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SHOOT THE MESSENGER: WHY SECTION 230 DOES NOT SHIELD SUGGESTIVE CONTENT DELIVERY

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INTRODUCTION

Following the conclusion of Super Bowl LVII in 2023, a team of Twitter[1] engineers was summoned late at night to solve a "high urgency" problem.[2] In a Slack message, James Musk, cousin of owner and CEO Elon Musk, wrote that there was an "issue with engagement" throughout the platform.[3] The problem? President Biden's tweet supporting the Philadelphia Eagles had generated nearly 29 million impressions, while Elon Musk's own tweet supporting the team generated only 9.1 million impressions.[4] Musk, who deleted the tweet in apparent frustration, flew back to Twitter's headquarters to demand answers and oversee a "fix" to the issue.[5]

Working into the morning, Twitter engineers deployed code that artificially boosted Musk's tweets and allowed them to bypass Twitter's filters designed to show users relevant content.[6] Musk's tweets were boosted "by a factor of 1,000," ensuring that they ranked higher than anyone else's in a user's feed.[7] The site's algorithm was also modified to allow Musk's tweets to overcome safeguards intended to prevent a single account from flooding Twitter's "For You" feed.[8] By Monday afternoon, Musk's tweets and replies dominated the feeds of millions of Twitter users—whether they followed him or not.[9]

Since purchasing Twitter in 2022,[10] Musk has shown a willingness to alter the site's algorithm to influence what content is shown to users.[11] After restoring the account of conspiracy theorist Alex Jones in December 2023, X's algorithm actively promoted the account to other users, and conspiratorial posts from Jones' account appeared in the "For

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1 In July 2023, Twitter was rebranded as "X." Jordan Valinsky, *Elon Musk Rebrands Twitter as X*, CNN BUS. (July 24, 2023, 5:44 AM), https://www.cnn.com/2023/07/24/tech/twitter-rebrands-x-elon-musk-hnk-intl [https://perma.cc/F6XQ-KHS4]; *see also* Nicole G. Iannarone, *Teaching Twitter's Takeover*, 53 STETSON L. REV. 295, 305 (2024).

2 Zoë Schiffer & Casey Newton, *Yes, Elon Musk Created a Special System for Showing You All His Tweets First*, PLATFORMER (Feb. 14, 2023), https://www.platformer.news/yes-elon-musk-created-a-special-system [https://perma.cc/UY7S-DYQH].

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 Iannarone, *supra* note 1, at 295.

11 *See generally* Jorge Rafael Sagastume Muralles, Visions and Values of Algorithms: A Study of How Elon Musk Envisions X's Algorithms (2024) (M.Sc. thesis, Lund University).

You" feed of users who did not follow him on the platform.[12] Jones is known for advancing the conspiracy that the 2012 Sandy Hook shooting massacre was a hoax.[13] In a livestreamed interview on X, promoted by Musk, Jones made false claims regarding his harassment of Sandy Hook victims' families, claiming that he was "just asking questions."[14]

Suppose that Jones had made false and defamatory statements concerning the shooting in a post on X, which in turn was amplified by the site's algorithm and shown to users who were not following Jones and who had not expressed interest in the post's subject matter.[15] Jones, as the author of the post, would be liable for its content.[16] Could X—the platform whose algorithm artificially boosted and promoted the post to others—also face liability for defamation and harassment, if Jones' post appeared in the "For You" feed of one of the grieving parents? The answer depends on a twenty-six-word statute known as Section 230.[17]

Internet companies have frequently relied on Section 230 of the Communications Decency Act of 1996 to avoid liability for third-party content hosted on their platforms.[18] Undoubtedly, many aspects of the internet would be unrecognizable without Section 230, as it has played a major role in allowing free-flowing public expression.[19] Internet companies would have struggled to grow their platforms if they could be held liable for defamatory statements made by others.[20] However, over time, companies began to take advantage of the broad cover of Section

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12 Clare Duffy, *Elon Musk's X Is Encouraging Users to Follow Conspiracy Theorist Alex Jones After Reinstating His Account*, CNN BUS. (Dec. 11, 2023, 5:29 PM), https://www.cnn.com/2023/12/11/tech/elon-musk-x-promoting-alex-jones-after-reinstating-his-account/index.html [https://perma.cc/DSC7-4MJW].

13 Keith A. Call, *Lessons from* Alex Jones*: The Rules Governing Inadvertently Produced Documents*, 35 UTAH B.J. 55, 55 (2022).

14 Duffy, *supra* note 12.

15 Prior to Musk's takeover and subsequent reinstatement of Jones' account, Jones had been banned from Twitter for posting tweets and videos that violated Twitter's "abusive behavior policy." *Twitter Bans Alex Jones and Infowars for Abusive Behaviour*, BBC NEWS (Sep. 6, 2018), https://www.bbc.com/news/world-us-canada-45442417 [https://perma.cc/MDT2-4HEP]. Jones has been held civilly liable for making false and defamatory statements about the shooting. *See* Heslin v. Jones, No. D-1-GN-18-001835, 2021 WL 4571198, at *1–2 (Tex. Dist. Ct. Sept. 27, 2021); *see also In re* Jones, 655 B.R. 868, 873 (Bankr. S.D. Tex 2023). In a more recent suit against Jones, a jury in Connecticut awarded nearly $1 billion in defamation and emotional distress damages. Lafferty v. Jones, No. UWY-CV-18-6046436-S, 2022 WL 21697091 (Conn. Super. Ct. Oct. 12, 2022); *see also* Cortelyou C. Kenney, *Defamation 2.0*, 56 LOY. L.A. L. REV. 1, 7 (2023).

16 Kenney, *supra* note 15.

17 *Id.*; 47 U.S.C. § 230(c)(1).

18 Max Del Real, *Breaking Algorithmic Immunity: Why Section 230 Immunity May Not Extend to Recommendation Algorithms*, 99 WASH. L. REV. ONLINE 1, 1 (2024); 47 U.S.C. § 230(c)(1).

19 Del Real, *supra* note 18, at 2.

20 *Id.*

230 in circumstances outside the statute's original scope.[21] One example is Section 230's application to recommendation algorithms.[22]

Social media algorithms were born with Facebook's introduction of ranked, personalized news feeds in 2009.[23] Today, many of the most popular internet services, such as search engines, streaming services, and social media platforms, rely on algorithms to personalize each user's experience and identify the content with which they will most likely engage.[24] What a user sees on the internet is often the product of an algorithmic process choosing from a large amount of content or information.[25] These algorithms, now found everywhere on the internet, were practically absent from public use when Section 230 was enacted.[26]

In recent years, a debate has emerged over the scope of Section 230 and whether internet companies are entitled to its broad immunity when they use algorithms to deliver third-party content.[27] Some maintain that recommendation algorithms should not be excluded from Section 230 immunity.[28] Others question whether Section 230, as written, applies to modern tools such as algorithms,[29] arguing that recommendation algorithms have allowed platforms to take a more active role in how content is shared and to whom it is distributed.[30]

While attempts have been made to distinguish between the different types of recommendation algorithms,[31] these arguments have generally treated all instances of their use the same, despite the fact that some are much more "suggestive" than others.[32] In reality, recommendation

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21 *Id.*

22 *Id.*

23 Nicholas Barrett, *How Have Social Media Algorithms Changed the Way We Interact?*, BBC NEWS (Oct. 12, 2024), https://www.bbc.com/news/articles/cp8e4p4z97eo [https://perma.cc/8BPU-R4H5].

24 Jonathan Gruber & Eszter Hargittai, *The Importance of Algorithm Skills for Informed Internet Use*, 10 BIG DATA & SOC'Y 1, 1 (2023).

25 *Id.*

26 Del Real, *supra* note 18, at 2–3.

27 Alan Rozenshtein, *Interpreting the Ambiguities of Section 230*, 41 YALE J. ON REGUL. BULLETIN 60, 61 (2024); *see also* Del Real, *supra* note 18; Haley Bernstein, *Reconciling Section 230 and the First Amendment: Should Social Media Companies be Held Liable for the Consequences of Their Recommendation Algorithms?*, 19 J. BUS. & TECH. L. 373, 374 (2024); Tomer Kenneth & Ira Rubinstein, *Gonzalez v. Google: The Case for Protecting "Targeted Recommendations"*, 72 DUKE L. J. ONLINE 176, 179 (2023).

