

CONTENT CULPABILITY IN THE AGE OF ALGORITHMS: *ANDERSON* AND THE FUTURE OF SECTION 230

Abstract: In 2024, in *Anderson v. TikTok, Inc.*, the U.S. Court of Appeals for the Third Circuit held that an algorithm may become sufficiently expressive as to constitute an internet service provider's (ISP) first-party speech. The historical context, purpose, and text underlying Section 230 suggest that Congress's sole aim was to bar strict publisher liability for the presence of harmful third-party content on a provider's platform. Congress did not intend to bar plaintiffs from pursuing claims under a distributor liability framework, such that ISPs acting by omission to promote third-party content they know to be causing harm may be held liable for failing to act upon learning of such harm. This Comment argues that Congress should amend the statute to clarify what liability should be imposed for ISPs that knowingly promote harmful content, or, in the absence of congressional action, the Supreme Court should resolve the existing circuit split by finding that distributor liability is not barred by Section 230.

INTRODUCTION

Congress enacted Section 230 of the Communications Decency Act (CDA) in 1996, seeking to govern a fledgling internet that looked nothing like the behemoth force it is today.¹ Following disagreement among courts over how to impose liability for internet platforms that post third-party content, Congress recognized that imposing tort liability on platforms for content posted by others poses a significant threat to the free speech that flourishes on the internet.² In response, lawmakers passed Section 230 to promote the development of the internet and preserve its vibrant and competitive free market, and to incentivize platforms to moderate harmful content without fearing liability.³

Section 230's "Good Samaritan" provision grants internet service providers (ISPs) immunity from claims arising out of content on their platform.⁴ The

¹ See *Est. of Bride v. YOLO Techs., Inc.*, 112 F.4th 1168, 1175 (9th Cir. 2024) (discussing the young age of the internet during the passage of the Communications Decency Act in 1996).

² See 47 U.S.C. § 230(a)(3) (stating Congress's finding that "[t]he internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity"); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (finding that Congress passed Section 230 to protect free speech on the newfound internet and maintain its vibrant marketplace without over-intrusive government regulation).

³ See 47 U.S.C. § 230(b) (stating the policy and purpose behind Section 230).

⁴ See *id.* § 230(c) (granting "[p]rotection for [a] 'Good Samaritan' blocking and screening . . . offensive material").

statute provides that no ISP may be treated as the “publisher or speaker” of content created or developed by a third party, and further shields ISPs from civil liability for any good-faith efforts to restrict access to material they consider obscene or otherwise objectionable.⁵ Although not immediately apparent, courts have interpreted Section 230 to confer sweeping immunity for any content on an ISP’s platform, no matter how harmful, so long as that content is created by a third party.⁶ In 1997, in *Zeran v. America Online, Inc.*, shortly after Section 230’s passage, the Fourth Circuit formed an interpretation of the law that significantly broadened ISP immunity, holding that ISPs open to distributor liability are also immune.⁷ Courts across the country have adopted *Zeran*’s reasoning, creating a nationwide legal regime immunizing publishers and distributors under the law.⁸

Three decades later, however, the internet bears little resemblance to what Congress sought to regulate in 1996.⁹ Today, social media companies operate

⁵ See *id.* § 230(c)(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.”); *id.* § 230(c)(2)–(2)(A) (“Civil liability. No provider or user of an interactive computer service shall be held liable on account of . . . 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 . . .”).

⁶ See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 592 U.S. 1013, 1018, 1020 (2020) (Thomas, J., concurring in the denial of certiorari) (arguing that courts interpreted Section 230 immunity to provide significantly more protection than Congress intended); see also Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 362–63 (2005) (describing the courts’ treatment of Section 230 immunity as excessive because courts have interpreted the law to bar distributor liability and nearly all tort actions).

⁷ See *Zeran*, 129 F.3d at 332 (broadening Section 230’s immunity by including distributors as a subset of the “publishers” immunized by the text of Section 230).

⁸ See *id.* (interpreting Section 230 to confer immunity on ISPs operating as either a publisher or distributor); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 190 (3d Cir. 2024) (Matey, J., concurring in part and dissenting in part) (describing the nationwide adoption of *Zeran*’s interpretation of Section 230). Even in 1999, commentators immediately questioned the *Zeran v. America Online, Inc.* decision, emphasizing that Congress’s intent to encourage the moderation of objectionable content does not comport with the *Zeran* court’s decision to immunize internet platforms against any and all tort claims involving third-party content. See David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905, 929–30 (1999) (refuting *Zeran*’s interpretation of Section 230 as far broader than Congress intended).

⁹ See Madeleine Blair, *From America Online to America, Online: Reassessing Section 230 Immunity in a New Internet Landscape*, 30 J. INTELL. PROP. L. 305, 316–17, 319–20 (2023) (describing changes in internet usage and Section 230’s modern application). Of course, Congress regulated the internet of the time—one where users pay by the hour for extremely limited content. *Id.* at 316. Most notably, social media did not exist, nor did Google or advanced search engines. *Id.* at 317. The interpersonal interactions that Congress sought to govern took place on chatrooms and bulletin boards, amounting to rudimentary communications when compared to the mass algorithmic dissemination of often mis- and dis-information spread across TikTok, Facebook, or Twitter. See *id.* (comparing early dial-up internet with modern social media). Furthermore, Congress passed Section 230 well before the internet would become an omnipresent element affecting nearly every American’s life—only 16% of

on an enormous scale, with more than sixty percent of the global population viewing algorithmically curated feeds in 2023, adding up to more than twelve trillion hours spent on the internet over one year.¹⁰ Social media algorithms are no longer passive conduits of information like the chat rooms and bulletin boards of the dial-up era.¹¹ Instead, social media companies, such as TikTok, employ mountains of user-specific metadata to actively shape what users see and amplify or suppress content with the foremost goal of maximizing engagement—the engine of their profitability.¹²

In this new algorithmic era, courts face a new question: How can the government regulate social media companies in a way that mitigates the harm caused by the targeted promotion of harmful third-party content without stifling the internet's robust free exchange of ideas?¹³ This Comment offers a framework for addressing this new challenge faced by the courts and the internet itself.¹⁴ Part I examines the contours of liability under Section 230 for a social media company's presentation of harmful third-party content on its platform and introduces a Third Circuit case on that topic: *Anderson v. TikTok, Inc.*¹⁵ Part II examines the evolving judicial treatment of social media algorithms under Section 230, contrasting the longstanding consensus that algorithms are neutral publisher tools with the *Anderson* majority's contention that algorithmic curation can constitute first-party speech, and ends by examining the dissent's argument that Section 230 never immunized distributor liability in

Americans used the internet in 1996, with internet usage soaring to 93% of Americans in 2023. See *Individuals Using the Internet (% of Population)—United States*, WORLD BANK GROUP, data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US [perma.cc/W3CE-7R87] (providing internet usage data by country).

¹⁰ See Joyce Abaño, *Nearly 61% of the World's Population Is Active on Social Media, Study Shows*, FORBES MIDDLE EAST (July 21, 2023), www.forbesmiddleeast.com/innovation/consumer-tech/nearly-61-of-worlds-population-active-on-social-media-study-shows [perma.cc/7WVV-K54R] (tracing the extraordinary growth of social media users across the globe, and noting that the numbers continue to grow).

¹¹ See Blair, *supra* note 9, at 317, 319 (comparing the internet of 1996 with modern providers, characterizing today's internet as a market of tech companies using tools to maximize user interest and revenue). When Section 230 passed in 1996, social media did not exist, with the user-generated content on the internet existing mostly on chatrooms and blogs. See *id.* at 317 (describing the 1996 internet as minimal and limited-in-scope).

¹² See Louise Matsakis, *TikTok Finally Explains How the 'For You' Algorithm Works*, WIRED (June 18, 2020), www.wired.com/story/tiktok-finally-explains-for-you-algorithm-works/ [perma.cc/4LVW-LLZ5] (explaining how TikTok's For You Page algorithm maintains engagement through user-specific metadata).

¹³ See *Anderson*, 116 F.4th at 182–83 (addressing the question of whether TikTok may be held liable for the death of a child after its algorithm curated and promoted the content that influenced her death); cf. *Force v. Facebook, Inc.*, 934 F.3d 53, 67 (2d Cir. 2019) (finding that an algorithm that recommends content to users can be subject to full immunity because it is still a mere organization of third-party content akin to publishing).

¹⁴ See *supra* notes 1–13 and *infra* notes 15–112 and accompanying text.

¹⁵ See *infra* notes 18–48 and accompanying text.

the first place.¹⁶ Finally, Part III argues that Congress or the Supreme Court should resolve this issue by clarifying that Section 230 does not subsume distributor liability within publisher liability, and that ISPs may be held liable for knowingly promoting harmful content while failing to act.¹⁷

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *ANDERSON V. TIKTOK, INC.*

In 2024, in *Anderson v. TikTok, Inc.*, the U.S. Court of Appeals for the Third Circuit diverged from other circuits in finding that TikTok's For You Page algorithm, through its compilation and curation of videos, constitutes first-party expressive activity and, therefore, is not covered by the immunity granted by Section 230 of the Communications Decency Act.¹⁸ Section A of this Part discusses Section 230 and how courts have distinguished between publisher and distributor liability before *Anderson*.¹⁹ Section B of this Part discusses the factual and procedural history of *Anderson*.²⁰

¹⁶ See *infra* notes 49–83 and accompanying text.

