

**REMEMBER THE CINNAMON CHALLENGE? IT’S NOT AS
HARMLESS AS YOU THINK: DISCUSSING THE HIDDEN
DANGERS OF SEEMINGLY HARMLESS CONTENT,
ALGORITHMS, AND SECTION 230 PROTECTIONS**

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INTRODUCTION

Three young men barrel down a road motivated by Snapchat's speed filter, believing they would unlock hidden achievements within Snapchat if they reached a high enough speed. Snapchat's speed filter overlaid a user's captured video, displaying their current speed. Instead of unlocking an achievement, all three lost their lives in pursuit of one.

The parents sued Snapchat. Amazingly, Section 230 of the Communications Decency Act did not immunize Snapchat or bar the parents' claims.¹ This case, *Lemmon v. Snap*, provides an example of how "seemingly harmless content," such as a speed overlay, can create real consequences and highlights the problem that Section 230 often poses for plaintiffs seeking redress.² *Lemmon* is an unusual case because Section 230 did not outright bar the plaintiffs' claims. Plaintiffs seeking to hold social media companies accountable for the harm caused by their platforms face a significant challenge due to Section 230, particularly in cases where seemingly harmless content inflicts harm.

Congress must reform Section 230 to limit its sweeping immunities. Section 230 has allowed large social media platforms to escape accountability for far too long, shutting the doors on plaintiffs seeking justice, even when ostensibly innocuous content inflicts real and devastating harm.

Part I of this Note provides an overview of Section 230 of the Communications Decency Act, outlining its purpose, key provisions, and the entities to which the Act applies. It also evaluates how various courts have interpreted Section 230 and discusses recent cases relevant for future plaintiffs. This Part also delves into the opposition to Section 230 and how it deviates from Congress's original intent at the time of its enactment. Laying the groundwork in this sense is crucial for legal professionals, policymakers, and scholars interested in internet law and Section 230, as it empowers them to shape the future of this important legislation.

Part II first analyzes the challenges that plaintiffs seeking redress face due to the broad interpretation of Section 230 by many courts, as illustrated in *In re Facebook, Inc.*³ A broad interpretation of Section 230 allows social media companies to skirt liability even when the content on their platform—

1. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021).

2. This Note uses the term "seemingly harmless content" primarily to describe online challenges that appear ostensibly harmless but can create unintended physical harm, particularly to minors. See *infra* Part II.B.2 (explaining why the salt and ice challenge is an example of seemingly harmless content).

3. 625 S.W.3d 80, 90 (Tex. 2021).

content that they are aware of—causes grave harm. Plaintiffs with claims relating to objectively harmless content will have a more difficult time having their claims heard with a broad interpretation. Congress is best suited to clarify Section 230’s correct scope of interpretation. This Part then explores how future plaintiffs can best position their legal claims within the current legal landscape surrounding Section 230. Finally, Part II discusses the implications of the Supreme Court’s recent decisions in *Moody v. NetChoice, LLC*⁴ and explores steps plaintiffs can take to avoid having their claims barred by Section 230.

Part III examines why reforming Section 230 is the best solution to realign it with Congress’s original intent in today’s modern internet landscape with the potential plaintiff’s interest at the forefront. This Part first discusses Section 230 and how advances in technology—unforeseeable at the time of enactment—along with broad judicial interpretations, have created challenging conditions for plaintiffs. Next, this Part explores a potential approach to reforming Section 230 for modern times. The approach is modeled after the Florida state law at issue in the Supreme Court’s decision in *Moody*, which hinged a platform’s Section 230 immunities on its annual revenue and monthly users. Afterward, it examines another proposed Section 230 reform, which offers tax credits to platforms that improve their content moderation. While this approach may be insufficient on its own, it could complement other reforms to realign Section 230 and help plaintiffs, especially those harmed by seemingly harmless content, to seek justice and obtain redress.

I. BACKGROUND

This Part provides the necessary background of Section 230 of the Communications Decency Act, covering the Act’s original purpose, how it functions, and how different courts have often broadly interpreted it. It explains the distinction between Sections 230(c)(1) and (c)(2) to show the immense immunities the Act and different courts give social media platforms. This Part also analyzes cases such as *Zango*,⁵ *Zeran*,⁶ *Fair Housing Council of San Fernando Valley*,⁷ *Anderson*,⁸ and *Lemmon*⁹ to

4. 144 S. Ct. 2383 (2024).

5. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

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

7. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

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

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

illustrate how courts have interpreted the Act and the impact it has had on plaintiffs, most often with negative consequences, emphasizing the need for reform.

A. The Purpose of Section 230 of the Communications Decency Act

In 1996, Congress enacted the Communications Decency Act of 1996, codified at 47 U.S.C. § 230.¹⁰ Congress enacted it with the primary aim of fulfilling two policy objectives: (1) “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”¹¹ and (2) “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”¹² Congress focused on these policy objectives to promote the free flow of information while protecting the safety of children.¹³ Congress sought to accomplish these policy objectives primarily through Sections 230(c)(1) and (c)(2).¹⁴

Section 230(c)(1) pertains to the treatment of a publisher and speaker. It states, “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.”¹⁵ Section 230(c)(1) makes an interactive computer service provider liable for content only if it creates or publishes the content itself.¹⁶ Meanwhile, Section 230(c)(2) protects providers from civil liability.¹⁷ It states that no provider or user of an interactive computer service is liable for such things outlined in subsections (A) and (B) of the statute.¹⁸ Subsections (A) and (B) provide,

(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

10. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133.

11. 47 U.S.C. § 230(b)(2) (originally enacted as Pub. L. No. 104-104, 110 Stat. at 138); see 15B AM. JUR. 2D *Computers and the Internet* § 200, Westlaw (database updated May 2026) (explaining the intent and objective of Congress in enacting Section 230).

12. 47 U.S.C. § 230(b)(5) (originally enacted as Pub. L. No. 104-104, 110 Stat. at 138); see 15B AM. JUR. 2D *Computers and the Internet*, *supra* note 11, § 200.

13. 15B AM. JUR. 2D *Computers and the Internet*, *supra* note 11, § 200.

14. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 2 (2024).

15. 47 U.S.C. § 230(c)(1).

16. BRANNON & HOLMES, *supra* note 14, at 2.

17. § 230(c)(2).

18. *Id.*

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 paragraph (1).¹⁹

Section 230(c)(2) incentivizes platforms to act responsibly by filtering out bad content without facing punishment.²⁰ Section 230(c)(2) protects platforms when they moderate content in good faith, while Section 230(c)(1) protects platforms from being held responsible for content posted by their users. Taken together, Sections 230(c)(1) and (c)(2) provide broad immunities for interactive service providers.²¹

Although *Zango* does not pertain to social media platforms, it illustrates the broad immunity that Sections 230(c)(1) and (c)(2) provide together.²² *Zango* was an internet company that provided online videos, games, and utilities to users who agreed to view advertisements while using the internet.²³ Kaspersky is an internet security software distributor that distributes software to filter and block malware.²⁴ Kaspersky's software classified *Zango*'s advertisements as a type of malware.²⁵ Once the software detected malware, it warned users of the potential presence of malware and gave the option to either block the malware or skip the warning.²⁶ *Zango* sued Kaspersky, claiming that the security software wrongfully interfered with user access to *Zango*.²⁷ The software disabled certain features and repeatedly displayed a malware warning whenever users accessed *Zango*, which would inevitably lead users to avoid using *Zango*.²⁸

The court articulated that Section 230(c)(1) did not grant Kaspersky immunity because Kaspersky's software did not host third-party content.²⁹

19. See § 230(c)(2)(A)–(B) (clarifying that “material described in paragraph (1)” is referring to material described in Subsection (A), “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”).

20. BRANNON & HOLMES, *supra* note 14, at 3.

21. *Id.* at 2.

22. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

23. *Id.* at 1170.

24. *Id.* at 1171 (defining malware as malicious software that “can compromise the security and functionality of a computer.” It does so by “compromising a user’s privacy, damaging computer files, stealing identities, or spontaneously opening Internet links to unwanted websites, including pornography sites.”).

25. *Id.*

26. *Id.*

27. *Id.* at 1172.

28. *Id.* at 1171.

29. *Id.* at 1174–75.

Instead, Kaspersky benefited from Section 230(c)(2)(B), which granted immunity to Kaspersky since the software provided a means to restrict access to objectionable material.³⁰ While this particular case is not in the context of social media platforms, it demonstrates the broad immunities of Sections 230(c)(1) and (c)(2) enjoyed by interactive service providers generally, including social media platforms. When one provision does not apply, the other may offer immunity. The two are not mutually exclusive. It is worth noting that up until *Zango*, in 2009, the Ninth Circuit had previously applied Section 230(c)(1) but had never applied Section 230(c)(2).³¹ The court stated, “This is the first time we have considered this particular application of § 230, although we have previously addressed immunity under § 230(c)(1).”³²

This is significant as it indicates or reinforces that when Section 230 is invoked, Section 230(c)(1) is primarily utilized, and Section 230(c)(2) is a backup. The court’s brief discussion of why Section 230(c)(1) did not apply before addressing Section 230(c)(2) supports this.³³ It demonstrates that internet service providers are afforded multiple outs when in litigation. In addition to demonstrating the stacked levels of immunity that providers of interactive computer services are afforded by Section 230, *Zango* helps clarify what qualifies as an interactive computer service, upon which such immunity is contingent.³⁴

The court explained that Kaspersky was a provider of an interactive computer service because Kaspersky was an “access software provider that provides or enables computer access by multiple users to a computer server” under Section 230(f)(2).³⁵ Additionally, it explained that Kaspersky was an “access software provider” since its security software provided “enabling tools that . . . filter, screen, allow, or disallow content” under Sections 230(f)(4) and (f)(4)(A).³⁶ Lastly, the court explained that “under the literal provisions of § 230(f)(2), Kaspersky ‘provides or enables computer access by multiple users to a computer server’ by providing its customers with online access to its update servers.”³⁷ Courts may consider a provider an interactive computer service if it provides software that enables multiple users to access a computer server. This case illustrates the expansive view of

30. *Id.*

31. *Id.* at 1174.

32. *Id.*

33. *Id.* at 1174–75.

34. 47 U.S.C § 230(c)(1), (f)(2).

35. *Zango*, 568 F.3d at 1175 (quoting 47 U.S.C § 230(f)(2)).

36. *Id.* (quoting § 230(f)(4), (f)(4)(A)).

37. *Id.* (quoting § 230(f)(2)).

what constitutes an interactive computer service and how some courts may interpret it—in this instance, the Ninth Circuit.

