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# The Religious Liberty Solution to Big Tech Censorship: How the Religious Freedom Restoration Act Limits Section 230

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# THE RELIGIOUS LIBERTY SOLUTION TO BIG TECH CENSORSHIP: HOW THE RELIGIOUS FREEDOM RESTORATION ACT LIMITS SECTION 230

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ABSTRACT

*Social media companies' rampant censorship in recent years focused public outcry, academic debate, and congressional inquiry on Section 230, which provides broad immunity to these "Big Tech" companies for censoring so-called "objectionable" content. Although Congress originally passed Section 230 in 1996 to reduce children's exposure to internet pornography, increasingly expansive definitions of "objectionable" speech allow Big Tech companies free rein to stifle expression and debate on controversial social and public policy issues. The legal immunity Section 230 confers is broad enough to protect social media platforms from liability for censoring opinions because the companies disagree with them, rather than because the posts expressing them contain obscene material. As a result, Section 230 now operates as a federal-government-provided incentive for private companies to exercise enormous control over public discourse.*

*The burden of censorship often falls hard on religious expression, whether because a social media company disagrees with a certain religious belief or considers certain religious expression not suited to the public sphere. While many propose to overhaul or eliminate Section 230, this Article posits that existing law provides a solution where Section 230 operates to legally insulate the suppression of religious exercise. The*

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*Religious Freedom Restoration Act (RFRA)—which protects sincere religious exercise from substantial burdens imposed by the federal government without means narrowly tailored to achieve compelling government interests—operates as a "superstatute" that limits all other statutes. The Congress that passed Section 230 likely never imagined a situation in which it would burden religious exercise. But circumstances have changed in the nearly thirty years since Section 230's passage. Increasingly capacious interpretations of the word "objectionable" enable Big Tech to take Section 230 far beyond its original purpose and burden religious exercise in unanticipated ways. RFRA is designed to operate in exactly this kind of circumstance—ensuring that Congress's actions do not sweep so broadly as to violate its interpretation of the First Amendment, especially in situations Congress could not anticipate.*

*In practice, RFRA operates as a statutorily prescribed canon of construction that limits the immunity Section 230 confers. Because RFRA limits all subsequent statutes not expressly exempted, when Congress created Section 230 immunity, it only granted that immunity insofar as it does not impose a substantial burden on religious exercise without a means narrowly tailored to achieve a compelling interest. While RFRA likely does not afford a cause of action against Big Tech companies that censor religious speech, RFRA can refute a Section 230 defense raised against a non-RFRA cause of action, thus allowing the non-RFRA claim to proceed to its merits.*

## INTRODUCTION

The Communications Decency Act of 1996 amended Section 230[1] of the Telecommunications Act of 1934 to combat pornography on the internet.[2] Congress intended this amendment to Section 230 to "promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."[3]

To accomplish this goal, Section 230 provides broad immunity for "interactive computer services" like Google and Facebook by: (1) shielding them from liability for "restrict[ing] access to or availability of material" they consider objectionable, and (2) determining as a matter of law that these companies are not to be treated as the publishers or speakers of content on their sites "provided by another information content provider."[4] In recent years, large technology companies such as Twitter, Facebook, and Google (colloquially referred to as "Big Tech") have applied increasingly expansive definitions of what constitutes offensive content.[5] As a result, concern is growing that this broad

1. 47 U.S.C. § 230.

2. Pub. L. No. 104-104, Tit. V, 110 Stat. 133 (1996).

3. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003). For a broader summary of the policy motivations behind Section 230, see 47 U.S.C. § 230(b):

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

*Id.*

4. 47 U.S.C. § 230(c); *see, e.g.*, Marshall's Locksmith Serv. Inc. v. Google, LLC, 925 F.3d 1263, 1272 (D.C. Cir. 2019) (applying Section 230 immunity to Google); Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (applying Section 230 immunity to Facebook).

5. Alison Beard, *Time to Rein in Big Tech?*, HARV. BUS. REV., Nov.–Dec. 2021, https://hbr.org/2021/11/time-to-rein-in-big-tech [https://perma.cc/LFU7-S54K] (referring to the top "Big Tech" companies as "the Big Five—Facebook, Google/Alphabet, Amazon, Apple, and Microsoft"); Lauren Feiner, *Big Tech's Favorite Law is Under Fire*, CNBC (Feb. 19, 2020), https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html [https://perma.cc/B9KV-8EGS]; *see also* U.S. DOJ, *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996* (Sept. 23, 2020), https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 [https://perma.cc/6UAJ-

immunity allows Big Tech to censor conservative and religious speech on the internet without providing any recourse for the average person.[6]

Indeed, in response to these censorship concerns, members of Congress continue to propose legislation[7] aimed at curtailing Section 230 immunity for Big Tech companies. One such bill, filed by Senator Marco Rubio, offered a particularly intriguing amendment to Section 230 that would limit the section's otherwise broad grant of immunity in order to protect religious expression. The bill eliminated Section 230 protection with respect to "religious material" or any action taken "in a manner that burdens the exercise of religion, as defined in section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb–2)."[8] Senator Rubio's bill strikes at the heart of the problem that this Article addresses.

According to Senator Rubio's proposal, Big Tech may not invoke Section 230 immunity in a case in which the plaintiff alleges that the Big Tech company discriminated against religious speech in some way. Of course, this does not ensure that the plaintiff suing the Big Tech company would actually win the case on the merits, but it would take an important chess piece off the table for Big Tech. In fact, Senator Rubio's proposal is akin to taking Big Tech's Queen off the chess board. But the question becomes: is this amendment necessary? This

4JHQ] (recommending replacing vague terminology in Section 230, including "otherwise objectionable").

