

CLOSING THE ONLINE SUICIDE ASSISTANCE LOOPHOLE: HOW TO REDUCE THE HARM OF PRO-SUICIDE WEBSITES

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In late 2021, The New York Times published an extensive investigation into a prominent website whose users encourage one another to take their own lives. While such websites and online forums have existed since the early days of the Internet, the investigation was the first time many citizens and lawmakers had heard of them. Spiking rates of depression and suicide—especially among teenagers and young adults—have further magnified the scope of this issue. Lawmakers in the U.S. Congress soon introduced bipartisan legislation with the intent of limiting the damage that the prominent website—and others like it—can cause. Yet this legislation closely resembled a number of bills that were periodically introduced in Congress over the past two decades—all of which died before reaching a vote on the House floor.

This Note examines the legal status of online suicide assistance forums and a number of potential avenues lawmakers and attorneys can pursue to reduce the harms these websites cause. While the First Amendment and Section 230 of the Communications Decency Act represent formidable hurdles to banning or criminalizing these websites, various state statutes and court rulings—along with certain foreign countries' related policies and regulations—provide insight into possible reforms. Part I of this Note discusses relevant First Amendment case law and how it would likely be applied in litigation over efforts to ban or criminalize online suicide assistance forums. Part II examines the role that Internet law and Section 230 play in this issue. Part III focuses on possible legislative solutions to the problem of online suicide assistance forums, and Part IV discusses other countries' efforts to combat such websites. Finally, Part V proposes an alternative path forward.

This Note discusses suicide and self-harm. If you are in crisis, please call, text, or chat with the Suicide and Crisis Lifeline at 988, or contact the Crisis Text Line by texting TALK to 741741.

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INTRODUCTION

In September 2019, 16-year-old Daniel Dal Canto was a high school junior, in a jazz band and getting straight A's. Yet he spent his nights online, hearing from strangers on the Internet about the most effective way to end his own life. On a prominent pro-suicide website, Daniel learned about sodium nitrite, an easily accessible lethal chemical that many young people have purchased online in recent years and swallowed, causing their deaths. "I thought that you were supposed to feel happy as you near" the date of your planned suicide, Daniel wrote on the online forum. "Is a part of me just desperately hanging on?" Another commenter quickly reassured Daniel: "Setting a date has always upset me. I just keep extending it, but I won't be able to forever. I don't think you're doing anything wrong. Hang in there." A few days later, Daniel's mother, Pam, found him in his bedroom; Daniel had ingested a lethal amount of sodium nitrite.¹

In late 2021, *The New York Times* published an extensive investigation about the popular website, an online gathering place—akin to a chat room—for people, including Daniel, who are contemplating suicide.² But instead of serving as a source for struggling people to find life-saving support, the website's focus is on teaching people how to take their own lives, and often encouraging them to do so. Users of the

1. Megan Twohey & Gabriel J.X. Dance, *Where the Despairing Log On, and Learn Ways to Die*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/interactive/2021/12/09/us/where-the-despairing-log-on.html> [<https://perma.cc/2ZUD-48VZ>].

2. *Id.*

website³ often instruct others on how to easily purchase death-inducing chemicals online, undetected by family members or loved ones.⁴ Despite the website's abhorrent nature, it remains live and easily accessible. As of 2021, likely more than 500 people had taken their own lives after visiting the website, according to the *Times*.⁵

In their investigation, *Times* reporters Megan Twohey and Gabriel J.X. Dance explained that the website's content is likely protected by the First Amendment, and while family members of suicide victims have requested that tech companies remove links to the website from their online algorithms, prominent companies like Google have refused to do so.⁶ Since the initial article ran, some members of Congress have tried to pressure tech companies into limiting access to websites that assist self-harm.⁷ Given the current legal landscape, any related legislation would have to comply with the First Amendment's broad free speech protections. Free speech absolutist groups like the American Civil Liberties Union (ACLU)⁸ and the Electronic Frontier Foundation (EFF) would likely oppose any narrowing of First Amendment doctrine. For example, EFF has condemned all content blocking on the Internet, regardless of the types of websites that are blocked—arguing that it violates Article 19 of the Universal Declaration of Human Rights.⁹ However, small changes to First Amendment interpretation that would

3. The prominent website is called Sanctioned Suicide. Another site is called Suicide Solution. Journalists covering these websites have openly struggled with whether to name them, hesitant to potentially contribute to increased Internet traffic on the sites. See, e.g., Twohey & Dance, *Where the Despairing Log On*, *supra* note 1. See also Shayla Love, *People Are Dying After Joining a 'Pro-Choice' Suicide Forum. How Much Is the Site to Blame?*, VICE (Nov. 19, 2020, 11:00 AM), <https://www.vice.com/en/article/z3vn9a/people-are-dying-after-joining-a-pro-choice-suicide-forum-how-much-is-the-site-to-blame> [<https://perma.cc/L5BA-427V>]. For the purposes of this Note, I will refer to these websites by name only when necessary.

4. Twohey & Dance, *Where the Despairing Log On*, *supra* note 1.

5. The Daily, 'Kids Are Dying. How Are These Sites Still Allowed?', N.Y. TIMES (Dec. 9, 2021), at 16:48 <https://www.nytimes.com/2021/12/09/podcasts/the-daily/suicide-investigation.html> [<https://perma.cc/9MG9-TDQ8>].

6. Twohey & Dance, *Where the Despairing Log On*, *supra* note 1.

7. See, e.g., Gabriel J.X. Dance & Megan Twohey, *Lawmakers Urge Big Tech to 'Mitigate Harm' of Suicide Site and Seek Justice Inquiry*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/technology/suicide-website-google.html> [<https://perma.cc/33GY-XRUM>].

8. See, e.g., *HB 184: Enhancement for Causing or Aiding Suicide (Shawn's Law)*, ACLU-PENNSYLVANIA (June 25, 2021), <https://www.aclupa.org/en/legislation/hb-184-enhancement-causing-or-aiding-suicide-shawns-law> [<https://perma.cc/PE9N-FTV8>].

9. Article 19 of the Universal Declaration of Human Rights says that every person has the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." See *Content Blocking*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/content-blocking> [<https://perma.cc/LFX2-W797>] (last visited Mar. 6, 2023).

remove protections for online suicide assistance would not affect other types of speech.

While a bipartisan bill sponsored by Rep. Lori Trahan (D-Mass.) is narrow enough that it would likely be viable despite the First Amendment, it would also work within the constraints of Section 230 of the Communications Decency Act—which immunizes website operators from prosecution stemming from users’ posts on the websites they run¹⁰—further limiting its effect.¹¹ With the Supreme Court’s decision in 2023 declining to change or eliminate Section 230’s protections for social media companies and online content hosts,¹² any imminent suicide-prevention legislation must adhere to current interpretations of that statute. However, potential legislative changes to Section 230 would open up new avenues to protect Americans from online suicide assistance forums.

Proposed legislation on the state level seeking to restrict sales of sodium nitrite,¹³ along with recent lawsuits against online retailers that have sold the lethal chemical to young people who went on to use it to take their own lives,¹⁴ represent a promising alternative avenue to reduce the number of suicides associated with online suicide assistance forums. But such strategies would not attack the root of the problem in the same way as more sweeping legislation that directly targets pro-suicide websites.

The purpose of this Note is to analyze the feasibility and constitutionality of legal strategies to curb the easy access that vulnerable people have to suicide instructions. In addition to relevant First Amendment case law from both federal and state courts, this Note will examine

10. Lizzie O’Leary, *A Supreme Court Case Could Decide the Fate of the Modern Internet*, SLATE (Oct. 10, 2022, 12:36 PM), <https://slate.com/technology/2022/10/gonzalez-v-google-section-230.html> [https://perma.cc/VBK9-5UGG].

11. Gabriel J.X. Dance & Megan Twohey, *Bill Outlawing Online Suicide Assistance Would Open Sites to Liability*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/technology/online-suicide-assistance-bill.html> [https://perma.cc/EG54-UGRT].

12. Robert Barnes & Cat Zakrzewski, *Supreme Court Rules for Google, Twitter on Terror-related Content*, WASH. POST (May 18, 2023, 11:04 AM), <https://www.washingtonpost.com/politics/2023/05/18/gonzalez-v-google-twitter-section-230-supreme-court/> [https://perma.cc/5YAG-3HPW].

13. See Zach Williams, *Brooklyn Dem Floats Ban on ‘Poison’ Sodium Nitrite Linked to Youth Suicides Across US*, N.Y. POST (Feb. 24, 2023, 7:03 PM), <https://nypost.com/2023/02/24/nys-sen-andrew-gounardes-floats-sales-ban-on-sodium-nitrite-tied-to-youth-suicides/> [https://perma.cc/GN6K-694T].

14. See, e.g., Eric Burkett, *Amazon Can’t Dodge Claims of Negligence in Teens’ Suicides*, COURTHOUSE NEWS SERV. (Feb. 16, 2023), <https://www.courthousenews.com/amazon-cant-dodge-claims-of-negligence-in-teens-suicides/> [https://perma.cc/SZ2A-TVU6].

U.S. Internet law, including Section 230; proposed and actual legislation on the federal and state levels; the pertinent legal landscape in a number of foreign countries; and finally, possible alternative ways to reduce harm through civil court action. This Note will ultimately argue that while narrow legislation in Congress or in state legislatures—in addition to lawsuits filed with the goal of making it more difficult for struggling young people to acquire lethal means—could help reduce the harm caused by online suicide assistance forums, lasting, meaningful change would require reformation of Section 230 and would be most successful if courts also reinterpreted aspects of First Amendment free speech law.

I.

THE FIRST AMENDMENT HURDLE

A. *U.S. Supreme Court Jurisprudence*

Any legislation to protect Americans from harms on the Internet must withstand judicial scrutiny under the U.S. Constitution’s freedom of speech clause. The First Amendment prescribes that “Congress shall make no law . . . abridging the freedom of speech.”¹⁵ While these words broadly protect Americans’ right to say what they want, U.S. courts—primarily the Supreme Court—have at various points qualified or created exceptions to the fundamental right to free speech. For example, First Amendment jurisprudence distinguishes between “content-neutral” regulations, which have an incidental impact on speech, and “content-based” regulations, which are enacted for the *purpose* of regulating speech.¹⁶ Perhaps unsurprisingly, content-based regulations on speech are more difficult for a state to pass without violating the First Amendment.¹⁷

More importantly for the purposes of this Note, the U.S. Supreme Court has identified certain “less-protected” types of speech that fall outside the purview of the First Amendment.¹⁸ While restrictions on free speech must be able to withstand strict scrutiny analysis—meaning that the statute in question must be narrowly tailored to serve a compelling

15. U.S. CONST. amend. I.

16. Thea E. Potanos, Note, *Dueling Values: The Clash of Cyber Suicide Speech and the First Amendment*, 87 CHI.-KENT L. REV. 669, 679 (2012).