28 Kenneth & Rubinstein, *supra* note 27, at 199.

29 Del Real, *supra* note 18, at 3.

30 Bernstein, *supra* note 27, at 375.

31 Del Real, *supra* note 18, at 10.

32 Julianne Gabor, *The TikTok Algorithm is Good, But Is It Too Good? Exploring the Responsibility of Artificial Intelligence Systems Reinforcing Harmful Ideas on Users*, 32 CATH. U. J. L. & TECH 109, 110 (2023) (explaining that the TikTok algorithm "is notorious for 'being inside a user's head'—by allowing the app to generate content for them, as opposed to other platforms where a user must follow other users to see content.").

algorithms operate on a spectrum: Some, such as those used to filter search results and recommend friends, are seemingly innocuous and work to enhance the user experience.[33] Others, such as those used to curate news feeds and promote video content, have a more profound impact and can facilitate the spread of misleading or defamatory information.[34]

Because it overlooks these important differences, Section 230 is insufficiently nuanced, and it confers a great deal of interpretive authority to the judiciary.[35] Courts, in turn, have also failed to grasp these distinctions.[36] From a textualist and policy perspective, the best interpretation of the statute is that immunity is not conveyed if the algorithm used to deliver the third-party content is so suggestive that it generates a message of its own.[37] By contrast, other, less-suggestive algorithms may be entitled to immunity.[38] And while this interpretation is both wise and within the statute as it is written, it would be better for Congress to amend the statute in its entirety to eliminate this ambiguity.[39]

Part I of this Note begins by taking a deep dive into Section 230, examining its origins and the intent of those who helped create it.[40] Part I then looks at how courts have traditionally interpreted the statute and considers previous attempts by Congress to amend it.[41] To better understand the role that algorithms play in delivering content, Part I will also explain the different types of algorithms used by internet companies and compare some of the algorithms used by popular social media platforms.[42] Part II analyzes the different approaches taken by judges in newer Section 230 cases involving algorithmic recommendations and evaluates the merit of some of the proposed legislative changes.[43] Part III advocates for a more nuanced interpretation of the statute as it applies to

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33 *See* Ben Lutkevich, *Google Algorithms Explained: Everything You Need to Know*, TECHTARGET (Apr. 20, 2023), https://www.techtarget.com/whatis/feature/Google-algorithms-explained-Everything-you-need-to-know [https://perma.cc/7ALP-QPZQ]; Shreyash Movale, *Facebook Friend Suggestion Algorithm*, MEDIUM (July 16, 2022), https://medium.com/@shreyash9m/facebook-friend-suggestion-algorithm-ff9319e2ad7f [https://perma.cc/EY7B-8N5P].

34 William Brady & The Conversation US, *Social Media Algorithms Warp How People Learn from Each Other*, SCI. AM. (Aug. 25, 2023), https://www.scientificamerican.com/article/social-media-algorithms-warp-how-people-learn-from-each-other [https://perma.cc/KWE3-8ZP6].

35 *See infra* Part II.

36 *Id.*

37 *See infra* Part III.

38 *Id.*

39 *Id.*

40 *See infra* Section I.A.

41 *Id.*

42 *See infra* Section I.B.

43 *See infra* Part II.

suggestive algorithms and offers a proposal for amending Section 230 to better reflect the modern digital landscape.[44]

I. BACKGROUND

A. *Section 230*

Section 230 has been referred to as "the twenty-six words that created the internet."[45] It has provided broad immunity to service providers and internet companies since 1996.[46] The relevant provision of the statute states 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."[47] Section 230 updated federal telecommunications law for the first time in over sixty years.[48] Despite its modern importance, Section 230 was only one small part of a larger legislative package: the Communications Decency Act of 1996, which was itself part of the Telecommunications Act of 1996.[49] Congress hoped that Section 230 would promote the continued development of the internet and encourage the removal of offensive or illegal content.[50]

1. The Legal Landscape Prior to 1996

Prior to the internet, courts consistently held that publishers (who were expected to be aware of the material they were publishing) are liable for any illegal content they published, while distributors (who are likely unaware of the content) enjoy immunity.[51] For example, while a newsstand could not be held legally responsible for illegal content found in one of the newspapers they sold, the publisher of the newspaper could

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44 *See infra* Part III.

45 Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 625 (2020).

46 *Id.*

47 47 U.S.C. § 230(c)(1).

48 *Telecommunications Act of 1996*, FED. COMMC'NS COMM'N (June 20, 2013), https://www.fcc.gov/general/telecommunications-act-1996 [https://perma.cc/497D-2YXY].

49 Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); Rozenshtein, *supra* note 27, at 66. For a description of how the name "Section 230" came to be, *see id.* at 66 n.23.

50 47 U.S.C. § 230(a), (b).

51 *See, e.g.*, Smith v. California, 361 U.S. 147, 152–55 (1959); Richard J. Hunter, Jr., Hector R. Lozada & John H. Shannon, *Director vs. Publisher vs. Provider: That Is the High-Tech Question: But Is an Extension of Liability the Answer?*, 8 INT'L J. EDUC. & SOC. SCI. 28, 29 (2021).

be.[52] This is because a person who "delivers or transmits defamatory matter published by a third person" is liable for defamation if they "knew or had reason to know" that the content was defamatory.[53] Under the Second Restatement of Torts, a publisher could therefore be held liable if they acted negligently, even if they lacked knowledge that the content was defamatory.[54] While the difference between a publisher and a distributor appeared at one point to be black and white, the development of the internet has blurred the line between the two.[55]

By today's standards, internet experiences in the 1990s were "underwhelming" and "static."[56] Websites rendered a consistent page to all users, no matter who they were or where they were accessing the website from.[57] Internet forums allowed users to discuss various topics and interact with content created by others.[58] At the start of the decade, internet platforms were considered "passive conduits" for users' communications, akin to telephone companies.[59] The question for courts was whether these platforms were publishers of third-party content such that they could be held liable for negligence in publishing it, or whether they were simply distributors of it.[60]

Two cases decided in the early 1990s addressed this question.[61] These cases involved CompuServe and Prodigy, two of the biggest information content providers at the time.[62] CompuServe did not moderate content posted on its website by other users.[63] By contrast, Prodigy did have moderators and tried to prevent illegal content from being shared on its platform.[64] Both were sued for defamation based on

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52 Bernstein, *supra* note 27, at 376.

53 Rozenshtein, *supra* note 27, at 63.

54 RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

55 Bernstein, *supra* note 27, at 376.

56 Del Real, *supra* note 18, at 1.

57 *Id.* at 9.

58 Nilesh Verma, *The Fascinating Evolution of Social Media: From Internet Forums to the Mobile Era*, MEDIUM (Dec. 23, 2022), https://medium.com/@techynilesh/the-fascinating-evolution-of-social-media-from-internet-forums-to-the-mobile-era-66da0657657d [https://perma.cc/GCM8-XZC6].

59 Bernstein, *supra* note 27, at 377.

60 Rozenshtein, *supra* note 27, at 64.

61 *Id.*

62 Adi Robertson, *Why the Internet's Most Important Law Exists and How People Are Still Getting It Wrong*, VERGE (June 21, 2019, 1:02 PM), https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview [https://perma.cc/7CZ4-22JQ].

63 *Id.*

64 *Id.*

third-party content hosted on their sites.[65] In *Cubby, Inc. v. CompuServe, Inc.*, the owner of a media news outlet sued CompuServe for hosting a forum in which allegedly defamatory material was posted about the news outlet.[66] The Southern District of New York held that because CompuServe allowed all content on its website to go unmoderated, it was a distributor and was therefore not liable for libelous content posted by its users.[67] Conversely, a New York state court held in *Stratton Oakmont, Inc. v. Prodigy Services Co.* that because Prodigy had taken an editorial role by moderating its users' posts, it was a publisher and was liable for libelous third-party content.[68] The court wrote that Prodigy differentiated itself by "exercis[ing] editorial control over the content of messages" posted on its bulletin boards and likened the company to a newspaper.[69] Ironically, by trying to prevent illegal content, Prodigy ended up exposed to more liability than it would have faced if it had enabled a free-for-all.[70] The message for content providers was therefore to take a hands-off approach to content on their platforms.[71]

2. Legislative Intent Behind Section 230

Stratton Oakmont directly led to Section 230's introduction in Congress a year later.[72] Then-representatives Chris Cox and Ron Wyden disagreed with the decision, arguing that online service providers should be encouraged and able to exercise control over what users post on their platforms.[73] But Cox and Wyden hoped that Section 230 would do more than simply overturn *Stratton Oakmont*.[74] The two aimed to create legislation that would encourage free speech on the internet and allow online service providers to moderate content without fear of liability.[75] Cox envisioned a "cleaner" web, where it was more difficult for users to

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65 *Id.*; *see* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

66 *Cubby*, 776 F. Supp. at 135; Rozenshtein, *supra* note 27, at 64.

67 *Cubby*, 776 F. Supp. at 141.

68 *Stratton Oakmont*, 1995 WL 323710 at *4.

69 *Id.* at *2.

70 *See id.* at *4–5.