6. *See, e.g.*, Press Release, Senator Ted Cruz, Sen. Cruz Calls on USTR to Eliminate Inclusion of Special Protections for Big Tech in U.S. Trade Deals (Nov. 1, 2019), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-calls-on-ustr-to-eliminate-inclusion-of-special-protections-for-big-tech-in-us-trade-deals [https://perma.cc/9B54-6Q9V] ("From Twitter locking the account of Senate Majority Leader Mitch McConnell's campaign to YouTube demonetizing a conservative comedian's account following pressure from the left, the examples of censorship are as disturbing as they are numerous. That is why elected officials are increasingly advocating for Section 230's revision or repeal.").

7. *E.g.*, Protect Speech Act, H.R. 8517, 116th Cong. § 2 (2020) (providing for liability when "a person or entity solicits, comments upon, funds, or affirmatively and substantively contributes to, modifies, or alters information"); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. § 2 (2020) (amending the definition of "information content provider" to include "any instance in which a person or entity editorializes or affirmatively and substantively modifies the content of another person or entity").

8. Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression Act, S. 2228, 117th Cong. (2021), https://www.rubio.senate.gov/public/_cache/files/8fb39a08-108c-40a0-863a-5e3c28ed9fe0/A142938A5BDD60AE25262FFB85103C21.discourse-act-text.pdf [https://perma.cc/GAE6-KHKV].

religious liberty exception to Section 230 immunity may, in fact, already exist.

Just three years before Section 230 arrived on the scene, Congress passed the important and overwhelmingly popular Religious Freedom Restoration Act of 1993 (RFRA).[9] RFRA's design as a limitation on future statutes indicates that it can already operate to limit Section 230 immunity for the censorship of religious speech. While Senator Rubio's proposal would make this operation of RFRA express within Section 230, it is not necessary given each statute's construction. This Article explores how Section 230 operates in light of RFRA and proposes that Congress did not give Big Tech the power to invoke Section 230 immunity when Big Tech seeks to censor religious speech. Part I examines the origin of what we now know as Section 230. Part II recounts the passage and operation of RFRA. Finally, Part III analyzes RFRA's application to Section 230 and how it can operate to enable lawsuits against Big Tech for censoring religious speech.

## I. THE ORIGIN OF SECTION 230

On August 6, 1991, the first website on the World Wide Web went live.[10] That website is, in fact, still live and accessible.[11] It was one of the most consequential moments in modern history—equivalent to, if not outpacing, Guttenberg's printing press. Within just a few short years, information, both educational and recreational, began to proliferate on what became known as the internet. While a great deal of the information exchanged over the internet benefits humanity, many dark corners threaten human flourishing. Section 230 arose in response to early concern about the ease with which children could encounter pornography on the internet. Senator James Exon of Nebraska, a Democrat, lamented that "the information superhighway should not become a red light district."[12] To address this issue, Senator

9. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §§ 1–7, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb4).

10. Alyson Shontell, *FLASHBACK: This Is What The First-Ever Website Looked Like*, Business Insider (Jun. 29, 2011, 3:57 PM), https://www.businessinsider.com/flashback-this-is-what-the-first-website-ever-looked-like-2011-6#:~:text=The%20first%20web%20page%20went,%2FWWW%2FTheProject.html [https://perma.cc/Y4K5-HQ33].

11. CERN, WorldWideWeb (W3), http://info.cern.ch/hypertext/WWW/TheProject.html [https://perma.cc/M9DS-DTC5].

12. 141 CONG. REC. 3203 (1995) (statement of Sen. James Exon).

Exon proposed "The Decency Act" to "protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies."[13]

Senator Exon felt so strongly about the need to protect children from dangerous aspects of the internet that during the floor debate on amendments to the Telecommunications Act, he read into the record a prayer that the Senate Chaplain gave only two days prior:

> Lord, we are profoundly concerned about the impact of this on our children. We have learned from careful study how children can become addicted to pornography at an early age. Their understanding and appreciation of Your gift of sexuality can be denigrated and eventually debilitated. Pornography disallowed in print and the mail is now readily available to young children who learn how to use the computer.[14]

Eventually, Congress passed the Communications Decency Act (CDA).[15] But its passage was not necessarily a unified effort between members of the Senate and the House. The Senate focused on decency provisions that "increase[d] the penalties for obscene, indecent, harassing or other wrongful uses of telecommunications facilities . . . and protect[ed] families from uninvited and unwanted cable programming which is unsuitable for children."[16] The House had other ideas.

### *A. Section 230 and Distrust of Government Regulation*

While Senator Exon focused on government regulation of internet pornography, Representatives Christopher Cox and Ron Wyden in the House of Representatives proposed what would become Section 230 in an amendment[17] to the House version of the CDA,[18] known as the "Online Family Empowerment Act." One commentator famously described Section 230 as containing "the twenty-six words that created the internet"[19]—at least as we know the internet today. Two provisions are at the heart of Section 230. First, the twenty-six words are "[n]o provider or user

13. *Id.*
14. *Id.* at 16008.
15. Pub. L. No. 104-104, Tit. V, 110 Stat. 133 (1996).
16. S. REP. NO. 104-23, at 59 (1995).
17. 141 CONG. REC. 22022, 22046 (1995).
18. H.R. 1555, 104th Cong. (1995)
19. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[20] This provision means that whether you provide internet services or use those services, the law does not consider you to be the person who expresses a particular message when you link to or provide that information. Second, Section 230 contains an immunity from civil liability if an "interactive computer service" takes steps to restrict access to objectionable material.[21]

The Cox/Wyden Amendment encapsulated a policy preference that the government is not the best censor of online objectionable material. While the Senate's CDA sought to restrain online pornography through government regulation, the Cox/Wyden Amendment offered immunity from liability to "protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, . . . who takes steps to screen indecency and offensive material for their customers."[22] The conference report highlighted that what was to become Section 230 provided "'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material."[23] The point of Section 230, then, was to provide immunity from civil liability to public-facing Internet platforms when the platform censors what the platform deems to be objectionable material. This was not a hypothetical concern, as the Wolf of Wall Street[24] demonstrated.