¹⁷ See *infra* notes 84–112 and accompanying text.

¹⁸ See 47 U.S.C. § 230(c) (granting immunity to ISPs such that they cannot be treated as publishers of content created or developed by third parties); *Anderson*, 116 F.4th at 184 (holding that TikTok could not claim Section 230 immunity because its algorithm was sufficiently expressive as to become TikTok's own first-party speech, which is not immunized by the statute); Matsakis, *supra* note 12 (defining TikTok's For You Page as a personalized feed of content algorithmically curated to each individual user based on their interactions with the platform). When presented with similar questions, circuit courts have generally reached the opposite conclusion, finding that Section 230 immunity is broad enough to include social media algorithms that curate and promote content. See, e.g., *Force*, 934 F.3d at 67 (holding that, even when an algorithm recommends content to users, full immunity applies because it is still a mere organization of third-party content akin to publishing); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097–98 (9th Cir. 2019) (finding algorithms that recommend and notify third-party content to users fall within Section 230 because the internet platform is not creating or developing the content); *M.P. ex rel. Pinckney v. Meta Platforms, Inc.*, 127 F.4th 516, 526 (4th Cir. 2025) (upholding Section 230 immunity for Facebook's algorithm because arranging and sorting third-party content is an editorial function integral to traditional publishing). Despite most courts' longstanding support for such a broad interpretation of Section 230 immunity, some district courts have recently expressed a willingness to view algorithms as expressive activity. See, e.g., *NetChoice v. Bonta*, 761 F. Supp. 3d 1202, 1223 (N.D. Cal. 2024) (finding that personalized feed algorithms have the possibility of containing expressive factors that convey a message, depending on the algorithm's function), *aff'd in part, rev'd in part*, 152 F.4th 1002 (9th Cir. 2025) (affirming most of the district court's holding with modification to one element of its injunction unrelated to algorithmic expression); *Doe v. WebGroup Czech Republic*, 767 F. Supp. 3d 1009, 1020 (C.D. Cal. 2025) (distinguishing between expressive and content-neutral search algorithms, where expressivity requires the platform to curate content in such a way as to develop its own content rather than simply disseminating it to the user).

¹⁹ See *infra* notes 21–36 and accompanying text.

²⁰ See *infra* notes 37–48 and accompanying text.

A. The Communications Decency Act § 230 and Platform Immunity for Third-Party Speech

Section 230 of the CDA grants immunity to social media platforms and interactive computer services (ICS) for content present on their platforms, so long as that content is provided by a third party.²¹ In an age of rapid technological change, Congress enacted Section 230 to clarify what content an internet platform may be liable for while also seeking to promote the continued development of the internet.²² Section 230, however, was also crafted with the goal of encouraging internet platforms to screen objectionable, obscene, and inappropriate material from the public view without fear of liability.²³

²¹ See 47 U.S.C. § 230(c)(1) (stating that ISPs may not be treated, when imposing liability, as the speaker or publisher of information furnished by a third party); *id.* § 230(c)(2) (establishing immunity from civil liability for ISPs for any action “taken in good faith” to block or limit content the provider deems obscene “or otherwise objectionable,” regardless of whether the content enjoys constitutional protections); see also *id.* § 230(f)(2) (defining “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions”); *id.* § 230(f)(3) (defining “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the [i]nternet or any other interactive computer service.”). Section 230 also specifies that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).

²² See *id.* § 230(c) (establishing broad immunity for the third-party content presented on an ISP’s site); *id.* § 230(a) (stating Congress’s findings about the advancement of the internet); *id.* § 230(b) (stating Congress’s policy promoting a vibrant but safe internet). Although the internet was in its infancy in the 1990s, Congress recognized its rapid development and focused its findings on the internet’s effect on the availability of information and resources, along with the opportunities for cultural and political discourse. See *id.* § 230(a) (listing Congress’s findings on the modern internet and its societal, technological, and political role). Moreover, Congress laid out a specific policy focused on encouraging the internet to develop as a competitive and vibrant marketplace of ideas and political discourse. See *id.* § 230(b) (listing policy objectives Congress sought to accomplish with Section 230’s passage). In essence, Congress worried that tort-based lawsuits for content moderation could become a “heckler’s veto” posing a threat to freedom of speech, allowing any “heckler” to remove speech with the mere threat of litigation. See Cynthia Lee, Comment, *Subverting the Communications Decency Act*: *J.S. v. Village Voice Media Holdings*, 7 CALIF. L. REV. CIR. 11, 18 (2016), <https://static1.squarespace.com/static/640d6616cc8bbb354ff6ba65/t/643a0d4adbc8187644f2d142/1681526090382/11-19-Lee-Final-online.pdf> [https://perma.cc/KA8P-2L2Q] (analyzing the congressional intent behind Section 230). In addition to the protection of free speech, Section 230 has been interpreted to serve two other main purposes—keeping government interference to a minimum and encouraging platforms to voluntarily self-regulate any harmful third-party material. See *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407–08 (6th Cir. 2014) (interpreting congressional intent with regard to Section 230).

²³ See 47 U.S.C. § 230(b)(4) (stating policy of removing disincentives for the development of parental policies restricting children’s access to inappropriate materials); *id.* § 230(c)(2)(A) (removing liability for any good faith effort to restrict online access to objectionable material); see also *Jones*, 755 F.3d at 407–08 (stating Congress’s intent to encourage internet platforms to self-regulate). Even when an ISP may fail to regulate harmful content, immunity still applies because Section 230 prohibits ISPs from being treated as the publisher of third-party content. See 47 U.S.C. § 230(c)(2) (stating

To qualify for protection under Section 230, the internet platform must meet the statute's definition of an ICS, which has been interpreted to include ISPs such as social media platforms, search engines, and online message boards.²⁴ Normally, under common tort law, an internet platform would incur liability for publishing a third party's tortious material on its platform even if it had no knowledge of it.²⁵ Section 230, however, treats ISPs differently by prohibiting platforms qualifying as an ICS from incurring liability for publishing tortious third-party content.²⁶ This immunity only applies if the alleged tortious content was provided by another "information content provider."²⁷

Congress enacted Section 230 in response to conflicting decisions over whether ISPs should be treated as publishers, subject to strict liability for third-

that ICS providers cannot be treated as publishers of third-party content); *Force*, 934 F.3d at 71 (rejecting plaintiffs' argument that Facebook should not be afforded immunity because it failed to eliminate objectionable content). In *Force*, the ICS was alleged to be responsible for content spread on its platform by the terrorist group, Hamas. *Id.* at 57. The court held that Section 230's purpose is to encourage self-regulation of harmful material and ensures that an ICS does not incur liability for undertaking such efforts, even if it fails to eliminate that harmful material. *See id.* at 71 (distinguishing § 230(c)(1) as barring courts from treating an ISP as a publisher of speech regardless of how it regulates that speech). *But see* *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1047 (9th Cir. 2019) (holding that an ISP blocking users for anticompetitive purposes falls outside of Section 230(c)(2)'s scope, which must be rooted in the blocking of material it finds otherwise objectionable rather than a threat to their commercial position).

²⁴ *See* 47 U.S.C. § 230(f)(2) (defining "interactive computer service"); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1175–76 (9th Cir. 2009) (interpreting § 230(f)(2) to find that the statute requires an ICS to be an "access software provider that provides or enables computer access by multiple users to a computer server") (emphasis omitted); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (explaining the meaning of "interactive computer service").

²⁵ *See Jones*, 755 F.3d at 407 (stating that "Section 230 marks a departure from the common-law rule" that imposes liability on publishers of tortious material provided by others).

²⁶ *See id.* at 408 (contrasting common law publisher liability with Section 230, noting that Congress intended to treat them differently); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (describing the requirements for immunity under Section 230). In *Klayman*, because the statute does not define "publisher," the court relied on its dictionary definition and ordinary meaning to conclude that it is "one that makes public and the reproducer of a work intended for public consumption." *See id.* at 1359 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1981)) (using its ordinary, dictionary meaning to interpret "publisher"). Furthermore, the court describes publishing as deciding on what content to print or exclude, which is similar to the content moderation implemented by Facebook and other social media companies. *See id.* (comparing Facebook's content moderation practices to traditional editorial functions).