Section 230(f) also defines the terms “interactive computer service” and “information content provider.”³⁸ The statute defines an “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.”³⁹ 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.”⁴⁰ Courts generally have interpreted an interactive computer service as anything that allows multiple users to access a server that transmits information to them.⁴¹

Based on this interpretation, courts have broadly interpreted “information content providers” to encompass platforms that provide broadband internet access or web hosting services.⁴² Web giants like Google and Facebook fit neatly into this definition. The broad interpretation even extends to physical libraries that provide access to computers.⁴³ Given the expansive scope of the statute, social media platforms fall well within the protections of Section 230.

B. How Courts Have Interpreted and Applied Section 230 to Social Media Platforms

Courts have yet to determine the extent of immunity social media platforms should have under Section 230, resulting in varied interpretations and differing outcomes. To understand the scope of interpretation, it is essential to recognize the typical difference between distributors and publishers. Courts may hold distributors of third-party content liable only if they knew or should have known that the content they are distributing is problematic.⁴⁴ Conversely, a publisher’s liability does not hinge on notice in

38. § 230(f)(2)–(3).

39. § 230(f)(2).

40. § 230(f)(3).

41. BRANNON & HOLMES, *supra* note 14, at 3 (“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.”).

42. *Id.*

43. *Id.*

44. Claudia Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37, § 24 (2011).

the same way distributor liability does, because publisher liability is not dependent on whether they knew content was problematic before dissemination of it.⁴⁵ However, many courts appear to reject the distinction between distributors and publishers, treating the two as the same.⁴⁶ The distinction is crucial to understanding Section 230 fully and how it operates; however, it is more critical to understand how courts have interpreted and applied it.

There is no uniform interpretation of Section 230 when applied to social media platforms and the level of immunity it grants.⁴⁷ A broad interpretation of Section 230 means that claims against a social media platform will be barred even if the platform knew of the offensive or prohibited content.⁴⁸ This broad interpretation requires courts to treat social media platforms as distributors, which, under this interpretation, are considered as a subset of publishers and therefore receive the same immunity from Section 230.⁴⁹ Even if a platform is a distributor and is aware of offensive content, it would be treated as a publisher under Section 230(c)(1) and thus immune from liability. A narrow, more limited interpretation of Section 230 would mean that a social media company would only be liable for third-party content if it had actual knowledge or reason to believe that the content was offensive or prohibited.⁵⁰

45. Compare RESTATEMENT (SECOND) OF TORTS § 581(1) (1977) (stating that a distributor, one who merely “delivers or transmits” content, is liable “if, but only if, he knows or has reason to know” of the problematic content being distributed), with *id.* § 581 cmt. g (stating that original publishers of content are not subject to the “exceptional rule” of notice which distributors benefit from).

46. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (explaining for purposes of defamation law that distributors are considered to be publishers, and stating “Congress has indeed spoken directly to the issue by employing the legally significant term ‘publisher,’ which has traditionally encompassed distributors and original publishers alike.”); *Barrett v. Rosenthal*, 146 P.3d 510, 517 (Cal. 2006) (“Although ‘distributors’ become liable only upon notice, they are nevertheless included in ‘the larger publisher category.’” (quoting *Zeran*, 129 F.3d at 332)); *Doe v. Am. Online, Inc.*, 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998) (“The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.” (quoting *Zeran*, 129 F.3d at 332)); *id.* (“If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message.” (quoting *Zeran*, 129 F.3d at 333)).

47. *Catalano*, *supra* note 44, § 2.

48. Jeff Kosseff, *A User’s Guide to Section 230, and a Legislator’s Guide to Amending It (Or Not)*, 37 BERKELEY TECH. L.J. 757, 776 (2022).

49. *Id.*; see 47 U.S.C. § 230(c)(1) (2018) (stating “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Under a broad interpretation, when a distributor is considered a subset of publisher, the distributor would receive the same immunity under Section 230’s prohibition on treating providers as publishers.

50. See Kosseff, *supra* note 48, at 791–92.

The Fourth Circuit in *Zeran v. America Online, Inc.* demonstrates just what a broad interpretation of Section 230 looks like.⁵¹ This case involved an anonymous post to AOL, advertising the sale of T-shirts showcasing distasteful messages about the 1995 Oklahoma City bombing.⁵² The post directed those interested in purchasing T-shirts to contact Zeran.⁵³ Subsequently, those offended by the T-shirts perpetually harassed Zeran.⁵⁴ Zeran contacted an AOL representative and informed them of the situation.⁵⁵ AOL assured Zeran it would be dealt with.⁵⁶ Instead, more posts continued to be posted, directing attention to Zeran.⁵⁷ Eventually, a local Oklahoma radio broadcaster saw the original post and directed listeners to contact Zeran, at which point his abuse intensified.⁵⁸ Zeran then sued AOL, claiming that once he notified AOL of the defamatory post, they had a duty to remove it and inform users that it was false.⁵⁹ The court refused to hold AOL liable, as Section 230 shielded it from liability⁶⁰.

The court reasoned that if computer service providers, such as AOL, were held liable as distributors, they would face endless liability whenever they received notice of a potentially defamatory message.⁶¹ It would be impractical to thoroughly investigate every report.⁶² Additionally, the court feared that unlimited exposure to liability and the impracticability of investigating every report would incentivize computer service providers to remove posts without conducting an investigation, thereby having a chilling effect on First Amendment speech.⁶³ This is because the incentive to remove posts promptly to avoid liability may discourage internet discourse and negatively impact protected online speech.⁶⁴ In effect, this could deter

51. *Zeran*, 129 F.3d at 331.

52. *Id.* at 329; *see Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited May 17, 2026) (explaining that the Oklahoma City Bombing carried out by Timothy McVeigh on April 19, 1995, when he bombed the Alfred P. Murrah Federal Building with a box truck loaded with explosives, remains the deadliest act of domestic terrorism in the United States, killing 168 people, including 19 children).

53. *Zeran*, 129 F.3d at 329.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 329–30.

60. *Id.* at 332.

61. *Id.* at 333.

62. *Id.*

63. *Id.*

64. *Id.*; *see* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 693 (1978) (“A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not

individuals from posting true—but controversial—statements that are protected speech, just because the message could potentially be deemed defamatory.

In *Zeran*, the court adopted a broad interpretation of Section 230.⁶⁵ Even though AOL was aware of the problematic content on its site, it was not held liable, thereby removing the distinction between distributor and publisher liability. The court stated that Congress intended “publisher” to encompass distributors in Section 230.⁶⁶ While AOL was acting as a distributor of content, it was liable as a publisher, which meant it was immune under Section 230.⁶⁷

Conversely, a prime example of a court adopting a narrow interpretation of Section 230 is *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.⁶⁸ This case involved a website that matched roommates, prompting users to complete an online questionnaire first.⁶⁹ The questionnaire asked sensitive questions like sex, sexual orientation, and if the user had children.⁷⁰ The Fair Housing Council alleged that the website acted as a broker, which it was not permitted to do.⁷¹ The court determined the website was not immune under Section 230 because it had materially contributed to unlawful content by creating a questionnaire that forced users to participate in a discriminatory process.⁷² Upon determining that the website was not immune under Section 230, the court remanded the case to the lower court to determine whether the website violated the Fair Housing Act.⁷³

The Ninth Circuit has boiled down the narrow interpretation in this case to the “material contribution test.”⁷⁴ Under a narrow interpretation, a company is liable under Section 230 if it made a “material contribution” that

specifically directed at that protected activity.”); *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (explaining the ambiguity of the Communications Decency Act’s scope raises First Amendment concerns because it creates uncertainty among speakers about whether they are violating the statute, resulting in an “obvious chilling effect on free speech”).

65. *Zeran*, 129 F.3d at 331.

66. *Id.* at 334.

67. *Id.* at 332.

68. 521 F.3d 1157 (9th Cir. 2008).

69. *Id.* at 1161.

70. *Id.*

71. *Id.* at 1162.

72. *Id.* at 1167–68 (explaining that an entity is deemed to have made a material contribution when it has taken steps to develop the alleged unlawful content, thus making the entity a developer and not immune under Section 230).

73. *Id.* at 1175.

74. Kosseff, *supra* note 48, at 781–82.

has made the content allegedly unlawful.⁷⁵ Under this test, just encouraging the content is not enough and will not be considered a “development” of the alleged unlawful content.⁷⁶ Unfortunately for potential plaintiffs, the narrow interpretation and this test have been used by courts in cases involving Section 230 only rarely.⁷⁷ If more courts adopted a narrow interpretation and the material contribution test, it would be easier to hold social media companies liable because social media platforms would not benefit from the blanket immunity of a broad interpretation. Plaintiffs would also have an opportunity to argue that the social media platform actually made a material contribution to the allegedly unlawful content that, if successful, could remove a platform’s immunity. However, courts generally do not adopt this approach.

Courts have generally adopted the broad interpretation of Section 230, which grants vast immunities to social media platforms for third-party content—that includes *Zeran*.⁷⁸ Over the last 20 years, only 19 out of 500 decisions involving Section 230 relied on Section 230(c)(2),⁷⁹ illustrating the vast immunities created by a broad interpretation of Section 230(c)(1). When Section 230(c)(1) immunity does not apply, Section 230(c)(2) may still apply to provide immunity. Suppose a social media platform is partly involved in creating the content. The platform will be barred from immunity under Section 230(c)(1) in that case.⁸⁰ Section 230(c)(2) may act as a safety net if the platform can show it took action to restrict access to the offensive or prohibited content.⁸¹ Section 230(c)(1) and Section 230(c)(2), combined with the broad interpretation courts have applied to Section 230, have allowed social media platforms to essentially skirt liability.

75. *Id.* at 781; see *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 414–15 (6th Cir. 2014). The Sixth Circuit explained that:

Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA—a concept that is certainly more difficult to define and apply than the Ninth Circuit’s material contribution test. Congress envisioned an uninhibited, robust, and wide-open internet, but the muddiness of an encouragement rule would cloud that vision.

Id. (citations omitted). It is unclear, but it appears that courts do not have a uniform stance on whether encouragement constitutes a material contribution; however, at least the Sixth Circuit has stated that it does not. *Id.*

76. Koseff, *supra* note 48, at 778.

77. *Id.* at 785.

78. *Id.*

79. *Id.* at 779.

80. *Id.* at 783.

81. *Id.*

Two recent critical cases involving the expansion of legal protections for social media platforms are *Moody v. NetChoice*⁸² and *Anderson v. TikTok*.⁸³ *Moody* expanded First Amendment protections for social media platforms.⁸⁴ *Anderson* demonstrated how these added protections from *Moody* intertwine with Section 230.⁸⁵ These cases illustrate the challenges plaintiffs face when bringing a Section 230 claim against social media platforms and offer insight into how future claims involving Section 230 may need to be approached.