17. According to the Minnesota Supreme Court, a state bears the burden of showing that its content-based restriction on speech does not violate the First Amendment. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014) (citing *State v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 885–86 (Minn. 1992)).

18. See Potanos, *supra* note 16, at 679–80 (identifying low value speech as speech which is less protected).

governmental interest¹⁹—less-protected speech is generally subject to less judicial scrutiny than is traditional speech.²⁰ In fact, regularly protected speech has repeatedly been found to be completely protected by the First Amendment.²¹

The Supreme Court initially created a category of less-protected or low-value speech in the 1940s and has expanded the category since then. The Court found in *Chaplinsky v. New Hampshire* (1942) that there are several classifications of speech that carry “slight social value” and are therefore less protected.²² In *Chaplinsky*, the Court wrote that states are able to prohibit the use of “fighting words” which would incite an “ordinary citizen” to immediately physically retaliate.²³ Additionally, the *Chaplinsky* Court found that obscenity is a less-protected category of speech.²⁴ The Court then held in *Giboney v. Empire Storage & Ice Co.* (1949) that “constitutional freedom for speech [does not] extend [protection] to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”²⁵

The Supreme Court later designated incitement as a new category of less-protected speech in its landmark 1969 decision in *Brandenburg v. Ohio*.²⁶ To fit the category, speech must incite actual action instead of constituting mere advocacy for an issue or point of view.²⁷ *Brandenburg* has proven to be a highly consequential decision, as courts have applied the *Brandenburg* test to other types of cases where speech “advocates, encourages, or aids and abets an unlawful action.”²⁸

However, in 2012, the U.S. Supreme Court in *United States v. Alvarez* declined to designate speech that constitutes a lie as a new category of less-protected speech.²⁹ The Court held that the U.S. government cannot regulate speech on the sole basis of it being a lie if the speaker’s purpose was to “gain a material advantage” or affect “other valuable considerations.”³⁰ In *Alvarez*, the Court struck down a key provision

19. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion).

20. James Schoeberl, *Constitutional Law: How Minnesota Unconstitutionally Broadened Its Assisted-Suicide Statute*—*State v. Melchert-Dinkel*, 41 WM. MITCHELL L. REV. 398, 404 (2015).

21. *Id.* at 405 (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000)).

22. *Id.* at 402 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

23. Ellen Luu, *Web-Assisted Suicide and the First Amendment*, 36 HASTINGS CONST. L.Q. 307, 312–13 (2009) (citing *Chaplinsky*, 315 U.S. at 572).

24. *Chaplinsky*, 315 U.S. at 571–72.

25. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498–501 (1949).

26. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

27. *Id.* at 449.

28. Potanos, *supra* note 16, at 680.

29. *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion).

30. *Id.* at 723.

of the 2006 Stolen Valor Act on the grounds that Congress could not criminalize the speech in question, even though it was untrue.³¹ In doing so, the Court recognized that a speaker knowing that they are lying does not necessarily mean that their speech is constitutionally unprotected.³²

The Supreme Court has not foreclosed the possibility of identifying further types of less-protected speech in its future jurisprudence. In his 2010 majority opinion in *United States v. Stevens*, Chief Justice John Roberts wrote that such categories of speech would likely be those that have historically been unprotected.³³

B. State Supreme Courts

Because state laws in the United States must be permissible under the federal constitution, state supreme courts have also played a role in the development of free speech law in the United States. In the past decade, two state high court decisions have been particularly consequential to the intersection of the Internet, assisted suicide, and free speech.

In 2019, the Massachusetts Supreme Judicial Court—the state’s highest court—affirmed the conviction of Michelle Carter on charges of involuntary manslaughter.³⁴ Carter had repeatedly texted her suicidal boyfriend, telling him to go through with taking his own life, including after he had expressed second thoughts and hesitated. After receiving her texts, he died by suicide. The Supreme Judicial Court found that Carter’s involuntary manslaughter conviction survived strict scrutiny; the state has a compelling interest in preserving the lives of its citizens, and the law that Carter violated was narrowly tailored to fit that state interest, meaning that it could stand despite the First Amendment of the U.S. Constitution.³⁵ Similarly, in *State v. Melchert-Dinkel*,³⁶ the Minnesota Supreme Court used the U.S. Supreme Court decision in

31. Cass Sunstein, *Can the Government Regulate Deepfakes?*, WALL ST. J. (Jan. 7, 2021, 11:56 AM), <https://www.wsj.com/articles/can-the-government-regulate-deepfakes-11610038590> [<https://perma.cc/7PSJ-WPG7>].

32. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 21 (Minn. 2014) (citing *Alvarez*, 567 U.S. at 718–19).

33. *United States v. Stevens*, 559 U.S. 460, 472 (2010) (holding that animal cruelty should not be one of these exceptions).

34. *Commonwealth v. Carter*, 115 N.E.3d 559 (Mass. 2019). Massachusetts has no assisted suicide statute. See Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 83 (2018).

35. David L. Hudson Jr., *Free Speech is No Defense for Teen Who Urged Friend to Commit Suicide, MA High Court Rules*, FREE SPEECH CTR. (Feb. 20, 2019), <https://www.mtsu.edu/first-amendment/post/200/free-speech-is-no-defense-for-teen-who-urged-friend-to-commit-suicide-ma-high-court-rules> [<https://perma.cc/4S88-5WXX>].

36. 844 N.W.2d at 13.

*Washington v. Glucksberg*³⁷ to establish that because of the state's compelling interest in the protection of human life,³⁸ statutes criminalizing speech intended to assist another person in dying by suicide could withstand strict scrutiny.³⁹

In *Melchert-Dinkel*, the Minnesota Supreme Court overturned in part the conviction of William Melchert-Dinkel, a registered nurse who had assumed false identities online in an effort to persuade depressed people to take their own lives.⁴⁰ The *Melchert-Dinkel* court found that the part of the state statute in question⁴¹ that criminalized “advising” or “encouraging” someone to die by suicide was not sufficiently narrowly tailored to fit the legitimate state interest in keeping citizens alive and preventing suicide.⁴² Therefore, according to the Minnesota Supreme Court, statutory language that criminalizes “advising” or “encouraging” another person to take their own life is overly broad and unconstitutional under the First Amendment of the U.S. Constitution.⁴³ The court, however, found that the specific prohibition on “assisting” another person's suicide was sufficiently narrowly tailored—and was therefore constitutional⁴⁴—because assistance is directed towards a specific individual and applies only to “the most direct, causal links between speech and the suicide.” Therefore, while the court found that speech can constitute assistance that alone enables another person to commit suicide, its holding was quite narrow.⁴⁵ In an earlier iteration of the *Carter* case, the Massachusetts Supreme Judicial Court cited *Melchert-Dinkel* in noting that “the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide.”⁴⁶

37. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

38. In *Glucksberg*, the U.S. Supreme Court found that states *do* have a fundamental interest in protecting life. Potanos, *supra* note 16, at 678 (citing *Glucksberg*, 521 U.S. at 710). Additionally, the Court found in *Glucksberg* that assisted suicide is not a fundamental right under the Due Process Clause—and that therefore a Washington State statute outlawing the practice did not violate the Due Process Clause of the Fourteenth Amendment. (The Court has also held that the First Amendment of the U.S. Constitution applies to the states via the Fourteenth Amendment. See *Melchert-Dinkel*, 844 N.W.2d at 18).

39. Schoeberl, *supra* note 20, at 415 (citing *Melchert-Dinkel*, 844 N.W.2d at 22 (citing *Glucksberg*, 521 U.S. at 728)).

40. *Melchert-Dinkel*, 844 N.W.2d at 16.

41. The statute said that “whoever intentionally advises, encourages, or assists another in taking the other's own life” can be held criminally liable. MINN. STAT. § 609.215 (2022).

42. *Melchert-Dinkel*, 844 N.W.2d at 23–24.

43. Schoeberl, *supra* note 20, at 415 (citing *Melchert-Dinkel*, 844 N.W.2d at 23–24).

44. *Melchert-Dinkel*, 844 N.W.2d at 16.

45. *Id.* at 23.

46. *Commonwealth v. Carter*, 52 N.E.3d 1054, 1064 n.17 (Mass. 2016).

In *Melchert-Dinkel*, the Minnesota Supreme Court found that Melchert-Dinkel's conduct, inasmuch as it was merely "advising" or "encouraging" people to take their own lives and not actually "assisting" them in doing so, did not fall under any of the established content-based exceptions to the First Amendment that the U.S. Supreme Court had established in *Giboney*, *Brandenburg*, or *Alvarez*.⁴⁷ The *Melchert-Dinkel* court also wrote that it was loath to broaden any exception to the First Amendment of the U.S. Constitution beyond any exemption previously established or noted by the U.S. Supreme Court.⁴⁸ On remand, Melchert-Dinkel was convicted of assisting suicide for suggesting the suicide method used by a victim and one count of attempted assisted suicide for suggesting a method that the other victim did not end up using.⁴⁹

Other state supreme courts have dealt with related issues. In 2012, the Georgia Supreme Court used strict scrutiny to determine the constitutionality of a state statute that made public advertisements or offers of assisted-suicide services a criminal offense.⁵⁰ The Georgia law specifically said that any person "who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony."⁵¹ In its decision, the Georgia Supreme Court found that for the law to stand, it would have had to withstand strict scrutiny analysis because of its restriction on free speech rights guaranteed by the Georgia Constitution and the U.S. Constitution. But while the court found that the state had a compelling interest in preserving human life, it found that this statute was not sufficiently narrowly tailored to fit that interest.⁵² Importantly, the Georgia statute in question did not ban *every* act of assisted suicide; rather, it only banned public advertisements or offers to assist in the act of suicide. Therefore, assisted suicide itself was not an illegal act. The statute was therefore *underinclusive* of the state's stated justification—to protect human life—and was thus not narrowly tailored enough to justify its restriction on Georgians' freedom of speech.⁵³ Indeed, underinclusiveness in a statute can be problematic in strict scrutiny analysis because it can signal pretext for a government favoring one form of

47. *Melchert-Dinkel*, 844 N.W.2d at 19–21.

48. *Id.* at 20.

49. Binder & Chiesa, *supra* note 34, at 117.

50. *Final Exit Network, Inc. v. State*, 722 S.E.2d 722, 722 (Ga. 2012).

51. GA. CODE ANN. § 16-5-5(b) (2010).

52. *Final Exit Network*, 722 S.E.2d at 724.