²⁷ *See* 47 U.S.C. § 230(f)(3) (defining "information content provider"). Courts have found that another "information content provider" must be entirely or partly responsible for developing or creating the harmful content. *See LeadClick Media*, 838 F.3d at 174 (requiring the offending content to originate from a third party). Courts have rejected claims of immunity when they find the platform to be wholly or partially responsible for the content that is the subject of the lawsuit. *See, e.g., id.* at 176 (finding that a marketing website involved in connecting, recruiting, and paying other websites to develop deceptive news stories is not immune because it was no longer a neutral party but a participant in the scheme that led to the creation of harmful content); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199, 1201 (10th Cir. 2009) (denying immunity to a website that obtained and sold details of caller information because its role in obtaining confidential information amounted to responsibility for the offensive content being developed).

party content, or as distributors, liable only upon knowledge of the content's harmful nature.²⁸ Courts analogized this distinction to traditional media—publishers monitor their material and exercise editorial control over everything they release, whereas distributors have no duty to monitor publishers' content, acting more like a for-profit library, bookstore, or newsstand merely disseminating information.²⁹ In response to rulings that found ISPs strictly liable when regulating actionable content on their platform, Congress swiftly amended the CDA to include Section 230, seeking to ensure that companies may actively monitor and eliminate obscene or lewd content from their platform without being held strictly liable like a traditional publisher.³⁰

Although it may not have been clear at the time, the effect of Section 230 went beyond regulating objectionable content, with courts construing Section 230 immunity in a way that broadly immunizes the activities of numerous

²⁸ See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding that an internet chatroom was not liable because it acted as a mere distributor and was not aware of the harmful content present on its platform); *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding an internet chatroom liable because it acted as a publisher by exercising editorial control over others' content).

²⁹ See *Stratton Oakmont*, 1995 WL 323710, at *5 (finding an internet platform liable as the publisher of the content on its website). American courts first addressed third-party content liability for internet platforms in *Cubby, Inc. v. CompuServe, Inc.*, a 1991 defamation case five years before the passage of Section 230. See 776 F. Supp. at 139 (addressing defamatory statements made on an online forum). In *Cubby*, the U.S. District Court for the Southern District of New York found that an internet platform hosting online forums was not liable for defamatory statements posted on the forum because it did not know or have reason to know of the statement's defamatory nature. *Id.* at 141, 144. Crucially, the court reasoned that the platform was more like a distributor than a publisher because it did not exercise editorial control over the content, likening it to a newsstand, bookstore, or library, where a duty to review content for defamation would pose an impermissible First Amendment burden, let alone be impractical. *Id.* at 140–41. Four years later, in *Stratton Oakmont v. Prodigy Services Co.*, the Supreme Court of New York for Nassau County decided the case that precipitated Section 230's passage. See 1995 WL 323710, at *5 (holding an internet chatroom liable because its editorial control amounted to the actions of a strictly liable publisher). The defendant in *Stratton Oakmont* similarly hosted an online forum where an allegedly defamatory statement was posted. *Id.* at *2. Unlike CompuServe, Prodigy Services monitored and enforced content guidelines over the forum so that it remained family-oriented. See *id.* at *5 (describing Prodigy Services' family-focused content moderation actions). The court found this editorial control as sufficient to treat Prodigy Services as a publisher, thus imposing strict liability for any defamatory statements found on the forum. *Id.*

³⁰ See 47 U.S.C. § 230(c) (establishing liability for ISPs that restrict obscene or objectionable content); *Stratton Oakmont*, 1995 WL 323710, at *5 (imposing strict liability for internet platforms acting as publishers). Congress recognized the risks posed to safety on the internet were courts to apply publisher liability to internet platforms engaging in content moderation. See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (describing Congress's intent to set liability standards for online content). Internet platforms faced a difficult choice: moderate some content, thereby becoming liable for all content or, alternatively, perform no content moderation whatsoever, allowing them to escape liability but risk the publication of harmful or obscene content. See *id.* (explaining the reason that Congress decided to enact Section 230). The passage of Section 230 eliminated that difficult choice by providing internet platforms with the freedom to moderate objectionable content without being treated as a publisher of that content and subsequently incurring liability. See *id.* (describing how Section 230's protections allow platforms to act freely as publishers in the moderation of content).

companies that would have previously been open to liability.³¹ In 1997, in *Zeran v. America Online, Inc.*, the U.S. Court of Appeals for the Fourth Circuit held that Section 230 immunizes both publishers and distributors of third-party content, cementing an interpretation of Section 230 liability that has been adopted nationwide.³²

In 2024, in *Moody v. NetChoice, LLC*, the U.S. Supreme Court opened the door for courts to find another way to hold ISPs liable for third-party content by considering whether modern social media algorithms constitute first- or third-party speech.³³ The Court also addressed the constitutionality of state laws that imposed restrictions on social media platforms' content moderation policies.³⁴ In *Moody*, the Court held that an internet platform's content moderation decisions regarding users' third-party speech, such as editorial discretion and the curation of content, can be considered first-party expressive activity subject to First Amendment protections.³⁵ Recognizing algorithmic curation as

³¹ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (interpreting Section 230 immunity to be so broadly construed as to include publisher and distributor liability). Compare *Cubby*, 776 F. Supp. at 140 (finding defendant functioned as a news distributor because it had no editorial control over its content, thus barring liability unless the defendant knew or should have known of the defamatory content), with *Zeran*, 129 F.3d at 332 (finding, subsequent to the passage of Section 230, that defendant is not liable for any content on their platform regardless of whether it functions as a distributor or publisher).

³² See *Zeran*, 129 F.3d at 332 (interpreting Section 230 as immunizing both publisher and distributor liability and addressing a claim for defamatory messages posted online). In *Zeran*, the plaintiff argued that Section 230's use of the word "publisher" kept distributor liability intact and only immunized platforms acting as publishers. *Id.* at 331. The court rejected this argument and extended immunity to distributors as well, reasoning that distributor liability is simply a subset of the publisher liability statutorily defined in Section 230, and to hold otherwise would be inconsistent with the statute's purpose. *Id.* at 332. Subsequent courts across the country adopted this liability framework, enabling broad immunity for the inestimable social media content that abounds on the modern internet. See, e.g., *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1016 (Fla. 2001) (finding that Section 230 immunity extends to distributors who fail to remove the defamatory content they are aware of); *Barrett v. Rosenthal*, 146 P.3d 510, 517 (Cal. 2006) (relying on the *Zeran* decision to construe Section 230 immunity as considerably broad without distinction between publisher and distributor liability). But see *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 592 U.S. 1013, 1016 (2020) (Thomas, J., concurring in the denial of certiorari) (expressing support for a reading of Section 230 where distributor liability is not immunized).

³³ See *Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024) (holding that the curation, construction, and compilation of social media algorithms can constitute expressive activity protected by the First Amendment, which state laws cannot suppress).

³⁴ See *id.* at 717 (considering whether state laws from Florida and Texas aimed at regulating social media on the basis of ideological viewpoints are facial violations of the First Amendment).

³⁵ See *id.* at 716–17 (holding that third-party expression edited into a compilation, such as social media algorithms, can become an expressive product subject to First Amendment treatment and protection). Although the Court did not comment on Section 230, its decision regarding an algorithm's first-party expressive speech laid the groundwork for future courts to decide that algorithmic content is outside the scope of Section 230 immunity because the platform becomes a creator of that speech. See *id.* (holding that one's gathering of third-party content can become expressive, and that any intrusion into such activity must comply with the First Amendment).

an expressive activity, the Court's reasoning in *Moody* forged new legal ground, providing courts with an analytical foundation to find ISPs liable for using an algorithm to promote harmful content posted by third-parties.³⁶

B. Factual and Procedural History of Anderson v. TikTok, Inc.

TikTok is a social media platform with over a billion users, who create, view, and share videos, powered by an algorithmic recommendation system.³⁷ According to internal documents, it is intensely focused on “retention” and “time spent”—TikTok wants users to return to the platform as much as possible and stay there as long as possible.³⁸ TikTok accomplishes this goal with its primary video feed, the For You Page (FYP).³⁹ The FYP relies on a machine learning algorithm that analyzes a user's quantifiable “signals,” such as likes, shares, comments, time spent watching a video, and other user interactions, to predict the videos most likely to keep users endlessly scrolling.⁴⁰ Nylah Anderson, the ten-year-old daughter of Plaintiff Tawainna Anderson, was recommended a video depicting the “Blackout Challenge” via her For You Page.⁴¹ This challenge encouraged TikTok users to choke themselves to the point of passing out.⁴² After TikTok's algorithm determined that this video would be of

³⁶ See *id.* at 716–17 (deciding that the compilation of third-party content does constitute expressive speech by the ISP).

³⁷ See Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html [perma.cc/FF8G-T7J2] (reporting on TikTok's powerful algorithm and how it succeeds in keeping users hooked).

³⁸ See *id.* (discussing an internal TikTok document obtained by the *New York Times*, titled “TikTok Algo 101,” which describes TikTok's “ultimate goal” as adding as many users as possible and keeping them on the app). Critics, on the other hand, describe this algorithm as merely aiming to addict users, especially children. See *id.* (describing criticisms of the algorithm).

³⁹ See Kelley Cotter, *TikTok's New Owner Puts App's Algorithm in the Spotlight—A Social Media Expert Explains How the ‘For You’ Page Works*, THE CONVERSATION (Sep. 22, 2025), <https://theconversation.com/tiktoks-new-owner-puts-apps-algorithm-in-the-spotlight-a-social-media-expert-explains-how-the-for-you-page-works-265658> [perma.cc/BP5D-4QAG] (describing the For You Page algorithm and its role in accomplishing TikTok's goal of retaining users).