1. *Moody v. NetChoice*: Social Media Algorithms and Expressive Activity

The Supreme Court has recently ruled that social media algorithms are protected speech under the First Amendment.⁸⁶ In *Moody v. NetChoice*, a Florida law that limited social media platforms' ability to regulate content on their platform was at issue.⁸⁷ The law limited social media platforms' ability to filter, prioritize, and label user content.⁸⁸ Additionally, the law required social media platforms to provide an individualized explanation to a user if a social media platform removed or altered the user's post.⁸⁹ The law established a threshold based on either a monthly user count of more than 100 million monthly active users or an annual gross revenue of more than \$100 million, which would determine who the law applied to.⁹⁰ This ensured that the law applied only to large social media platforms.⁹¹ The district court entered a preliminary injunction against the state's law.⁹² The Eleventh Circuit upheld the injunction, stating that the restrictions triggered, and were unlikely to withstand, First Amendment heightened scrutiny.⁹³ By contrast, the Fifth Circuit, reviewing a similar Texas law, reversed a preliminary injunction and held that the platforms' content moderation did not constitute protected First Amendment speech.⁹⁴ The state of Florida appealed the Eleventh Circuit's decision and petitioned the Supreme Court for certiorari.

82. 144 S. Ct. 2383 (2024).

83. 116 F.4th 180 (3d Cir. 2024).

84. *Moody*, 144 S. Ct. at 2409. ("First, presenting a curated and 'edited compilation of [third party] speech' is itself protected speech." (alteration in original) (quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 570 (1995))).

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

86. *Moody*, 144 S. Ct. at 2409.

87. *Id.* at 2395.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2396.

93. *Id.*

94. *Id.* at 2388.

The Court granted review to resolve a circuit split between the Fifth and Eleventh Circuits' differing decisions.⁹⁵

NetChoice argued that the challenged state law affected a social media platform's ability to make editorial judgments, choose and display content, and engage in expressive activity—all of which is protected speech.⁹⁶ The Court ultimately remanded the case to the lower appellate courts of Florida and Texas,⁹⁷ stating that the lower courts did not properly analyze the facial First Amendment challenge.⁹⁸ However, the Court noted that social media platforms' curated feeds, which are edited compilations of third-party content, constitute expressive activity and are considered protected First Amendment speech.⁹⁹ Additionally, the Court stated that the government could not be given the power to control the expression of ideas by burdening some and allowing others at its discretion.¹⁰⁰

Moody further highlights the challenges of holding social media platforms accountable. Notably, this decision established that social media platforms' use of algorithms to create a feed is an expressive activity protected under the First Amendment.¹⁰¹ Justice Alito's concurrence, joined by Justices Thomas and Gorsuch, expressed skepticism toward the majority opinion, sensing that social media platforms were given excessive freedom and protection.¹⁰² Justice Alito's concurrence stated that the majority "unreflectively assumes the truth of NetChoice's unsupported assertion that social-media platforms—which use secret algorithms to review and moderate an almost unimaginable quantity of data today—are just as expressive as the newspaper editors who marked up typescripts in blue pencil 50 years ago."¹⁰³ As a result of *Moody*, social media platforms receive significant protection from the courts beyond the Section 230 immunities, making it more difficult for plaintiffs to bring successful challenges.

95. *Id.* at 2397.

96. *Id.*

97. *Id.* at 2384 (noting that the Supreme Court consolidated *NetChoice v. Paxton* with *Moody v. NetChoice*).

98. *Id.* at 2399.

99. *Id.* at 2409.

100. *Id.* ("To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. And that is what the First Amendment protects all of us from.").

101. *Id.*

102. *Id.* at 2422 (Alito, J., concurring).

103. *Id.*

2. *Anderson v. TikTok*: A Post-*Moody* Challenge to Algorithms

Enter *Anderson v. TikTok*: a critical case involving algorithms and Section 230.¹⁰⁴ The issue in *Anderson* revolved around the death of a ten-year-old girl, Nylah Anderson.¹⁰⁵ Anderson attempted the “Blackout Challenge,” a challenge where individuals record themselves choking to the point of blacking out and post the videos to the platform.¹⁰⁶ Tragically, Anderson choked herself to death to replicate the Blackout Challenge.¹⁰⁷ The challenge appeared on her “For You Page,” a curated feed of third-party content on TikTok that uses an algorithm to recommend content based on the user’s interests, age, demographics, and “other metadata.”¹⁰⁸ Anderson’s attempt at the challenge—shown to her through TikTok’s algorithm—resulted in her death.

Anderson’s mother sued TikTok for strict product liability and negligence.¹⁰⁹ She alleged that TikTok was aware of the challenge, “allowed users to post videos” of the challenge, and “recommended and promoted” the video to minors.¹¹⁰ The court held that the Blackout Challenge was protected speech.¹¹¹ The court reiterated that Section 230 only immunizes a social media platform if it is being sued for someone else’s expressive activity and does not immunize the platform if the expressive activity is the platform’s own.¹¹² Anderson’s mother alleged that TikTok’s algorithm constituted expressive activity.¹¹³ However, the Third Circuit cited *Moody*, stating that although the algorithm that recommended the Blackout Challenge was the platform’s own expressive activity, it was protected First Amendment

104. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 181 (3d Cir. 2024).

105. *Id.*

106. *Id.*

107. *Id.* at 182.

108. *Id.*; see generally Annie Badman & Matthew Kosinski, *What is Metadata?*, IBM, <https://www.ibm.com/think/topics/metadata> (last visited May 17, 2026). Badman and Kosinski define metadata as:

[D]ata about data. That is, it provides details about data that is separate from the content of the data itself. For example, a table of recent customer orders constitutes a data set, while information about that data set—such as who owns it or what type of file it is—is the metadata.

Id. (internal quotation marks omitted). Metadata is important and crucial for effectively organizing large swathes of content and data. Metadata generally consists of “the author, creation date, file size and keywords” which attaches to data when it is created. *Id.* Metadata is often attached automatically but can be done manually.

109. *Anderson*, 116 F.4th at 182.

110. *Id.*

111. *Id.* at 184.

112. *Id.* at 183.

113. *Id.*

speech.¹¹⁴ Additionally, the court noted that Section 230 did not bar Anderson's claims.¹¹⁵

This case highlights the difficulty plaintiffs face when trying to hold social media companies liable. Even when a claim such as Anderson's was not barred by Section 230 because it was the platform's own expressive activity, it was still unsuccessful due to *Moody* because such activity constituted protected speech. Judge Matey concurred, stating that Section 230 provides immunity only for hosting third-party content and nothing more.¹¹⁶ Therefore, Anderson's other claims may be successful if he can demonstrate that TikTok knowingly distributed, recommended, and promoted content it knew could cause harm.¹¹⁷ After *Moody*, the bar for holding social media companies liable is exceptionally high, even in cases involving objectively harmful content, such as the Blackout Challenge. Before *Moody*, such a challenge would have had a much higher likelihood of success.

3. *Lemmon v. Snap*: A Case Where a Challenge Survived Section 230

A key takeaway from *Lemmon v. Snap* is that social media platforms are not invincible.¹¹⁸ *Lemmon* is an example of a potentially successful claim involving seemingly harmless content brought against a social media platform. Three young men were traveling in a car at a high rate of speed, with one of them using a Snapchat speed filter to capture their speed.¹¹⁹ To keep users engaged, Snapchat has a reward system that rewards users for the snaps they send with "trophies, streaks, and social recognitions."¹²⁰ Snapchat would not inform users how to unlock these different achievements, leaving them to rely on luck or guesswork to find where an achievement might be hidden.¹²¹ Many Snapchat users believed they would receive an achievement for recording a speed over 100 miles per hour, including the young men in *Lemmon*.¹²²

114. *Id.* at 183–84.

115. *Id.* at 184.

116. *Id.* at 186 (Matey, J., concurring).

117. *Id.*

118. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021).

119. *Id.* at 1088.

120. *Id.* (clarifying that Snapchat works by allowing users to communicate primarily through "snaps": photos and videos that exist only temporarily on the receiver's phone).

121. *Id.*

122. *Id.* at 1089.

The young men pursued the alleged achievement, but the car eventually crashed, and all three men died.¹²³ There was never such an achievement.¹²⁴ The parents sued Snapchat for negligent design, a tort product liability claim.¹²⁵ This claim requires the reviewing court to apply the *risk-utility test*, which asks whether the foreseeable risk of harm outweighs the utility of the product.¹²⁶ Under the risk-utility test, a product is deemed defectively designed if the risks associated with its use outweigh the benefits it offers.¹²⁷ To determine whether the risk of a product outweighs its benefits, courts may consider the product's utility, cost, nature of the alleged defect, its danger, likelihood of causing harm, presence of warnings, and the availability of removing the defect or of a safer alternative design.¹²⁸

The Ninth Circuit did not apply the risk-utility test. Instead, it stated that the plaintiff's claim was not barred by Section 230 because it did not hold Snapchat to be a publisher or speaker, nor did it depend on third-party content.¹²⁹ The court noted that the claim rested on Snapchat's creation of the speed filter and reward system, which encouraged users to attempt dangerous speeds for a reward.¹³⁰ The claim is predicated on Snapchat's own actions: the design.¹³¹ Since the claim was predicated in this way, the court stated, "Because the Parents' claim does not seek to hold Snap responsible as a publisher or speaker, but merely 'seek[s] to hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter,' § 230(c)(1)

123. *Id.* at 1088–89.

124. *Id.*; see WSB Cox, *Judge Orders Snapchat CEO to Answer Questions in 100mph Crash Lawsuit over App's Speed Filter*, YAHOO!NEWS (July 25, 2024), <https://www.yahoo.com/news/judge-orders-snapchat-ceo-answer-012202680.html> (responding to an allegation from litigation involving the speed filter, Snapchat stated: "The complaint filed in this case is not factually accurate. Among other things, Snapchat has never offered in-app trophies or additional points for using the speed filter."). Snapchat's speed filter never had any associated achievements; users only believed it did. *Id.*

125. *Lemmon*, 995 F.3d at 1092.

126. *Id.*

127. 12 JAMES D. HERSCHLEIN, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 127:61, Westlaw (Robert L. Haig ed., 5th ed., database updated Nov. 2025) Herschlein states: Under the risk-utility approach, the determination of whether a product is defectively designed is dependent upon whether the benefits in using the products as designed outweigh the risk of harm associated with the design. Considerations taken into account in this test are the nature and utility of the product to the user; the cost of the product; the nature of the defect and its danger; the likelihood that such harm will occur; the presence or absence of warnings and instructions; the cost of eliminating the danger of the defect; the manufacturer's ability to eliminate the danger without impairing the usefulness of the product; and the availability of an alternative design.

