

A CLEAR AND PRESENT DANGER: THE NEED  
FOR REGULATED ACCOUNTABILITY FOR ONLINE  
SERVICE PROVIDERS TO PRESERVE AND PROMOTE  
FREE SPEECH, NOTICE, AND DUE PROCESS

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## I. INTRODUCTION

At 8:45 pm on Friday, August 11th, 2017, hundreds of individuals with actual torches began to march, chanting “Blood and soil,” “You will not replace us,” and “Jews will not replace us.”<sup>1</sup> They continued to chant and march throughout the campus of the University of Virginia and as they met a collection of 30 students counter-protesting with locked arms, their protests began to escalate, screaming “White lives matter” and making monkey noises at the African-American counter-protesters.<sup>2</sup> At this point, what with hindsight paled in comparison as chaos broke out with punches, slurs, and torches being exchanged between the two groups.<sup>3</sup> The next morning, the planned “Unite the Right”<sup>4</sup> rally began. This was significantly more populated and had been planned ahead of time. Throughout the day, between thousands of protesters and counter-protesters, three were killed and dozens were injured amidst overtly racist, anti-Semitic and race-motivated violence organized by White Nationalist groups.<sup>5</sup>

The Daily Stormer, a prominent White Supremacist website<sup>6</sup>, was a key player in the promotion of the “Unite the Right” rally; after the events, a post on the site promised that they were going to “go bigger than Charlottesville” and declared they were “now at war.”<sup>7</sup> One of the victims of this violence was Heather Heyer, a 32-year old paralegal who had been run over by a car recklessly driving through the protests.<sup>8</sup> The Daily Stormer posted an article entitled “Heather Heyer: Woman Killed in Road Rage Incident a Fat, Childless 32 Year-Old Slut.”<sup>9</sup> In the aftermath of

<sup>1</sup> See Joe Heim, *Recounting a day of rage, hate, violence and death.*, THE WASHINGTON POST (Aug. 14, 2017) [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm\\_term=.6213a8dd5005](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.6213a8dd5005).

<sup>2</sup> See *Id.*

<sup>3</sup> See *Id.*

<sup>4</sup> Maggie Astor, Christina Caron and Daniel Victor, *A Guide to the Charlottesville Aftermath*, THE NEW YORK TIMES (Aug. 13, 2017) <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html>.

<sup>5</sup> See Joe Ruiz and Doreen McCallister, *Events Surrounding White Nationalist Rally in Virginia Turn Fatal*, NPR (Aug. 12, 2017) <http://www.npr.org/sections/thetwo-way/2017/08/12/542982015/home-to-university-of-virginia-prepares-for-violence-at-white-nationalist-rally>.

<sup>6</sup> See Will Oremus, *GoDaddy Joins the Resistance*, SLATE (Aug. 16 2017) [http://www.slate.com/articles/technology/technology/2017/08/the\\_one\\_big\\_problem\\_with\\_godaddy\\_dropping\\_the\\_daily\\_stormer.html](http://www.slate.com/articles/technology/technology/2017/08/the_one_big_problem_with_godaddy_dropping_the_daily_stormer.html).

<sup>7</sup> Sonam Sheth, *Leading white supremacist site The Daily Stormer promises to ‘go bigger than Charlottesville’*, BUSINESS INSIDER (Aug. 14, 2017) <http://www.businessinsider.com/the-daily-stormer-charlottesville-threats-2017-8>.

<sup>8</sup> Steve Almasy and Chandrika Narayan, *Heather Heyer died ‘fighting for what she believed in’*, CNN (Dec. 16, 2017) <http://www.cnn.com/2017/08/13/us/charlottesville-heather-heyer-profile/index.html>.

<sup>9</sup> Todd Spangler, *White-Supremacist Site Daily Stormer Booted by Hosting Provider*, VARIETY (Aug. 13, 2017) <http://variety.com/2017/digital/news/daily-stormer-heather-heyer->

these events coupled with increasingly incendiary comments by The Daily Stormer, social media ran rampant with calls for GoDaddy, the website hosting company that had been hosting The Daily Stormer for the last four years, to ban the site and terminate their service.<sup>10</sup> As social media platforms have begun to give individuals a voice and an ability to reach others in easier ways than the past, a trend has developed in which consumers and the public alike voice dissatisfaction and requests for changes to be amplified by fellow consumers.<sup>11</sup> Consumers have always been dissatisfied and often have tried to make changes – often done differently from the past – but with the advent and ubiquity of the internet, the owners have increased responsibility to respond and change, as everyone’s eyes followed their every move. This is a more organic, yet indirect form of market regulation that has led to decreased sales and fall in public favor because of the access the public has to the opinions and words of the people running companies.<sup>12</sup>

This is seen no more clearly than in a tweet from Amy Siskind,<sup>13</sup> which called for users to re-tweet her message to GoDaddy asking to take down The Daily Stormer after they published a story ruthlessly disparaging the victim of the violence in the rally riddled with profanity.<sup>14</sup> This message has received 24,000 retweets,<sup>15</sup> and on the same day the tweet had been first sent out, GoDaddy responded “We informed The Daily Stormer that they have 24 hours to move the domain to another provider, as they have violated our terms of service.”<sup>16</sup> The Daily Stormer chose to then use Google’s domain hosting services, which shortly thereafter cancelled The Daily Stormer’s service, citing a violation of terms of service.<sup>17</sup> The Daily Stormer, over the next few days, began a

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white-supremacist-neo-nazi-hosting-provider-1202526544/.

<sup>10</sup> Katie Mettler and Avi Selk, *GoDaddy – then Google – ban neo-Nazi site Daily Stormer for disparaging Charlottesville victim*, THE WASHINGTON POST (Aug. 14, 2017) [https://www.washingtonpost.com/news/morning-mix/wp/2017/08/14/godaddy-bans-neo-nazi-site-daily-stormer-for-disparaging-woman-killed-at-charlottesville-rally/?utm\\_term=.a424fb51f465](https://www.washingtonpost.com/news/morning-mix/wp/2017/08/14/godaddy-bans-neo-nazi-site-daily-stormer-for-disparaging-woman-killed-at-charlottesville-rally/?utm_term=.a424fb51f465)

<sup>11</sup> See Liam Stack, *H&M Apologizes for ‘Monkey’ Image Featuring Black Child*, THE NEW YORK TIMES (Jan. 8, 2017) <https://www.nytimes.com/2018/01/08/business/hm-monkey.html>.

<sup>12</sup> Dave Sutton, *How PR Disasters Destroy Brand Perception and Bottom Line*, BUSINESS 2 COMMUNITY (July 27, 2017) <https://www.business2community.com/public-relations/pr-disasters-destroy-brand-perception-bottom-line-01889203>.

<sup>13</sup> Amy Siskind (@Amy\_Siskind), Twitter (Aug. 13, 2017 at 8:24PM) [https://twitter.com/GoDaddy/status/896935462622957573?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F08%2F14%2Fus%2Fgodaddy-daily-stormer-white-supremacists.html](https://twitter.com/GoDaddy/status/896935462622957573?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F08%2F14%2Fus%2Fgodaddy-daily-stormer-white-supremacists.html).