53. *Id.*

speech over another form that lawmakers simply find less desirable.⁵⁴ Therefore, the court held that the state law was unconstitutional under both the Georgia Constitution and the First Amendment of the U.S. Constitution.⁵⁵

Suicide pacts can also pose complex problems for state courts. While suicide and attempting suicide were considered criminal acts under common law, and survivors of suicide pacts were traditionally prosecuted for murder, California does not follow any of these precedents.⁵⁶ In 1983, the California Supreme Court overturned the murder conviction of a teenager who had survived a car crash that killed his friend. The two friends had entered into a suicide pact, but the defendant Joseph was the one driving the car at the time of the crash. The court remanded the case to the lower court to determine whether the defendant's conviction for aiding and abetting a suicide should stand.⁵⁷

C. *Giboney or Brandenburg?*

Given the somewhat limited case law regarding online speech that encourages people to commit suicide, there are a number of ways that courts could address such cases in the future.⁵⁸ In 2012, Thea Potanos suggested that pro-suicide Internet speech should either be analyzed using the strict scrutiny test or should count as a newly recognized traditional category of unprotected speech under *Stevens*.⁵⁹ But given that the Supreme Court has not yet recognized such a category, courts generally use either *Giboney* or *Brandenburg* to determine whether online speech that encourages someone to commit suicide is unprotected by the First Amendment. In 2012, years before the Massachusetts Supreme Judicial Court's *Carter* decision, Potanos wrote that encouragement to commit suicide is likely to be analyzed under *Brandenburg* because "encouragement is a form of advocacy." Potanos theorized, therefore, that *Giboney* is likely to be applied only to instructions or directions on how to commit suicide, and not mere encouragement.⁶⁰ Furthermore, Potanos argued that if a court strictly applies the *Brandenburg* test, it would be difficult for it to find an act of encouragement illegal. Indeed, the hypothetical scenario that Potanos posed was quite similar to the

54. Luu, *supra* note 23, at 326.

55. *Final Exit Network*, 722 S.E.2d at 725.

56. *See In re Joseph G.*, 667 P.2d 1176, 1178–82 (Cal. 1983).

57. *Id.* at 1176.

58. Indeed, "the U.S. Supreme Court has never considered a First Amendment challenge to a statutory prohibition against assisting another in committing suicide." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 22 (Minn. 2014).

59. Potanos, *supra* note 16, at 671.

60. *See id.* at 691.

Carter case, and the Massachusetts Supreme Judicial Court did not mention *Brandenburg* in its *Carter* opinion, instead applying *Giboney* to affirm Carter’s conviction.⁶¹

Carter was an unusual case, however, in that the defendant was charged with involuntary manslaughter because Massachusetts lacks a statute proscribing assisted suicide. The *Carter* court held under *Giboney* that Carter’s conviction did not violate free speech protections “because her conduct was not necessarily related to speech, and criminal conduct speech was unprotected.”⁶² The Supreme Judicial Court therefore reasoned that Carter “cannot escape liability just because she happened to use ‘words to carry out [her] illegal [act]’”—the act of involuntary manslaughter.⁶³ The court explained that it was “not punishing words alone . . . but reckless or wanton words causing death. The speech at issue is thus integral to a course of criminal conduct and thus does not raise any constitutional problem. . . . Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person’s will to live has been proscribed.”⁶⁴

In cases in which speech aids or abets a crime, courts have used *Giboney* as precedent instead of the *Brandenburg* incitement test,⁶⁵ finding that printed material alone can constitute the “aiding or abetting” of a crime.⁶⁶ Under the *Giboney* test, direct or physical incitement is not necessary for speech to be exempted from the First Amendment; rather, the “speech or writing” could simply be “used as an integral part of conduct in violation of a valid criminal statute.”⁶⁷ In *Rice v. Paladin*, the Fourth Circuit extended this logic to a civil case, finding that the publisher of a book that included specific instructions for how to commit murder was civilly liable for the wrongful deaths of murdered individuals whose killer had followed the book’s instructions.⁶⁸

61. Clay Calvert, *The First Amendment and Speech Urging Suicide: Lessons from the Case of Michelle Carter and the Need to Expand Brandenburg’s Application*, 94 TUL. L. REV. 79, 83–84 (2019).

62. Commonwealth v. Carter, 115 N.E.3d 559 (Mass. 2019).

63. *Id.* at 570 (quoting Commonwealth v. Johnson, 21 N.E.3d 937 (Mass. 2014) (quoting United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982))).

64. *Id.* at 572.

65. Potanos, *supra* note 16, at 685. This distinction is possible because the *Giboney* standard is separate from the *Brandenburg* test; thus, a court could find that speech that is an integral part of illegal conduct is exempt from First Amendment protection under *Giboney* without applying the *Brandenburg* incitement test at all. This is what the Massachusetts Supreme Judicial Court did in *Carter*. 115 N.E.3d at 571.

66. *Id.* at 686.

67. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498–501 (1949).

68. *Rice v. Paladin Enters. Inc.*, 128 F.3d 233, 242–43 (4th Cir. 1997).

By contrast, in cases where the speech in question was not itself a criminal act, courts apply the *Brandenburg* test. For example, in *McCollum v. CBS*, the family of a teenager who had died by suicide while listening to recorded music sued the performer, composer, producer, and distributor of the music for negligence, intentional tort, and encouraging the suicide.⁶⁹ The California Second District Court of Appeals held that music produced for the public cannot incite someone to commit suicide; music or lyrics cannot “contain the requisite ‘call to action’” or “incitement to imminent violence” necessary for the defendants in the case to be held criminally liable for McCollum’s suicide.⁷⁰ This legal standard comes from *Brandenburg*, in which the U.S. Supreme Court said that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁷¹ As such, the *McCollum* court wrote that in order to find the defendants liable for McCollum’s suicide, the court would have had to conclude “(1) that [the artist’s] music was directed and intended toward the goal of bringing about the imminent suicide of listeners and (2) that it was likely to produce such a result” (emphasis omitted).⁷² Thus, causing someone to take their own life must have been a “specifically intended consequence” of the music or speech.⁷³ This was obviously not the case with the performers or producers of popular music.

The distinction between whether a person directed real-time suicide directions towards a specific person or merely disseminated general instructions to the public is critical. To pass the *Giboney* test, speech must have provoked a specific individual,⁷⁴ and there must be an *immediate* physical reaction by the addressee.⁷⁵ This requirement marks a dividing line between general instructions on how to die by suicide and real-time instructions to someone who is imminently going to do so.⁷⁶

D. *The Legal Status of Suicide*

The murky legal status in the United States of suicide itself poses another challenge to the legality of potential restrictions on online

69. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 189 (Cal. Ct. App. 1988).

70. *Id.* at 194.

71. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

72. *McCollum*, 249 Cal. Rptr. at 193.

73. *Id.*

74. Luu, *supra* note 23, at 313. Ellen Luu here refers to the “*Chaplinsky* test,” which is, for our purposes, synonymous with the *Giboney* test.

75. *Id.* at 314.

76. *Id.*

suicide assistance forums. As discussed *supra*, the *Giboney* exception to the First Amendment’s free speech guarantee only applies to speech used to further criminal conduct, and James Schoeberl has argued that *Brandenburg*, similarly, only applies to speech that incites illegal actions.⁷⁷ As such, Schoeberl asserts that a state in which suicide itself is not illegal cannot criminalize speech that directly incites or compels another person to take their own life. In other words, the government cannot restrict speech that compels an action that is not itself illegal.⁷⁸ In *Melchert-Dinkel*, the Minnesota Supreme Court agreed, finding that because suicide is not illegal in Minnesota, the content-based exception to the First Amendment’s freedom of speech guarantee that the U.S. Supreme Court established in *Giboney* (that there is an exception for “speech or writing used as an integral part of conduct in violation of a valid criminal statute”) cannot apply.⁷⁹ Thus, relevant recent jurisprudence indicates that the non-criminality of suicide is key to determining the liability of any aider, abettor, or advisor—regardless of whether there is a clear causal connection between the inciting speech and the other person’s death.

Yet this argument seems cynically flawed; after all, criminalizing suicide is symbolic at best. A state has a compelling interest in protecting the lives of its citizens regardless of whether the actual act of suicide is illegal. Suicide was considered illegal under the common law and was illegal in Britain until 1961.⁸⁰ When the U.K. government repealed its suicide ban, lawmakers cited as a reason the clear negative societal effects of suicide itself being illegal. Criminalizing suicide, they noted, can lead to suicide attempt survivors being arrested for their desperate acts.⁸¹ Presumably, arrests in such situations could further drive survivors’ desire to die, increasing the chances of repeat suicide attempts. Another reason governments refrain from criminalizing suicide is out of respect for victims’ families.⁸²

Because governments have compelling reasons to choose not to make suicide itself illegal, the spirit of the law would have governments and courts treat incitement to die by suicide similarly as they

77. Schoeberl, *supra* note 20, at 420.

78. *Id.*

79. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 19 (Minn. 2014) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

80. Gerry Holt, *When Suicide Was Illegal*, BBC NEWS (Aug. 3, 2011), <https://www.bbc.com/news/magazine-14374296> [<https://perma.cc/M42P-AC8J>]. See generally Potanos, *supra* note 16, at 694.

81. See HL Deb (2 Mar. 1961) (229) cols. 248–49, <https://hansard.parliament.uk/Lords/1961-03-02/debates/bb7dc284-75de-44a0-b846-ce36905cab19/SuicideBillHL>.

82. Potanos, *supra* note 16, at 689.

do incitement of explicitly illegal acts. In this vein, Potanos suggests that courts consider suicide a “quasi-unlawful” act⁸³—a type of wrongful act just outside illegality. Under this interpretation, someone who incites another person to take their own life would not be protected by the First Amendment.⁸⁴ Potanos argues that given the history of vigorous debate in common law jurisdictions over the question of whether to criminalize suicide, it would not be much of a stretch for the Supreme Court to expand *Brandenburg* to include this sort of historically illegal, “quasi-illegal” conduct.⁸⁵ Such an expansion of *Brandenburg* could allow laws that criminalize forms of direct suicide *encouragement* to stand. Additionally, this logic would likely mean that suicide-assistance speech qualifies as historically unprotected and is thus a type of speech that, as Chief Justice Roberts noted in *Stevens*, could be newly recognized in the future as unprotected by the First Amendment.⁸⁶

Some analysts argue that because suicide is only legal due to unique, extenuating circumstances, it should be considered an illegal act for the purposes of the First Amendment. This point of view long predates the Internet. In a 1969 Comment in the *Villanova Law Review*, David S. Markson wrote that “the criminality of the actual suicide is incidental in determining the liability of the aider, abettor, and adviser, as long as a causal connection can be established between the incitement and the death.”⁸⁷ While Markson’s theory has not borne out in recent state high court decisions, if courts were to adopt his logic, inciters and abettors of other people’s suicides would likely be significantly more exposed to prosecution.