Id.

128. *Id.*

129. *Lemmon*, 995 F.3d at 1093.

130. *Id.*

131. *Id.* at 1094.

immunity is unavailable.”¹³² This reasoning may be useful for future plaintiffs attempting to hold social media companies liable for seemingly harmless content.

This case is significant for demonstrating that a tort product liability claim can successfully overcome the immunity provided by Section 230. To be sure, *Lemmon*, taken with *Anderson*, indicates that it is very difficult for a claim to survive Section 230, especially for a claim involving seemingly harmless content. However, these cases suggest an alternative route for redress: product liability claims. A social media platform user who sustains an injury due to seemingly harmless content may be able to claim the algorithm was defectively designed in the way it promoted the content to a vulnerable population. However, a more effective and practical approach to securing redress would be to reform Section 230, making it easier for plaintiffs to bring claims against social media platforms.

C. *Opposition to Section 230*

Congress enacted Section 230 of the Communications Decency Act in 1996, nearly 30 years ago, during the infancy of the internet.¹³³ Since its formative years, the internet has progressed beyond what Congress could have understood in 1996.¹³⁴ The Communications Decency Act was an early attempt by Congress to regulate the internet.¹³⁵ There is little evidence to suggest that Congress intended Section 230 to extend to technological advances such as algorithms used by social media platforms.¹³⁶ In 1996,

132. *Id.* at 1093 (alteration in original) (emphasis added) (quoting *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 136 (2018)) (explaining that the court ultimately remanded the case to the lower court for further proceedings because the lower court dismissed the case based entirely on Section 230).

133. Nandor F.R. Kiss, *The Twenty-Six Words That Created the Internet . . . and Then Maybe, Kind of, Destroyed Society: Understanding and Reforming Section 230 of the Communications Decency Act*, 31 MICH. TECH. L. REV. 131, 131 (2025). Kiss explains:

In 1996, Congress passed Section 230 of the Communications Decency Act, a twenty-six-word law that immunized early internet companies from civil immunity arising from hosted, third-party content. At the time, the law was necessary to allow fledging companies to innovate without fear of bankruptcy-inducing lawsuits and ultimately helped to create the internet as we know it. To the extent this civil immunity has contributed to the vast technological advances over the past three decades, it should be lauded.

Id.

134. Allison Zakon, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1108, 1120 (2020).

135. Tyler Lisea, *Lemmon Leads the Way to Algorithm Liability: Navigating the Internet Immunity Labyrinth*, 50 PEPP. L. REV. 785, 788 (2023).

136. Haley Bernstein, *Reconciling Section 230 and the First Amendment: Should Social Media Companies be Held Liable for the Consequences of Their Recommendation Algorithms?*, 19 J. BUS. & TECH. L. 373, 385 (2024).

Congress enacted Section 230 to encourage moderation of online obscenity and protect small startup companies from litigation that could financially cripple them.¹³⁷

At the time, Congress couldn't have predicted social media giants like Google or Facebook, which are now trillion-dollar companies.¹³⁸ Section 230 would have protected these companies when they were small; however, such companies no longer require the same extensive protections as they now have sufficient revenue to defend against litigation when necessary.¹³⁹ Those in favor of reforming or repealing Section 230 argue that diluting Section 230 protections would require social media platforms to be more vigilant in monitoring the content they promote, thereby incentivizing them to avoid promoting harmful content for the sake of engagement and profit.¹⁴⁰ If social media platforms do not benefit from the protections of Section 230, they would be more apt to prevent litigation in the first place by ensuring their content is adequately moderated and more aware of who it is directed towards.

II. HOLDING SOCIAL MEDIA COMPANIES LIABLE: A PLAINTIFF'S PLAYBOOK

Social media platforms' algorithm-driven content feeds promote and direct seemingly harmless content to youths, creating the potential for physical harm. Yet Section 230 of the Communications Decency Act wrongfully shields them from liability. To correct this, Congress should reform Section 230 to peel back the strong immunities that social media platforms benefit from, making it easier for plaintiffs injured by seemingly harmless content to seek redress.

A. Congress Is Best Suited to Clarify the Scope of Section 230

To bring a successful Section 230 claim, plaintiffs must surmount an exceedingly high bar. Many courts' broad interpretation of Section 230 makes it extremely difficult for claims involving seemingly harmless content

137. *Id.*

138. *Id.*; see *Meta Platforms, Inc. (META)*, YAHOO!FINANCE, <https://finance.yahoo.com/quote/META/> (last visited May 17, 2026) (demonstrating that as of May 17, 2026, Facebook's market capitalization was \$1.559 trillion); *Alphabet Inc. (GOOG)*, YAHOO!FINANCE, <https://finance.yahoo.com/quote/GOOG/> (last visited May 17, 2026) (demonstrating that as of May 17, 2026, Google's market capitalization was \$4.765 trillion).

139. Bernstein, *supra* note 136, at 386.

140. Zakon, *supra* note 134, at 1108, 1110.

to survive even though the claim may involve serious harm.¹⁴¹ This leads to a twofold effect. First, it makes it difficult for plaintiffs' claims to survive Section 230. Second, the difficulty in surviving Section 230 has a chilling effect on plaintiffs who may want to bring a claim.¹⁴²

Many courts' unwillingness to interpret Section 230 more narrowly is crushing potential claims, especially those involving seemingly harmless content.¹⁴³ It means that Section 230 will bar a plaintiff's claims against a social media platform, even if the platform was aware of the harmful content leading to the claim and took no action.¹⁴⁴ This requires a court to treat a social media platform—normally acting as a distributor of content—as a publisher, thereby affording the lesser liability of a publisher. The Supreme Court's recent denial of certiorari and Justice Thomas's accompanying statement in *Doe v. Facebook* stemming from the facts of *In re Facebook, Inc.* demonstrate the judicial lean to interpret Section 230 broadly. This broad interpretation grants social media platforms immunity regardless of the harm a plaintiff has sustained.¹⁴⁵ However, Justice Thomas remains skeptical of an expansive interpretation.¹⁴⁶

In the case of *In re Facebook, Inc.*, a male sexual predator used Facebook to lure a 15-year-old girl to a meeting where she was then beaten, raped repeatedly, and trafficked for sex.¹⁴⁷ After she escaped, the predator continued to use the girl's online profile to lure other minors; the mother of the girl reported this activity to Facebook, but Facebook never responded.¹⁴⁸ The plaintiffs brought various claims against Facebook, including negligence, gross negligence, negligent undertaking, and a sex trafficking claim under a Texas statute.¹⁴⁹

141. See discussion *supra* Part I.

142. See *Zeran v. Am. Online, Inc.*, 129 F.3d 331, 331 (4th Cir. 1997); cases cited *supra* note 64.

143. See Kosseff, *supra* note 48, at 773–79 (discussing the predominantly broad interpretation of Section 230 adopted by reviewing courts, which has shielded platforms from most claims brought under the Act).

144. *Id.* at 774.

145. *In re Facebook, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (“Federal and state courts have uniformly held that section 230 ‘should be construed broadly in favor of immunity.’” (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019))).

146. *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (statement of J. Thomas respecting denial of certiorari) (clarifying that the Texas Supreme Court in *In re Facebook* applied a broad interpretation immunizing Facebook, but Justice Thomas's statement in *Doe v. Facebook* expresses skepticism about such expansive immunity). *Doe v. Facebook* was issued in 2022, but Justice Thomas still expressed similar skepticism of Section 230 in *Moody*, issued in 2024. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2421 (2024) (Thomas, J., concurring).

147. *In re Facebook*, 625 S.W.3d at 84.

148. *Id.*

149. *Id.* at 83.

The plaintiffs based their common law claims on Facebook's failure to satisfy its duty of care to its users by failing to implement safeguards to prevent adults from contacting minors.¹⁵⁰ The district court determined that all common law claims were barred under Section 230.¹⁵¹ The court barred them by adopting a broad interpretation of Section 230, treating social media platforms as publishers of third-party content.¹⁵² This interpretation allows Section 230 to bar any claim against a social media platform that originates from third-party content.¹⁵³ However, Section 230 did not bar the sex-trafficking claim due to the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA).¹⁵⁴ FOSTA made clear that Section 230 should not be construed to bar certain sex trafficking-related causes of action.¹⁵⁵

The Supreme Court denied the plaintiff's writ of certiorari, and Justice Thomas issued the statement of denial.¹⁵⁶ Justice Thomas acknowledged that courts have granted extensive immunity to social media platforms such as Facebook.¹⁵⁷ He further noted that, in this case, Facebook received immunity even though it was aware of its platform being used to facilitate trafficking.¹⁵⁸ Moreover, Facebook did not take reasonable steps to mitigate the issue, as doing so would have cost the company users and the ad revenue generated by those users.¹⁵⁹ Significantly, Justice Thomas noted that it is challenging to fathom why Section 230's third-party content immunities should extend to Facebook's own acts and omissions.¹⁶⁰ He also emphasized that Congress should address the correct scope of Section 230 and that this was not the appropriate case to attempt to determine the proper scope of Section 230.¹⁶¹

This Note remains focused on addressing seemingly harmless content that injures individuals and discussing avenues by which such individuals may be able to bring a claim past Section 230. Yet *In re Facebook, Inc.* illustrates well the judiciary's broad interpretation of Section 230 and how it will bar almost any claim, regardless of how heinous. In *In re Facebook, Inc.*,

150. *Id.* at 93.

151. *Id.*

152. *Id.* at 90.

153. *Id.*

154. *Id.* at 99.

155. *Id.* at 100.

156. *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1087 (2022) (statement of J. Thomas respecting denial of certiorari).

157. *Id.* at 1088.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

which involved claims seeking redress for serious harm caused by third-party content that Facebook was aware of, the court was still unwilling to hold the social media company liable. Additionally, only because of a separate act did the sex trafficking claim survive.