<sup>14</sup> Andrew deGrandpre, *The Man Who Disparaged the Charlottesville Victim is Amused by Death Threats*, WASHINGTON POST (Aug. 15, 2017) [https://www.washingtonpost.com/news/post-nation/wp/2017/08/15/the-man-who-disparaged-the-charlottesville-victim-is-amused-by-death-threats/?utm\\_term=.7e43f4e50adf](https://www.washingtonpost.com/news/post-nation/wp/2017/08/15/the-man-who-disparaged-the-charlottesville-victim-is-amused-by-death-threats/?utm_term=.7e43f4e50adf).

<sup>15</sup> As of October 24, 2017.

<sup>16</sup> *Id.*

<sup>17</sup> Todd Spangler, *White-Supremacist Site Daily Stormer Booted by Hosting Provider*,

freefall: the administrators bounced between providers with different permutations of their site's name, until they were ultimately dropped<sup>18</sup> by an Internet Security Firm. The firm is Cloudflare, which protects their clients from hackers and Distributed Denial of Service (DDOS) attacks, which purposely overwhelm a website's server and often lead to crashing.<sup>19</sup> This had the effect of relegating the Neo-Nazi site exclusively to the Dark Web.<sup>20</sup> The aforementioned decline was affected by termination of contracts based on more than five companies' terms of service, after their sites were hosted for years prior without incident. Herein lies the danger, a slippery slope of where a few powerful private companies become the moral arbiters of a nation and, with the international nature of the internet, the world.

The inherent problem is the omission in the regulatory power of the Federal Communications Commission, particularly of the private companies that allow individuals to purchase domain space and have it hosted on the internet. Without regulation, the Online Service Providers have complete autonomy to effectively disallow an individual or group from expressing themselves on the internet. In practice, the decision to terminate service is almost always based on "violations of Terms of Service" as a result of the fact that each company is a private business.<sup>21</sup> Another driving force for these companies is social media and social pressures – a phenomenon that has been deemed "Internet Mob Rule."<sup>22</sup> The contractual language in the first and most notable violation where GoDaddy violating the service of The Daily Stormer was fairly typical of those leading to the termination.<sup>23</sup> It was not cited directly in any formal complaint available to the public when they terminated the service of The Daily Stormer and reads in relevant part:

You agree that GoDaddy, in its sole discretion and without liability to you, may refuse to accept the registration of any domain name. GoDaddy also may in its sole discretion and without liability to you delete

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VARIETY (Aug. 13, 2017) <http://variety.com/2017/digital/news/daily-stormer-heather-heyer-white-supremacist-neo-nazi-hosting-provider-1202526544/>.

<sup>18</sup> Lily Hay Newman, *The Daily Stormer's Last Defender in Tech Just Dropped It*, WIRED (Aug. 16, 2017) <https://www.wired.com/story/cloudflare-daily-stormer/>.

<sup>19</sup> Kim Zetter, *Hacker Lexicon: What are DOS and DDOS Attacks?*, WIRED (Jan. 16, 2016) <https://www.wired.com/2016/01/hacker-lexicon-what-are-dos-and-ddos-attacks/>.

<sup>20</sup> John Biggs, *The Daily Stormer has officially retreated to the dark web*, TECHCRUNCH (Aug. 24, 2017) <https://techcrunch.com/2017/08/24/daily-stormer-has-officially-retreated-to-the-dark-web/>.

<sup>21</sup> GODADDY TERMS OF SERVICE, <https://www.godaddy.com/legal-agreements.aspx> (last visited September 26, 2017).

CLOUDFLARE TERMS OF USE, <https://www.cloudflare.com/terms/> (last visited Sep. 27, 2017).

GOOGLE CLOUD PLATFORM ACCEPTABLE USE POLICY, <https://cloud.google.com/terms/aup> (last visited September 27, 2017).

<sup>22</sup> Chris Baraniuk, *Internet Mob Rule*, WIRED (Sep. 28, 2017), <http://www.wired.co.uk/article/mob-rule-internet>.

<sup>23</sup> infra 17

the registration of any domain name during the first thirty (30) days after registration has taken place. GoDaddy may also cancel the registration of a domain name, after thirty (30) days, if that name is being used, as determined by GoDaddy in its sole discretion, in association with spam or morally objectionable activities. Morally objectionable activities will include, but may not be limited to:

Activities prohibited by the laws of the United States and/or foreign territories in which you conduct business;

Activities designed to encourage unlawful behavior by others, such as hate crimes, terrorism and child pornography;<sup>24</sup>

Cloudflare, the aforementioned Internet Security Firm whose termination of service played a strong role in The Daily Stormer's mainstream demise, felt the impact of their actions and a sense of responsibility.<sup>25</sup> In public statements and interviews about The Daily Stormer as an example of the current culture and the future of his business, Cloudflare CEO Richard Prince mentioned that he plans to never "play referee" again.<sup>26</sup> He feels a responsibility to protect free speech and recognizes the insufficient qualifications of Online service Providers to control what is on the internet.<sup>27</sup> "It's very important for a deep infrastructure company like Cloudflare to be content neutral," Prince said in late November 2017.<sup>28</sup> He continued on to say "At the end of the day, it was an arbitrary decision . . . It would've been very easy for us in this case to say our terms of service give us the right to terminate these guys for any reasons, which is what Google did, which is what Go Daddy did."<sup>29</sup> This can lead to a slippery slope that could chill political dissident speech: a tenet of our democracy which has been held dearly.<sup>30</sup>

In response to this problem, a regulatory scheme should be created and enforced. One aimed to protect the speech of individual consumers,

<sup>24</sup> Domain Name Registration Agreement, GODADDY, [https://www.godaddy.com/agreements/ShowDoc.aspx?pageid=reg\\_sa](https://www.godaddy.com/agreements/ShowDoc.aspx?pageid=reg_sa) (last visited Jan. 13, 2018).

<sup>25</sup> Russel Brandorn, *The Daily Stormer just lost the most important company defending it*, THE VERGE (Aug 16, 2017) <https://www.theverge.com/2017/8/16/16157710/cloudflare-daily-stormer-drop-russia-hate-white-nationalism>.

<sup>26</sup> Timothy B. Lee, Cloudflare's CEO has a plan to never censor hate speech again, ARS TECHNICA (Dec 4 2017) <https://arstechnica.com/tech-policy/2017/12/cloudflares-ceo-has-a-plan-to-never-censor-hate-speech-again/>.

