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Section 230: An Overview

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Section 230: An Overview

Section 230 of the Communications Act of 1934, enacted as part of the Communications Decency Act of 1996, provides limited federal immunity to providers and users of interactive computer services. The statute generally precludes providers and users from being held liable—that is, legally responsible—for information provided by another person, but does not prevent them from being held legally responsible for information that they have developed or for activities unrelated to third-party content. Courts have interpreted Section 230 to foreclose a wide variety of lawsuits and to preempt laws that would make providers and users liable for third-party content. For example, the law has been applied to protect online service providers like social media companies from lawsuits based on their decisions to transmit or take down user-generated content.

Two provisions of Section 230 are the primary framework for this immunity. First, Section 230(c)(1) specifies that service providers and users may not “be treated as the publisher or speaker of any information provided by another information content provider.” In *Zeran v. America Online, Inc.*, an influential case interpreting this provision, a federal appeals court said that Section 230(c)(1) bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” Second, Section 230(c)(2) states that service providers and users may not be held liable for voluntarily acting in good faith to restrict access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material. Section 230(c)(2) is thus more limited: it applies only to good-faith takedowns of objectionable material, while courts have interpreted Section 230(c)(1) to apply to both distribution and takedown decisions.

Section 230 contains statutory exceptions. This federal immunity generally will not apply to suits brought under federal criminal law, intellectual property law, any state law “consistent” with Section 230, certain privacy laws applicable to electronic communications, or certain federal and state laws relating to sex trafficking.

Government officials and outside commentators have debated the proper scope of Section 230. While the law has a number of defenders, others have argued that courts have interpreted Section 230 immunity too broadly. Recent Congresses have seen a number of bills that would have amended the scope of Section 230 immunity. These proposals ranged from outright repeal, to placing certain conditions on immunity, to creating narrower exceptions allowing certain types of lawsuits. Some bills sought to amend the scope of Section 230(c)(1), limiting “publisher” immunity in an attempt to encourage sites to take down certain types of undesirable content. Others sought to encourage sites to host more content by narrowing immunity for certain types of takedown decisions.

Proposals to amend Section 230 may raise two distinct types of First Amendment issues. The first issue is whether any given proposal infringes the constitutionally protected speech of either providers or users. This concern may be especially acute if a proposal restricts providers’ editorial discretion or creates content- or viewpoint-based distinctions. The second issue is whether, if Section 230 is repealed in whole or in part, the First Amendment may nonetheless prevent private parties or the government from holding providers liable for publishing content. The First Amendment might prevent some claims premised on decisions to host or restrict others’ speech, but its protections are likely less extensive than the current scope of Section 230 immunity.

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In 1996, Congress passed a suite of measures to amend the Communications Act of 1934 in order to protect children on the internet. The new measures were known collectively as the Communications Decency Act (CDA).¹ Some portions of the CDA directly imposed liability for transmitting obscene or harassing material online,² including two provisions that the Supreme Court struck down as unconstitutional in 1997.³ The CDA’s new Section 230 of the Communications Act⁴ took a different approach.⁵ It sought to allow users and providers of “interactive computer services” to make their own content moderation decisions, while still permitting liability in certain limited contexts.⁶

Since its passage, federal courts have interpreted Section 230 as creating expansive immunity for claims based on third-party content that appears online.⁷ Consequently, internet companies and users frequently rely on Section 230’s protections to avoid liability in federal and state litigation. But in recent years, commentators and jurists have expressed concern that the broad immunity courts have recognized under Section 230 is beyond the law’s intended scope.⁸

This report explores the origins, current application, and future of Section 230. It first discusses the history and passage of Section 230 and the CDA. The report then analyzes how courts have applied Section 230 in litigation. The report concludes with a discussion of proposed reforms to Section 230 and legal considerations relevant to reform efforts.

This report focuses on Section 230 protections from liability and does not more broadly address the potential liability other laws may impose for hosting or restricting others’ content.⁹ This report also does not discuss the possible international trade implications of amending Section 230.¹⁰

Text and Legislative History

Congress enacted the CDA as part of the Telecommunications Act of 1996.¹¹ According to the conference report, the CDA as a whole was intended to “modernize the existing protections

¹ Pub. L. No. 104-104, Tit. V, 110 Stat. 133 (1996).

² *E.g.*, 47 U.S.C. § 223(d).

³ *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

⁴ 47 U.S.C. § 230. Although Section 230 is sometimes referred to as “Section 230 of the CDA” or “CDA Section 230,” “Section 230” more accurately refers to the statute’s place in the Communications Act.

⁵ 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Ron Wyden) (noting that the approach of Section 230 stands “in sharp contrast to the work of the other body,” which sought “to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids”).

⁶ *See* 47 U.S.C. § 230(b) (expressing a deregulatory policy goal); *id.* § 230(e) (providing limited exceptions).

⁷ *See, e.g., Zeran v. Am. Online, Inc.* 129 F.3d 327, 330–31 (4th Cir. 1997).

⁸ *See, e.g., Force v. Facebook, Inc.*, 934 F.3d 53, 84 (2d Cir. 2019) (Katzmann, J., concurring in part) (opining that Section 230 as applied creates “extensive immunity . . . for activities that were undreamt of in 1996” and “[i]t therefore may be time for Congress to reconsider the scope of § 230”); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14–15 (2020) (Thomas, J., statement respecting the denial of certiorari) (positing that the “modest understanding” of what Section 230 is meant to do based on its text “is a far cry from what has prevailed in court”); 1 R. SMOLLA, *LAW OF DEFAMATION* § 4.86 (2d ed. 2019) (“[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress.”).

⁹ *See, e.g., Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023) (holding that social media platform was not liable for claims brought under the Anti-Terrorism Act irrespective of whether the platform was eligible for protection under Section 230). Whether a plaintiff has stated a legally actionable claim will depend on the particular claim alleged and the facts present in each case—issues that are outside the scope of this report.

¹⁰ The legal aspects of this issue are discussed briefly in CRS Legal Sidebar LSB10484, *UPDATE: Section 230 and the Executive Order on Preventing Online Censorship*, by Valerie C. Brannon et al.

¹¹ Pub. L. No. 104-104, § 501, 110 Stat. 133–43 (1996).

against obscene, lewd, indecent or harassing uses of a telephone.”¹² Since its enactment in 1996,¹³ Section 230 has been amended twice: once to add a new obligation for interactive computer services to notify customers about parental control protections,¹⁴ and once to create an exception for certain civil and criminal cases involving prostitution or sex trafficking.¹⁵

Section 230 contains findings¹⁶ and policy statements,¹⁷ expressing, among other things, that Congress sought to promote the free development of the internet, while also “remov[ing] disincentives” to implement “blocking and filtering technologies” that restrict “children’s access to . . . inappropriate online material”¹⁸ and “ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment” online.¹⁹ The heart of Section 230, however, is arguably the immunity created in subsection (c):

(c) PROTECTION FOR “GOOD SAMARITAN” BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(1) TREATMENT OF PUBLISHER OR SPEAKER.—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.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)].²⁰

Thus, Section 230(c) contains two distinct provisions that together create a broad immunity from suit for a “provider or user of an interactive computer service.” Section 230(c)(1) specifies that service providers may not “be treated as the publisher or speaker of any information provided by

¹² S. REP. NO. 104-23, at 59 (1995); *see also id.* (“The decency provisions increase the penalties for obscene, indecent, harassing or other wrongful uses of telecommunications facilities; protect privacy; protect families from uninvited and unwanted cable programming which is unsuitable for children and give cable operators authority to refuse to transmit programs or portions of programs on public or leased access channels which contain obscenity, indecency, or nudity.”). The Supreme Court struck down some of these provisions as unconstitutional in *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

¹³ Pub. L. No. 104-104, § 509, 110 Stat. 137–39 (1996).

¹⁴ Pub. L. No. 105-277, § 1404, 112 Stat. 2681-739 (1998). This 1998 law also amended 47 U.S.C. § 230(e)(1) to clarify that Section 230 should not be construed to impair the enforcement of 47 U.S.C. § 231, a new provision created by the 1998 law. *Id.*

¹⁵ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, § 4, 132 Stat. 1253 (2018). FOSTA also created criminal and civil liability for owning, managing, or operating an interactive computer service “with the intent to promote or facilitate the prostitution of another person . . .” *Id.* § 3.

¹⁶ 47 U.S.C. § 230(a).

¹⁷ *Id.* § 230(b).

¹⁸ *Id.* § 230(b)(4).

¹⁹ *Id.* § 230(b)(5).

²⁰ *Id.* § 230(c). Courts have read 47 U.S.C. § 230(c)(2)(B)’s reference to “paragraph (1)” to mean § 230(c)(2)(A). *E.g.* *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 n.5 (9th Cir. 2009) (“We take it that the reference to the ‘material described in paragraph (1)’ is a typographical error, and that instead the reference should be to paragraph (A), i.e., § 230(c)(2)(A). . . . Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing to do with ‘material,’ whereas subparagraph (A) pertains to and describes material.”) (citation omitted).

another information content provider,”²¹ while Section 230(c)(2) ensures that service providers may not be held liable for voluntarily acting to restrict access to objectionable material.²²

Both “interactive computer service” and “information content provider” are statutorily defined terms.²³ An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”²⁴ In a computer network, a server is generally the hardware or software that provides a service, such as transmitting information, to another piece of hardware or software called the client. Courts have accordingly interpreted “interactive computer service” broadly.²⁵ They have considered online service providers such as Google,²⁶ Facebook,²⁷ Amazon,²⁸ and Craigslist²⁹ to be “interactive computer service” providers.³⁰ Given the breadth of this definition, courts have also concluded that it extends to companies that provide broadband internet access³¹ or web hosting.³² Most litigation has focused on online service providers, but the definition can include services providing access to private servers³³ and brick-and-mortar entities such as libraries³⁴ or employers³⁵ who provide computer access.³⁶

²¹ 47 U.S.C. § 230(c)(1).

²² *Id.* § 230(c)(2).

²³ *Id.* § 230(f). For more information on “online platforms” more generally, see CRS Report R47662, *Defining and Regulating Online Platforms*, coordinated by Clare Y. Cho.

²⁴ 47 U.S.C. § 230(f)(2).

²⁵ See, e.g., *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27–28 (2d Cir. 2015) (observing that the definition of interactive computer service “has been construed broadly to effectuate the statute’s speech-protective purpose”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (observing that reviewing courts have “adopt[ed] a relatively expansive definition of ‘interactive computer service’”); IAN C. BALLON, 4 E-COMMERCE & INTERNET LAW 37.05[2] (2020 update) (“[A]lmost any networked computer service would qualify as an interactive computer service, as would an access software provider.”).

²⁶ E.g., *Marshall’s Locksmith Serv. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019).

²⁷ E.g., *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

²⁸ E.g., *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019).

²⁹ *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

³⁰ See also *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (“Providing access to the Internet is . . . not the only way to be an interactive computer service provider.”).

³¹ See *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 607 (N.D. Ill. 2008); see also, e.g., *Winter v. Bassett*, No. 1:02CV00382, 2003 WL 27382038, at *6 (M.D.N.C. Aug. 22, 2003) (concluding Section 230 protects Verizon and AT&T as interactive computer service providers).

³² *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015); see also, e.g., *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 412 (S.D.N.Y. 2001) (describing Mindspring, a web hosting service, as an “interactive computer service”).

³³ Cf., e.g., *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1175 (9th Cir. 2009) (rejecting argument that definition includes only services that enable “people to access the Internet or access content found on the Internet”); *In re Zoom Video Comm’n’s Privacy Litig.*, 525 F. Supp. 3d 1017, 1030 (N.D. Cal. 2021) (ruling the definition “does not recognize a public/private distinction”).

³⁴ The statute specifically provides that the definition includes “such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2). See, e.g., *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 777 (Cal. Ct. App. 2001) (“Respondent provides an ‘interactive computer service’ in this case because its library computers enable multiple users to access the Internet.”).

³⁵ E.g., *Miller v. Fed. Express Corp.*, 6 N.E.3d 1006, 1017 (Ct. App. Ind. 2014).

³⁶ Section 230 applies to both providers and users of interactive computer services. Some courts have opined that website operators are themselves *users* of interactive computer services (such as internet access service) and therefore are entitled to Section 230’s protection regardless of whether the website in question provides an interactive computer service. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”³⁷ Thus, Section 230 distinguishes those who create content from those who provide access to that content, providing immunity from suit to the latter group.³⁸ An entity may be both an “interactive computer service” provider and an “information content provider,” but the critical inquiry for applying Section 230’s immunity provisions is whether the service provider developed the content that is the basis for liability.³⁹

Section 230(e) contains “exceptions” to the law’s immunity provision:⁴⁰

(e) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.⁴¹

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON SEX TRAFFICKING LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit:

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted.⁴²

Courts have interpreted the language providing that Section 230 will not “limit” or “impair the enforcement of” other laws as creating “exceptions” to Section 230.⁴³ As one court reasoned, if intellectual property laws would impose liability on a provider, then applying Section 230 to bar that lawsuit “would ‘limit’ the laws pertaining to intellectual property in contravention of

³⁷ 47 U.S.C. § 230(f)(3).

³⁸ *See id.* § 230(c), (f).

³⁹ *See, e.g.,* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc).

⁴⁰ *E.g.,* Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (“[Plaintiff] has attempted to plead around that immunity . . . by asserting causes of action that purportedly fall into one of the statutory *exceptions* to Section 230 immunity.” (emphasis added)).

⁴¹ In contrast to the exceptions created by most of subsection (e), courts have read the second sentence of Section 230(e)(3) to “preempt contrary state law.” *E.g.,* Doe v. GTE Corp., 347 F.3d 655, 658 (7th Cir. 2003).

⁴² 47 U.S.C. § 230(e).

⁴³ *See, e.g.,* Universal Commc’n Sys., Inc., 478 F.3d at 418.

§ 230(e)(2).⁴⁴ Accordingly, Section 230 immunity generally will not apply to suits brought under federal criminal law,⁴⁵ intellectual property law,⁴⁶ any state law “consistent” with Section 230,⁴⁷ certain electronic communications privacy laws,⁴⁸ or certain federal and state laws relating to sex trafficking.⁴⁹

Section 104: Online Family Empowerment

Representatives Cox and Wyden offered the provision that would become Section 230 as Section 104 of House Bill 1555,⁵⁰ an amendment to the House version of the CDA titled “Online Family Empowerment.”⁵¹ Representative Cox stated that Section 104 would serve two purposes:

First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet⁵²

Many of those who spoke in favor of this amendment on the floor of the House argued that it would allow private parties, in the form of parents and internet service providers, to regulate offensive content, rather than the FCC.⁵³ In particular, then-Representative Wyden emphasized that “parents and families are better suited to guard the portals of cyberspace and protect our

⁴⁴ *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001).

⁴⁵ 47 U.S.C. § 230(e)(1).

⁴⁶ *Id.* § 230(e)(2). As discussed in more detail below, courts have disagreed about whether this exception includes only federal laws, or state laws as well. *Infra* “Intellectual Property Law.”

⁴⁷ 47 U.S.C. § 230(e)(3).

⁴⁸ *Id.* § 230(e)(4).

⁴⁹ *Id.* § 230(e)(5).

⁵⁰ H.R. 1555, 104th Cong. (1995).

⁵¹ *See* 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995).

⁵² *See id.* (statement of Rep. Christopher Cox). *See also, e.g.,* *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (“Congress enacted this provision as part of the Communications Decency Act of 1996 for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (“Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . . Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.”).

⁵³ *See* 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox) (“[W]e do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.”); *id.* at H8470 (statement of Rep. Joe Barton) (arguing this amendment provides “a reasonable way to . . . help [service providers] self-regulate . . . without penalty of law”); *id.* at H8471 (statement of Rep. Rick White) (arguing the responsibility for “protect[ing children] from the wrong influences on the Internet” should lie with parents instead of federal government); *id.* at H8471 (statement of Rep. Zoe Lofgren) (arguing that amendment should be adopted to “preserve . . . open systems on the Net”); *id.* at H8471 (statement of Rep. Bob Goodlatte) (“The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.”). Some have questioned whether the text of the amendment, in fact, prevented the federal government from regulating the Internet. *See* Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 68 (1996) (“The opposition [to the Senate version of the CDA] proclaimed that the Cox/Wyden Amendment forbade FCC regulation of the Internet; it did not. The opposition claimed that it preempted state regulation of the Internet; it did not.”) (citations omitted).

children than our Government bureaucrats,” and argued against federal censorship of the Internet.⁵⁴

The conference report echoed these concerns:

This section provides “Good Samaritan” protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.⁵⁵

As originally introduced and passed by the House, Section 104 also contained a section stating that the CDA should not be construed “to grant any jurisdiction or authority” to the Federal Communications Commission (FCC) to regulate the Internet.⁵⁶ However, this language was removed during the conference committee on the bill.⁵⁷

Stratton Oakmont, Inc. v. Prodigy Services Co.

As observed on the floor of the House⁵⁸ and in the conference report,⁵⁹ the amendment that would become Section 230 sought to overturn the result in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a 1995 New York state trial court decision.⁶⁰ The plaintiff in that case had sued Prodigy for libel—that is, defamation in written form.⁶¹ Although Prodigy, an internet service provider,⁶² had not itself made the allegedly libelous statements, the plaintiff alleged that Prodigy was legally responsible for publishing those statements because it hosted the message boards on which the statements were posted.⁶³ Prodigy’s liability depended on a determination that the company was a “publisher,” because under ordinary principles of defamation law, a publisher like a newspaper “who repeats or otherwise republishes a libel is subject to liability as if he had originally

⁵⁴ 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Ron Wyden).

⁵⁵ S. REP. NO. 104-230, at 194 (1996).

⁵⁶ See H.R. REP. NO. 104-223, at 29 (1995); 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995); 141 CONG. REC. H9988 (daily ed. Oct. 12, 1995).

⁵⁷ See S. REP. NO. 104-230, at 86–87 (1996). For more information on conference committees, see CRS Report 98-696, *Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses*, by Elizabeth Rybicki.

⁵⁸ 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).

⁵⁹ S. REP. NO. 104-230, at 194 (1996).

⁶⁰ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In contrast, Representative Cox noted approvingly a federal trial court decision holding that CompuServe could not be held liable for allegedly defamatory statements that were posted on an internet forum over which it exercised no editorial control. 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

⁶¹ *Stratton Oakmont, Inc.*, 1995 WL 323710, at *1.

⁶² Prodigy was “a consumer-oriented online service” that allowed users to “trade emails, participate in online message board discussions, read the daily news, shop for mail-order items, check the weather, stocks, sports scores, play games, and more.” Benj Edwards, *Where Online Services Go When They Die*, THE ATLANTIC (July 12, 2014), <https://www.theatlantic.com/technology/archive/2014/07/where-online-services-go-when-they-die/374099>. “It was very much like a microcosm of the modern Internet—if the entire World Wide Web was published by a single company.” *Id.*

⁶³ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *2.

published it.”⁶⁴ By contrast, speech “distributors” such as libraries or newsstands may be held liable for circulating publications that contain defamatory statements only if they know or have reason to know of the defamatory statements.⁶⁵ A 1991 decision from a federal trial court, *Cubby v. CompuServe, Inc.*, applied this notice-based distributor liability to another early internet service provider, CompuServe, that the court determined was sufficiently similar to a newsstand.⁶⁶

The plaintiffs in *Stratton Oakmont* argued that Prodigy should be considered a publisher rather than a distributor because it “held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards.”⁶⁷ Prodigy argued in response that it was more like a bookstore or newsstand than a newspaper, citing *Cubby* and claiming that it did not exercise “sufficient editorial control over its computer bulletin boards to render it a publisher” of the allegedly unlawful material.⁶⁸ Prodigy pointed out that it did not—and could not—manually review “all messages prior to posting” them.⁶⁹

The court concluded that Prodigy was a publisher of the alleged libel because it controlled the content of its message boards through an “automatic software screening program” and “Board Leaders” who removed messages that violated Prodigy’s guidelines.⁷⁰ The court held that “[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’ for example, [Prodigy] is clearly making decisions as to content . . . , and such decisions constitute editorial control.”⁷¹ The court emphasized that it was Prodigy’s “conscious choice” to exercise editorial control, implemented through “policies, technology and staffing decisions,” that had “opened it up to a greater liability.”⁷²

One of the sponsors of Section 104 argued on the floor of the House that the ruling against Prodigy was “backward.”⁷³ Representative Cox argued that Congress should be encouraging internet service providers “like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.”⁷⁴ It was to this end, Representative Cox contended, that Section 104 sought to protect “computer Good Samaritans,” protecting them “from taking on liability such as occurred in the

⁶⁴ *Id.* at *3.

⁶⁵ *Id.*

⁶⁶ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991). *See id.* at 140 (“A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.”).

⁶⁷ *Stratton Oakmont, Inc.*, 1995 WL 323710, at *2.

⁶⁸ *Id.* at *3.

⁶⁹ *Id.*

⁷⁰ *Id.* at *4.

⁷¹ *Id.* (citation omitted).

⁷² *Id.* at *5. *Cf. Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (“[A third party] uploads the text of Rumorville into CompuServe’s data banks and makes it available to approved . . . subscribers [to CompuServe’s publishing service] instantaneously. CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.”); *id.* at 140–41 (holding CompuServe could not be held liable unless “it knew or had reason to know of the allegedly defamatory Rumorville statements”).

⁷³ 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).

⁷⁴ *Id.* *See also id.* at H8471 (statement of Rep. Ron Wyden) (“Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need . . .”).

Prodigy case in New York that they should not face for helping us and for helping us solve this problem.”⁷⁵ Ultimately, Section 104 made it into the CDA, largely unchanged, as Section 230.⁷⁶

Judicial Interpretation

Courts have interpreted Section 230 as creating broad immunity that allows the early dismissal of many legal claims against interactive computer service providers,⁷⁷ preempting lawsuits and statutes that would impose liability based on third-party content.⁷⁸ Courts have generally interpreted Section 230(c)’s two separate provisions as creating two distinct liability shields. Section 230(c)(1) states that interactive computer service providers and users may not “be treated as the publisher or speaker of any information provided by another” person.⁷⁹ Section 230(c)(2) provides that interactive computer service providers and users may not be “held liable” for any voluntary, “good faith” action “to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”⁸⁰ One conception of these two provisions is that Section 230(c)(1) applies to claims for content that is “left up,” while Section 230(c)(2) applies to claims for content that is “taken down.”⁸¹ In practice, however, courts have also applied Section 230(c)(1) to “take down” claims, and courts sometimes collapse Section 230’s two provisions into a single liability shield or do not distinguish between the two provisions.⁸² A defendant’s chosen statutory basis for immunity under Section 230 is consequential: Section 230(c)(2) includes a good faith requirement absent from Section 230(c)(1), while Section 230(c)(1) is limited to claims based on another’s content.⁸³

Section 230’s provisions apply to users and providers of “interactive computer services,” a defined term discussed above.⁸⁴ Under this definition, courts have recognized that a website operated by a print or broadcast media provider may be an interactive computer service.⁸⁵ Thus, a “traditional” media outlet could receive protection under Section 230 for material posted on its

⁷⁵ *Id.* at H8470 (statement of Rep. Christopher Cox).

