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Spencer A. Overton

George Washington University Law School, soverton@law.gwu.edu

Catherine Powell

Fordham Law School

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THE IMPLICATIONS OF SECTION 230 FOR BLACK COMMUNITIES

SPENCER OVERTON & CATHERINE POWELL*

ABSTRACT

Section 230 of the Communications Decency Act generally immunizes online platforms such as Facebook, YouTube, Amazon, and Uber from liability for third-party user content (for example, posts, comments, and videos) and for moderation of that content. This Article addresses an important issue overlooked by both defenders and critics of Section 230: the implications of the law and proposed reforms for Black communities in particular. By relieving tech platforms of most legal liability for third-party content, Section 230 helps facilitate Black social activism, entrepreneurship, and

* Spencer Overton is the Patricia Roberts Harris Research Professor at George Washington University Law School. Catherine Powell is the Eunice Hunton Carter Distinguished Research Scholar Professor at Fordham Law School. This Article was made possible with generous support from the John S. and James L. Knight Foundation and the Joint Center for Political and Economic Studies. Thanks to various experts who participated in a workshop and reviewed and provided comments on an early draft of this Article, including Rita Bosworth, David Brody, Danielle Brown, Jess Fjeld, Mary Anne Franks, Chanelle Hardy, Hoda Hawa, Frank Pasquale, Hong Qu, Blake Reid, Ari Waldman, Morgan Williams, and Caitlin Vogus. Thanks also to a variety of experts who provided input at different times throughout this process, including Julia Angwin, Roy Austin, Koustubh “K.J.” Bagchi, Elizabeth Banker, Paula Boyd, Pauline Kim, Bertram Lee, Emma Llansó, Susan Mann, Safiya Noble, Lisa Rice, Aaron Rieke, Galen Sherwin, Jason Schultz, and Olivier Sylvain. This Article benefited from the research assistance of GW Law School students (Priyanka Mara, Morenike Oyebade, and Eleonora Viotto) and Fordham Law School students (Tasha Brown, Krisana Goel, Caitlin Rubin, and Alexis Saulny). Thanks also to background research provided by Penelope Codrington and Michelle Aronowitz. We also extend special thanks to LaShonda Brenson, Danielle Citron, Mary Anne Franks, Jessica Fulton, Dayna Matthew, Laura Murphy, Dawn Nunziato, Sterling Overton, Erica Perkins, Dhanaraj Thakur, Rebekah Tromble, Kimberly Victor, and Fane Wolfer. Catherine Powell extends special thanks to Microsoft’s Academic Research Program, whose funding was vital in supporting part of her time working on this Article. The views expressed in this Article are solely those of the authors.

artistic creativity. Section 230 also relieves platforms of most legal liability for content moderation, which boosts platforms' freedom to remove or downrank unlawful activity, as well as an array of "lawful but awful" content that government cannot constitutionally restrict—such as hate speech, white supremacy organizing, medical disinformation, and political disinformation. However, platforms' overly broad interpretations of Section 230 also incentivize platforms to allow unlawful activity directed at Black communities (such as harassment, white supremacist violence, voter intimidation, and housing and employment discrimination) and to prevent legal recourse when platforms erroneously downrank Black content. These insights provide factors that can help policymakers assess whether proposed Section 230 reforms—such as notice-and-takedown, content neutrality, and carve-outs to immunity for civil rights laws, algorithmic recommendations, or advertisements—will benefit or harm Black communities.

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INTRODUCTION

The internet presents both opportunities and challenges to Black communities. Online platforms have allowed Black activists to build political movements, Black creators to find audiences, and Black businesses to reach customers. Unfortunately, online platforms have also facilitated white supremacy group organizing and domestic terrorism, steered housing opportunities toward white users and away from Black users, and allowed for the targeting of Black communities with disinformation about voting, health, and other critical issues.

These opportunities and challenges affect Black Americans broadly. Approximately 77% of Black adults use social media.¹ Black adults are more likely than white adults to use Instagram, X (formerly known as Twitter), YouTube, WhatsApp, and TikTok.² Black Americans are increasingly likely to rely on online platforms such as Google, Apartments.com, LinkedIn, and ZipRecruiter to access such essential services as housing and employment.³

The internet's benefits and costs to Black communities are shaped by Section 230 of the Communications Decency Act (commonly known as "Section 230"), which was enacted as part of the Telecommunications Act of 1996.⁴ Section 230 has been recognized as the key legal provision that has facilitated the growth of the web because it has allowed platforms to freely host and remove third-party user content (for example, comments, posts, and videos) without fear of liability for the content posted or for moderating that content.⁵ Although privacy regulations and many other legal provisions also shape the experiences of Black people online and

1. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media> [<https://perma.cc/RCL4-TJ96>].