<sup>27</sup> *Id.*

<sup>28</sup> Sidney Fussell, *Cloudflare CEO on Policing Nazis Online: We never Considered 'People Could Just be Really Evil'*, Nov. 29, 2017 <https://gizmodo.com/cloudflare-ceo-on-policing-nazis-online-we-never-consi-1820849643>

<sup>29</sup> *Id.*

<sup>30</sup> "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." Justice Anthony Kennedy in *Ashcroft v Free Speech Coalition* 534 U.S. 234 (2002): Court struck down Child Pornography Prevention Act of 1996 because they were so broad as to abridging "the freedom to engage in a substantial amount of lawful speech."

domain purchasers, and Edge Providers<sup>31</sup> from having their speech banned from Hosting services and Domain registries and hold them accountable. This is especially important for the Online Service Providers more than specific sites or Internet Service Providers because they are essential: every website needs to be hosted, and the average consumer tends not to view websites with the presence of mind that there is an arbiter allowing only certain speech through.<sup>32</sup> The proposed mechanism would classify the Internet as a public utility in order to further regulate these hosting companies and domain registry systems, thereby preventing them from terminating service for arbitrary<sup>33</sup> or discriminatory<sup>34</sup> reasons. The system would ensure that the content provider is given proper notice of the termination, as well as an explanation, and the right to appeal the suspension. The proposed regulation sets forth the standard outlining the same limits as it has with speech in person; however, as more internet speech case law develops in this context, more appropriate contours with regard to the right limits on internet speech may be developed. This will modernize and tweak how the protections set forth by the First Amendment<sup>35</sup> will truly manifest themselves in the digital age. It will also reveal the inherent flaw of waiting for law to catch up to technology. And, of course it should be dealt with earlier rather than later. Case law should ultimately guide this, decided by the appropriate governing bodies. Still, there are many dynamics both similar and unique to the already vast array of First Amendment cases. However, within this time of notice, the domain holder may appeal to a court or administrative court system (perhaps within the Federal Communications Commission) and have the opportunity to challenge the basis on which their service may be

<sup>31</sup> **Edge Provider.** Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

David Post, *Does the FCC really not get it about the internet?*, THE WASHINGTON POST (Oct. 31, 2014) [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/does-the-fcc-really-not-get-it-about-the-internet/?utm\\_term=.f9ef11feca78](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/does-the-fcc-really-not-get-it-about-the-internet/?utm_term=.f9ef11feca78).

<sup>32</sup> What is Web Hosting?, WEBSITE.COM, <https://www.website.com/beginnerguidewebhosting/6/1/what-is-web-hosting?.ws> (last visited Sep. 5, 2018).

<sup>33</sup> **Arbitrary:** Based on individual discretion, not supported by fair or substantial cause or reason, such as discriminating against someone simply because they have a beard or other personal characteristic; often used in reference to a judge's ruling in a court case . . . . *Arbitrary*, CORNELL LIBRARY LAW SCHOOL LEGAL INFORMATION INSTITUTE <https://www.law.cornell.edu/wex/arbitrary> (last visited Jan. 18, 2018).

<sup>34</sup> **Discriminatory:** Different treatment for similarly situated parties, especially when no legitimate reason appears to exist. An employer who rejects all male applicants and hires the first female applicant with the same qualifications might be discriminating on the basis of gender. The more repugnant the discrimination, the more likely it is to be found unlawful under the U.S. Constitution or some other law.

*Discriminatory*, CORNELL LIBRARY LAW SCHOOL LEGAL INFORMATION INSTITUTE <https://www.law.cornell.edu/wex/discrimination> (last visited Jan. 18, 2018).

<sup>35</sup> US Const Amd. 1

terminated. This is meant to ensure that political and social dissidence does not get unfairly and dangerously silenced in the future and that both due process and anti-discrimination principles are carried into the ubiquitous internet landscape.

## II. BACKGROUND

### A. *Internet Infrastructure Background*

Generally speaking, in the delivery of the websites consumers receive, there are two main players: internet service providers<sup>36</sup> and online service providers<sup>37</sup>. An internet service provider delivers to its customers access to the internet through broadband networks or Wi-Fi.<sup>38</sup> Online Service Providers, although characterized differently source-to-source, will for the purposes of this note, be referring to domain registries and the hosting services that host these domains. They provide and maintain the space in which content is stored on and the Internet Service Providers provide consumers access to.<sup>39</sup> Domain registries are companies which are accredited by the Internet Corporation for Assigned Names and Numbers (ICANN) and organize available domain names and sell them to “Edge Provider”<sup>40</sup> registrants, such as The Daily Stormer, The New York Times, or Amazon.com.<sup>41</sup> The term Edge Provider is used to describe entities that create content that goes on the internet.<sup>42</sup> ICANN was formed in 1988 and is a non-profit that does not control content on the internet but is instrumental in keeping it “secure, stable and interoperable.” ICANN facilitates the hosting process we have become accustomed to.<sup>43</sup> Hosting services are provided by companies who then allow this reserved domain space to be on the internet. The content that

<sup>36</sup> *Internet Service Provider*, TECHOPEDIA <https://www.techopedia.com/definition/2510/internet-service-provider-isp> (last visited Jan. 13, 2018).

<sup>37</sup> *Online Service Provider*, TECHOPEDIA [https://www.webopedia.com/TERM/O/online\\_service\\_provider.html](https://www.webopedia.com/TERM/O/online_service_provider.html) (last visited Jan. 13, 2018).

<sup>38</sup> *Internet Service Provider*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/Internet%20service%20provider> (last visited Oct 26, 2017)

<sup>39</sup> Rush Shuler, *How Does the Internet Work*, STANFORD UNIVERSITY (2002) <https://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm>.

<sup>40</sup> *United States Telecom Association, Et Al. v Federal Communications Commission*, D.C. Circ. No. 15-103 (2017).

<sup>41</sup> Domain Name Registration Process, ICANN, <https://whois.icann.org/en/domain-name-registration-process> (last visited Jan. 13, 2018).

<sup>42</sup> Larry Downes, *The Tangled Web of Net Neutrality and Regulation*, HARVARD BUSINESS REVIEW (Mar. 31, 2017) <https://hbr.org/2017/03/the-tangled-web-of-net-neutrality-and-regulation>.

<sup>43</sup> *What does ICANN do?*, ICANN <https://www.icann.org/resources/pages/what-2012-02-25-en> (last visited Jan. 13, 2018)

is hosted by these providers comprises the entirety of what an ISP<sup>44</sup> delivers to the end-user.<sup>45</sup> The Edge Provider then pays a monthly fee to both of these servicers, in practice often both provided by only one company. This can be considered to be the rent you pay to be able to be seen on the internet. The purchase of a domain name from the registry would be renting the plot of land, and the hosting services would be keeping the utilities on and allowing it to actually be a place one can live in. In theory, one can pay for a domain site, reserving the website space without hosting anything substantive on it, but most do that either to hold it and eventually sell it or to use it later if they foresee a popular use for it.<sup>46</sup> The internet service providers then “deliver” everything that is created by Edge Providers and hosted through Online Service Providers and deliver it to the consumer through broadband or Wi-Fi.