### *B. The Wolf of Wall Street Problem*

Popular book and movie *The Wolf of Wall Street* depicts some of the events surrounding the rise and fall of Stratton Oakmont, Inc., a "securities investment banking firm."[25] In late October 1994, someone anonymously posted on a Prodigy[26] online

20. 47 U.S.C. § 230(c)(1).

21. 47 U.S.C. § 230(c)(2).

22. *See* 141 CONG. REC. 22045 (1995) (statement of Rep. Christopher Cox) (explaining the extent of liability protection of the Cox/Wyden Amendment).

23. S. REP. NO. 104-230, at 194 (1996).

24. JORDAN BELFORT, THE WOLF OF WALL STREET (2007); THE WOLF OF WALL STREET (Paramount Pictures 2013).

25. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995),

26. Prodigy Communications Corporation was one of the leading internet information services in the 1990s. Known as being family-friendly, Prodigy provided users

bulletin board that Stratton Oakmont's president had "committed criminal and fraudulent acts" and that the company was a "cult of brokers who either lie for a living or get fired."[27] Stratton Oakmont sued Prodigy as a publisher of the alleged defamatory speech. A state trial court in Nassau County, New York held that Stratton Oakmont could recover damages against Prodigy because Prodigy did not just provide the forum for the speech, it also retained editorial control of the bulletin boards according to its own policies. Thus, Prodigy was responsible for the allegedly defamatory speech.

Congress designed Section 230 to overrule *Stratton Oakmont*:

> One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.[28]

Section 230 nullified *Stratton Oakmont* by enabling internet platforms to exercise editorial control over content through broad immunity from civil liability for such censorship.

Ultimately, Section 230(c)(1) bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[29] In addition, Section 230(c)(2) seemingly provides that internet service platforms, providers, and users may not be held liable for acting "in good faith to restrict access to . . . obscene" (and similar), "harassing," and "otherwise objectionable" content.[30] The breadth of Section 230's proper scope is subject to debate this Article does not

with access to a variety of content, including bulletin boards on which it monitored and regulated the content. *See id.* at *1–2 (Prodigy "held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin board . . . .").

27. *Id.* at *1.

28. H.R. REP. NO. 104-458, at 194 (1996).

29. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

30. What counts as an "interactive computer service" under Section 230? It appears that almost every way in which a person interacts with the internet counts. IAN C. BALLON, 4 E-COMMERCE & INTERNET LAW 37.05[2] (2020 update) ("[A]lmost any networked computer service would qualify as an interactive computer service, as would an access software provider.").

address.[31] Assuming Section 230 immunity is broad in its reach and commanding in its effect, RFRA limits its reach with respect to religious speech.

## II. THE RELIGIOUS FREEDOM RESTORATION ACT

The Free Exercise Clause[32] of the First Amendment to the United States Constitution provides, or more aptly once provided, robust protection for religious activity, including religious speech. From roughly 1940 to 1990, any government law or policy that burdened a person's religious exercise was subject to strict scrutiny[33] analysis.[34] That all changed in 1990 when Justice Scalia infamously penned the dagger that struck the Free Exercise Clause in the heart—*Employment Division v. Smith*.[35]

### *A. The Rise of RFRA*

*Smith* involved two members of a Native American Church denied unemployment compensation because they were fired for using peyote for religious purposes.[36] Oregon law prohibited the use of peyote for any purpose.[37] The Supreme Court, in an opinion by Justice Scalia, held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[38] The Court thus reserved strict scrutiny of government burdens on religious exercise to only those regulations "specifically directed at"

31. This Article also does not address the statutory exceptions to Section 230 immunity as detailed in 47 U.S.C. § 230(e). But to get a sense of the breadth of Section 230 immunity—at least according to some—consider *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). There, the Second Circuit held that Section 230 shielded Facebook from civil liability under federal anti-terrorism law after it allowed the terrorist group Hamas to use its platform to spread messages of violence. *Id.* at 59, 71.

32. The Free Exercise Clause applies both to states and to the federal government. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact [laws prohibiting the free exercise of religion].").

33. Under strict scrutiny, the government "may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Bd., Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981).

34. *E.g.*, *Cantwell*, 310 U.S. 296, 303–04; Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943); Thomas v. Collins, 323 U.S. 516, 530 (1945); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion); Sherbert v. Verner, 374 U.S. 398, 407 (1963); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); *Thomas*, 450 U.S. at 718; Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987).

35. 494 U.S. 872 (1990).

36. *Id.* at 874.

37. *Id.*

38. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

religious practice, rather than to all regulations that substantially burden religious exercise incidentally as well as intentionally.[39]

In the majority opinion, Justice Scalia curiously cites *Minersville School District v. Gobitis*,[40] in which the Court upheld the constitutionality of forcing school children to salute the American flag, even though they had a religious objection to doing so.[41] But three years later, the Court overruled *Gobitis*'s erroneous holding and restored the religious liberty of school children in *West Virginia State Board of Education v. Barnette*.[42]

*Smith*'s revision of Free Exercise Clause jurisprudence, toward a *Gobitis*-style subjugation of individual liberty, derived not from judicial restraint but from judicial policy concerns that applying strict scrutiny in Free Exercise claims "would be courting anarchy"[43] and would "open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."[44] Strict scrutiny remained applicable for laws that specifically target religious practice, as the Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[45] But even *Lukumi*'s holding is often viewed as neutered by its reliance on *Smith*.[46]

Just a few months after *Lukumi* failed to expand the application of strict scrutiny for religious liberty cases, President Bill Clinton signed Congress's response to *Smith*—RFRA.[47] With bipartisan support nearly unimaginable today—the bill passed via voice vote in the House[48] and in the Senate 97–3[49]—RFRA

39. *Id.* at 877–78.