⁴⁰ See *id.* (explaining how TikTok's algorithm works, describing it as a “computational process” where the algorithm learns from user datasets to predict a video feed most likely to achieve TikTok's goal of “retention” and “time spent”). When a video is uploaded, TikTok's algorithm analyzes how the first subset of users respond to the video using various strong and weak signals, which then informs the algorithm whether the video should be added to a large or small number of For You Pages with matching characteristics. See Matsakis, *supra* note 12 (explaining the interplay of strong and weak user-provided signals that drive TikTok's algorithm). Strong signals include the length of time users watch each video and the share or follow decisions made by each user. *Id.* Weak signals include the user's device type, language preference, or geographical location. *Id.*

⁴¹ Complaint at 14, *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276 (E.D. Pa. 2022) (No. 22-18).

⁴² *Id.* The Blackout Challenge is not an isolated trend and has led to the deaths of multiple children. See Edward Alan Glasper, *Is Social Media Fueling Deaths Among Children?*, 46 COMP. CHILD AND ADOLESCENT NURSING 1, 1–3 (2023) (listing the adolescent deaths fueled or caused by the Blackout Challenge). Experts have warned that the trend is particularly appealing to adolescents and teens. See Gigen Mammoser, *Dangerous Social Media ‘Blackout Challenge’ Can Cause Brain Dam-*

interest to Nylah, it displayed it on her feed, allegedly influencing Nylah to imitate the challenge and accidentally kill herself by self-asphyxiation.⁴³

As the estate administratrix, Nylah's mother subsequently brought suit against TikTok and its parent company, ByteDance, Inc., for strict products liability, negligence, and other claims.⁴⁴ Anderson alleged that, despite knowing about the Blackout Challenge, TikTok nonetheless allowed such videos to be posted and, most importantly, suggested and promoted Blackout Challenge videos to minors via their For You Page.⁴⁵

The district court dismissed Anderson's complaint, finding that TikTok posts and the use of its algorithm fell within Section 230 immunity.⁴⁶ On appeal, the Third Circuit addressed Anderson's argument that TikTok's amalgamation of third-party content generated an expressive product that placed it outside of Section 230 immunity.⁴⁷ The Third Circuit largely found for Anderson, reversing in part, vacating in part, and remanding the case.⁴⁸

age, *Death in Less Than 5 Minutes*, HEALTHLINE (Sep. 9, 2024), www.healthline.com/health-news/tiktok-blackout-challenge [perma.cc/E8N7-TNCY] (describing the dangers posed by the viral Blackout Challenge, with children being particularly susceptible).

⁴³ Complaint, *supra* note 41, at 14.

⁴⁴ *Id.* at 2–3. Understanding the historically broad immunity bestowed by Section 230, Anderson's complaint specifies that it does not seek to hold TikTok "liable as the speaker or publisher of third-party content and instead intends to hold TikTok responsible for their own independent conduct" as knowingly operating a defective product and for acting negligently, thereby falling outside of Section 230 protections. *Id.*

⁴⁵ *Id.* at 14–16. Anderson's complaint lists four other children who died while attempting the Blackout Challenge to demonstrate that TikTok knew its algorithm was promoting dangerous content, arguing that TikTok prioritized corporate profits above the safety of its users and should therefore be liable for its negligent actions despite Section 230. *Id.*

⁴⁶ *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 278 (E.D. Pa. 2022), *rev'd in part, vacated in part*, 116 F.4th 180 (3d Cir. 2024). Although Anderson sought to frame her complaint as negligence and products liability claims distinct from Section 230 immunity, the district court found such "creative[] labeling" unpersuasive. *See id.* at 280 (rejecting Anderson's novel argument). The district court explained that what matters in a Section 230 analysis is not the type of cause of action but whether the claim requires that the defendant be treated as a "publisher or speaker" of third-party content. *Id.* at 279–80. Here, Anderson claims the wrong was in TikTok's actions, yet it is still based on video content created by third parties published by TikTok, thus requiring the court to treat TikTok as a publisher. *See id.* (finding TikTok as immune because it cannot be treated as a publisher under Section 230). The district court also rejected Anderson's failure to warn claim, reasoning that even if TikTok knew about the Blackout Challenge and the harm it was causing, it would still be immune because a failure to warn claim necessitates that the ISP be treated as a publisher. *See id.* at 281 (finding TikTok's failure to warn is inseparably linked to their publishing decisions concerning third-party content).

⁴⁷ *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024).

⁴⁸ *See id.* at 184–85 (reversing and vacating in part and remanding because Section 230 only immunizes an ISP when the content was provided by a third party, whereas here, the content underlying Anderson's claim—TikTok's algorithmic recommendations—is TikTok's expressive product and first-party speech not barred by Section 230).

II. DIFFERING APPROACHES TO RECONSIDERING SECTION 230 IMMUNITY

As social media algorithms have evolved, federal circuit courts have consistently treated them as passive tools that compile and present third-party content, akin to traditional publishing functions.⁴⁹ In 2024, in *Anderson v. TikTok, Inc.*, however, the Third Circuit reconsidered the expressive nature of such algorithms to conclude that they may rise to the level of first-party speech by the platform itself.⁵⁰ Alternatively, Judge Matey's partial dissent in *Anderson* argued for narrowing Section 230 immunity on different grounds, finding distributor liability to be outside of the statute's protections.⁵¹ Section A of this Part discusses how other circuit courts have interpreted Section 230 as immunizing algorithms, as well as barring liability for platforms acting as publishers or distributors.⁵² Section B analyzes the *Anderson* decision and explains why the Third Circuit diverged from the broad consensus among federal circuit courts.⁵³ Finally, Section C examines Judge Matey's argument that Section 230 never immunized distributor liability, with Congress's sole intention being to immunize publisher liability.⁵⁴

⁴⁹ See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (holding that social media algorithms do not amount to developing or creating information pursuant to Section 230 and instead are neutral and consistent with the immunized role of a traditional publisher arranging, sorting, or distributing content); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (holding that the ISP's use of algorithms to analyze and recommend user groups are tools meant to facilitate others' content, not creating content itself); *Marshall's Locksmith Serv. v. Google, LLC*, 925 F.3d 1263, 1270–71 (D.C. Cir. 2019) (holding that an ISP's use of an automated algorithm to recommend scam locksmiths on a map did not make them responsible for third-party information because the algorithm was neutral); *M.P. ex rel. Pinckney v. Meta Platforms, Inc.*, 127 F.4th 516, 526 (4th Cir. 2025) (holding that an algorithm's prioritization of content does not change the successful application of Section 230 immunity because it is still functioning as a publisher editorializing third-party content); cf., e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (noting that the editorial methods employed by a platform are irrelevant to a finding of liability); *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016) (quoting *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014)) (holding that even automated editorial acts are nevertheless within the publisher's traditional function of "deciding whether to publish, withdraw, postpone or alter content"). Circuit courts have found that algorithms are simply an automated version of a publisher's editorial decision-making akin to the traditional actions of a publisher, and such automation does not alter a finding of liability. See, e.g., *Marshall's Locksmith Serv.*, 925 F.3d at 1270–71 (finding defendant's algorithm to consist of automated but neutral editorializing); *M.P.*, 127 F.4th at 526 (finding Facebook's algorithm to be automated editorial decision-making).

⁵⁰ See *Anderson*, 116 F.4th at 184 (holding TikTok's algorithm to be first-party speech and allowing plaintiff's claims to proceed because they are therefore not based only on information "provided by another").

⁵¹ See *id.* at 192 (Matey, J., concurring in part and dissenting in part) (asserting an alternate interpretation of Section 230's definition of "publisher" such that immunity is not imparted to platforms acting as distributors).

⁵² See *infra* notes 55–62 and accompanying text.

⁵³ See *infra* notes 63–71 and accompanying text.

⁵⁴ See *infra* notes 72–83 and accompanying text.

*A. Other Circuits Construe Broad Immunity for
Third-Party Content on Algorithms*

Prior to *Anderson*, courts repeatedly found that algorithms perform the functions of a neutral publisher, not a creator or developer.⁵⁵ Under that reasoning, they do not materially contribute to the content and are not sufficiently expressive to render the platform an “information content provider.”⁵⁶

For example, in 2019, in *Force v. Facebook, Inc.*, the Second Circuit considered whether Facebook’s recommendation algorithms made the platform responsible for developing terrorist content posted by users, thus falling outside of Section 230 protections.⁵⁷ The plaintiffs alleged that Facebook’s algorithm allowed the terrorist organization Hamas to disseminate propaganda and encourage individuals to commit fatal terrorist attacks.⁵⁸ In rejecting this claim, the Second Circuit articulated a “material contribution” test—later adopted by the Fourth, Sixth, and Ninth Circuits—under which an internet platform develops third-party content only if it “directly and ‘materially’ contributed” to the unlawful nature of the content.⁵⁹ This test distinguishes between merely displaying actionable content and actually contributing to what makes the content unlawful.⁶⁰ Applying that standard, the Second Circuit held

⁵⁵ See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (finding the ISP’s algorithm as performing the role of a neutral publisher under Section 230); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (same); *Marshall’s Locksmith Serv. v. Google, LLC*, 925 F.3d 1263, 1270–71 (D.C. Cir. 2019) (same). But see *Moody v. NetChoice, LLC*, 603 U.S. 707, 716–17 (2024) (holding that social media algorithms may constitute a platform’s first-party expressive speech subject to First Amendment protections).

