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Election Speech and Collateral Censorship at the Slightest Whiff of Legal Trouble

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ABSTRACT

Collateral censorship occurs when an intermediary refuses to carry a speaker's message for fear of legal liability. Election speech intermediaries are prone to engage in collateral censorship because their interests do not align with the interests of election speakers, yet the common law places liability on intermediaries and speakers alike. But collateral censorship is not a problem unique to election speech. It would threaten the vibrancy of Internet speech had it not been for the Communications Decency Act immunizing Internet intermediaries from civil liability (except intellectual property law). The rationales and successes of the CDA justify immunizing election speech intermediaries because they, like Internet intermediaries, do not share the same characteristics as traditional publishers, have misaligned interests that are seldom addressed by the market, and are incentivized to censor valuable speech when uncertain about liability. This Comment proposes model legislation to immunize election speech intermediaries, but only from claims for defamation and violation of state false election speech laws. Such legislation would largely remove election speech intermediaries' incentive to censor election speech that may seem unlawful (or legally troublesome), but in fact be lawful and highly valuable to our democracy.

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[T]he slightest whiff of, oh, this is going to be legal trouble, [and intermediaries] say, forget about it.

—Chief Justice John Roberts[1]

INTRODUCTION

What if a perfectly legal advertisement about a candidate's voting record could not be displayed because no intermediary was willing to carry it? What if the reason was simply that intermediaries feared legal liability? That is an example of collateral censorship, an unsolved problem that continues to chill protected and valuable election-related speech.

This form of private censorship is rarely documented, but it was recently encountered by the U.S. Supreme Court. In *Susan B. Anthony List v. Driehaus* (*SBA List*),[2] an owner of a billboard refused to carry a nonprofit organization's advertisement criticizing a congressman.[3] The Court observed that the owner's refusal occurred only after the billboard company received a letter from the congressman threatening legal action through the Ohio Election Commission.[4] Yet the Court seemed untroubled in its suggestion that a billboard company may indeed be found liable for displaying a third party's message if the message violates a statute such as the Ohio state law at issue in this case, which criminalized false statements made during a political campaign.[5] In effect, the billboard company engaged in collateral censorship in order to avoid liability that otherwise might have been imposed on it as a result of the advertisement.

Intermediaries are incentivized to block a speaker's message because the law imposes legal liability not only on speakers but also on them.[6] This Comment argues that legislation should be enacted to immunize election speech intermediaries from claims for defamation and state false campaign speech laws,[7] similar to

1. Transcript of Oral Argument at 37, Susan B. Anthony List v. Driehaus (*SBA List*), 134 S. Ct. 2344 (2014) (No. 13-193), 2014 WL 1620849, at *37 (referring to a billboard company's refusal to display a nonprofit's campaign advertisement after it was threatened with legal action).
2. 134 S. Ct. 2334 (2014).
3. *See id.* at 2338–39.
4. *See id.* at 2345.
5. *Id.* at 2338–39.
6. Under common law standards, a speaker and an intermediary share equal liability for the contents of a message. *See* RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977); David S. 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, 397 (2010).
7. I use the term "election speech intermediary" to refer to any intermediary when it carries election-related speech. For example, a billboard company is an election speech intermediary only when it

how the U.S. Congress immunized Internet intermediaries from civil law claims (except intellectual property law) under the Communications Decency Act (CDA). A major policy rationale behind the CDA was to prevent Internet intermediaries from collaterally censoring the valuable exchange of ideas that takes place on the Internet.[8] Internet intermediaries engage in collateral censorship for fear of liability because their interests diverge with those of online speakers. They do not gain the same nonmonetary benefits that speakers receive by being able to express themselves on the Internet.[9] And unlike the speakers, Internet intermediaries have limited knowledge and resources to monitor every bit of content posted on their fora to determine the content's legality. But thanks to the CDA, Internet intermediaries have little, if any, legal incentive to engage in collateral censorship.

The same rationales underlying the grant of immunity to Internet intermediaries justify immunizing election speech intermediaries.[10] Election speakers and intermediaries have misaligned interests. As compared with the speaker, an election speech intermediary bears higher costs and yet does not reap the same benefits. It is very costly, if not impossible, for an election speech intermediary to determine whether a particular message is legally protected or would expose it to potential litigation.[11] The election speech intermediary has less knowledge than the speaker because it lacks firsthand knowledge about the underlying facts of a certain election-related message. Moreover, the intermediary has less time to investigate the truthfulness of the message because the speaker only provides a short

carries election-related speech, such as an advertisement for a candidate, but not when it carries other types of speech, such as an advertisement for a restaurant.

8. *See infra* Part II.B.2

9. For example, bloggers may want to build their reputation or advocate for views they are passionate about. Those interests, however, are often not shared by the blog hosting website. *See infra* Part II.A.1.

10. That an election speech intermediary already enjoys immunity under the Communications Decency Act (CDA) when it carries election speech on the Internet does not lessen the seriousness of collateral censorship in the election speech context for two main reasons. First, the majority of election-related speech still takes place offline. *See, e.g.*, Stephanie Stamm, *How Do Presidential Candidates Spend $1 Billion?*, NAT'L J. (June 8, 2015), http://www.nationaljournal.com/s/65877/how-do-presidential-candidates-spend-1-billion [perma.cc/5NGX-9XWQ] (reporting that in 2012, President Obama's reelection campaign spent $74.5 million in online advertising compared to $397.9 million in offline advertising, including television, radio, and print media). Second, the CDA provides only civil immunity for Internet intermediaries, *infra* note 151 and accompanying text, so election speech intermediaries could still face criminal liability for carrying speech on the Internet pursuant to state laws that criminalize defamation or false election speech. *See, e.g.*, WIS. STAT. ANN. § 12.05, § 12.60(1)(b) (West 2015) (punishing by a fine of not more than $1000, or imprisonment of not more than six months, or both, anyone who knowingly makes or publishes, or causes to be made or published false representations affecting elections).

11. *See infra* Part I.B.1.

turnaround time to publish the message. Even if an intermediary believes the message is not defamatory or in violation of a state false campaign speech law, it still risks being threatened with or dragged into a costly defamation lawsuit—not a "rare occurrence" in political campaigns.[12] And unlike the speaker who has a priceless interest in the election's outcome, the intermediary often derives no benefit from how the election turns out.

Collateral censorship of election speech is particularly troubling because election speech deserves the highest protection under the law. Election speech allows voters to make more informed decisions when electing political candidates and deciding whether or not to approve a ballot initiative. Yet collateral censorship deprives the public of useful information and hinders free exchange in the democratic process.

Intermediaries' decision to engage in collateral censorship is largely due to the legal liability imposed on them by the government, making the government indirectly responsible for collateral censorship. Although the government may be justified in imposing common law liability on intermediaries in some contexts, it is not so justified in the election speech context. Placing liability on intermediaries when they carry election speech leads them to censor election speech that is not actually defamatory but is instead both lawful and fundamental to our democracy. By immunizing election speech intermediaries from claims for defamation and violation of state false campaign speech laws, the government can largely solve the problem of collateral censorship in the election speech context—a problem indirectly caused by the government in the first place.

This Comment proceeds as follows. Part I presents the problem of collateral censorship in the election speech context by explaining the concept of collateral censorship, why it is particularly problematic for election speech, and why judges cannot solve the problem. Part II explores the problem of collateral censorship in the Internet context, how it was resolved by the CDA, and how it is similar to the election context, both in terms of why the intermediaries engage in collateral censorship and why the high value of the speech justifies immunity. Part III proposes a statute modeled after the CDA that would immunize election speech intermediaries from claims for defamation and state false campaign speech laws, thereby largely solving the collateral speech problem.

12. *See, e.g.*, Susan B. Anthony List v. Driehaus (*SBA List*), 134 S. Ct. 2334, 2345 (2014).

I. THE PROBLEM OF COLLATERAL CENSORSHIP FOR ELECTION SPEECH

A. The Concept of Collateral Censorship and Its Illustration in the Election Speech Context

In simplest terms, collateral censorship occurs when "[t]hreats of liability" made against one party offer it "reasons to try to control or block the speech" of another party.[13] Imagine a political candidate who wishes to place an advertisement in the local newspaper that criticizes his opponent. As the intermediary, the newspaper will engage in a rough cost-benefit analysis to decide whether running the advertisement is a profitable transaction.[14] One would expect the newspaper to agree to run the advertisement in return for a profitable sum. But what if the newspaper believes that the advertisement may expose it to a defamation lawsuit and for that reason refuses to take the deal?[15] This is an illustration of collateral censorship.