⁷⁶ *See* S. REP. NO. 104-230, at 86–87 (1996).

⁷⁷ *But see* *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 566 (7th Cir. 2023) (saying Section 230(c)(1) does not create “immunity” but functions as an affirmative defense).

⁷⁸ *See, e.g.*, David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 438–39 (2010) (reporting that almost all unreversed federal decisions involving invocations of Section 230 between Section 230’s passage and September 30, 2009, happened at the motion to dismiss or summary judgment stage).

⁷⁹ 47 U.S.C. § 230(c)(1).

⁸⁰ *Id.* § 230(c)(2).

⁸¹ *E.g.*, *Doe v. GTE Corp.* 347 F.3d 655, 659 (7th Cir. 2003); *cf.* *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., statement respecting the denial of certiorari) (articulating this view of Section 230 before positing that “[t]his modest understanding is a far cry from what has prevailed in court”).

⁸² *E.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009) (saying that imposing liability for removing content would treat a party as “a publisher” under Section 230(c)(1)); *Malwarebytes*, 141 S. Ct. at 17 (Thomas, J., statement respecting the denial of certiorari) (collecting cases).

⁸³ Although Section 230(c)(1) refers to content created by “another information content provider,” there is not judicial agreement about whether Section 230(c)(1) applies when a plaintiff’s own content is at issue—in other words, courts are divided as to whether a plaintiff itself may be “another information content provider” under Section 230(c)(1). For more discussion of this issue, *see infra* note 166.

⁸⁴ 47 U.S.C. § 230(c); *see supra* “Text and Legislative History.”

⁸⁵ *See, e.g.*, *Straw v. Streamwood Chamber of Commerce, Inc.*, No. 1-14-3094, 2015 IL App (1st) 143094-U, at *8 (Ill. App. Ct. Sept. 29, 2015) (applying Section 230 to a letter to the editor published on a newspaper’s website).

website while facing a different standard for material it prints or broadcasts.⁸⁶ That said, courts may deny Section 230’s protections without determining whether a party claiming its protections is a provider or user of an interactive computer service, as detailed below.⁸⁷

Section 230(c)(1): Publisher Activity

Section 230(c)(1) states that a provider or user of an interactive computer service will not be considered a publisher or speaker of content “provided by another information content provider.”⁸⁸ Courts asked to apply Section 230(c)(1) to dismiss legal claims therefore ask three questions⁸⁹:

1. Is the defendant a provider or user of an interactive computer service?⁹⁰
2. Does the plaintiff seek to hold the defendant liable as a publisher or speaker?
3. Does the plaintiff’s claim arise from information provided by another information content provider?

If the answer to any of these questions is “no,” Section 230(c)(1) will not bar liability.

As discussed above, courts have construed the definition of “interactive computer service” broadly.⁹¹ Cases thus often turn on the answers to the other two questions, which depend on the legal claims’ specific facts: an entity may act as an information content provider for certain content, but still be entitled to protection under Section 230(c)(1) for other content.⁹² This section will first summarize Section 230(c)(1) case law before probing specific judicial interpretations of when a service provider is acting as a publisher of another’s information or an information content provider.

Early Interpretations: *Zeran v. America Online, Inc.*

While the legislative history of Section 230 reflects, among other things, an intent to overturn the result in *Stratton Oakmont*, as discussed above,⁹³ courts have applied Section 230(c)(1) broadly to cover other circumstances. The first federal court of appeals decision to examine the scope of

⁸⁶ Cf. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (“Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations[.]”).

⁸⁷ See, e.g., *FTC v. Leadclick Media, LLC*, 838 F.3d 158, 176 (2d Cir. 2016) (ruling that claims were based on information developed by defendant); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197–98 (10th Cir. 2009) (reaching the same conclusion and leaving the question of whether defendant is an interactive computer service “to another day”).

⁸⁸ 47 U.S.C. § 230(c)(1).

⁸⁹ See, e.g., *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014).

⁹⁰ Although many cases involving Section 230(c)(1) are brought against providers of interactive computer services, Section 230(c)(1) also provides protection to users of interactive computer services. See, e.g., *Barrett v. Rosenthal*, 146 P.3d 510, 526–27 (Cal. 2006) (applying Section 230(c)(1) to an individual who posted a third-party article on a message board); see also *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (opining that a website’s operator is a “user” of interactive computer services, such as internet access service, and is therefore entitled to protection under Section 230(c)(1)).

⁹¹ See *supra* “Text and Legislative History.”

⁹² See, e.g., *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (observing that a website may avoid liability under Section 230(c)(1) for “passively display[ing] content that is created by third parties,” but such website could be subject to liability for “content that it creates itself”).

⁹³ See *supra* “*Stratton Oakmont, Inc. v. Prodigy Services Co.*”

Section 230(c)(1) was the Fourth Circuit’s 1997 decision in *Zeran v. America Online, Inc.*,⁹⁴ a case with several differences from *Stratton Oakmont*. Since its publication, other courts of appeals have largely adopted *Zeran*’s reasoning and broadly construed Section 230(c)(1),⁹⁵ although some more recent cases have signaled a potential retreat from *Zeran*.⁹⁶

In *Zeran*, an unidentified user on an America Online (AOL) bulletin board posted an advertisement for T-shirts featuring slogans celebrating the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.⁹⁷ The user invited AOL subscribers interested in purchasing these shirts to call the plaintiff, Kenneth Zeran, at his home phone number and “ask for Ken” upon calling.⁹⁸ Despite this invitation, Zeran did not post the ad himself, nor did he direct anyone to post the ad on his behalf.⁹⁹ Zeran received harassing and threatening calls, and consequently he contacted AOL and asked the company to remove the ad.¹⁰⁰ An AOL employee assured Zeran that AOL would take down the ad, but after AOL removed the ad, a similar ad took its place.¹⁰¹ Zeran brought negligence claims against AOL on the theory that once Zeran notified AOL of the ads, AOL had a duty to remove the ads, notify users that the ads were deceptive, and screen for similar postings.¹⁰²

Zeran premised his claim against AOL on a theory of “distributor” liability.¹⁰³ At common law, as discussed above,¹⁰⁴ vendors and distributors of defamatory publications are liable for the content of those publications if they know or have reason to know of the illegal or tortious content.¹⁰⁵ Central to Zeran’s theory was the notion that, although Section 230(c)(1) prohibited the court from holding AOL liable as a “publisher” of the defamatory statements, as the court treated Prodigy in *Stratton Oakmont*,¹⁰⁶ it did not eliminate notice-based distributor liability. In support of this argument, Zeran noted that Section 230 specifically uses the term “publisher.”¹⁰⁷

⁹⁴ *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). For purposes of brevity, references to a particular circuit in this report (e.g., the Fourth Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Fourth Circuit).

⁹⁵ See *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. Am. Online (AOL)*, 318 F.3d 465 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014); *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015); see also *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) (recognizing agreement among other courts of appeals but reaching a decision on other grounds); cf. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (partially rejecting the reasoning in *Zeran* but nonetheless finding that Section 230 barred Fair Housing Act claims against online service provider).

⁹⁶ See, e.g., *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 121–22 (4th Cir. 2022) (discussing the definition of “publisher”).

⁹⁷ *Zeran*, 129 F.3d at 329.

⁹⁸ *Id.*

⁹⁹ *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1126 (E.D. Va. 1997).

¹⁰⁰ *Zeran*, 129 F.3d at 329.

¹⁰¹ *Id.*

¹⁰² *Id.* at 330.

¹⁰³ Though Zeran characterized his claims as stemming from America Online’s negligence, the Fourth Circuit noted that the claims were “indistinguishable from a garden variety defamation action.” *Id.* at 332.

¹⁰⁴ See *supra* “*Stratton Oakmont, Inc. v. Prodigy Services Co.*”

¹⁰⁵ See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139–40 (S.D.N.Y. 1991). This limitation on distributor liability is rooted in the First Amendment. *Id.* (citing *Smith v. California*, 361 U.S. 147, 152–53 (1959)).

¹⁰⁶ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).

¹⁰⁷ See *Zeran*, 129 F.3d at 331–32.

The Fourth Circuit rejected this argument. Writing for a unanimous panel, Chief Judge Wilkinson posited that “distributor” liability depends on a distributor’s publication of tortious material, and a distributor is therefore a publisher.¹⁰⁸ Judge Wilkinson therefore reasoned that both at common law and in Section 230, the use of the term “publisher” includes original publishers as well as distributors.¹⁰⁹ The court suggested that subjecting a computer service provider to liability based on the provider’s knowledge would “reinforce[] service providers’ incentives to restrict speech and abstain from self-regulation” and “deter service providers from regulating the dissemination of offensive material over their own services.”¹¹⁰ Chief Judge Wilkinson therefore concluded that reading Section 230(c)(1) to leave notice-based distributor liability intact would conflict with Section 230’s purposes.¹¹¹

As discussed below, *Zeran* has informed the approach of a vast number of courts interpreting Section 230(c)(1). As one commentator has noted, “the rule of *Zeran* [barring distributor liability] has been uniformly applied by every federal circuit court to consider it and by numerous state courts.”¹¹² Even so, some jurists have expressed skepticism about the Fourth Circuit’s approach. In a statement written to accompany a denial of certiorari in a Section 230 case, U.S. Supreme Court Justice Clarence Thomas suggested, contrary to the holding in *Zeran*, that Section 230(c)(1) might not limit distributor liability.¹¹³ Two federal appellate judges concurring in separate Section 230 cases also questioned whether *Zeran*’s definition of “publisher” interpreted Section 230(c)(1) beyond its intended scope.¹¹⁴ In addition to the skepticism expressed by individual jurists, a 2022 Fourth Circuit opinion appeared to narrow *Zeran*’s conception of “publisher” activity without disturbing its basic ruling on distributor liability.¹¹⁵ This decision is discussed below.¹¹⁶

Service Provider Role as Publisher

While *Zeran* may be understood as addressing Section 230(c)(1)’s general scope, the case also addressed how courts may determine whether a claim treats a defendant as a “publisher or speaker” of another’s content.¹¹⁷ The *Zeran* court determined that the provision bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.”¹¹⁸ More

¹⁰⁸ *Id.* at 332 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 803 (5th ed. 1984)).

¹⁰⁹ *Id.* at 333–34.

¹¹⁰ *Id.* at 333.

¹¹¹ *Id.*

¹¹² Ian C. Ballon, *Zeran v. AOL and Its Inconsistent Legacy*, LAW JOURNAL NEWSLETTERS (Dec. 2017), <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/12/01/zeran-v-aol-and-its-inconsistent-legacy/?sreturn=20201103124726> (noting, though, that different federal appeals courts apply *Zeran* differently).

¹¹³ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15–16 (2020) (Thomas, J., statement respecting the denial of certiorari) (arguing that the imposition of distributor liability elsewhere in the CDA and the use of terms different from those used in *Stratton Oakmont* might suggest that Section 230 was not meant to limit distributor liability).

¹¹⁴ *E.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 84 (2d Cir. 2019) (Katzmann, J., concurring in part) (opining that Section 230 as applied creates “extensive immunity . . . for activities that were undreamt of in 1996”); *Gonzalez v. Google, LLC*, 2 F.4th 871, 915 (9th Cir. 2021) (Berzon, J., concurring) (arguing that the legislative history of Section 230 does not support a broad reading of publisher functions).

¹¹⁵ *Henderson v. Source for Public Data, L.P.*, 53 F.4th 110, 121 n.12 (4th Cir. 2022).

¹¹⁶ *Infra* text accompanying notes 146 to 150.

¹¹⁷ *See generally* *Force v. Facebook, Inc.*, 934 F.3d 53, 64 n.18 (2d Cir. 2019) (discussing the scope of “publisher liability”).

¹¹⁸ *Zeran*, 129 F.3d at 330.

generally, the Fourth Circuit interpreted Section 230(c)(1) as “creat[ing] a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”¹¹⁹ This interpretation would apply beyond the defamation claims brought in *Zeran* and *Stratton Oakmont*, and courts of appeals have barred many claims on the theory that the defendant computer service is being treated as a publisher or speaker.¹²⁰ Many courts have used this “traditional editorial functions”¹²¹ standard to interpret the scope of “publisher” immunity under Section 230.¹²²

For instance, the D.C. Circuit affirmed the dismissal of a lawsuit claiming Facebook acted negligently in failing to promptly remove an allegedly threatening page, saying that deciding “whether to print or retract a given piece of content” constitutes “the very essence of publishing.”¹²³ A number of courts have held that Section 230 not only bars lawsuits seeking monetary damages, but also bars suits for injunctive relief that would require sites to take specific actions with respect to third-party content.¹²⁴ For example, in *Hassell v. Bird*, the California Supreme Court said that Section 230 required the dismissal of a claim that sought to enforce a court order against Yelp.¹²⁵ The plaintiffs had sued the author of allegedly defamatory statements posted about their business on Yelp and obtained a default judgment in their favor after the defendant failed to respond to the lawsuit.¹²⁶ The plaintiff then attempted to enforce that judgment against Yelp, who was not originally a party to the litigation, asking the court to enter an injunction requiring Yelp to take down the defamatory statements.¹²⁷ In the state court’s view, the lawsuit sought “to overrule Yelp’s decision to publish the three challenged reviews,” impermissibly treating it as a publisher of third-party information.¹²⁸ The court said that allowing injunctions could “impose substantial burdens” on internet intermediaries, contrary to Section

¹¹⁹ *Id.*

¹²⁰ *See, e.g., Doe v. Backpage.com, LLC*, 817 F.3d 12, 18–24 (1st Cir. 2016) (applying Section 230(c)(1) to claims brought under federal and state sex trafficking statutes); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (rejecting negligence liability for a service provider when an adult user used the service to meet and allegedly abuse minor children); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–69 (7th Cir. 2008) (affirming dismissal of a federal housing discrimination claim); *Force v. Facebook, Inc.*, 934 F.3d 53, 65–68 (2d Cir. 2019) (applying Section 230(c)(1) to federal civil claims based on terrorist attacks encouraged and coordinated by users of a service); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (affirming dismissal of claims brought under state securities and cyberstalking laws).

¹²¹ *Zeran*, 129 F.3d at 330.

¹²² *See, e.g., Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1019 (N.Y. 2011).

¹²³ *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014).

¹²⁴ *See, e.g., Hassell v. Bird*, 420 P.3d 776, 788 (Cal. 2018) (plurality opinion); *id.* at 794 (Kruger, J., concurring); *see also Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 539–540 (E.D. Va. 2003) (collecting Section 230 cases dismissing claims for injunctive relief and concluding that the “continuing authority” of a 1998 trial court case holding that Section 230 did not bar injunctive relief was “questionable”); *Republican Nat’l Comm. v. Google, Inc.*, No. 2:22-cv-01904, 2023 WL 5487311, at *8 (E.D. Cal. Aug. 24, 2023) (concluding injunctive relief was also barred under Section 230(c)(2)).

¹²⁵ *Hassell*, 420 P.3d at 778–79 (plurality opinion); *id.* at 794 (Kruger, J., concurring).

¹²⁶ *Id.* at 780–81 (plurality opinion).

¹²⁷ *Id.* at 781–82.

¹²⁸ *Id.* at 789; *accord id.* at 794 (Kruger, J., concurring). *See also id.* at 790 (plurality opinion) (“The duty that plaintiffs would impose on Yelp, in all material respects, wholly owes to and coincides with the company’s continuing role as a publisher of third party online content.”).

230’s goal of “spar[ing] republishers of online content . . . from this sort of ongoing entanglement with the courts.”¹²⁹

In limited circumstances, courts have concluded that a particular claim does not treat a defendant as a publisher or speaker and is thus not barred by Section 230. One such case decided by the Ninth Circuit, *Doe v. Internet Brands, Inc.*, involved a negligent failure to warn claim against a service provider, arguing that under state law, the provider had a duty to warn users that third parties had used its site to target and lure victims in a “rape scheme.”¹³⁰ The court held that Section 230 did not bar the claim because the alleged duty resulted from information the service provider acquired offline, rather than from user content generated on the provider’s website, and the service provider could satisfy this duty to warn without removing any user content or changing how it monitored user content.¹³¹

Similarly, the Ninth Circuit refused to bar a state contract law claim based on a provider’s promise to remove third-party content.¹³² The court said that liability for the “promissory estoppel” claim came “not from [the provider’s] publishing conduct, but from [the provider’s] manifest intention to be legally obligated to do something, which happens to be removal of material from publication.”¹³³ Another case decided by the Seventh Circuit involved a claim against a provider of customer relationship management software based on the provider’s alleged knowing participation in sex trafficking undertaken by one of its clients, a website that used its software.¹³⁴ The court held that this claim depended on the provider’s offering of business support to its client, rather than its publication of any particular content.¹³⁵

Claims founded on economic regulations of online services have also survived Section 230(c)(1) preemption. For example, in *City of Chicago v. Stubhub!, Inc.*, the Seventh Circuit declined to apply Section 230(c)(1) to bar collection of a city amusement tax from an online ticket resale platform, noting that the tax “does not depend on who ‘publishes’ any information or is a ‘speaker.’”¹³⁶ Likewise, the Ninth Circuit held that Section 230(c)(1) did not preempt a local ordinance regulating short-term property rentals, as applied to websites that hosted listings of such rentals.¹³⁷ In the Ninth Circuit’s view, the ordinance merely required platforms to monitor booking transactions listed in a city-run registry of rental properties and did not require platforms to police the content of third-party listings.¹³⁸ The court thus did not believe that the ordinance would impermissibly treat the platforms as publishers of third-party content.¹³⁹ Courts have also

¹²⁹ *Id.* at 791 (plurality opinion). *See also Noah*, 261 F. Supp. 2d at 540 (“[G]iven that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief. After all, in some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive.”).

¹³⁰ *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 849 (9th Cir. 2016).

¹³¹ *Id.* at 851.

¹³² *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009).

¹³³ *Id.* *See also, e.g., Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *8 (N.D. Cal. Nov. 2, 2016) (“Plaintiff’s claim for breach of the implied covenant of good faith and fair dealing . . . is not precluded by § 230(c)(1) because it seeks to hold defendants liable for breach of defendants’ good faith contractual obligation to plaintiff, rather than defendants’ publisher status.”).

¹³⁴ *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 548 (7th Cir. 2023).

¹³⁵ *Id.* at 567.

¹³⁶ *City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010).

¹³⁷ *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019).

¹³⁸ *Id.* at 682.

¹³⁹ *Id.* at 682–83; *see also In re Zoom Video Commc’ns Privacy Litig.*, 525 F. Supp. 3d 1017, 1033 (N.D. Cal. 2021) (continued...)

sometimes found claims arising from an online marketplace’s role as a seller of a defective product to fall outside of Section 230’s protection.¹⁴⁰

Federal courts have also declined to apply Section 230(c)(1) to lawsuits brought by the Federal Trade Commission (FTC) against service providers alleging violations of Section 5 of the Federal Trade Commission Act.¹⁴¹ The first Court of Appeals to address this issue was the Tenth Circuit in *FTC v. Accusearch, Inc.*¹⁴² The majority opinion in *Accusearch* did not decide whether the defendant was being treated as a publisher or speaker, instead concluding that Section 230 did not bar the suit because the defendant had contributed to the allegedly unlawful content.¹⁴³ However, Judge Tymkovich wrote in a concurring opinion that the cause of action sought to hold the defendant liable for its own conduct, rather than for third-party content, and thus the defendant was not being treated as a publisher or speaker.¹⁴⁴ In *FTC v. Leadclick Media, LLC*, the Second Circuit agreed with Judge Tymkovich’s concurrence and determined that a claim brought under Section 5 of the FTC Act depended on the defendant’s own deceptive acts or practices and therefore did not treat the defendant as a publisher or speaker.¹⁴⁵

One recent decision signals an approach that may define publisher activity more narrowly than some courts previously applied *Zeran*. In *Henderson v. Source for Public Data, L.P.*, the Fourth Circuit held that to treat a service provider as a publisher or speaker, a claim must hold a service provider liable based on the improper content of the disseminated information.¹⁴⁶ The court drew this requirement from defamation law, under which a defendant’s liability as a publisher depends on the improper, “false and defamatory” nature of the material published.¹⁴⁷ Under this view, Section 230 did not bar claims alleging that a website had failed to comply with the Fair Credit Reporting Act.¹⁴⁸ Although the claims would have held the site liable for improperly disseminating information, they did not depend on the information’s *content* being improper.¹⁴⁹ The opinion cited and purported to apply *Zeran*, but *Henderson* appeared to add a new requirement given that *Zeran* made no reference to the content of information.¹⁵⁰ Several subsequent decisions from state and federal courts outside of the Fourth Circuit have declined to

(characterizing this as “content-neutral liability”). Cf. *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 120–24 (D. Mass. 2019) (ruling that a similar regulation was not preempted by Section 230, but concluding Section 230 likely did preempt portions of the regulation requiring a “booking agent” to remove improper listings).

¹⁴⁰ See, e.g., *Lee v. Amazon.com, Inc.*, 291 Cal. Rptr. 3d 332, 378–79 (Cal. Ct. App. 2022); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139–40 (4th Cir. 2019). As discussed, the unavailability of Section 230 in cases brought against online marketplaces does not necessarily mean the marketplace will face liability. See, e.g., *Erie Ins. Co.*, 925 F.3d at 142 (holding that Amazon was not liable for sale of a defective product).

¹⁴¹ 15 U.S.C. § 45.

¹⁴² *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1204 (Tymkovich, J., concurring). For more discussion of *Accusearch*, see *infra* “Subsequent Developments in Material Contribution Analysis.”

¹⁴⁵ *FTC v. Leadclick Media, LLC*, 838 F.3d 158, 176–77 (2d Cir. 2016).

¹⁴⁶ *Henderson v. Source for Public Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022).

¹⁴⁷ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 558(a) (AM. L. INST. 1965)).

¹⁴⁸ *Id.* at 117.

¹⁴⁹ *Id.* at 123–24.