⁵⁶ Compare *Force*, 934 F.3d at 68 (finding that a platform’s algorithm arranging a third party’s harmful content is not “materially contributing” to the unlawful nature of it such that the platform becomes an “information content provider”), with *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014) (finding, in the absence of any algorithms, that a platform is not an “information content provider” when it chooses to publish defamatory content written by a third party because the platform makes no “material contribution” to the defamatory character of the content).

⁵⁷ See *Force*, 934 F.3d at 68 (considering whether Facebook is an “information content provider” such that it is the creator or developer of terrorism-related content in whole or in part).

⁵⁸ See *id.* at 59 (describing plaintiffs’ allegations).

⁵⁹ See *id.* at 68 (applying a “material contribution” test to Facebook’s role in posting third-party terrorist content, asking whether Facebook “materially” and directly contributed to the unlawful nature of that content). The Fourth, Sixth, and Ninth Circuits subsequently adopted a version of this test as well. See, e.g., *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 129 (4th Cir. 2022) (finding that a data website’s decision to alter a third party’s report to create inaccuracies was a material contribution, thereby going beyond the editorial functions of a traditional publisher); *Jones*, 755 F.3d at 413, 415 (adopting the “material contribution” test to find that an ISP that published third-party defamatory statements on a website did not materially contribute to their defamatory nature and was therefore not a developer or creator of that content); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269–70 (9th Cir. 2016) (finding that a review website’s star-rating system did not amount to materially contributing to the creation or development of a third party’s libelous business review).

⁶⁰ See *Force*, 934 F.3d at 68 (describing the difference between displaying and developing third-party content under Section 230); see also *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 176–77 (2d Cir. 2016) (finding that the defendant materially contributed to and developed unlawful third-party

that Facebook’s algorithms functioned as traditional publishing tools that organize and display user content, not create or develop it.⁶¹ Accordingly, Facebook was not an “information content provider” with respect to that content.⁶²

B. Moody Upends the Court’s Interpretation of Algorithms

In *Anderson*, the majority penned only four pages to depart significantly from each of its sister circuits, holding that the operation of TikTok’s algorithm goes beyond the mere hosting of third-party content.⁶³ The court concluded that when TikTok’s algorithm selects and organizes third-party content into a curated feed, TikTok creates an “expressive product” of its own and becomes a provider of first-party speech, thereby constituting activity that falls outside the scope of Section 230 immunity.⁶⁴

Crucial to the court’s departure from conventional algorithmic wisdom was a Supreme Court decision issued one month prior.⁶⁵ In 2024, in *Moody v. NetChoice, LLC*, the United States Supreme Court considered the constitutionality of state laws that imposed restrictions on social media platforms’ content moderation policies, including the curation and promotion of posts.⁶⁶ In *Moody*, the Court addressed a First Amendment facial challenge to Florida and Texas legislation regulating a social media platform’s ability to censor and re-

content by helping to edit the harmful content). Under the Second Circuit’s reasoning, Facebook’s algorithm is neutral and leaves the third-party content materially unaltered by simply matching it to users, thus having no role in developing that content under Section 230. *See Force*, 934 F.3d at 70 (rejecting plaintiffs’ arguments that the Facebook algorithm’s arrangement of third-party content is sufficient to make Facebook responsible as a developer of that content).

⁶¹ *See Force*, 934 F.3d at 70 (finding that Facebook’s algorithm is simply making information available as a traditional publisher would rather than developing that information as an “information content provider”); *see also* M.P. *ex rel.* Pinckney v. Meta Platforms, Inc., 127 F.4th 516, 526 (4th Cir. 2025) (relying on *Force*, finding that an algorithm promoting and suggesting racist, hate-driven content does not change the fact that the ISP’s underlying role is still that of a publisher editorializing content, not that of a creator).

⁶² *See Force*, 934 F.3d at 67–68 (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)) (noting that as long as the published content is willingly provided by a third party, the ISP is afforded complete immunity regardless of the editorial process it implements).

⁶³ *See Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (holding that TikTok is not immune from liability under Section 230 because its algorithm amounted to first-party speech).

⁶⁴ *See id.* (holding that TikTok’s For You Page algorithm is sufficiently expressive in nature as to render TikTok itself as conducting first-party speech without Section 230 protections).

⁶⁵ *See id.* at 183–84 (citing the Supreme Court’s *Moody* decision as support for its view that algorithms may constitute first-party speech). The *Anderson* court also cited Justice Clarence Thomas’s dissent from a denial of certiorari in *Doe v. Snap, Inc.* as support, where Justice Thomas criticizes the suggestion that platforms can retain First Amendment protections when it benefits them yet have the ability to disclaim such treatment when it leads to liability. *See id.* at 184 (citing *Doe v. Snap, Inc.*, 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from the denial of certiorari)) (noting a plain contradiction between the platforms’ desire for free speech protections and their rejection of liability for that same content).

⁶⁶ *See Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024) (addressing First Amendment protections for social media algorithms).

move content based on the user's ideological viewpoint.⁶⁷ Resolving a circuit split, the Court held that an internet platform's content moderation decisions regarding users' third-party speech, such as editorial discretion and the curation of content, can be considered expressive activities protected under the First Amendment.⁶⁸ The Court reasoned that these curations and compilations are analogous to the protected editorial decisions of traditional publishers and should be subject to the same First Amendment protections.⁶⁹ Therefore, state laws that impose restrictions on such content curation infringe on an internet platform's expressive speech.⁷⁰

Relying on *Moody*, the Third Circuit in *Anderson* reasoned that if algorithmic curation of others' content consists of first-party speech within First Amendment jurisprudence, it may likewise be considered first-party speech under the text of Section 230.⁷¹

⁶⁷ See *id.* at 720–21 (describing laws passed in Florida and Texas aiming to regulate social media companies).

⁶⁸ See *id.* at 728 (holding that social media algorithms constitute expressive conduct). Although *Moody* did not address Section 230 liability from suit, the Court similarly found that an algorithmic curation of third-party content retains First Amendment protections because it amounts to expressive editorializing. See *id.* at 716–17 (comparing algorithms to traditional publishers). The Court noted that government restrictions on the editorial choices of traditional publishers and editors have always been subject to First Amendment protections—a principle that should not change simply because the compilation exists in the virtual world. *Id.* at 717.

⁶⁹ See *id.* at 717, 728 (comparing algorithms to publisher activities protected by the First Amendment). This decision can be traced to the Court's so-called "editorial discretion" doctrine, which identifies where the First Amendment should restrict the government's ability to require that private platforms host certain speech. See Kyle Langvardt & Alan Z. Rozenshtein, *Beyond the Editorial Analogy: First Amendment Protections for Platform Content Moderation After Moody v. NetChoice*, 6 J. FREE SPEECH L. 1, 4 (2025) (introducing the "Doctrine of 'Editorial Discretion'"). The Court's majority opinion laid out three principles: (1) the First Amendment is triggered when the government forces expressive entities to host messages they do not want; (2) the First Amendment still applies if most of the expression is accepted with minor exclusions; and (3) interference cannot be justified by the government's argument that it is seeking to enhance or balance the "marketplace of ideas." *Id.* at 17.

⁷⁰ See *Moody*, 603 U.S. at 728 (finding certain social media algorithms as protected by the First Amendment). The *Moody* decision included five opinions, with Justice Elena Kagan writing the majority's First Amendment framework. Langvardt & Rozenshtein, *supra* note 69, at 14. Justice Amy Coney Barrett joined the majority but added a concurrence that raised additional questions regarding First Amendment protections for platforms. *Id.* Justice Ketanji Brown Jackson concurred in part and joined the judgment in part, briefly adding that some of the constitutional questions should have been remanded to the lower court. *Id.* at 14–15. Justices Clarence Thomas, Neil Gorsuch, and Samuel Alito authored a concurrence that essentially rejected the First Amendment reasoning in the majority opinion. *Id.* at 15. Justice Thomas also separately argued against First Amendment facial challenges. *Id.*

⁷¹ See *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (holding that TikTok's For You Page algorithm, as a compilation and curation of third-party speech, is TikTok's own expressive activity).

C. Judge Matey Seeks to Exclude Distributor Liability from Section 230 Immunity

The *Anderson* majority chose not to address the issue of publisher versus distributor liability.⁷² Judge Matey, on the other hand, concurred with the disposition but entered a partial dissent to argue for a reconsideration of Section 230's application of immunity to distributors.⁷³ Judge Matey argued that the language of Section 230 shields far less wrongdoing than the courts have come to recognize because it strictly limits immunity to ICSs being treated as publishers.⁷⁴ Under this view, social media companies that knowingly distribute and recommend videos they know to be harmful would remain open to liability.⁷⁵

⁷² See *id.* (finding that TikTok's liability was not barred by Section 230 because its algorithm constitutes first-party speech).