2. *Social Media Fact Sheet*, PEW RSCH. CTR. (Jan. 9, 2024), <https://www.pewresearch.org/internet/fact-sheet/social-media> [<https://perma.cc/2XRX-WERA>].

3. *See id.*

4. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 137-39 (codified at 47 U.S.C. § 230).

5. *See* JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 9-10 (2019).

warrant examination,⁶ Section 230 is a primary provision and the focus of this Article.

Section 230(c) provides:

(c) Protection for “Good Samaritan” blocking and screening of offensive material.

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

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

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material.⁷

Courts have interpreted Section 230 to immunize website operators such as Facebook, X, and YouTube from legal liability for decisions to leave up or take down content created by third-party users, as well as decisions to make posts more likely or less likely to be viewed (that is, upranking or downranking).⁸ Thus, in a hypothetical police union’s defamation lawsuit claiming that a Black Lives Matter activist’s Facebook post was false and malicious, Meta (which owns Facebook, Instagram, and WhatsApp, all of which are

6. For a broader examination of the “system of societal disadvantage comprised of discriminatory oversurveillance” under which “African Americans dwell under the attentive eye of a Black Opticon,” see Anita L. Allen, *Dismantling the “Black Opticon”: Privacy, Race, Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 913-28 (2022), https://www.yalelawjournal.org/pdf/F7.AllenFinalDraftWEB_6f26iyu6.pdf [<https://perma.cc/WVK8-M3U7>].

7. 47 U.S.C. § 230(c)(1)-(2).

8. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Jones v. Dirty World Ent. Recordings, LLC*, 755 F.3d 398, 402-03 (6th Cir. 2014).

protected by Section 230) would likely face no liability and would be immediately dismissed as a defendant. Similarly, Facebook would not be legally liable for removing a post by a user falsely claiming that voter fraud is rampant in Black communities.⁹

Section 230 contains several carve-outs. The section does not give platforms immunity for violations of federal criminal law, intellectual property law, the federal Electronic Communications Privacy Act of 1986 and similar state laws, or federal sex-trafficking law and related state laws.¹⁰ Further, states may enforce state laws that are consistent with Section 230 but not those that are inconsistent with the section.¹¹

As nonstate actors, social media companies have free speech rights to engage in content moderation. While the First Amendment of the U.S. Constitution protects the right of platforms to publish and remove content (as recently underscored by the Supreme Court in the consolidated *NetChoice* litigation),¹² judicial interpretations of Section 230 give platforms additional substantive and procedural tools. For example, unlike the First Amendment, Section 230 has been interpreted by the courts to allow platforms to evade liability for publishing defamation, deceptive trade practices, false advertising, and commercial speech and transactions, as well as to prohibit state and local governments from enacting laws that restrict platforms from publishing this material.¹³ Also unlike the First Amendment, Section 230 has been interpreted to enable early dismissals of lawsuits that avoid extensive discovery and allow more

9. See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 18-19 (1st Cir. 2016) (noting, nonetheless, that “Congress sought to encourage websites to make efforts to screen content without fear of liability”).

10. 47 U.S.C. § 230(e)(1)-(5).

11. *Id.* § 230(e)(3).

12. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399-407 (2024) (vacating and remanding because lower courts failed to conduct a proper analysis of facial First Amendment challenges to Texas and Florida laws regulating platform content moderation, but observing that “Texas is not likely to succeed in enforcing its law” because “a State may not interfere with private actors’ speech to advance its own vision of ideological balance”; that the Texas law prevents platforms from demoting, labeling, or removing posts, despite the fact that the Court has “time and again held that type of regulation to interfere with protected speech”; and concluding that “Texas’s law does not pass” even intermediate scrutiny).

13. Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 36-39 (2019).

predictable outcomes for litigants.¹⁴ These expanded protections reduce platforms' litigation costs. These judicial interpretations of Section 230 also reduce plaintiffs' ability to recover when they suffer harms from content and conduct that are not protected by the First Amendment, such as deceptive trade practices and discrimination.