¹⁵⁰ See *Zeran v. Am. Online, Inc.* 129 F.3d 327, 330 (4th Cir. 1997) (referencing the exercise of “traditional editorial functions” without reference to the content of information). Because the material at issue in *Zeran* was allegedly defamatory, see *id.*, the Fourth Circuit’s decision in *Henderson* does not call into question the outcome of *Zeran*.

follow *Henderson*, reasoning that the decision conflicts with binding precedent in their jurisdictions that reads Section 230(c)(1) more broadly.¹⁵¹

Product Design Claims

Courts have seen a rise in suits alleging, often as product liability claims,¹⁵² that online services were designed negligently.¹⁵³ Some opinions have held that Section 230(c)(1) barred claims seeking to hold sites liable for failing to adopt safety features that plaintiffs claim would have prevented violence.¹⁵⁴ To take one example, in *Doe v. MySpace, Inc.*, the Fifth Circuit affirmed the dismissal of a lawsuit alleging that MySpace acted negligently in failing “to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site.”¹⁵⁵ The plaintiff, a minor, had used the site to meet and communicate with an older teenager who later sexually assaulted her at an in-person meeting.¹⁵⁶ The plaintiff argued that her negligence claims depended on “MySpace’s failure to implement basic safety measures” and therefore would not treat the site as a publisher.¹⁵⁷ The Fifth Circuit disagreed, saying the allegations were “merely another way of claiming that MySpace was liable for publishing the communications.”¹⁵⁸ In the court’s view, the negligence claims hinged on MySpace’s publisher functions: its decisions relating to the “monitoring, screening, and deletion” of third-party content.¹⁵⁹ As a result, Section 230(c)(1) barred liability.¹⁶⁰

In contrast, the Ninth Circuit determined more recently that claims brought against the maker of Snapchat for negligently designing its platform to include a “speed filter” that encouraged users to drive at recklessly high speeds would not be barred by Section 230(c)(1).¹⁶¹ The Ninth Circuit determined that the claims based on Snapchat’s speed filter did not treat the platform as a “publisher or speaker,” because the claims “treat[ed] Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect.”¹⁶² Citing *Internet Brands*, the failure to warn case discussed above, the court observed that “Snap could have satisfied” the alleged obligation to design a better product “without altering the content that Snapchat’s users

¹⁵¹ *E.g.*, *Divino Grp. LLC v. Google LLC*, No. 19-04749, 2023 WL 218966, at *2 (N.D. Cal. Jan. 17, 2023) (“*Henderson* is not binding on this Court; and . . . the Fourth Circuit’s narrow construction of Section 230(c)(1) appears to be at odds with Ninth Circuit decisions indicating that the scope of the statute’s protection is much broader.”); *Prager Univ. v. Google LLC*, 85 Cal. App. 5th 1022, 1033 n.4 (Cal. Ct. App. 2022) (“*Henderson*’s narrow interpretation of section 230(c)(1) is in tension with the California Supreme Court’s broader view, which we follow, absent a contrary ruling by the United States Supreme Court.”).

¹⁵² For a discussion of products liability claims, see CRS In Focus IF11291, *Introduction to Tort Law*, by Andreas Kuersten.

¹⁵³ *See generally, e.g.*, Peter Karalis & Golriz Chrostowski, *Analysis: Product Claims Spike as SCOTUS Ponders Section 230 Fix*, BLOOMBERG LAW (Mar. 2, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-product-claims-spike-as-scotus-ponders-section-230-fix>.

¹⁵⁴ *E.g.*, *Herrick v. Grindr LLC*, 765 F. App’x 586, 590–91 (2d Cir. 2019) (affirming dismissal of product liability, negligence, and infliction of emotional distress claims alleging Grindr should have adopted safety features that would have protected a user from an ex-boyfriend’s “campaign of harassment” conducted on the service).

¹⁵⁵ *Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008).

¹⁵⁶ *Id.* The suit was brought by the minor and her mother under the aliases Jane and Julie Doe. *See id.* at 415–16. This report refers to a singular plaintiff for convenience.

¹⁵⁷ *Id.* at 419.

¹⁵⁸ *Id.* at 420.

¹⁵⁹ *See id.* (quoting *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3rd Cir. 2003)).

¹⁶⁰ *Id.* at 422.

¹⁶¹ *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091–94 (9th Cir. 2021).

¹⁶² *Id.* at 1092.

generate.”¹⁶³ A state court in Georgia reached a similar conclusion, holding that claims based on Snapchat’s speed filter did “not seek to hold Snapchat liable for publishing” and therefore could proceed.¹⁶⁴

Information Provided by Another Information Content Provider

Section 230(c)(1)’s protections extend only to claims that would hold a defendant liable for “information provided by *another* information content provider.”¹⁶⁵ Put another way, Section 230(c)(1) does not protect defendants from claims arising from their own content.¹⁶⁶ For example, Section 230(c)(1) would not bar a defamation claim against a social media website based on the content of a label or disclaimer added by the website to third-party content.¹⁶⁷ But as recognized in *Zeran* and other cases, Section 230(c)(1) does allow a defendant to make some editorial adjustments to third-party content without being considered the provider of that content.¹⁶⁸

Whether a defendant is being treated as the publisher of information provided by “another information content provider” depends in part on whether the defendant is an information content provider itself.¹⁶⁹ As defined in Section 230, an “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”¹⁷⁰ When a case involves third-party content, courts routinely focus on the defendant’s role in the “creation or development” of the content.¹⁷¹

¹⁶³ *Id.*; see *supra* text accompanying notes 130 to 131.

¹⁶⁴ *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018). The court emphasized that the alleged liability stemmed from actions taken before a third party had posted any content. *Id.* at 80.

¹⁶⁵ 47 U.S.C. § 230(c)(1) (emphasis added).

¹⁶⁶ A separate but related question is whether a plaintiff bringing claims based on their own content is “another information content provider” under Section 230(c)(1). Some courts have declined to apply Section 230(c)(1) to content created by a plaintiff, reasoning that allowing Section 230(c)(1) to cover such content would render Section 230(c)(2) superfluous. See, e.g., *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) (declining to apply Section 230(c)(1) to unfair competition claims based on Google’s removal of plaintiff’s advertising material). Other courts have applied Section 230(c)(1) to such claims. See, e.g., *Riggs v. MySpace, Inc.*, 444 F. App’x 986, 987 (9th Cir. 2011) (affirming dismissal under Section 230(c)(1) of claims based on removal of plaintiff-created profile pages); *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093–94 (N.D. Cal. 2015) (applying Section 230(c)(1) to dismiss claims based on blocking access to plaintiff-created page), *aff’d*, 697 F. App’x 526 (9th Cir. 2017); *cf. Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (interpreting Section 230(c)(1)’s reference to “another information content provider” to “distinguish[] the circumstance in which the interactive computer service itself meets the definition of ‘information content provider’ with respect to the information in question”).

¹⁶⁷ *Cf. Maffick, LLC v. Facebook, Inc.*, No. 20-05222, 2020 WL 5257853, at *1 (N.D. Cal. Sept. 3, 2020) (ignoring Section 230 entirely in a case based on Facebook’s labeling of user accounts as “Russia state-controlled media”).

¹⁶⁸ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); see *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (making minor alterations to email before posting email to listserv did not render defendant liable for third-party content); *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 985–86 (10th Cir. 2000) (deleting erroneous information from a database containing third-party content did not render defendant liable for third-party content); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51–52 (D.D.C. 1998) (reserving right to “require reasonable changes” to content did not render service provider liable for content).

¹⁶⁹ See 47 U.S.C. § 230(c)(1).

¹⁷⁰ *Id.* § 230(f)(3).

¹⁷¹ See, e.g., *Batzel*, 333 F.3d at 1031; *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 985.

Fair Housing Council v. Roommates.com, LLC

A foundational case on this issue is the Ninth Circuit’s decision in *Fair Housing Council v. Roommates.com, LLC* (*Roommates*).¹⁷² In *Roommates*, housing agencies in San Diego and the San Fernando Valley sued the operators of the website Roommates.com,¹⁷³ a website that allows individuals to locate prospective roommates.¹⁷⁴ New Roommates.com users were required to complete a questionnaire that included the user’s preferences for a roommate’s age, gender, sexual orientation, and number of children.¹⁷⁵ Roommates.com then displayed the answers to these questions in personal profiles, which users of the site could search and view.¹⁷⁶ The housing agencies alleged that Roommates.com had violated a provision of the Fair Housing Act that prohibits publishing advertisements for the sale or rental of a dwelling that indicate any preference based on sex, familial status, or other protected characteristics.¹⁷⁷ In defense, Roommates.com argued that the housing agencies were seeking to hold Roommates.com liable for content generated by individual users, and therefore Section 230(c)(1) would bar liability.¹⁷⁸ In an en banc ruling, the Ninth Circuit rejected this contention, saying that Roommates.com’s required questionnaire “induce[d] third parties to express illegal preferences.”¹⁷⁹ According to the court, because this questionnaire was created by Roommates.com and not its users, Section 230(c)(1) did not apply.¹⁸⁰

Addressing Roommates.com’s liability for displaying its user’s preferences on personal profiles, the court acknowledged that the “illegal preferences” at issue were pieces of information provided by information content providers other than Roommates.com.¹⁸¹ But the Ninth Circuit noted that Roommates.com may still have “develop[ed] . . . in part” this information, such that Roommates.com could be considered the “information content provider” of the information.¹⁸² The court determined that by requiring users to answer its questionnaire, Roommates.com had at least in part developed the information.¹⁸³ The Ninth Circuit cabined the reach of its holding by specifying that “passive conduits” or “neutral tools,” such as a search engine that filters content only by user-generated criteria, would not be responsible for developing content.¹⁸⁴ The court also concluded that Section 230(c)(1) did bar liability for user comments made in an “Additional

¹⁷² Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc).

¹⁷³ The defendant’s corporate name in *Roommates* is the singular Roommate.com, LLC. However, the domain of the website operated by the defendant is the plural roommates.com. This linguistic mismatch resulted in the party being named as “Roommates.com” in the Ninth Circuit case. Cf. Fair Hous. Council v. Roommate.com, LLC, No. 03-09386, 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004). For clarity, this report will refer to the defendant website operator as “Roommates.com.”

¹⁷⁴ *Roommates*, 521 F.3d at 1162.

¹⁷⁵ *Id.* at 1161.

¹⁷⁶ *Id.*

¹⁷⁷ 42 U.S.C. § 3604(c).

¹⁷⁸ *Roommates*, 521 F.3d at 1162.

¹⁷⁹ *Id.* at 1165.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*; see 47 U.S.C. § 230(c)(1) (applying only to information provided by “another information content provider”).

¹⁸³ *Roommates*, 521 F.3d at 1166.

¹⁸⁴ *Id.* at 1167–69.

Comments” section of user profiles, a blank box where users could post text with no constraints.¹⁸⁵

Writing for the majority, Chief Judge Kozinski summarized the *Roommates* court’s holding: “a website helps to develop unlawful content . . . if it contributes materially to the alleged illegality of the conduct.”¹⁸⁶ In a later Ninth Circuit opinion, the court clarified that this “material contribution” test “draw[s] the line at ‘the crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable.’”¹⁸⁷

Subsequent Developments in Material Contribution Analysis

Since the Ninth Circuit’s decision in *Roommates*, other federal courts of appeals and state courts have adopted variations on *Roommates*’ “material contribution” analysis in determining whether a defendant is the information content provider of the information at issue. The next federal appeals court to consider *Roommates* was the Tenth Circuit in *FTC v. Accusearch, Inc.*, which adopted—and possibly expanded upon—the Ninth Circuit’s reasoning in *Roommates*.¹⁸⁸ At issue in *Accusearch* was whether a website that sold information contained in telephone records could claim Section 230 protection from an FTC enforcement action when the operator acquired these records from third parties.¹⁸⁹ Accusearch argued that it did not add anything to the information after receiving it and thus was not an information content provider of the information.¹⁹⁰ In an opinion written by Judge Hartz, the Tenth Circuit held that a defendant’s solicitation of and payment for telephone records rendered the defendant an information content provider of these records.¹⁹¹

The Tenth Circuit focused on whether the defendant had played any role in “developing” the information. Judge Hartz opined that the inclusion of two terms—“creation” and “development”—in Section 230’s definition of “information content provider” suggested that the two terms had distinct meanings.¹⁹² Unwilling to adopt a redundant definition of “development,” the court turned to dictionary definitions of the term and determined that information may be “developed” when the information is made “‘visible,’ ‘active,’ or ‘usable.’”¹⁹³ The Tenth Circuit therefore concluded that by making telephone records public on its website, the defendant had “developed” those records.¹⁹⁴ Noting that Section 230 defines an information content provider as one “responsible, in whole or in part” for the creation or development of content,¹⁹⁵ the *Accusearch* court followed *Roommates* in holding that a party is “responsible” for content only

¹⁸⁵ *Id.* at 1173–75; see also *Chi. Lawyers’ Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 671 (2008) (concluding Section 230(c)(1) barred a similar Fair Housing Act case brought against website that hosted apartment listings, but listings were written entirely by users).

¹⁸⁶ *Roommates*, 521 F.3d at 1168.

¹⁸⁷ *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) (quoting *Jones v. Dirty World Entmt. Recordings LLC*, 755 F.3d 398, 413–14 (6th Cir. 2014)).

¹⁸⁸ *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009).

¹⁸⁹ *Id.* at 1190.

¹⁹⁰ *Id.* at 1197–98.

¹⁹¹ *Id.* at 1200.

¹⁹² *Id.* at 1198.

¹⁹³ *Id.* (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 618 (2002)).

¹⁹⁴ *Id.*

¹⁹⁵ 47 U.S.C. § 230(f)(3).

when the party “in some way specifically encourages development of what is offensive about the content.”¹⁹⁶ To the Tenth Circuit, what was “offensive” about the information at issue was that it had been publicly exposed: as the court observed, federal law generally prohibits the disclosure of telephone records to third parties.¹⁹⁷ Judge Hartz noted that Accusearch had “affirmatively solicited” telephone records from its paid researchers and “knowingly sought to transform virtually unknown information into a publicly available commodity,” and was therefore responsible for the records being made public.¹⁹⁸

Courts interpreting *Roommates* and *Accusearch* have attempted to define the contours of when a defendant has or has not “materially contributed” to content. A North Carolina appellate court held that “a website must effectively control the content . . . or take other actions which essentially ensure the creation of unlawful content” to be considered an information content provider.¹⁹⁹ The Sixth Circuit has emphasized that mere encouragement does not rise to the level of material contribution, asserting that holding otherwise “would inflate the meaning of ‘development’ to the point of eclipsing the immunity from publisher-liability that Congress established.”²⁰⁰ Even the Ninth Circuit has cautioned against the broad application of *Roommates*, declining to hold, for example, that a defendant materially contributed to content when the defendant did not “require[] users to post specific content,” as *Roommates.com* did by requiring users to complete its questionnaire.²⁰¹ In one of the few instances where a court has recognized material contribution, a California Court of Appeal decision applying *Roommates* held that a social media platform’s advertising tools, which required advertisers to select a target age range and gender, materially contributed to the alleged proliferation of discriminatory advertisements on the platform.²⁰²

Algorithmic Sorting and Promotion

A recurring issue in Section 230 cases is whether Section 230(c)(1) immunizes the use of algorithms to filter and sort content in a particular way—a common feature on social media websites and search engines.²⁰³ Claims brought against websites for their use of algorithms often cast a website’s use of algorithms either as “development” of third-party content, much like the theories of *Roommates* and *Accusearch*, or as nonpublisher activity to which Section 230(c)(1) would not apply. Federal courts of appeals that have considered this issue thus far have uniformly rejected these theories.²⁰⁴ For a more detailed discussion of these cases and recent developments, see CRS Report R47753, *Liability for Algorithmic Recommendations*, by Eric N. Holmes.

¹⁹⁶ *Accusearch*, 570 F.3d at 1199.

¹⁹⁷ *Id.*; see 47 U.S.C. § 222.

¹⁹⁸ *Accusearch*, 570 F.3d at 1200.

¹⁹⁹ *Hill v. Stubhub, Inc.*, 727 S.E.2d 550, 561 (N.C. App. 2012).

²⁰⁰ *Jones v. Dirty World Entmt. Recordings LLC*, 755 F.3d 398, 414 (6th Cir. 2014); see *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1161 n.19 (9th Cir. 2008) (en banc) (noting that *Roommates.com* “does much more than encourage or solicit”).

²⁰¹ *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019).

²⁰² *Liapes v. Facebook, Inc.*, 313 Cal. Rptr. 3d 330, 346 (Cal. Ct. App. 2023).

²⁰³ For more information on content recommendation and moderation algorithms, see CRS In Focus IF12462, *Social Media Algorithms: Content Recommendation, Moderation, and Congressional Considerations*, by Kristen E. Busch.

²⁰⁴ *E.g.*, *Dyroff*, 934 F.3d at 1098–99 (opining that plaintiffs could not frame “website features as content” and that the site’s recommendation and notification functions did not materially contribute to alleged unlawfulness of content); *Force v. Facebook, Inc.*, 934 F.3d 53, 66–69 (2d Cir. 2019) (rejecting theories that algorithmic sorting rendered website a nonpublisher or materially contributed to development of content); *Marshall’s Locksmith Serv., Inc. v. Google, LLC*, (continued...)

A thorough examination of the relationship between algorithmic content and Section 230 is the Second Circuit’s opinion in *Force v. Facebook, Inc.*, a case brought by victims of terrorist attacks allegedly coordinated and encouraged on Facebook by individual users.²⁰⁵ In *Force*, the plaintiffs contended that Facebook’s use of algorithms to display personalized content and friend suggestions was nonpublisher activity outside Section 230’s scope or, alternatively, materially contributed to the development of user content by “mak[ing] that content more visible, available, and usable.”²⁰⁶ The Second Circuit declined to endorse either of these arguments and instead held that Section 230 barred the plaintiffs’ claims.²⁰⁷ Addressing the first argument, the court decided that how and where to display content is a quintessential editorial decision protected under Section 230, and therefore plaintiffs sought to hold Facebook liable as a publisher.²⁰⁸ The Second Circuit likewise held that Facebook had not developed user content when its algorithms “take the information provided by Facebook users and ‘match’ it to other users—again, materially unaltered—based on objective factors applicable to any content.”²⁰⁹

The *Force* court’s treatment of algorithmic sorting applies the “neutral tools” language first appearing in *Roommates*.²¹⁰ Several earlier cases adopt a similar approach to such neutral tools that, though originating with this language from *Roommates*, slightly diverges from *Roommates*’ material contribution analysis. In an early case on the issue, the D.C. Circuit held that “a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online.”²¹¹ Both the D.C. Circuit and the Second Circuit have elaborated on particular features that may make a website’s tools “neutral.” In *Marshall’s Locksmith Service, Inc. v. Google*, a case involving search engines that automatically converted addresses provided by third parties into “pinpoints” appearing on the search engines’ mapping websites, the D.C. Circuit emphasized that the search engines’ tools did “not distinguish” between different types of user content.²¹² Instead, the algorithm translated all types of information, both legitimate and scam information, in the same manner.²¹³ The Second Circuit in *Force* characterized Facebook’s involvement in user content as “neutral” when Facebook did not require users to provide more than “basic identifying information” and its sorting algorithms used “objective factors” that applied in the same way “to any content.”²¹⁴

925 F.3d 1263, 1271 (D.C. Cir. 2019) (declining to treat search engines’ conversion of fraudulent addresses from webpages into “map pinpoints” as developing content).

²⁰⁵ *Force*, 934 F.3d at 57.

²⁰⁶ *Id.* at 70 (internal quotations omitted); *id.* at 65–66.

²⁰⁷ *Id.* at 71. In a partially dissenting opinion, Chief Judge Katzmann wrote that he would not apply Section 230(c)(1), reasoning that claims based on Facebook’s friend and content suggestion systems did not treat Facebook as a publisher of another’s content. *Id.* at 76–89 (Katzmann, J., concurring in part and dissenting in part).

²⁰⁸ *Id.* at 66–67 (majority opinion); see *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003) (applying Section 230 to a website’s “decision to structure the information provided by users”); *Marshall’s Locksmith Serv.*, 925 F.3d at 1269 (holding that “the choice of presentation” is a publisher function protected by Section 230); cf. *O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016) (applying Section 230 to “automated editorial acts”).

²⁰⁹ *Force*, 934 F.3d at 70.

²¹⁰ *Id.* at 66 (“[W]e find no basis . . . for concluding that an interactive computer service is not the ‘publisher’ of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer’s interests.”) (citing *Fair Hous. Council v. Roommates.com, Inc.*, 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc)).

²¹¹ *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014); accord *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (characterizing a rating system based on third-party input as a “neutral tool”).

²¹² *Marshall’s Locksmith Serv.*, 925 F.3d at 1271.

²¹³ *Id.*

²¹⁴ *Force*, 934 F.3d at 70.

The Ninth Circuit reached a similar conclusion in a since-vacated decision in *Gonzalez v. Google LLC*, which also involved claims brought by victims of terrorist attacks against social media providers.²¹⁵ As in *Force*, two members of the three-judge panel held that Section 230 would bar these claims because they sought to impose liability based on a decision not to remove terrorist content and because Google’s algorithms applied to terrorist content no differently than they applied to other content.²¹⁶ The Supreme Court granted certiorari in *Gonzalez*, but vacated the Ninth Circuit’s judgment without addressing Section 230.²¹⁷

Section 230(c)(2)(A): Restricting Access to Objectionable Material

Section 230(c)(2)(A) states that service providers and users may not “be held liable” for voluntary, “good faith” actions “to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”²¹⁸ This provision is more limited than Section 230(c)(1) in a few ways. First, as discussed above,²¹⁹ while a number of courts have held that Section 230(c)(1) shields decisions both to distribute and to restrict others’ content, Section 230(c)(2) applies only to decisions to restrict content. For example, providers have successfully invoked Section 230(c)(2) in claims challenging decisions to restrict user videos,²²⁰ suspend accounts,²²¹ prevent unsolicited bulk emails,²²² or not to run certain ads.²²³ In addition, unlike Section 230(c)(1), Section 230(c)(2) applies only to voluntary, good-faith actions, and it applies only to the listed categories of “objectionable” material.²²⁴ These limits on Section 230(c)(2) immunity have been litigated in the courts and have led courts to conclude, in some circumstances, that providers cannot claim Section 230 immunity.²²⁵

²¹⁵ *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), *vacated*, 598 U.S. 617 (2023) (per curiam).

²¹⁶ *Id.* at 892, 896.

²¹⁷ *Gonzalez v. Google LLC*, 598 U.S. 617, 621 (2023) (per curiam) (ruling the complaint failed to state a claim for aiding and abetting an act of international terrorism).

²¹⁸ 47 U.S.C. § 230(c)(2)(A).

²¹⁹ *Supra* note 82 and accompanying text.