Intermediaries engage in collateral censorship because their interests do not align with those of speakers;[16] intermediaries bear higher costs yet derive fewer benefits than speakers.[17] When profit-maximizing intermediaries engage in a cost-benefit analysis, they consider the risk of legal liability imposed on them for the content of the speaker's message.[18] Inherent in such analysis is the uncertainty over whether certain speech is legally protected.[19] Moreover, intermediaries lack first-hand knowledge about the evidence underlying the speech

13. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 435 (2009).
14. "[T]he profit-maximizing intermediary likely will choose the mechanism that is least costly, rather than the one that preserves the most speech." Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 31 (2006).
15. As the intermediary publishing the advertisement, the newspaper is held equally liable as the candidate. *See* RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977); *see also* Ardia, *supra* note 6, at 397.
16. *See* Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 296 (2011).
17. *See id.* at 304–08. Consider for example a newspaper assessing whether to run an inflammatory campaign advertisement for a candidate. The newspaper does not benefit from the advertisement's effect on the election, yet it bears a higher risk of liability as it has less information and time than the original speaker. *See infra* Part I.B.1.
18. *See, e.g.*, Ardia, *supra* note 6, at 377 (cautioning that intermediaries are subject to civil and criminal liability for the content they carry).
19. Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971) (recognizing that "uncertainty as to what publications are and what are not protected" is "unavoidable").

and have a shorter time than speakers to analyze the speech.[20] They are also "more susceptible to legal threats" than speakers,[21] who overestimate the truthfulness of their own speech.[22] Added to this increased cost is that intermediaries cannot derive all the benefits enjoyed by speakers.[23] For example, intermediaries generally do not have a powerful political belief or pride of authorship that offsets the risk of liability for some speakers.[24] So when intermediaries are uncertain about the legality of the speech, they are likely to deny service to the speaker.[25] This is because intermediaries are unlikely to expend much time or energy investigating the truthfulness of the message and possibly being sued when they can instead carry other speech.[26]

The interests of intermediaries also diverge with the interests of the public. Intermediaries, many of whom are profit-maximizing entities, are not often driven by a desire to advance the social interest.[27] And because they do not share "society's interest in ensuring a vibrant landscape for speech," they are often unwilling to act as champions for those whose speech poses liability risks.[28] Instead, risk-averse intermediaries censor "all but the most banal speech."[29] The result is that society is deprived of speech that may be both lawful and socially desirable.[30]

The Supreme Court's recent decision in *SBA List* illustrates collateral censorship of election speech.[31] Susan B. Anthony List (SBA), a nonprofit organization, sought to criticize incumbent Congressman Steve Driehaus, a pro-life, fiscally conservative Democrat.[32] SBA planned to display a billboard

20. *See* Wu, *supra* note 16, at 307.
21. Ardia, *supra* note 6, at 379.
22. *See* Wu, *supra* note 16, at 307.
23. *See, e.g.*, *id.* at 304–06 (explaining nonmonetary incentives to speak on the Internet such as building one's reputation, seeking revenge, or simply expressing ideas); *see also* Ardia, *supra* note 6, at 391–92 ("[I]t is unlikely that [intermediaries] would be able to adequately weigh or capture the full social value of the speech they are poised to interdict.").
24. *See* Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 117 (1995).
25. *See, e.g.*, Wu, *supra* note 16, at 296.
26. Kreimer, *supra* note 14, at 31; *see also* Wu, *supra* note 16, at 308 (explaining that an intermediary "loses little or nothing" for censoring speech that poses a risk of liability while the speaker "loses all of the benefits" of expressing that speech).
27. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970.
28. Ardia, *supra* note 6, at 379.
29. *Id.* at 392.
30. *See, e.g.*, Wu, *supra* note 16, at 296.
31. *See SBA List*, 134 S. Ct. 2334 (2014).
32. *See id.* at 2339; *Steve Driehaus*, OHIO DEMOCRATIC PARTY, http://web.archive.org/web/20080731010028/http://www.ohiodems.org/site/c.mhLRKZPCLmF/b.4147149.

criticizing Driehaus's vote in favor of the Patient Protection and Affordable Care Act.[33] The planned billboard would have read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."[34] But the billboard was never displayed due to collateral censorship.

As the Court observed, the billboard company refused to display the message only after Driehaus's counsel alleged the message was false and threatened legal action against the billboard company for defamation and violation of the Ohio false campaign speech law.[35] Driehaus's threat to file a complaint with the Ohio Elections Commission was based on an Ohio statute that prohibited making a "false statement" during an election campaign.[36] Faced with the risk of liability under the Ohio statute or defamation law, the billboard company censored SBA's message.[37]

B. Why Collateral Censorship Is Problematic for Election Speech

Collateral censorship is especially problematic in the context of election speech for two main reasons. First, the interests of election speakers clash with those of election speech intermediaries. As a result, these misaligned interests provide a heightened incentive for intermediaries to engage in collateral censorship. Second, censorship of election speech is particularly alarming because election speech is fundamental to our democracy. This Subpart develops and explains these two problems.

33. *See SBA List*, 134 S. Ct. at 2339.

34. *Id.*

35. *See id.* at 2345. In a letter to the attorney for Lamar Advertising (the billboard company), Driehaus's attorney wrote: "In exchange for your agreement that Lamar will not post the billboards . . ., I agreed that our Complaint will not allege that Lamar has violated [the Ohio false campaign speech law]." Joint Appendix at 26–27, *SBA List*, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 769627, at *26–27. But he warned: "[I]f Lamar posts [SBA's advertisement] or similarly worded advertisements . . ., we reserve the right to proceed against Lamar before the Ohio Elections Commission and/or in a court of law." *Id.* at 27.

36. *See SBA List*, 134 S. Ct. at 2338. The Ohio statute provided the following:

> No person, during the course of any campaign for nomination or election . . . shall knowingly and with intent to affect the outcome of such campaign . . . : [p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not . . . .

OHIO REV. CODE ANN. § 3517.21(B)(10) (West 2014).

37. *See* Affidavit of Wendi Loup at 1, Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 412 (S.D. Ohio 2011) (No. 1:10-cv-720) ("[The billboard] company reviewed the proposed billboards, assessed our potential legal liability, and chose not to put them up.").

1. Misaligned Interests of Election Speech Intermediaries

Election speech intermediaries engage in collateral censorship because their interests are not aligned with election speakers' interests. This Subpart explains these misaligned interests by detailing how intermediaries face higher costs and derive fewer benefits in the election speech context.

Election speech often needs to jump two hurdles before it is disseminated: self-censorship by the primary speaker and collateral censorship by an intermediary. Self-censorship occurs when a speaker refrains from publishing material for legal reasons.[38] For example, a political organization will most likely refrain from intentionally making an utterly false accusation about a political candidate.[39] But as political players often do, the organization may wish to sharply criticize a candidate's voting record through an inflammatory advertisement.[40] It may seem potentially defamatory, but the organization, knowing it to be true and legally protected, will wish to expose the candidate's record.[41] Presumably, the organization is aware of the potential need to defend its speech in court, but any such risk is likely to be offset by the organization's "powerful political belief" in the message and interest in the outcome of the election.[42]

Yet even if the primary speaker does not self-censor, the speech must jump the hurdle of collateral censorship. In other words, the speech will only be disseminated if an intermediary agrees to carry it. If intermediaries refuse to carry the speech, it will be collaterally censored. In the example above, an intermediary would have more incentive to censor the advertisement than the political organization due to diverging interests. First, the intermediary, acting as a profit-maximizing entity, does not share the speaker's "powerful political belief"[43] in the message or the speaker's interest in the election's outcome.[44] Likewise, the intermediary does not stand to gain the nonmonetary benefits available to the

38. Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1736 n.4 (1979). It should be noted that the term "self-censorship" has also been generally used to "refer[] to a needless restraint on First Amendment freedoms." *Id.*

39. Aside from other deterrents such as reputational harm, the fear of legal liability keeps political organizations from making utterly false accusations. *See* Wu, *supra* note 16, at 296 ("People regularly engage in self-censorship for fear of liability . . . .").

40. *See, e.g.*, *SBA List*, 134 S. Ct. at 2339.

41. *See, e.g.*, *id.* at 2344 ("SBA[] insist[ed] that its speech is factually true . . . ." (citation omitted)).

42. *See* Meyerson, *supra* note 24, at 117 (explaining that although rules imposing liability "will threaten speakers to some extent," they "do[] not have an excessively negative effect on communications, as speakers will presumably ignore a small risk because of the value they place on communicating their own messages").

43. *Id.*

44. *Cf. id.* (arguing that distributors are more likely to censor speech than primary speakers because they have "no strong personal stake in the communication").

speaker, such as being elected to office or being vindicated in his or her position. Second, an intermediary faces relatively higher costs than the organization because it has a harder time determining whether the speech is legally protected, and it would take on an unusually high risk of expensive litigation if it were to carry the speech.[45] For those reasons, collateral censorship is more harmful than self-censorship because intermediaries have an incentive to suppress more speech than would be withheld by the primary speaker.[46]

The intermediary's decision to publish the election speech is complicated by uncertainty about whether the election speech is legally protected.[47] The tension between the U.S. Constitution and the various state laws of defamation[48] has created vague legal standards such as the mental element of "knowing or reckless disregard,"[49] which is not always easy of ascertainment.[50] This uncertainty is further exacerbated in the context of election speech.[51] The Eighth Circuit observed that "[c]ourts and scholars constantly struggle to draw a line between knowingly or recklessly false statements and uses of rhetoric, exaggeration, and ideologically-derived facts," especially with respect to political speech.[52] When courts and scholars struggle to determine the legality of political speech, there is no doubt that election speakers and intermediaries struggle at least as much.