71 *Id.*

72 Rozenshtein, *supra* note 27, at 64.

73 Ash Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved [https://perma.cc/483C-J2TA].

74 Rozenshtein, *supra* note 27, at 65.

75 Johnson & Castro, *supra* note 73.

encounter obscene or offensive content.[76] He feared that, under existing standards, companies trying to clean such content risked opening themselves up to multi-million dollar lawsuits; this risk would discourage companies from acting and the internet would eventually devolve into the "Wild West."[77] The pair also reasoned that the growth and development of the internet as a whole would be limited if startups and emerging companies had to worry about liability for third-party content.[78] Seeing its importance, the House passed Section 230 (then referred to as the Cox-Wyden Amendment) by a vote of 420-4.[79]

Proponents of Section 230 maintain that it has succeeded in its goals and allowed for the creation of a "vibrant" social networking environment online.[80] Without Section 230, they argue, many aspects of the internet would be "unrecognizable."[81] Cox and Wyden would likely agree, having recognized the internet as a "unique" opportunity for cultural development and "extraordinary" advance in the availability of informational resources.[82]

3. Traditional Interpretations and New Approaches

Section 230's straightforward language and limited exceptions gave courts significant flexibility in interpreting the scope of immunity provided to online service providers.[83] At first, courts applied this immunity broadly.[84]

A year after the passage of Section 230, the Fourth Circuit issued an opinion in *Zeran v. America Online, Inc.*, holding that the statute creates a federal immunity "to any cause of action that would make service providers liable for any information originating with a third-party user."[85]

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76 Matt Reynolds, *The Strange Story of Section 230, the Obscure Law that Created Our Flawed, Broken Internet*, WIRED (Mar. 24, 2019, 2:00 AM), https://www.wired.com/story/section-230-communications-decency-act [https://perma.cc/79NY-FQX6]. Section 230 was part of a broader congressional effort to respond to the "danger" of children being exposed to inappropriate content on the internet, such as pornography. Rozenshtein, *supra* note 27, at 65–66.

77 Rozenshtein, *supra* note 27, at 65–66.

78 Weintraub & Moore, *supra* note 45, at 626.

79 *Section 230: Legislative History*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history#:~:text=The%20Cox%2DWyden%20Amendment%3A%20Section%20230&text=Section%20230%20had%20two%20purposes,and%20provide%20for%20child%20safety [https://perma.cc/K94B-6ESA].

80 Kenneth & Rubinstein, *supra* note 27, at 66.

81 Del Real, *supra* note 18, at 2.

82 Rozenshtein, *supra* note 27, at 66.

83 Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 COLUM. SCI. & TECH L. REV. 1, 10 (2016).

84 *Id.*

85 129 F.3d 327, 330 (4th Cir. 1997).

In that case, an anonymous post on an America Online bulletin board alleged that an individual named "Ken" was selling offensive t-shirts related to the 1995 Oklahoma City bombing.[86] The post included a phone number which was the home phone number of the plaintiff, Kenneth Zeran, who claimed to have received angry calls and death threats.[87] Zeran sued America Online, seeking to hold them liable for the allegedly defamatory speech hosted on their platform.[88] This marked the first time that a federal appellate court interpreted the scope of Section 230,[89] and the court concluded that lawsuits seeking to hold a service provider liable for "traditional editorial functions," such as deciding whether to publish, were barred.[90]

Zeran quickly caught the attention of litigants, courts, and legal scholars, sparking a new debate over the scope of Section 230.[91] The *Zeran* court's interpretation quickly became the dominant one,[92] with many believing it to be the most influential.[93] Opponents argued against the defendant-friendly reading of the statute, urging courts to apply Section 230 immunity more narrowly.[94] However, courts rejected most of these challenges and continued to apply Section 230 protections broadly through the early 2000s.[95]

Over time, courts began applying broad immunity not only to service providers, such as America Online, but also to websites and other online platforms that hosted user-generated content, which more closely resemble modern social media platforms.[96] In 2003, the Ninth Circuit ruled in *Carafano v. Metrosplash.com, Inc.* that Matchmaker.com was entitled to immunity from a lawsuit arising out of a user's creation of a fake profile that used photographs of the plaintiff actress.[97] Earlier that year, in *Batzel v. Smith*, the Ninth Circuit had extended Section 230 immunity to online platforms that made a "voluntary and affirmative" decision to display user content.[98] There, the court immunized the Museum Security Network ("the Network"), a website and email listserv

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86 *Id.* at 329.

87 *Id.*

88 *Id.* at 328–30.

89 Kosseff, *supra* note 83, at 11.

90 *Zeran*, 129 F.3d at 330.

91 Kosseff, *supra* note 83,at 11.

92 *Id.*; *see, e.g.*, Doe v. America Online, Inc., 783 So. 2d 1010, 1013 (Fla. S. Ct. 2001); Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637 at *1 (Cal. Super. Ct. Nov. 7, 2000).

93 Paul Ehrlich, *Communications Decency Act Section 230*, 17 BERKELEY TECH. L.J. 401, 406 (2002).

94 Kosseff, *supra* note 83, at 11.

95 *Id.* at 11–13.

96 *Id.* at 12.

97 339 F.3d 1119, 1120–21 (9th Cir. 2003).

98 Kosseff, *supra* note 83, at 13; Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003).

concerning stolen artwork, when it modified and published a defamatory email that it had received.[99] The majority reasoned that Section 230 afforded immunity to the Network because it did not create the defamatory content.[100] However, *Batzel* differed from previous cases in that the online platform took affirmative steps to review and edit the third-party content.[101] Judge Ronald Gould, in a partial concurrence and partial dissent, reasoned that because the Network had selected and edited certain content, the content was no longer "information provided by another" and therefore not entitled to Section 230 immunity.[102] He wrote that selecting particular information for distribution adds a person's "imprimatur" to it,[103] and he argued that a defendant who actively selected libelous information for distribution should not be entitled to immunity, even if the information was "provided by another."[104] The majority disagreed, holding that the Network's minor alterations did not constitute "development of information."[105]

A few years later, as online platforms took on a more active role in content curation, the Ninth Circuit attempted to curtail the scope of Section 230 immunity.[106] The Fair Housing Councils of San Fernando Valley and San Diego sued Roommates.com, alleging that the site's business practices violated the federal Fair Housing Act (FHA) and state housing discrimination laws.[107] Roommates.com, attempting to match compatible roommates, required users to complete a profile with information about themselves such as their sex and sexual orientation.[108] The website allowed users to search within the Roommates.com network for one or more of these criteria, and Roommates.com periodically sent emails indicating availability of housing that matched a user's preferences.[109] In response to claims that its business violated the FHA, Roommates.com argued that Section 230 immunity applied because the allegedly violative (discriminatory) content was provided by its users.[110] The Ninth Circuit found Roommates.com only partially immune, not affording safe harbor protection to the website's search function or email

99 *Batzel*, 333 F.3d at 1021–22.

100 *Id.* at 1031.

101 *Id.*; Kosseff, *supra* note 83, at 13–14.

102 *Batzel*, 333 F.3d at 1037 (Gould, J., concurring in part and dissenting in part).

103 *Id.* at 1038.

104 *Id.* at 1039.

105 *Id.* at 1031.

106 Varty Defterderian, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 564 (2009).

107 *Id.* at 572; Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d. 1157, 1162 (9th Cir. 2008).

108 *Roommates.com*, 521 F.3d at 1161.

109 Defterderian, *supra* note 106, at 572.

110 *Roommates.com*, 521 F.3d at 1166.

notifications.[111] The "Additional Comments" section of profile pages, which allowed users to provide additional information beyond the required fields, was eligible for Section 230 immunity.[112] The court reasoned that, since every profile page was a "collaborative effort" between the website and the user, Roommates.com was at least partially responsible for the content's development.[113] Here, the court first articulated the "material contribution test," which bars Section 230 immunity if the service provider or online platform "makes a material contribution to the creation or development of content."[114] By contrast, "neutral tools" that do not enable such contribution do receive immunity, as long as they are identically applied in all contexts.[115]

What constitutes "development" of content remained unclear, however. The Tenth Circuit attempted to answer that question in *F.T.C. v. Accusearch Inc.*[116] Accusearch owned and operated Abika.com, a website that allowed users to access and obtain personal information for members of the public.[117] The site acted as an intermediary, facilitating users' acquisition of information from "third-party researchers."[118] Accusearch sought Section 230 immunity, arguing that it was being treated as the publisher of information provided by a third-party.[119] The court, in evaluating whether Accusearch partially developed the content, defined "develop" as "the act of drawing something out, making it 'visible,' 'active,' or 'usable.'"[120] Since Accusearch made the information "visible" by exposing it to public view, the court reasoned that the company was partially responsible for its development, meaning that Section 230 immunity did not apply.[121]

Roommates.com and *Accusearch Inc.* have been instrumental in shaping modern Section 230 jurisprudence.[122] By focusing on a platform's role in development, these cases "laid the foundation for

111 *Id.* at 1175.

112 *Id.* at 1173–75.

113 *Id.* at 1167.

114 Nathalie Dalzell, *Telecommunications Law—Facebook Immunized from Civil Liability Under Communications Decency Act Despite Using Algorithms to Recommend Content*, 54 SUFFOLK U. L. REV. 599, 605 (2021).

115 *Roommates.com*, 521 F.3d at 1169; Del Real, *supra* note 18, at 20.

116 570 F.3d 1187, 1197 (10th Cir. 2009).

117 *Id.* at 1191.

118 *Id.*

119 *Id.* at 1193. Disclosing information related to private phone records, which were made available on Abika.com, is generally prohibited under the Telecommunication Act of 1996. 47 U.S.C. § 222(a); Del Real, *supra* note 18, at 19.

120 *Accusearch Inc.*, 570 F.3d at 1198.