²²⁰ *E.g.*, *Divino Grp. LLC v. Google LLC*, No. 19-cv-04749-VKD, 2022 WL 4625076, at *18 (N.D. Cal. Sept. 30, 2022) (involving state discrimination and unfair competition claims).

²²¹ *E.g.*, *Berenson v. Twitter, Inc.*, No. 21-09818, 2022 WL 1289049, at *2 (N.D. Cal. Apr. 29, 2022) (involving, among others, federal and state unfair competition laws and state common carrier law); *Dipp-Paz v. Facebook*, No. 18-CV-9037, 2019 WL 3205842, at *3 (S.D.N.Y. July 12, 2019) (involving constitutional free speech claims).

²²² *E.g.*, *Green v. Am. Online (AOL)*, 318 F.3d 465, 473 (3rd Cir. 2003) (involving negligence, breach of contract, constitutional free speech, and consumer fraud claims); *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1105 (N.D. Cal. 2011) (involving, among others, intentional interference with contract and intentional interference with prospective business advantage claims); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 607 (N.D. Ill. 2008) (involving federal Computer Fraud and Abuse Act, constitutional free speech, tortious interference with prospective economic advantage, and consumer fraud claims).

²²³ *E.g.*, *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630–31 (D. Del. 2007) (involving free speech, fraud, breach of contract, deceptive business practices, and “public calling” claims).

²²⁴ *See* 47 U.S.C. § 230(c). *See also, e.g.*, *Fyk v. Facebook, Inc.*, 808 Fed. App’x 597, 598 (9th Cir. 2020) (“Unlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service.”). As discussed below, some courts have interpreted these categories broadly. *See infra* “Objectionable Material.”

²²⁵ *See, e.g.*, *Enhanced Athlete Inc. v. Google LLC*, No. 19-cv-08260-HSG, 2020 WL 4732209, at *4 (N.D. Cal. Aug. 14, 2020); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017); *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *8 (N.D. Cal. Nov. 2, 2016).

Good Faith

Providers or users may claim immunity under Section 230(c)(2)(A) only if they act in “good faith.”²²⁶ The statute does not itself define what it means to act in good faith, and courts have applied a few different understandings of the term. Some trial court decisions have denied immunity and allowed claims to proceed where the plaintiff alleged that a service provider acted with an anticompetitive motive.²²⁷ For example, one court declined to dismiss a lawsuit alleging that Google had engaged in unfair competition by removing a company’s websites from its search results.²²⁸ Although Google said it had removed the results because they were “webspam” that violated its guidelines, the plaintiff claimed that Google actually had acted with an anticompetitive motive, because the plaintiff, which specialized in search engine optimization, “was cutting into Google’s revenues.”²²⁹ The court ruled that the plaintiff had presented enough evidence “to raise a genuine issue of fact” as to whether Google acted in good faith, preventing the court from dismissing the claim under Section 230.²³⁰ To take another example, a different court allowed a claim to proceed where the plaintiff alleged that YouTube removed her video to punish her for working with a competitor rather than buying Google’s advertising services.²³¹

In evaluating whether a provider acted in good faith, courts have also looked to whether the provider’s rationale for restricting content is “pretextual.”²³² As one trial court put it, for a removal to be made in good faith, “the provider must actually believe that the material is objectionable for the reasons it gives.”²³³ Under this view, if a provider says it is enforcing its terms of service, but is in fact motivated by some other reason, the provider may be acting in bad faith.²³⁴ Another trial court concluded that a service provider could be seen as acting in bad faith when the provider “failed to respond to [the user’s] repeated requests for an explanation.”²³⁵

In comparison, one trial court suggested that “selective enforcement” of a policy alone would not be enough to demonstrate bad faith.²³⁶ A mere mistake may be similarly insufficient.²³⁷ One trial court rejected allegations that Google acted in bad faith by sending emails from the Republican

²²⁶ 47 U.S.C. § 230(c)(2)(A).

²²⁷ See *Darnaa*, 2016 WL 6540452, at *8–9 (involving allegation that Google removed plaintiff’s video from YouTube because the plaintiff refused to allow Google to embed advertising in the video). Cf. *Spy Phone Labs LLC v. Google Inc.*, No. 15-cv-03756-KAW, 2016 WL 6025469, at *8 (N.D. Cal. Oct. 14, 2016) (involving allegation that Google was retaliating against plaintiff for submitting a trademark infringement complaint against another app).

²²⁸ *e-ventures Worldwide, LLC*, 2017 WL 2210029, at *1–2. Specifically, the lawsuit involved claims of “unfair competition under the Lanham Act, 15 U.S.C. § 1125(a); violation of Florida’s Deceptive and Unfair Trade Practices Act; and tortious interference with contractual relationships.” *Id.* at *2.

²²⁹ *Id.* at *1.

²³⁰ *Id.* at *3.

²³¹ *Darnaa*, 2016 WL 6540452, at *8–9.

²³² *Spy Phone Labs LLC*, 2016 WL 6025469, at *8; *accord GCM Partners, LLC v. Hipaaline Ltd.*, No. 20 C 6401, 2020 WL 6867207, at *13 (N.D. Ill. Nov. 23, 2020).

²³³ *Darnaa*, 2016 WL 6540452, at *8.

²³⁴ *Id.*; *Spy Phone Labs*, 2016 WL 6025469, at *8. *But see* *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (rejecting plaintiff’s assertion that the provider acted in bad faith because it gave false reasons for declining to run his ads, on the grounds that the provider must have permissibly concluded they were “otherwise objectionable”).

²³⁵ *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, No. 09-4567, 2011 WL 900096, at *9 (D.N.J. Mar. 15, 2011).

²³⁶ *Spy Phone Labs*, 2016 WL 6025469, at *8. *See also* *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008) (ruling that plaintiff did not sufficiently plead an “absence of good faith” even though the plaintiff claimed the provider “singl[ed] out” the plaintiff).

²³⁷ *e360Insight, LLC*, 546 F. Supp. 2d at 609; *Deutsch v. Microsoft Corp.*, No. 22-2904, 2023 WL 2966947, at *6 (D.N.J. Apr. 17, 2023).

National Committee (RNC) to users' spam folders.²³⁸ The RNC proffered a study allegedly showing that Gmail labeled Republican campaign emails as spam at a significantly higher rate than Democratic emails.²³⁹ The court held this study alone did not demonstrate bad faith.²⁴⁰ Among other factors, the court observed that the study did not attribute any motive to Google, that Google had worked with the RNC to reduce its spam rate, and that the RNC conducted an internal test suggesting technical features rather than content affected the spam rate.²⁴¹

Objectionable Material

The second important limitation on Section 230(c)(2)(A) immunity is that it applies only when providers or users restrict the listed types of content: “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”²⁴² Although this list includes only specific types of content, it can still be interpreted relatively broadly. In particular, some courts have interpreted the catch-all phrase “otherwise objectionable” broadly because Section 230(c)(2)(A) states that the provider or user is the one who determines whether the content is objectionable.²⁴³ As one court noted, the statute’s text injects “a subjective element” into this inquiry, by asking whether “the provider or user considers” the content to be objectionable.²⁴⁴ Thus, some courts have concluded that material classified as spam or malware can be considered “harassing” or “objectionable” under Section 230(c)(2)(A).²⁴⁵ In some cases, courts have looked to providers’ policies to determine whether the providers considered the restricted material objectionable.²⁴⁶

In 2009, one Ninth Circuit judge expressed concern about interpreting “otherwise objectionable” too broadly, cautioning that “the literal terms of” Section 230(c)(2)(A) could be read to grant providers “free license to *unilaterally* block the dissemination of material by content providers.”²⁴⁷ While the “good faith” provision discussed above limits providers’ discretion,²⁴⁸ some courts have concluded that “otherwise objectionable” should also be read more narrowly to

²³⁸ Republican Nat’l Comm. v. Google, Inc., No. 2:22-cv-01904, 2023 WL 5487311, at *6 (E.D. Cal. Aug. 24, 2023).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² 47 U.S.C. § 230(c)(2)(A).

²⁴³ *See, e.g., e360Insight*, 546 F. Supp. 2d at 607–08.

²⁴⁴ *Id.* at 608. *See also, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, No. 07-0807-JCC, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007) (“Section 230(c)(2)(A), which provides the definition of the relevant material described in Section 230(c)(2)(B), does not require that the material actually be objectionable; rather, it affords protection for blocking material ‘that the provider or user considers to be’ objectionable.” (quoting 47 U.S.C. § 230(c)(2)(A))), *aff’d*, 568 F.3d 1169 (9th Cir. 2009). *Cf. Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (“No court has articulated specific, objective criteria to be used in assessing . . . a provider’s subjective determination of what is ‘objectionable’ Here, however, it is clear . . . that Microsoft *reasonably* could conclude that Holomaxx’s emails were ‘harassing’ and thus ‘otherwise objectionable.’” (emphasis added)).

²⁴⁵ *E.g., e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) (“[S]pam is undoubtedly ‘harassing’ or ‘objectionable’ content for purposes of the CDA.”). *See also Zango*, 2007 WL 5189857, at *4 (“There is no question that [the provider] considers the software to be objectionable [as malware.]”); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (concluding implicitly, without discussion, that Section 230 barred plaintiff’s lawsuit because Google considered his ads “otherwise objectionable”).

²⁴⁶ *E.g., e360Insight*, 546 F. Supp. 2d at 608.

²⁴⁷ *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J., concurring).

²⁴⁸ *Cf. id.* at 1179 (expressing concern that Section 230(c)(2)(B) does not contain a good faith limitation).

avoid giving providers this free license.²⁴⁹ For example, one trial court denied Section 230 immunity to YouTube in a case challenging YouTube’s decision to remove a video because its view count had allegedly been artificially inflated.²⁵⁰ The court noted that the ordinary meaning of “objectionable” could include anything a provider finds undesirable, but ultimately concluded that such a broad definition was inconsistent with “the context, history, and purpose” of Section 230.²⁵¹ Looking to the list of adjectives preceding “otherwise objectionable,” the court believed that Congress was focused on “potentially offensive materials, not simply any materials undesirable to a content provider or user.”²⁵² Consequently, the court said that “it is hard to imagine that the phrase includes . . . the allegedly artificially inflated view count.”²⁵³

Similarly looking to congressional intent, the Ninth Circuit held in a 2019 case that the term “otherwise objectionable” should be interpreted to exclude anticompetitive conduct.²⁵⁴ At the same time, however, the court emphasized the “breadth of the term” and concluded it should be read more broadly than the specific categories preceding the “catchall phrase.”²⁵⁵ This Ninth Circuit ruling interpreted Section 230(c)(2)(B) and is discussed in more detail below.²⁵⁶

Section 230(c)(2)(B): Enabling Access Restriction

Section 230(c)(2)(B) provides that service providers and users may not “be held liable” for actions “taken to enable or make available to . . . others the technical means to restrict access to material” that falls within the specific categories listed in Section 230(c)(2)(A).²⁵⁷ Accordingly, Section 230(c)(2)(B) focuses on enabling *others* to restrict access to objectionable material, and offers immunity to, for example, “providers of programs that filter adware and malware,”²⁵⁸ as well as services that enable the filtering of spam email.²⁵⁹ Courts have concluded that companies

²⁴⁹ See, e.g., *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1050 (9th Cir. 2019); *Song Fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 884 (N.D. Cal. 2015); *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221-RMW, 2016 WL 6540452, at *8 (N.D. Cal. Nov. 2, 2016).

²⁵⁰ *Song Fi*, 108 F. Supp. 3d at 882.

²⁵¹ *Id.* at 882, 884.

²⁵² *Id.* See also *Darnaa*, 2016 WL 6540452, at *8 (“The context of § 230(c)(2) appears to limit the term [objectionable] to that which the provider or user considers sexually offensive, violent, or harassing in content.”).

²⁵³ *Song Fi*, 108 F. Supp. 3d at 883.

²⁵⁴ *Enigma Software Grp. USA*, 946 F.3d at 1045 (“[T]he phrase ‘otherwise objectionable’ does not include software that the provider finds objectionable for anticompetitive reasons.”); *id.* at 1051 (“Congress wanted to encourage the development of filtration technologies, not to enable software developers to drive each other out of business.”).

²⁵⁵ *Id.* at 1051; see also *id.* at 1052 (“We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s.”). See also, e.g., *Word of God Fellowship, Inc. v. Vimeo, Inc.*, 166 N.Y.S.3d 3, 7–8 (N.Y. App. Div. 2022) (rejecting a narrow reading of “objectionable” given the differences in the categories and concluding “vaccine misinformation may be ‘otherwise objectionable’ content that providers are entitled to remove”).

²⁵⁶ *Infra* notes 271 to 277 and accompanying text.

²⁵⁷ 47 U.S.C. § 230(c)(2)(B). Although Section 230(c)(2)(B) refers to “material described in paragraph (1),” a note in the United States Code indicates that this is likely meant to reference “subparagraph (A)” instead. *Id.* n.1.

²⁵⁸ *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1174 (9th Cir. 2009). See generally, e.g., Russell A. Miller, *The Legal Fate of Internet Ad-Blocking*, 24 B.U. J. SCI. & TECH. L. 301, 358–60 (2018) (discussing how Section 230(c)(2)(B) might protect ad-blocking firms from liability).

²⁵⁹ *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, No. 09-4567, 2011 WL 900096, at *6 (D.N.J. Mar. 15, 2011) (granting Section 230(c)(2)(B) immunity to service that investigated and provided information about IP addresses, “help[ing] information content providers restrict access to spam email”); *id.* at *8 (granting Section 230(c)(2)(B) immunity to software that “provide[d] Comcast with a means to restrict access to harassing spam email”).

like Facebook are also eligible for Section 230(c)(2)(B) immunity, to the extent they provide users with tools to hide or otherwise restrict their own access to content.²⁶⁰

The fact that a company provides users with the choice to opt out of receiving certain content, however, may not always be sufficient to gain Section 230(c)(2)(B) immunity.²⁶¹ In one case, a plaintiff sued Yahoo! for sending automated text message notifications about messages the plaintiff had received on Yahoo! Messenger.²⁶² Yahoo! claimed that the suit was barred by Section 230(c)(2)(B) because the text message “include[d] a link to a help page which . . . contain[ed] instructions on how to block further messages,” and accordingly, made “available the ‘technical means to restrict access’ to messages which plaintiff might deem ‘objectionable.’”²⁶³ The trial court rejected this claim, noting that because the text message notifications were sent automatically, “neither Yahoo! nor the mobile phone user ha[d] the opportunity to determine whether the third party message” was objectionable.²⁶⁴ Accordingly, the court held that Yahoo! could not claim Section 230(c)(2)(B) immunity where it “did not engage in any form of content analysis of the subject text to identify material that was offensive or harmful prior to the automatic sending of a notification message.”²⁶⁵

Because Section 230(c)(2)(B) applies only to actions restricting the types of content listed in Section 230(c)(2)(A),²⁶⁶ it implicates the same interpretive questions discussed above regarding whether the provider or user considered the restricted material “to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”²⁶⁷ However, unlike Section 230(c)(2)(A), Section 230(c)(2)(B) does not contain an explicit requirement for the provider or user to act in good faith.²⁶⁸ Thus, one Ninth Circuit judge expressed concern that Section 230(c)(2)(B) could be read to grant immunity to bad faith conduct, including “covert, anticompetitive blocking” of competitors.²⁶⁹ The judge believed it was “very likely” that Congress “did not intend to immunize” such conduct.²⁷⁰

In a 2019 decision, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, the Ninth Circuit held that Section 230(c)(2)(B) did not block a suit alleging anticompetitive conduct.²⁷¹ A company that sold computer security software sued a competitor after the competitor began flagging some of the plaintiff’s programs as “potentially unwanted programs.”²⁷² The plaintiff

²⁶⁰ Fehrenbach v. Zeldin, No. 17-CV-5282, 2018 WL 4242452, at *5 (E.D.N.Y. Aug. 6, 2018) (holding that Section 230(c)(2)(B) immunized Facebook from a complaint premised on the fact that Facebook allows users to hide comments).

²⁶¹ Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014).

²⁶² *Id.* at 1130.

²⁶³ *Id.* at 1137 (quoting 47 U.S.C. § 230(c)(2)).

²⁶⁴ *Id.* at 1138.

²⁶⁵ *Id.*

²⁶⁶ 47 U.S.C. § 230(c)(2)(B).

²⁶⁷ *Id.* § 230(c)(2)(A); *supra* “Objectionable Material.”

²⁶⁸ 47 U.S.C. § 230(c)(2). *See also, e.g.,* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1177 (9th Cir. 2009) (holding that allegations that provider acted in bad faith did not preclude dismissal of suit under Section 230(c)(2)(B) because this subparagraph “has no good faith language,” and noting that the plaintiff waived any argument that the provision “should be construed implicitly to have a good faith component”).

²⁶⁹ Zango, 568 F.3d at 1179 (Fisher, J., concurring).

²⁷⁰ *Id.*; *see also id.* at 1179 n.3 (“[T]he legislative history the parties cite is not helpful in determining the exact boundaries of what Congress intended to immunize. Whatever those exact boundaries, I doubt Congress intended to leave victims of malicious or anticompetitive blocking without a cause of action . . .”).

²⁷¹ Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1045 (9th Cir. 2019).

²⁷² *Id.* at 1047–48.

argued that this characterization served “as a ‘guise’ for anticompetitive conduct.”²⁷³ In evaluating the competitor’s attempt to claim immunity under Section 230(c)(2)(B), the Ninth Circuit looked to Section 230’s purpose, concluding that “Congress wanted to encourage the development of filtration technologies, not to enable software developers to drive each other out of business.”²⁷⁴ Accordingly, the court rejected the idea that the competitor could claim immunity “regardless of anticompetitive purpose.”²⁷⁵ The court believed that the term “objectionable” is not limited only to “material that is sexual or violent in nature,” and can encompass other “forms of unwanted online content that Congress could not identify in the 1990s.”²⁷⁶ But “if a provider’s basis for objecting to and seeking to block materials is because those materials benefit a competitor,” the court held that the provider could not claim Section 230 immunity.²⁷⁷

This decision was appealed to the Supreme Court, and although the Court declined the appeal, the case garnered a number of amicus briefs from parties interested in the case, as well as a separate statement from Justice Thomas respecting the denial of certiorari.²⁷⁸ Interest groups argued that the Ninth Circuit’s decision improperly imported a “good faith” requirement into Section 230(c)(2)(B), even though the text did not contain such a limitation.²⁷⁹ In an opinion concurring in the Court’s decision to deny certiorari, Justice Thomas argued that the Ninth Circuit decision—and other decisions interpreting Section 230—improperly “relied on purpose and policy” rather than textual arguments, creating “questionable precedent.”²⁸⁰ It remains to be seen whether courts outside the Ninth Circuit will agree with its ruling.

Section 230(e): Exceptions

As detailed above, Section 230(e) outlines five exceptions to the immunity created by Section 230.²⁸¹ A defendant cannot claim Section 230 immunity as a basis to dismiss a federal criminal prosecution or any lawsuit brought under intellectual property laws, state laws that are consistent with Section 230, certain electronic communications privacy laws, or certain sex trafficking laws.²⁸² Outside of these exceptions, courts have generally held that Section 230 will bar inconsistent liability even under later-enacted federal civil laws.²⁸³

²⁷³ *Id.* at 1048. Specifically, the complaint alleged both state law causes of action—deceptive business practices and tortious interference with business and contractual relations—and a federal claim under the Lanham Act. *Id.* The Ninth Circuit also considered whether the Lanham Act claim fell within the Section 230 exception for intellectual property claims, holding that it did not. *Id.* at 1045.

²⁷⁴ *Id.* at 1051.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1051–52.

²⁷⁷ *Id.* at 1052. However, the court noted that the defendant provider disputed whether it did engage in “anticompetitive blocking” and claimed instead that it found the plaintiff’s “programs ‘objectionable’ for legitimate reasons based on the programs’ content.” *Id.* The court suggested this factual dispute could be resolved on remand to the lower court. *Id.*

²⁷⁸ See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020).

²⁷⁹ See, e.g., Brief of Electronic Frontier Foundation as *Amicus Curiae* in Support of Petitioner at 4, *Malwarebytes, Inc.*, 208 L. Ed. 2d 197 (No. 19-1284); Brief of TechFreedom as *Amicus Curiae* in Support of Petitioner at 5, *Malwarebytes, Inc.*, 208 L. Ed. 2d 197 (No. 19-1284).

²⁸⁰ *Malwarebytes, Inc.*, 141 S. Ct. at 13–14 (Thomas, J., statement respecting the denial of certiorari).

²⁸¹ *Supra* notes 40 to 49 and accompanying text.

²⁸² See 47 U.S.C. § 230(e).

²⁸³ For example, two federal courts of appeals concluded that the Justice Against Sponsors of Terrorism Act, adopted in 2016, did not implicitly repeal Section 230, and Section 230 would therefore bar any inconsistent liability. *Gonzalez v. Google LLC*, 2 F.4th 871, 889 (9th Cir. 2021), *vacated*, 598 U.S. 617 (2023) (ruling on the merits of the claims and declining to address the application of Section 230); *Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019).

Federal Criminal Law

The first exception to Section 230 immunity is for “any . . . Federal criminal statute,” meaning that any defendant in a federal criminal prosecution cannot claim Section 230 immunity.²⁸⁴ For example, Section 230 does not bar prosecution under federal statutes that prohibit the knowing distribution of obscene materials online.²⁸⁵ Neither did Section 230 bar the federal prosecution of Backpage.com corporate entities for conspiracy to engage in money laundering.²⁸⁶ This exception does not include state criminal laws, and courts have read Section 230 to preempt inconsistent state criminal prosecutions.²⁸⁷

Most courts to consider the issue have interpreted Section 230(e)(1) to allow only criminal prosecutions, not civil lawsuits based on violations of federal criminal laws.²⁸⁸ A number of plaintiffs have argued that, particularly where federal law creates criminal and civil liability for the same conduct, applying Section 230 to bar suits under a civil enforcement provision would “impair the enforcement” of the criminal law.²⁸⁹ Several courts have rejected those arguments,²⁹⁰ noting the traditional distinction between criminal and civil liability and concluding that, by referring only to “criminal” statutes in Section 230(e)(1), Congress intended to exclude civil suits.²⁹¹

Intellectual Property Law

The second exception to Section 230 immunity is for “any law pertaining to intellectual property.”²⁹² This phrase is somewhat ambiguous,²⁹³ but courts have concluded that this exception

²⁸⁴ 47 U.S.C. § 230(e)(1).