Even if state courts do not adopt Markson’s and Potanos’s ideas about the legal status of suicide, advocates against suicide assistance websites could argue that the question of whether suicide is illegal is irrelevant, as long as the act of *assisting* suicide is unlawful. After all, although suicide itself is not illegal in the United States, assisted suicide is illegal in most states—and heavily regulated in others.⁸⁸ Under this argument, because the act of assisting a suicide is itself criminal, a court would be free to apply the *Giboney* exception or the *Brandenburg* test. The speech that assisted the suicide would be in furtherance of a criminal act: the act of

83. *Id.*

84. *Id.*

85. *Id.* at 694.

86. See *United States v. Stevens*, 559 U.S. 460, 472 (2010).

87. David S. Markson, *The Punishment of Suicide - A Need for Change*, 14 VILL. L. REV. 463, 473–74 (1969).

88. See *States Where Medical Aid in Dying is Authorized*, COMPASSION & CHOICES, <https://compassionandchoices.org/resource/states-or-territories-where-medical-aid-in-dying-is-authorized> [https://perma.cc/CSF3-NVAG] (last visited Jan. 17, 2023).

unlawfully assisting suicide. But this logic is somewhat circular.⁸⁹ Indeed, the Minnesota Supreme Court pointed out this problem in its *Melchert-Dinkel* opinion, writing that the argument that verbally encouraging suicide is speech that is integral to establishing criminal liability “is circular because it effectively upholds [Minnesota’s] statute on the ground that the speech prohibited by [the assisted suicide statute] is an integral part of a violation of [the assisted suicide statute].”⁹⁰

Of course, even if courts were to either recognize suicide itself as effectively illegal for the purposes of First Amendment analysis or apply the *Giboney* exception under the theory that the act of assisting suicide is itself criminal, Section 230 of the Communications Decency Act would still protect the operators of online suicide assistance forums from liability for individual posts on their websites. Without changes to Section 230, only individual posters and commenters could be held liable for assisting suicide—and it is often difficult for law enforcement or plaintiffs to determine the real-life identities of anonymous online accounts.

II.

THE ROLE OF INTERNET LAW

A. *Speech on the Internet*

The United States’ antiquated Internet laws, including Section 230, present further hurdles to restricting access to online suicide assistance forums. While the online landscape has changed dramatically in the past twenty-five years, Internet law in the United States largely relies on statutes and court decisions from the early days of the World Wide Web in the 1990s, complicating efforts to effectively address issues that are specific to the contemporary digital world. For example, in *Reno v. ACLU*, a 1997 case concerning freedom of speech and the Internet, the U.S. Supreme Court compared the Web to other forms of broadcast media. The Court found that speech on the Internet is *more* protected than speech on traditional forms of broadcast media because people have to actively seek out information on the Internet, while information from traditional broadcast media is beamed into people’s homes without their consent.⁹¹ As such, any speech that is lawful in real life cannot be banned on the Internet.⁹² This legal precedent remains in

89. Binder & Chiesa, *supra* note 34, at 126.

90. *Id.* (quoting *State v. Melchert-Dinkel*, 844 N.W.2d 13, 20 (Minn. 2014)).

91. See *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

92. See Potanos, *supra* note 16, at 683. The question then becomes whether speech that incites or encourages suicide is legal in real life.

effect twenty-five years later, despite the revolutionary transformations that the Internet has undergone since 1997. The reality of Internet and social media use today, especially among teenagers, underscores the *Reno* framework's insufficiencies. After all, contemporary social media platforms—especially video applications such as TikTok—seem much more analogous to broadcast media than do the types of websites that the Court anticipated in the 1990s. According to a 2022 study from the Pew Research Center, forty-six percent of U.S. teens reported that they use the Internet “almost constantly.”⁹³ The two most widely used applications are YouTube and TikTok, which both feature entirely video-based content.⁹⁴

Inconsistent with its enhanced legal protections, some experts argue that speech is actually *more* harmful online than it is in real life because the anonymous nature of the Internet restricts accountability.⁹⁵ While the First Amendment protects the right to speak anonymously, including through written communication,⁹⁶ Sarah Jameson argued back in 2008 that this right should not fully extend to anonymous communication on the Internet due to the potentially dangerous nature of such anonymity. To illustrate her point, Jameson used an example of a teenage girl who took her own life after being harassed by an older neighbor who was posing online as a teenage boy.⁹⁷ And while a 1998 federal law, the Children's Online Privacy Protection Act, requires that websites aimed at children ages twelve or younger request parental consent before collecting the child's personal information,⁹⁸ worsening suicide rates in the United States have disproportionately affected teenagers—not young children or pre-teens.⁹⁹ Proposed legislation in California would expand the definition from the 1998 federal law to include

93. Emily A. Vogels, Risa Gelles-Watnick & Navid Massarat, *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [https://perma.cc/9RRU-YBTM].

94. *Id.* In the 2022 Pew study, ninety-five percent of U.S. teenagers reported using YouTube and sixty-seven percent reported using TikTok.

95. *See, e.g.*, Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 *COMMLAW CONSPPECTUS* 231, 238–39 (2008).

96. *Id.* at 239 (citing *Talley v. California*, 362 U.S. 60, 64 (1960) and *McIntyre v. Ohio Election Comm'n.*, 514 U.S. 334, 357 (1995)).

97. *Id.* at 231.

98. Caitlin Dewey, *California's New Child Privacy Law Could Become National Standard*, PEW: STATELINE (Nov. 7, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/11/07/californias-new-child-privacy-law-could-become-national-standard> [https://perma.cc/GHD6-Y92C].

99. As of 2022, suicide is the second-highest cause of death among teenagers and young adults between the ages of fifteen and twenty-four. *See* Sandy Cohen, *Suicide Rate Highest Among Teens and Young Adults*, UCLA HEALTH (Mar. 15, 2022), <https://>

all minors in California under 18 years old and would broaden the types of affected websites from those that specifically target children to those that are merely “likely to be accessed” by children.¹⁰⁰ Some state legislators, however, have declined to specify what types of websites the phrase “likely to be accessed” would cover.¹⁰¹

B. Section 230

Most significantly, Section 230 of the Communications Decency Act, as currently written, poses a major constraint to meaningful legislation curtailing suicide advocacy websites. Under Section 230, website operators cannot be held legally liable for content posted by other users on their websites.¹⁰² In other words, Section 230 would protect the suicide website’s administrators from prosecution even if a court were to find that a post by one of the website’s users constituted illegal assistance of another person’s suicide and was not protected by the First Amendment.

Despite at least one Supreme Court Justice’s previous hints that he wanted to examine Section 230,¹⁰³ the Court in May 2023 declined to reinterpret the statute.¹⁰⁴ In *Gonzalez v. Google*, relatives of victims of an Islamic State terrorist attack in Europe sued Google and YouTube for allegedly helping radicalize terrorists through their websites’ algorithms’ promotion of extremist content.¹⁰⁵ The plaintiffs argued that Section 230 does not extend to websites’ algorithmically-created recommendations.¹⁰⁶ According to law professor Jeff Kosseff, this was the first case concerning Section 230 that the Supreme Court ever heard.¹⁰⁷ Had the Court ruled broadly that Section 230 does not cover websites’ algorithms at all,¹⁰⁸ the outcome would have drastically changed the nature of the Internet. While it is unclear exactly how or whether such

connect.uclahealth.org/2022/03/15/suicide-rate-highest-among-teens-and-young-adults/ [https://perma.cc/R9WW-7BCL].

100. Dewey, *supra* note 98.

101. *Id.*

102. O’Leary, *supra* note 10; 47 U.S.C. § 230(c)(1) (noting that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”).

103. See Ashley Gold, *Clarence Thomas Wants To Reel in Section 230*, AXIOS (Oct. 13, 2020), <https://www.axios.com/2020/10/14/clarence-thomas-wants-to-reel-in-section-230> [https://perma.cc/93QA-TK4D].

104. Barnes & Zakrzewski, *supra* note 12.

105. Ashley Gold, *Google Tells Supreme Court: Don’t Undercut the Internet*, AXIOS (Jan. 12, 2023), <https://www.axios.com/2023/01/12/google-supreme-court-undercut-internet-section-230> [https://perma.cc/J6A8-8V74].

106. *Id.*

107. O’Leary, *supra* note 10.

108. *Id.*

a ruling would have affected suicide websites, Kosseff suggests that review websites such as Glassdoor would have been affected greatly by such a ruling, given that the website's operators would have been vulnerable to a defamation suit every time they declined to remove user-posted content that other parties complained about.¹⁰⁹ Presumably, this logic would have applied to suicide websites, too. Instead, the Court avoided directly addressing Section 230, finding that the plaintiffs failed to show that Google or Twitter actually encouraged ISIS.¹¹⁰ While the Court could revisit Section 230 in the future, for now, it is up to Congress to make any changes to the statute that would, in turn, allow for meaningful regulation of websites that encourage suicide.

Indeed, in just the past few years alone, members of Congress have introduced more than 40 bills that would repeal or amend Section 230.¹¹¹ Many of these proposed laws, from full repeals of Section 230 to bills that would exempt specific types of harm from Section 230 protection,¹¹² could open online suicide assistance forum operators like Diego Joaquín Galante and Lamarcus Small¹¹³—the longtime administrators of the prominent suicide website at the center of the 2021 *New York Times* investigation—to legal liability for content posted on their websites. If they are no longer protected by Section 230, Galante and Small would likely face an avalanche of lawsuits from families of suicide victims. Even if courts were to ultimately find that most speech by users on online suicide assistance forums is protected by the First Amendment,¹¹⁴ such litigation could have a chilling effect on operators' ability to continue running such websites, akin to the aforementioned hypothetical scenario involving Glassdoor. But Galante and Small have proven tenacious thus far; the current iteration of Sanctioned Suicide—the prominent suicide assistance website discussed throughout this Note—went live in 2019 after more mainstream platforms like

109. *Id.*

110. Barnes & Zakrzewski, *supra* note 12.

111. Meghan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/8N9A-VK99>].

112. Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, Brookings (Sept. 21, 2021), <https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/> [<https://perma.cc/B9HC-72P5>].

113. See The Daily, *supra* note 5, at 23:13.

114. A likely distinction in this scenario would involve the difference between suicide *assistance* and suicide *encouragement*, as the Minnesota Supreme Court discussed in *Melchert-Dinkel*. See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16, 23–24 (Minn. 2014). The question of imminence would also come into play in this hypothetical scenario.