121 *Id.* at 1199.

122 Del Real, *supra* note 18, at 20.

applying Section 230 immunity to algorithmic recommendations."[123] Subsequently, in 2019, the D.C. Circuit became the first appellate court to do so.[124]

In *Marshall's Locksmith Service Inc. v. Google, LLC*, the court granted Google immunity for using a neutral algorithm to translate fraudulently provided third-party information onto a map.[125] Fourteen locksmith businesses alleged that Google violated false advertising and antitrust statutes by accepting advertising revenue from scam locksmiths that provided fake information.[126] Google's search algorithms provided this information to users in the form of pins on a map, in place of legitimate listings.[127] The court held that Google's display of the scam locksmith locations did not "enhance" the third-party content, and that it was simply a translation of third-party information.[128] *Marshall's Locksmith* thus expanded the "neutral tools" framework of *Roommates.com* to include neutral algorithms, as long as they are applied consistently.[129]

Shortly after *Marshall's Locksmith* was decided, the Second Circuit analyzed whether Facebook's recommendation algorithms were responsible for "developing" Hamas content.[130] In *Force v. Facebook, Inc.*, the plaintiffs alleged that the platform's tools and algorithms enabled the terrorist group to quickly disseminate its content, which they argued enabled deadly attacks on U.S. citizens in Gaza.[131] The court did not find Facebook liable because it did not alter the information published by Hamas, and the algorithms it used to arrange and display the content were deemed to be sufficiently neutral.[132] The majority opinion reasoned that "merely arranging and displaying others' content . . . through such algorithms" was not enough to hold the provider liable for developing or creating the content.[133]

In his partial concurrence, Chief Judge Katzmann questioned whether Facebook's algorithms developed content through its

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123 *Id.*

124 *Id.* at 21; *see* Marshall's Locksmith Service Inc. v. Google, LLC, 925 F.3d 1263, 1271 (D.C. Cir. 2019).

125 925 F.3d 1263, 1271; Dalzell, *supra* note 114, at 605 n.32.

126 *Marshall's Locksmith*, 925 F.3d at 1265; Del Real, *supra* note 18, at 21.

127 *Marshall's Locksmith*, 925 F.3d at 1265.

128 *Id.* at 1269; Dalzell, *supra* note 114, at 605 n.32. Google's algorithm did not alter the underlying information—it only changed its visual representation. Del Real, *supra* note 18, at 22.

129 *Marshall's Locksmith*, 925 F.3d at 1270–71; Del Real, *supra* note 18, at 21.

130 Force v. Facebook, Inc., 934 F.3d 53, 68 (2d Cir. 2019).

131 *Id.* at 59. Under the Anti-Terrorism Act, a party can be liable for an injury arising out of an act of international terrorism when it "aids and abets, by knowingly providing substantial assistance" or "conspires with the person who committed such an act." 18 U.S.C. § 2333(d)(2).

132 *Force*, 934 F.3d at 70.

133 *Id.*

recommendations.[134] He argued that Section 230 immunity should not apply to Facebook's friend and content suggestion algorithms because the company used the algorithms "to create and communicate its own message."[135] The mere fact that Facebook's algorithms relied on third-party content should not have been enough to trigger the protections of Section 230, Chief Judge Katzmann reasoned.[136] To fall within the scope of Section 230, he believed, the claim must "inherently fault the defendant's activity as the publisher" of the specific third-party content.[137]

The Ninth Circuit followed the Second Circuit's lead in *Gonzalez v. Google LLC*.[138] In this case, the family of Nohemi Gonzalez, a U.S. citizen killed by ISIS, alleged that Google was directly liable for providing support to a terrorist organization by allowing ISIS to monetize videos uploaded to YouTube and promoting those videos through its algorithm.[139] The Ninth Circuit ruled in favor of Google, finding that its algorithm did not develop the third-party content.[140] The plaintiffs' complaint lacked any allegations that Google designed its website to promote videos that furthered the terrorist group's mission.[141] Rather than deliberately suggesting certain kinds of content, YouTube's algorithm neutrally matched what it knew about users based on their historical actions and sent third-party content that it anticipated the user would prefer.[142] The court described the algorithm as simply a more sophisticated search engine, as it selected the particular content provided to a user based on that user's inputs.[143] Referencing *Roommates.com*, the court noted that search engines were immune under Section 230 because they provide content in response to a user's queries, "with no direct encouragement to perform illegal searches."[144] Ultimately, the court found that Google similarly provided a "neutral platform" that did not determine which particular types of content its algorithms would promote.[145]

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134 *Id.* at 82 (Katzmann, C.J., concurring in part and dissenting in part).

135 *Id.*

136 *Id.*

137 *Id.* Chief Judge Katzmann added that Section 230 does not necessarily immunize defendants from claims based on promoting content or selling advertising, even if those activities might nowadays be common among publishers. *Id.* at 80–81.

138 2 F.4th 871, 895 (9th Cir. 2021), *vacated and remanded*, 598 U.S. 617 (2023), and *rev'd sub nom.*

139 *Gonzalez*, 2 F.4th at 880–81.

140 *Id.* at 894–95.

141 *Id.* at 895.

142 *Id.*

143 *Id.*

144 *Id.* (quoting *Roommates.com*, 521 F.3d at 1175).

145 *Id.*

Judge Gould pushed back on this finding in yet another separate opinion, arguing that YouTube's content recommendation system did "develop" and "deliver" a message to ISIS-interested users.[146] He argued that YouTube's algorithm "magnified and amplified" propaganda messages posted by ISIS and its sympathizers "in a way that contributed to the ISIS terrorists' message beyond what would be done by considering them alone."[147] And he disagreed with the majority's holding that Section 230 shielded Google from liability for its content-generating algorithm since the algorithm "acted affirmatively" to amplify and direct ISIS content.[148] Considering how the algorithm appeared to operate, Judge Gould concluded that, while Google cannot be liable for "the mere content of the posts made by ISIS," it could be liable for other conduct that went beyond simply hosting the post.[149] He challenged the assumption that websites using "neutral" tools, such as algorithms, were generally immunized by Section 230, suggesting that the tools could not be considered "neutral" if the website "knowingly amplifie[d] a message designed to recruit individuals for a criminal purpose" and the dissemination of that message "materially contribute[d] to a centralized cause giving rise to a probability of grave harm."[150]

The Supreme Court granted certiorari to review the Ninth Circuit's ruling and to clarify whether Section 230 protects online platforms when they use recommendation algorithms.[151] The Court, however, resolved the case without deciding the core Section 230 issue, finding that the complaint appeared to state "little, if any, plausible claim for relief."[152] It sent *Gonzalez* back to the Ninth Circuit to consider the complaint in light of the Court's simultaneous decision in *Twitter, Inc. v. Taamneh*,[153] which clarified the requirements of a claim made under the Justice Against Sponsors of Terrorism Act.[154] The question therefore remains unresolved by the Supreme Court.[155]

But cases continue to emerge. Recently, in August 2024, the Third Circuit held that TikTok was not immune from liability when a ten-year-old child died after attempting the "Blackout Challenge," prompted by a

146 *Id.* at 924.

147 *Id.* at 920.

148 *Id.* at 921.

149 *Id.* at 922.

150 *Id.* at 923.

151 Kenneth & Rubinstein, *supra* note 27, at 176; Gonzalez v. Google LLC, 598 U.S. 617, 622 (2023).

152 *Gonzalez*, 598 U.S. at 622.

153 *Id.*; 598 U.S. 471 (2023).

154 598 U.S. 471, 503–07 (2023); 18 U.S.C. § 2333(d)(2).

155 *See* Melissa Quinn, *Supreme Court Declines to Review Scope of Section 230 Liability Shield for Internet Companies*, CBS NEWS (July 2, 2024), https://www.cbsnews.com/news/supreme-court-section-230-liability-shield-internet-companies [https://perma.cc/J6MB-UV2F].

video found in her "For You Page" ("FYP").[156] TikTok's algorithm promoted videos of third-parties depicting the challenge to the child's uniquely curated FYP.[157] The court found that TikTok's algorithm was not based solely on a user's online inputs and that it curated and recommended a tailored compilation of videos for a user's FYP "based on a variety of factors."[158] The court held that the algorithm was TikTok's own "expressive activity," and thus its own first-party speech, even though the algorithm organized and presented the third-party speech of others.[159]

In making this determination, the court relied heavily on the Supreme Court's decision in *Moody v. NetChoice, LLC*.[160] In *Moody*, the Court held that a platform's algorithm that reflects "editorial judgments" about compiling the third-party speech it wants—in the way it wants—is the platform's own "expressive product" and is protected by the First Amendment.[161] The Third Circuit extrapolated this ruling and reasoned that curating compilations of others' content via expressive algorithms amounts to first-party speech under Section 230 as well.[162] Since Section 230 immunizes only information "provided by another," Anderson's lawsuit, based on TikTok's own expressive activity, was not barred.[163]

Taken together, these decisions reflect a growing reluctance of courts to apply Section 230 as broadly as they have in the past.[164] While Section 230 is alive and well, courts are gradually carving out more exceptions to its once-robust immunity.[165]

4. Attempts at Amendment and Repeal

In recent years, there has been widespread debate over whether Section 230 should be amended or overturned in its entirety, and several pieces of legislation have been introduced in Congress (though none have

156 Anderson v. TikTok, Inc., 116 F.4th 180, 184 (3d Cir. 2024). The challenge "encourages users to choke themselves with belts, purse strings, or anything similar" until they pass out. *Id.* at 182 (citation omitted).