²⁸⁵ *See, e.g.*, 18 U.S.C. § 1462 (making it a crime to “knowingly use[] any . . . interactive computer service . . . for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy . . . picture, motion-picture film, . . . writing, print, or other matter of indecent character; or (b) any obscene, lewd, lascivious, or filthy . . . electrical transcription, or other article or thing capable of producing sound”).

²⁸⁶ *See* Press Release, U.S. Dep’t of Justice, Backpage’s Co-founder and CEO, As Well As Several Backpage-Related Corporate Entities, Enter Guilty Pleas (Apr. 12, 2018), <https://www.justice.gov/opa/pr/backpage-s-co-founder-and-ceo-well-several-backpage-related-corporate-entities-enter-guilty>.

²⁸⁷ *See generally, e.g.*, *Voicenet Commc’ns, Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318, at *3 (E.D. Pa. Aug. 30, 2006) (interpreting Section 230(e)(1) not to include state criminal laws); *see also, e.g.*, *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (dismissing suit under state cyberstalking law because defendant’s “liability would depend on treating it as the publisher of those postings”); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (concluding proposed state legislation “is likely inconsistent with and therefore expressly preempted by [47 U.S.C. § 230]” because it imposes “liability on Backpage.com and [Internet Archive] for information created by third parties—namely ads for commercial sex acts depicting minors—so long as it ‘knows’ that it is publishing, disseminating, displaying . . . such information”).

²⁸⁸ *See, e.g.*, *Yuksel v. Twitter, Inc.*, No. 22-cv-05415-TSH, 2022 WL 16748612, at *5 (N.D. Cal. Nov. 7, 2022); *but see Doe #1 v. MG Freesites, Ltd.*, No. 7:21-cv-00220-LSC, 2022 WL 407147, at *22 (N.D. Ala. Feb. 9, 2022) (indicating Section 230 did not bar claims under certain civil provisions contained in Title 18); *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931, at *9 (C.D. Ill. Aug. 3, 2012) (saying in dicta that “arguably, § 230 of the CDA may not be used to bar a civil RICO claim because that would impair the enforcement of a Federal criminal statute”). Other exceptions do allow specific federal civil claims; for example, civil suits based on certain federal sex trafficking offenses may be permitted under a different exception. *See infra* “Sex Trafficking Law (FOSTA).”

²⁸⁹ *E.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 71 (2d Cir. 2019); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016); *Doe v. Bates*, No. 5:05CV91, 2006 WL 8440858, at *13 (E.D. Tex. Jan. 18, 2006).

²⁹⁰ *E.g.*, *Force*, 934 F.3d at 72; *Backpage.com*, 817 F.3d at 23; *Bates*, 2006 WL 8440858, at *14.

²⁹¹ *See, e.g.*, *Force*, 934 F.3d at 71; *Backpage.com*, 817 F.3d at 23.

²⁹² 47 U.S.C. § 230(e)(2).

²⁹³ *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (“The CDA does not contain an express (continued...)”).

for laws “pertaining to intellectual property” allows, for example, suits for copyright and trademark infringement.²⁹⁴ In evaluating whether Section 230(e)(2) applies, courts have sometimes looked not only to whether the plaintiff is suing under a law that generally involves intellectual property issues, but more specifically, whether the plaintiff’s claim itself involves an intellectual property right.²⁹⁵

For example, the Ninth Circuit ruled in 2019 that a false advertising claim brought under the Lanham Act did not fall within the Section 230(e)(2) exception.²⁹⁶ The court noted that the Lanham Act, a federal law, “contains two parts, one governing trademark infringement and another governing false designations of origin, false descriptions, and dilution.”²⁹⁷ Noting that Congress intended to provide broad immunity in Section 230, the Ninth Circuit construed the intellectual property exception narrowly, to include only “claims pertaining to an established intellectual property right . . . like those inherent in a patent, copyright, or trademark.”²⁹⁸ Because the false advertising claim did not “relate to or involve trademark rights or any other intellectual property rights,” the court held that the intellectual property exception did not apply.²⁹⁹ Somewhat similarly, a New Hampshire trial court held in one case that three “right of privacy” torts— intrusion upon seclusion, publication of private facts, and casting in a false light—involved rights that could not be considered property rights.³⁰⁰ Accordingly, the court concluded that the claims did “not sound in ‘law pertaining to intellectual property’” and Section 230 barred the claims.³⁰¹

Courts have disagreed about whether Section 230(e)(2) includes state law claims such as the right to publicity,³⁰² a cause of action that essentially allows plaintiffs to sue for the improper commercial use of their identity.³⁰³ Some courts, including the Third Circuit, have held that the exception does include state intellectual property claims, allowing, for example, state law claims for copyright infringement, misappropriation and unfair competition, and right of publicity to

definition of ‘intellectual property,’ and there are many types of claims in both state and federal law which may—or may not—be characterized as ‘intellectual property’ claims.”).

²⁹⁴ *E.g.*, *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 503 n.8 (E.D. Penn. 2006); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 414 (S.D.N.Y. 2001); *Malibu Media, LLC v. Weaver*, No. 8:14-cv-1580-T-33TBM, 2016 WL 1394331, at *8 (M.D. Fla. Apr. 8, 2016).

²⁹⁵ *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052–53 (9th Cir. 2019). *See also, e.g.*, *Corker v. Costco Wholesale Corp.*, No. C19-0290RSL, 2019 WL 5895430, at *6 (W.D. Wash. Nov. 12, 2019) (concluding Section 230(e)(2) did not apply to a false association claim because the claim did “not involve an intellectual property right or trademark”); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302–03 (D.N.H. 2008) (holding that Section 230(e)(2) did not apply to state right of privacy claims that involved personal rights).

²⁹⁶ *Enigma Software Grp. USA*, 946 F.3d at 1053. However, the court nonetheless concluded that because the claim was “based on allegations of [anticompetitive] conduct,” it would not apply Section 230(c)(2) to dismiss the claim. *Id.* at 1054. This portion of the opinion is discussed *supra* “Section 230(c)(2)(B): Enabling Access Restriction.”

²⁹⁷ *Enigma Software Grp. USA*, 946 F.3d at 1053.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1053–54.

³⁰⁰ *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 302–03.

³⁰¹ *Id.* at 303. *See also* *Ratermann v. Pierre Fabre USA, Inc.*, No. 22-CV-325, 2023 WL 199533, at *5 (S.D.N.Y. Jan. 17, 2023) (concluding Section 230(e)(2) did not apply to a state law construed as creating “a statutory right to *privacy*, not property”).

³⁰² *See, e.g.*, *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 888–89 (W.D. Wis. 2009) (noting that a right to publicity claim “is generally considered an intellectual property claim,” implicating this exception, but further noting the “disagreement among various federal courts regarding the scope of the intellectual property exception,” and ultimately dismissing the claim on jurisdictional grounds); *see also Friendfinder Network, Inc.*, 540 F. Supp. 2d at 302 (holding that a state right of publicity claim “arises out of a ‘law pertaining to intellectual property’ within the meaning of” 47 U.S.C. § 230(e)(2)).

³⁰³ *See, e.g.*, *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928–37 (6th Cir. 2003) (discussing the right of publicity).

proceed.³⁰⁴ These courts have noted that the exception refers broadly to “*any law*,”³⁰⁵ and that other provisions of Section 230 distinguish between state and federal law, suggesting that “any law” includes both state and federal laws.³⁰⁶

In contrast, the Ninth Circuit has held that Section 230(e)(2) encompasses only *federal* laws and that Section 230 bars state intellectual property claims.³⁰⁷ In *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit looked to Congress’s policy goals and “construe[d] the term ‘intellectual property’ to mean ‘federal intellectual property.’”³⁰⁸ The court observed that state intellectual property laws “are by no means uniform,” and could subject websites to varied liability schemes.³⁰⁹ In the view of the court, this outcome “would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.”³¹⁰ The Ninth Circuit did not discuss the fact that the text of Section 230(e)(2) refers to “any law,” noting only that the term “intellectual property” was undefined.³¹¹

State Law

The third exception provides that Section 230 will not “prevent any State from enforcing any State law that is consistent with this section,” allowing states to continue enforcing any laws that are “consistent” with Section 230.³¹² As one trial court described this provision, “Section 230(e)(3) does not attempt to define what state law is consistent and inconsistent with the CDA;” in effect, this subsection “provides no substantive content.”³¹³ In evaluating whether a state law, or a particular application of a state law, is consistent with Section 230 or whether it is instead inconsistent and preempted, courts have looked to whether the law would violate Section 230(c)(1) by treating service providers or users as the publisher of another person’s content.³¹⁴ Accordingly, for example, one court concluded that a libel claim that would hold a website

³⁰⁴ *Hepp v. Facebook*, 14 F.4th 204, 210 (3d Cir. 2021); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 694, 704 (S.D.N.Y. 2009); *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 302; *Albert v. Tinder, Inc.*, No. 22-60496-CIV, 2022 WL 18776124, at *11 (S.D. Fla. Aug. 5, 2022). The First Circuit suggested in one decision that a state trademark claim was “not subject to Section 230 immunity.” *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007). Courts have debated whether this conclusion was dicta, given that the First Circuit ultimately concluded that the claim “would not survive” even if Section 230 did not apply. *Id.* at 423; *compare Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299 (describing this statement as dicta), *with Hepp*, 14 F.4th at 210 (saying the merits discussion “was necessary only because” of the court’s Section 230(e)(2) ruling).

³⁰⁵ 47 U.S.C. § 230(e)(2) (emphasis added).

³⁰⁶ *Hepp*, 14 F.4th at 210–11; *Atl. Recording Corp.*, 603 F. Supp. 2d at 703–04; *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299–300.

³⁰⁷ *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007).

³⁰⁸ *Perfect 10, Inc.*, 488 F.3d at 1118–19.

³⁰⁹ *Id.* at 1118.

³¹⁰ *Id.*

³¹¹ *See id.* at 1119; *see also, e.g., Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299 (“The Ninth Circuit made no attempt to reckon with the presence of the term ‘any’—or for that matter, the absence of term ‘federal’—in § 230(e)(2) when limiting it to federal intellectual property laws.”).

³¹² 47 U.S.C. § 230(e)(3).

³¹³ *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 694, 702 (S.D.N.Y. 2009).

³¹⁴ *Compare, e.g., HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (holding that an ordinance regulating home rentals “is not ‘inconsistent’ with the CDA” because it would not impose a duty on websites to monitor third-party content), *with, e.g., Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (holding that a state criminal law “is likely inconsistent with and therefore expressly preempted by Section 230” because it would impose liability on websites for third-party content). *Cf. Dangaard v. Instagram, LLC*, No. C 22-01101 WHA, 2022 WL 17342198, at *5 (N.D. Cal. Nov. 30, 2022) (citing Section 230(e)(3) and the “policy” provisions in Section 230(b) as additional support for a ruling that Section 230(c)(1) did not bar certain claims).

operator “liable for statements *he* actually authored” was “consistent with” Section 230 and could proceed.³¹⁵

Electronic Communications Privacy Act of 1986

The fourth exception to Section 230 immunity is for claims brought under the Electronic Communications Privacy Act of 1986 (ECPA) “or any similar State law.”³¹⁶ ECPA is a federal law that governs wiretapping and electronic eavesdropping.³¹⁷ ECPA creates a number of criminal offenses, which would fall within the first exception for federal crimes,³¹⁸ but also contains civil liability provisions, which fall within this fourth exception.³¹⁹ Perhaps most relevant to service providers that host user-generated content, ECPA makes it unlawful not only to intercept covered communications intentionally, but also to disclose information intentionally if the person “ha[s] reason to know that the information was obtained through” an unlawful interception.³²⁰ However, the Seventh Circuit ruled in one case that this exception did not allow a lawsuit against companies that provided web hosting services to people who sold illegally obtained videos.³²¹ The court said the plaintiffs had not shown that the web service companies had “disclose[d] any communication,” declining to impose secondary liability on the web service providers absent evidence that the companies provided “culpable assistance” to the “wrongdoer.”³²²

Sex Trafficking Law (FOSTA)

The fifth exception to Section 230 immunity was added in 2018 by the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) and relates to certain sex trafficking offenses.³²³ Specifically, Section 230(e)(5) provides that Section 230 will not bar (1) federal³²⁴ civil actions “brought under” 18 U.S.C. § 1595 “if the conduct underlying the charge would constitute a violation of” 18 U.S.C. § 1591, which prohibits knowingly engaging in sex trafficking of minors or in sex trafficking that involves force, fraud, or coercion, or knowingly benefiting from participation in a venture that engaged in such an act;³²⁵ (2) state criminal

³¹⁵ Cisneros v. Sanchez, 403 F. Supp. 2d 588, 592 (S.D. Tex. 2005) (emphasis added).

³¹⁶ 47 U.S.C. § 230(e)(4). *See also, e.g.*, Universal Comm’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 421 (1st Cir. 2007) (“We note that liability under the ECPA is specifically exempted from Section 230 immunity.”).

³¹⁷ *See generally* CRS Report R41733, *Privacy: An Overview of the Electronic Communications Privacy Act*, by Charles Doyle.

³¹⁸ *See* 47 U.S.C. § 230(e)(1).

³¹⁹ *See id.* § 230(e)(4).

³²⁰ 18 U.S.C. §§ 2511 (outlining the prohibitions), 2520 (authorizing civil suits).

³²¹ Doe v. GTE Corp., 347 F.3d 655, 662 (7th Cir. 2003).

³²² *Id.* at 658–59.

³²³ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018). One state court described Section 230(e)(5) as a “rule of construction” going beyond a mere exception applicable to the specified claims. *In re Facebook, Inc.*, 625 S.W.3d 80, 100 (Tex. 2021). A number of federal courts have described it as an “exception.” *E.g.*, Does v. Reddit, Inc., 51 F.4th 1137, 1140 (9th Cir. 2022); Doe #1 v. MG Freesites, Ltd., No. 7:21-cv-00220-LSC, 2022 WL 407147, at *10 (N.D. Ala. Feb. 9, 2022).

³²⁴ While one state court concluded Section 230(e)(5) also allows state civil suits that are “materially indistinguishable” from liability under 18 U.S.C. § 1595, a number of federal courts have disagreed with this view, concluding Section 230(e)(5) does not allow state civil lawsuits. *Compare In re Facebook, Inc.*, 625 S.W.3d at 100, *with, e.g.*, Doe v. Reddit, Inc., No. SACV 21-768 JVS(KESx), 2021 WL 4348731, at *5 (C.D. Cal. July 12, 2021), *and* J.B. v. G6 Hosp., LLC, No. 19-cv-07848-HSG, 2020 WL 4901196, at *7 (N.D. Cal. Aug. 20, 2020).

³²⁵ “Participation in a venture” is in turn defined as “knowingly assisting, supporting, or facilitating a violation” of these provisions. 18 U.S.C. § 1591(e)(4). The D.C. Circuit concluded that this provision prohibits “aiding and abetting sex trafficking.” Woodhull Freedom Found. v. United States, 72 F.4th 1286, 1298–99 (D.C. Cir. 2023).

prosecutions where the underlying conduct would violate 18 U.S.C. § 1591; and (3) state criminal prosecutions where the underlying conduct would violate 18 U.S.C. § 2421A, which prohibits “operat[ing] an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person” in jurisdictions where such conduct is illegal.³²⁶ There has been significant litigation over the scope of this exception.

The FOSTA exception will apply only if a private plaintiff or state prosecutor can demonstrate that the service provider or user violated the specified federal laws.³²⁷ A number of early cases considering the scope of this exception faced disagreements over whether the plaintiff had to prove a violation of the criminal law, 18 U.S.C. § 1591, or merely a violation of 18 U.S.C. § 1595, the provision allowing civil actions.³²⁸ This distinction was significant because the two provisions have slightly distinct elements: most significantly, different *mens rea*, or mental state, requirements. As stated by one trial court, while both statutes authorize liability against “beneficiaries” of a sex trafficking venture, “the criminal statute requires that the defendant have actual knowledge of sex trafficking at issue while the civil statute allows a plaintiff to plead that the defendant merely had constructive knowledge.”³²⁹

The Ninth Circuit and a number of trial courts have adopted the former reading, requiring plaintiffs to prove the defendant violated the criminal law in order to avoid Section 230 immunity.³³⁰ In *Does 1–6 v. Reddit, Inc.*, for example, the Ninth Circuit considered claims alleging that the social media platform Reddit had “done little to remove” or prevent sexually explicit images and videos of minors because such images and videos “drive[] user traffic” and contribute to “substantial advertising revenue.”³³¹ The plaintiffs alleged the FOSTA exception applied and Reddit was liable “as a beneficiary of child sex trafficking.”³³² To qualify for the exception, the Ninth Circuit held that the “defendant-website’s own conduct must ‘underl[ie]’ the claim” and violate the criminal provisions in 18 U.S.C. § 1591.³³³ Thus, the plaintiff had to prove the website violated that law “by directly sex trafficking or, with actual knowledge, ‘assisting, supporting, or facilitating’ trafficking.”³³⁴ In addition to requiring beneficiaries to possess actual knowledge, the Ninth Circuit held that “mere association with sex traffickers” was insufficient to violate the criminal law “absent some knowing ‘participation’ in the form of assistance, support, or facilitation.”³³⁵ In the case before it, the Ninth Circuit concluded that the plaintiffs had alleged

³²⁶ 47 U.S.C. § 230(e)(5).

³²⁷ *See id.*

³²⁸ *See, e.g., Doe #1 v. MG Freesites, Ltd.*, No. 7:21-cv-00220-LSC, 2022 WL 407147, at *11–15 (N.D. Ala. Feb. 9, 2022) (acknowledging the disagreement and differing judicial resolutions but avoiding the question).

³²⁹ *Id.* at *11. 18 U.S.C. § 1595 provides: “An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or *should have known* has engaged in an act in violation of this chapter)” (emphasis added).

³³⁰ *Does 1–6 v. Reddit, Inc.*, 51 F.4th 1137, 1141 (9th Cir. 2022); *see also, e.g., M.H. & J. v. Omegle.com, LLC*, No. 8:21-cv-814-VMC-TGW, 2022 WL 93575, at *6 (M.D. Fla. Jan. 10, 2022), *appeal filed*, No. 22-10338 (11th Cir. Jan. 31, 2022); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020).

³³¹ *Does 1–6*, 51 F.4th at 1139–40.

³³² *Id.* at 1140.

³³³ *Id.* at 1143 (quoting 47 U.S.C. § 230(e)(5)(A)).

³³⁴ *Id.* at 1145 (quoting 18 U.S.C. § 1591(e)(4)).

³³⁵ *Id.* In another case, the D.C. Circuit concluded that 18 U.S.C. § 1591(e)(4) prohibits “aiding and abetting sex trafficking,” or more precisely, “prohibits aiding and abetting a venture that one knows to be engaged in sex trafficking while knowingly benefiting from that venture.” *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1298–99 (D.C. Cir. 2023).

“only that Reddit ‘turned a blind eye’ to the unlawful content posted on its platform, not that it actively participated in sex trafficking.”³³⁶

In contrast, the Seventh Circuit allowed broader liability in *G.G. v. Salesforce.com, Inc.*—although its ruling did not weigh in on Section 230(e)(5).³³⁷ The minor plaintiff in that case was trafficked on Backpage.com, and she alleged that Salesforce, which generally provides customer relationship management software, “knowingly benefited from its participation in what it knew or should have known was Backpage’s sex-trafficking venture.”³³⁸ The plaintiff alleged Salesforce provided Backpage.com with specialized software and support that created a “close business relationship.”³³⁹ The Seventh Circuit held that the allegations involving constructive knowledge stated a claim under 18 U.S.C. § 1595 and avoided dismissal under Section 230.³⁴⁰ However, the Seventh Circuit did not consider the scope of the FOSTA exception, instead concluding that Section 230(c) did not apply on its own terms.³⁴¹

Reform Proposals and Considerations for Congress

This section of the report discusses various proposals to reform Section 230, as well as some of the legal considerations implicated by those proposals, including relevant First Amendment issues. The report focuses primarily on examples of bills introduced in the 116th and 117th Congresses that would have amended Section 230.³⁴² The report does not discuss bills that would have directly regulated content moderation practices such as by restricting the use of certain algorithms or other design features, or imposing disclosure or transparency requirements outside the Section 230 framework.

Overview of Reform Proposals and Select Legal Considerations

Following the enactment of FOSTA in 2018, Members of Congress introduced a variety of proposals to further reform Section 230. There have also been a number of reform proposals from outside commentators and the executive branch.³⁴³ While over 25 bills to amend Section 230 were introduced in each of the 116th and 117th Congresses, and Members of the 118th Congress continued to introduce such proposals, no further amendments have been enacted.³⁴⁴ Although there have been many proposals to reform Section 230’s immunity shield, some argue either that

³³⁶ *Does I–6*, 51 F.4th at 1145. See also *J.B. v. Craigslist, Inc.*, No. 22-15290, 2023 WL 3220913, at *1 (9th Cir. May 3, 2023) (mem.) (affirming trial court’s conclusion that Section 230(e)(5) did not allow lawsuit under 18 U.S.C. § 1595 where defendant lacked actual knowledge).

³³⁷ *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 548 (7th Cir. 2023).

³³⁸ *Id.* The suit was brought by the minor and her mother, but this report refers to a singular plaintiff for convenience.

³³⁹ *Id.*

³⁴⁰ *Id.* at 548, 555.

³⁴¹ *Id.* at 567–68. This aspect of the case is discussed *supra* note 134 and accompanying text.

³⁴² Some of the bills referenced in this discussion have been introduced in multiple Congresses, but for brevity, the report generally only discusses one version.

³⁴³ See, e.g., CRS Legal Sidebar LSB10484, *UPDATE: Section 230 and the Executive Order on Preventing Online Censorship*, by Valerie C. Brannon et al.; Joe Biden, *Republicans and Democrats, Unite Against Big Tech Abuses*, WALL ST. J. (Jan. 11, 2023), <https://www.wsj.com/articles/unite-against-big-tech-abuses-social-media-privacy-competition-antitrust-children-algorithm-11673439411>.

³⁴⁴ See, e.g., *The Telecommunication Act’s “Good Samaritan” Protection: Section 230*, DISRUPTIVE COMPETITION PROJECT, <https://www.project-disco.org/featured/section-230/> (last visited Jan. 4, 2024); see also CRS Report R46662, *Social Media: Misinformation and Content Moderation Issues for Congress*, by Jason A. Gallo and Clare Y. Cho, Appendix B (listing bills from the 116th Congress).