It is clear to see the issue this would pose to plaintiffs attempting to bring claims for injuries stemming from third-party content that seemed harmless. That is, courts are unwilling to hold social media companies liable for objectively harmful third-party content. It is difficult to see why they would extend liability to objectively harmless content. The broad immunities that bar many claims relating to objectively harmful third-party content have likely discouraged many from bringing similar claims that would be actionable if not for Section 230.¹⁶² Likewise, individuals with claims stemming from objectively harmless content are also likely deterred from even bringing a claim, given the judicial landscape related to Section 230. However, Justice Thomas signaled a shift in the judicial tide toward a narrower interpretation that would provide plaintiffs with a better chance of succeeding in holding social media companies liable.¹⁶³

In Justice Thomas's denial of certiorari, he acknowledged the Court's broad interpretation of Section 230 as problematic, as it grants social media platforms too much immunity. He noted that it should only be resolved once an appropriate case is before the Court to decide on the issue or once Congress steps in to clarify the correct scope of Section 230.¹⁶⁴ However, it is uncertain when an appropriate case to decide the issue will come before the Court, especially given the discouraging nature of the judicial landscape for plaintiffs' claims. This is consistent with Justice Thomas's posture in *Moody*, where he and Justice Gorsuch joined Justice Alito's concurrence.

The concurrence expressed concerns that the *Moody* decision had given social media platforms excessive freedom and protection.¹⁶⁵ Justice Thomas's statement accompanying the denial of certiorari in *In re Facebook, Inc.* and Justice Alito's *Moody* concurrence signal that the justices on the Court have recognized that social media platforms have been granted excessive immunity. This furthers the difficulty plaintiffs will face in bringing a successful claim stemming from objectively harmless content. Congress should be the arbiter of the correct scope of Section 230. Still, until

162. Stanley M. Bensen & Philip L. Verveer, *Section 230 and the Problem of Social Cost*, 30 J.L. & POL'Y 68, 120 (2021).

163. *Doe*, 142 S. Ct. at 1089 (statement of J. Thomas respecting denial of certiorari).

164. *Id.* at 1088.

165. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2422 (2024) (Thomas, J., concurring) ("The holding in these cases is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta.").

an appropriate case reaches the Court to decide the proper scope of Section 230, plaintiffs are left to grapple with the broad interpretation of Section 230. *Anderson v. TikTok* illustrates the difficulty plaintiffs face. *Anderson* is a post-*Moody* challenge that clarifies what a future plaintiff may have to do to bring a successful claim past Section 230 in the wake of *Moody*.

B. A Future Plaintiff's Posture for Potential Success with a Broad Interpretation of Section 230

Given the broad interpretation of Section 230 that many courts have adopted, as well as *Moody*, which afforded social media platforms additional protection beyond Section 230, the most suitable approach for plaintiffs is to bring a product liability claim. Plaintiffs' claims against social media platforms stemming from objectively harmless third-party content will likely struggle to survive Section 230 immunity, as courts have barred many claims related to harmful content. Plaintiffs with claims arising from seemingly harmless content have a lesser chance of success than those with claims arising from harmful content. Still, they may be able to succeed based on a product liability claim, similar to those presented in *Anderson* and *Lemmon*.

In *Anderson*, the plaintiff brought claims of negligence and strict product liability against TikTok.¹⁶⁶ While Section 230 did not bar the claims, they failed under *Moody*, as the Court stated that TikTok's algorithm constituted expressive activity and was thus protected under the First Amendment.¹⁶⁷ For a plaintiff's claim stemming from objectively harmless third-party content, they must pass two barriers: (1) *Moody*'s classification of algorithms as the platform's own expressive activity protected by the First Amendment; and (2) Section 230. Getting past *Moody* may be possible because the court in *Anderson* appears to have oversimplified the application of *Moody*. The court in *Anderson* reasoned that TikTok's algorithm compiles third-party content; therefore, it is expressive activity and is protected First Amendment speech.¹⁶⁸

However, *Moody*'s concurrences state that not all compilations of third-party content qualify as expressive activity deserving of First Amendment protection.¹⁶⁹ There is hope that the concurrences will kickstart plaintiffs' claims to progress past *Moody*.

166. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 182 (3d Cir. 2024).

167. *Id.* at 184.

168. *Id.* at 183.

169. *Moody*, 144 S. Ct. at 2430. The Court explains that:

Because not all compilers express a message of their own, not all compilations are protected by the First Amendment. Instead, the First Amendment protects only those compilations that are "inherently

1. A Plaintiff's Stance to First Survive *Moody*

The concurrences in *Moody* suggest that the application of the majority opinion may be more nuanced than it appears. First, in Justice Thomas's concurrence, he raised an issue with the majority's failure to consider the full range of applications an algorithm may have on a platform, instead basing the opinion on two specific examples: Facebook's newsfeed and YouTube's homepage.¹⁷⁰ This issue is particularly important in light of Justice Alito's concurrence, joined by Justices Thomas and Gorsuch. Justice Alito stated that since "not all compilers express a message of their own, not all compilations are protected by the First Amendment."¹⁷¹

Additionally, the First Amendment only protects inherently expressive compilations, which means that the compiler selects third-party content to spread the compiler's own message.¹⁷² Most importantly, Justice Alito stated that not all compilers compile third-party content in an inherently expressive way and that "[s]ome may serve as 'passive receptacle[s]' of third-party speech or as 'dumb pipes . . .'"¹⁷³ These kinds of compilers do not deserve First Amendment protection. The concurrence first provides the example of an inherently expressive compiler: an editor's select compilation of poems that express their view of poets.¹⁷⁴ Then, the concurrence offers a counterexample: a head of a neighborhood group who compiles residents' contact information.¹⁷⁵ The latter is not a meaningful expression of the compiler.¹⁷⁶ Platforms such as TikTok, which utilize an algorithm to make editorial decisions, should not be considered inherently expressive; instead, they function as a "dumb pipe" and are therefore not entitled to First Amendment protections.

expressive" in their own right, meaning that they select and present speech created by other persons in order "to spread [the compiler's] own message."

Id. (alteration in original) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)).

170. *Id.* at 2412 (Thomas, J., concurring).

171. *Id.* at 2430 (Alito, J., concurring).

172. *Id.*

173. *Id.* at 2431 (alteration in original). Justice Alito clarified that a "dumb pipe" in the context of social media platforms is one that acts as a passive receptacle regurgitating content it is fed by users for other users to view with the platform not conveying a message of their own by showing one user's content to another user. *Id.* This is in contrast to Facebook or YouTube, which attempted to convey a message of their own by specifically showing one user's content to another to convey a specific message or set of beliefs or values. *Id.* at 2403–06 (majority opinion).

174. *Id.* at 2430 (Alito, J., concurring).

175. *Id.*

176. *Id.*

One may argue that TikTok is fundamentally different from the platforms in *Moody* because it generally lacks an inherently expressive message of its own, which it tries to convey through its algorithm and compilation of third-party content. It is more akin to a “dumb pipe,”¹⁷⁷ thus not inherently expressive and not protected by the First Amendment. The majority in *Moody* articulated that social media platforms’ curated feeds consist of third-party content, but the greater message, conveyed through the compilation of particular content by algorithms, is the platform’s own message.¹⁷⁸ They state, importantly, that the choices on what to display “rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality.”¹⁷⁹ The majority had an issue with the way the state laws attempted to manipulate the platforms “to create a different expressive product, communicating different values and priorities.”¹⁸⁰ Facebook’s newsfeed and YouTube’s homepage both displayed a set of values through the curation of content to present a particularly trustworthy feed in accordance with their guidelines and standards.¹⁸¹ The content displayed on users’ feeds may also be influenced by a user’s interests and past activities; however, that is not the only factor that drives an algorithm’s curation on these platforms.¹⁸²

Conversely, TikTok appears to lack any message of its own that it is attempting to display through the aggregation of third-party content. TikTok’s algorithm appears to compile information solely driven by users’ behavior without advancing its own inherently expressive message. TikTok’s lack of value-driven compilation becomes evident from the name of its user feed, which is called the “For You Page,” and the themes on which TikTok bases its community guidelines. Its community guidelines, which dictate curation, are based on themes of balancing harm prevention and expression, embracing human dignity, and ensuring their actions are fair.¹⁸³ However, it is unclear from these guidelines what message of its own TikTok is trying to convey.¹⁸⁴

It seems that TikTok attempts to create a general space where users can share their own messages, devoid of TikTok’s own message, by compiling

177. *Id.* at 2431.

178. *Id.* at 2405 (majority opinion).

179. *Id.*

180. *Id.* at 2408.

181. *Id.* at 2403.

182. *Id.*

183. *Community Principles*, TIKTOK (Aug. 14, 2025), <https://www.tiktok.com/community-guidelines/en/community-principles>.

184. *Id.*

users' content. TikTok's vague mission statement further reinforces this: "Our mission is to inspire creativity and bring joy."¹⁸⁵ Inspiring creativity and joy is not an inherently expressive message of TikTok's own that it can express through its compilation of third-party content. Its mission statement is more of an aspiration that users bring creativity and joy to the platform through their content rather than TikTok's curation of content that conveys creativity and joy in itself. It is devoid of an articulable set of beliefs or values. Contrast this with Facebook's newsfeed or YouTube's homepage, which the Court assessed as possessing certain values that guided its content curation to convey an inherently expressive message of its own, conducive to a newsfeed or homepage.¹⁸⁶

For example, Facebook's mission statement is "to give people the power to build community and bring the world closer together."¹⁸⁷ This mission statement embodies values and beliefs that Facebook can articulate and promote through its curated content, such as fostering community and empowering communities. Facebook itself supports this as it provides various examples of how it has utilized its site's content to support its mission statement. Facebook stated, "When data is shared responsibly with communities that need it most, it can improve well-being and save lives. For example, the results of our COVID-19 symptom survey have enabled us to share symptom maps and predict disease spread, helping health researchers track and combat the coronavirus (COVID-19) pandemic."¹⁸⁸ Similarly, Facebook provides instances where Facebook's content sharing has supported Black and diverse communities, small businesses, and the news industry by making news more accessible.¹⁸⁹ Facebook has a value-driven mission statement that is reflected in its content compilation. This is in stark contrast to TikTok's valueless mission statement and endless stream of content, which lacks any aggregated message of its own; it is not an inherently expressive use of an algorithm.

Moody poses an additional barrier for plaintiffs bringing claims stemming from seemingly harmless content by classifying a social media

185. *About*, TIKTOK, <https://www.tiktok.com/about?lang=en> (last visited May 17, 2026).

186. *Moody*, 144 S. Ct. at 2403–06 (2024) (explaining that social media platforms implement community standards through algorithms that prefer certain content and disfavor other content based on the values within those standards). The majority also stated that the use of an algorithm deciding to prefer and disfavor certain content based on the platform's set of values is what gives the platform a "particular expressive quality." *Id.* at 2405.

187. *Connecting People and Building Community on Facebook*, FACEBOOK <https://www.facebook.com/government-nonprofits/blog/connecting-people-and-building-community-on-facebook> (last visited May 17, 2026).