## II. ANALYSIS OF CURRENT LAW

### A. *Hate Speech and First Amendment Limit Background*

The First Amendment preserves freedom of speech by stating: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>47</sup> This was an important tenet since the inception of the United States, as it epitomizes the original recognition that political and social dissidence is valued and must be protected.<sup>48</sup> However, this does not follow that the right to freedom of speech is absolute by any means.<sup>49</sup> This is largely due to balancing factors such as safety and the possibility of one person’s free speech actually inhibiting another’s. This forces courts and society to value certain forms of speech over others, and through a combination of case law and statutes, there have been developments effectively limiting free speech.<sup>50</sup> Examples of this speech that have consistently been ruled unprotected include obscenity, child porn, fighting words, and incitement to imminent lawless action.<sup>51</sup> The Supreme Court decided in 2010 that, in a case regarding severe animal cruelty, there are some unprotected types of speech beyond the

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<sup>44</sup> For example, Verizon or Spectrum.

<sup>45</sup> *infra* 39

<sup>46</sup> *An introduction to Buying and Selling Domain Names*, PCNAMES.COM (last visited Sep. 5, 2018) <http://www.pcnames.com/articles/an-introduction-to-buying-and-selling-domain-names>.

<sup>47</sup> U.S. Const. Am.1.

<sup>48</sup> Arthur Milikh, *Franklin and the Free Press*, THE HERITAGE FOUNDATION (Apr. 4, 2017) <https://www.heritage.org/american-founders/commentary/franklin-and-the-free-press>.

<sup>49</sup> See <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does>

<sup>50</sup> See <https://fas.org/sgp/crs/misc/95-815.pdf>

<sup>51</sup> *Id.*

aforementioned groups that have yet to be identified, but decisions to limit speech are not made lightly.<sup>52</sup> As of now, unprotected speech is still limited to the aforementioned categories.<sup>53</sup>

The “fighting words” standard was articulated in *Chaplinsky v. New Hampshire*, where a Jehovah’s Witness was convicted under a state law for violating “a breach of the peace” after calling a city official a “fascist.”<sup>54</sup> The standard the court developed in a unanimous decision was that some forms of expression do not convey ideas, but rather that they merely live to “inflict injury or tend to incite an immediate breach of the peace.”<sup>55</sup> These words of a “God-damned racketeer” and “a damaged fascist” were enough to rise to this standard in *Brandenburg*.<sup>56</sup>

Throughout time, however, the standard for unprotected speech has been consistently elasticized, allowing an increasing range of speech.<sup>57</sup> In 1919, the court established the use of a “clear and present danger” test, where a real danger must be identified before speech can be limited.<sup>58</sup> After 50 years, this standard progressed to one of incitement to imminent lawless action; the standard was borne through a landmark 1969 Supreme Court<sup>59</sup> decision and is still used today.<sup>60</sup> This standard went beyond the previously used “clear and present danger”<sup>61</sup> test to allow antigovernment speech to continue to the point that there is direct incitement to illegal conduct that is both imminent and likely to occur.<sup>62</sup>

With internet speech, an analogue of sorts that is to be considered is with government speech, as different standards are examined. Government speech is speech directly from a government source, whether this be on a website of an Attorney General or on forms one fills out at the Department of Motor Vehicles.<sup>63</sup> It adds another complicated layer in protecting others’ First Amendment rights because it can’t directly discriminate in its speech – “For example, if the government allows private groups to hold rallies in a public park, it may not exclude a white supremacist rally solely because it disagrees with the rally’s

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<sup>52</sup> *U.S. v. Stevens*, 559 U.S. 460 (2010)

<sup>53</sup> *Id.* (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulatable balancing test as a means of identifying them.”)

<sup>54</sup> *Chaplinsky v. New Hampshire*, 315 US 568 (1942).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Infra* 50

<sup>58</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919).

<sup>59</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>60</sup> *Infra* 50

<sup>61</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919).

<sup>62</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>63</sup> *Government Speech*, CORNELL LIBRARY LAW SCHOOL LEGAL INFORMATION INSTITUTE [https://www.law.cornell.edu/wex/government\\_speech](https://www.law.cornell.edu/wex/government_speech) (last visited Jan. 13, 2018)

message.”<sup>64</sup> It is distinguished from the speech of private citizens in that it doesn’t directly implicate the rights of specific individuals in the way the First Amendment protects, but it does impact the public in various ways.<sup>65</sup> An exemplar of this principle is with two cases involving license plate.<sup>66</sup> In *Walker v Texas, Songs of Confederate Veterans, Inc*, the Supreme Court held that Texas could refuse a proposed specialty license plate for members of a group called the Sons of Confederate Veterans, which is comprised of the descendants of those in the Confederate Army.<sup>67</sup> The proposed license plate said the name of the group and included their logo, which boasts a large Confederate flag.<sup>68</sup> Additionally, faded over the entire background of the whole plate is another Confederate Flag. The Court’s reasoning here hinged on the license plate being government speech, and that, as a result, they can choose how to express themselves.<sup>69</sup>

### B. *The Internet Should be Treated as a Public Utility*

A designation of a resource as a Public Utility<sup>70</sup> began in the late 19th century with gas and electric companies, and throughout the 19th and 20th century, industries such as water, telephone service, and radio.<sup>71</sup> In 2016, the court decided in favor of upholding a Federal Communications Commission Regulation essentially regarding the internet a public utility.<sup>72</sup> Here, the decision upheld the right that “broadband ISPs have no First Amendment entitlement to hold themselves out as indiscriminate conduits but then to act as something different.” With a new regime in control, the FCC headed by former

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<sup>64</sup> *Id.*

<sup>65</sup> Erwin Chemerinsky, AM. CONST. SOC. FOR LAW AND POL’Y BLOG (Jun. 19, 2015) <https://www.acslaw.org/acsblog/the-troubling-government-speech-doctrine>.

<sup>66</sup> Scott Neuman, *High Court Rules Specialty License Plates Constitute ‘Government Speech’*, NATIONAL PUBLIC RADIO (Jun. 18, 2015) <https://www.npr.org/sections/thetwo-way/2015/06/18/415462597/high-court-rules-specialty-license-plates-constitute-government-speech>.

<sup>67</sup> *Walker v Texas, Songs of Confederate Veterans, Inc*, 576 U.S. \_\_\_\_ 2014,

<sup>68</sup> *Infra* 64

<sup>69</sup> *Id.*

<sup>70</sup> Public Utility: Any organization which provides services to the general public, although it may be privately owned. Public utilities include electric, gas, telephone, water, and television cable systems, as well as streetcar and bus lines. Public utilities are allowed certain monopoly rights because of the practical need to service entire geographic areas with one system, but they are regulated by state, county, and city public utility commissions under state laws.

*Public Utility*, CORNELL LIBRARY LAW SCHOOL LEGAL INFORMATION INSTITUTE [https://www.law.cornell.edu/wex/public\\_utility](https://www.law.cornell.edu/wex/public_utility) (last visited Jan. 13, 2018).

<sup>71</sup> Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, (Mar. 2006 <http://www.nber.org/chapters/c9986.pdf>).