The problem is not just differing assessments, that a political advertisement may be interpreted as true "rhetoric, exaggeration, or ideolog[y]"[53] by a speaker and as a legally punishable false statement by an intermediary. Rather, the intermediary is more likely to censor the speech because it faces a higher level of uncertainty than the primary speaker. The speaker can insist that its message is "factually true,"[54] since it is more familiar with the facts that underlie its own speech.[55] But the intermediary cannot necessarily confirm the message's truth

45. *See* Wu, *supra* note 16, at 296–97.
46. *See id.* at 296.
47. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971).
48. *See id.* ("[T]he First Amendment guarantee of a free press is inevitably in tension with state libel laws designed to secure society's interest in the protection of individual reputation.").
49. The U.S. Supreme Court has held that public officials and public figures who sue for defamation need to prove that the speaker or publisher put out false statements with knowledge that it was false or with reckless disregard for whether it was false or not. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153–55 (1967).
50. *Monitor Patriot*, 401 U.S. at 276.
51. *See, e.g.*, 281 Care Comm. v. Arneson, 638 F.3d 621, 629 (8th Cir. 2011) ("[D]eciding whether a statement was made with 'reckless disregard for the truth' in the political-speech arena often proves difficult.").
52. *Id.* at 629 n.1.
53. *Id.*
54. *See, e.g.*, *supra* note 41.
55. *See* Wu, *supra* note 16, at 307.

because it often has neither firsthand knowledge about the facts underlying the message nor ready access to the evidence of those facts.[56] For these reasons, the intermediary experiences more uncertainty about whether the speech is true and thus legally protected. This uncertainty poses a risk to the intermediary that if it carries the message, it may be dragged into litigation. Consequently, the intermediary is incentivized to avoid the risk of litigation by engaging in collateral censorship.

The intermediary's assessment of the speech's legality is further complicated because the intermediary has only a short time between being presented with the speech and being asked by the speaker to display it.[57] After developing the speech, the speaker presents it to the intermediary with the hope that it will carry it. The speaker, usually a candidate or an organization supporting a candidate, often needs the message to be put out as soon as possible.[58] This is not surprising given that a campaign is a race between candidates to appeal to voters through persuasive and timely communication.[59] If an intermediary delays or refuses to carry the speech, the message may lose its intended effect or become wholly irrelevant in the fast-paced campaign. Thus, election speech intermediaries lack adequate time to analyze the legality of the speech; left uncertain, they are likely to reject carrying the speech rather than risk liability.

Even if an intermediary is certain that the speech is legally protected, it nevertheless faces a substantial risk of being hauled into court. Political candidates can easily file a complaint alleging that their opponent engaged in defamation and/or violated a state law punishing false campaign speech—regardless of how weak its merits—as a tactic to burden their opponents and gain an advantage in the campaign.[60] In *SBA List*, the billboard company's collateral censorship of

56. *Id.*

57. *Cf.* Reuber v. Food Chem. News, Inc., 925 F.2d 703, 717 (4th Cir. 1991) (discussing the "rapid-fire nature of public debate" where publishers often have only a few days to assess the accuracy of an allegation before deciding whether or not to publish it).

58. *See* Patrick Novotny, *From Polis to Agora: The Marketing of Political Consultants*, 5 HARV. INT'L J. PRESS/POL. 12, 21–23 (2000) (explaining that campaigns develop messages and disseminate them through media in as quickly as several hours).

59. *See* Shanto Iyengar, Helmut Norpoth & Kyu S. Hahn, *Consumer Demand for Election News: The Horserace Sells*, 66 J. POL. 157, 158–59 (2004) (likening the competition between the candidates to present a compelling story to a "horserace").

60. *See, e.g.*, Brief of Amicus Curiae Ohio Attorney General Michael Dewine in Support of Neither Party at 6, *SBA List*, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 880938, at *6 ("Because the [Ohio Election] Commission has no system for weeding out frivolous complaints, candidates on the receiving end of a false-statement complaint must endure these burdens no matter how weak the complaint . . . . The only alternative to risking being subjected to these procedures is to self-censor or remain silent."). Another example was documented by the Massachusetts Supreme Court:

SBA's message, though undesirable, was rational considering the circumstances.[61] Under the Ohio statute, anyone could file a complaint against the intermediary carrying an election-related message by merely alleging that the message was false.[62] Far from being a rare occurrence, the Ohio Elections Commission handled twenty to eighty false statement complaints per year.[63] If filed within 90 days prior to an election, these complaints would be heard within three days.[64] And although the hearings could be conducted without the respondent present or even notified, the Commission only needed find the low standard of probable cause met, in order to be able to seek enforcement through contempt proceedings and to issue subpoenas compelling the attendance of witnesses and the production of documents.[65] But according to the Ohio Attorney General, these complaints "rarely go to the full Commission" and "judicial review is extremely uncommon" prior to an election.[66] So those on the receiving end of these complaints have no effective relief, even when their speech eventually proves to be true.[67] Understandably, the very threat of legal action led the billboard company to censor SBA's speech.[68] This was despite the fact that SBA's message was not a "false statement" under Ohio's state defamation law, as later held by a unanimous three-judge panel of the Sixth Circuit.[69]

Not only is litigation a high probability, but its cost is unusually high. Intermediaries recognize that if they become the target of a defamation lawsuit,

> The candidate then used the application [for a criminal complaint to allege that the PAC violated a Massachusetts statute criminalizing false campaign speech] as a political tool not only to discredit the statements but also to persuade the PAC to refrain from airing a political advertisement shortly before the election. Although [the PAC chairwoman] filed a motion to dismiss the application, [the candidate] already had won the election by a narrow margin by the time of the probable cause hearing. Thus, even if the application had been dismissed, the damage was already done.

Commonwealth v. Lucas, 34 N.E.3d 1242, 1247 (Mass. 2015).

61. *See SBA List*, 134 S. Ct. 2334, 2345 (2014) ("[T]he specter of enforcement [of Commission proceedings] is so substantial that the owner of the billboard refused to display SBA's message after receiving a letter threatening Commission proceedings.").
62. The Ohio Attorney General informed the Court that, "[u]nder Ohio's generalized false-statement prohibitions, a complaint may be filed by 'any person,' including but not limited to political opponents, who must merely attest that one of the statements was 'false' and made with knowledge or reckless disregard of its falsity." Brief of Amicus Curiae Ohio Attorney General Michael Dewine in Support of Neither Party, *supra* note 60, at 4.
63. *SBA List*, 134 S. Ct. at 2345.
64. *See* Brief of Amicus Curiae Ohio Attorney General Michael Dewine in Support of Neither Party, *supra* note 60, at 5.
65. *See id.*
66. *Id.* at 6.
67. *See id.*
68. *See id.* at 21 ("[T]he threat of prosecution can be terrifying.").
69. Anthony List v. Driehaus, 779 F.3d 628, 632–34 (6th Cir. 2015).

they will have to divert significant resources to hire legal counsel and respond to time-consuming discovery requests.[70] For example, in one defamation lawsuit, a journalist's deposition alone continued intermittently for over a year and filled twenty-six volumes containing nearly 3000 pages and 240 exhibits.[71] For an intermediary, then, the potential cost of being sued can far exceed the value it would gain from carrying the speech.[72] Chief Justice Roberts was correct when he observed that at "the slightest whiff of, oh, this is going to be legal trouble, [intermediaries] say, forget about it."[73]

Nevertheless, one would expect an intermediary to monetize the liability risk and pass the cost to the speaker in the form of a higher price.[74] Imagine that a magazine typically charges X dollars to run a full-page advertisement. A candidate wishes to run a negative and inflammatory advertisement in that magazine criticizing his opponent's record. If the magazine perceives the advertisement as potentially defamatory, it will, as a rational profit-maximizing firm, attempt to monetize the liability risk, add that risk to its cost, and determine an altered price at which the transaction would be profitable.[75] Theoretically, it would agree to run the advertisement for a price of $X + Y$ dollars, where Y represents the liability risk. Realistically, however, two issues often prevent such a result. First, it is extremely difficult, if not impossible, for the magazine to accurately evaluate and monetize the liability risk under the time pressures of the campaign and given the unusual uncertainty about the legality of the advertisement. As a result, the magazine is likely to outright refuse the advertisement;[76] this is especially so if it can earn the same profit by carrying an advertisement with little to no risk of liability, such as a Coca Cola advertisement.[77] Second, even if the magazine is willing to run the advertisement, either for a price of $X + Y$ dollars (assuming it monetizes the liability risk) or a price sufficiently high enough to offset its liability concerns, the speaker would often be deterred by the

70. *See SBA List*, 134 S. Ct. at 2346.
71. Herbert v. Lando, 441 U.S. 153, 176 n.25 (1979).
72. *See, e.g.*, *id.* at 205 ("Faced with the prospect of escalating attorney's fees, diversion of time from journalistic endeavors, and exposure of potentially sensitive information, editors may well make publication judgments that reflect less the risk of liability than the expense of vindication.").
73. Transcript of Oral Argument at 37, *SBA List*, 134 S. Ct. 2334 (2014) (No. 13-193), 2014 WL 1620849, at *37.
74. *See* Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 273 (2005) ("It is well recognized that imposing liability on intermediaries will affect the services and prices they present to their customers.").
75. *Cf. supra* note 14 and accompanying text.
76. *See supra* note 73 and accompanying text.
77. *See* David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 432 n.52 (1975) ("[M]ost broadcasters and publishers can avoid liability, without discontinuing their activities or reducing their profits, by ceasing to carry material that creates the risk of liability . . . .").

higher price.[78] To be sure, a candidate with a well-funded campaign may be willing to pay a higher price for the advertisement; but a candidate who has raised less money—often a challenger to an incumbent[79]—may be unable to afford to run the advertisement.[80] The same is true for the few deep-pocketed political speakers and organizations that may be willing to pay the higher price.[81] But the majority of political speakers such as the nonprofit SBA, though confident that their messages are not defamatory, simply cannot pay to disincentivize an intermediary from censoring their speech. Therefore, the lawful but risky election speech of the majority of political speakers, such as SBA, will be censored by the intermediaries, either due to intermediaries' outright refusal to carry the speech or their prohibitively high asking price.