188. *Id.*

189. *Id.*

platform's use of an algorithm to make editorial decisions as an expressive activity protected by the First Amendment.¹⁹⁰ The court in *Anderson* demonstrates this by oversimplifying the application of *Moody*, which appears more nuanced than the court suggested.¹⁹¹ The concurrence's skepticism of the majority opinion's broadness provides an avenue for plaintiffs to argue that the algorithm will receive protection only if it conveys an inherently expressive message of the platform's own.¹⁹² Plaintiffs may still be able to bring claims against a social media platform's algorithm if they can demonstrate that the platform's use of an algorithm does not convey an inherently expressive message of its own,¹⁹³ as TikTok has shown. If a plaintiff successfully demonstrates that a platform's algorithm is not inherently expressive and thus not protected under the First Amendment, they still have to deal with Section 230.

2. The Second Step for Plaintiffs: Surviving Section 230

Even if a plaintiff can avoid First Amendment protections under *Moody*, the plaintiff's claim still needs to survive Section 230 to be successful. A plaintiff may be able to do this through a product liability claim because it can survive Section 230 and be successful. In *Anderson*, *Moody* blocked the claims, including a product liability claim.¹⁹⁴ However, the concurrence noted that Section 230 provided immunity from suits based on third-party content but did not shield TikTok from suits based on its own actions.¹⁹⁵ Section 230 would not block *Anderson*'s product liability claim.¹⁹⁶ Such a claim may be successful if a plaintiff can demonstrate that the platform knowingly distributed content through targeted recommendations that it knew could cause harm.¹⁹⁷ This is where *Lemmon* comes in to explain how a

190. *Moody*, 144 S. Ct. at 2409.

191. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (explaining that the court classified TikTok's recommendation of the Blackout Challenge as expressive activity deserving of First Amendment protections under *Moody*). However, the court does not engage in the value or belief analysis that *Moody* did for Facebook and YouTube when the Court classified their algorithm use as First Amendment-protected expressive activity. *Moody*, 144 S. Ct. at 2405–06 (explaining the values and beliefs Facebook and YouTube attempt to convey through their content compilation). Nor does the court analyze whether the recommendation was a part of TikTok's own inherently expressive message that Justice Alito's concurrence states is necessary to receive First Amendment protections. *Id.* at 2431 (Alito, J., concurring) (stating only those platforms that convey their own inherently expressive message through their compilation of content are deserving of First Amendment protections).

192. *Anderson*, 116 F.4th at 183.

193. *Moody*, 144 S. Ct. at 2431 (Alito, J., concurring).

194. *Anderson*, 116 F.4th at 184–85; see *supra* text accompanying notes 109–15.

195. *Id.* at 186.

196. *Id.* at 193.

197. *Id.*

successful product liability claim may work for plaintiffs bringing claims stemming from seemingly harmless content.

Lemmon is a prime example of plaintiffs piercing a social media platform's immunity under Section 230 for seemingly harmless content through a product liability claim.¹⁹⁸ Though Snapchat's speed filter, which was the focus of this case,¹⁹⁹ fundamentally differs from a platform's use of an algorithm that makes targeted recommendations, *Lemmon*'s reasoning can be extended to algorithms. The court reasoned that this claim was based on the idea that "manufacturers have a 'duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public.'"²⁰⁰ Thus, the fundamental analysis for holding a manufacturer liable is "whether a reasonable person would conclude that 'the reasonably foreseeable harm' of a product, manufactured in accordance with its design, 'outweigh[s] the utility of the product.'"²⁰¹ More broadly, this is known as the risk-utility test, which determines whether a reasonable person would consider a product's foreseeable risk of harm to outweigh its utility.²⁰² The court notes that a manufacturer's duty of care requires the manufacturer to foresee all reasonable uses and misuses of its product, as well as the consequential, foreseeable dangers.²⁰³ A claim like this will be the best way for plaintiffs bringing claims stemming from harmless content to demonstrate that certain algorithms fail the risk-utility test and to hold social media companies liable.

A plaintiff may be able to show that a social media platform fails the risk-utility test by pointing to specific defects in the design of the algorithm.²⁰⁴ One such defect that could be utilized is *inattentional blindness*, which "occurs when developers design a system to focus on a specific goal, such as time spent or engagement, and overlook equally essential features like user wellbeing."²⁰⁵ The danger with a defect like inattentional blindness is that manufacturers will prioritize user engagement and time spent on the app through targeted recommendations that increasingly narrow content to maintain a user's attention without regard for other risks.²⁰⁶ Interestingly, multiple investigations have revealed that TikTok systematically displays

198. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021).

199. *Id.* at 1088.

200. *Id.* at 1092 (quoting LEWIS BASS, PRODS. LIAB.: DESIGN & MFG. DEFECTS § 2.5 (2d ed., 2020)).

201. *Id.* (alteration in original).

202. *Id.*; see HERSCHLEIN, *supra* note 127, § 127:61.

203. *Lemmon*, 995 F.3d at 1092.

204. Zakon, *supra* note 134, at 1129.

205. *Id.* at 1128.

206. *Id.* at 1129.

extreme content to vulnerable teenage accounts, primarily to maintain user attention and engagement, which drives profit.²⁰⁷ In 2022, major social media companies generated approximately \$11 billion in ad revenue from U.S. children aged 0 to 17 years old.²⁰⁸

To prevail on a claim of inattentive blindness, a plaintiff needs to show that the social media platform could have avoided the defect and dangers it poses if a reasonable design alternative existed that the manufacturer did not adopt.²⁰⁹ In cases where plaintiffs bring claims for seemingly harmless content, the outcome will depend heavily on the specific facts and whether an alternative design could have reasonably prevented whatever harm was caused. However, when it comes to seemingly harmless challenges, such as the “Cinnamon Challenge”²¹⁰ or “Planking,”²¹¹ a social media platform could adopt an algorithm that refuses to recommend such content entirely but does not block a user from searching for it. This way, such challenges are less likely to reach those users—such as minors—most likely to be influenced to replicate them and face potential injury.

A plaintiff would then need to show that the reasonable alternative design’s burdens do not outweigh the safety benefits to users.²¹² A plaintiff

207. Nancy Costello et al., *Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-Level Policy Action to Protect Youth from the Dangers of Social Media*, 49 AM. J.L. & MED. 135, 136–37 (2023).

208. *Id.* at 137.

209. Zakon, *supra* note 134, at 1130.

210. See, e.g., Anand N. Bosmia & Kevin J. Leon, *Lung Injury and the Cinnamon Challenge: College Students Should Beware This Internet Dare*, 7 J. INJ. & VIOLENCE RSCH. 41, 41 (2015) (explaining that the cinnamon challenge consisted of an individual consuming one tablespoon of cinnamon powder within one minute without drinking any liquids). The issue is that “cinnamon is a caustic powder composed of cellulose fibers, which neither dissolve nor biodegrade in the lungs. The powder quickly dries out the mouth, which makes swallowing the powder very difficult.” *Id.* This can lead to irritation of the mouth, nose, throat, and lungs and can lead to respiratory complications, especially for those with pre-existing conditions. *Id.*; see also Amelia Grant-Alfieri et al., *Ingesting and Aspirating Dry Cinnamon by Children and Adolescents: The “Cinnamon Challenge”*, 131 PEDIATRICS 833, 833–34 (2013) (explaining that “there were 51,100 YouTube clips depicting the Cinnamon Challenge. One video was viewed >19 million times, predominantly by 13- to 24-year-olds, ages similar to people taking the Cinnamon Challenge and associated with the greatest need for conformity.”). Attempts of the challenge have led to calls to poison centers, emergency room visits, hospitalizations, and use of ventilators for those who suffered a collapsed lung as a result. *Id.* at 833.

211. See Stefania Barbieri et al., *Planking or the “Lying-Down Game:” Two Case Reports*, 6 INTERACT. J. MED. RSCH. e4 (2017) (explaining that planking consisted of individuals lying face down stiff like a board of wood). The challenge encouraged and influenced primarily adolescents to perform this act in more extreme or obscure locations in hopes of impressing peers by their funny, creative, or unusual location. *Id.* This can lead to unintended or unforeseen injuries; a 17-year-old who attempted the challenge suffered severe injury from a fall, with hospital bills costing about \$37,440. *Id.* An 18-year-old injured in a similar manner had hospital bills costing about \$27,380, demonstrating that such a simple act can lead to costly consequences. *Id.*

212. Zakon, *supra* note 134, at 1130–31.

could do this by articulating that such an alternative design does not impose a significant burden on anyone or limit access to content. This would improve safety by preventing an algorithm from taking advantage of minors and their desire to be seen through replicating such challenges. Minors are particularly vulnerable to social media challenges as they are more susceptible to peer pressure and the desire to belong.²¹³ Such harmless challenges that a minor may be influenced to imitate as a result of the algorithm’s targeted recommendations could include the “salt and ice challenge.”²¹⁴

The salt and ice challenge involved an individual pouring salt on their arm and holding an ice cube to it as long as the participant could withstand.²¹⁵ This challenge may seem harmless enough, especially for a minor, although unbeknownst to most, mixing salt with ice lowers the melting point of ice to the point where it can cause cold burns.²¹⁶ Dangerously, as the challenge progresses, the pain from the initial chill evolves into numbness.²¹⁷ At the same time, damage is being done to the skin tissue, ultimately resulting in localized, deep-stage frostbite.²¹⁸ Given their susceptibility to peer pressure, minors may not fully comprehend the risks associated with such seemingly innocuous challenges.²¹⁹ Minors’ lack of awareness makes the issue particularly significant.²²⁰

This issue is sinisterly supported by physicians’ recent difficulty distinguishing unintentional injuries from suicides among adolescents related to social media challenges.²²¹ In recent years, adolescents injured as a result of such challenges have denied any intention of self-harm, demonstrating the unawareness of the many dangers such challenges may pose.²²² Such difficulty in distinguishing the two can be seen in *Anderson*, where a girl essentially hanged herself even though it was in pursuit of an online challenge.²²³ As Judge Matey stated, “Nylah, still in the first years of her

213. Elisa Astorri et al., *Online Extreme Challenges: Putting Children at Risk: What We Know to Date*, 75 MINERVA PEDIATRICS 98, 99 (2023).

214. *Adolescent Risk-Taking: Salt and Ice Challenge*, CLINICAL ADVISOR, <https://www.clinicaladvisor.com/clinicalchallenges/adolescent-risk-taking-salt-and-ice-challenge/2/> (last visited May 17, 2026); accord Michael M. Vosbikian & Jennifer M. Ty, *The Ice and Salt Challenge: An Atypical Presentation of a Cold Injury*, 5 J. BONE & JOINT SURGERY 1, 1 (2015).