⁷³ *Id.* at 186. The courts that have read distributor immunity into Section 230 have effectively declared that Congress, not the courts, is responsible for fixing the breadth of Section 230's protections. See Marc Mandich, *Tort and Product-Based Lawsuits Against Social Media Companies—the Legal Landscape*, 45 ALA. ASS'N JUST. J. 72, 75 (2024) (arguing that the judges “dismiss[ing] social media harm” are saying “sorry, take it up with Congress”). Judge Matey's dissent suggests the opposite view—Section 230's deficiencies stem not from statutory text or legislative purpose, but from the courts' sweeping interpretation of who is considered a “publisher or speaker” of another's content. See *id.* (arguing that courts have had a “capacious conception” of Section 230). The statute has not immunized too many ISPs—the courts have derived a broad immunity that immunizes ISPs for *their own conduct*. See *id.* at 75–76 (arguing that Section 230 does not immunize all harm caused by ISPs themselves).

⁷⁴ See *Anderson*, 116 F.4th at 192 (interpreting 47 U.S.C. § 230(c)(1) as only immunizing publisher liability because it is illogical that Congress would invent a new definition of publisher liability that subsumes distributor liability). Judge Matey's concurrence included two primary criticisms of the courts that “blindly” followed the reasoning laid out by *Zeran v. America Online, Inc.*, which he characterized as a kind of judicial complacency that replaces Section 230 analysis with an injurious deference towards precedent. See Mary Graw Leary, *The Failed Experiment of Section 230 of the Communications Decency Act: How It Facilitates Exploitation and How It Must Be Reformed*, 70 VILL. L. REV. 49, 82 (2025) (explaining the critical nature of Judge Matey's concurrence in *Anderson*). First, he argues that TikTok's claim of distributor liability is not supported by Section 230's text nor the historical tradition of common carrier regulations. See *id.* (arguing that TikTok's claim is not supported by Section 230 nor common carrier regulations). Second, he condemns the courts' “near-limitless interpretation” of the breadth of Section 230, accusing them of publishing “cut-and-paste [opinions] copied by courts across the country . . . after the statute arrived.” See *id.* (quoting *Anderson*, 116 F.4th at 190) (arguing that past courts have misinterpreted or failed to properly analyze Section 230) (emphasis omitted).

⁷⁵ See *Anderson*, 116 F.4th at 187 (rejecting the breadth of Section 230 immunity, writing that claims against social media companies are not afforded the boundless immunity the courts have provided them). Judge Matey heavily emphasizes the fact that TikTok knew the Blackout Challenge was causing the death of children and nonetheless continued to allow its algorithmic promotion to users. See *id.* at 193–94 (noting that TikTok knew the Blackout Challenge was spreading on users' feeds, it was being presented to children, and that multiple children had died by attempting the challenge after viewing the video on their For You Page). Therefore, if Congress did not preempt liability for platforms acting as distributors, TikTok cannot escape liability for its knowing promotion of harmful content. See *id.* (concluding that TikTok acted as a distributor and can still be found liable for harmful content it had knowledge of and did not take action to address).

Judge Matey argued that the broad interpretation of Section 230 adopted by *Zeran v. America Online, Inc.* and subsequent courts is inconsistent with the plain meaning of the statute's text, its purpose, and the historical context in which it was enacted.⁷⁶ He explained that Congress enacted Section 230 to overrule *Stratton Oakmont v. Prodigy Services Co.*, which opened up ISPs that editorialize and moderate content to strict publisher liability.⁷⁷ Both *Stratton Oakmont* and *Cubby, Inc. v. CompuServe, Inc.* specifically distinguished between publisher and distributor liability.⁷⁸ Distributors that exercise no editorial control over the platform would only face liability if they were aware of the harmful content, whereas publishers that exercise editorial control would face strict liability for any harmful content on their platform, regardless of their knowledge.⁷⁹

Given that Congress's blunt goal was to overrule these cases, it follows, then, according to Judge Matey, that Congress must have adopted the meaning of "publisher" found within them.⁸⁰ Where the *Zeran* court held that imposing liability on distributors conflicts with Congress's overall goal in passing Section 230, Judge Matey concluded that *Zeran* ignored the ordinary meaning of

⁷⁶ See *id.* at 191–92 (describing the historical backdrop behind Section 230's enactment to demonstrate Congress's intent to immunize only publishers); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (holding that Congress intended for Section 230 immunity to be so broadly construed as to include publisher and distributor liability).

⁷⁷ See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding that ISPs acting as distributors are not liable so long as they were not aware of the harmful content); *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding an internet chatroom liable because it acted as a publisher by exercising editorial control over its content); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008) (comparing *Stratton Oakmont* to the instant case and noting that Congress passed Section 230 specifically to overturn *Stratton Oakmont*). In *Cubby, Inc. v. CompuServe, Inc.*, an online forum was found not liable for defamatory statements posted on its chatroom because it acted as a distributor exercising no editorial control over its platform, similar to a library or newsstand, and it did not know about their defamatory nature. See 776 F. Supp. at 140–41 (finding internet platforms acting as distributors not strictly liable). In *Stratton Oakmont v. Prodigy Services Co.*, an online forum was found strictly liable for defamatory statements posted on its forum because, unlike *Cubby*, it exercised editorial control by monitoring and enforcing guidelines, making it a publisher that would traditionally be found liable for all published content under common carrier law. See *Stratton Oakmont*, 1995 WL 323710, at *5 (finding internet platforms acting as publishers to be strictly liable).

⁷⁸ See *Cubby*, 776 F. Supp. at 140–41 (ruling that internet platforms acting as distributors without knowledge of harmful content on their platform are not liable for such content); *Stratton Oakmont*, 1995 WL 323710, at *5 (ruling that internet platforms acting as publishers exercising editorial control are strictly liable for any harmful content on their platform).

⁷⁹ See *Anderson*, 116 F.4th at 188–89 (Matey, J., concurring in part and dissenting in part) (describing the difference between "publisher" and "distributor" liability for internet platforms prior to the passage of Section 230).

⁸⁰ See *id.* at 192 (concluding that, because Section 230 was passed to overrule *Stratton Oakmont* and *Cubby*, Congress must have adopted the interpretations of "publisher" and "distributor" in those cases).

“publisher” and incorrectly subsumed distributor liability into Section 230 immunity.⁸¹

Under Judge Matey’s interpretation, Section 230 only immunizes the mere hosting of the Blackout Challenge, and any conduct beyond hosting is outside of Section 230’s reach.⁸² Accordingly, Judge Matey concluded that TikTok’s actions as a distributor—hosting Blackout Challenge videos with full knowledge that they were causing the deaths of children *and* recommending those videos it knew to be harmful—are outside of Section 230 protections.⁸³

III. NARROWING SECTION 230 TO ALLOW DISTRIBUTOR LIABILITY

As the burgeoning caseload of social media users suffering real harm or death has blanketed news feeds, there are significant concerns over social media’s role in these tragedies.⁸⁴ Of course, however, commentators are far from

⁸¹ See *id.* (comparing Section 230’s use of “publisher” with the interpretations delineated in *Stratton Oakmont* and *Cubby*). According to Judge Matey, it is illogical to conclude that Congress intended to “silently” mint a new meaning of “publisher” in Section 230 by including distributor liability despite no mention of it in the statute’s text. See *id.* at 191–92 (noting that, at the time of Section 230’s enactment, “publisher” and “distributor” liability were two distinct concepts).

⁸² See *id.* at 192 (noting that 47 U.S.C. § 230(c)(1) does not mention immunity for an internet platform’s actions beyond the hosting of third-party content). Judge Matey asserts that Section 230(c)(2) provides support for this interpretation by enumerating a list of acts that platforms can take without risking liability, implying that acts beyond those are not immunized. See *id.* (citing enumerated acts in § 230(c)(2) that ISPs can take without liability); 47 U.S.C. § 230(c)(2)(A)–(B) (“any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene . . . or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)”).

⁸³ See *Anderson*, 116 F.4th at 194 (Matey, J., concurring in part and dissenting in part) (dissenting from the majority’s interpretation of Section 230 to find that TikTok is liable for harm caused by the Blackout Challenge videos because TikTok acted as a distributor and knew about the harm they posed).