Section 230 should not be changed or that reforms should be modest and carefully considered.³⁴⁵ As commentators have observed, some of the reform proposals may conflict with others and pursue divergent goals, making it more difficult to predict which of these reform efforts, if any, may garner sufficient support to be enacted.³⁴⁶

While some Members of Congress have proposed to repeal Section 230 entirely,³⁴⁷ others suggest more incremental rollbacks, removing immunity only for certain types of claims or certain providers. Broadly, many proposals to reform Section 230 have pursued one of two distinct goals: encouraging sites to take down more harmful content, and encouraging sites to take down less lawful content.³⁴⁸ Some proposals include provisions aimed at both goals, although the goals can sometimes be in tension depending on what type of content is being targeted. Content seen as harmful by some may be seen as beneficial by others. The bills that have been introduced have sought to achieve these goals in a variety of different ways, including by creating new exceptions to Section 230 or conditioning Section 230 immunity on certain prerequisite actions. Other bills have focused on procedural aspects of Section 230, such as clarifying that the provision operates as an “affirmative defense” or does not bar injunctive relief.³⁴⁹

One initial consideration is that proposals to remove Section 230 immunity for either hosting or taking down certain types of content will not necessarily result in a provider or user being held liable for that activity. Instead, the result of these proposals is that *if* a provider would be liable under some other law, such liability would not be barred by Section 230. Nonetheless, because of this threat of liability, a service provider may respond to the removal of Section 230 immunity for specific types of actions by ceasing that action: removing content or no longer engaging in certain content moderation practices. For example, Craigslist took down its personal ads section in response to FOSTA, reportedly out of concern that it might face lawsuits based on some of the activity in that section of its site.³⁵⁰

However, the way any given provider responds to an amendment of Section 230 would depend on a variety of factors. For instance, if Congress added an exception removing immunity for hosting certain content, providers might continue to host that content if they believe the benefits of

³⁴⁵ See, e.g., Sen. Ron Wyden, *Wyden Remarks at Section 230 Briefing Hosted by EFF* (Mar. 8, 2023), <https://www.wyden.senate.gov/news/press-releases/wyden-remarks-at-section-230-briefing-hosted-by-eff>; Clyde Wayne Crews, *The Case Against Social Media Content Regulation*, COMPETITIVE ENTER. INST. (June 1, 2020), https://cei.org/issue_analysis/the-case-against-social-media-content-regulation; Eric Goldman, *Want to Learn More About Section 230? A Guide to My Work*, TECH. & MKTG. L. BLOG (July 1, 2020), <https://blog.ericgoldman.org/archives/2020/07/want-to-learn-more-about-section-230-a-guide-to-my-work.htm>; Jennifer Huddleston, *Does Content Moderation Need Changes to Section 230?*, AM. ACTION FORUM (June 18, 2020), <https://www.americanactionforum.org/insight/does-content-moderation-need-changes-to-section-230/>.

³⁴⁶ See, e.g., Rebecca Kern, *White House Renews Call to ‘Remove’ Section 230 Liability Shield*, POLITICO (Sept. 9, 2022), <https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771>; Dean DeChiaro, *OK to Change Section 230, Tech CEOs Say, But How Remains Elusive*, CONG. Q (Nov. 17, 2020), <https://plus.cq.com/doc/news-6052674>.

³⁴⁷ E.g., S. 2972, 117th Cong. (2021); H.R. 8896, 116th Cong. (2020). Cf. 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021) (proposing to repeal Section 230 and replace with an altered intermediary liability scheme).

³⁴⁸ Cf. Shaun B. Spencer, *The First Amendment and the Regulation of Speech Intermediaries*, 106 MAR. L. REV. 1, 8 (2022) (distinguishing “proxy-censor regulations” from “must-carry regulations”).

³⁴⁹ E.g., SAFE TECH Act, S. 299, 117th Cong. § 2(1) (2021).

³⁵⁰ See Brian Feldman, *Craigslist’s Legendary Personals Section Shuts Down*, N.Y. MAG. (Mar. 23, 2018), <https://nymag.com/intelligencer/2018/03/craigslist-shuts-down-personals-section-because-of-fosta.html>. Craigslist expressly cited FOSTA as the motive for its decision; others speculated that Reddit and Tumblr, among other sites, made changes to their content policies in response to FOSTA. See, e.g., Paris Martineau, *Tumblr’s Porn Ban Reveals Who Controls What We See Online*, WIRED (Dec. 4, 2018), <https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online>.

hosting the content outweigh potential litigation costs, particularly if providers believe they are likely to prevail in any lawsuits or that lawsuits are unlikely. Some have pointed to the outcome in *Stratton Oakmont, Inc.*, discussed above, to suggest that absent Section 230, sites might stop all content moderation to attempt to avoid liability.³⁵¹ Economic and social considerations may also factor into a provider’s decision about how to respond to Section 230 amendments.³⁵² For instance, if Congress limited immunity for restricting certain types of content, providers might continue to restrict it if they believe advertisers or users disfavor that content.

Another general consideration is what type of defendants would be subject to liability under any given proposal to amend Section 230. As previously discussed, Section 230 is currently available to any provider or user of an interactive computer service, a broad term referring to any service that enables multiple users to access a computer server.³⁵³ A wholesale exception to Section 230 would remove that federal immunity for all interactive computer service providers and users. Some proposals to amend Section 230 would instead only limit Section 230 immunity for certain providers, such as larger providers or providers of certain types of services such as social media.³⁵⁴ For a discussion of policy considerations in defining “online platforms,” see CRS Report R47662, *Defining and Regulating Online Platforms*, coordinated by Clare Y. Cho.

Finally, as discussed in more detail in a later section, proposals to reform Section 230 may also raise First Amendment considerations.³⁵⁵

Liability for Hosting Content

A number of proposals would have exposed service providers or users to greater liability for hosting another’s content, with the apparent goal of incentivizing content removal or restriction. Several bills would have created new exceptions to Section 230 by amending subsection (e) to carve out certain categories of claims, similar to FOSTA.³⁵⁶ Other bills would have created exceptions from only Section 230(c)(1) for certain types of claims,³⁵⁷ content,³⁵⁸ or defendants.³⁵⁹ The type of claim or content carved out from Section 230 protections varied. For instance, multiple bills focused on child sexual exploitation, allowing claims premised on conduct that violates new or existing laws related to distributing child sexual abuse material.³⁶⁰ Other bills

³⁵¹ *Supra* “*Stratton Oakmont, Inc. v. Prodigy Services Co.*” In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995), a state court held that a message board host could be subject to liability as the publisher of allegedly defamatory statements in part because it removed other messages.

³⁵² For a discussion of the content recommendation and moderation policies of social media sites, see CRS Report R46662, *Social Media: Misinformation and Content Moderation Issues for Congress*, by Jason A. Gallo and Clare Y. Cho; and CRS In Focus IF12462, *Social Media Algorithms: Content Recommendation, Moderation, and Congressional Considerations*, by Kristen E. Busch.

³⁵³ 47 U.S.C. § 230(f)(2); *supra* “Text and Legislative History.”

³⁵⁴ *E.g.*, Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. § 2 (2021); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. § 2 (2021). *See generally, e.g.*, Eric Goldman & Jess Miers, *Regulating Internet Services by Size*, 2 COMPETITION POL’Y INT’L ANTITRUST CHRON. 24 (2021) (discussing considerations related to distinguishing internet services based on size).

³⁵⁵ *Infra* “Free Speech Considerations.”

³⁵⁶ *E.g.*, Civil Rights Modernization Act of 2021, H.R. 3184, 117th Cong. § 2(a) (2021); SAFE TECH Act, S. 299, 117th Cong. § 2(2) (2021); PLAN Act, H.R. 4232, 116th Cong. § 2(b) (2019).

³⁵⁷ *E.g.*, Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020).

³⁵⁸ *E.g.*, Health Misinformation Act of 2021, S. 2448, 117th Cong. (2021).

³⁵⁹ *E.g.*, Accountability for Online Firearms Marketplaces Act, S. 2725, 117th Cong. (2021).

³⁶⁰ *E.g.*, Holding Sexual Predators and Online Enablers Accountable Act, S. 5012, 116th Cong. § 5 (2020); EARN IT Act of 2020, S. 3398, 116th Cong. § 5 (2020). *See also, e.g.*, STOP CSAM Act of 2023, S. 1199, 118th Cong. § 5(e) (2023); END CSAM Act, S. 823, 118th Cong. § 5(g) (2023).

would have created exceptions for certain lawsuits brought under state law, including breach of contract claims³⁶¹ or claims relating to property rentals.³⁶² Still other bills would have exempted claims under federal and state civil rights laws that prohibit discrimination on the basis of a protected class.³⁶³ Some of these bills would have authorized liability only if a service provider used certain types of algorithms to deliver the specified type of content.³⁶⁴

In addition to proposals that created *exceptions* for harmful or illegal content, some proposals would have effectively *conditioned* immunity on a service provider’s ability to remove harmful or illegal content. For example, the CASE-IT Act, as introduced in the 116th Congress, stated that a service provider or user would lose Section 230(c)(1) immunity for a year if they engaged in activities such as permitting harmful content to be distributed to minors, if the harmful content was “made readily accessible to minors by the failure of such provider or user to implement a system designed to effectively screen users who are minors from accessing such content.”³⁶⁵

Apart from these bills focusing on specific claims or content, some bills would have more broadly limited Section 230(c)(1) immunity.³⁶⁶ For example, some bills would have created new exceptions for the enforcement of all federal civil laws.³⁶⁷ Other proposals would have exposed providers to liability for hosting unlawful content if the provider was aware of that content.³⁶⁸ For example, the Platform Accountability and Consumer Transparency Act (PACT Act), as introduced in the 117th Congress, would have amended Section 230 so that some providers would lose immunity under subsection (c)(1) if they were notified about certain illegal content or activity occurring on their service and did not “remove the illegal content or stop the illegal activity” within certain time periods.³⁶⁹ The PACT Act would have required written notice that contained, among other elements, a copy of a court order finding the content or activity illegal.³⁷⁰

³⁶¹ Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. § 2 (2020).

³⁶² PLAN Act, H.R. 1107, 117th Cong. § 2(a) (2021).

³⁶³ *E.g.*, Civil Rights Modernization Act of 2021, H.R. 3184, 117th Cong. § 2(a) (2021); SAFE TECH Act, S. 299, 117th Cong. § 2(2) (2021).

³⁶⁴ *E.g.*, Health Misinformation Act of 2021, S. 2448, 117th Cong. § 3(a) (2021) (providing that a service provider “shall be treated as the publisher or speaker of health misinformation” if it uses certain algorithms to promote that content); Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. § 2 (2020) (providing that “an interactive computer service shall be considered to be an information content provider” and will not receive Section 230(c)(1) immunity in civil actions brought under 42 U.S.C. §§ 1985, 1986, or 18 U.S.C. § 2333, if the claim involves the use of certain types of algorithms to deliver the relevant content, with exemptions for certain services).

³⁶⁵ CASE-IT Act, H.R. 8719, 116th Cong. § 2 (2020).

³⁶⁶ *See, e.g.*, Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. § 2 (2020) (providing that both service providers and users may only claim immunity under Section 230(c)(1) if a service “takes reasonable steps to prevent or address the unlawful use” of the service “or the unlawful publication of information on” the service).

³⁶⁷ *E.g.*, PACT Act, S. 4066, 116th Cong. § 7 (2020) (providing that Section 230 does not apply to the enforcement of federal civil statutes or regulations); Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. § 2 (2020) (creating a new exception for civil enforcement actions brought by the federal government arising out of violations of federal law).

³⁶⁸ *E.g.*, See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. § 5 (2020) (providing that a provider “that fails to report a known suspicious transmission may be held liable as a publisher for the . . . transmission”). *Cf.* Stop Shielding Culpable Platforms Act, H.R. 2000, 117th Cong. (2021) (stating that Section 230(c)(1) does not prevent a provider or user “from being treated as the distributor of information”). The bill’s sponsor explained in a press release that this was intended to allow liability if an entity “knowingly shares” information. Press Release, Rep. Jim Banks, Chairman, Republican Study Committee, Banks Statement on the Stop Shielding Culpable Platforms Act (Mar. 22, 2021), https://banks.house.gov/uploadedfiles/stop_shielding_culpable_platforms_act_-_one-pager.pdf.

³⁶⁹ PACT Act, S. 797, 117th Cong. § 6(a) (2021). The bill defines “illegal activity” as content provider activity “that has been determined by a” court “to violate Federal criminal or civil law.” *Id.* § 6(b). It defines “illegal content” as information that a court has determined violates “(A) Federal criminal or civil law; or (B) State defamation law.” *Id.*

³⁷⁰ *Id.* § 6(a).

The notice-and-takedown liability regime of the PACT Act may be compared to the notice-and-takedown procedures of the Digital Millennium Copyright Act (DMCA), enacted in 1998.³⁷¹ The DMCA provides a safe harbor to covered providers who remove content after being notified that it may violate federal copyright law.³⁷² The law protects them from lawsuits premised on hosting potentially infringing content. While the PACT Act would have required the specified notice to contain a court order adjudicating the challenged content as illegal, the DMCA essentially leaves the initial determination of whether content is illegal to private parties. Under the DMCA, the person notifying a service provider of copyright infringement must provide a good-faith assertion under penalty of perjury that the use of the allegedly infringing material is unlawful.³⁷³ The notifier thus has the initial burden of determining whether the material violates copyright laws.³⁷⁴ The provider hosting the allegedly infringing content then must decide whether to accept the notice and expeditiously take down the material, or instead to ignore the notice and risk liability.

The DMCA can therefore incentivize removals by granting immunity to providers that remove allegedly infringing material, creating the potential that providers will take down lawful material rather than risk litigation.³⁷⁵ The PACT Act, in contrast, would have incentivized removal after a court already determined the material violated the law.³⁷⁶ If a proposal to convert Section 230 into a notice-and-takedown liability scheme instead left it to providers to determine in the first instance whether activity on their site violated the law, then such a hypothetical proposal could, like the DMCA, incentivize the removal of at least some lawful content.

Other bills would have effectively conditioned Section 230 immunity on the provider's content recommendation and moderation practices. For instance, some bills would have caused providers to lose Section 230 immunity if they used certain algorithms to distribute content to users or display behavioral advertising, regardless of whether the algorithmically distributed content or behavioral advertising formed the basis of the suit.³⁷⁷ One bill would have required certain

³⁷¹ 17 U.S.C. § 512(c). It could also be compared to the notice-based liability imposed on distributors of defamatory content. *See supra* notes 64 to 66 and accompanying text; *cf.*, *e.g.*, *Barrett v. Rosenthal*, 146 P.3d 510, 520 (Cal. 2006) (comparing the DMCA's "limited liability" scheme to Section 230, and concluding "that Congress did not intend to permit notice liability under the CDA").

³⁷² *See generally* CRS In Focus IF11478, *Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview*, by Kevin J. Hickey; U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

³⁷³ 17 U.S.C. § 512(c)(3).

³⁷⁴ *See, e.g.*, *Lenz v. Univ. Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016) (acknowledging the copyright holder's obligation to state that the use is unauthorized and holding that this provision requires the holder to consider whether the potentially infringing material is authorized as "fair use" of a copyright).

³⁷⁵ 17 U.S.C. § 512(g)(1); *see also, e.g.*, Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J. LAW & TECH. 171, 175 (2010) (discussing the incentive structure and arguing that the DMCA results in removal of constitutionally protected speech). The DMCA also provides a process for the user who posted the allegedly infringing material to challenge the initial notice. 17 U.S.C. § 512(g)(2)–(3). If there is such a "counter notification," the provider may be able to replace the initial post and retain immunity. *Id.* § 512(g)(2), (4).

³⁷⁶ *See* PACT Act, S. 797, 117th Cong. § 6 (2021).

³⁷⁷ *E.g.*, Break Up Big Tech Act of 2020, H.R. 8922, 116th Cong. § 2 (2020) (providing that Section 230 will not apply if a provider sells targeted advertising and displays the advertising to users who have not opted in, among other provisions); Don't Push My Buttons Act, S. 4756, 116th Cong. § 2 (2020) (providing that a provider generally may not claim Section 230 immunity if the provider uses automated functions to deliver content to users based on information it has collected about the user's habits, preferences, or beliefs, with certain exceptions); BAD ADS Act, S. 4337, 116th Cong. § 2 (2020) (preventing certain providers from claiming Section 230 immunity for 30 days after displaying "behavioral advertising" to a user or providing user information to a person knowing the information will be used to "create or display behavioral advertising").

providers to “publicly disclose accurate information” about their “content moderation activity” before they could claim Section 230(c)(1) immunity.³⁷⁸

Still other bills would have allowed liability if a provider or user promoted the content at issue in a particular lawsuit,³⁷⁹ sometimes focusing specifically on providers’ use of algorithms.³⁸⁰ For instance, the Justice Against Malicious Algorithms Act of 2021 would have provided that Section 230(c)(1) would not apply to certain providers that knew, should have known, or recklessly made a personalized recommendation that materially contributed to a physical or severe emotional injury.³⁸¹ Taking a different approach, the DISCOURSE Act would have provided that certain service providers would be deemed the “information content provider” for information targeted to a user through an algorithm.³⁸² This approach seemingly drew on cases ruling that if a provider creates or develops the challenged information—is the content provider—Section 230 immunity does not apply.³⁸³ Both of these bills contained exceptions if the recommendations responded to a user search. Viewed on a general level, these proposals accordingly would have attempted to discourage the use of recommendation algorithms. For more information on algorithms, see CRS In Focus IF12462, *Social Media Algorithms: Content Recommendation, Moderation, and Congressional Considerations*, by Kristen E. Busch; and CRS Report R47753, *Liability for Algorithmic Recommendations*, by Eric N. Holmes.

Some bills would have targeted similar concerns by further amending the term “information content provider” to encompass other types of activity. Multiple proposals would have treated a person as an information content provider if the person “affirmatively and substantively” modified another’s content,³⁸⁴ or solicited or funded information.³⁸⁵

Liability for Restricting Content

Some proposals would have limited providers’ and users’ immunity for restricting access to another’s content, with the apparent goal of incentivizing the hosting of content. One preliminary consideration in proposals seeking to limit immunity for restricting access to content is the respective scope of Section 230(c)(1) and (c)(2), an issue discussed above.³⁸⁶ Because courts have held that both provisions may immunize decisions to take down or otherwise restrict content, a bill that seeks to limit such immunity may need to amend both provisions. Otherwise, if a proposal amends only Section 230(c)(2) and does not address the scope of Section 230(c)(1),

³⁷⁸ DISCOURSE Act, S. 2228, 117th Cong. § 2(d)(2) (2021).

³⁷⁹ *E.g.*, Platform Integrity Act, H.R. 9695, 117th Cong. § 2 (2022) (providing that Section 230(c)(1) will not apply if the “provider or user has promoted, suggested, amplified, or otherwise recommended such information”).

³⁸⁰ *E.g.*, Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. § 2 (2019) (stating that if “an owner or operator of a social media service . . . displays user-generated content in an order other than chronological order, delays the display of such content relative to other content, or otherwise hinders the display of such content relative to other content, if for a reason other than to restrict access to or availability of material described in [Section 230(c)(2)(A)] or to carry out the direction of the user that generated such content,” that social media service “shall be treated as a publisher or speaker of such content”).

³⁸¹ Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. § 2(a) (2021).

³⁸² *E.g.*, DISCOURSE Act, S. 2228, 117th Cong. § 2(a)(2)(A) (2021).

³⁸³ *See supra* “Information Provided by Another Information Content Provider.”

³⁸⁴ *E.g.*, 21st Century FREE Speech Act, S. 1384, 117th Cong. § 2(a) (2021); Protect Speech Act, H.R. 8517, 116th Cong. § 2 (2020); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. § 2 (2020).

³⁸⁵ *E.g.*, DISCOURSE Act, S. 2228, 117th Cong. § 2(a)(2)(A) (2021); Protect Speech Act, H.R. 8517, 116th Cong. § 2 (2020). *Cf.*, *e.g.*, SAFE TECH Act, S. 299, 117th Cong. § 2(1) (2021) (creating an exception to Section 230(c)(1) if the provider or user accepted payment to make the speech available or funded the creation of speech).

³⁸⁶ *Supra* text accompanying notes 81 to 83.

courts might continue to apply (c)(1) to some takedown decisions regardless of whether the more limited immunity in (c)(2) no longer protected those decisions. In response to this issue, some bills would have provided that Section 230(c)(1) does not apply to decisions to restrict content, so that Section 230(c)(2) is the sole provision that immunizes takedown decisions.³⁸⁷

Some proposals would have amended the specific categories of material mentioned in Section 230(c)(2), changing the types of content covered by this provision.³⁸⁸ For example, a few proposals would have deleted the catch-all term granting providers and users immunity for restricting “otherwise objectionable material” and added new, more limited categories of material such as material promoting “terrorism,” “violence,” or “self-harm.”³⁸⁹ One bill would have added definitions for some of the existing categories of material: for example, defining “harassing” material in part as material provided “with the intent to abuse, threaten, or harass any specific person” and “lacking in any serious literary, artistic, political, or scientific value.”³⁹⁰ A bill without such definitions may face interpretive questions about whether, for instance, specific material promotes terrorism or self-harm. A number of these types of proposals would also have granted immunity for removing “unlawful” material.³⁹¹ Using the phrase “unlawful” makes these proposals subject to the same questions discussed above regarding who determines whether the content is unlawful and how.³⁹²

If a proposal retains the language in Section 230(c)(2) providing immunity for restricting material “that the provider or user considers to” fall within the listed categories,³⁹³ it is likely courts would continue interpreting this provision as embodying a subjective standard.³⁹⁴ Some proposals, though, would have amended Section 230(c)(2) to state that it applies only if the provider or user has an “objectively reasonable” belief that the content falls within one of the listed categories,³⁹⁵ seemingly inviting courts to engage in a more rigorous review of this belief.³⁹⁶

Other proposals would have limited immunity for takedown decisions in ways that depart more substantially from the current Section 230 framework. Some proposals sought to condition Section 230(c)(2) immunity on certain procedural requirements, such as requiring providers and users to explain their decisions to restrict access to content.³⁹⁷ Other bills would have required

³⁸⁷ *E.g.*, Protect Speech Act, H.R. 3827, 117th Cong. § 2 (2021); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. § 2 (2020).

³⁸⁸ *See, e.g.*, Stop the Censorship Act, H.R. 4027, 116th Cong. § 2 (2019) (replacing entire list of adjectives in Section 230(c)(2) with “unlawful”).

³⁸⁹ *E.g.*, Preserving Political Speech Online Act, S. 2338, 117th Cong. § 4(2) (2021) (deleting “filthy” and “otherwise objectionable” and adding “threatening, or promoting illegal activity”); Protect Speech Act, H.R. 8517, 116th Cong. § 2 (2020) (replacing “harassing, or otherwise objectionable” with “promoting terrorism or violent extremism, harassing, promoting self-harm, or unlawful”); Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. § 2 (2020) (replacing “otherwise objectionable” with “unlawful, or that promotes violence or terrorism”).