Reddit, Facebook, and Twitter banned discussion of suicide methods and self-harm.¹¹⁵

Broad legislation that clarifies that content algorithms are not covered by Section 230 would have the same effect as if the Supreme Court had sided with the plaintiffs in *Gonzalez v. Google*. However, given that such an amendment could have far-reaching effects on the Internet as a whole, narrower legislative action is more realistic. An amendment to Section 230 that exempts pro-suicide websites from the statute's liability protection would allow lawsuits against online suicide assistance forum operators to proceed in court and would likely lead to a significant reduction in the accessibility of and harm caused by pro-suicide websites. One such proposal is the Online Freedom and Viewpoint Diversity Act, which was introduced in 2020 by Senators Marsha Blackburn (R-Tenn.), Roger Wicker (R-Miss.), and Lindsey Graham (R-S.C.). The proposed bill specifically mentions advocacy for "self-harm" as speech that would be exempted from Section 230.¹¹⁶ This legislation, which was supported by anti-suicide activist groups like Fix the 26¹¹⁷—whose name refers to the 26 operative words in Section 230¹¹⁸—was referred to the Commerce Committee, but never made it out of committee or gained any additional co-sponsors.¹¹⁹

One possible way to work around Section 230, if Congress does not change the law, is arguing that the law does not immunize a website operator if they are engaged in illegal conduct themselves through their operation of the website.¹²⁰ However, Galante and Small are careful not to encourage suicide themselves on the website and seem keenly aware of the fine legal lines they must walk to keep the website running without facing legal consequences.¹²¹

115. Twohey & Dance, *Where the Despairing Log On*, *supra* note 1.

116. Love, *supra* note 3. While the Online Freedom and Viewpoint Diversity Act specifically mentioned the issue of online advocacy for self-harm, the bill primarily concerned the opinion that social media companies restrict conservative speech. See Press Release, U.S. S. Comm. on Com., Sci., & Transp., Wicker, Graham, Blackburn Introduce Bill to Modify Section 230 and Empower Consumers Online (Sept. 8, 2020), <https://www.commerce.senate.gov/2020/9/wicker-graham-blackburn-introduce-bill-to-modify-section-230-and-empower-consumers-online> [<https://perma.cc/QJS3-9UBB>].

117. Love, *supra* note 3. See also FIX THE 26, <https://fixthe26.com> [<https://perma.cc/Z93D-M8JE>] (last visited Mar. 5, 2023).

118. The 26 words of 47 U.S.C. § 230(c)(1) are: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

119. Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. § 2 (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4534/committees>.

120. Love, *supra* note 3.

121. See, e.g., *id.*

III.

LEGISLATIVE SOLUTIONS

A. *Federal Legislation*

While the New York Times' high-profile 2021 investigation, along with spiking teen and young adult suicide rates during the COVID-19 pandemic,¹²² has led to increased public attention to the problem of pro-suicide websites, this heightened societal awareness has yet to lead to meaningful change from a legislative standpoint. This section examines both the history of congressional efforts to curb the influence of online suicide assistance forums and Rep. Trahan's recent proposed bill.

Although Congress has not passed any meaningful legislation to curb access to websites that advocate suicide, Rep. Trahan is not the first member of Congress to try to do so. In 2003, California teenager Suzanne Gonzales, who was known as Suzy, logged onto an Internet forum called alt.suicide.holiday for the final time. After receiving guidance from other commenters on the website, Suzy posed as a jeweler online to obtain a lethal dose of potassium cyanide without raising suspicion.¹²³ Suzy then rented a hotel room near her university in Florida and drank the poison. Minutes after her death, timed emails arrived in her family's and best friend's inboxes, notifying them of Suzy's suicide.¹²⁴ "I will make this short, as I know it will be hard to deal with," Suzy wrote in the emails before she took her own life. "If you haven't heard by now, I have passed away."¹²⁵ In the wake of their daughter's death, Suzy's parents, Mike and Mary Gonzales, lobbied politicians to address online suicide assistance.¹²⁶

As a result of Suzy's death and her family's advocacy, Rep. Wally Herger (R-Calif.) introduced the Suzanne Gonzales Suicide Prevention

122. See Aria Bendix, *Adolescents Accounted for Larger Share of Suicides in Many States in 2020*, NBC NEWS (Apr. 25, 2022, 6:16 PM), <https://www.nbcnews.com/health/health-news/teen-suicides-increased-many-states-pandemic-rcna25825> [<https://perma.cc/7ZEF-J8GQ>].

123. Kara Rowland, *Mourning Parents Target Suicide Sites*, WASH. TIMES (July 24, 2008), <https://www.washingtontimes.com/news/2008/jul/24/mourning-parents-hit-advice-sites-for-suicide/> [<https://perma.cc/D5ZQ-ABLD>]. Potassium cyanide can be used in jewelry making. See, e.g., Jim Herron Zamora, *Jeweler Found Dead Near Spilled Cyanide Powder*, L. A. TIMES (June 3, 1992), <https://www.latimes.com/archives/la-xpm-1992-06-03-me-748-story.html> [<https://perma.cc/V6K2-YDD7>].

124. *Id.*

125. C. Jerome Crow, *Suicide Leads to Suzy's Law*, RED BLUFF DAILY NEWS (Feb. 20, 2007, 12:00 AM), <https://www.redbluffdailynews.com/2007/02/20/suicide-leads-to-suzys-law/> [<https://perma.cc/K7R7-AHNY>].

126. *Id.*

Act in 2007.¹²⁷ The bill, which was reintroduced in 2009 and 2011 but never received a committee vote, would have made online suicide assistance a federal crime.¹²⁸ Every iteration of the bill had bipartisan sponsorship, and two sponsors of the 2009 version—Rep. Marcy Kaptur (D-Ohio) and Rep. Ken Calvert (R-Calif.)—still serve in the House of Representatives.¹²⁹ Despite this support, no version of the bill has gained traction in the House in the many years since Gonzales' suicide in 2003. While there does not seem to be one specific issue that has prevented Congress from passing such a law, the First Amendment and Section 230 limit the reach of any legislation in this area.

Despite these challenges, some representatives have renewed congressional efforts to pass a federal bill. The Stop Online Suicide Assistance Forums Act was introduced in the U.S. House of Representatives on November 2, 2022, by Reps. Lori Trahan (D-Mass.), Mike Carey (R-Ohio), Katie Porter (D-Calif.), and Chris Stewart (R-Utah).¹³⁰ By the end of the 117th Congress, which ended in January 2023, the proposed legislation had eight co-sponsors; in addition to the four aforementioned representatives, Grace Napolitano (D-Calif.), Kathy Castor (D-Fla.), Ken Calvert (R-Calif.) and Tom Tiffany (R-Wis.) had signed onto the bill.¹³¹ The bill was referred to the House Judiciary Committee,¹³² but it would have to be re-introduced to be considered for a vote by the 118th Congress.

As introduced in the 117th Congress, the Stop Online Suicide Assistance Forums Act “establishes a felony offense for anyone who uses mail or interstate communication, including online forums, to intentionally assist in another individual’s suicide attempt that results in death,” according to its original co-sponsors in a press release. “The bipartisan legislation does not criminalize the act or attempt to die by suicide,” the press release continues.¹³³ Because the Internet is an instrument of interstate commerce, Congress has the power to regulate it.¹³⁴ The legislation would prohibit people from giving online instructions on

127. Dance & Twohey, *Bill Outlawing Online Suicide Assistance*, *supra* note 11. *See also* Suzanne Gonzales Suicide Prevention Act, H.R. 853, 111th Cong. (2009).

128. *Id.*

129. *Id.*

130. Press Release, Lori Trahan, Congresswoman, House of Representatives, Trahan, Carey, Porter, Stewart Unveil Bipartisan Legislation to Stop Online Suicide Assistance Forums (Nov. 2, 2022), <https://trahan.house.gov/news/documentsingle.aspx?DocumentID=2657> [<https://perma.cc/85MJ-5E44>].

131. Stop Online Suicide Assistance Forums, H.R.9260, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9260/cosponsors>.

132. *Id.*

133. Press Release, Lori Trahan, *supra* note 130.

134. *See, e.g.*, *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007).

how to die by suicide by making it a federal crime to assist another person's suicide through "interstate communication," a phrase that includes communication on online forums.¹³⁵ If codified, the Stop Online Suicide Assistance Forums Act would be added to the end of 18 U.S.C. Chapter 51, which governs homicide.¹³⁶

While the 2022 bill has significant similarities to the various iterations of the Suzanne Gonzales Suicide Prevention Act, it is notably narrower in scope. For example, while the 2007 bill does not require a victim to have actually died for a criminal penalty to be handed down on the person who assisted in their suicide attempt,¹³⁷ the 2022 bill would only cover incidents that result in an individual's death.¹³⁸ Another major change from the older legislation is an added requirement that the suicide assistance be contemporaneous to the suicide itself; unlike the 2007 bill, the Stop Online Suicide Assistance Forums Act includes a requirement that the person being prosecuted provided the person who committed suicide with material support while the victim was actively ending their life.¹³⁹ The 2022 bill also leans on the Minnesota Supreme Court's emphasis on suicide *assistance*, defining someone who assists in another person's suicide as a person who "specifically aims to facilitate the [other] individual's suicide" *and* who "furnishes the individual with material support to facilitate the suicide, or with substantial information facilitating the suicide at the same time as an attempt or act of suicide is occurring."¹⁴⁰ By contrast, the language of the 2007 bill is much broader, subjecting anyone who "knowingly uses any facility of interstate or foreign commerce with intent—1) to teach a particular person how to commit suicide, knowing that the person so taught is likely to use that teaching to commit suicide; or 2) to provide a particular person with material support or resources to help such person commit suicide, knowing that the person is likely to use the support to commit suicide" to criminal prosecution, with the possible punishment of fines or imprisonment of up to five years' time.¹⁴¹ Beyond these major

135. *Stop Online Suicide Assistance Forums Act would criminalize helping a person die by suicide, including via the internet*, GOVTRACK INSIDER, <https://govtrackinsider.com/stop-online-suicide-assistance-forums-act-would-criminalize-helping-a-person-die-by-suicide-a04a7980bbac> [<https://perma.cc/PQJ7-GF2D>] (last visited Jan. 20, 2023).

136. Stop Online Suicide Assistance Forums Act, H.R.9260, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9260/text>.

137. Suzanne Gonzales Suicide Prevention Act, H.R. 940, 110th Cong. (2007).

138. Stop Online Suicide Assistance Forums Act, H.R. 9260, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9260/text>.

139. *Id.*

140. *Id.*

141. Suzanne Gonzales Suicide Prevention Act, H.R. 940, 110th Cong. (2007).

differences, much of the language of the 2022 bill mirrors the earlier legislation. Both the 2022 bill and the 2007 bill, for example, include caveats that they would not interfere with any state laws concerning physician-assisted suicide.¹⁴²

The notably narrower scope of the 2022 bill introduces a number of questions about the political and legal viability of similar legislation in the future. While it is possible that the more recent bill is narrower because its co-sponsors thought that a less comprehensive law would have a better chance of passing through Congress, it seems from the bill's emphasis on "assistance" that it might be more limited because of the increasingly crystallized, difficult legal landscape of speech regulation on the Internet.¹⁴³ Either way, while narrow in scope, Rep. Trahan's legislation is a serious attempt to mitigate the harm caused by suicide assistance websites. Of course, even if such legislation were to be signed into law, it could not be used to prosecute most of the suicide website's users, let alone its administrators. To achieve a conviction under such legislation, federal prosecutors would have to show that a website user had materially assisted in another user's death at the exact time of their suicide and would have to prove the real-life identity of the anonymous Internet user. Even so, it is possible that any federal legislation targeting suicide assistance websites would have a chilling effect on such forums.