⁸⁴ See Glasper, *supra* note 42 (listing adolescent deaths caused by the Blackout Challenge and how social media may be fueling them). Additionally, there have been numerous studies demonstrating a clear link between social media and rising levels of self-harm, suicide, and depression among adolescent social media users. See, e.g., Aksha M. Memon et al., *The Role of Online Social Networking on Deliberate Self-Harm and Suicidality in Adolescents: A Systematized Review of Literature*, INDIAN J. PSYCHIATRY, Oct.–Dec. 2018, at 384, 384 (reviewing the relationship between social media use and self-harm, suicide, and depression); Jean M. Twenge et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, CLINICAL PSYCH. SCI., Jan. 2018, at 3, 3–4 (examining possible reasons for the increase in adolescent depression and suicide rates, including increased exposure to screens and social media); Abderrahman M. Khalaf, *The Impact of Social Media on the Mental Health of Adolescents and Young Adults: A Systematic Review*, CUREUS, Aug. 5, 2023, at 1, 2–3, www.cureus.com/articles/176889-the-impact-of-social-media-on-the-mental-health-of-adolescents-and-young-adults-a-systematic-review#!/ [perma.cc/BWY2-4HRZ] (analyzing the link between teen depression rates and social media use, with numerous studies finding an increase in loneliness and self-harm). Much of the political discourse surrounding Section 230 reform revolves around amending the statute rather than a change in statutory interpretation given the undesired nature of judicial activism. See *Gonzalez v. Google LLC*, 2 F.4th 871, 896–97 (9th Cir. 2021) (sharing concerns that Section

agreement on what an optimal solution might be.⁸⁵ The Supreme Court has not yet addressed whether social media algorithms could alter liability under Section 230 jurisprudence.⁸⁶ Despite that, the Court's decision in *Moody v. NetChoice, LLC*, finding that algorithms are subject to First Amendment protections, heavily implies that algorithms should be treated differently from traditional internet platforms.⁸⁷ To address this query, Congress must step in to clarify when liability should be imposed on social media companies that knowingly promote harmful content on their algorithms, or, in the absence of congressional action, the Supreme Court should reconsider Section 230's applicability to modern social media companies nearly thirty years after its enactment.⁸⁸ Congress should amend Section 230 to identify "distributor" liability

230's current interpretation is overly broad but finding that it is Congress's role, not the courts, to decide whether or not more regulation is needed), *vacated and remanded*, 598 U.S. 617 (2023) (remanding on other grounds because, in light of new Supreme Court precedent, plaintiffs' complaint likely fails to state a claim); see also Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 B.Y.U. L. REV. 1435, 1448–50 (2022) (describing Section 230 reform proposals).

⁸⁵ See Daisuke Wakabayashi, *Big Tech C.E.O.s Face Lawmakers on Disinformation*, N.Y. TIMES (Mar. 25, 2021), www.nytimes.com/live/2021/03/25/business/social-media-disinformation [perma.cc/5HF2-YA5F] (discussing tech executives' perspectives on Section 230 reforms during testimony to Congress); see also Millicent Ball, Note, *Broken Shields: Holding Social Media Giants Accountable for the Youth Mental Health Crisis*, 66 B.C. L. REV. 1403, 1442–43 (2025) (stating that, although bipartisan discussions of reforming Section 230 are a positive development, Congress and the Supreme Court have been ambivalent as to what specific reforms should be implemented).

⁸⁶ See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 592 U.S. 1013, 1013 (2020) (Thomas, J., concurring in the denial of certiorari) (noting that the Supreme Court has not yet interpreted Section 230 liability). Although *Moody v. NetChoice, LLC* found social media algorithms to be expressive for purposes of First Amendment protections, the Court did not provide any reasoning as to how its decision would affect Section 230 liability. See 603 U.S. 707, 728 (2024) (addressing only First Amendment challenges to two state regulatory laws). That is not to say the Court has never expressed an eagerness to do so—Justice Thomas delivered an impassioned dissent when the Court denied certiorari in *Doe v. Snap, Inc.* because he viewed it as the ideal opportunity to narrow Section 230. See 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from the denial of certiorari) (urging the Court to reconsider the scope of Section 230). Justice Thomas was unequivocal: there should be “no mistake about it—*there is danger in delay.*” *Id.* (emphasis added). *Snap* is a similarly tragic example of a social media platform facilitating the death of a minor, with Snapchat's self-deleting message feature enabling a fifteen-year-old boy's science teacher to groom him for sexual abuse, ultimately resulting in the boy's fatal overdose from prescription drugs provided by that teacher. See *id.* at 2493 (describing the Snapchat user's death). The facts of *Snap* lend support to Justice Thomas's argument that the Court cannot reconcile a platform's status as a purveyor of protected First Amendment speech with its claim to avoid all legal liability for such speech via Section 230. See *id.* at 2494 (pointing to the contradiction between the legal protections that ISPs claim to have while disclaiming any legal risk); see also *Malwarebytes*, 592 U.S. at 1017 (arguing in a denial of certiorari that courts have misconstrued Section 230 immunity, and that some editorial decisions to edit and remove content amount to the platform becoming the creator and developer of such content, thereby barring immunity).

⁸⁷ See *Moody*, 603 U.S. at 716–17 (changing internet First Amendment jurisprudence); *Anderson*, 116 F.4th at 184 (relying on *Moody* to interpret Section 230 as not immunizing algorithms that constitute expressive product).

⁸⁸ See *Doe*, 144 S. Ct. at 2494 (Thomas, J., dissenting from the denial of certiorari) (urging the Court to reconsider Section 230 because of the platforms' continued abuse of its prescribed immunity).

as distinct from the statutorily designated “publisher” liability, and to clarify that internet platforms are immune for the presence of harmful third-party content, but not when their acts or omissions knowingly lead to harm.⁸⁹ Under this framework, although TikTok would be immune for the mere hosting of the Blackout Challenge, claims that seek to hold TikTok liable for its conduct—algorithmically promoting the Blackout Challenge while knowing it led to the deaths of children—would not be barred by Section 230 immunity.⁹⁰

The historical context, statutory construction, and purpose behind Section 230 suggest that it is unlikely Congress intended the breadth of immunity that Section 230 currently confers on all internet platforms.⁹¹ Understanding distributor liability as a subset of publisher liability comes not from the statute but from the Fourth Circuit’s decision in *Zeran v. America Online, Inc.*, which was subsequently adopted nationwide.⁹² This interpretation ignores the legal landscape within which Section 230 was adopted.⁹³ Prior to Section 230, ISP liability was governed by traditional common carrier regulations for publishers and distributors, where publishers that exercised editorial control were held strictly liable, and distributors that merely disseminated information were held liable only if they knew or had reason to know of the harmful content.⁹⁴

This distinction was interpreted in 1991 and 1995 in *Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont v. Prodigy Services Co.*, respectively.⁹⁵ Congress responded just nine months after *Stratton Oakmont*’s 1995 holding in an explicit effort to overturn *Stratton Oakmont*’s decision holding publishers

⁸⁹ See *Anderson v. TikTok, Inc.*, 116 F.4th 180, 192 (3d Cir. 2024) (Matey, J., concurring in part and dissenting in part) (arguing that the proper reading of Section 230 limits immunity to publishers and does not immunize an ISP’s conduct beyond mere hosting).

⁹⁰ See *id.* at 192, 194 (arguing that, in allowing videos it knew to be causing harm to remain on its platform, TikTok’s conduct goes beyond the immunity bestowed by Section 230).

⁹¹ See *Malwarebytes*, 592 U.S. at 1016 (arguing that courts have extended Section 230 immunity beyond what Congress intended).

⁹² See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (subsuming distributor liability into the publisher liability immunized by Section 230); see also *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1028 (Fla. 2001) (Lewis, J., dissenting) (refuting *Zeran*’s reasoning that Congress intended a broad enough shield to immunize every ISP’s posting of third-party content, no matter the circumstances).

⁹³ Compare *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding that internet platforms acting as distributors can only be held liable for third-party content if they knew or had reason to know of its harmful nature), with *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding that internet platforms acting as publishers should be held strictly liable for all third-party content on their platform).

⁹⁴ See *Anderson*, 116 F.4th at 188–89 (describing the distinction between publishers, who are strictly liable for any harmful content on their platform regardless of their knowledge or actions, and distributors, who may only be held liable if they knew or should have known about the harmful content).

⁹⁵ See *Cubby*, 776 F. Supp. at 141 (holding that internet platforms may be subject to distributor liability if they knew or had reason to know of the third-party content’s harmful nature); *Stratton Oakmont*, 1995 WL 323710, at *5 (holding that internet platforms may be strictly liable under publisher liability for all third-party content on their platform).

liable.⁹⁶ Congress's choice to wait until the court decided *Stratton Oakmont* suggests that Congress was not concerned with the status of distributor liability after *Cubby* in 1991, but acted quickly to ensure internet platforms are not held strictly liable as publishers.⁹⁷ This delay, in tandem with Congress's decision to refer only to publishers in the text, signals that Congress never intended to immunize distributors.⁹⁸ Therefore, Congress should amend the statute to conclusively allow plaintiffs to bring claims under a distributor liability theory if they can prove the platform was distributing content it knew to be harmful.⁹⁹

The blanket immunity that presently exists for social media companies whose actions cause harm frustrates the purpose behind Section 230.¹⁰⁰ The primary concern that instigated this legislation was to encourage self-regulation on the internet so that companies could moderate and remove objectionable content, such as the Blackout Challenge and other videos recommending suicidal acts, without fearing liability.¹⁰¹ *Zeran* and the courts that followed it reasoned that Section 230's self-regulatory objective would not be achieved without absolute immunity.¹⁰² In practice, however, this simply allows social media algorithms to endlessly promote objectionable content without any accountability.¹⁰³ Algorithms that sort and recommend the most extreme content

⁹⁶ See *Malwarebytes*, 592 U.S. at 1015 (describing Congress's passage of Section 230 primarily as a direct response to the free speech concerns surrounding *Stratton Oakmont* in 1995).

⁹⁷ See *id.* (describing the legal backdrop behind Section 230's passage); see also *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003) (discussing Congress's concern with the *Stratton Oakmont* decision and its intent to overrule it).