40. *Id.* at 879 (citing Minersville Sch. Dist. v. Gobitis, 310 U. S. 586, 594–95 (1940)).

41. *Gobitis* at 599–600. The seven-Justice majority opinion casts itself as the Court exercising judicial restraint and allowing legislatures to determine the best means by which to inculcate young citizens with American values. *Id.* at 597–98. As the opinion notes, "It is not [the Court's] province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances." *Id.* at 598. To this end, the Court's rationale is well-grounded. But in misapplying the protections of the First and Fourteenth Amendments under cover of judicial restraint, the Court betrayed the constitutional principles the People entrusted it to defend.

42. 319 U.S. 624, 642 (1943).

43. *Smith*, 494 U.S. at 888.

44. *Id.*

45. 508 U.S. 520, 546 (1993).

46. *See* René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725, 731–32 (2011) ("[T]here was no suggestion that the *Lukumi* majority was limiting or retreating from the holding of *Smith* in any way.").

47. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb4).

48. 139 CONG. REC. 9687 (1993).

sought to restore the strict-scrutiny standard for all Free Exercise claims. The Coalition for the Free Exercise of Religion, a conglomeration of 66 organizations ranging across the political spectrum—from the Christian Legal Society to the American Civil Liberties Union, and from the National Association of Evangelicals to the American Humanist Association, pushed for RFRA's adoption.[50] President Clinton even joked that the broad political and cultural unity behind the passage of RFRA "shows . . . that the power of God is such that even in the legislative process miracles can happen."[51]

At the signing ceremony, President Clinton noted that "[t]he free exercise of religion has been called the first freedom"[52] and characterized RFRA as "basically say[ing] . . . that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion."[53] President Clinton called on the nation to "respect one another's faiths, fight to the death to preserve the right of every American to practice whatever convictions he or she has, [and] bring our values back to the table of American discourse to heal our troubled land."[54] RFRA was a remarkable achievement brought about by a unity that could only come from the Supreme Court's stunning reversal of decades of robust free exercise rulings.

### *B. RFRA's Unique Promise*

RFRA's text is straightforward. RFRA restores strict scrutiny analysis when the government burdens a person's exercise of religion.[55] That much is plain, and there are many volumes of analysis regarding the substance of RFRA. But RFRA also has a

49. 139 CONG. REC. 26416 (1993).

50. *See* Baptist Joint Committee for Religious Liberty, The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom 6, http://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf [http://perma.cc/J9QY-K98F] (reproducing a Letter sent by Oliver S. Thomas, Chair of the Coalition, to a Senator on October 20, 1993) (listing organizations).

51. Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

52. *Id.*

53. *Id.* at 2001.

54. *Id.*

55. RFRA originally applied both to the federal government and to the states and their political subdivisions. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down RFRA as it applies to the states and their political sub-divisions, *id.* at 536. RFRA continues to apply to the federal government. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 & n.1 (2006).

unique feature, and it is difficult to find its analog in federal law or otherwise. RFRA is a "super-statute"[56] in two ways.

First, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."[57] That is not completely remarkable.[58] RFRA simply creates a statutory cause of action that applies to all federal laws, regulations, and actions. Congress could have limited RFRA's reach to certain types of cases, but the statute clearly indicates it did not.

Second, Congress took the unique step of creating an enduring restraint on its own legislative power by providing that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."[59] This provision subjecting later-enacted laws to RFRA has been referred to as a "legislative precommitment,"[60] which in RFRA is designed to "secure[] Congress' view of the right to free exercise under the First Amendment."[61] Due to this legislative precommitment, RFRA is considered a "super-statute"[62] without analog in federal law.[63] Of course, Congress may curtail RFRA's application to subsequent laws by expressly exempting a new law from RFRA's reach, but such examples are few and far between.[64] Where

56. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."); *see also* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253–54 (1995) ("RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.").

57. 42 U.S.C. § 2000bb-3(a).

58. *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 213 (1995) ("Congress can restrain the federal agencies if it wants, and that is what it has done [in RFRA].").

59. 42 U.S.C. § 2000bb-3(b).

60. Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1917–23 (2001).

61. Tanzin v. Tanvir, 141 S. Ct. 486, 489 (2020).

62. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013) (citing Paulsen, *supra* note 56); *id.* at 1157 (Gorsuch, J., concurring) (same); Korte v. Sebelius, 735 F.3d 654, 673 (7th Cir. 2013) (same).

63. *See* Magarian, *supra* note 60 (identifying the line-item veto as "the closest parallel to Federal RFRA's legislative methodology," before explaining that "[c]loser analysis . . . reveals an important difference between the line-item veto and Federal RFRA").

64. *See, e.g.*, H.R. 5, 117th Cong. (2021) (exempting the proposed Equality Act from RFRA claims).

Congress simply remains silent in new legislation with respect to RFRA's application, RFRA applies under its express terms.

## III. RFRA APPLIES TO SECTION 230

Only three years separate the enactment of RFRA and the enactment of Section 230. Because Section 230 makes no mention of RFRA, RFRA expressly applies to it.[65] After an exhaustive search of the legislative record for Section 230, it does not appear that RFRA even surfaced as an issue. And why would it? Section 230 was enacted as part of a package to assist parents mainly in protecting their children from online pornography, not to empower Big Tech to censor wide swaths of religious speech. The Congress that passed Section 230 likely never imagined a situation in which the immunity would burden religious exercise. But circumstances have changed in the nearly thirty years since Section 230's passage. Increasingly capacious interpretations of "objectionable" enable Big Tech to take Section 230 far beyond its original focus to burden religious exercise in unanticipated ways. RFRA is designed to operate in exactly this kind of circumstance—ensuring that Congress's actions do not sweep so broadly as to violate Congress's interpretation of the First Amendment, especially in situations Congress could not anticipate. RFRA thus serves as a crucial guardrail to protect religious liberty by expressly applying to later statutes unless specifically excluded.