<sup>72</sup> *United States Telecom Association, Et Al. v Federal Communications Commission*, D.C. Circ, No. 15-1063 (2015).

commissioner Ajit Pai after the 2016 election<sup>73</sup>, the court denied rehearing en banc on the questioned FCC rule from 2015 largely because the agency vowed to reverse the 2015 rules.<sup>74</sup> Those regulations, entitled Restoring Internet Freedom<sup>75</sup> were passed in December 2017.<sup>76</sup> They did not take effect until April 23, 2018, and have consequently not yet been tested by courts.<sup>77</sup> This, however, will be an important development as different states and private parties bring challenges and the order is litigated. The courts, Congress, and the FCC should treat the internet as a public utility as largely put forth by the 2015 Open Internet Order<sup>78</sup>.

### III. OTHER CONSIDERATIONS AND OPTIONS

#### A. *Challenges Inherent in Controlling Internet Speech*

One challenge ever-present in any attempt to regulate internet speech will be the common theme of anonymity. It is not difficult to be hard to find or invisible on the internet, and even if an IP address<sup>79</sup> can be found, it is unclear exactly who is actually making the speech. Additionally, many forums use usernames or social media handles instead of anything with meaningful identifying information.

Another challenge in regulating internet speech is a lack of casual connection to action in order to trigger aforementioned First Amendment standard of incitement to violence.<sup>80</sup> The internet has become “a new frontier for hate speech,”<sup>81</sup> but just as they are written words communicated so easily and so widely, it is hard to draw a direct connection between what inspires a given action, what might have

<sup>73</sup> David Lieberman, *FCC Chairman Vows to Reverse Open Internet Rules, Enhance Investment*, DEADLINE HOLLYWOOD (Apr. 26, 2017), <http://deadline.com/2017/04/fcc-chairman-ajit-pai-reverse-open-internet-rules-depress-investment-1202077925/>

<sup>74</sup> *Infra* 58.

<sup>75</sup> FEDERAL COMMUNICATIONS COMMISSION, RESTORING INTERNET FREEDOM (2017) <https://www.fcc.gov/restoring-internet-freedom>

<sup>76</sup> Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, NEW YORK TIMES (Dec. 14, 2017) <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html>.

<sup>77</sup> Seth Fiegerman, *Net Neutrality will officially end on April 23*, CNN (Feb. 22, 2018) <http://money.cnn.com/2018/02/22/technology/fcc-net-neutrality-date/index.html>.

<sup>78</sup> FEDERAL COMMUNICATIONS COMMISSION, REPORT AND ORDER ON REMAND IN THE MATTER OF PROTECTING AND PROMOTING THE OPEN INTERNET (2015) [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf).

<sup>79</sup> Internet Protocol Address: Identifying set of numbers where geographically your internet activity is coming from

*What is an IP address—and how do you find it?*, Daily Dot ( Apr. 9 2017) <https://www.dailydot.com/debug/what-is-an-ip-address/>.

<sup>80</sup> *Brandenburg v. Ohio*, 395 US 444 (1969).

<sup>81</sup> Banks, James (2010). Regulating hate speech online, *International Review of Law, Computers and Technology*, 24 (3), 233-239.

happened anyway, and what may have been inspired by different motives. Similar to the offline considerations of speech, varying contexts produce varying opportunity for impact with their speech. For example, an article from the New York Times is to be taken more seriously than a magazine article from the Enquirer. If rhetoric suggesting a dangerous activity was to be in both, the New York Times is more likely to be held responsible because it significantly matters how others perceive an entity's speech. These are hard lines to draw because, for example, a senile individual urging you to kill a specific person or an op-ed in a respected newspaper saying that all members of a class are stupid, worthless, or dangerous implying it would be better for all if they were gone could incite one person to violence but not others. Additionally, in a system designed to protect speech for all, there is always the danger that hateful and dangerous speech as seen in *The Daily Stormer* may not be banned in this scheme with arguments that it is free speech.<sup>82</sup> Because of the aforementioned subjective tensions when considering what speech to limit for what purposes, arguments can be made for both sides in most cases. However, American legal practice, in theory, is based on a presumption of innocence<sup>83</sup> and an opportunity to make sets of well-reasoned arguments on both sides. The concept is that with these opportunities to be heard, the truth is more likely to be found and the most equitable result will be reached.<sup>84</sup> As a result, the subjective nature of these considerations shouldn't be seen as a hindering danger, but simply as an extension of many aspects of the justice system.

*B. Whose Law is it Anyway? Challenges Inherent in International Nature of Internet Speech*

As a result of the fact that the same internet can be accessed largely throughout the world,<sup>85</sup> regulations and laws from different countries

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<sup>82</sup> Kristine Phillips, *Founder of neo-Nazi Site argues that 'troll storm' against Jewish woman is free speech*, THE SPOKESMAN, (Dec. 4, 2017) <http://www.spokesman.com/stories/2017/dec/04/founder-of-neo-nazi-site-argues-that-troll-storm-a/>.

<sup>83</sup> Presumption of Innocence: "One of the most sacred principles in the American criminal justice system, holding that a defendant is innocent until proven guilty. In other words, the prosecution must prove, beyond a reasonable doubt, each essential element of the crime charged." *Presumption of Innocence*, CORNELL LIBRARY LAW SCHOOL LEGAL INFORMATION INSTITUTE [https://www.law.cornell.edu/wex/presumption\\_of\\_innocence](https://www.law.cornell.edu/wex/presumption_of_innocence) (last visited Jan. 18, 2018).

<sup>84</sup> John Stuart Mill, *On Liberty*, UTILITARIANISM <https://www.utilitarianism.com/ol/two.html> (last visited March 11, 2018).

<sup>85</sup> With the exception of certain sites being censored by the government and other country/language-specific content. See Wataru Kodaka, *China toughens web censorship, encourages others to follow*, NIKKEI ASIAN REVIEW (Dec. 5, 2017) <https://asia.nikkei.com/Politics-Economy/Economy/China-toughens-web-censorship-encourages-others-to-follow>.

apply with varying certainty. One major case in which this dichotomy was explored is one that has come to be known as *Yahoo v France*.<sup>86</sup> In this 2000 case, the source of conflict was an American Yahoo auction site that offered over 1000 pieces of Nazi memorabilia.<sup>87</sup> Two non-profits from France challenged Yahoo in French court and what was ultimately decided was that the French court did have jurisdiction, based on a test similar to that used in US Courts in *Calder v Jones*,<sup>88</sup> reasoning that even though it was a U.S. site, French people may potentially be harmed through a violation of their Criminal Code Article R645-2 by having access to it, as a result of the internet's international nature.<sup>89</sup> The French Judge ordered that Yahoo block access to the site in France in order to protect both the speech in America and the laws in France.<sup>90</sup> This decision has had mixed reviews and since 2000, other cases have considered the same tensions.<sup>91</sup> Applicable to the current proposal, the holding of all the cases adds a layer of complexity of the potential challenged speech if coming from another country. However, the jurisdiction of the proposed court system will only be as wide as a US Court could reasonably handle coupled with potential voluntary cooperation from other countries. This could be done at any one of many conferences or consortiums of international scholars which consider how the internet should be regulated.<sup>92</sup>

### C. *Self-Regulation and Market Stabilization*

For the same reasons this proposal is necessary – that the internet is

<sup>86</sup> Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France c. Yahoo! Inc. et Société Yahoo! France (*LICRA v. Yahoo!*) <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1430&context=pubs> (last visited Jan. 14, 2018).