78. *See* Kreimer, *supra* note 14, at 38 ("The demand by an intermediary for a risk premium would often result in a deterrent substantially greater than the equivalent expected risk of sanctions being imposed on the primary [speaker].").

79. For example, in the 2014 elections for the U.S. House of Representatives, the 425 incumbents raised an average of $1,557,426 each, while their 669 challengers raised an average of $258,177 each. *See Incumbent Advantage*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/overview/incumbs.php [http://perma.cc/95T9-W6HF].

80. Consider, for example, the 2014 congressional election for Ohio's 8th district between former House Speaker John Boehner and his Democratic challenger, Tom Poetter. A candidate like Poetter, who had raised $193,360, is less likely to be able to afford running a legally risky advertisement than an incumbent like Boehner, who had raised over $17 million. *See Ohio District 08 Race: Summary Data*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/races/summary.php?cycle=2014&id=OH08 [http://perma.cc/SLJ7-94CD]. Admittedly, the example is hypothetical and in a context where all else is held equal (for example, the candidates' personal willingness to engage in negative campaigning). But as a simple economic matter, a candidate who has more money can afford to spend more money on advertising. This example also sheds light on the financial advantage enjoyed by incumbents. Although deep analysis of that issue is beyond the scope of this Comment, there is a relevant point worth mentioning. Incumbents are generally more capable of avoiding collateral censorship of their election speech by paying to offset the liability risk faced by an intermediary. Beyond the equality and fairness concerns, it means that incumbents can run more harshly critical advertisements against their challengers, both in terms of quantity and quality. Challengers, on the other hand, must tone down their criticism of incumbents to prevent the perception that it is potentially defamatory, and to thereby disincentivize the intermediary from engaging in collateral censorship. In other words, to avoid collateral censorship, an incumbent is more likely to offer a higher price ($X + Y$) to preserve his or her desired speech, while a challenger is more likely to offer a watered-down version of his or her desired speech to preserve the original price (X). That shields incumbents at the expense of not only challengers, but also voters not receiving full information about the incumbents.

81. Compare, for example, the 595,686 donors who individually gave $200–$2599 in the 2014 federal election campaign, with the 1281 donors who gave more than $95,000 each. *Donor Demographics*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/overview/donordemographics.php [http://perma.cc/VD3U-Q9S9].

2. Value of Election Speech

The Constitution protects the freedom of speech as a fundamental right and liberty[82] for the primary purpose of ensuring that the public is well informed on civic matters.[83] In other words, a major purpose of protecting the freedom of speech has traditionally been understood as safeguarding the public's ability to address the key issues of the day and to vote for desired elected representatives.[84] This view has been adopted and repeatedly affirmed by the Supreme Court. The Court stated in *Monitor Patriot Co. v. Roy*[85] that "it can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."[86] A unanimous court reiterated in *Buckley v. Valeo*[87] that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[88] Collateral censorship poses a serious problem in the context of election speech because it hinders the goal of maintaining a public that is well informed as to political issues and candidates.

In writing about newsgathering, the Fourth Circuit recognized that if news is not gathered in a timely manner, readers may be "deprived of a timely report."[89] Similarly, if election speech is not disseminated in a timely manner, the electorate will be deprived of information needed to make prompt campaign contributions or fully informed voting decisions. But the harm of collateral censorship is not just that election speech will be disseminated with a delay; it is that election speech may never be disseminated at all. Moreover, the public's interest in election-related information outweighs its interest in ordinary day-to-day news. Election speech is fundamental to democracy as it informs the public about candidates and helps the people select the most desirable individuals to

82. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).
83. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–27 (1960).
84. *See id.*; *see also* Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.").
85. 401 U.S. 265 (1971).
86. *Id.* at 272.
87. 424 U.S. 1 (1976) (per curiam).
88. *Id.* at 14.
89. Reuber v. Food Chem. News, Inc., 925 F.2d 703, 717 (4th Cir. 1991).

serve them in government.[90] For these reasons, the high value of election speech calls for the highest level of legal protection.[91]

C. Why Judges Can't Solve the Problem

The solution to the problem of collateral censorship will not come from judges' construction of the common law or the First Amendment. This Subpart explains that while the Supreme Court has recognized the problem of collateral censorship, it has not moved to entirely solve the problem by, for example, immunizing intermediaries from defamation liability. The majority of the Justices have been either unwilling to extend immunity to intermediaries or have believed that such a construction is untenable under the First Amendment.[92]

Defamation liability finds its roots in the common law.[93] Under the common law, an intermediary who publishes the message of another is held liable as if the message belonged to the intermediary.[94] This principle survived the ratification of the First Amendment.[95] It was not until 1964, in the famous case of *New York Times v. Sullivan*, that the Supreme Court applied the First Amendment to a defamation claim.[96] The case involved a public official who had brought a defamation claim against a critic of his official conduct and

90. *See* MEIKLEJOHN, *supra* note 83, at 24–27; *see also Buckley*, 424 U.S. at 14.

91. *Cf.* Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982))).

92. To be sure, some Justices' unwillingness has been due to their belief that the First Amendment does not prescribe immunity for intermediaries. Here, I wish to distinguish between Justices who believe the First Amendment may be construed to immunize intermediaries but are unwilling to construe it as such for other reasons (such as the overriding interests of defamation law), with those Justices who, even if willing, believe the First Amendment cannot be construed to immunize intermediaries.

93. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 158 (1979).

94. *See* RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."); *id.* § 581 ("One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher."); *see also* Ardia, *supra* note 6, at 397.

95. *See Herbert*, 441 U.S. at 158 ("Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability.").

96. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 5:3 (2012) ("For the first time, the Supreme Court ruled that 'libel can claim no talismanic immunity from constitutional limitations,' but must be 'measured by standards that satisfy the First Amendment.'" (quoting *N.Y. Times*, 376 U.S. at 269)); RODNEY A. SMOLLA, 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23:1 (2015) ("In one of the great landmark decisions in First Amendment history, the Supreme Court in *New York Times Co. v. Sullivan* held that traditional common law tort rules governing libel were inconsistent with many core free speech values . . . ." (footnote omitted)).

the intermediary publishing the criticism.[97] The intermediary, the New York Times, had published an advertisement by the Committee to Defend Martin Luther King and The Struggle for Freedom in the South.[98]

Despite holding in favor of the New York Times and recognizing the potential chilling effect on speech due to collateral censorship, the Court implicitly adopted the common law principle of placing equal liability on the primary speaker and the intermediary.[99] Although it did not employ the term "collateral censorship," the Court acknowledged that placing strict liability on intermediaries for carrying paid advertisements may discourage them from carrying the advertisements of some speakers.[100] Such an outcome, the Court reasoned, would "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities . . . ."[101] To solve that issue, the Court construed the First Amendment to require a public official suing for defamation to show that the speaker and intermediary had published a damaging falsehood with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[102] In effect, this was the majority's compromise between the common law's strict liability rule and the concurrence's call for absolute immunity.[103]

The majority admitted that the actual malice standard does not entirely solve the problem of "privately administered" censorship.[104] But only Justices Black, Goldberg, and Douglas were willing to advocate for a more speech-protective standard, thereby seriously addressing private censorship, including collateral censorship.[105] In their concurring opinions, the Justices expressed their

97. *See N.Y. Times*, 376 U.S. at 256.
98. *Id.* at 256–57.
99. *See id.* at 266.
100. In rejecting the argument that the First Amendment's protections do not apply to the publication of a commercial advertisement, the Court essentially recognized the concept of collateral censorship when it reasoned that "[a]ny other conclusion would *discourage newspapers from carrying 'editorial advertisements' of this type* . . . ." *Id.* (emphasis added).
101. *Id.* Moreover, it would "shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.* (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
102. *Id.* at 279–80.
103. *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 801 (1986) ("The Supreme Court's recognition of the undesirable consequences of an absolute immunity rule led it to the actual malice rule as a compromise between the strict liability and no liability positions."). *Compare, e.g.*, E. Hulton & Co. v. Jones, [1910] AC 20 (HL) (applying the common law strict liability rule), *with infra* note 108 and accompanying text (explaining the *New York Times* concurring opinions' call for absolute immunity).
104. *N.Y. Times*, 376 U.S. at 279.
105. Although Justice Goldberg did not use the term "collateral censorship" in his concurring opinion, he essentially recognized the concept of collateral censorship when he distinguished between

willingness to grant intermediaries "an absolute, unconditional privilege to criticize official conduct."[106]

The cases following *New York Times* were no different in failing to entirely solve the problem of collateral censorship. In *Curtis Publishing Co. v. Butts*,[107] Justices Black and Douglas once again tried and failed to convince a majority of the Court to grant immunity to publishers.[108] In *Rosenbloom v. Metromedia, Inc.*,[109] Justice Black was the sole Justice to reason that "the First Amendment does not permit the recovery of libel judgments against the news media" (whether as an original speaker or as an intermediary).[110] And in *Gertz v. Robert Welch, Inc.*,[111] the majority refused to grant intermediaries "unconditional and indefeasible immunity" from liability, reasoning that the value served by defamation law to compensate victims of a defamatory falsehood trumped the "intolerable" censorship that may result from undue liability placed on the media.[112] As these cases show, while the Supreme Court has recognized the problem of collateral censorship, it has consistently refused to immunize intermediaries from liability.