That RFRA applies to Section 230 is relatively straightforward. Congress could have exempted Section 230 from RFRA by expressly saying so, it did not, and therefore RFRA applies. How that operates in practice, though, proves a little more nuanced. Unless the Big Tech companies are considered governmental or quasi-governmental[66] by virtue of Section 230 immunity, RFRA would not provide a substantive claim against them. But RFRA's application is not limited only to substantive claims against government agencies. It also provides a defense when the legal claims of others substantially burden religious exercise.[67]

65. 42 U.S.C. § 2000bb-3(a).

66. *See, e.g.*, Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1989) (explaining that a private party can act as an agent or instrument of the government for Fourth Amendment purposes if there is a sufficiently high degree of government "participation in the private party's activities").

67. 42 U.S.C. § 2000bb-1(c); Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343–45

Building on that premise, the following Part posits that in lawsuits against Big Tech companies based on non-RFRA causes of action, RFRA operates as a congressionally mandated rule of statutory construction that deprives Section 230 of force where it substantially burdens religious exercise—unless the application of Section 230 is "the least restrictive means of furthering [a] compelling governmental interest."[68] In practice, this means that a plaintiff who brings a non-RFRA claim against a Big Tech company for censoring religious speech can use RFRA to refute a Section 230 defense.

### *A. RFRA Provides a Defense to Legal Claims*

RFRA provides that "[a] person whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a claim *or defense* in a judicial proceeding."[69] Ms. Chaganti's law review article extensively examines how RFRA operates as a defense, and we need not cover the same ground here. Circuits are split on how to interpret RFRA's application as a defense. Specifically, they are split as to whether the defense may only be used in suits where the government is a party, or if it applies in suits between two private parties as well.[70] However, Ms. Chaganti effectively explains how the latter interpretation is most consistent with RFRA's text and drafting history:

> The starting point for analysis is not RFRA's affirmative defense, but RFRA's basic rule: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in" the affirmative defense. Since it is well established that government burdens constitutional rights when it creates constitutionally burdensome rules to be enforced by private plaintiffs, this prohibition on government-imposed burdens is most naturally read to include suits by private plaintiffs. RFRA expressly applies to the "implementation" of federal law, and private plaintiffs suing over defendants' exercises of religion are enforcing, or "implement[ing]," a government-imposed burden on religion. RFRA's core prohibition applies, and the

(2013) (carefully reviewing the circuit split regarding whether RFRA may be used as a defense in suits by private plaintiffs).

68. 42 U.S.C. § 2000bb-1.

69. *Id.* § 2000bb-1(c) (emphasis added).

70. Chaganti, *supra* note 67, 343–45.

> private plaintiff can undertake to justify the burden if he chooses to do so.[71]

Although RFRA creates a cause of action, it also creates a broader principle of law as well. With that in mind, the next sections will explore how that broader principle functions in relation to other statutes in cases between private parties where the underlying claim is not related to RFRA.

### *B. RFRA Functions as a Congressionally Prescribed Canon of Statutory Construction*

Because RFRA operates as a "super statute" that "displac[es] the normal operation of other federal laws,"[72] it is similar in operation and effect to certain canons of statutory construction: the presumption against unconstitutionality, the constitutional-doubt canon, and the related-statutes canon. First, the presumption against unconstitutionality "disfavors interpretations that . . . would cause a statute to be unconstitutional."[73] Thus, "when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys."[74] Second, the similar constitutional-doubt canon goes further to avoid the constitutional questions altogether by providing that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter."[75] Both canons of interpretation operate similarly to narrow a statute's reach where it conflicts (or may conflict) with the Constitution, rather than invalidating the statute outright. RFRA operates very similarly to these avoidance canons, although Congress supplies the principle that interpretations of statutes must avoid violating. That is, in effect, RFRA is

71. *Id.* at 357 (footnotes omitted).

72. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

73. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 66 (2012).

74. Panama Refining Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting); *see, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("Whenever called upon to judge the constitutionality of an Act of Congress . . . the Court accords 'great weight to the decisions of Congress.'" (citation omitted)).

75. U.S. *ex rel.* Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909); *see* SCALIA & GARNER, *supra* note 73, at 247 ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt.").

Congress's prescription that its statutes must be construed in a way consistent with Congress's interpretation of the First Amendment's Free Exercise Clause.[76]

Moreover, as the related-statutes canon demonstrates, it is not at all unusual for two statutes to be interpreted in light of each other. The related-statutes canon provides that "[s]tatutes *in pari materia* are to be interpreted together, as though they were one law."[77] This canon "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so."[78] Just as the meaning of a word or phrase within a statute is affected by that statute's other provisions, individual statutes exist within a broader body of law and should not be interpreted to clash with it.[79] Rather, laws must be interpreted within the context of other related laws.[80] RFRA employs a similar principle, because Congress designed RFRA to provide a default context for all other law[81]—by RFRA's terms, courts must interpret laws in a way consistent with RFRA, which is an operation similar to that of the related-statutes canon.[82]

In this sense, RFRA operates much like a canon of statutory construction, albeit one that Congress designed to apply by operation of statute rather than one that operates by judicial practice. It supplies a limiting principle that cabins the application of all other laws, and, like a canon of statutory construction, it is relevant to interpreting a statute properly regardless of the procedural posture in which the statutory interpretation question arises.

76. *See* Tanzin v. Tanvir, 141 S. Ct. 486, 489 (2020) (explaining that RFRA is designed to "secure[] Congress' view of the right to free exercise under the First Amendment").