215. Vosbikian & Ty, *supra* note 214, at 3.

216. Astorri et al., *supra* note 213, at 102.

217. Vosbikian & Ty, *supra* note 214, at 3.

218. *Id.*

219. Astorri et al., *supra* note 213, at 104.

220. *Id.* at 99.

221. Onomeasike Ataga & Valerie K. Arnold, *TikTok Challenges—Unintentional Injuries vs Suicide Attempts*, 82 JAMA PSYCHIATRY 5, 5 (2025).

222. *Id.*

223. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 186 (3d Cir. 2024).

adolescence, likely had no idea what she was doing or that following along with the images on her screen would kill her.”²²⁴

Highlighting the dangers of online challenges and the unawareness of their risks, “unintentional injuries were the leading cause of death among adolescents aged 15 to 19 years in the US from 2018 to 2021, while intentional self-harm (ie, suicide) was the third leading cause of death.”²²⁵ With this, a plaintiff could argue that the burdens of the alternative design, that is, not promoting even harmless challenges, do not outweigh the safety benefits in mitigating minors’ susceptibility to replicate even seemingly innocuous challenges. A plaintiff has a good argument that the example alternative design does not restrict access to content. The alternative just prevents the content from being promoted to vulnerable classes of individuals for their safety.

This is likely the most effective way for a plaintiff to bring claims stemming from harmless content and overcome Section 230, potentially succeeding in holding a social media company liable. Taken together, *Anderson* and *Lemmon* strongly suggest that a product liability claim will survive Section 230.²²⁶ Such a claim does not attempt to hold the social media company liable for third-party content, but rather for how the platform recommends it in a targeted manner—that is, the platform’s own actions for which Section 230 does not provide immunity. A plaintiff with a product liability claim would have to show that a social media platform’s algorithm fails the risk-utility test. They would have to do this by pointing to a specific defect, assessing other reasonable alternative designs, and determining whether the alternate design’s burdens would outweigh its safety benefits. As demonstrated above, a compelling case exists for plaintiffs to argue that a social media platform’s algorithm can fail the risk-utility test, thereby allowing them to prevail under Section 230 against the social media company.

224. *Id.*

225. Ataga & Arnold, *supra* note 221, at 5; see *Suicide*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/suicide> (last updated Aug. 2025) (showing available data from 2023 shows a consistent trend of unintentional injuries resulting in far more death in adolescents than suicide). For ages 10–14, there were 481 suicides and 914 unintentional injury-related deaths. *Id.* For ages 15–24, there were 5,936 suicides and 14,126 unintentional injury-related deaths. *Id.* In both adolescent age brackets, the number of unintentional injury-related deaths roughly doubled the number of intentional suicides. *Id.*

226. See discussion *supra* Parts I.B.2–3, II.B.2.

III. REELING IN SECTION 230

While the above outlines the best posture for a plaintiff with a claim stemming from harmless content, the best outcome for long-term justice is for Congress to step in and reform the statute to remove the substantial barrier it has imposed on plaintiffs. In recent years, there have been calls to reform the Communications Decency Act, with multiple bills proposed to Congress, indicating a desire for change.²²⁷ Social media platforms have gained vast immunities under Section 230 in ways Congress did not intend when enacting Section 230, particularly regarding the platforms' use of algorithms.²²⁸ In 1996, Congress intended Section 230 primarily "to encourage internet service providers to engage in content moderation of obscenity, as well as to protect small, start-up companies from excessive litigation threats."²²⁹

However, courts' broad interpretation of the statute has caused Congress's objectives in enacting Section 230 to be lost. As a result, Section 230 has expanded beyond Congress's limited intent, creating a nearly impenetrable barrier for plaintiffs seeking to hold social media companies liable. In 1996, Congress enacted Section 230 at a time when the internet was vastly different from what it is now; social media platforms, especially algorithms, would not emerge until many years later.²³⁰ There is no way Congress in 1996 could have understood what the internet would eventually evolve into; in 1996, Google and Facebook did not even exist.²³¹

227. Michael Healy, *Opening the Floodgates: An Analysis of How State Intellectual Property Law Could Change the Modern Internet*, 98 CHI.-KENT L. REV. 701, 706 (2023); see *Section 230 Legislation Tracker*, LAWFARE, <https://www.lawfaremedia.org/projects-series/lawfare-research-initiative/section-230-tracker> (last updated Oct. 2, 2025) (demonstrating that there have been many congressional proposals to reform Section 230). Between 2020 and the time the tracker was last updated in 2025, a total of 89 proposals to reform Section 230 had been submitted. *Id.* That's 23 from the 116th Congress, 27 from the 117th Congress, 28 from the 118th Congress, and 11 from the 119th Congress. *Id.* This demonstrates a persistent and heavy push to reform Section 230.

228. Bernstein, *supra* note 136, at 385.

229. *Id.*

230. *Id.*; see Nicholas Barrett, *How Have Social Media Algorithms Changed the Way We Interact?*, BBC, (Oct. 12, 2024), <https://www.bbc.com/news/articles/cp8e4p4z97eo> (showing that the use of algorithms with social media platforms would not emerge until at least 13 years after the enactment of Section 230 in 1996; "Social media algorithms, in their commonly known form, are now 15 years old. They were born with Facebook's introduction of ranked, personalised news feeds in 2009 and have transformed how we interact online.").

231. *Id.*

A. Proposed Reform to Section 230 That Tracks the Florida Law at Issue in Moody

Congress intended to protect companies like Facebook and Google when they were small startups.²³² For instance, Facebook, founded by a broke college student, likely could not afford to face liability for every user's post that might contain an actionable claim. Mark Zuckerberg even acknowledged that Section 230 has deviated from Congress's original intent during a Senate Commerce Committee hearing.²³³ Referring to revising Section 230, he stated, "Changing it is a significant decision. However, I believe Congress should update the law to make sure it's working as intended."²³⁴ This demonstrates that some large social media companies are at least aware that the protections of Section 230 they received differ from the intent of Congress when it enacted the law in 1996. However, companies such as Google and Facebook still enjoy the immunities of Section 230, which were intended for small startups, even though they are trillion-dollar companies with the resources to prevent litigation in the first place and face it when they cannot.²³⁵ Given this departure from original legislative intent, it is time for Congress to step in and reform Section 230 to significantly reduce the level of immunity that social media platforms currently enjoy. Congress enacted the Communications Decency Act as an early attempt to establish guidelines for the new, rapidly expanding internet landscape.²³⁶

There is debate on whether Congress or the courts are better suited to remedy Section 230.²³⁷ This Note argues that Congress is best suited to amend Section 230, potentially revising the law to require social media platforms to be more vigilant in monitoring the content they promote.²³⁸ This would be beneficial as it would force social media platforms to be more cognizant of the content being circulated on their platform and inherently penalize things like inattentive blindness.²³⁹ Platforms would no longer be able to freely use algorithms that focus on keeping a user's attention to target recommendations of any content to users, because users may hold them liable

232. *Id.* at 385–86.

233. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the Comm. on Com., Sci., & Transp.*, 116th Cong. 15 (2020) (statement of Mark Zuckerberg, Chief Executive Officer, Facebook, Inc.).

234. *Id.*

235. Bernstein, *supra* note 136, at 398; *see* sources cited *supra* note 138.

236. Lisea, *supra* note 135, at 788.

237. Noah Hale, *Section 230: The Valyrian Steel for Website Operators, and Why a Tax Credit Is the Best Solution to a Safer Internet*, 41 PACE L. REV. 281, 292 (2020).

238. Zakon, *supra* note 134, at 1108–10.

239. *See* discussion *supra* Part II.B.2.

for that content. Social media platforms would then have an incentive to ensure the content they circulate is not the kind that brings liability. If social media platforms fail to effectively monitor third-party content, they could face endless liability. Section 230 reform is due to bring it up to speed with the modern landscape of the internet and social media platforms now that the use of algorithms has complicated.

While plaintiffs bringing claims stemming from seemingly harmless content may be successful in bringing a product liability claim, a more effective solution would be for Congress to reform Section 230 and reduce the immunities from which social media platforms currently benefit. Congress should reform Section 230, as it no longer primarily fulfills Congress' original intent of regulating obscenity and protecting small startups and cannot adequately address the modern social media landscape.

One way Congress can implement effective reform is to adopt a model like the one at issue in the Florida state law in *Moody*. An approach modeled after this state law would more closely align with Congress' original intent of protecting small startups and entrepreneurs.²⁴⁰ If this proposed scheme exactly mirrored the Florida state law, then social media companies with annual gross revenue over \$100 million or more than 100 million monthly active users would lose Section 230 immunities.²⁴¹ Such a scheme would update Section 230 to reflect the modern internet landscape, accounting for large social media platforms while retaining the policy objectives of the Communications Decency Act and the intent of Congress. The scheme would grant small social media startups the full range of Section 230 immunities, which they would then forfeit once they reach an annual gross revenue or monthly user count threshold set by Congress.

A staggered approach to Section 230 reform is necessary, as an outright repeal of Section 230 would benefit large social media platforms that can afford to defend themselves by eliminating smaller competitors in the market that cannot.²⁴² Mark Weinstein, CEO of a small messaging startup, in connection with the effects of a Section 230 repeal, stated, "The big boys have deep pockets. They can easily hire the massive moderation and legal

240. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2395 (2024) ("Florida's law regulates 'social media platforms,' as defined expansively, that have annual gross revenue of over \$100 million or more than 100 million monthly active users." (quoting FLA. STAT. § 501.2041(1)(g) (2026))); FLA. STAT. § 501.2041(1)(g) (2026) (stating that a social media platform has to meet either threshold: "Has annual gross revenues in excess of \$100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index[,] or "[h]as at least 100 million monthly individual platform participants globally.").

241. *See sources cited supra* note 240.

242. Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, 1, 2 (CATO Inst. Pol'y Analysis No. 922, 2022).

teams that would be necessary to defend themselves. I can't. Revoking Section 230 would put hundreds of startups and other smaller companies out of business."²⁴³ One of the authors of Section 230 further emphasizes the importance of a staggered approach. Senator Ron Wyden stated that removing immunities for small startups "will kill the little guy, the startup, the inventor, the person who is essential for a competitive marketplace. It will kill them in the crib."²⁴⁴ An approach modeled after the Florida state law in *Moody* will retain the Act's original intent, which includes protecting small startups while benefitting plaintiffs and bringing the Act up to speed with modern times, limiting the power of large platforms. The thresholds that Congress determines is appropriate should ensure that a startup would not get snuffed out by litigation but is also big enough to defend itself against litigation that may arise while operating a social media company.