Although many Justices have been unwilling to immunize intermediaries from liability, others do not believe the Constitution allows for it. In *Herbert v. Lando*,[113] the Court held that granting publishers (and perhaps other intermediaries) "complete immunity from liability . . . has regularly [been] found . . . to be an untenable construction of the First Amendment."[114] This statement exemplifies the reasoning of those Justices who may be sympathetic to the idea, but who

individuals being constrained from speaking and intermediaries refusing to publish certain speech of others:

> If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if *newspapers, publishing advertisements dealing with public issues, thereby risk liability*, there can also be little doubt that *the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished*.

Id. at 300 (Goldberg, J., concurring, joined by Douglas, J.) (emphasis added).

106. *Id.* at 297–98; *see also id.* at 293 (Black, J., concurring, joined by Douglas, J.) ("[T]he Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms . . . .").
107. 388 U.S. 130 (1967).
108. *See id.* at 170–72 (Black, J., concurring in part and dissenting in part, joined by Douglas, J.). *But see id.* at 150 (majority opinion) (holding that the publishers have "no special immunity from the application of general laws" like defamation (quoting Associated Press v. NLRB, 301 U.S. 103, 132 (1937))).
109. 403 U.S. 29 (1971).
110. *Id.* at 57 (Black, J., concurring).
111. 418 U.S. 323 (1974).
112. *Id.* at 340–41.
113. 441 U.S. 153 (1979).
114. *Id.* at 176.

do not believe the First Amendment can be interpreted to immunize intermediaries from defamation liability. The solution to the problem of collateral censorship, therefore, will not come from judges; it lies elsewhere.

II. NOT A UNIQUE PROBLEM: ANALOGY TO INTERNET SPEECH

Collateral censorship is not a problem unique to election speech. It also exists in the Internet speech context because online speakers and intermediaries have misaligned interests.[115] If Internet intermediaries shared equal liability with primary speakers, they would censor speech that would pose a risk of litigation to them.[116] That would be a problem not only because the speech may in fact be lawful, but because speech on the Internet, which allows virtually anyone to participate in the exchange of ideas, is socially beneficial.[117]

Unlike the election speech context, Internet speech's collateral censorship problem has been largely solved because the Communications Decency Act immunizes Internet intermediaries from civil liability, with the exception of intellectual property law.[118] As a result, Internet speech has thrived as intermediaries liberally carry speech, even speech that may appear to be potentially defamatory, because they do not risk civil liability.[119]

A. The Problem of Collateral Censorship for Internet Speech

1. Misaligned Interests of Internet Intermediaries

Internet intermediaries do not review and monitor every post that they allow to be displayed on their website. For example, Yelp does not monitor every review posted on its website.[120] Monitoring and censoring millions of bits of information that flow between computers on a daily basis would be an

115. *See infra* Part II.A.1.
116. *See id.*
117. *See infra* Part II.A.2.
118. *See infra* Part II.B.1.
119. *See infra* Part II.B.2.
120. *See* Justin Jouvenal, *Sued for Defamation Over a Negative Yelp Review*, WASH. POST (Dec. 4, 2012), http://www.washingtonpost.com/local/crime/2012/12/04/1cdfa582-3978-11e2-a263-f0ebffed2f15_story.html [https://perma.cc/H2BW-RLTJ] ("Yelp, like many review sites, says it simply can't check the veracity of millions of reviews . . . ."). *But see* Jennifer Golbeck, *On Second Thought . . .*, SLATE (Dec. 13, 2013, 11:20 AM), http://www.slate.com/articles/technology/future_tense/2013/12/facebook_self_censorship_what_happens_to_the_posts_you_don_t_publish.html [http://perma.cc/6WW8-N9DP] (explaining that primary speakers on Facebook spend a lot of time thinking about what to post on Facebook).

impractical, if not impossible, task for many Internet intermediaries.[121] Investigating and editing limitless material online by countless speakers is tremendously costly to Internet intermediaries.[122] Intermediaries would only engage in that kind of investigation if the costs of doing so were outweighed by the benefits.[123]

But the benefits of Internet speech are not equally shared between intermediaries and primary speakers.[124] Most people post speech on the Internet because they derive social benefits such as communicating with others or building their reputations.[125] Others post not only to derive social benefits but also to gain monetary benefits, such as through blogging.[126] So for primary speakers on the Internet, the benefits of speaking often outweigh the costs of ensuring the material is not defamatory or the risk of possibly being sued for defamation.

To be sure, Internet intermediaries profit from advertising revenues when people visit their webpages to view content posted by the primary speakers.[127] But the intermediaries do not obtain the other (often nonmonetary) benefits gained by primary speakers.[128] And due to substantial transaction costs and impracticalities, those benefits may not be shifted from primary speakers to intermediaries.[129] For Internet intermediaries, then, the cost of investigating the legality of the speech they carry is not offset by the benefits they derive.[130] Therefore, imposing full liability costs on Internet intermediaries for every post

121. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 59 (1996).

122. *See* Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 412 (2002) (explaining that Internet intermediaries shoulder significant costs to screen primary speakers' content and determine, with certainty, whether the speech is defamatory).

123. *See* Kreimer, *supra* note 14, at 30–31 (explaining that intermediaries only transmit speech for which the revenues outweigh the costs because intermediaries are profit-maximizing entities).

124. *See* Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 112 (2007).

125. *See* Wu, *supra* note 16, at 305–06; *Social Media: What Are the Advantages and Disadvantages of Social Networking Sites? What Should We Include in a Policy?*, SOC'Y FOR HUMAN RES. MGMT. (June 1, 2012), http://www.shrm.org/templatestools/hrqa/pages/socialnetworkingsitespolicy.aspx [http://perma.cc/JAJ5-LN68].

126. *See, e.g.*, Steve Nicastro, *How to Make Money Blogging: Five Steps*, CHRISTIAN SCI. MONITOR (Oct. 31, 2014), http://www.csmonitor.com/Business/Saving-Money/2014/1031/How-to-make-money-blogging-Five-steps [http://perma.cc/DK6T-SS7T] (describing how blogging can be a source of income); Brandon Turner, *8 Non-Monetary Benefits of Blogging*, GEEKESTATE (Feb. 21, 2013), http://geekestateblog.com/beyond-8-non-monetary-benefits-of-blogging [http://perma.cc/C4QR-3U8D] (explaining the nonmonetary benefits of blogging).

127. *See* Wu, *supra* note 16, at 308.

128. *See id.* at 306.

129. *See id.* at 307.

130. *See* Lemley, *supra* note 124, at 112 ("Intermediaries do not and cannot reasonably expect to capture anything like the full social value of the uses that pass through their system.").

on their website or domain when they cannot capture the full social benefits of those posts incentivizes them to engage in collateral censorship.[131]

2. Value of Internet Speech

Collateral censorship of Internet speech is not only problematic because it may chill lawful speech.[132] It is also problematic because Internet speech is thought to be an especially valuable type of speech. The Internet has been called "the nirvana of the founders of our democracy" because of the opportunity it provides for all citizens to engage in the free exchange of ideas.[133] Unlike traditional forms of media, such as newspapers and broadcast stations, which are not easily accessible to most speakers, the Internet enables any speaker to have a potential worldwide audience at little cost.[134] Moreover, Internet speech has resulted in an unprecedented amount of readily available information and the advancement of innovative ideas.[135]

Internet speech can only thrive if intermediaries grant access to speakers and transmit their speech. If intermediaries face liability for everything speakers post, they have little incentive to open their fora to all speakers and all speech.[136] Instead, intermediaries would avoid the threat of liability by refusing to transmit much valuable Internet speech.[137] In short, placing liability on Internet intermediaries would "debilitate the Internet."[138]

131. *See id.* (explaining that the misaligned interests of online speakers and intermediaries lead intermediaries to "restrict[] the uses that [others] can make of the Internet").
132. Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 148 (2008).
133. Cannon, *supra* note 121, at 88.
134. *See* ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996).
135. *A World Transformed: What Are the Top 30 Innovations of the Last 30 Years?*, KNOWLEDGE@WHARTON (Feb. 18, 2009), http://knowledge.wharton.upenn.edu/article/a-world-transformed-what-are-the-top-30-innovations-of-the-last-30-years [http://perma.cc/JQ3R-59NT].
136. *See* Ardia, *supra* note 6, at 390 (explaining that Internet intermediaries can filter or block material based on many things such as the identity of the speaker and the substance of the speech).
137. *See id.*; *see also* Balkin, *supra* note 13, at 435–36 (discussing how collateral censorship on the Internet "simultaneously leads to too much censorship and too little innovation").
138. Lemley, *supra* note 124, at 101–02.