Many federal and state courts have construed Section 230 broadly—extending immunity even when platforms “republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies to enable illegal activity, or sold dangerous products.”¹⁵

For years, various experts and advocates have called for Congress to reform Section 230, for courts and the Federal Communications Commission to reinterpret Section 230, and for states to regulate tech platforms in ways that some argue conflict with Section 230.¹⁶ Unfortunately, despite the significant opportunities and challenges of the law for Black communities in the United States, no entity has comprehensively examined the implications of Section 230 and

14. *Id.* at 39-42; cf. *Platform Accountability: Gonzalez and Reform: Hearing Before the Subcomm. on Privacy, Tech. & the L. of the S. Comm. on the Judiciary*, 118th Cong. 48 (2023) (testimony of Dr. Mary Anne Franks, Professor of Law) [hereinafter *Mary Anne Franks Testimony*] (“The fact that Section 230 uses the term ‘information’ rather than ‘speech’ has helped tech platforms invoke the law to absolve themselves of responsibility for virtually everything individuals do online—a protection that goes far beyond anything the First Amendment would or should protect.”).

15. See Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 *GEO. L. TECH. REV.* 453, 460 (2018) (internal footnotes omitted). Despite the conventional judicial interpretation that Section 230(c)(1) provides broad immunity from liability to platforms for third-party content, Section 230 protection from liability is not absolute. One empirical study found that more than one-third of claims survived a Section 230 defense. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 *LOY. L.A. L. REV.* 373, 493 (2010).

16. See, e.g., Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, *N.Y. TIMES* (Dec. 15, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html> [<https://perma.cc/A3LW-7SUU>]. In October Term 2022, the U.S. Supreme Court heard its first Section 230 case to determine whether Section 230(c)(1) immunity extends to a platform's recommendations of third-party content and declined to resolve the question. See *Gonzalez v. Google LLC*, 143 S. Ct. 1191, 1192 (2023) (per curiam).

proposed reforms for Black communities in particular.¹⁷ This Article fills that void.

Granted, many of the Section 230 issues that confront Black communities also affect other communities, and an understanding of these common challenges is essential to policymaking. For example, both Black and Latino adults experience online harassment due to their race at more than two times the rate of their white counterparts.¹⁸ White supremacists post comments, manifestos, and videos on platforms protected by Section 230 to inspire each other to commit mass shootings, whether against mosques in Christchurch, New Zealand; a Walmart in heavily Latino El Paso; the Tree of Life synagogue in Pittsburgh; the LGBTQ+ Pulse nightclub in Orlando; or Mother Emanuel African Methodist Episcopal Church in Charleston.¹⁹ Black and transgender users'

17. A few scholars have made important foundational contributions to the understanding of the relationship between Section 230 and racial discrimination more broadly (for example, in housing, employment, and voting). See Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Apr. 1, 2018) [hereinafter Sylvain, *Discriminatory Designs on User Data*], <https://knightcolumbia.org/content/discriminatory-designs-user-data> [<https://perma.cc/C8T5-95N4>] (examining Section 230(c)(1)'s facilitation of racial inequality in housing markets); Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J.F. 475, 477 (2021), https://www.yalelawjournal.org/pdf/F7.SylvainFinalDraftWEB_j6rpya1u.pdf [<https://perma.cc/92VA-PVPQ>] (asserting that online companies should bear more responsibility to guard against discrimination that they facilitate or deliver); Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 869-70 (2020) (examining Section 230(c)(1)'s facilitation of racial and gender inequality in labor markets); Bertram Lee, *Where the Rubber Meets the Road: Section 230 and Civil Rights*, PUB. KNOWLEDGE (Aug. 12, 2020), <https://publicknowledge.org/where-the-rubber-meets-the-road-section-230-and-civil-rights/> [<https://perma.cc/36PS-5JYC>] (summarizing civil rights problems of platforms, explaining some of the limits of Section 230, and proposing removing advertisements from 230 protection to solve some of these problems); see also Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. DAVIS L. REV. 1793, 1812-28 (2020) (explaining that Section 230 does not limit the power of states to hold social media companies legally responsible for using data collection and algorithms to target protected classes of voters with suppressive ads).

18. EMILY A. VOGELS, PEW RSCH. CTR., THE STATE OF ONLINE HARASSMENT 10 (2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/01/PI_2021.01.13_Online-Harassment_FINAL-1.pdf [<https://perma.cc/7JNX-79SJ>] (noting for the purposes of this study that "Hispanics are of any race").

19. See HEATHER J. WILLIAMS, ALEXANDRA T. EVANS, JAMIE RYAN, ERIK E. MUELLER & BRYCE DOWNING, RAND CORP., THE ONLINE EXTREMIST ECOSYSTEM 8-10 (2021), https://www.rand.org/content/dam/rand/pubs/perspectives/PEA1400/PEA1458-1/RAND_PEA1458-1.pdf [<https://perma.cc/GZ4M-37F7>]; see also OFF. N.Y. STATE ATT'Y GEN. LETITIA JAMES, INVESTIGATIVE REPORT ON THE ROLE OF ONLINE PLATFORMS IN THE TRAGIC MASS SHOOTING IN BUFFALO ON MAY 14, 2022, at 17 (2022) [hereinafter NEW YORK AG INVESTIGATIVE REPORT],

social media accounts are removed at disproportionately high rates, and such removals often occur when the users follow site policies or when their content falls into gray areas of content moderation.²⁰ Section 230 also shields platforms from liability for technology-facilitated discrimination, harassment, and violence against women and members of LGBTQ+ communities, including individuals at intersections of various identities.²¹