<sup>87</sup> *infra* 65

<sup>88</sup> *Calder v Jones*, 465 U.S. 783 (1984) allowed an entertainer in CA to bring a libel suit with jurisdiction over Florida resident defendants because the harm was done to the entertainer in California. <https://supreme.justia.com/cases/federal/us/465/783/case.html>

<sup>89</sup> *Conflict of Laws: Cases and Materials* R. Lea Brilmayer, Jack L. Goldsmith, Erin O'Hara O'Connor.

[https://books.google.com/books?id=087fDgAAQBAJ&pg=PT50&lpg=PT50&dq=french+Criminal+Code+Article+R.645-2&source=bl&ots=DwhTXlsLq8&sig=ki\\_5zwr0uwCMRfxksa2SMrEqkV8&hl=en&sa=X&ved=0ahUKEwjX4eTbk9DYAhVPq1MKHTOUAScQ6AEISDAF#v=onepage&q=french%20Crimina1%20Code%20Article%20R.645-2&f=false](https://books.google.com/books?id=087fDgAAQBAJ&pg=PT50&lpg=PT50&dq=french+Criminal+Code+Article+R.645-2&source=bl&ots=DwhTXlsLq8&sig=ki_5zwr0uwCMRfxksa2SMrEqkV8&hl=en&sa=X&ved=0ahUKEwjX4eTbk9DYAhVPq1MKHTOUAScQ6AEISDAF#v=onepage&q=french%20Crimina1%20Code%20Article%20R.645-2&f=false) (last visited Jan. 14, 2018).

<sup>90</sup> *infra* 65

<sup>91</sup> Greenberg, Marc, *A Return to Lilliput: The LICRA v. Yahoo – Case and the Regulation of Online Content in the World Market*, BERKELEY TECH L. J. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1435&context=btlj>

<sup>92</sup> See Josh Horwitz, *Tim Cook and Sundar Pichai's surprise remarks at China's "open internet" conference*, QUARTZ (Dec. 04, 2017) <https://qz.com/1145637/2017-world-internet-conference-tim-cook-and-sundar-pichais-surprise-remarks/>.

an open environment – a “great democratizing force”<sup>93</sup> – freedom is important for the people who build it and keep it running. This is partially because lawmakers are, generally, older and more generally focused, and potentially less abreast of specific knowledge and full appreciation of how the internet works on the back-end.<sup>94</sup> This narrow scope of skill and specialized knowledge is dangerous for regulating many industries for this reason. Perhaps it’s arguable that the lack of experts would render the current government, as currently constituted, unequipped to effectively regulate the internet. The executive branch has a Technology Council<sup>95</sup> in which CEOs throughout the technology industry have met with President Donald Trump to discuss in a closed setting the priorities they have and issues moving forward, demonstrating progress and cooperation in the right direction. Still, however, the free-flowing form of communication the internet is instrumental in creating could potentially be hindered by misguided regulation. There is a strong argument that mob rule, emotionally driven decisions, and Terms and Conditions of companies will naturally limit the promulgators of real dangerous speech, and the market would regulate itself if Congress or agencies weren’t aptly holding it. Many scholars argue that companies should collaborate with each other.<sup>96</sup> Featured on a blog post by a faculty member of the Berkman Center for Internet & Society at Harvard University was the argument that “the creation of self-regulatory mechanisms should, to the extent possible, be the product of cooperation or collaboration between state bodies and the Internet Service Provider (ISPs) or self-regulatory bodies.”<sup>97</sup>

There are so many providers, that there is no scarcity in the internet generally for Edge Providers to get domains and access, albeit top-level domains (.com,.org,.edu) have begun to have scarcity with the advent and meteoric popularization of their use. Scarcity was precisely what justified regulating airwaves.

Another sort of self-regulation is the existence of the robust and largely unknown “Dark Web.” The Dark Web, or the Dark Internet, is a “collection of thousands of websites that use anonymity tools” and are not inaccessible to the public, but rather just use these anonymity tools

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93 Mary C Joyce, *The Democratic Power Shift on the Internet*, BERKMAN CENTER FOR INTERNET & SOCIETY INTERNET & DEMOCRACY BLOG (May 14, 2008) <http://blogs.harvard.edu/idblog/2008/05/14/the-democratic-power-shift-on-the-internet/>.

94 Jennifer E. Manning, *Membership of the 115<sup>th</sup> Congress: A Profile*, CONGRESSIONAL RESEARCH SERVICE (July 11, 2018) <https://www.senate.gov/CRSpubs/b8f6293e-c235-40fd-b895-6474d0f8e809.pdf>.

95 See Tony Romm, *President Trump is Launching a new tech group to ‘transform and modernize’ the U.S. government*, RECODE (May 1, 2017) <https://www.recode.net/2017/5/1/15499586/american-technology-council-trump-tech>.

96 *infra* 75

97 *Id.*

that basically force web traffic to bounce through different computers throughout the world before landing on their site to avoid tracking of visitor data and the identities of website administrators.<sup>98</sup> They are less commonly used and less likely to come up casually on a Google search.<sup>99</sup> Both a reason and result is that the sites tend to promote activity that is either illegal or highly unacceptable to the public: such as “black market drug sales and even child pornography.”<sup>100</sup> In fact, in 2014, European and US law enforcement agencies teamed up to prosecute hundreds of sites riddled with illegal activity, including most notoriously an iteration of Silk Road<sup>101</sup> Beyond these types of Dark Web sites that make headlines, however, are sites in this landscape that enable anonymous whistleblowing.<sup>102</sup>

This is relevant here because “banned” sites under the proposed regime can live there even if kicked off through aforementioned methods. This is a positive because it allows a home for speech of nearly any kind, even if not welcome on the more traditional web as a result of the aforementioned potential reasons. Daily Stormer has done this as well as countless other sites.<sup>103</sup> Sometimes this group of sites is incorrectly referred to as the Deep Web, which is a collection of sites that are unindexed<sup>104</sup> and as a result, will never come up on a search engine.<sup>105</sup>

## V. CURRENT PROPOSAL

### A. Generally

This proposal would create new regulation that treats the hosting and domain registry systems as it relates to the internet like a Public Utility and prevents the gatekeeping Online Service Providers from terminating

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<sup>98</sup> Andy Greenberg, *Hacker Lexicon: What is the Dark Web?*, WIRED (Nov. 19, 2014) <https://www.wired.com/2014/11/hacker-lexicon-whats-dark-web/>.