157 *Id.* at 181.

158 *Id.* at 182.

159 *Id.* at 184.

160 *Id.*; 603 U.S. 707 (2024).

161 *Moody*, 603 U.S. at 717–19.

162 *Anderson*, 116 F.4th at 184.

163 *Id.*

164 Kosseff, *supra* note 83, at 34–37.

165 *Id.* at 36.

been enacted).[166] Some of the different approaches include broadening carveouts for immunity, clarifying one or more parts of the content governance process, or solely targeting illegal content.[167]

The SAFE TECH Act, introduced in 2021, would impose limits on Section 230 immunity for content involving civil rights violations, harassment, stalking, wrongful death, or violations of state and federal antitrust laws.[168] It would also eliminate immunity for content promoted or amplified through paid advertising.[169] The BAD ADS Act, introduced in 2020, would remove Section 230 protections for larger platforms and service providers (defined as those with more than 30 million U.S. users, or 300 million worldwide users, and more than $1.5 billion in annual revenue) that use behavioral targeting to serve advertisements.[170] The PACT Act would require platforms "to publish their terms of service or use explaining what types of content are permissible," while establishing a system for users to flag potentially illegal or violative content.[171] Platforms would lose their immunity if they have actual knowledge of illegal content on their service and fail to remove it in a timely manner.[172] The Online Freedom and Viewpoint Diversity Act takes a slightly different approach, stripping Section 230 immunity from platforms that lack an adequate justification for actions taken to moderate or restrict content.[173]

There has also been an attempt at executive action: In 2020, President Trump issued an executive order aimed at narrowing the scope of the immunity enjoyed by digital platforms under Section 230.[174] The executive order declared that any platform that edited content, apart from restricting violent or obscene posts, was "engaged in editorial conduct" and may forfeit Section 230 immunity.[175] The executive order targeted the "Good Samaritan" clause that protects platforms from liability for

166 Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks within the Section 230 Debate*, BROOKINGS (Sep. 21, 2021), https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate [https://perma.cc/DX4S-VWS3].

167 *Id.*

168 SAFE TECH Act, S. 299, 117th Cong. (2021).

169 *Id.*

170 BAD ADS Act, S. 4337, 116th Cong. (2020).

171 Rishteen Halim, *Section 230 Reform: A Work in Progress*, 6 U. CENT. FLA. DEP'T LEGAL STUD. L.J. 193, 203 (2023); PACT Act, S. 797, 117th Cong. (2021).

172 PACT Act, S. 797, 117th Cong. (2021).

173 Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020).

174 Joshua D. Wright & Alexander Krzepicki, *What Is an Independent Agency to Do? The Trump Administration's Executive Order on* Preventing Online Censorship *and the Federal Trade Commission*, 6 ADMIN. L. REV. ACCORD 29, 30, 34–35 (2020); Exec. Order No. 13925, 85 Fed. Reg. 34079 (June 2, 2020).

175 Exec. Order No. 13925, 85 Fed. Reg. 34079 (June 2, 2020).

moderating objectionable third-party content in good faith.[176] President Biden revoked the executive order the following year.[177] Brendan Carr, who was appointed to run the Federal Communications Commission in the second Trump administration, has written about the need to "rein[] in Big Tech" and shared his desire to restrict Section 230 immunity.[178]

As courts attempt to apply Section 230 to modern technologies and lawmakers propose alternatives, much of the conversation has shifted toward the role of algorithms in amplifying content.[179] These algorithms, which curate and promote posts based on user data, have come under scrutiny for their potential to spread harmful or misleading information.[180] Understanding how these systems operate is essential to interpreting Section 230 and its broader impact on digital content governance.

B. *Social Media Recommendation Systems*

Recommendation systems are algorithms aimed at suggesting relevant items to users, such as movies to watch, products to buy, and social media posts to view.[181] Recent advancements in technology have resulted in an "online data overload problem," which "complicates the process of finding relevant and useful content over the internet."[182] Recommendation systems filter through this data and reduce the amount of effort and time a user spends looking for suitable information.[183]

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176 *Id.*; 47 U.S.C. § 230(c).

177 Exec. Order No. 14029, 86 Fed. Reg. 27025 (May 19, 2021).

178 Aimee Picchi, *Trump's FCC Pick, Brendan Carr, Wrote Project 2025's Chapter on the Agency. Here's What He Wants*, CBS NEWS (Nov. 19, 2024), https://www.cbsnews.com/news/trump-fcc-brendan-carr-project-2025-what-to-know [https://perma.cc/UKU6-3DCM].

179 *See* Gabriela Poleac & Alexandra-Niculina Gherguț-Babii, *How Social Media Algorithms Influence the Way Users Decide - Perspectives of Social Media Users and Practitioners*, 57 TECHNIUM SOC. SCI. J. 69, 72 (2024).

180 *Id.* at 77–78.

181 Francesco Casalegno, *Recommender Systems–A Complete Guide to Machine Learning Models*, MEDIUM: TOWARDS DATA SCI. (Nov. 25, 2022), https://towardsdatascience.com/introduction-to-recommender-systems-6c66cf15ada [https://perma.cc/6NAW-JVVP].

182 Deepjyoti Roy & Mala Dutta, *A Systematic Review and Research Perspective on Recommender Systems*, 9 J. OF BIG DATA 1, 1 (2022).

183 *Id.* at 1–2.

1. An Introduction to Algorithms

Algorithms are "mathematical or logical process[es] consisting of a series of steps," carefully crafted with specific objectives in mind.[184] Recommendation algorithms on social media platforms determine how best to use content on the platform to maximize user engagement.[185] Algorithms have enabled internet companies to generate over $50 billion dollars in annual advertising revenue.[186] Incorporating machine learning, artificial intelligence, and feedback loops, algorithms have "generally operated with impunity."[187]

Two major categories of recommender systems exist: collaborative filtering methods and content-based methods.[188] In order to produce new recommendations, collaborative filtering methods rely solely on prior interactions recorded between users and items.[189] These past user-item interactions are used to make predictions, and the more users interact, the more accurate the recommendations become.[190] An example of this would be a movie recommendation system that suggests movies to a user, based on both similarity to movies the user has liked in the past and movies that similar users liked.[191] The advantage to collaborative methods is that they require no information about users or items.[192] The drawback, though, is that it can be difficult to recommend anything to new users or users who have few interactions.[193]

Content-based methods rely on additional information about users and items, such as the age, sex, and occupation of the user, and the category, duration, and creator of the content.[194] To generate recommendations, a model is created to explain the observed user-item interactions.[195] An example of this would be an app store recommendation system suggesting a shopping app to a user because they recently installed a similar app.[196] This approach demands in-depth knowledge of both the user and the content for an accurate

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184 Algorithm, BLACK'S LAW DICTIONARY (12th ed. 2024); Kevin Ofchus, *Cracking the Shield: CDA Section 230, Algorithms, and Product Liability*, 46 UALR L. REV. 27, 38 (2023).

185 Kenneth & Rubinstein, *supra* note 27, at 181.

186 Ofchus, *supra* note 186, at 30.

187 *Id.*

188 Casalegno, *supra* note 181.

189 *Id.*

190 *Id.*

191 *Collaborative Filtering*, GOOGLE FOR DEVS., https://developers.google.com/machine-learning/recommendation/collaborative/basics [https://perma.cc/EFK5-PW7R].

192 Casalegno, *supra* note 181.

193 *Id.*

194 *Id.*

195 *Id.*

196 GOOGLE FOR DEVS., *supra* note 191.

recommendation.[197] This information can be input by the developer (including through machine learning) or provided by the users themselves.[198]

2. Modern Applications

Recommendation systems allow social media companies to actively control what users view, "when they view it," and who they interact with on their platforms.[199] Today, most platforms incorporate both content-based and collaborative filtering methods into their recommendation algorithms.[200] However, each algorithm differs in scope,[201] as some are more "assertively curatorial" than others.[202]

TikTok's FYP allows TikTok users to "discover new content,"[203] and unlike certain other algorithmically generated newsfeeds, TikTok does not require a user to follow an account to receive its content in their feed.[204] TikTok's algorithm "serv[es] content to users in which they have not explicitly expressed interest."[205] TikTok users allow the app to "generate content for them, as opposed to other platforms where a user must follow other users to see content."[206] While TikTok has stated that a user's shares, likes, and follows each play a role in what the algorithm recommends, a *Wall Street Journal* study found that retention time (how long a user views a particular piece of content) is the most important factor for the algorithm, marking a sharp contrast from other platforms.[207]

TikTok's success has prompted competing media platforms, such as Instagram, Snapchat, and YouTube, to attempt to replicate TikTok's algorithm.[208] Instagram's main feed is now powered by a complex

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197 Roy & Dutta, *supra* note 182, at 3.