After Rep. Trahan introduced her bill in Congress, there was a long thread on Sanctioned Suicide about the proposed legislation, which most of the commenters seemed to think would not be effective in stopping the website. Most commenters seemed to agree that the only way the government could truly prevent the suicide website—and others like it—from operating is by repealing or amending Section 230, which could then allow the government to pursue the website's administrators instead of just its individual users.¹⁴⁴ In the thread, commenters

142. See, e.g., *id.* See also Stop Online Suicide Assistance Forums Act, H.R. 9260, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9260/text>.

143. Luu argued in 2009 that while "[a] statute that prohibits general information about suicide or suicide methods posted on internet community boards or social networking sites may in fact violate the First Amendment . . . a statute that prohibits intentionally and knowingly providing information and methods for committing suicide through interstate commerce to a specific recipient who has implicitly or explicitly indicated a desire for such information, with the intent and knowledge that the recipient uses that information to commit suicide, may survive First Amendment scrutiny." Indeed, this roadmap essentially describes Trahan's bill. Luu, *supra* note 23, at 328.

144. Cathy Ames, *Discussion: Clarification of "Stop Suicide Assistance Forums Act"—Please Read This and Quit Panicking.*, SANCTIONED SUICIDE (Nov. 18, 2022), <https://sanctioned-suicide.org/threads/clarification-of-stop-online-suicide-assistance-forums-act-please-read-this-and-quit-panicking.103672/> [<https://perma.cc/U69U-T3LC>].

discussed using virtual private networks and other methods of penetrating the deep web to access the website in the event that the government makes it illegal to view,¹⁴⁵ further underscoring the scope and number of hurdles the government would have to overcome to truly end access to such websites.

B. State Statutes

Given Congress' inability thus far to protect young Americans from pro-suicide websites, state laws might be the most effective way to do so. This section examines a number of state laws that address or have been interpreted to address online suicide assistance.

No state in the U.S. prosecutes suicide or attempted suicide,¹⁴⁶ and the Model Penal Code does not recognize suicide as a crime.¹⁴⁷ One major reason why states decriminalized suicide was the increasingly widespread understanding that suicide is a mental health issue.¹⁴⁸ But looking beyond suicide and attempted suicide, state laws begin to differ, and the exact language of these statutes becomes essential. For example, while many states criminalize *assisting* suicide, few criminalize *inciting* suicide.¹⁴⁹ Laws also differ by state as to how direct the causation must be for someone to be held criminally liable for assisting another person's suicide; for example, some states require "certain physical acts or attacks on the victim's voluntariness."¹⁵⁰ Such requirements in state laws would prohibit someone who has "assisted" or encouraged another person online to take their own life from being convicted in those states. This protection would presumably cover someone like Michelle Carter from *Commonwealth v. Carter*.¹⁵¹ In states whose laws require "certain physical acts or attacks on the victim's voluntariness" for criminal liability, verbal encouragers could potentially still be convicted under any provision that punishes causation by deception.¹⁵²

Some states have drawn this same distinction. The California Supreme Court has interpreted California's current assisted suicide

145. *Id.*

146. The last conviction for attempted suicide in the United States was in North Carolina in 1961. Potanos, *supra* note 16, at 676 (citing MODEL PENAL CODE § 210.5(2) cmt. at 94, n.11 and accompanying text). Additionally, the last U.S. state law designating attempted suicide as a crime was repealed in Oklahoma in 1976. Potanos, *supra* note 16, at 676–77 (citing MODEL PENAL CODE § 210.5(2) cmt. at 94, n.10).

147. *See In re Joseph G.*, 667 P.2d 1176, 1178 (Cal. 1983).

148. Binder & Chiesa, *supra* note 34, at 118.

149. *Id.* at 117.

150. *Id.* at 113.

151. *Id.* at 114.

152. *Id.* at 113.

statute as prohibiting the “aiding and abetting of a specific suicidal act.”¹⁵³ That court has also found that “aiding and abetting” means there must be some sort of “physical participation” by the person considered to be the aider or abettor.¹⁵⁴ While Minnesota’s and California’s statutes are nearly identical, the California Supreme Court has interpreted that state’s language more conservatively, finding that there must be a physical action for a court to consider a person’s actions “aiding and abetting.”¹⁵⁵ The Minnesota Supreme Court, on the other hand, has defined very similar wording more liberally, finding that “aiding” is broad enough to include assistance or encouragement of someone else to take their own life.¹⁵⁶

Robust debate over the issue of physician-aided suicide for terminally ill patients can further complicate efforts to criminalize encouraging or assisting the suicides of young, healthy people. In 2019, Pennsylvania resident Jackie Bieber found that her daughter Shawn Shatto had died by suicide. Soon, Bieber saw that Shawn had spent many of her final hours on the prominent suicide website. On the forum, Bieber found a trove of posts by both a terrified Shawn and by other commenters reassuring her that she should go through with taking her own life.¹⁵⁷ Horrified, Bieber lobbied the Pennsylvania legislature heavily for the passage of Shawn’s Law, a bill that strengthens existing penalties in the state for aiding or encouraging another person to die by suicide. The legislature eventually passed the bill, and former Governor Tom Wolf signed it into law in 2021.¹⁵⁸ The ACLU of Pennsylvania, however, strongly opposed it, arguing that the law does not meaningfully differentiate between “aggravating” cases such as Shawn’s and “non-aggravating” cases such as a physician supplying a gravely ill person with medication to end their life.¹⁵⁹ The ACLU also expressed concern that the law imposes strict lia-

153. Schoeberl, *supra* note 20, at 424 (citing *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197 (Cal. Ct. App. 1988)).

154. *See id.* (citing *People v. Matlock*, 336 P.2d 505, 511 (Cal. 1959)).

155. *Id.* at 425.

156. *Id.*

157. Tasneem Nashrulla, *Police Are Investigating After The Family Of A 25-Year-Old Woman Say That A “Pro-Choice” Suicide Website Encouraged Her To Kill Herself*, BUZZFEED NEWS (June 1, 2019, 8:30 AM), <https://www.buzzfeednews.com/article/tasneemnashrulla/shawn-shatto-death-suicide-forum-police-investigating> [<https://perma.cc/N45X-L674>].

158. Ron Southwick, *Pa. Gov. Tom Wolf Signs Law Imposing Tougher Penalties on Those Who Aid or Encourage Suicide*, PENNLIVE (Sept. 30, 2021, 4:50 PM), <https://www.pennlive.com/news/2021/09/pa-gov-tom-wolf-signs-law-imposing-tougher-penalties-on-those-who-aid-or-encourage-suicide.html> [<https://perma.cc/PUS7-WLDD>]. *See also* Love, *supra* note 3.

159. *HB 184: Enhancement for Causing or Aiding Suicide (Shawn’s Law)*, ACLU-PENNSYLVANIA (June 25, 2021), <https://www.aclupa.org/en/>

bility, as the person being charged does not have to have known that the suicide victim was under 18 or had an intellectual disability to be given an enhanced penalty under the law.¹⁶⁰

By contrast, the California legislature has attempted to draw a clear distinction between physician-aided suicide and online suicide encouragement and assistance. While it is legal in California for a physician to prescribe life-ending medication under California's End of Life Option Act,¹⁶¹ it is a felony for anyone to help or encourage someone not covered by that law to take their own life.¹⁶² In California, if the victim fails to successfully end their life, the assister can be charged with the separate crime of attempting to assist in a suicide.¹⁶³

Unfortunately, since the 2021 *New York Times* investigation, there has not been significant momentum in state legislatures on comprehensive legislation to stop online suicide assistance forums. However, Andrew Gounardes, a Democratic New York State Senator from Brooklyn, introduced a bill in February 2023 that would ban online retailers like Amazon from selling sodium nitrite—the chemical used in many deaths linked to the prominent suicide website—to customers in New York under the age of 21.¹⁶⁴ While young people under that age might still be able to acquire the chemical illicitly, the proposed bill would also establish a right to sue violators—presumably retailers—of the ban.¹⁶⁵ While there is no indication yet whether the bill will pass the New York legislature, the proposal represents a novel strategy for reducing the harm caused by pro-suicide websites.

IV.

THE GLOBAL LANDSCAPE

Given the relatively uncharted and dynamic nature of legal issues surrounding online activity and suicide assistance, this section examines the paths that some foreign countries have taken to address similar questions. The fact that other countries' governments have grappled

legislation/hb-184-enhancement-causing-or-aiding-suicide-shawns-law [https://perma.cc/WZ7T-D7YF].

160. *Id.*

161. *End of Life Option Act*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH: CENTER FOR HEALTH STATISTICS AND INFORMATICS (June 30, 2022), <https://www.cdph.ca.gov/programs/chsi/pages/end-of-life-option-act-.aspx> [https://perma.cc/Q2WQ-KYNX].

162. CAL. PENAL CODE § 401 (Deering 2019). *See also Assisted Suicide Laws in the United States*, PATIENT RTS. COUNCIL (Jan. 6, 2017), <https://www.patientsrightscouncil.org/site/assisted-suicide-state-laws/> [https://perma.cc/FB8S-FQRD].

163. CAL. PENAL CODE § 664 (Deering 2011).

164. Williams, *supra* note 13.

165. *Id.*

with these issues underscores the magnitude of the harm that online suicide assistance forums cause and the urgency with which the U.S. government must tackle the problem.

The U.S. legal system is based on English common law, which traditionally considered suicide itself a crime. Before the mid-20th century, it was illegal to commit suicide in Britain, which had led to the arrests of people who had attempted suicide. In 1961, however, the government of the United Kingdom passed the 1961 Suicide Act, which decriminalized suicide but prohibited people from encouraging others to take their own lives.¹⁶⁶ The law reads in part: “A person (‘D’) commits an offence if— (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D’s act was intended to encourage or assist suicide or an attempt at suicide... If D arranges for a person (‘D2’) to do an act that is capable of encouraging or assisting the suicide or attempted suicide of another person and D2 does that act, D is also to be treated for the purposes of this Act as having done it.”¹⁶⁷

The government of the United Kingdom already requires sellers of sodium nitrite to report any suspicious purchases of the chemical—sometimes used as a meat preservative—to law enforcement.¹⁶⁸ (The plaintiffs in a recent lawsuit against Amazon, discussed *infra*, also note that the government of the Netherlands has made efforts to stop sales of sodium nitrite to private individuals.¹⁶⁹) Additionally, the U.K. Parliament recently passed a massive overhaul of the country’s online safety laws, aiming “to protect children and tackle criminal activity online while preserving free speech.”¹⁷⁰ Additionally, “the government has also confirmed it will use the Online Safety Bill to create a new criminal offence of assisting or encouraging self-harm online.”¹⁷¹ The law

166. Roger Dobson, *Internet Sites May Encourage Suicide*, *The BMJ* (Aug. 7, 1999), <https://www.ncbi.nlm.nih.gov/pmc/articles/PPM1126981/> [https://perma.cc/2LH6-JUQU].