77. SCALIA & GARNER, *supra* note 73, at 252. Although the concept of statutes *in pari materia* generally refers to statutes that both concern the same subject, *id.*, the concept of *in pari materia* provides "a good deal of leeway" as to how affiliated statutes must be to be interpreted together, *id.* at 253. RFRA, by its express and intended operation, is essentially a universally affiliated statute.

78. *Id.* at 252.

79. *Id.*

80. *Id.* ("'Statutes,' Justice Frankfurter once wrote, 'cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947))).

81. *See* 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ."); Paulsen, *supra* note 56; *see also* Part II.

82. To be clear, we suggest here that RFRA textually operates in a similar way to the related-statutes canon, not that the related-statutes canon gives RFRA its superstatute status.

### *C. RFRA Can Refute a Section 230 Defense*

Operating as a rule of statutory construction, RFRA can refute a Section 230 defense raised against a non-RFRA cause of action. While RFRA likely does not afford a cause of action against Big Tech companies that censor religious speech,[83] RFRA limits the immunity that Section 230 confers. So, when Congress granted immunity to interactive computer services under Section 230, it only granted that immunity insofar as it does not impose a substantial burden on religious exercise.

In practice, this argument would arise when a plaintiff sues an interactive computer service under a non-RFRA cause of action for censoring the plaintiff's religious speech, the interactive computer service raises Section 230 as a defense, and then the plaintiff has the opportunity to demonstrate that Section 230 immunity does not apply because it would violate RFRA to do so. As a general matter, a defendant bears the burden of demonstrating affirmative defenses, and the plaintiff may respond to argue that the defendant's asserted affirmative defense does not apply.[84] RFRA would simply operate as an argument the plaintiff could raise in response to the Section 230 affirmative defense; the plaintiff would have to demonstrate that affording the defendant Section 230 immunity substantially burdened the exercise of his sincerely held religious beliefs. If the defendant failed to establish that Section 230 accomplished a compelling interest by narrowly tailored means as applied to that particular plaintiff,[85] RFRA would require that the Section 230 defense fail. Although the private defendant would have to satisfy the compelling interest and narrow tailoring prongs of RFRA's test, it is not unusual for RFRA to apply in a lawsuit where the government is not a party and thus for a private party

83. *But see* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 614–16 (1989) (concluding that the Fourth Amendment applied to alcohol and drug testing by private railroads because the federal government "encourage[d], endorse[d], and participat[ed]" in the testing).

84. *See, e.g.*, Speaks v. Mazda Motor Corp., 118 F. Supp. 3d 1212, 1223–24 (D. Mont. 2015) (citing BLACK'S LAW DICTIONARY 482 (Bryan A. Garner ed., 9th ed. 2009)); U.S. *ex rel.* Bias v. Tangipahoa Par. Sch. Bd., 816 F.3d 315, 322 (5th Cir. 2016) (explaining that once defendant raises affirmative defenses plaintiff must have the opportunity to respond).

85. *See* 42 U.S.C. § 2000bb-1; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.").

to bear the burden of defending a law's validity under RFRA, as explained above.[86]

Consider the following hypothetical: A person of deep religious convictions posts on Twitter that, according to her faith tradition, marriage should only be between a man and a woman. Twitter takes the position that such a statement is "objectionable" and removes the content from its platform. The person who posted the religious statement sues Twitter for violating a consumer protection statute in her state, which authorizes suits against Twitter for this sort of conduct. In response to the lawsuit, Twitter files a motion to dismiss based on Section 230 immunity. The plaintiff responds that censoring the speech at issue imposes a substantial burden on her religious exercise. Twitter is not likely in a position to refute this, because even a minor penalty on religious exercise (including religious expression) qualifies as a substantial burden, and as a result substantial burden is ordinarily assumed in RFRA cases.[87] By way of analogy, in a defamation suit brought by a public figure, after it is established that the plaintiff is a public figure, the question becomes whether the plaintiff meets the heightened standard of proving malice—or in other words, whether the defendant engaged in conduct that falls outside of the protection of the First Amendment. Similarly, in this hypothetical, after it is established that Twitter's Section 230 immunity substantially burdens the plaintiff's religious exercise, the question for Twitter becomes: does the government have a compelling interest in conferring Section 230 immunity on Twitter in this particular situation, and, if so, is conferring Section 230 immunity in this particular situation the least restrictive means of furthering that

86. *See supra* subpart III(A); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (finding the First Amendment provides a defense to a libel lawsuit); Shelley v. Kraemer, 334 U.S. 1, 17–18 (1948) (finding court's role in enforcing racially discriminatory restrictive covenant between two private parties constitutes government action subject to the Fourteenth Amendment).

87. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421–42, 2426 (2022) (finding school's restriction on football coach's religious expression violated the Free Exercise Clause); Wisconsin v. Yoder, 406 U.S. 205, 208 (1972) (finding $5 fine against Amish parents for violating compulsory attendance law a substantial burden); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) (relying on *Thomas*, which found a substantial burden when a steel worker was denied unemployment benefits after losing his job because he objected only to manufacturing weapons but not the steel itself) (citing Thomas v. Review Bd., Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981)); *see also Kennedy*, 142 S. Ct. at 2425 (noting that religious expression may not be treated as "second-class speech").

compelling interest?[88] If Twitter cannot demonstrate those two things, then it does not enjoy Section 230 immunity for censoring the plaintiff's religious speech. That does not mean the plaintiff will prevail on the underlying claim against Twitter. It simply means that Twitter is not statutorily immune from the claim. While RFRA would not resolve the underlying merits of the state law claim, it would refute a defense and allow the merits to proceed.