198 Casalegno, *supra* note 181.

199 Bernstein, *supra* note 27, at 383.

200 *Id.* at 378.

201 *See* Gabor, *supra* note 32, at 110; Massimo Airoldi, Davide Beraldo, & Alessandro Gandini, *Follow the Algorithm: An Exploratory Investigation of Music on YouTube*, 57 POETICS 1, 9–11 (2016); ALESSIO CORNINA, ANNIKA SEHL, DAVID A. L. LEVY & RASMUS KLEIS NIELSEN, PRIVATE SECTOR NEWS, SOCIAL MEDIA DISTRIBUTION, AND ALGORITHM CHANGE, 29–30 (2018).

202 *Id.*; Fergus Ryan, *TikTok Algorithm: Why It Isn't Really a Social Media App*, VISION OF HUMANITY, https://www.visionofhumanity.org/why-tiktok-isnt-really-a-social-media-app [https://perma.cc/PK8P-E6WD].

203 Del Real, *supra* note 18, at 14.

204 *Id.*

205 *Id.*

206 Gabor, *supra* note 32, at 110.

207 *Id.* at 112–13; The Wall Street Journal, *How TikTok's Algorithm Figures You Out*, YOUTUBE (July 21, 2021), https://www.youtube.com/watch?v=nfczi2cI6Cs [https://perma.cc/4W94-74ZT].

208 Melany Amarikwa, *Social Media Platforms' Reckoning: The Harmful Impact of TikTok's Algorithm on People of Color*, 29 RICH. J.L. & TECH. 69, 76–77 (2023).

algorithm showing the user content from across the platform, similar to TikTok's FYP.[209] One of the app's features, Stories, allow users to share everyday moments "through photos and videos that disappear after 24 hours."[210] Like the main feed, Stories is powered by an algorithm.[211] However, the Stories feed only shows the user content from accounts they follow.[212] The Stories algorithm assesses the user's general interest in a person's post based on their interaction history, but it does not show the user stories from outside accounts.[213] Instagram is thus an example of how one platform can rely on multiple algorithms, with some being more "curatorial" than others.[214]

Reddit's content sorting algorithms are designed to enhance content discovery by incorporating machine learning.[215] The site's "Best" sorting option analyzes user activity—such as votes, subscriptions, posts, and comments—to predict and display content more aligned with a user's individual preferences.[216] When sorting by "Best," users receive home feed recommendations, which highlight posts from new communities and provide context for why that particular piece of content was suggested.[217] Reddit allows users to turn off home feed recommendations, limiting a user's feed to communities they have joined.[218]

Media platforms rely on algorithms for more than just organizing content.[219] Algorithms are used to provide users with friend

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209 Kyra Goodman, *How the Instagram Algorithm for Stories Works*, SKED SOC. (Apr. 17, 2024), https://skedsocial.com/blog/instagram-algorithm-stories [https://perma.cc/FND4-U4TR]. In addition to the main feed, "Instagram has a page called the 'explore page,' where users can find new content tailored to their interests." Kelsey Bishqemi & Michael Crowley, *TikTok vs. Instagram: Algorithm Comparison*, 11 J. STUDENT RSCH. 1, 2 (2022).

210 *Instagram Stories*, INSTAGRAM, https://about.instagram.com/features/stories [https://perma.cc/KV5Q-ZE6J].

211 Adam Mosseri, *Instagram Ranking Explained,* INSTAGRAM (May 31, 2023) https://about.instagram.com/blog/announcements/instagram-ranking-explained [https://perma.cc/F57Y-MBGX].

212 *Stories*, INSTAGRAM HELP CENTER, https://www.facebook.com/help/instagram/1660923094227526 [https://perma.cc/BA4W-CCBX]; Goodman, *supra* note 209.

213 Mosseri, *supra* note 211. The exception to this is advertisements. *Id.*

214 Mosseri, *supra* note 211 ("Each part of the app—Feed, Stories, Explore, Reels, Search and more—uses its own algorithm tailored to how people use it.").

215 Andrew Hutchinson, *Reddit Looks to Improve Content Discovery with Algorithm-Defined 'Best' Listing*, SOC. MEDIA TODAY (July 15, 2021), https://www.socialmediatoday.com/news/reddit-looks-to-improve-content-discovery-with-algorithm-defined-best-lis/603446 [https://perma.cc/XE45-QZQM].

216 *Id.*

217 *What Are Home Feed Recommendations?*, REDDIT HELP, https://support.reddithelp.com/hc/en-us/articles/4402284777364-What-are-home-feed-recommendations [https://perma.cc/YJ2S-T7NQ].

218 *Id.*

219 Bernstein, *supra* note 27, at 383.

recommendations to connect with others who may share their interests.[220] Google used algorithms to strengthen its search engine's responses to users' specific queries.[221] It is difficult to overstate the prevalence of algorithms in modern consumer technology,[222] and this ubiquity has significant implications for Section 230 jurisprudence.[223]

II. ANALYSIS

A. *The Use of Highly Suggestive Algorithms to Push and Promote Certain Types of Content Should Not Be Considered a Traditional Editorial Function*

Not all recommendation algorithms are created equal.[224] There is a lack of meaningful precedent closely examining the technical differences between algorithms and how they would impact the outcome of a Section 230 immunity claim.[225] Such an in-depth analysis is necessary to properly determine whether immunity should be granted because the way a recommendation algorithm functions can significantly impact a platform's role in content dissemination. While some algorithms passively sort content based on chronological order or simple engagement metrics, others actively amplify, promote, or personalize content in ways that could lead to harm.[226]

The Third Circuit attempted to conduct such an analysis in *Anderson*, evaluating the technical aspects of TikTok's algorithm and finding that its output was the company's own first-party speech.[227] In an amicus brief, the Electronic Frontier Foundation and other non-profit organizations argued that recommendations of TikTok videos, "whether implemented by algorithm or otherwise, reflect decisions about how to display third-party content and are thus 'part of a publisher's traditional editorial functions.'"[228] The amici argued that online platforms'

220 *Id.* at 384. Chief Judge Katzmann found in *Force* that, with regard to friend suggestions, Facebook's algorithms went beyond presenting information and instead actively created content. Force v. Facebook, Inc., 934 F.3d 53, 76–77 (2d Cir. 2019).

221 Del Real, *supra* note 18, at 15–16.

222 *Id.* at 13.

223 *Id.* at 16.

224 *See* discussion *supra* Part I.B.2.

225 Del Real, *supra* note 18, at 4.

226 *See supra* Section I.B.2; *see also* Ayushmaan, *Social Media Algorithms in Fuelling Islamophobia: Case Study of Facebook and YouTube*; 4 JUS CORPUS L.J. 158, 161–65 (2024) (explaining how the Facebook algorithm contributed to Islamophobia in India).

227 Anderson v. TikTok, Inc., 116 F.4d 180, 184 (3d Cir. 2024).

228 Brief of Amici Curiae Electronic Frontier Found., et al. in Support of Petition for Rehearing En Banc at 9, *Anderson v. TikTok, Inc.*, 116 F.4d 180, (9th Cir. 2024) (No. 22-3061) (citing *Zeran*

recommendations of third-party content are protected by Section 230, comparing TikTok's placement of videos on a user's FYP to a newspaper's decision to place an article on page A1.[229] This analogy is flawed, since publishers (including newspapers) can still be found liable for incitement or negligent publication if a reader is seriously injured, dies, or suffers damage to their personal property after acting upon or using the content contained in the publication.[230] There is no reason to think that the same standard shouldn't apply to digital publishers.

The Ninth Circuit's three-part test for when Section 230 immunity applies, first articulated in *Barnes v. Yahoo!, Inc.*,[231] fails to consider this.[232] According to the Ninth Circuit, a defendant is entitled to Section 230 immunity when they are "(1) a provider or user of an interactive computer service (2) *whom the plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker* (3) of information provided by another information content provider."[233] The Fourth Circuit, in its 1997 *Zeran v. American Online, Inc.* decision, barred lawsuits "seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content."[234] The internet has, undoubtedly, evolved a great deal since *Zeran* was decided, yet the standard applied by circuit courts has remained static.[235] The capabilities of AOL, such as sending and receiving electronic mail and communicating via bulletin board, are a far cry from the content recommendation algorithms used by social media platforms today,[236] which are so highly suggestive that their use should not be likened to "traditional editorial function[s]."[237]

While the court in *Anderson* arrived at the correct outcome, some parts of the majority's reasoning are problematic. Since the algorithm was "TikTok's own expressive activity," the court held that Section 230 did

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v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)). The Third Circuit has since denied TikTok's request for an en banc rehearing. Emily Field, *TikTok Won't Get 3rd Circ. Rehearing of Section 230 Ruling*, LAW360 (Oct. 24, 2024), https://www.law360.com/articles/2251176 [https://perma.cc/ET3A-D5NQ].