167. Suicide Act 1961, 10 Eliz. 2 c. 60 9 (Gr. Brit.).

168. Megan Twohey & Gabriel J.X. Dance, *Lawmakers Press Amazon on Sales of Chemical Used in Suicides*, *N.Y. TIMES* (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/technology/amazon-suicide-poison-preservative.html> [https://perma.cc/3M5R-3QHC].

169. Complaint for Civil Penalties and Demand for a Jury Trial at 98, *McCarthy v. Amazon.com, Inc.*, No. 22CV018942 (Cal. Super. Ct. Sept. 29, 2022).

170. Adam Satariano, *Britain Passes Sweeping New Online Safety Law*, *N.Y. TIMES* (Sept. 13, 2023), <https://www.nytimes.com/2023/09/19/technology/britain-online-safety-law.html> [https://perma.cc/EMM4-PRJ8].

171. Dep’t for Digital, Culture, Media & Sport & The Rt. Hon. Michelle Donelan, *New Protections for Children and Free Speech Added to Internet Laws*, *Gov.UK* (Nov. 28, 2022), <https://www.gov.uk/government/news/new-protections-for-children-and-free-speech-added-to-internet-laws>.

will cover a wide variety of online sources, from social media to search engines, but will treat different types of platforms differently. There has been disagreement about how exactly the new law will protect children and will be enforced, but it seems clear that the law will address the issue of online encouragement of suicide.¹⁷² An amendment to the legislation that specifically concerns online encouragement of suicide would require social media platforms to remove content related to self-harm and would expose any person who posted such content to prosecution.¹⁷³ The Electronic Frontier Foundation, a prominent group that advocates for greater freedom on the Internet, has come out strongly against the bill, arguing that it would violate the free speech rights of U.K. citizens and could result in citizens being arrested because of what they write online.¹⁷⁴ Nevertheless—and despite a lower standard for protected speech in the U.K. than in the U.S.¹⁷⁵—legislators in the U.S. state of California have already introduced legislation largely inspired by the British Online Safety Bill, potentially charting a roadmap for other jurisdictions to follow.¹⁷⁶

Some European Union countries like Germany and Italy have attempted to crack down on websites that encourage suicide. Administrators and users of Sanctioned Suicide seem to follow these international developments closely; in September 2020, Small, who uses the pseudonym “Marquis,” posted on the site lamenting Germany’s banning of Internet search results for the site under the country’s German Youth Law.¹⁷⁷ Similarly, in 2021, after prosecutors in Rome blocked Sanctioned Suicide in Italy following the suicides of two Italian teenagers,¹⁷⁸

172. Jacqui Morrissey, Laura Kennedy, & Lydia Grace, *The Opportunities and Challenges of Regulating the Internet for Self-Harm and Suicide Prevention*, HOGREFE (Mar. 2, 2022), <https://econtent.hogrefe.com/doi/10.1027/0227-5910/a000853> [<https://perma.cc/7LG9-U47F>].

173. Charley Adams, *Encouraging Self-harm To Be Criminalized in Online Safety Bill*, BBC (Nov. 27, 2022), <https://www.bbc.com/news/uk-63768496> [<https://perma.cc/5REK-HGZ8>].

174. Joe Mullin, *Experts Condemn the UK Online Safety Bill As Harmful To Privacy And Encryption*, ELEC. FRONTIER FOUND. (Nov. 23, 2022), <https://www EFF.ORG/deep-links/2022/11/experts-condemn-uk-online-safety-bill-harmful-privacy-and-encryption> [<https://perma.cc/WH9P-X4FU>].

175. See, e.g., Stephen J. Shapiro, *Comparing Free Speech: United States v. United Kingdom*, 19 U. BALT. L.F. 17, 17 (1989).

176. Dewey, *supra* note 98.

177. *SS Removed from Search Results in Germany*, SANCTIONED SUICIDE (Sept. 15, 2020), <https://sanctioned-suicide.org/threads/ss-removed-from-search-results-in-germany.48342/> [<https://perma.cc/949K-N4CP>].

178. Redazione ANSA, *Site blocked for helping youngsters to kill themselves*, ANSA GEN. NEWS (June 7, 2021), https://www.ansa.it/english/news/general_news/2021/06/07/site-blocked-for-helping-youngsters-to-kill-themselves_da6fbf6d-8b7f-414d-ab43-d32026479077.html [<https://perma.cc/YR6Z-LCT9>].

the website's administrator posted about the ban, but said that the site has no operations in Italy.¹⁷⁹

Galante, the other one of the website's original administrators, is Uruguayan and resides in Montevideo, Uruguay. The Uruguayan government opened a criminal investigation into him in 2021.¹⁸⁰ The Uruguayan government has confirmed the probe, but according to Uruguayan media, it might be difficult to prosecute Galante because any actual deaths that resulted from Galante's actions would have occurred outside of Uruguay.¹⁸¹

Arguably, the country that has had the greatest success cracking down on websites that encourage suicide is Australia, which is the only country that has a national law criminalizing the act of aiding or abetting suicide online.¹⁸² Activists and family members of suicide victims in Australia have waged campaigns to further restrict the accessibility of the suicide website in the country. Under the country's Online Safety Act, which went into effect in 2020, the country's eSafety Commission can demand that search engines remove results that link to material that "promotes, incites or instructs in matters of crime or violence."¹⁸³ The Commission has said that this material includes instructions on particular methods of suicide. However, the process is only triggered by citizen complaints; the eSafety Commission does not proactively take down search results or demand that they be taken down.¹⁸⁴ Before the 2020 law went into effect, the Australian Federal Police (AFP) in 2019 used a 1997 telecommunications law to restrict most access to the suicide website.¹⁸⁵ Some tech companies were more compliant with the Australian government's orders than others; for example, while Microsoft told ABC

179. *Italy & Site Blocking*, SANCTIONED SUICIDE (July 3, 2021), <https://sanctioned-suicide.org/threads/italy-site-blocking.69854/> [<https://perma.cc/G2VB-ZFQW>].

180. Scott Tong & Serena McMahon, *Disturbing Website Encourages Vulnerable Users to Die by Suicide. What's Being Done About It?*, WBUR: HERE & NOW (Jan. 18, 2022), <https://www.wbur.org/hereandnow/2022/01/18/suicide-websites-caution> [<https://perma.cc/H7QN-BYJK>].

181. *Fiscalía investiga a uruguayo presuntamente vinculado a web que promueve el suicidio [Prosecutor's Office Investigates Uruguayan Allegedly Linked to Website that Promotes Suicide]*, EL OBSERVADOR (Dec. 21, 2021, 1:13 PM) (Uru.), <https://www.elobservador.com.uy/nota/fiscalia-investiga-a-uruguayo-presuntamente-vinculado-a-web-que-promueve-el-suicidio-20211221131330> [<https://perma.cc/BZ4F-TR4U>].

182. Raphael Cohen-Almagor & Sam Lehman-Wilzig, *Digital Promotion of Suicide: A Platform-Level Ethical Analysis*, 37 J. MEDIA ETHICS 108, 119 (2022) (citing *Australian Criminal Code Amendment (Suicide Related Material Offenses) Act 2005* (Austl.)).

183. Alicia Bridges, *A Dark Place*, ABC RADIO PERTH (Nov. 15, 2022, 1:49 PM), <https://www.abc.net.au/news/2022-11-16/fight-to-block-pro-suicide-website/101530766> [<https://perma.cc/ES4S-LB5J>] (citing *Online Safety Act 2021* (Austl.)).

184. *Id.*

185. *Id.* (citing *Telecommunications Act 1997* s 313 (Austl.)).

Australia that it altered its search engine algorithm to de-emphasize websites such as the suicide website, Google Australia declined to take down the website from its platform, saying that the website was not illegal under Australian law.¹⁸⁶ Despite the government's efforts in 2019, it was still possible for some people in Australia to get around the prohibition and access the website; once the website moved to a new URL, some Internet service providers (ISPs) failed to block the website again at its new web address.¹⁸⁷ Thus, while the Australian government has limited access to online suicide assistance forums to a far greater extent than currently possible in the United States, it has not been fully successful in restricting access to these websites.

Australian authorities have also tried to attack the issue through restricting sales of sodium nitrite—a legal strategy that, if adopted in the United States, could significantly reduce the number of suicides connected to online forums without implicating First Amendment concerns. In Australia, there were no recorded deaths from sodium nitrite before 2017, but there were at least 20 between 2017 and 2020. In response, the Therapeutic Goods Administration, an Australian government agency, placed restrictions on the selling of sodium nitrite, allowing only businesses—not individuals—to purchase the substance in its most potent form.¹⁸⁸

While the First Amendment and Section 230 represent significant restrictions on the U.S. government's ability to target pro-suicide websites as aggressively as Australia or the U.K., regulating or restricting sales of sodium nitrite and similar lethal chemicals is a strategy that U.S. officials and governmental entities could potentially pursue, inspired by the efforts of these foreign governments. State-level legislation like the New York bill proposed by State Sen. Gounardes, discussed *supra*, is one possible avenue for doing so. Additionally, depending on whether California is successful in implementing a state law akin to the U.K.'s Online Safety Bill, lawmakers in other U.S. states might try to follow California's lead—as long as the resulting laws do not violate the First Amendment.

V.