³⁹⁰ 21st Century FREE Speech Act, S. 1384, 117th Cong. § 2(a)(2) (2021).

³⁹¹ *Supra* notes 388 and 389.

³⁹² *See supra* text accompanying notes 368 to 376.

³⁹³ 47 U.S.C. § 230(c)(2)(A).

³⁹⁴ *See supra* text accompanying notes 243 to 246.

³⁹⁵ *E.g.*, DISCOURSE Act, S. 2228, 117th Cong. § 2(b)(1)(A) (2021); Protect Speech Act, H.R. 8517, 116th Cong. § 2 (2020); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. § 2 (2020).

³⁹⁶ *Cf.* *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (“No court has articulated specific, objective criteria to be used in assessing . . . a provider’s subjective determination of what is ‘objectionable’ . . . Here, however, it is clear . . . that Microsoft *reasonably* could conclude that Holomaxx’s emails were ‘harassing’ and thus ‘otherwise objectionable.’” (emphasis added)).

³⁹⁷ *E.g.*, Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. § 2 (2020).

providers (and sometimes users) to adopt public terms of service for restricting access to content and then consistently apply those terms in order to benefit from Section 230 immunity.³⁹⁸

Some proposals would have made broader changes to limit the types of content restriction decisions receiving immunity, focusing on the substance of those decisions. A number of bills would have granted immunity for takedown decisions only if the provider or user acted in a viewpoint-neutral manner.³⁹⁹ Another proposal would have stated that providers do not act in “good faith” for purposes of Section 230(c)(2)(A) if they restrict material on the basis of certain protected classes, including race, religion, sex, or “political affiliation or speech.”⁴⁰⁰

Perhaps departing most significantly from the current Section 230 framework, one bill would have added a new provision to Section 230 making it unlawful for “any internet platform” to restrict access to legally protected material and creating a private right of action to enforce this provision.⁴⁰¹ This bill would have raised similar questions as the proposals using the phrase “unlawful” discussed above, regarding who determines whether material is legally protected. Under this bill, another question might have been when material is “protected” under the Constitution or other laws—when a law is explicit enough to create protections, for instance, and whether any protections have to be absolute rather than qualified.

Free Speech Considerations

The Free Speech Clause of the First Amendment to the U.S. Constitution limits the government’s ability to regulate speech.⁴⁰² There are at least two distinct types of First Amendment issues that

³⁹⁸ *E.g.*, 21st Century FREE Speech Act, S. 1384, 117th Cong. § 2(a)(2) (2021) (defining “in good faith” to mean, among other requirements, that a provider or user (1) restricts access to material consistent with publicly available terms of service; (2) does not restrict access to material on deceptive grounds; (3) does not restrict material that is similarly situated to material the provider or user intentionally declines to restrict; and (4) gives the content provider notice of the restriction and an opportunity to respond); Protect Speech Act, H.R. 8517, 116th Cong. § 2 (2020) (providing that Section 230(c)(1) and Section 230(c)(2)(A) apply only if the provider or user (1) makes publicly available terms of service for content moderation; (2) restricts content consistently with those terms of service; (3) does not restrict content “on deceptive grounds or apply terms of service or use to restrict access to or availability of material that is similarly situated to material that the service intentionally declines to restrict”; and (4) gives the content provider “timely notice” of the basis for restricting access to the content and “a meaningful opportunity to respond”); Limiting Section 230 Immunity to Good Samaritans Act, S. 3983, 116th Cong. § 2(1) (2020) (amending Section 230(c)(1) so that it applies to a covered “edge provider” only if it adopts written terms of service for restricting material that “promise” that the provider will (1) “design and operate” the service in “good faith,” a term defined as excluding “intentionally selective enforcement” of the service’s terms of service, among other provisions, and (2) pay certain damages and costs if the provider is found to have breached that promise).

³⁹⁹ *E.g.*, DISCOURSE Act, S. 2228, 117th Cong. § 2(a)(2) (2021) (stating that dominant service providers will be deemed information content providers if they “suppress a discernible viewpoint” of the information); Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. § 2(1)(B)(iii) (2020) (providing that Section 230(c)(2)(A) will apply only if a provider or user, among other requirements, acts “in a viewpoint-neutral manner”); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2(a)(1) (2019) (providing that Section 230(c) will apply to larger providers only if the FTC has certified that “the company does not moderate information . . . in a manner that is biased against a political party, political candidate, or political viewpoint”).

⁴⁰⁰ Preserving Political Speech Online Act, S. 2338, 117th Cong. § 4(5) (2021).

⁴⁰¹ Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83, 117th Cong. § 2(a)(2) (2021).

⁴⁰² U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”). Although the text of the First Amendment refers to “Congress,” it has long been understood to restrict action by the executive branch as well. *See, e.g.*, *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 160 (1973) (Douglas, J., concurring) (describing First Amendment as restricting Congress, whether “acting directly or through any of its agencies such as the FCC”); *see generally, e.g.*, Daniel J. Hemel, *Executive Action and the First Amendment’s First Word*, 40 PEPP. L. REV. 601 (2013). The First Amendment applies to the states through the Fourteenth Amendment. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996); U.S. CONST. amend. XIV.

may be raised by proposals to amend Section 230. The first issue is whether any given proposal unconstitutionally infringes the constitutionally protected speech of either providers or users. The second is whether, if Section 230 is repealed in whole or in part, the First Amendment may nonetheless prevent private parties or the government from holding providers liable for hosting content. This section of the report first explains background principles on legal protections for online speech, and then provides some initial considerations for evaluating these two issues.

Background Principles

First Amendment Protections for Online Speech

The Supreme Court has recognized that the First Amendment protects speech transmitted over the internet, saying in one case that “cyberspace,” and in particular, “social media,” is today the most important place for “the exchange of views” and other core speech activities.⁴⁰³ Accordingly, the Court has invalidated a number of laws that regulate online speech, particularly if they target speech based on its content.⁴⁰⁴ For example, in 1997, the Supreme Court struck down two provisions of the Communications Decency Act of 1996 that prohibited sending or displaying certain “indecent” or “patently offensive” material to minors.⁴⁰⁵

In addition to protecting website users when they post or read speech online, the First Amendment protects website operators when they engage in speech activities.⁴⁰⁶ The Supreme Court has concluded that a website designer engages in protected speech when designing a website, even when the website incorporates third-party material.⁴⁰⁷ The Court has also recognized that businesses engaged in speech activities generally have the right to refuse to host customers’ speech, saying that the government may violate the First Amendment if it compels “a private corporation to provide a forum for views other than its own.”⁴⁰⁸ This concern is heightened if the business is providing a forum for speech⁴⁰⁹ and if there is a risk the user’s speech will be attributed to the business hosting it, such that the business’s decision to host the

⁴⁰³ *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017); *see also id.* at 107 (ruling unconstitutional a state law that prohibited convicted sex offenders from using social media, barring “access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge”).

⁴⁰⁴ *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”). *See generally* Cong. Rsch. Serv., *Overview of Content-Based and Content-Neutral Regulation of Speech*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-3-1/ALDE_00013695/ (last visited Jan. 4, 2024).

⁴⁰⁵ *Reno*, 521 U.S. at 859–60. For more discussion of the constitutional tiers of scrutiny used to evaluate speech regulations, *see* CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion.

⁴⁰⁶ *See generally* CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon.

⁴⁰⁷ *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023).

⁴⁰⁸ *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986) (plurality opinion); *see also id.* at 19–20 (holding that a state regulatory commission could not require a utility company to publish content in its monthly newsletter from entities who disagreed with the utility’s views); *id.* at 24 (Marshall, J., concurring) (“While the interference with appellant’s speech is, concededly, very slight, the State’s justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden.”); *see also, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 576 (1995) (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”).

⁴⁰⁹ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

speech can be seen as an expressive choice to be associated with that speech.⁴¹⁰ For instance, the Court has said that newspapers are engaged in constitutionally protected speech when they “exercise . . . editorial control and judgment” in choosing what “material [will] go into a newspaper,” and has further held that the government generally may not interfere with those editorial judgments.⁴¹¹

Some lower courts have extended this line of Supreme Court cases to websites that host or present third-party content, dismissing lawsuits premised on the sites’ editorial decisions about what content to publish.⁴¹² The Supreme Court agreed to consider this issue in its October 2023 term, in two cases involving conflicting appeals court rulings.⁴¹³ Both cases involve state laws restricting online platforms’ ability to moderate user content.⁴¹⁴ The Eleventh Circuit held that social media companies making content moderation decisions are likely engaged in “protected exercises of editorial judgment,”⁴¹⁵ while the Fifth Circuit said the covered online platforms “exercise virtually no editorial control or judgment.”⁴¹⁶ Contrary to the conclusion of the Eleventh Circuit, the Fifth Circuit said that the platforms screen out obscenity and spam but allow the posting of “virtually everything else.”⁴¹⁷

A 2016 decision by the D.C. Circuit somewhat similarly looked at the degree of editorial judgment that online service providers actually exercised. In *U.S. Telecom Association v. FCC*, the D.C. Circuit rejected a First Amendment challenge to the FCC’s 2015 net neutrality order.⁴¹⁸ The 2015 order classified broadband internet access service providers as common carriers, subjecting them to heightened regulation, including prohibiting these providers from blocking lawful content.⁴¹⁹ A broadband service provider argued that the rules violated its First Amendment rights by forcing providers “to transmit speech with which they might disagree.”⁴²⁰ The D.C. Circuit rejected this argument, concluding that there was no First Amendment issue because the

⁴¹⁰ Compare *Hurley*, 515 U.S. at 575 (ruling that a state could not force a parade organizer to host a specific group where the group’s “participation would likely be perceived as having resulted from the [organizer’s] . . . determination . . . that its message was worthy of presentation and quite possibly of support as well”), with *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64–65 (2006) (rejecting challenge to federal funding condition requiring law schools to host military recruiters, saying the hosting decision was not “inherently expressive” and “[n]othing about recruiting suggests that law schools agree with any speech by recruiters”), and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (concluding a shopping center did not have a First Amendment right to eject students distributing pamphlets, acknowledging the pamphleteers’ views would “not likely be identified with . . . the owner”). At least one scholar has argued this Supreme Court precedent suggests First Amendment protections apply if an online platform is creating a “coherent speech product.” Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 427 (2021).

⁴¹¹ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (ruling unconstitutional a state law requiring newspapers, in certain circumstances, to publish replies to criticisms of political candidates).

⁴¹² See, e.g., *Isaac v. Twitter, Inc.*, 557 F. Supp. 3d 1251, 1261 (S.D. Fla. 2021); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 992 (S.D. Tex. 2017); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014).

⁴¹³ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196 (11th Cir. 2022), cert. granted, 216 L. Ed. 2d 1313 (2023); *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), cert. granted, 216 L. Ed. 2d 1313 (2023).

⁴¹⁴ The cases, including the state laws, are discussed in more detail in CRS Legal Sidebar LSB10748, *Free Speech Challenges to Florida and Texas Social Media Laws*, by Valerie C. Brannon.

⁴¹⁵ *NetChoice, LLC*, 34 F.4th at 1203.

⁴¹⁶ *NetChoice, L.L.C.*, 49 F.4th at 459.

⁴¹⁷ *Id.*

⁴¹⁸ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016).

⁴¹⁹ *Id.* at 696; see also CRS Report R40616, *The Federal Net Neutrality Debate: Access to Broadband Networks*, by Patricia Moloney Figliola; CRS Report R46973, *Net Neutrality Law: An Overview*, by Chris D. Linebaugh.

⁴²⁰ *U.S. Telecom Ass’n*, 825 F.3d at 740.

FCC’s rules “affect[ed] a common carrier’s neutral transmission of others’ speech, not a carrier’s communication of its own message.”⁴²¹ One critical basis for the D.C. Circuit’s conclusion was the FCC’s finding that broadband providers did not, in fact, exercise control over the content they transmitted, and instead acted “as ‘mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections.’”⁴²² The Eleventh Circuit, in contrast, said “social-media platforms aren’t ‘dumb pipes’” that “reflexively transmit[] data from point A to point B.”⁴²³

Justice Kavanaugh, then a judge on the D.C. Circuit, wrote an opinion disagreeing with the D.C. Circuit’s approach to the First Amendment analysis.⁴²⁴ He argued internet service providers “enjoy First Amendment protection of their rights to speak and exercise editorial discretion” regardless of whether the providers actually choose to exercise much editorial discretion.⁴²⁵ In his view, First Amendment protections should attach because internet service providers deliver content to consumers, performing the same kinds of functions as more traditional media.⁴²⁶ It remains to be seen whether Justice Kavanaugh will adhere to these views when considering the cases appealed to the Supreme Court in the October 2023 term, or what approach the rest of the Court will take to this issue. As discussed, lower court caselaw suggests that whether any given lawsuit or regulation implicates the First Amendment by interfering with a provider’s editorial discretion will likely depend in part on the factual circumstances and the nuances of the lawsuit or regulation.

Section 230 Protections for Online Speech

There is more precedent clarifying Section 230’s protections for promotion and moderation activities, and courts have described the law as protecting the speech of both users and providers. Section 230 arguably protects user speech by allowing providers to host user-generated content without fear of incurring liability.⁴²⁷ The Fourth Circuit said in *Zeran* that in enacting Section 230, Congress was, in part, responding to concerns that online providers facing potential tort liability would simply prohibit or remove user content rather than litigate its legality.⁴²⁸ By shielding providers from that liability, Congress removed that incentive for providers to restrict user speech.⁴²⁹ Further, in immunizing decisions both to host and *not* to host user content, Section 230 can also be seen as protecting possible First Amendment rights of editorial discretion.⁴³⁰ Significantly, the way courts have interpreted Section 230(c)(1) to grant immunity for “publisher”

⁴²¹ *Id.*

⁴²² *Id.* at 741 (quoting *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5870 (2015)).

⁴²³ *NetChoice, LLC*, 34 F.4th at 1204. The court said a social media platform likely exercised editorial judgment in two ways: by removing posts that violate its terms of service and by arranging available content in certain ways. *Id.*

⁴²⁴ *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

⁴²⁵ *Id.* at 428–29.

⁴²⁶ *Id.* at 428.

⁴²⁷ *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997); *Ardia*, *supra* note 78, at 386–87.

⁴²⁸ *Zeran*, 129 F.3d at 330–31.

⁴²⁹ *Id.* at 331.

⁴³⁰ *Cf., e.g., Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–31 (D. Del. 2007) (concluding plaintiff’s claims are barred by both the First Amendment and 47 U.S.C. § 230(c)(2)(A)).

activities seems consistent with the Supreme Court’s description of constitutionally protected “editorial” functions.⁴³¹

According to the *Zeran* court, Congress also intended to “encourage service providers to self-regulate the dissemination of offensive material”—that is, to remove some user content.⁴³² Granting providers immunity for their decisions to remove or restrict access to user content could operate in some tension with the goal of encouraging providers to host user speech.⁴³³ But both aspects of Section 230—providing providers with immunity for hosting user content and for restricting content—were arguably intended to ensure that the *government* generally would not be the entity striking the proper balance between these two goals,⁴³⁴ and that private parties would instead be the ones deciding whether content belonged online.⁴³⁵ In this sense, then, both aspects of Section 230 serve the First Amendment by shielding speech from government intervention.

Section 230 accordingly overlaps somewhat with the First Amendment. However, while Section 230 may protect some speech activities, Section 230 is not coextensive with the First Amendment’s protections,⁴³⁶ as discussed in more detail below.⁴³⁷

First Amendment Issues with Reform Proposals

Any legislative proposal that regulates online content may implicate the First Amendment to the extent that it burdens protected speech activity. As currently written, Section 230 does not itself make any speech unlawful. Instead, it governs whether interactive computer service providers and users may be subject to liability under *other* laws for their interactions with others’ content.⁴³⁸ Further, although Section 230 can be seen as speech-protective, the removal of Section 230’s statutory speech protections would not affect the scope of any constitutional speech protections.

⁴³¹ Compare, e.g., *Zeran*, 129 F.3d at 330 (“[L]awsuits 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—are barred [by Section 230].”), with, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment.”).

⁴³² *Zeran*, 129 F.3d at 331.

⁴³³ See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (“We recognize that there is an apparent tension between Congress’s goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet. . . . [L]aws often have more than one goal in mind, and . . . it is not uncommon for these purposes to look in opposite directions. . . . Tension within statutes is often not a defect but an indication that the legislature was doing its job.”).

⁴³⁴ See 47 U.S.C. § 230(a)(4) (finding that the internet has “flourished, to the benefit of all Americans, with a minimum of government regulation”); *id.* § 230(b)(2) (stating that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”).

⁴³⁵ See, e.g., 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox) (“[W]e do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet”); *id.* at H8470 (statement of Rep. Joe Barton) (arguing Section 230 provides “a reasonable way to . . . help [service providers] self-regulate . . . without penalty of law”); *id.* at H8471 (statement of Rep. Rick White) (arguing the responsibility for “protect[ing children] from the wrong influences on the Internet” should lie with parents instead of federal government); *id.* at H8471 (statement of Rep. Bob Goodlatte) (“The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.”).

⁴³⁶ See, e.g., Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. ONLINE 33, 34 (2019) (“Section 230 provides significant and irreplaceable substantive and procedural benefits beyond the First Amendment’s free speech protections.”).

⁴³⁷ *Infra* “Comparing the Operation of First Amendment and Section 230 Protections .”

⁴³⁸ See 47 U.S.C. § 230.

Section 230 is not constitutionally required, and Congress could repeal it without violating the First Amendment.⁴³⁹

Section 230 nonetheless affects constitutionally protected speech by creating government incentives for certain speech activities, and accordingly, *amendments* to Section 230 could implicate constitutional free speech concerns.⁴⁴⁰ A law is not necessarily unconstitutional merely because it affects protected speech, however. Courts apply a variety of different tests to determine whether government regulations implicating First Amendment interests are constitutional.⁴⁴¹ Which analysis a court adopts depends on a variety of factors, including whether the regulation is focused primarily on speech or on conduct,⁴⁴² and whether the regulation targets only certain types of speech.⁴⁴³

In general, laws that regulate speech based on its content or viewpoint will be considered “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”⁴⁴⁴ Content-neutral speech regulations, in contrast, are generally evaluated under a more lenient standard and are more likely (but not guaranteed) to be upheld against a First Amendment challenge.⁴⁴⁵ Specifically, content-neutral laws that regulate speech are subject to intermediate scrutiny, which asks whether the restriction is “narrowly tailored to serve a significant governmental interest” and “leave[s] open ample alternative channels for communication of the information.”⁴⁴⁶ Further, Congress may be able to target certain limited categories of speech that the Supreme Court has historically recognized can be regulated more freely, such as obscenity or fraud, without triggering heightened scrutiny.⁴⁴⁷

As previously discussed, jurisprudence regarding First Amendment protections for editorial discretion is still developing.⁴⁴⁸ Some Supreme Court cases suggest the protection for editorial discretion may be absolute, while others suggest First Amendment protections in this realm may track ordinary constitutional standards.⁴⁴⁹ Both the Fifth and Eleventh Circuits have taken the

⁴³⁹ See, e.g., *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 422 (S.D.N.Y. 2001) (“Section 230 reflects a ‘policy choice,’ not a First Amendment imperative, to immunize ISPs from defamation and other ‘tort-based lawsuits,’ driven, in part, by free speech concerns.” (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997))).

⁴⁴⁰ See, e.g., Ashutosh Bhagwat, *Do Platforms Have Editorial Rights*, 1 J. FREE SPEECH L. 1, 135 (2021); Daphne Keller, *Who Do You Sue?*, HOOVER INST., Aegis Series Paper No. 1902, at 3 (2019).

⁴⁴¹ See generally, e.g., CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon.

⁴⁴² See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“[T]he Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.”); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (upholding law where “the compelled speech . . . is plainly incidental to the [law’s] regulation of conduct”).

⁴⁴³ See generally CRS In Focus IF12308, *Free Speech: When and Why Content-Based Laws Are Presumptively Unconstitutional*, by Victoria L. Killion.

⁴⁴⁴ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

⁴⁴⁵ See, e.g., *Univ. City Studios, Inc. v. Corley*, 273 F.3d 429, 451, 454 (2d Cir. 2001) (rejecting a First Amendment challenge to a court order enforcing the Digital Millennium Copyright Act because the restriction targeted the “functional,” “nonspeech” aspects of computer code, and was accordingly content neutral). In contrast, for example, the Eleventh Circuit struck down certain aspects of a state law regulating online content moderation that it believed did not survive intermediate scrutiny. *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1227 (11th Cir. 2022), *cert. granted*, 216 L. Ed. 2d 1313 (2023).

⁴⁴⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

⁴⁴⁷ See generally CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

⁴⁴⁸ *Supra* “First Amendment Protections for Online Speech.”

⁴⁴⁹ *Compare Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“It has yet to be demonstrated how (continued...)”).

latter approach, and in particular, suggested content-based laws regulating editorial discretion are more likely to be ruled unconstitutional than content-neutral laws.⁴⁵⁰ If a Section 230 reform proposal imposes direct requirements for providers or users to distribute or restrict content,⁴⁵¹ it may raise these First Amendment concerns.

The fact that Section 230 currently does not directly require or prohibit certain types of speech, but merely creates incentives for moderating speech, is potentially another complicating factor in determining the appropriate First Amendment analysis for reform proposals. Some have argued that because Congress was not required to grant this immunity, it can restrict or condition Section 230 immunity without raising any constitutional concerns.⁴⁵² Other commentators have argued that speech-based limits on Section 230 immunity would run afoul of Supreme Court precedent prohibiting unconstitutional conditions on government benefits.⁴⁵³

In other contexts, the Supreme Court has recognized that denying a benefit “to claimants who engage in certain forms of speech is in effect to penalize them for such speech” and can have the same “deterrent effect” as a more direct speech restriction.⁴⁵⁴ Under the unconstitutional conditions doctrine, which has largely—but not solely⁴⁵⁵—been developed in the context of grant programs, the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”⁴⁵⁶ Thus, the government might violate the First Amendment if it uses a grant program to impose restrictions on private speech.⁴⁵⁷ At the same time, the

governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . .”), with *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643–44 (1994) (applying an intermediate level of scrutiny to regulations that “interfere with cable operators’ editorial discretion,” but where “the extent of the interference does not depend upon the content of the cable operators’ programming”).

⁴⁵⁰ *NetChoice, LLC*, 34 F.4th at 1226; *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 448, 457 (5th Cir. 2022), *cert. granted*, 216 L. Ed. 2d 1313 (2023).