It is fair to ask how Twitter would be able to make the requisite showing. One possible scenario could be if a Twitter user tries to justify posting pornography by asserting a religious belief. Twitter could demonstrate that Congress had a compelling interest in encouraging censorship of illegal pornography and that there is no less restrictive means to accomplish that goal than by removing the illegal pornography in question. There are any number of scenarios wherein Twitter might successfully make the case that applying Section 230 in a particular case can meet RFRA's exacting standard. But Twitter would have to make the case that Section 230's application *in this particular case* meets the standard because the Supreme Court's interpretation of RFRA requires a case-by-case analysis regarding "the particular claimant whose sincere exercise of religion is being substantially burdened."[89]

Although RFRA would not provide the underlying cause of action in these hypotheticals, many causes of action could potentially provide the bases for lawsuits against Big Tech companies for censoring religious speech. State causes of action could include libel, consumer protection laws,[90] public accommodations laws, or social media regulations.[91] In any of the state court proceedings, a Section 230 defense would still be

88. *See* 42 U.S.C. § 2000bb-1 (codifying RFRA's test).

89. *O Centro*, 546 U.S. at 430–31.

90. *See, e.g.*, *AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations*, TEX. ATT'Y GEN. (Dec. 16, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-multistate-coalition-lawsuit-against-google-anticompetitive-practices-and-deceptive [https://perma.cc/RG9G-WNLA] (announcing that Texas was "leading a multistate coalition in a lawsuit against Google for multiple violations of federal and state antitrust and consumer protection laws").

91. *See, e.g.*, Mackenzie Cerwick, *Censoring Social Media: Texas HB20*, VAND. J. ENTM'T & TECH. L. BLOG (Oct. 6, 2021), https://www.vanderbilt.edu/jetlaw/2021/10/06/censoring-social-media-texas-hb-20/ [https://perma.cc/7JUR-B67N] ("A Texas resident who has been 'wrongfully' censored due to their political ideology can sue under [a Texas] law . . . .").

subject to RFRA because it is a federal law, even though RFRA is not a cause of action against state actors.[92] Antitrust,[93] common carrier laws,[94] federal consumer protection laws,[95] or telecommunications regulations could potentially provide causes of action on the federal side.

### *D. RFRA's Impact on Other Congressional Grants of Immunity to Private Entities or Individuals*

Although the previous subpart specifically analyzed the Section 230 context, the concept that RFRA can refute a defense to a legal claim can theoretically apply to other kinds of federal statutory immunities. As a practical matter, however, the above-described application of RFRA may not come into conflict with other federal statutory immunities for private parties. Two examples are explored here to flesh out how RFRA analysis can play out in similar procedural postures.

#### 1. PLCAA Immunity

The Protection of Lawful Commerce in Arms Act (PLCAA) exempts various parts of the firearms industry from liability "for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended."[96] Congress passed the PLCAA because "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, . . . [and] invites the disassembly and destabilization of other industries and economic sectors lawfully competing" in the U.S. economy.[97] So, the PLCAA is designed to establish as a matter of law the general tort principle that the manufacturer of a given firearm is not the proximate cause of harm to third parties when that firearm is used illegally.[98] (The PLCAA does not, however, immunize manufacturers for product defects.)[99]

92. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

93. *See* Kelly Ranttila, *Social Media and Monopoly*, 46 OHIO N.U. L. REV. 161, 167 (2020) (noting that "lawsuits have attempted to use [the Sherman Antitrust Act] to curtail social media companies' alleged misconduct").

94. *See generally, e.g.*, 47 U.S.C. § 201 et seq. (regulating common carriers).

95. *See generally, e.g.*, 15 U.S.C. § 1051 et seq. (concerning, *inter alia*, unfair competition and false advertising).

96. 15 U.S.C. § 7901(a)(5); *id.* §§ 7901–7903.

97. *Id.* § 7901(a)(6).

98. *Id.*; *see, e.g.*, *id.* § 7903(5)(A)(iii) (withholding PLCAA immunity in "an action in

This immunity resembles Section 230's declaration that interactive computer service providers are not publishers, but it functions differently in certain respects. The goal of each is the same—to immunize from civil liability those who provide the product and to place the responsibility for actions using the product on those who engage in wrongful conduct.[100] The difference between the PLCAA and Section 230 is that the latter pushes beyond mere immunity from civil liability and grants the product provider the ability to dictate appropriate uses of the product—to screen out content, block consumers, and take affirmative action in taking down content. This is a discretionary power that can be so broadly construed that it becomes nearly unlimited. In contrast, the PLCAA does not give gun manufacturers the federally protected power to restrict firearm purchasers or to take firearms away from citizens. Nor does it enable those manufacturers to dictate which uses of guns are lawful and which are not; that is a matter for federal and state law. Further, Section 230 gives interactive computer services immunity from actions that would otherwise give rise to valid private causes of action; the censorship Section 230 enables would otherwise define those platforms as publishers liable for that content.[101] The PLCAA, however, simply prevents outlier courts from departing from the standard formulation of proximate cause to hold firearm manufacturers liable where they otherwise would not be.[102] So, Section 230 and the PLCAA are similar in purpose and effect, but Section 230's grant of immunity is far more robust because it authorizes the internet service platforms to engage in affirmative conduct aimed at the consumers and the public in a way that the PLCAA does not.

Because the PLCAA has a more limited effect, RFRA would not likely have much application to the kind of case the PLCAA encompasses. An outlying example of a potential case could be a church's lawsuit against a firearm manufacturer for harms suffered in a church shooting by a crazed third party. The

which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought").

99. *Id.* §§ 7902(a), 7903(5)(A)(v).

100. *See* 47 U.S.C. §§ 230(b)(1), (3) (establishing the policy, *inter alia*, to "promote the continued development of the Internet" and "encourage the development of technologies which maximize user control over what information is received").

101. *See supra* subpart I.B.