B. The Solution: The Communications Decency Act of 1996 (CDA)

1. Online Intermediary Immunity Under the CDA

Under the common law, entities bear differing levels of liability for publishing, distributing or carrying the speech of primary speakers.[139] Publishers, like newspapers and broadcasters, bear full liability for publishing defamatory statements made by primary speakers.[140] Distributors, such as booksellers or newsstand owners, are liable for delivering or transmitting the speech only if they knew or had reason to know of its defamatory character.[141] Common carriers like telephone companies are immunized for the speech relayed over their networks because they are not deemed to have published or intended to have published the statements.[142] Because Internet intermediaries "did not fit neatly into [these] three liability categories"[143] under common law standards, the problem of collateral censorship remained unresolved for speech on the Internet.

The solution came in 1996, when Congress exempted Internet intermediaries from the common law regime.[144] By passing the Communications Decency Act of 1996 (CDA), Congress largely put an end to collateral censorship on the Internet.[145] The CDA establishes that "[n]o 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."[146] By not treating Internet intermediaries as publishers, the law does not place absolute liability on Internet intermediaries as the common law had on traditional publishers.[147] Furthermore, the Act states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this

139. *See* Ciolli, *supra* note 132, at 144–45 ("Prior to the popularization of the Internet, the common law generally classified vicarious liability for [primary speakers'] defamatory speech into three groups: publisher liability, distributor liability, and common-carrier non-liability.").
140. *See* RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."); *id.* § 581 ("One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.").
141. *See id.* § 581 ("[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.").
142. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 113, at 803–04 (5th ed. 1984); *see also* Ciolli, *supra* note 132, at 144–45.
143. Ciolli, *supra* note 132, at 145.
144. *See id.* at 148.
145. *See* Communications Decency Act of 1996, Pub. L. No. 104, § 509, 110 Stat. 133 (1996).
146. *Id.*; 47 U.S.C. § 230(c)(1) (2012).
147. *See generally* Ciolli, *supra* note 132, at 144.

section."[148] The CDA's express federal preemption grants Internet intermediaries absolute immunity from defamation claims, whether brought under state common law or statutory law.[149]

With the exception of intellectual property law,[150] the CDA effectively grants Internet intermediaries, such as website operators and Internet service providers, immunity from civil liability.[151] Moreover, every court to hear a case under the CDA has granted broad immunity to Internet intermediaries that were sued for defamation and other torts committed by primary speakers.[152] Because of the CDA, Internet intermediaries do not shoulder the costs of determining whether the speech they transmit is legally protected and whether it would pose a risk of litigation for them.[153] Therefore, the cost of displaying others' speech is significantly reduced such that Internet intermediaries have little legal incentive to censor any speech.[154]

2. Policy Rationales and CDA's Successes

A major goal of the CDA was to prevent Internet intermediaries from censoring lawful speech.[155] The CDA certainly seems to have accomplished that goal.[156] The growth of the Internet and the information on it shows that Internet

148. 47 U.S.C. § 230(e)(3) (2012).

149. *See* Ricci v. Teamsters Union Local 456, 781 F.3d 25, 27 (2d Cir. 2015) (holding that the CDA provides for express federal preemption).

150. 47 U.S.C. § 230(e)(2) (2012).

151. The CDA does not immunize Internet intermediaries from criminal liability. 47 U.S.C. § 230(e)(1) (2012) ("Nothing in this section shall be construed to impair the enforcement of [laws relating to obscenity or sexual exploitation of children], or any other Federal criminal statute.").

152. *See* Ciolli, *supra* note 132, at 153; *see, e.g.*, *Ricci*, 781 F.3d at 25–27 (holding that a website hosting service was immune under the CDA from defamation claims based on a user-created website); Obado v. Magedson, 612 F. App'x 90 (3d Cir. 2015) (affirming dismissal of plaintiff's defamation claim against a blog host provider based on the immunity provided by the CDA).

153. *See* Wu, *supra* note 16, at 296 ("If the content of a message cannot provide a basis for suing the intermediary, then the intermediary no longer has a legal incentive to suppress that message based on its content.").

154. *See id.* ("To avoid giving intermediaries an incentive to block lawful content, they are immunized from claims [regarding] the . . . content that they carry.").

155. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 334 (4th Cir. 1997) (reasoning that it is "plain" that by enacting the CDA, "Congress[] desire[d] to promote unfettered speech on the [I]nternet"); *see also* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099–100 (9th Cir. 2009) (recognizing that section 230 of the CDA has "two parallel goals" because it is "designed at once 'to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material'" (quoting Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003))).

156. Some argue that Internet intermediaries do not even censor defamatory statements, let alone legally protected statements. *See, e.g.*, Robert T. Langdon, Note, *The Communications Decency Act § 230: Makes Sense? Or Nonsense?—A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST.

intermediaries have engaged in minimal censorship;[157] the CDA is at least partly responsible for fostering an uninhibited forum for the free exchange of information.

Before the passage of the CDA, a New York state court famously ruled in *Stratton Oakmont, Inc. v. Prodigy Services, Co.* that an Internet service provider "is a publisher rather than a distributor."[158] But most lawmakers believed that treating Internet intermediaries as publishers, thus placing full liability on them, would lead them to unnecessarily censor their content in order to avoid lawsuits.[159] Such censorship was seen as a potential threat to the vibrancy of the Internet, because speech that may offend even one individual might be removed by an Internet intermediary fearing litigation.[160] These concerns led to discussions about whether Internet intermediaries should be immune from liability.

Although the main concern of the CDA was the transmission of indecent material to minors,[161] there is no question that lawmakers also debated the appropriateness of placing liability on Internet intermediaries.[162] For example,

JOHN'S L. REV. 829, 848 (1999) (contending that even when Internet intermediaries are notified that they are carrying defamatory material, the CDA allows them "to do whatever they please" and gives them no incentive to remove the material).

157. *See, e.g.*, *Total Number of Websites*, INTERNET LIVE STATS, http://www.internetlivestats.com/total-number-of-websites [http://perma.cc/7272-GFL7] (showing that when the CDA was enacted in 1996, there were about a quarter million websites and 77 million users, and as of 2014, there were close to one billion websites and three billion users).

158. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104, § 509, 110 Stat. 133, *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

159. Ciolli, *supra* note 132, at 148; *see, e.g.*, 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (arguing that treating online service providers as publishers and imposing liability on them for the content posted on their websites is "backward" in part because an online service provider is unable to control or edit the thousands of messages posted on its forum by thousands of subscribers). As the Fourth Circuit explained:

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum . . . .
>
> . . . Congress made a policy choice . . . not to . . . impos[e] tort liability on companies that serve as intermediaries for other parties' potentially injurious message.

Zeran, 129 F.3d at 330–31.

160. *See* Ciolli, *supra* note 132, at 148.

161. *See* Wu, *supra* note 16, at 316.

162. Felix Wu contends that "[section] 230 [of the CDA] was not the product of debate over the proper scope of intermediary liability on the Internet." *Id.* at 315. He explains that "[t]he conference committee report stated that the provision was intended to overrule *Stratton Oakmont*, but otherwise provided little guidance on the question of intermediary liability." *Id.* at 317. But

during a House debate, Congressman Chris Cox called on other members to protect Internet intermediaries "from taking on liability such as occurred in the [*Stratton Oakmont*] case in New York."[163] Lawmakers' debates about the appropriateness of *Stratton Oakmont* reflected the larger debate of whether Internet intermediaries should be deemed publishers and thus subject to liability for the speech of primary speakers.[164] Given the concerns about Internet intermediaries engaging in censorship, it is no surprise that Congress explicitly overturned *Stratton Oakmont* by passing the CDA.[165]

Since its passage, the CDA has been described as "the savior of free speech in the digital age."[166] Even if that is an overstatement, without the immunity provided by the CDA, Internet intermediaries would have incentives to carry only prescreened speech that is certainly not defamatory or the speech of those with deep pockets who can offset the intermediary's cost of investigating the legality and liability risk of the speech. The CDA's grant of immunity to intermediaries has allowed the Internet to serve as a robust and uninhibited forum for all kinds of speech. Anyone can expect to post just about any material on the Internet without being censored by an intermediary.[167] People have been able to contribute a diverse array of speech that benefits others who can readily access it.[168]

3. Similarities of Internet Speech and Election Speech

The common law rationale for assigning equal liability to the primary speaker and the publishing intermediary is that the intermediary "has the knowledge, opportunity, and ability to exercise editorial control over the content

that argument overlooks the fact that the holding of *Stratton Oakmont* and the question of intermediary liability are one and the same. By debating *Stratton Oakmont*, which held an Internet service provider to be a publisher (and thus subject to liability), 1995 WL 323710, at *4, lawmakers were in fact debating intermediary liability. *See, e.g.*, 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox). The U.S. Congress ultimately rejected the holding in *Stratton Oakmont* and decided not to treat Internet intermediaries as publishers. *See, e.g.*, *Shiamili*, 952 N.E.2d at 1016.