⁹⁸ See 47 U.S.C. § 230(c)(1) (barring courts from treating internet platforms as the "publisher or speaker" of third-party content); *Malwarebytes*, 592 U.S. at 1017 (contending that if Congress intended to immunize publisher and distributor liability, it would have created an absolute immunity for all third-party content on a platform).

⁹⁹ See *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 282 (E.D. Pa. 2022), *rev'd in part, vacated in part*, 116 F.4th 180 (3d Cir. 2024) (asserting that it is Congress's role to determine the "wisdom" of granting such broad immunity to distributors).

¹⁰⁰ See 47 U.S.C. § 230(b) (stating policy goals of Section 230, which include preserving the free market of the internet and encouraging internet platforms to self-regulate and moderate objectionable content on their websites).

¹⁰¹ See *id.* (stating Section 230's policy goals); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (recognizing that one important purpose behind Section 230 was to encourage internet platforms to self-regulate the harmful content on their platforms without fearing tort liability).

¹⁰² See *Zeran*, 129 F.3d at 333 (holding that notice-based distributor liability would discourage platforms from self-regulating their content as Section 230 originally intended); see also *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003) (citing Section 230's goal of removing disincentives for the use of technologies that restrict and moderate harmful content).

¹⁰³ See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53, 70–71 (2d Cir. 2019) (holding that Section 230 provides Facebook with immunity for its algorithmic suggestion of Hamas terrorist videos that encouraged fatal terrorist attacks on U.S. citizens); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1099, 1101 (9th Cir. 2019) (upholding motion to dismiss because Section 230 provides website operator Ultimate Software Group with immunity for its recommendation of user accounts dealing drugs that led to decedent's overdose death, despite inference that Ultimate Software Group may have known its website was being used for drug dealing); *Anderson*, 637 F. Supp. 3d at 282 (holding that

on the basis of achieving maximum engagement—and profit—are a far cry from Section 230’s policy aim of encouraging technologies that empower parents to protect their children.¹⁰⁴ Given that Section 230’s stated goal would align with prompting TikTok to remove the Blackout Challenge, it seems untenable to grant limitless immunity for its decision to continue promoting it.¹⁰⁵

Even under this narrowing of Section 230, ISPs retain significant immunity, dispelling any fears of a chilling effect on free speech created by intrusive government regulation.¹⁰⁶ In addition to avoiding strict liability for content they have no knowledge of, they retain immunity even when their algorithm ultimately causes harm, so long as they made good faith efforts to restrict access to such harmful material.¹⁰⁷ In *Anderson*, TikTok did not merely fail to

Section 230 provides TikTok with immunity for the algorithmic promotion of a video that led to the deaths of multiple children).

¹⁰⁴ See 47 U.S.C. § 230(b)(3)–(4) (stating that one policy goal of Section 230 is “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services . . . [and] to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material”). This distinction could not be clearer than in *Anderson*—rather than encouraging companies to implement controls that prevent videos like the Blackout Challenge from being seen by minors, Section 230 instead provides TikTok with a safe harbor, allowing it to knowingly promote harmful videos in the hopes of securing more user engagement. See 637 F. Supp. 3d at 280 (holding that TikTok was immune for any death resulting from the Blackout Challenge because TikTok did not create the challenge and the algorithm published it). The district court in *Anderson* suggested that it may not be “wis[e]” to confer immunity on TikTok’s actions but nevertheless found that the power to decide otherwise lies with Congress. See *id.* at 282 (“The wisdom of conferring such immunity is something properly taken up with Congress, not the courts.”).

¹⁰⁵ See 47 U.S.C. § 230(b) (stating Section 230’s policy goals).

¹⁰⁶ See *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1027 (Fla. 2001) (Lewis, J., dissenting) (arguing that Section 230 does not chill a platform’s speech rights, but is actually intended to prevent a platform from facing liability for removing objectionable and harmful material, such as pornography); *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (discussing Section 230’s intent to promote free speech and limit any government regulation that could chill such speech); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 592 U.S. 1013, 1020 (2020) (Thomas, J., concurring in the denial of certiorari) (arguing that narrowing Section 230 immunity does not automatically hold defendants liable for online misconduct, and only provides plaintiffs with the opportunity to bring claims without facing immediate dismissal).

¹⁰⁷ See 47 U.S.C. § 230(c)(2)(A) (establishing immunity from civil liability for any good faith actions to restrict users’ access to obscene or otherwise objectionable material). Because Section 230(c)(1) has been construed so broadly, ISPs rarely require the protections afforded by Section 230(c)(2)(A). See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 22–23 (1st Cir. 2016) (upholding a motion to dismiss based on the broad immunity provided by § 230(c)(1) despite plaintiffs claiming § 230(c)(2)(A) should have justified a discovery stage to address the defendant’s good faith removal of content). Were Section 230(c)(1) liability to be narrowed, Section 230(c)(2)(A) provides an independent protection that distinguishes providers who are culpable in knowingly allowing harm to befall users from those who take good faith efforts to restrict content once they learn of the harm it may cause. See *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (finding that § 230(c)(2)(A) acts as a “safety net” by eliminating civil liability for providers who choose to filter out offensive material, thus inducing them to protect user sensibilities); see also *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th

act in good faith—it did the opposite; TikTok knowingly allowed the Blackout Challenge to proliferate on its platform, yet it would have remained immune against wrongful death claims had it made a good faith effort to take the content down once it became aware of it.¹⁰⁸

The Third Circuit's majority in *Anderson* chose an alternate theory to narrow Section 230 by finding TikTok's algorithm to be expressive first-party speech, thereby not covered by Section 230.¹⁰⁹ Although this argument has some logical merit, its practical effect would destroy the goals underlying Section 230—if all algorithms could be considered first-party speech, social media companies would have no option but to eliminate algorithms altogether or heavily regulate them to ensure they are not expressive, thus stifling the unfettered free speech that Section 230 sought to protect.¹¹⁰ The *Anderson* majority's approach also leaves open the question of whether all or some algorithms are first-party speech, placing courts in the difficult position of determining when Section 230 applies based on an algorithm's context-dependent details.¹¹¹ Therefore, amending or reinterpreting Section 230 to allow plaintiffs to bring claims that allege an ISP is acting as a distributor and knowingly promoting content it knows to be harmful is a more measured approach that holds platforms accountable when their conduct leads to harm while also remaining faithful to Congress's original intent to encourage self-regulation and limit government intrusion on free speech.¹¹²

Cir. 2009) (clarifying that § 230(c)(2)(A) protects all providers, even those who do not qualify for immunity under § 230(c)(1)).

¹⁰⁸ See *Barnes*, 570 F.3d at 1105 (finding that § 230(c)(2)(A) protects providers who act in good faith to restrict objectionable material regardless of their immunity under § 230(c)(1)); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 186 (3d Cir. 2024) (Matey, J., concurring in part and dissenting in part) (noting that TikTok knew about the Blackout Challenge's presence on the platform, that children had died while attempting it, and that TikTok still took no action to prevent children from viewing it).

¹⁰⁹ See *Anderson*, 116 F.4th at 184 (holding that TikTok's algorithm is sufficiently expressive as to constitute first-party speech not immunized by Section 230).

¹¹⁰ See 47 U.S.C. § 230(b) (stating Section 230's policy goals, which include preserving the competitive and vibrant internet marketplace unfettered by regulation and promoting the development of the internet); see also *Force v. Facebook, Inc.*, 934 F.3d 53, 83 (2d Cir. 2019) (comparing Facebook's options if algorithms were subject to liability, finding that Facebook would need to either stop using algorithms altogether or heavily monitor its algorithms).

¹¹¹ See *Anderson*, 116 F.4th at 184 (holding that algorithms that curate compilations of third-party content amount to first-party speech under Section 230 without providing the factual characteristics necessary to determine the threshold at which social media compilations become expressive algorithms).

¹¹² See 47 U.S.C. § 230(b) (stating Congress's goal to encourage regulation of objectionable content and promote free speech); see also *Anderson*, 116 F.4th at 191 (Matey, J., concurring in part and dissenting in part) (arguing that Section 230 shields ISPs from the consequences of their actions and allows them to ignore any obligation to prevent their platforms from causing serious harm).

CONCLUSION

In 2024, in *Anderson v. TikTok, Inc.*, a majority of the U.S. Court of Appeals for the Third Circuit held that TikTok was open to liability for the death of a TikTok user, reasoning that social media algorithms can be a sufficiently expressive product as to transform third-party content into TikTok's own first-party speech, thus barring any immunity afforded by Section 230 of the Communications Decency Act. Although this argument has some legal footing, and a reconsideration of Section 230 is long overdue, declaring algorithms to be first-party expressive conduct creates more problems than it solves. Instead, Congress, or, in the absence of congressional action, the Supreme Court, should resolve the existing circuit split by permitting plaintiffs to bring claims under a distributor liability framework while continuing to bar claims under a publisher liability framework. Under Section 230's original meaning, an ISP knowingly promoting harmful content and taking no action to protect users should be held liable for any resulting harm, thus encouraging the self-regulation and promotion of free speech on the internet while also holding ISPs accountable when their intentional actions and inactions harm users.

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