B. Implications of the Proposed Reform and an Alternative Approach

This proposed solution of reforming Section 230 modeled after the Florida law in *Moody* is not without criticism and potential implications of such reform. Critics of this solution may argue that entirely stripping Section 230 immunities from large social media companies would be overly burdensome and expose them to significant litigation. However, removing Section 230 immunities would not necessarily increase the number of lawsuits plaintiffs file against social media platforms, because plaintiffs already bring claims and courts then determine if Section 230 bars liability.²⁴⁵ It would, however, allow more plaintiffs' claims to proceed without being barred automatically. Section 230 immunities only burden

243. *Id.* at 6 (quoting Mark Weinstein, *Small Sites Need Section 230 to Compete*, WSJ OPINION, (Jan. 25, 2021), <https://www.wsj.com/opinion/small-sites-need-section-230-to-compete-11611602173>).

244. Jake Latimer, "I'm Concerned about This Post": *Combatting Fake News on Social Media*, 12 SEATTLE J. TECH & ENV'T & INNOVATION L. 209, 213 (2022) (quoting Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It - and Everything It's Brought with It*, VOX (May 16, 2019), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulationsneutrality>).

245. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 1-2 (2018). Courts analyze whether Section 230 will bar liability by applying a three-part test:

"(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." A defendant must meet all three parts of the test to gain the benefit of Section 230's liability protections.

Id. (alteration in original) (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)). This does not affect a potential plaintiff's right to begin a cause of action and only determines whether a cause of action can succeed or must be ended because the three questions were answered in the affirmative and Section 230 bars liability for the defendant. *See id.*

plaintiffs and their claims; removing these immunities for large social media companies may prove to be a financial burden but would not create more litigation—that is, new categories of claims. Plaintiffs already bring these claims and courts then determine whether Section 230 bars liability. Such reform would be highly beneficial for plaintiffs seeking redress caused by seemingly harmless content.

Such plaintiffs would not need to go through the hurdle of pursuing a product liability claim, as the plaintiffs in *Lemmon* and *Anderson* had done for their claims to survive Section 230. Plaintiffs would be able to hold the company liable for seemingly harmless content from third parties without having to rely on another claim. Such reform would shift the burden from plaintiffs to social media platforms to prevent litigation in the first place through better moderation practices.

In re Facebook, Inc. provides a good example of the effect that such reform can have.²⁴⁶ Had this reform been in place at the time of *In re Facebook, Inc.*, Facebook would have been well aware that it does not benefit from Section 230, would have employed best practices to protect its users from harm, and would likely have taken the mother's report more seriously rather than ignoring it.²⁴⁷ Without Section 230, Facebook would face greater liability for failing to acknowledge or act on reports like the mother's, making it more likely they would take such reports seriously. Additionally, such reform would have ensured that the plaintiff's claims were not outright barred by Section 230, since Facebook would not have benefited from immunity for claims involving objectively harmful content.²⁴⁸

This reform would also allow plaintiffs to hold companies directly liable for seemingly harmless content, such as online challenges like the salt and ice challenge, without the need to utilize the risk-utility test.²⁴⁹ Creating a way for plaintiffs to hold companies directly liable would create a strong incentive for platforms to prevent such content from reaching vulnerable populations, such as minors, thereby reducing the risk of harm and future litigation.

Another proposed reform to limit Section 230 is the introduction of a tax credit.²⁵⁰ This would encourage both small and large platforms to invest in content moderation—which may be expensive—to remove dangerous

246. 625 S.W.3d 80 (Tex. 2021).

247. *See id.* at 84 (noting that interactive website operators have strong expectations about Section 230 due to “prevailing judicial interpretation”).

248. *Id.* at 93.

249. *See* discussion *supra* Part II.B.2.

250. Hale, *supra* note 237, at 305.

content more effectively.²⁵¹ Then, the tax credit would reimburse platforms for these investments.²⁵² The rationale behind this approach is that platforms are just intermediaries; they are not the ones creating content and should be a part of the solution in creating a safer experience for users.²⁵³ They should not be scared by the threat of liability.²⁵⁴ This approach also aims to preserve technological innovation that might be hampered if platforms do not benefit from Section 230.²⁵⁵ However, this solution fails to address the core issue—Section 230 outright bars plaintiffs’ claims—and instead seeks to target and limit hateful content.²⁵⁶

While primarily aimed at hate speech and hurtful content, the tax credit approach is still a proposed reform to the same Section 230 discussed above.²⁵⁷ Tax credits are a less compelling option to protect future plaintiffs’ interests.²⁵⁸ This approach is also flawed as it further benefits social media platforms and continues to quash potential plaintiffs’ claims. As it pertains to a plaintiff’s ability to hold social media companies liable, social media platforms will still retain all the immunities that Section 230 affords them. While this tax credit system aims to protect users by promoting content moderation, it disproportionately benefits social media platforms while leaving plaintiffs in the same position. Social media platforms get reimbursed for improving their platform systems and content moderation, while plaintiffs still struggle to get their claims past Section 230. The improved content moderation by platforms that could come from the tax credit system may prove helpful in preventing some claims. Still, it would be impossible to stop all legitimate claims from arising. Furthermore, improved content moderation systems are a great thing, but they can only go so far; as was seen in *Anderson*, it does not take much to create the conditions for irreparable harm to occur.²⁵⁹ Even if content moderation systems could prevent 99% of

251. *Id.* at 305–06.

252. *Id.*

253. *Id.* at 306.

254. *Id.* at 305.

255. *Id.* at 303.

256. *Id.* at 305.

257. *Id.* at 282.

258. *Id.*

259. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 186 (3d Cir. 2024) (Matey, J., concurring). Judge Matey explained:

The Blackout Challenge—performed in videos widely circulated on TikTok—involved individuals “chok[ing] themselves with belts, purse strings, or anything similar until passing out.” The videos “encourage[d]” viewers to record themselves doing the same and post their videos for other TikTok users to watch. Nylah, still in the first year of her adolescence, likely had no idea what she was doing or that following along with the images on her screen would kill her. But TikTok knew that Nylah would watch

harmful content that could conceivably cause harm from reaching users, the remaining 1% would still struggle to have their claims heard and not be outright barred by Section 230.

Additionally, money is not an issue for the large social media platforms that appear to be at the root of most plaintiffs' issues. As stated in the proposal for this approach, Facebook incurs approximately "\$432 million in labor costs for content moderators," excluding other associated expenses.²⁶⁰ While this is a substantial sum, it is a drop in the bucket compared to the company's total revenue; according to Facebook's SEC filings, the company earned \$134.90 billion in 2023, a 16% increase from 2022.²⁶¹ It would not be in the interest of taxpayers or those who have struggled to obtain redress from platforms such as Facebook to award them a tax credit, even a temporary one. At the same time, platforms can retain Section 230 immunities. If there were a company that could face endless liability in such a scenario, it would be one like Facebook, which consistently generates large sums of money year after year. Large platforms, such as Facebook, have more than enough capital to defend against lawsuits, which they could mitigate through improved moderation practices without a tax credit system.²⁶²

Although the tax credit system approach is flawed on its own, it could be beneficial if combined with the Florida law approach. For example, tax credits could be granted to social media platforms that are still small enough to receive Section 230 immunities. This makes practical sense because small social media platforms would have relatively little annual revenue and fewer resources to put towards content moderation when compared to a company like Facebook. This combined approach would grant them the resources to protect users from potentially dangerous content, avoiding potential lawsuits and litigation costs, while also benefiting from the immunity of Section 230, thereby avoiding being stifled by litigation costs. However, once small social media companies satisfy the threshold to lose Section 230 immunities, they would simultaneously lose the tax credit benefits that can be used for content moderation. This would have the added benefit of incentivizing platforms to prioritize user well-being over growth. A company that prioritizes growth

because the company's customized algorithm placed the videos on her "For You Page" after it "determined that the Blackout Challenge was 'tailored' and 'likely to be of interest' to Nylah."

Id. (alterations in original) (footnotes omitted) (citations omitted) (quoting Complaint, ¶¶ 3, 64–65, *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276 (E.D. Pa. 2022) (No. 2:22-cv-01849-PD)).

260. Hale, *supra* note 237, at 296.

261. Meta Platforms, Inc., Annual Report (Form 10-K), at 59 (Feb. 1, 2024).

262. Dean Baker, *Section 230: Can We Talk About It?*, CTR. FOR ECON. & POL'Y RSCH. (Sept. 9, 2023), <https://cepr.net/publications/section-230-can-we-talk-about-it/>.

over user well-being without adequate content moderation will face the consequences of litigation without Section 230 immunities.

CONCLUSION

Many plaintiffs' claims, especially those stemming from seemingly harmless content, have been disparately disadvantaged by the Section 230 immunities that have benefited social media platforms, creating a high bar to pass. The broad interpretation of Section 230 adopted by many courts has aggravated the issue for plaintiffs, barring claims before they can be heard. By classifying algorithms as expressive activity, *Moody* raised the bar even higher for plaintiffs, exacerbating their challenges.²⁶³ Forcing plaintiffs to rely on legal theories like product liability to have their claims heard, as was the case in *Lemmon*²⁶⁴ and *Anderson*,²⁶⁵ creates unnecessary legal hurdles for plaintiffs. These cases, along with others, illustrate the damaging effect that Section 230 can have on plaintiffs seeking redress.

Therefore, reforming Section 230 is necessary to bring it up to speed with the modern internet landscape, restore Congress's original intent, and lower the bar for plaintiffs to hold social media companies liable. This can be accomplished through an approach modeled by *Moody*, based on a platform's annual revenue and user count, which may be more effective than other approaches, such as one that awards a tax credit alone. Ultimately, reforming Section 230 is necessary for Congress to ensure that platforms prioritize the well-being of their users and the content they display while also empowering plaintiffs to bring claims for harm caused by innocuous content.

—*Christian Patierno* *

263. See *supra* text accompanying note 114; see generally *Patterson v. Meta Platforms, Inc.*, 244 A.D.3d 29, 38 (2025) (demonstrating in a recent case the effect Section 230 and *Moody* are having on current plaintiffs). Notably, the court in *Patterson* outlined this exact scenario, illustrating how the foundation laid by *Moody* forces plaintiffs to fight both Section 230 and the First Amendment:

Thus, the interplay between section 230 and the First Amendment gives rise to a “Heads I Win, Tails You Lose” proposition in favor of the social media defendants. Either the social media defendants are immune from civil liability under section 230 on the theory that their content-recommendation algorithms do not deprive them of their status as publishers of third-party content, per *Force* and *M.P.*, or they are protected by the First Amendment on the theory that the algorithms create first-party content, as per *Anderson*.

Id.

264. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

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

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