163. 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox).

164. *See* Ciolli, *supra* note 132, at 147–48; *see also supra* note 162.

165. *See, e.g.*, Shiamili, 952 N.E.2d at 1016 (recognizing that section 230 of the CDA overturned *Stratton Oakmont*'s holding that Internet service providers may be treated as publishers).

166. Ardia, *supra* note 6, at 379.

167. *See* Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 3 (2000) (explaining that persons face "remarkably low barriers to entry" on the Internet and can post on any topic without "editorial 'filters' to screen" their speech).

168. Philip Brey, *Evaluating the Social and Cultural Implications of the Internet*, 36 COMPUTERS & SOC'Y 41, 42–43 (2005) (explaining the benefits of the Internet such as the availability of a vast amount of information that is readily accessible by anyone).

of its publication."[169] Although this rationale is certainly true for some intermediaries like newspapers and book publishers, it is not true for all intermediaries.[170] Congress correctly recognized that Internet intermediaries do not have the same degree of knowledge, opportunity, or ability to exercise editorial control over the content posted by online users, and elected to immunize Internet intermediaries under the CDA.[171] Whereas a newspaper publisher is active in the editorial process, thus giving readers "a sense of authoritativeness" over the content, an Internet intermediary does not monitor or edit every posting of online material.[172] It would be impractical, if not impossible, for an Internet intermediary to investigate posts on "millions of new web pages, message-board posts . . . emails, and other online content"[173] created by "millions of users around the globe."[174] Moreover, whereas book publishers have a vested interest in the work of their authors and newspapers have a vested interest in the work of their journalists, Internet intermediaries lack the strong incentives to defend Internet speakers' speech and instead have every incentive to prevent lawsuits.[175]

Similar to Internet speech intermediaries, election speech intermediaries do not have the "knowledge, opportunity, and ability" to review content as that possessed by traditional publishers. Election speech intermediaries are not actively engaged in the editorial process because they find it difficult, if not impossible, to determine whether or not election speech is legally protected.[176] Also, their lack of vested political interest in the speakers' election speech means that they, like Internet intermediaries, lack strong incentives to defend the speech and are incentivized to avoid lawsuits by censoring.[177]

Moreover, election speech intermediaries do not share traditional publishers' incentive of "devot[ing] a significant amount of time and expense in vetting" the content they publish because of the potential impact on their reputations.[178]

169. Ardia, *supra* note 6, at 397.
170. *See, e.g.*, *id.* (positing that a book publisher or newspaper publisher can be held liable for its publications because they "cooperate actively" in the publication); *see also* Balkin, *supra* note 13, at 435.
171. *See supra* Part II.B.1.
172. *See* Cannon, *supra* note 121, at 59.
173. *See* Ciolli, *supra* note 132, at 146.
174. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 32 (2006).
175. Balkin, *supra* note 13, at 436.
176. *See, e.g.*, 281 Care Comm. v. Arneson, 638 F.3d 621 (8th Cir. 2011) (evaluating Minnesota's state election code, which prohibited election speech made with reckless disregard for the truth, and reasoning that "deciding whether a statement was made with 'reckless disregard for the truth' in the political-speech arena often proves difficult" even for courts and scholars).
177. *See* Balkin, *supra* note 13, at 436.
178. *See* Ciolli, *supra* note 132, at 144–45.

An election speech intermediary such as a billboard company simply displays anything that it deems profitable without being concerned about its own reputation. Viewers' perception of the message does not alter their view of the billboard company's reputation in the same way that a newspaper's readers' perception of an article alters their view of the newspaper's reputation and how much they trust and ultimately read that newspaper. The cost to investigate the truthfulness and legality of the speech is particularly high for election speech intermediaries because they are neither familiar with complex or vague state election codes[179] nor can they determine with any level of certainty whether certain election speech is lawful, especially in the fast-paced campaign season.[180] And election speech intermediaries face a high risk of defamation litigation just like Internet intermediaries, because defamation litigation is not uncommon during campaigns.[181]

In addition, the value of election speech, just like the value of Internet speech, outweighs the compensatory goals of defamation law where the victim seeks compensation from the intermediary.[182] Election speech is fundamental to our democracy because it assists the electorate in learning about candidates and ballot initiatives, and in making informed decisions at the ballot box.[183] These interests undoubtedly compete with the individual interest in receiving compensation for defamation from both the primary speaker and the intermediary.[184] But the balance tips in favor of free speech in the election speech context just as in the

179. Many vague state laws punishing false campaign speech have been struck down as unconstitutional. *See, e.g.*, Susan B. Anthony List v. Driehaus, 814 F.3d 466, 476 (6th Cir. 2016) (striking down the Ohio election code that criminalized making false statements about candidates during political campaigns); 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014) (striking down a Minnesota law that made it a crime to make a false statement about a proposed ballot initiative knowingly or with reckless disregard for the truth); Commonwealth v. Lucas, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down a Massachusetts law that criminalized making certain false statements about political candidates or questions submitted to voters); Rickert v. State Public Disclosure Comm'n, 168 P.3d 826, 829–31 (Wash. 2007) (striking down Washington's political false-statements statute). But other states have similar laws that are still being enforced. *See, e.g.*, COLO. REV. STAT. § 1-13-109 (West 2015) (prohibiting knowingly false statements designed to affect an election); WIS. STAT. § 12.05 (West 2015) (criminalizing false representations pertaining to a candidate or referendum that affects an election).

180. *See supra* note 176; *see also supra* Part I.B.1.

181. *Cf.* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 300 (2004) (explaining that defamation actions are brought against candidates not always only to correct the record or remedy the injury to reputation, but also as a tool to inflict political damage).

182. Cannon, *supra* note 121, at 88 ("[T]he value of [Internet speech] outweighs the danger that offensive speech may bring to some individuals."). *But cf.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (explaining that the state's interest in compensating defamed individuals outweighs preventing censorship by intermediaries).

183. *See* MEIKLEJOHN, *supra* note 83, at 24–27.

184. *See Gertz*, 418 U.S. at 340–41.

Internet speech context, justifying intermediary immunity in order to prevent collateral censorship.[185]

The interest to prevent the collateral censorship of valuable speech is even stronger in the election context than in the Internet context because all lawful election speech is beneficial or at least deserving of protection. In contrast, not all lawful Internet speech is socially beneficial or desirable; in fact, a lot of material on the Internet is harmful.[186] All lawful election speech is socially beneficial, however, because it informs us and helps us elect the best candidates. Even allegedly false or misleading election speech deserves protection because it allows the public to be "the monitor of falseness in the political arena" by "digest[ing] and question[ing] writings or broadcasts in favor or against [candidates and] ballot initiatives [and then] weigh[ing] counterpoints."[187] As Justice Brandeis famously stated, the remedy to misleading or biased election speech is "more speech, not enforced silence," so people have the opportunity to use "free and fearless reasoning" to participate in the democratic process.[188] A candidate's misleading

185. *Cf.* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 437 (2007) (explaining that the Court in *New York Times* acknowledged that it is necessary for some victims of defamation to not receive any compensation "because, without such breathing space, robust discussion about public issues would be chilled by the potential for liability").

186. *See, e.g.*, Brey, *supra* note 168, at 43–44 (outlining types of harmful information on the Internet such as extremist ideology, recipes for making bombs, and pornography); Janice Shaw Crouse, *Pornography Is Addictive, Pervasive and Harmful*, CONCERNED WOMEN FOR AM. (Apr. 1, 2010), http://www.cwfa.org/pornography-is-addictive-pervasive-and-harmful [http://perma.cc/3B6W-MAPQ].

187. 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014); *see also* Marshall, *supra* note 181, at 297–98 (arguing that false statements may generate voter interest and serve to make the public more informed as they learn much about the candidate alleging falsity and the candidate defending his assertion). Moreover, it is difficult to distinguish what is or is not misleading, especially when it comes to political statements, as a less informed voter may be misled by a political statement whereas another more informed voter may not be. The best solution is to allow the voters to decide for themselves the truthfulness of political statements. *See* List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014) ("[A]t times, there is no clear way to determine whether a political statement is a lie or the truth. What is certain, however, is that *we do not want the Government . . . deciding what is political truth* . . . . Instead, in a democracy, *the voters should decide*."); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

188. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (holding that absent a serious emergency, the remedy to dangerous, false, and fallacious political ideas, is "more speech, not enforced silence"); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society."). *But see* DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS 536–37 (5th ed. 2012) (discussing evidence that voters respond to

statements will presumably be exposed by his opponents or the media.[189] Citizens will be the arbiters of the statements' veracity and will judge the candidate's integrity, truthfulness, and trustworthiness based on those statements. In these ways, even misleading election speech is deserving of protection because it has the potential to lead to the truth and inform voters of a candidate's character or motivation. Because all lawful election speech is beneficial or at least deserving of protection, the interest in preventing collateral censorship is more significant in the election speech context than in the Internet speech context.