<sup>99</sup> *Google can't search the Deep Web, So How do Deep Web Search Engines Work?*, CORNELL UNIVERSITY NETWORKS COURSE BLOG <https://blogs.cornell.edu/info2040/2017/10/18/google-cant-search-the-deep-web-so-how-do-deep-web-search-engines-work/> (last visited Sep. 8, 2018)

<sup>100</sup> *Id.*

<sup>101</sup> Joshua Bearman, *The Rise & Fall of Silk Road*, WIRED (May 2015) <https://www.wired.com/2015/04/silk-road-1/>.

<sup>102</sup> Andy Greenberg, *Dark Web's Got a Bad Rep: 7 in 10 People want it shut down, Study Shows*, WIRED (Mar. 29, 2016) <https://www.wired.com/2016/03/study-finds-7-10-people-want-dark-web-shut/>.

<sup>103</sup> Adi Robertson, *Neo-Nazi site moves to dark web after GoDaddy and Google bans*, THE VERGE (Aug. 15, 2017) <https://www.theverge.com/2017/8/15/16150668/daily-stormer-alt-right-dark-web-site-godaddy-google-ban>.

<sup>104</sup> Indexing is a form of organizing the websites. The sites that are indexed on Google are the ones that the search engine will pull from, essentially.

<sup>105</sup> *Infra* 94

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service for arbitrary or discriminatory reasons. This would provide accountability for these gatekeepers and a peace of mind for content creators and consumers looking to experience a free and open internet.<sup>106</sup> The regulatory scheme will set forth that the standard is the same limits that exist with speech in person; however, as more internet speech case law develops in this context, more appropriate contours on what speech should be allowed will take shape. This could help facilitate a result that Online Service Providers do not inappropriately minimize the political and social dissidence of Edge Providers and other Content Creators. Despite the critical need for case law of the system created by this regulation to develop more apt First Amendment limitations, proposed standard and analysis is explored later. Additionally, both due process and anti-discrimination principles are carried on into the internet. Both of these tenets are long-held by Constitutional case law and eminent scholars.<sup>107</sup>

As of now, there are no substantive regulations in the United States holding accountable the Online Service Providers specifically.<sup>108</sup> The hotly contested FCC rules regarding Internet Service Providers and net neutrality has no direct<sup>109</sup> effect on the content-control aspect dealt with here.<sup>110</sup> It is critical that private companies controlling the internet act as neutral intermediaries.

Private companies should not act as a judicial decision maker to decide what speech is acceptable to be heard and what is not. The government, even more so for judges, is set up as a centralized place to represent the interests of everyone, in theory at least, whereas private companies are exclusively in it for their own monetary profit.<sup>111</sup> The government's regulation of private businesses that have participated in discriminatory behavior has been upheld in Courts using the Commerce Clause<sup>112</sup> in two cases: In the *Heart of Atlanta Motel v US*, the Supreme Court upheld a series of bills regulating discrimination in highway motels

<sup>106</sup> Jake Johnson, *Consumer Survey Shows Two-Thirds Oppose FCC's Plan to Destroy Free and Open Internet*, COMMON DREAMS (Sep. 27, 2017) <https://www.commondreams.org/news/2017/09/27/consumer-survey-shows-two-thirds-oppose-fccs-plan-destroy-free-and-open-internet>.

<sup>107</sup> Magna Carta; Muse and Mentor, Library of Congress available at <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> (last visited Sep. 5, 2018).

<sup>108</sup> Alina Selyukh, *As Congress Repeals Internet Privacy Rules, Putting your Options In Perspective*, NPR (Mar. 28, 2017) <https://www.npr.org/sections/alltechconsidered/2017/03/28/521813464/as-congress-repeals-internet-privacy-rules-putting-your-options-in-perspective>.

<sup>109</sup> There are obviously some indirect impacts.

<sup>110</sup> <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1529&context=fclj>

<sup>111</sup> Paul Krugman, *A Country is Not a Company*, HARVARD BUSINESS REVIEW (Jan. 1996) <https://hbr.org/1996/01/a-country-is-not-a-company>.

<sup>112</sup> "The Congress shall have power to . . . regulate commerce . . . among the several states." US Const Art. I, Sec. 8, Cl. 3.

under the Commerce Clause even though the law was created for moral purposes.<sup>113</sup> Similarly, in *Katzenbach v McClung*, the Supreme Court upheld regulations against discriminatory practices in Ollie's BBQ near border/highway with the reasoning that the discrimination had negative effects on interstate commerce.<sup>114</sup> The relevance of these cases is that they show that in the past, the highest court has adapted to use creative ways to protect people against discrimination from private businesses and that additional regulation has precedence.

Similarly, to the efforts at the Supreme Court to curb forms of discrimination in public places, the internet is becoming a ubiquitous meeting place seen as theoretically analogous. The internet is largely a democratizing force for change to foster connectedness, innovation, and incredible things never before thought possible. The ubiquity of it is an unavoidable truth, and it affects the way we think<sup>115</sup>, act, and treat each other.<sup>116</sup> It is a new platform that requires tweaking of the rules as presently constituted. Allowing private censorship can lead to public censorship and stifling of, for example, disparaging speech about an oppressive regime. As the Electronic Frontier Foundation mentioned in an online congressional hearing of the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives<sup>117</sup> in 1993, "we need a place where we can share information unfiltered by the needs and desires of either Big Brother or the marketing department down at Channel Six."

The sheer number of customers handled by a company like GoDaddy, alone servicing over 17 million customers and 73 million domain names<sup>118</sup>, seems likely to decrease the ability for meaningful or nuanced content monitoring. As we have seen analyzed more fully with Facebook and Twitter in regard to the way they censor speech regarding racism and white supremacy<sup>119</sup>, breastfeeding<sup>120</sup>, and more, the "black-

<sup>113</sup> *Heart of Atlanta Motel v US*, 379 US 241 (1964).

<sup>114</sup> *Katzenbach v McClung*, 379 U.S. 294 (1964).

<sup>115</sup> Rick Nauert, *Ubiquity of Internet Affects How We Think*, PSYCH CENTRAL (Dec. 9, 2015) <https://psychcentral.com/news/2015/12/09/ubiquity-of-internet-affects-how-we-think/95982.html>.

<sup>116</sup> Melissa Nilles, *Technology is Destroying the Quality of Human Interaction*, THE BOTTOM LINE (Jan. 24, 2012) <https://thebottomline.as.ucsb.edu/2012/01/technology-is-destroying-the-quality-of-human-interaction>.

<sup>117</sup> ELECTRONIC FRONTIER FOUNDATION, ONLINE CONGRESSIONAL HEARING (1993) <https://www.eff.org/effector/5/12>.

<sup>118</sup> *About Us*, GODADDY <https://aboutus.godaddy.net/about-us/default.aspx> (LAST VISITED JAN. 13, 2018).

<sup>119</sup> Julia Angwin, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech But Not Black Children*, PROPUBLICA (June 28, 2017) <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms>.