229 Brief of Amici Curiae Electronic Frontier Found., et al. in Support of Petition for Rehearing En Banc at 9–10, *Anderson v. TikTok, Inc.*, 116 F.4th 180, (9th Cir. 2024).

230 *See* Terri R. Day, *Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73, 87–101 (1995).

231 570 F3d 1096, 1100–01 (9th Cir. 2009).

232 Gonzalez v. Google LLC, 2 F.4th 871, 922 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part). In his concurrence, Judge Gould took issue with the court's application of the second *Barnes* factor, noting that Section 230 "in no way provides immunity for other conduct of Google or YouTube or Facebook or Twitter that goes beyond merely publishing the post." *Id.*

233 *Barnes*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (emphasis added).

234 129 F.3d 327, 330 (4th Cir. 1997).

235 *See supra* Section I.A.3.

236 *Zeran*, 129 F.3d at 329; *see generally* Bernstein, *supra* note 27; Del Real, *supra* note 18.

237 *Zeran*, 129 F.3d at 330.

not bar Anderson's claims.[238] However, this leaves the door open for platforms seeking immunity under the First Amendment: "Because platforms organize users' content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech."[239] The question of whether the First Amendment could provide immunity for platforms' algorithmic output arose out of the Court's decision in *Moody*.[240] Assuming that the output does constitute speech, there are likely permissible grounds for the government to regulate such speech because algorithms, as commercial speech, would be subject to a lower standard of review.[241] However, such an approach would simply lead to more questions without meaningfully addressing the Section 230 problem.

Additionally, while the court briefly considered the inner workings of TikTok's algorithm, it did not discuss whether or not their holding would apply to less suggestive algorithms—certain algorithms, such as TikTok's, are much more suggestive than others.[242] Features of a platform that may seem less suggestive, such as language translation, search, and notifications, are often powered by algorithms.[243] Under *Anderson*, these features would be found to be the platform's own "expressive activity,"[244] even though they are fundamentally different from TikTok's recommendations and closer to the type of activity that Section 230 was intended to protect.[245] This would be problematic, and it would prevent Section 230 immunity from being applied in the vast majority of cases, even when warranted.

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238 Anderson v. TikTok, Inc., 116 F.4d 180, 184 (3d Cir. 2024).

239 Doe Through Roe v. Snap, Inc., 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting).

240 Moody v. NetChoice, LLC, 603 U.S. 707, 745–46 (2024) (Barrett, J., concurring) (arguing that platforms likely enjoy First Amendment protection when using algorithms to "prioritize and remove content on their feeds").

241 Bernstein, *supra* note 27, at 397.

242 *See supra* Section I.B.2.; *see also* Gabor, *supra* note 32, at 112–16; Bishqemi & Crowley, *supra* note 209, at 6–7. TikTok's CEO, Shou Chew, described TikTok's revolutionary algorithm as "interest-predicting" because it showed videos to users "based not on subjects or social networks but instead on content others with similar likes have also enjoyed." Renae Reints & Tom Carter, *TikTok CEO Shou Chew Discusses the App's Algorithm and Future—Live at TED2023*, TED BLOG (Apr. 20, 2023), https://blog.ted.com/tiktok-shou-chew-ted2023 [https://perma.cc/U3Q6-9XR8].

243 Arvind Narayanan, *Understanding Social Media Recommendation Algorithms*, KNIGHT FIRST AMEND. INST. (Mar. 9, 2023), https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms [https://perma.cc/7VSK-P8LV].

244 Anderson v. TikTok, Inc., 116 F.4d 180, 184 (3d Cir. 2024).

245 "[P]art of the motivation for the adoption of Section 230 was to enable freer exchange of information on the internet." Stanley M. Besen & Philip L. Verveer, *Section 230 and the Problem of Social Cost*, 30 J.L. & POL'Y 68, 84 (2021). It was intended as a rule of intermediary liability for "online service providers," "network providers," and "cloud computing platforms." Shlomo Klapper, *Reading Section 230*, 70 BUFF. L. REV. 1237, 1246 (2022).

The approach advocated for by Chief Judge Katzmann is preferrable because it leaves the door open for a technical evaluation of the specific algorithm.[246] His analysis relied on "'a careful exegesis' of the statutory language."[247] In situations where algorithms create and communicate their own message, "that it thinks you, the reader—you, specifically—will like," first-party speech is generated.[248] This first-party speech sometimes invites users "to become part of a unique global community, the creation and maintenance of which goes far beyond . . . traditional editorial functions."[249] Judge Gould offered a similar framework, insisting that algorithms could not be considered "neutral" tools if they "knowingly amplifie[d] a message."[250] Even if the algorithm is neutral on its face, if it acts affirmatively to magnify and direct problematic content, the platform is not entitled to immunity.[251] While platforms cannot be held liable for the content of third-party posts, they can be held liable for conduct that goes beyond simply hosting the content.[252] When using the search feature, "users affirmatively seek specific information" and receive an algorithmically generated recommendation.[253] Feed-based social media displays content not affirmatively sought by the user, and in the case of TikTok's FYP, recommends posts from others that the algorithm *thinks* the user will enjoy.[254] Under Chief Judge Katzmann's approach, the output of highly curated feeds such as the FYP would be found to be first-party speech and exempt from Section 230 protection, while more neutral algorithmic applications would still be eligible for immunity.

B. *Arguments in Support of an Expansive Interpretation of Section 230 are Misguided*

Those who favor a broad interpretation of Section 230 believe that limiting immunity would fundamentally alter the internet.[255] One author

246 Force v. Facebook, Inc., 934 F.3d 53, 76–89 (2019) (Katzmann, C.J., concurring in part and dissenting in part).

247 *Force*, 934 F.3d at 82 (quoting Barnes v. Yahoo!, Inc., 570 F3d 1096, 1100 (9th Cir. 2009)).

248 *Id.*

249 *Id.*

250 Gonzalez v. Google LLC, 2 F.4th 871, 923 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part).

251 *Id.* at 920.

252 *Id.* at 922.

253 Del Real, *supra* note 18, at 36.

254 *Id.*

255 *See* Eric Goldman, *Bonkers Opinion Repeals Section 230 In the Third Circuit-Anderson v. TikTok*, TECH. & MKTG. L. BLOG (Aug. 29, 2024), https://blog.ericgoldman.org/archives/2024/08/bonkers-opinion-repeals-section-230-in-the-third-circuit-anderson-v-tiktok.htm [https://perma.cc/

argues that the Third Circuit's decision in *Anderson* is a hard shove towards "the end of . . . the internet as we know it."[256] Others argue that the loss of immunity "would likely threaten current tech company operations and have a chilling effect on innovation."[257] They insist that algorithmic recommendations are necessary for providers to "select and organize content that users will find relevant and engaging."[258]

It is true that the amount of content uploaded to social media platforms is increasing at a staggering rate; for example, estimates suggest that 2.45 billion pieces of content are shared on Facebook each day.[259] Social media platforms have become dependent on algorithmic recommendation to deliver relevant content to users.[260] However, there are ways to sort and deliver content that do not require the use of suggestive algorithms. In its infancy, Facebook presented content in reverse chronological order.[261] While Facebook later developed an algorithm to rank content and determine the order in which status updates should be displayed, it was not initially suggestive and did not convey a message.[262]

Today, the sequence of posts a user sees on most social media platforms is determined by an algorithm.[263] However, many platforms still provide users with the ability to sort their feeds in chronological order, even if it is not the default setting.[264] Instagram, Facebook, and YouTube make it possible for their users to see the latest content from those they follow or subscribe to without interference from the algorithm;

WM7V-U8S7]; Jason Kelley, *Section 230 is Good, Actually*, ELECTRONIC FRONTIER FOUND. (Dec. 3, 2020), https://www.eff.org/deeplinks/2020/12/section-230-good-actually [https://perma.cc/SH74-WW8F]; Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 127, 144–45 (2010).

256 Goldman, *supra* note 255.

257 Del Real, *supra* note 18, at 37.

258 Kenneth & Rubinstein, *supra* note 27, at 185.

259 Fabio Duarte, *Amount of Data Created Daily (2025)*, EXPLODING TOPICS, https://explodingtopics.com/blog/data-generated-per-day (last updated Apr. 24, 2025) [https://perma.cc/HA7V-E9RX].

260 Kenneth & Rubinstein, *supra* note 27, at 186.

261 *Id.* at 185.

262 *Id.*; *see also* Jillian D'Onfro, *Facebook's News Feed Is 10 Years Old. This Is How the Site Has Changed*, WORLD ECON. F. (Sep. 9, 2016), https://www.weforum.org/stories/2016/09/facebooks-news-feed-is-10-years-old-this-is-how-the-site-has-changed [https://web.archive.org/web/20241123114832/https://www.weforum.org/stories/2016/09/facebooks-news-feed-is-10-years-old-this-is-how-the-site-has-changed/#expand].

263 Reece Rogers, *How to See Instagram, Facebook, and Twitter Posts Chronologically*, WIRED (Sep. 17, 2022), https://www.wired.com/story/how-to-see-instagram-facebook-twitter-chronological-order [https://perma.cc/4HS9-UJ68].