III. PROPOSED LEGISLATION TO ADDRESS COLLATERAL CENSORSHIP OF ELECTION SPEECH

The problem of collateral censorship for election speech will almost certainly not be solved through the judicial system.[190] The Supreme Court has been both unwilling and seemingly unable to interpret the First Amendment in a way that would grant immunity to intermediaries.[191] A rational alternative is to immunize election speech intermediaries from liability through legislation—just as Congress did for Internet intermediaries when it passed the CDA. Congress can pass legislation immunizing election speech intermediaries engaged in interstate commerce, while state legislatures can pass legislation immunizing election speech intermediaries solely engaged in intrastate commerce.[192]

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emotional appeals in campaign advertising which casts some doubt on the effectiveness of counter-speech as a remedy to false campaign speech).

189. *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 61 (1982) ("[A] candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent."); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 53–54 (2013) (discussing the proliferation of journalistic "fact checkers" who rate and explain the truthfulness of candidates' statements).

190. *See supra* Part I.

191. *See supra* Part I.C.

192. To be sure, the Commerce Clause may be so broadly construed as to authorize federal regulation of even intrastate intermediaries, so long as their carrying of local election advertisements is deemed to substantially affect interstate commerce. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."). *See generally* U.S. CONST. art. I, § 8, cl. 3. For example, it may be argued that a campaign advertisement on a billboard, although appearing on an intrastate medium, substantially affects the national market for advertising, and therefore falls under the reach of the Commerce Clause. *Cf. Gonzalez*, 545 U.S. at 19 ("[T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."). But out of an abundance of caution and respect for federalism principles, this Comment proposes that election speech intermediaries solely engaged in intrastate commerce be immunized through state legislation. Alternatively, a federal statute applying to all election speech intermediaries might also

A statute could grant immunity to intermediaries only when they carry election speech. For example, a magazine that displays a campaign advertisement would be immune from a potential defamation lawsuit, but the same magazine would still be liable for displaying a defamatory statement about a professional athlete. This way, an intermediary will have little incentive to censor election speech because it will not be burdened with the disproportionately expensive task of determining whether the message is lawful, and it will not have to risk litigation if the message is alleged to be defamatory.[193] Moreover, like the CDA, a federal statute immunizing election speech intermediaries should preempt state laws, but only those state laws that punish defamation or false election speech. This will relieve election speech intermediaries from the burden of ascertaining the application of vague legal standards created by the tension between the First Amendment and state laws of defamation and false campaign speech.[194]

Although the CDA provides a sensible blueprint for immunizing election speech intermediaries through legislation, it does have flaws that should be avoided. First, the CDA's preemption provision has led some courts to give intermediary immunity an overly broad construction.[195] For example, a California appellate court held that a social networking website was immune under the CDA from tort claims by minor females who were sexually assaulted by men they met on the website.[196] Such broad immunity from all tort claims undermines both the tort victims' right to seek civil recourse and the government's interest in providing the judicial avenue for that recourse.[197] Second, the CDA's vagueness about how to legally separate primary speakers from intermediaries has allowed some intermediaries to enjoy immunity even when they are acting not as an intermediary, but rather as a primary speaker.[198] This leads to the

be supported by section five of the Fourteenth Amendment. *See generally* U.S. CONST. amend. XIV, § 5; City of Boerne v. Flores, 521 U.S. 507 (1997).

193. *Cf.* Wu, *supra* note 16, at 296.

194. *See supra* Part I.B.1; *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971); *supra* note 179 and accompanying text.

195. *See* Claudia G. Catalano, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. § 230*, 52 A.L.R. Fed. 2d 37 (2011).

196. *Id.*; *see* Doe II v. Myspace, Inc., 96 Cal. Rptr. 3d 148, 149–150 (Cal. Ct. App. 2009).

197. *See* Wu, *supra* note 16, at 340–41. *See generally*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 971–75 (2010) (explaining that tort victims have a right to "civil recourse" against those who have committed relational and injurious wrongs against them).

198. Wu, *supra* note 16, at 297. Consider *Doe v. Friendfinder Network, Inc.*, a lawsuit against an adult website that connected members through online personal ads. 540 F. Supp. 2d 288, 291 (D.N.H. 2008). The plaintiff sued the website for posting, and reposting on other websites, a sexually explicit profile purportedly belonging to the plaintiff, even after the plaintiff had warned the website that the profile was false. *Id.* at 292. The Court held that the website was immune from

unacceptable result of intermediaries not being held responsible for their own speech.[199]

The aforementioned shortcomings are certainly problematic. But they are actually unrelated to the problem of collateral censorship in the election speech context, which occurs when the intermediary has misaligned interests with the primary speaker.[200] Election speech intermediaries' interests diverge only when they carry a message that is not their own and they fear a defamation lawsuit due to the uncertainty of the message's legality. A law immunizing election speech intermediaries should therefore be limited to claims for defamation and violation of state false election speech laws. Moreover, the law should clearly distinguish between election speech intermediaries and primary speakers. To do this, the legislation should focus on who spoke the election message rather than who created its contents.[201]

A model statute immunizing election speech intermediaries could resemble the following, whether enacted by Congress or by a state legislature:

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the state law tort claims under the CDA despite having reposted the profile elsewhere, reasoning that "[s]ection 230 immunity depends on the source of the *information* in the allegedly tortious statement, not on the source of the statement itself." *Id.* at 295. But when the website reposted the profile on other websites, it was acting as a speaker, not as an intermediary, so it should have been held liable.

199. Wu, *supra* note 16, at 330. The CDA immunizes intermediaries when they carry "information provided by another information content provider," but the Act does not define "information." 47 U.S.C. § 230(c)(1) (2012). If "information" is defined as facts, then an intermediary may avoid liability for its own message so long as the message is based on facts it gathered from a third party. *See, e.g.*, discussion *supra* note 198 (discussing *Friendfinder Network*, 540 F. Supp. 2d at 295, which held that a website was immune both when it carried the profile posting of a primary speaker (in the role of an intermediary) and when it reposted the profile onto other websites (in the role of a primary speaker)). For example, a prominent website may report on its homepage that a judge had an affair based on facts it gathered from the judge's clerk. If "information" is defined as facts, then the website could claim immunity in a defamation suit brought by the judge. But if "information" is correctly defined as a message, then the website would not be immune for its own message about the judge. *See* Wu, *supra* note 16, at 335 ("The relevant meaning of 'information' is thus not 'facts' or 'data,' but rather 'message' or 'communication.'"). The website would only be immune if it carried the message of the judge's clerk claiming the judge had an affair. *See id.* ("What we want to know is not whether these are someone else's facts, but whether this is someone else's message. When an [intermediary] is conveying someone else's message, that is when concerns over collateral censorship arise, and when immunity is consequently appropriate.").

200. *See supra* Part I.B.1.

201. *See* Wu, *supra* note 12, at 297 (arguing that when courts are distinguishing between speakers and intermediaries under the CDA, they have inappropriately focused on "who 'made up' the content, rather than who is speaking it"). Wu gives the following example to illustrate this point: "If I blog about a juicy rumor, I am the speaker, and I should be subject to liability, even if the rumor started elsewhere." *Id.*

> Section 1. No print, broadcast, digital, or similar intermediary engaged in interstate commerce[202] shall be treated as the publisher or speaker of any message spoken by another, when that message is intended to have, or could reasonably have, an effect on the outcome of an election.
>
> Section 2. No cause of action may be brought in the nature of defamation and no liability may be imposed under any State law prohibiting false election-related speech that is inconsistent with this statute.

On a federal level, this statute immunizes election speech intermediaries engaged in interstate commerce but Section 2 only preempts state laws regarding defamation and false election speech. As a result, immunity is limited to those laws that incentivize election speech intermediaries to engage in collateral censorship. On a state level, this statute would immunize any intermediary acting within the state from claims for defamation or the state's false campaign speech law, if the state has such a law. Moreover, by only immunizing intermediaries when they carry another's message, the statute attempts to avoid situations such as those that have occurred under the CDA where the intermediary may escape liability for its own message.[203]

CONCLUSION

Election speech is too valuable to our democratic process to be subject to collateral censorship. Immunizing election speech intermediaries will not eliminate all instances of collateral censorship, but it is sure to significantly reduce collateral censorship such that speakers like SBA will not be silenced by risk-averse intermediaries. By removing the legal incentive to engage in collateral censorship, Congress and state legislatures can ensure that people have an opportunity to receive more speech and become more informed as they cast the votes that shape how our nation will be governed.

202. The federal statute would need to specify that it regulates only those intermediaries engaged in interstate commerce, whereas a state statute may leave out the phrase, "engaged in interstate commerce."

203. *See* discussion and sources cited *supra* notes 198–199.