AN ALTERNATIVE PATH FORWARD

A recent lawsuit shows another potential legal path for victims' families to make it more difficult for young people to receive suicide

186. *Id.*

187. *Id.*

188. *Id.*

instructions online. In September 2022, family members of two teenagers who took their own lives by ingesting sodium nitrite after reading about that suicide method on the suicide website sued Amazon and Loudwolf, a manufacturer of the chemical, in state court in Alameda County, California.¹⁸⁹ The lawsuit is for products liability against both Amazon and Loudwolf, negligence against both Amazon and Loudwolf, and negligent infliction of emotional distress (by one of the plaintiffs only, against both Amazon and Loudwolf).¹⁹⁰ The plaintiffs seek both economic and non-economic damages.¹⁹¹ The case has since been removed to federal court in the Northern District of California and then transferred to the Western District of Washington, where Amazon is headquartered.¹⁹² A similar lawsuit was filed in early 2023 by separate plaintiffs in state court in King County, Washington.¹⁹³

In the initial California complaint, the plaintiffs specifically cite the prominence of sodium nitrite as a suicide method on the website. The plaintiffs note that commenters on the website frequently discuss exact instructions for how to ingest the chemical to die by suicide, in addition to instructions about where and how to purchase the chemical easily online (through Amazon or directly through Loudwolf, the most prominent manufacturer of the chemical).¹⁹⁴ Despite there being no household use of the drug at the level of purity that Amazon and Loudwolf sell to any paying customer,¹⁹⁵ Amazon has defended its selling of the chemical, saying that it is legally sold and that the company is not responsible for anyone purchasing and “misusing” it.¹⁹⁶ As of February 2022, at least ten people have died by suicide after purchasing and ingesting sodium nitrite, a number that is likely significantly higher due to undercounting and incomplete data.¹⁹⁷

189. Complaint for Civil Penalties and Demand for a Jury Trial, *McCarthy v. Amazon.com, Inc.*, No. 22CV018942 (Cal. Super. Ct. Sept. 29, 2022).

190. *Id.* at 203–22.

191. *Id.* at 232.

192. *McCarthy v. Amazon.com, Inc.*, No. 3:22-cv-05718-JD, 2023 WL 5358356 (N.D. Cal. Feb. 17, 2023). *See also* Burkett, *supra* note 14.

193. Kaustuv Basu, *Amazon Loses Bid to End Lawsuit Over Orders Tied to Suicides*, BLOOMBERG L. (Jan. 3, 2023, 1:54 PM), <https://news.bloomberglaw.com/us-law-week/amazon-loses-bid-to-end-lawsuit-over-orders-tied-to-suicides> [https://perma.cc/678T-TN22].

194. Complaint for Civil Penalties and Demand for a Jury Trial at 95–96, *McCarthy v. Amazon.com, Inc.*, No. 22CV018942 (Cal. Super. Ct. Sept. 29, 2022).

195. *Id.* at 13.

196. *See* Twohey & Dance, *Lawmakers Press Amazon*, *supra* note 168 (“Amazon makes a wide selection of products available to our customers because we trust that they will use those products as intended by the manufacturers . . . Like many widely-available consumer products, . . . [the compound] can unfortunately be misused.”).

197. *Id.*

The plaintiffs further note in the complaint that other online sellers of sodium nitrite, including eBay and Etsy, voluntarily stopped selling the chemical after it was brought to their executives' attention that it was being used in suicides.¹⁹⁸ By contrast, despite being notified of the issue, Amazon has declined to stop selling the product and has not substantively replied to a U.S. congressional inquiry into its continued sales of the chemical.¹⁹⁹ The plaintiffs outline at length how the Amazon algorithm directs suicidal consumers to its listing for sodium nitrite and suggests other items that are recommended by commenters on Sanctioned Suicide as companion products to the sodium nitrite. These products include a drug taken to prevent life-saving vomiting of the poison and a handbook that includes instructions on how to take a fatal dose of sodium nitrite.²⁰⁰

While civil litigation like the California lawsuit would not bring accountability to either the administrators or users of the suicide website, it does represent a potential alternative path to use legal means to attempt to meaningfully reduce the number of people who take their own lives after spending time on such websites. A significant body of research shows that struggling people are far more likely to attempt to take their own lives if they have access to lethal means;²⁰¹ anecdotally, the parents of an Australian young man who died by suicide after spending time on a pro-suicide website said in an interview with Australian media that messages found on their son's computer after his death indicated that he had been unsure about whether to take his own life until he found the website and learned about a lethal chemical—presumably sodium nitrite—at which point he decided to go through with the act.²⁰² If the plaintiffs in the California lawsuit are successful in court, Amazon could be forced or otherwise prompted to end sales of sodium nitrite. Given that other prominent e-commerce companies have already removed the product from their platforms, this change in policy would make it appreciably more difficult for young people to acquire the chemical. Of course, there are many methods by which people take their own lives, and other, smaller websites could start selling the

198. Complaint for Civil Penalties and Demand for a Jury Trial at 184, *McCarthy v. Amazon.com, Inc.*, No. 22CV018942 (Cal. Super. Ct. Sept. 29, 2022).

199. *Id.* at 188–89.

200. *Id.* at 85–87.

201. See, e.g., *Suicide Prevention: Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 2, 2022), <https://www.cdc.gov/suicide/factors/index.html> [<https://perma.cc/TKZ2-6HTA>]; see also *Frequently Asked Questions About Suicide*, NAT'L INST. MENTAL HEALTH (2021), <https://www.nimh.nih.gov/health/publications/suicide-faq> [<https://perma.cc/UJ5U-WHDX>].

202. Bridges, *supra* note 183.

substance, but reducing the ease of acquiring sodium nitrite could have an appreciable downward effect on the number of young people dying by suicide after spending time on the website.

Indeed, Nikki Maynard, one of the plaintiffs in the California lawsuit—the mother of one of the deceased teenagers, who was 17 years old when he took his own life—describes how her son, Ethan McCarthy, ordered sodium nitrite to their family home using her Amazon account. Maynard had noticed an online receipt from Amazon showing the unusual purchase,²⁰³ and called Amazon to cancel the order,²⁰⁴ assuming that her account had been hacked.²⁰⁵ An Amazon representative told her they were cancelling the order,²⁰⁶ but the company shipped it anyway.²⁰⁷ Expecting other packages from Amazon, Maynard unknowingly brought the box containing the chemical into the house.²⁰⁸ Hypothetically, had Ethan not been able to get the substance through Amazon, his mother might have noticed an unrecognized package arriving at the house and could have prevented him from easily obtaining it.

CONCLUSION

While suicide is an ancient problem,²⁰⁹ contemporary societal factors, including the free flow of information on the Internet, have contributed to a steep rise in suicide rates, especially among adolescents and young adults.²¹⁰ To attempt meaningful mitigation in the face of ubiquitous and ever-increasing technological saturation can feel quixotic. Illustrating the difficulty of such efforts, as of August 23, 2023, the “Suicide Discussion” part of Sanctioned Suicide had more than 1.2 million total comments, while the “Recovery” part had not even 79,000.²¹¹ Yet a problem of this magnitude will continue to worsen without urgent and innovative harm reduction efforts.

203. Complaint for Civil Penalties and Demand for a Jury Trial at 161, *McCarthy v. Amazon.com, Inc.*, No. 22CV018942 (Cal. Super. Ct. Sept. 29, 2022).

204. *Id.* at 162.

205. *Id.* at 163.

206. *Id.* at 162.

207. *Id.* at 165.

208. *Id.* at 166.

209. See, e.g., Elise P. Garrison, *Attitudes Toward Suicide in Ancient Greece*, 121 *TRANSACTIONS OF THE AM. PHILOLOGICAL ASS'N* 1 (1991).

210. For example, “emergency room visits for suicidal ideation and attempts nearly doubled among children and adolescents” during the 2010s. Jean M. Twenge, *Increases in Depression, Self-Harm, and Suicide Among U.S. Adolescents After 2012 and Links to Technology Use: Possible Mechanisms*, 2 *PSYCHIATRIC RES. AND CLINICAL PRAC.* 19 (2020).

211. SANCTIONED SUICIDE, <https://sanctioned-suicide.org/> [<https://perma.cc/85S3-YU7S>] (last visited Aug. 23, 2023).

The goal of this Note was to examine the current legal status of online suicide assistance forums and to determine the most promising paths that lawmakers and litigators can take to reduce the harm such websites cause. The most impactful way to drastically reduce the accessibility of suicide assistance websites and to ensure accountability for their operators would involve changes to both First Amendment jurisprudence and Section 230 of the Communications Decency Act—modifications that together could expose website operators like Small and Galante to liability for a broad range of suicide assistance posted by users on their online forums.

As such, impact litigation with the goal of convincing courts to recognize suicide as effectively illegal for the purposes of First Amendment analysis—allowing an expansion of the *Brandenburg* test and the possible upholding of laws that criminalize forms of suicide encouragement—could greatly increase the government’s ability to reduce access to suicide assistance websites. The introduction of a new free speech exception pursuant to the Supreme Court’s decision in *Stevens* could have a similar effect. Additionally, a judicial or statutory update to the twenty-five-year-old doctrine from *Reno* might also make room for further legal restrictions on online speech that encourages suicide.

Freedom of speech has long been an essential part of American life and one of the core freedoms that U.S. citizens cherish. While groups like the ACLU will likely continue to oppose any effort to carve out further exceptions to the First Amendment—as evidenced by the Pennsylvania ACLU’s opposition to Shawn’s Law—a narrow exception for online suicide assistance could save many lives without affecting speech in other areas. Nevertheless, while the passage of a sweeping and effective federal law criminalizing the act of aiding or abetting suicide online—akin to the law in Australia—would likely not be possible without small changes to First Amendment interpretation, legislation or judicial reinterpretation in these areas seems unlikely to happen in the near future.

A more realistic option might be changes to Section 230 of the Communications Decency Act, which would have the most significant impact on the future of pro-suicide websites. If Section 230 were repealed or amended to allow liability for operators of online suicide assistance forums, these websites might struggle to remain active under a likely crush of lawsuits by grieving families—even if many of the legal claims would ultimately fail on First Amendment grounds. While website operators like Galante and Small would likely continue attempts to resurrect online suicide assistance forums, grieving loved ones like Pam Dal Canto, Mike and Mary Gonzales, Jackie Bieber, and

Nikki Maynard would have expanded legal options to ensure that other parents never have to go through the horror of losing a child to suicide.

If Congress fails to act on Section 230, narrow federal legislation like the Stop Online Suicide Assistance Forums Act—or similar legislation on the state level—could help bring some accountability to bad actors like William Melchert-Dinkel. Congress or state legislatures could also try to pass laws that resemble the broader statute that the Minnesota Supreme Court struck down in *Melchert-Dinkel*, forcing other high courts to decide for themselves whether the fact that suicide is technically not illegal in the United States effectively shields online predators from prosecution.

Finally, given the dual hurdles of broad interpretations of the First Amendment and congressional inaction regarding Section 230, legislation and litigation to limit the accessibility of chemicals frequently used to commit suicide is a promising strategy to reduce the harms caused by pro-suicide websites, albeit without addressing the roots of the problem. State-level bills like the proposed New York statute that would restrict the sale of sodium nitrite, along with lawsuits that target online retailers that sell lethal chemicals to vulnerable teenagers and young adults, are good first steps. While it is impossible to know whether such restrictions would have saved the lives of Daniel Dal Canto or Ethan McCarthy, it is imperative that lawmakers at every level of government act quickly and creatively to reduce the increasing number of suicides by young people in the United States.