⁴⁵¹ See, e.g., See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. § 5 (2020) (amending Section 230 to include an affirmative requirement for providers to “take reasonable steps to prevent or address unlawful users of the service through the reporting of suspicious transmissions”); CASE-IT Act, H.R. 8719, 116th Cong. § 2 (2020) (creating a new private right of action allowing content providers to sue service providers that fail “to make content moderation decisions pursuant to policies or practices that are reasonably consistent with the First Amendment”).

⁴⁵² See, e.g., Craig Parshall, *Big Tech and the Whole First Amendment*, FEDERALIST SOC’Y (Aug. 14, 2020), <https://fedsoc.org/commentary/fedsoc-blog/big-tech-and-the-whole-first-amendment>.

⁴⁵³ See, e.g., Bhagwat, *supra* note 440, at 135; Edwin Lee, *Conditioning Section 230 Immunity on Unbiased Content Moderation Practices as an Unconstitutional Condition*, 2020 U. ILL. J.L. TECH. & POL’Y 457, 467 (2020). For a discussion of the unconstitutional conditions doctrine, see *Overview of Unconstitutional Conditions Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-13-1/ALDE_00000771/ (last visited Jan. 4, 2024).

⁴⁵⁴ *Speiser v. Randall*, 357 U.S. 513, 518 (1958); see also *id.* at 529 (concluding that a California provision requiring veterans seeking a property tax exemption to swear a loyalty oath was unconstitutional because it placed the burden of proof on the claimants).

⁴⁵⁵ See, e.g., *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583, 593–94 (1926) (holding that a state could not place conditions on permits that would “require the relinquishment of constitutional rights”). Cf. *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) (ruling unconstitutional regulations that unduly interfered with broadcast licensees’ ability to express their own “editorial opinion”). *League of Women Voters* involved a condition on a grant program administered by the Corporation for Public Broadcasting, but the condition was analyzed under the constitutional rubric that applies to broadcast licenses. See *id.* at 377–78.

⁴⁵⁶ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that a public university could not place a condition on employment that violated a person’s free speech rights). See generally CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress’s Spending Power*, by Victoria L. Killion.

⁴⁵⁷ See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 208, 218 (2013) (holding that a federal condition requiring funding recipients to have “a policy explicitly opposing prostitution and sex trafficking” was unconstitutional because it limited the recipients’ speech outside the bounds of the federal program); *Legal Servs. Corp.* (continued...)

government can impose conditions that ensure funds “will be used only to further the purposes of a grant.”⁴⁵⁸ Additionally, when the government uses a grant program to recruit “private entities to convey a governmental message,” it may impose content- and viewpoint-based restrictions on funded speech.⁴⁵⁹

Section 230 grants a legal benefit, in the form of immunity. To the extent that reform proposals would impose conditions on that benefit related to editorial choices about distributing or restricting others’ content, the unconstitutional conditions doctrine may be seen as an appropriate framework to analyze the law’s constitutionality.⁴⁶⁰ This would mean conditions on Section 230 trigger First Amendment analysis—but if a court followed the cases analyzing grant programs, the doctrine might allow certain content- and viewpoint-based restrictions on immunity.

It is unclear, however, how some aspects of this doctrine might apply outside the context of grant programs and other forms of monetary benefits. In 2017’s *Matal v. Tam*, four members of the Supreme Court concluded that unconstitutional conditions cases involving “cash subsidies or their equivalent” were not relevant in analyzing speech restrictions in the context of trademark registration, a nonmonetary government benefit.⁴⁶¹ It may be difficult, for instance, to apply cases asking whether a speech restriction serves “the purposes of a grant”⁴⁶² to review conditions on nonmonetary benefits that do not seem to exist to convey a clear “governmental message.”⁴⁶³ The Court’s ruling in *Tam* further suggested, though, that viewpoint-based conditions on nonmonetary government benefits sometimes violate the Constitution.⁴⁶⁴ *Tam* held that a federal law prohibiting the registration of disparaging trademarks was unconstitutional under the First Amendment, saying that “[s]peech may not be banned on the ground that it expresses ideas that offend.”⁴⁶⁵ Like Section 230, the federal trademark law did not directly prohibit disparaging speech; it merely limited the benefits of trademark registration.⁴⁶⁶ Section 230 also provides legal protections for private speech, and *Tam* could thus suggest that any viewpoint-based conditions on Section 230 immunity are unconstitutional.⁴⁶⁷ *Tam* did not consider content-based conditions or other types of speech restrictions on nonmonetary benefits.⁴⁶⁸

v. *Velazquez*, 531 U.S. 533, 542, 548–49 (2001) (holding that a federal condition prohibiting funds from being used for legal representation involving an effort to amend welfare law was unconstitutional, where the program “was designed to facilitate private speech, not to promote a governmental message”).

⁴⁵⁸ *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (upholding a federal grant condition prohibiting health programs receiving federal funding from encouraging the use of abortion).

⁴⁵⁹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833–34 (1995).

⁴⁶⁰ *E.g.*, Lee, *supra* note 453, at 466. *Cf.* Cathy Gellis, *Section 230 Isn’t a Subsidy; It’s a Rule of Civil Procedure*, TECHDIRT (Dec. 29, 2020), <https://www.techdirt.com/articles/20201229/12003745970/section-230-isnt-subsidy-rule-civil-procedure.shtml> (arguing that Section 230 is more similar to a rule of civil procedure than “some sort of tangible prize the government hands out selectively”).

⁴⁶¹ *Matal v. Tam*, 582 U.S. 218, 240 (2017) (plurality opinion).

⁴⁶² *Rust*, 500 U.S. at 198.

⁴⁶³ *Rosenberger*, 515 U.S. at 833.

⁴⁶⁴ *See Tam*, 582 U.S. at 243–44; *id.* at 247 (Kennedy, J., concurring).

⁴⁶⁵ *Id.* at 223 (majority opinion).

⁴⁶⁶ *See id.* at 226–27 (discussing the legal rights and benefits conferred by registration).

⁴⁶⁷ *See also* Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533, 548–49 (2001) (“Where private speech is involved, even Congress’ antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government’s own interest.”).

⁴⁶⁸ In its October 2023 term, the Supreme Court is considering another First Amendment challenge in which the federal government has argued a restriction on trademark registration is constitutional because it is a condition on a benefit rather than a direct restriction on speech. *E.g.*, Transcript of Oral Argument at 7–9, *Vidal v. Elster*, No. 22-704 (U.S. Nov. 1, 2023).

If a court did not apply Supreme Court precedent on grant programs to conditions on Section 230 immunity, content- and viewpoint-based conditions on Section 230 could trigger heightened First Amendment scrutiny under prevailing Supreme Court precedent.⁴⁶⁹ Section 230 already contains content-based distinctions: Section 230(c)(2) extends immunity only to those providers and users restricting access to specific types of “objectionable” content,⁴⁷⁰ arguably regulating speech on the basis of its content and viewpoint.⁴⁷¹ Courts have not weighed in on the constitutionality of Section 230’s current content-based distinctions.⁴⁷² Reform proposals that would add to the current list of types of content in Section 230(c)(2) could create additional content- or viewpoint-based distinctions.⁴⁷³ Other proposals would have created content-based exceptions to Section 230, allowing liability for hosting certain types of content.⁴⁷⁴ Some bills that would have created new content-based exceptions seemed to target historically “unprotected”⁴⁷⁵ categories of speech such as child sexual abuse material,⁴⁷⁶ and therefore might not trigger heightened constitutional scrutiny on that basis.⁴⁷⁷

Other bills from prior Congresses would have limited providers’ editorial discretion by extending immunity only to providers that moderate content in specific ways.⁴⁷⁸ It might be argued that some of these proposals are content- or viewpoint-based, while others might be considered content-neutral. Open doctrinal questions may complicate this analysis. The Eleventh Circuit held that a state law prohibiting a platform from making content moderation decisions based on the content of certain users’ posts was content-based because it applied based on the message conveyed by the platform’s decision.⁴⁷⁹ Under this reasoning, proposals that extend Section 230 immunity only to providers or users who moderate content in a viewpoint-neutral manner could

⁴⁶⁹ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

⁴⁷⁰ 47 U.S.C. § 230(c)(2) (providing immunity to providers and users for certain decisions to restrict access to “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”).

⁴⁷¹ See, e.g., *Tam*, 582 U.S. at 243 (plurality opinion) (“Giving offense is a viewpoint.”); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2000) (holding that a law restricting the sale of “violent” works to children was content-based).

⁴⁷² Cf., e.g., *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1306 (D.C. Cir. 2023) (rejecting an argument that FOSTA’s “Section 230(e)(5) selectively withdraws immunity on the basis of speech’s content or viewpoint,” because that exception denies immunity only for unprotected speech integral to criminal conduct); *Lewis v. Google*, 851 Fed. Appx. 723, 724 n.2 (9th Cir. 2021) (rejecting a First Amendment overbreadth challenge to Section 230 in part because the law “does not prohibit any speech”); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470 (3rd Cir. 2003) (rejecting plaintiff’s claim that Section 230(c)(2) violates the First Amendment by allowing providers to restrict constitutionally protected material, noting that the provision did “not require” the provider to “restrict speech”).

⁴⁷³ E.g., *Online Freedom and Viewpoint Diversity Act*, S. 4534, 116th Cong. § 2 (2020) (replacing “otherwise objectionable” in Section 230(c)(2) with “promoting self-harm, promoting terrorism, or unlawful”); *supra* note 389.

⁴⁷⁴ E.g., *Public Servant Anti-Intimidation Act of 2022*, H.R. 8962, 117th Cong. (2022) (providing that Section 230 will not bar liability for the publication of the personal information of a public servant); *Health Misinformation Act of 2021*, S. 2448, 117th Cong. (2021) (providing that a service provider “shall be treated as the publisher or speaker of health misinformation” if it uses certain algorithms to promote that content); *Ending Support for Internet Censorship Act*, S. 1914, 116th Cong. (2019) (providing that Section 230(c) will not apply to larger providers unless the FTC has certified that “the company does not moderate information . . . in a manner that is biased against a political party, political candidate, or political viewpoint”).

⁴⁷⁵ For a discussion of the so-called unprotected categories, see CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

⁴⁷⁶ E.g., *EARN IT Act of 2022*, S. 3538, 117th Cong. § 5 (2022).

⁴⁷⁷ See *Woodhull Freedom Found.*, 72 F.4th at 1306.

⁴⁷⁸ See *supra* notes 377 to 385 and accompanying text, and notes 397 to 401 and accompanying text.

⁴⁷⁹ *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196, 1226 (11th Cir. 2022), *cert. granted*, 216 L. Ed. 2d 1313 (2023). In *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), the Supreme Court said a law is content-based if it “draws distinctions based on the message a speaker conveys.”

be considered content-based if they are also viewed as applying based on the message conveyed.⁴⁸⁰ The Fifth Circuit and others have claimed, however, that these types of proposals should be considered content-neutral because requiring viewpoint-neutrality does not itself single out any particular viewpoint or subject matter.⁴⁸¹ This debate implicates open questions in the Supreme Court’s definition of what qualifies as a content-based law.⁴⁸² Similar questions could be raised by bills that would have restricted the availability of Section 230 immunity when content is recommended or restricted by an algorithm, to the extent these decisions about what content to transmit could be seen as conveying a message.⁴⁸³

Proposals that condition Section 230 immunity on adopting certain types of procedures to promote or restrict content, across all types of content, may be more likely to be considered content-neutral.⁴⁸⁴ This might include, for example, bills that would have conditioned immunity for takedown decisions on providing notice of the restriction and an opportunity for the content provider to respond.⁴⁸⁵ The Eleventh Circuit characterized state law provisions requiring the disclosure of content moderation standards as content-neutral.⁴⁸⁶ The federal bills that would have conditioned Section 230 immunity on providing publicly available content moderation practices could be viewed in the same light.⁴⁸⁷ At the same time, the Supreme Court has said disclosure requirements are a type of compelled speech and has applied a variety of First Amendment tests to disclosure requirements depending on the type of speech being compelled.⁴⁸⁸

Ultimately, given the open questions surrounding conditions on nonmonetary benefits, it is difficult to say definitively how a court would analyze a First Amendment challenge to a limit or condition on Section 230 immunity. As discussed, some Supreme Court precedent suggests that laws that draw distinctions based on the content or viewpoint of speech may be subject to heightened scrutiny, even in the context of a law that merely disfavors, rather than prohibits, certain speech.⁴⁸⁹ However, the fact that any given Section 230 reform proposal does not directly prohibit or compel speech would likely be a relevant factor in the First Amendment analysis.

⁴⁸⁰ See, e.g., Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. § 2 (2020).

⁴⁸¹ See, e.g., NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 480 (5th Cir. 2022), cert. granted, 216 L. Ed. 2d 1313 (2023); Spencer, *supra* note 348, at 59–60.

⁴⁸² See CRS Legal Sidebar LSB10739, *Refining Reed: City of Austin Updates Test for Content-Based Speech Restrictions*, by Victoria L. Killion.

⁴⁸³ See, e.g., Platform Integrity Act, H.R. 9695, 117th Cong. § 2 (2022); Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. § 2 (2019). Cf., e.g., United States v. Rundo, 990 F.3d 709, 717 (9th Cir. 2021) (per curiam) (holding a federal law prohibiting speech tending to “promote” a riot swept in constitutionally protected speech).

⁴⁸⁴ See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643–44 (1994) (characterizing as content-neutral regulations that “interfere with cable operators’ editorial discretion,” where “the extent of the interference does not depend upon the content of the cable operators’ programming”).

⁴⁸⁵ E.g., Protect Speech Act, H.R. 3827, 117th Cong. § 2 (2021).

⁴⁸⁶ NetChoice, LLC v. Att’y Gen., 34 F.4th 1196, 1227 (11th Cir. 2022), cert. granted, 216 L. Ed. 2d 1313 (2023).

⁴⁸⁷ E.g., 21st Century FREE Speech Act, S. 1384, 117th Cong. (2021); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. (2021).

⁴⁸⁸ See generally CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al. Both the Fifth and Eleventh Circuits, for example, applied a relatively lenient standard known as *Zauderer* review to evaluate state law provisions requiring notice and appeal of content moderation decisions—although they disagreed on the outcome of that constitutional analysis. See NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 485, 487 (5th Cir. 2022) (ruling the provision “easily passes muster under *Zauderer*”), cert. granted, 216 L. Ed. 2d 1313 (2023); NetChoice, LLC, 34 F.4th at 1230–31 (ruling the provision was likely unduly burdensome on speech).

⁴⁸⁹ See, e.g., *Matal v. Tam*, 582 U.S. 218, 224 (2017) (majority opinion).

Comparing the Operation of First Amendment and Section 230 Protections

Besides the constitutionality of Section 230’s immunity provisions and proposed reforms, another relevant issue is the extent to which the First Amendment might prevent liability for hosting content. The scope of First Amendment protections is important to understand the potential consequences of Section 230 reforms. For example, FOSTA both created a new federal criminal offense and created new exceptions to Section 230 immunity.⁴⁹⁰ The new criminal offense, which prohibits operating an interactive computer service “with the intent to promote or facilitate the prostitution of another person,”⁴⁹¹ was challenged on constitutional grounds.⁴⁹² Courts ultimately rejected those challenges, reading the criminal law narrowly to avoid sweeping in protected advocacy.⁴⁹³ Nonetheless, those cases could have affected not only the government’s ability to enforce this federal criminal law, but could also have been relevant for courts determining whether providers and users can face liability under the FOSTA exceptions to Section 230 immunity. Namely, even though Section 230 no longer barred state criminal prosecutions that track this new criminal offense,⁴⁹⁴ courts might have concluded that the First Amendment prevented prosecution.⁴⁹⁵

In a variety of legal contexts, courts have suggested that the First Amendment imposes a heightened standard of liability, such as requiring proof of a higher level of intent, before speech “distributors” such as bookstores and newsstands can be punished for circulating unlawful content.⁴⁹⁶ And even in the context of lawsuits against publishers such as newspapers or magazines, courts have sometimes imposed heightened standards where the liability is premised on speech.⁴⁹⁷ Consequently, some commentators have argued that even if Section 230 were repealed, the First Amendment would continue to prevent liability premised on hosting or distributing speech.⁴⁹⁸ Although the Constitution likely would preclude civil or criminal liability

⁴⁹⁰ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, §§ 3–4, 132 Stat. 1253, 1253–54 (2018).

⁴⁹¹ 18 U.S.C. § 2421A.

⁴⁹² *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1296 (D.C. Cir. 2023); *United States v. Martono*, No. 3:20-CR-00274-N-1, 2021 WL 39584, at *1 (N.D. Tex. Jan. 5, 2021).

⁴⁹³ *Woodhull Freedom Found.*, 72 F.4th at 1299; *Martono*, 2021 WL 39584, at *1.

⁴⁹⁴ 47 U.S.C. § 230(e)(5)(C) (providing that Section 230 will not “impair or limit . . . any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of [18 U.S.C. § 2421A] and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted”).

⁴⁹⁵ *Cf.*, e.g., *United States v. Rundo*, 990 F.3d 709, 717 (9th Cir. 2021) (per curiam) (holding a federal law prohibiting speech tending to “promote” a riot impermissibly swept in constitutionally protected speech).

⁴⁹⁶ *See*, e.g., *Smith v. California*, 361 U.S. 147, 155 (1959) (holding that a law imposing criminal penalties on bookstores that possess obscene material was unconstitutional under the First Amendment because it did not include any element of scienter, or knowledge); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (requiring proof of knowledge before a distributor may be held liable for defamation). *See also*, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (holding that a state commission violated the First Amendment by sending book publishers notices threatening punishment under state obscenity laws, characterizing the scheme as a system of prior administrative restraints that was impermissible because it lacked sufficient procedural safeguards).

⁴⁹⁷ *See*, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring a showing of “actual malice” before a “public official” may recover damages from a newspaper for a defamatory statement “relating to his official conduct”); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1114 (11th Cir. 1992) (ruling that a magazine could be held liable for negligently publishing an advertisement “only if the advertisement on its face would have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm”).

⁴⁹⁸ *See*, e.g., Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018); *cf.* Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635, 637 (2020) (arguing that in the area of defamation law, “First Amendment considerations would likely lead courts to a § 230-like liability protection,” but noting differences in the two regimes).

in some circumstances, the protections of the First Amendment are likely not coextensive with Section 230 immunity.⁴⁹⁹ Generally, this stems from the fact that Section 230 provides complete immunity for covered activities absent an inquiry into whether the underlying content is constitutionally protected, meaning that Section 230 likely protects at least some speech that the First Amendment does not protect.

First, while Section 230 provides a complete bar to liability for covered activities, the First Amendment may merely impose a heightened standard of liability if a lawsuit implicates protected speech.⁵⁰⁰ One illustration comes from the pre-Section 230 rulings described above that considered whether early online platforms hosting message boards could be held liable for defamatory statements posted by users.⁵⁰¹ In *Cubby*, the federal trial court concluded that CompuServe should be treated as a distributor for purposes of analyzing the defamation claim.⁵⁰² Accordingly, the court ruled that the plaintiff had to meet a heightened standard and prove that CompuServe “knew or had reason to know of the allegedly defamatory . . . statements.”⁵⁰³ While the trial court ultimately concluded that the plaintiff had not met this standard and dismissed the defamation claim,⁵⁰⁴ it was theoretically possible for the plaintiff to prove the claim by submitting sufficient evidence of CompuServe’s knowledge. By contrast, courts have ruled that Section 230 will bar a claim against a provider that merely publishes a defamatory statement regardless of whether the provider actually knew about the statement.⁵⁰⁵ Accordingly, while heightened First Amendment standards likely would lead courts to dismiss some lawsuits premised on speech, plaintiffs with sufficient proof may be able to overcome those standards in circumstances where Section 230 would have barred the suit. However, a few trial courts have concluded that the First Amendment completely immunizes websites from certain civil claims without suggesting that some heightened standard applies—similar to the current regime under Section 230.⁵⁰⁶

More generally, Section 230’s complete immunity for “publisher” activities has procedural advantages for providers and users engaged in protected activity.⁵⁰⁷ As discussed above, the inquiry into whether a service provider or user has engaged in “publisher” activities may overlap with constitutional protections for “editorial” activity,⁵⁰⁸ but Section 230 nonetheless does not require a court to investigate whether First Amendment activity has occurred. Accordingly, Section 230 provides greater certainty for service providers and users that distributing or restricting others’ speech will be protected from liability, without having to consider whether a court would conclude the speech is constitutionally protected.⁵⁰⁹ In at least some cases, courts

⁴⁹⁹ See generally, e.g., Goldman, *Why Section 230 Is Better than the First Amendment*, *supra* note 436 (discussing ways Section 230 offers more protection, both substantive and procedural, than the First Amendment).

⁵⁰⁰ See, e.g., *id.* at 38–39 (noting that “sufficient scienter can override” First Amendment protections in defamation cases, but Section 230 “moot[s] inquiries into defendants’ scienter”).

⁵⁰¹ See *supra* “*Stratton Oakmont, Inc. v. Prodigy Services Co.*”

⁵⁰² *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

⁵⁰³ *Id.* at 140–41.

⁵⁰⁴ *Id.* at 141.

⁵⁰⁵ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (concluding Section 230 barred claim that provider could be held liable for defamation as a distributor with knowledge of the statement).

⁵⁰⁶ E.g., *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *3–4 (W.D. Okla. May 27, 2003).

⁵⁰⁷ See, e.g., 47 U.S.C. § 230(c)(1) (providing that a service provider or user may not be treated as a “publisher” of another’s content); *id.* § 230(c)(2) (extending immunity for decisions to restrict certain material “whether or not such material is constitutionally protected”).

⁵⁰⁸ See *supra* note 431.

⁵⁰⁹ See, e.g., Goldman, *Why Section 230 Is Better than the First Amendment*, *supra* note 436, at 42–43.

may dismiss a lawsuit against a provider on Section 230 grounds at an early stage in the litigation based on the allegations alone.⁵¹⁰ Whether early dismissal is warranted, however, will depend on the elements of the claim, the factual circumstances, and the particulars of any Section 230 or First Amendment defense. For example, as discussed above, allegations that a provider acted in bad faith have prevented providers from obtaining early dismissal under Section 230(c)(2)(A).⁵¹¹ Nonetheless, some commentators believe that in most cases, Section 230 will allow a quicker dismissal than the First Amendment.⁵¹²

Accordingly, while the First Amendment might prevent some claims premised on decisions to host or restrict others' speech, its protections are likely less extensive than the current scope of Section 230 immunity.

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⁵¹⁰ *See id.* at 39–40.

⁵¹¹ *See supra* note 227.

⁵¹² *E.g.*, Gellis, *supra* note 460.

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