<sup>120</sup> Tierney McAfee, *Instagram Now Allows Photos of Women Breastfeeding*, PEOPLE (Apr. 17, 2015) <http://people.com/bodies/instagram-allows-breastfeeding-photos-after-backlash-from-alyssa-milano-and-more/>.

box” problem of important algorithms being translucent at best presents a major issue for the masses that rely on it.<sup>121</sup> Public outrage<sup>122</sup>, vague moral guidelines or personal animus<sup>123</sup> seem to be guiding some decisions made by companies, and the importance and ubiquity of internet speech should also be regulated.

The standard that should be set forth in terms of the First Amendment line drawn should largely develop naturally with case law in the form of challenges under this proposal. However, it should start with the incitement standard and use the case law decided at a federal level. Additional important precedent to guide this standard includes the unprotected class of speech considered “true threats,” defined as the “unequivocal, unconditional and specific expressions of intention immediately to inflict injury.”<sup>124</sup> This precedent was further fleshed out and affirmed in *Virginia v. Black*, where this was expanded upon to encompass “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>125</sup>

### B. *Logistics*

To start, the Edge Provider and the Online Service Provider would still have their contractual relationship, and they would be as free and open to use different services as they are now. An example here would be if a company selling bananas, Nana, signed up with Interweb Hosting Company to rent domain space and host their website. Each month, the Edge Provider would pay their fees and in turn, consumers would be able to access their website. At a certain point, Nana uses the blog tab on their website to make consistent incendiary remarks about how a certain class of person shouldn’t eat bananas and suggests how their products can cause harm to these people. Later, this suggested act of violence is acted upon, and social media unrest calls for Interweb to terminate the service of Nana. This could alternatively manifest itself not from external pressures, but from internal review or algorithms put in place to monitor the content of the sites they host. For whatever reason, Interweb decides

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<sup>121</sup> Will Knight, *The Dark Secret at the Heart of AI*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY TECHNOLOGY REVIEW (Apr. 11, 2017) <https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/>.

<sup>122</sup> Chris Baraniuk, *How to tackle internet mob rule*, WIRED UK (Sept. 28, 2017) <http://www.wired.co.uk/article/mob-rule-internet>.

<sup>123</sup> See Kate Conger, *Cloudflare CEO on Terminating Service to Neo-Nazi Site: ‘The Daily Stormer are Assholes’*, GIZMODO (Aug. 16, 2017) <https://gizmodo.com/cloudflare-ceo-on-terminating-service-to-neo-nazi-site-1797915295>.

<sup>124</sup> *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976).

<sup>125</sup> *Virginia v. Black*, 538 U.S. 343, 359–60 (2003)

they must limit the speech of Nana. They must articulate on a simple form that must be distributed to the administrator the reason for the termination. This is an approach that takes into account administrative burdens, because the Online Service Provider has all the information. These reasons would include an example from the content provider's site. On the relevant form, it says that the termination would take effect in 30 days if not appealed. It would be delivered to both the Edge Provider and the governing body of this policy. This would ensure that the long-held ideals of notice and due process are fulfilled.<sup>126</sup> Nana may accept the termination or lay passive and be rightly terminated by Interwebs. Alternatively, Nana can challenge Interwebs' termination request in the form of an administrative hearing completed by a group of FCC commissioners charged to the tribunal. It need not be FCC commissioners specifically who must hear this. The governing body can take the form of a separately formed organization, such as ICANN, that would have the authority to hear arguments from both sides. These arguments would be largely law-based, and would apply the facts to the existing standards, setting new standards and making arguments about why the contested speech should or should not be protected. The beginning standard would be the incitement to violence standard, but the governing body as well as well-thought out arguments from both sides would inspire a more apt standard for the 21st century. Depending on the decision, Nana would continue to have its site hosted on Interwebs, or they would be able to change, and start anew with a different provider. Alternatively, until the Dark and Deep Web become more mainstream, any site ruled to be too dangerous may reside there for the time being. Still, however, even if an adverse decision is made against Nana, they may be able to use an Interweb competitor if the specific conduct is changed. If Nana continued to bounce around to different providers and suffered adverse decisions and terminations, there would be penalties in the form of more substantive bans or fines.

## VI. CONCLUSION

Every day, an immeasurable volume of speech is expressed and exchange both in person and online. Speech has incredible amounts of inherent power to influence, express, and cause both great joy and harm. The First Amendment vows to protect the right to free speech<sup>127</sup>, but in practice, this right is simply not absolute.<sup>128</sup> The most salient example of this restriction is the standard of "incitement of imminent lawless action"

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<sup>126</sup> U.S. Const. 14<sup>th</sup> Amd.

<sup>127</sup> US Const. 1<sup>st</sup> Amendment

<sup>128</sup> *infra* 49

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set forth by the Supreme Court in *Brandenburg v. Ohio*.<sup>129</sup> This is characterized by a two pronged-test to evaluate speech developed by a unanimous supreme court, holding that speech can be prohibited if it is “directed at inciting or producing imminent lawless action” and “is likely to incite or produce such action.”<sup>130</sup> This standard is difficult to apply in personal interactions and has been a complicated, but fitting way to regulate speech as we knew it in 1969.

In 2018, the pure and growing ubiquity of the internet, controlled largely by a few private companies, has led to an urgent need to develop a system to ensure that speech on the internet is protected in the same way that speech in person is. The need for this is seen through the functional demise of the prominent and militant Alt-Right<sup>131</sup> website, The Daily Stormer, after the companies keeping them on the internet decided they were causing too much trouble and should not be on the internet and as a result violated their Terms of Service.<sup>132</sup> This is well within their right to do as of now, but it sparks the concept of a slippery slope where speech, some of which may not be objectively vile or detestable as some of the speech of The Daily Stormer, could be blocked by private companies without any real accountability.

This note calls for a system to be put in place not to deprive the private companies who control the important resource of an internet of their rights, but in a balancing effort to protect the greater First Amendment right for all. The system would ensure due process and notice for content providers and would give guidance to the Online Service Providers unsure of where to draw the line.

The main troubles with this include the implementation of methods drawing an appropriate line of allowed speech, curtailing corporate freedom, and the fears of taking too much control over the internet when self-regulatory features such as the Dark Web may be sufficient at the moment. However, these questions: of implementation, line-drawing, and weighing of interests are at the heart of regulation and governing, and similar tough decisions have had to be made. This is just a beginning step in modernizing the regulatory landscape in the country as technology has developed at breakneck speeds just in the last twenty years.

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<sup>129</sup> *Brandenburg v. Ohio*, 395 US 444 (1969).

<sup>130</sup> *Id.*

<sup>131</sup> Liam Stack, *Alt-Right, Alt-Left, Antifa: A Glossary of Extremist Language*, THE NEW YORK TIMES (Aug. 15, 2017) <https://www.nytimes.com/2017/08/15/us/politics/alt-left-alt-right-glossary.html>.

<sup>132</sup> Russell Brandom, *Google says it will ban neo-Nazi site after domain name switch*, THE VERGE (AUG 14, 2017) <https://www.theverge.com/2017/8/14/16145064/google-daily-stormer-ban-neo-nazi-registrar-godaddy>.