102. *See supra* note 98.

church would have to show that the PLCAA immunity substantially burdens its religious exercise, but the chain of causation between the PLCAA immunity and the harm to the church's religious beliefs would be incredibly attenuated through multiple third-party actions and chance circumstances. As a result, the plaintiff would not likely carry RFRA's substantial-burden prong.

### 2. Diplomatic Immunity

Diplomatic immunity[103] provides another potential example. Statutory diplomatic immunity is a congressional grant of absolute immunity to diplomats and their families from criminal prosecution.[104] It enforces the United States' obligations under the Vienna Convention[105] in order to assure reciprocal protections for United States diplomats and their families overseas.[106] Diplomatic immunity is far broader than Section 230 immunity, and it differs in two key ways. First, Congress passed the Diplomatic Relations Act[107] only because it sought to clarify the obligations of the United States pursuant to the otherwise self-executing Vienna Convention on Diplomatic Relations.[108] The Vienna Convention is the supreme law of the land because of the United States Constitution's Supremacy Clause.[109] It was therefore unnecessary for Congress to act for diplomatic immunity to exist, and diplomatic immunity would exist in the absence of a statute. Diplomatic immunity is, in this way, a different creature than Section 230.

Second, many typical contexts in which RFRA issues would arise—namely potential burdens on consular employees' religious exercise—are not relevant because of the

103. 22 U.S.C. §§ 254a–254e.

104. 1 A.L.R. Fed. 2d 351 § 2 (2005).

105. *Id.*; 22 U.S.C. § 254b.

106. *Cf.* 1 A.L.R. Fed. 2d 351 § 2 (explaining that "[i]nviolability of the diplomat's person" is "essential in order to allow the diplomat to perform his or her functions without any hindrance from the government of the receiving state, its officials, and even private persons").

107. 22 U.S.C. §§ 254a–254e.

108. "[A] treaty is . . . self-executing, when it 'operates of itself without the aid of any legislative provision.'" Medellin v. Texas, 552 U.S. 491, 505 (2008) (citation omitted). The Vienna Convention does not contain an article requiring legislative action by the endorsing state. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

109. *See* U.S. CONST. art. VI, § 2 ("[T]he laws of the United States . . . [and] all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

extraterritoriality canon.[110] Under that canon, RFRA does not apply in other countries' territory, as consulates are deemed to be.[111] Finally, diplomatic immunity serves a compelling interest that would likely survive a RFRA challenge. Diplomatic immunity serves interests at the core of the United States' ability to negotiate with other countries.[112] It also ensures that United States diplomats receive the same protection overseas—crucially, in countries with laws that would seriously endanger diplomats' lives or liberties.[113] And it is not likely that a more narrowly tailored method of protecting the United States' diplomats exists. Any abrogation of foreign diplomats' immunity could see reciprocal reductions in the protection other countries afford to United States diplomats. So, while it is conceivable that a diplomat could violate consulate workers' free-exercise rights by, for example, prohibiting them from attending religious services during non-work hours, RFRA will either not apply because of extraterritoriality, or the diplomatic immunity will likely be able to survive strict scrutiny.

* * *

These two examples demonstrate more concretely how RFRA analysis proceeds when it is raised to refute a defense. RFRA analysis will play out differently depending on the particulars of plaintiffs' claims and the type of defense at issue. As in any RFRA case, strict scrutiny robustly protects religious liberty, but it is not insurmountable.

110. *See* SCALIA & GARNER, *supra* note 73, at 268–72 ("A statute presumptively has no extraterritorial application . . . .").

111. *See* 1 OPPENHEIM'S INTERNATIONAL LAW § 494, at 1076 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("[T]he official residences of envoys were in every respect considered to be outside the territory of the receiving state . . . ."); Vienna Convention, *supra* note 108, art. 22 (declaring the premises of missions to be "inviolable" and "immune from search, requisition, attachment or execution"); *cf.* Rasul v. Meyers, 563 F.3d 527, 533 (D.C. Cir. 2009) (holding nonresident aliens not within the scope of RFRA's protections).

112. *See generally* 1 A.L.R. Fed. 2d 351 § 2 (2005) (defining diplomatic immunity as "the freedom from local jurisdiction accorded under principles of international law by the receiving state to the duly accredited diplomatic representatives of other states").

113. *See, e.g.*, Hristina Byrnes, *Thirteen Countries Where Being Gay Is Punishable by Death*, USA TODAY (June 19, 2019), https://www.usatoday.com/story/money/2019/06/14/countries-where-being-gay-is-legally-punishable-by-death/39574685/ [https://perma.cc/9PYX-7W6P].

## CONCLUSION

In *Cantwell v. Connecticut*,[114] the Court declared:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[115]

This principle remains true regardless of whether the government or a Big Tech company is responsible for silencing religious speech. The damage that censorship works to societal discourse and fundamental liberty is the same regardless of who is pulling the trigger, and Big Tech censorship is not merely a private business matter. Big Tech censorship occurs because the federal government specifically authorized it by law. And the federal government can take away what it gives. Through RFRA, Congress has done exactly that. Although the present conflict between Section 230 and religious liberty is a recent development due to circumstances the Section 230 drafters could not have envisioned, RFRA is designed to operate in novel circumstances. Since its passage, RFRA has supplied an interpretive principle for the entire body of federal law that becomes relevant when there is a substantial burden to the exercise of sincerely held religious beliefs. Now that Section 230 can impose such a burden, RFRA operates to limit it. While RFRA does not provide a broad solution to Big Tech censorship, it is a bird in the hand. Many comprehensive proposals would address the broader problem that Big Tech censorship poses, but such proposals may never carry the day. RFRA, on the other hand, has force against Section 230 *now*, operating as a last line of defense to protect religious liberty from Big Tech censorship.

114. 310 U.S. 296 (1940).
115. *Id.* at 310.