264 *Id.*

the change is not permanent, however, and algorithmically-targeted advertisements are still interspersed among the posts.[265]

Platforms' use of algorithms is not driven by a need to filter content, but rather by a desire to keep users engaged and active on their platform. Even with the large amount of content shared online, chronological ordering remains a viable option to sort and deliver content, and it allows the user to meaningfully interact with the platform.[266] The argument that suggestive content recommendation systems are "all but necessary" to sort content is unpersuasive.[267] There is no reason why a user's feed cannot be limited to accounts that the user follows, which would effectively curate the large volume of content uploaded to the platform. Companies are instead interested in using algorithms because they drive engagement and increase the amount of time users spend on the platform, thus raising advertising revenues.[268] This justification does not warrant broad immunity under Section 230. The statute's original intention was to "protect computer Good Samaritans . . . who . . . screen indecency and offensive material for their customers."[269] Those involved in its passage hoped that it would deliver "rich and diverse informational, educational, [and] cultural resources."[270] Concerns about retaining a user base and collecting revenue for advertising were not motivating factors behind its enactment.[271]

III. PROPOSAL

To determine whether a social media platform is a "publisher," and to assess the second prong of the Ninth Circuit's immunity test, courts should conduct a fact-specific inquiry, guided by Chief Judge Katzmann's and Judge Gould's analyses. This would consider how the content was shown to the user: In cases where the user searched for the content, or affirmatively sought it out, immunity may be warranted. But in situations where a user was shown content that they did not request, where an algorithm created and conveyed its own message, companies

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265 *Id.*

266 Jan Bigum Warming, *Social Media Chronological Feed*, LINKEDIN (Nov. 17, 2024), https://www.linkedin.com/pulse/social-media-chronological-feed-jan-bigum-warming-mzjcf [https://perma.cc/2Z2N-XG29] (explaining that chronological feeds encourage "a more intentional interaction with the platform, as users would not need to sift through a mountain of algorithmically chosen posts just to stay up-to-date").

267 Kenneth & Rubinstein, *supra* note 27, at 185.

268 *Id.*

269 141 CONG. REC. H8470 (1995).

270 Kenneth & Rubinstein, *supra* note 27, at 186.

271 *See id.*

should be held liable for their own speech.[272] Recommendation algorithms that are facially "neutral," in the context of *Roommates.com*, should not face this level of scrutiny.[273]

From a textualist perspective, this is the proper approach to apply Section 230 to recommendation algorithms. First, there is little evidence that Congress enacted Section 230 intending to protect modern social media algorithms.[274] According to the material contribution standard, a platform receives no immunity if they play a large role in "developing, as opposed to merely publishing, content that leads to illegal activity."[275] Applying this standard to recommendation algorithms, platforms should not receive protection since hyper-personalized content curation is more akin to creation and development than passive publication.[276] Further, Section 230(a) states that interactive computer services "offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops."[277] This could not be further from reality, as algorithmic recommendations give users *less* control over the information they see.[278] The statute indicates that Congress never intended immunity to extend to such tools.[279]

It is the proper approach from a policy perspective, as well. In recent years, many researchers and public health officials have raised the alarm about the impact of digital media platforms on individual and societal welfare.[280] Social media platforms have leveraged human attention spans to maximize profit.[281] Studies have shown that these platforms are extremely harmful when consumed in excess.[282] Social media companies

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272 Force v. Facebook, Inc., 934 F.3d 53, 82 (2d Cir. 2019).

273 Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d. 1157, 1169 (9th Cir. 2008).

274 Bernstein, *supra* note 27, at 385.

275 *Id.* at 382.

276 *Id.* at 382–83.

277 47 U.S.C. § 230(a)(2).

278 *See generally supra* Section I.B.2.

279 *See e.g.*, § 230(a)(2).

280 James Niels Rosenquist, Fiona M. Scott Morton, & Samuel N. Weinstein, *Addictive Technology and Its Implications for Antitrust Enforcement*, 100 N.C. L. REV. 431, 432 (2022). *See, e.g.*, Press Release, Off. of Comm'r Rohit Chopra, Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Social Media Bots and Deceptive Advertising (July 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578231/social_bots_chopra_statement.pdf [https://perma.cc/9ZEX-GE8U]; Lien Faelens, Kristof Hoorelbeke, Eiko Fried, Rudi De Raedt & Ernst H.W. Koster, *Negative Influences of Facebook Use Through the Lens of Network Analysis*, 96 COMPUTS. HUM. BEHAV. 13, 13–14 (2019).

281 Rosenquist et al., *supra* note 280, at 433.

282 *Id.* Social media websites have a similar effect on the brain as tobacco and opiate-derived pain medications. *Id.* These platforms can be harmfully addictive and can cause negative mental health consequences in youth and adolescents. *Id.* at 442.

should not be able to take advantage of an outdated statute to enjoy broad immunity for what takes place on their platforms. The harmful effects that result from major internet platforms' use of algorithms adversely affect the American population, through "defamation of individuals, groups, and institutions; dissemination of hate speech; and incitements to violence."[283] Some expansion of platform liability would likely reduce these negative externalities.[284]

One of the less often discussed options for internet immunity reform is for Congress to delegate its policy-making authority to an administrative agency.[285] There are several advantages to this: delegating authority to an administrative agency "allows the law to evolve in response to changing circumstances," allows Congress to "take advantage of agency employees' expertise,"—since almost no legislators hold technical degrees—and only requires a congressional majority at one point in time.[286] However, uncertainty over the authority of federal agencies makes this option less appealing.[287] Additionally, delegating to administrative agencies could result in drastic policy shifts every four years, depending on which party controls the White House. Internet companies may struggle to remain compliant with the law, making this a worse option than a traditional amendment.

There are things to keep in mind when thinking about what an amended Section 230 should look like. First, there are political concerns: Democrats want to hold platforms accountable for spreading misinformation, while Republicans fear censorship due to political bias.[288] Second, supporters of the statute as currently written want to ensure the protection of a free and open internet, with a "vibrant social networking environment."[289] Finally, civil rights groups, such as the American Civil Liberties Union ("ACLU"), want to protect free speech.[290] While these concerns are legitimate, the priority should be reining in platforms causing societal harm through addictive and highly suggestive recommendation systems.

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283 Besen & Verveer, *supra* note 245, at 73.

284 *Id.* at 92.

285 Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 BYU L. REV. 1435, 1458–59.

286 *Id.* at 1459–60.

287 *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 396 (2024).

288 Dickinson, *supra* note 285, at 1452–53.

289 Kenneth & Rubinstein, *supra* note 27, at 179.

290 Jennifer Stisa Granick, *Is This the End of the Internet as We Know It?*, AM. C.L. UNION (Feb. 22, 2023), https://www.aclu.org/news/free-speech/section-230-is-this-the-end-of-the-internet-as-we-know-it [https://perma.cc/FLY4-G4ZE]; Dariely Rodriguez & David Brody, *Section 230 Requires a Balanced Approach that Protects Civil Rights and Free Expression*, AM. CONST. SOC'Y (Feb. 21, 2023), https://www.acslaw.org/expertforum/section-230-requires-a-balanced-approach-that-protects-civil-rights-and-free-expression [https://perma.cc/WF5R-6HFZ].

It is crucial that the statute be updated to reflect the modern social media landscape. Any proposal should effectively reduce a platform's discretion to selectively bar or promote certain speech through the use of algorithms.[291] The Biased Algorithm Deterrence Act, introduced in 2019, provides that an owner or operator of a social media service shall be treated as a publisher or speaker of user-generated content (and, therefore, may be held liable) if the service or its algorithm "displays user-generated content in an order that is not chronological."[292] While this would be a step in the right direction, the statute goes too far. Under this definition, a platform's search result that responds to a user's query with the most relevant, not the most recent, information could be held liable with respect to the content it retrieved. A stronger bill would provide that the operator of a social media service be treated as a publisher or speaker of user-generated content when the service presents content to the user that they did not actively seek out (through search, for example) and that was not posted by an account followed by the user. The ideal legislative reform would specifically prevent companies from receiving immunity for any third-party content delivered through an intricately curated newsfeed such as TikTok's FYP. This would discourage platforms from implementing extremely addictive algorithms that curate content from across the entire platform, while protecting less suggestive functions that also rely on algorithms.

CONCLUSION

Designed to facilitate the growth of the internet and shield internet service providers of the 1990s from liability for third-party content, Section 230 of the Communications Decency Act is insufficiently nuanced to address the realities of modern algorithmically-based social media. Its scope has expanded far beyond its original intent, and circuit courts have inconsistently applied the statute, with recent cases suggesting a shift away from the broad immunity once enjoyed by internet companies.[293] Courts should narrow the scope of immunity in cases where platforms employ algorithms that actively shape and promote content. Platforms should be held accountable when their own expressive activity results in the distribution of harmful content. The best interpretation of Section 230 demands as much, and Congress should amend the statute to make that even clearer.

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291 Dickinson, *supra* note 285, at 1450–51.

292 Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2020).

293 *See generally supra* Section I.A.3.