECOMMENDATION

Perhaps the most just model of compensation for collegiate athletes is one where the NCAA and its member institutions are completely uninvolved. This means not only prohibiting these institutions to determine a maximum for NIL payments, but also ensuring they are uninvolved in the process of vetting agents allowed to represent athletes.

This model would eliminate any issues of fairness between men’s and women’s sports and revenue and non-revenue generating sports, while also preventing the worry of inadvertently creating an employment relationship between schools and athletes. Student-athletes would simply receive what third parties believe to be the market value of their NIL. Opponents of this approach might argue that this approach will unfairly disadvantage certain athletes that participate in non-revenue generating sports, specifically female athletes. While not without merit, this objection ignores the very quickly changing landscape in collegiate sports.⁸⁸ No longer are the days where football and basketball players are the only household names. For instance, in 2019, UCLA gymnast Katelyn Ohashi performed a floor routine that went viral on all social media platforms, and to this date has over 158 million views on the UCLA athletics YouTube page.⁸⁹ Besides the fact that the UCLA Athletics media department likely earned ad revenue from this viral video that Ohashi was unable to benefit from, Ohashi was

87. Kathleen Elkins, *Here’s How Much Olympic Athletes Earn in 12 Different Countries*, CNBC, <https://www.cnbc.com/2018/02/23/heres-how-much-olympic-athletes-earn-in-12-different-countries.html#:~:text=The%20International%20Olympic%20Committee%20doesn,member%20split%20the%20pot%20evenly> (Feb. 25, 2018, 9:01 AM).

88. Sarah Traynort, Article, *California Says Checkmate: Exploring the Nation’s First Fair Pay to Play Act and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 224 (2020).

89. UCLA Athletics, *Katelyn Ohashi—10.0 Floor (1-12-19)*, YOUTUBE (Jan. 12, 2019), <https://www.youtube.com/watch?v=4ic7RNS4Dfo>.

unable to capitalize on her fame by leveraging her NIL.⁹⁰ Another such example is the story of Oregon women's basketball star Sedona Prince, who has had her fair share of viral fame across platforms such as TikTok and Instagram and became a household name for many during the 2021 March Madness tournament for exposing the discrepancies between amenities provided for male and female athletes.⁹¹ Despite her popularity among sports fans and non-sports fans alike (even though she participates in a non-revenue generating sport), Sedona will likely never be able to capitalize on her fame at the collegiate level because of NCAA regulations that deem student-athletes as amateurs that are participating in exchange for an academic experience.⁹²

A federal NIL guideline that is not regulated by the NCAA is the most just way of compensating collegiate athletes without running afoul of Title IX guidelines and protecting institutions and athletes alike from the implications of an employment relationship. By allowing all student-athletes to receive third-party NIL compensation, the market is completely outside of the control of the universities and allows athletes to leverage their NIL for market value. Implementing this model is sure to be one of the rare instances in sports where everyone wins.

V. CONCLUSION

The most unfortunate aspect of the pay-the-players debate is that it has become so polarized that there seems to be no middle ground. On one hand, requiring student-athletes to work the equivalent of a full-time job, combined with the average rigor of a college education, without them being compensated in any tangible way is a grave injustice. On the other hand, compensating student-athletes directly for their participation in competition poses its own host of issues that would change the landscape of collegiate sports. It is time for both sides to meet in the middle and create a free market for exercising NIL rights that allows student-athletes the opportunity to receive their fair share of what has become a billion-dollar industry, without treating these athletes as professionals.

90. Katelyn Ohashi, *Everyone Made Money off MY N.C.A.A. Career, Except Me*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html>.

91. Sedona Prince (@sedonaprince_), TWITTER, (Mar. 18, 2021, 9:26 PM), https://twitter.com/sedonaprince_/status/1372736231562342402 ("Let me put it on Twitter too cause this needs the attention."). At the time of writing this tweet had over 17 million views, 214,000 "retweets," and 623,000 "likes." *Id.*

92. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 5.