Although these connections are important, and this Article has benefited from studies that examine various demographic groups, an analysis of Section 230 that centers on Black communities in the United States adds unique value.²² Focusing on Black communities in a more targeted way illuminates the full costs and benefits of the immunity Section 230 provides for both third-party content and content moderation, as well as the costs and benefits of reform

<https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf> [<https://perma.cc/G6BY-ZFYH>].

20. See Oliver L. Haimson, Daniel Delmonaco, Peipei Nie & Andrea Wegner, *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, 5 PROC. ACM ON HUM.-COMP. INTERACTION 1, 5-6 (2021).

21. See, for example, WHITE HOUSE TASK FORCE TO ADDRESS ONLINE HARASSMENT & ABUSE, FINAL REPORT AND BLUEPRINT 4 (2024), https://www.whitehouse.gov/wp-content/uploads/2024/05/White-House-Task-Force-to-Address-Online-Harassment-and-Abuse_FINAL.pdf [<https://perma.cc/RH5P-UMD4>], which states:

Online harassment and abuse are increasingly widespread in today's digitally connected world. This can include online threats and intimidation as well as various forms of technology-facilitated gender-based violence (TFGBV), such as the non-consensual distribution of intimate images, including non-consensual intimate imagery generated with artificial intelligence (AI) tools, cyberstalking, and sextortion. Women, girls, and LGBTQI+ individuals, particularly those who face intersectional discrimination and bias on the basis of race and ethnicity, gender, religion, disability, sexual orientation, and other factors, are disproportionately affected.

See also Danielle Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1875 (2019) ("Women and individuals from marginalized communities shoulder the brunt of the abuse."); Ari Ezra Waldman, *Disorderly Content*, 97 WASH. L. REV. 907, 907 (2022) (discussing content moderation and noting, "throughout the social media ecosystem, nonnormative and LGBTQ+ sexual expression is disproportionately taken down, restricted, and banned").

22. While this Article examines Black communities in the United States, intermediary liability regulation has a significant impact on Black communities outside of the United States, including in Africa, the Caribbean, South America, and Europe. See generally Nicolo Zingales, *Intermediary Liability in Africa: Looking Back, Moving Forward?*, in THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 214, 215 (2020); *World Intermediary Liability Map*, CTR. FOR INTERNET & SOC'Y AT STAN. L. SCH., <https://wilmap.stanford.edu/map> [<https://perma.cc/GW7S-AK4Y>].

proposals. This is particularly important because Black communities are often underrepresented in large tech companies that enjoy Section 230 protections and in legal and policy debates surrounding Section 230.²³ This Article also contributes to the capacity of civil rights organizations to develop independent perspectives and exercise more agency while participating in Section 230 reform debates.

As such, this Article is a tool that allows for Section 230 debates that are more informed and can better tailor proposed reforms to include the interests of all communities. Rather than purport to identify a single Section 230 proposal that will completely and permanently resolve all challenges facing Black communities, this Article reveals the most significant benefits and challenges to Black communities of Section 230 and a few popular reforms. Many of these insights provide factors for analyzing and improving Section 230 reforms generally, such as the effectiveness of a proposal in addressing primary challenges to Black communities, the scope of the challenges that will remain unaddressed, the likelihood that a proposal will exacerbate or create challenges to Black communities, and the potential for a proposal to result in overmoderation of Black users or curtail existing opportunities that Black communities enjoy.

Part I of this Article examines the opportunities and challenges to Black communities that stem from Section 230's insulation of tech companies from liability for pure third-party content. On one hand, the immunity Section 230 provides has arguably incentivized tech platforms to create virtual spaces that Black communities have used to build community; organize and engage in social activism; amplify issues underreported in traditional media; scale businesses; and build careers in music, video, and other creative endeavors. On the other hand, interpretations of Section 230—sometimes overly broad and unsupported by statutory text or judicial decisions—allow platforms to justify their hosting of unlawful activities that present challenges to Black communities, including the organization of

23. Jan Shelly Brown, Matthew Finney, Mark McMillan & Chris Perkins, *How to Close the Black Tech Talent Gap*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Feb. 3, 2023), <https://www.mckinsey.com/bem/our-insights/how-to-close-the-black-tech-talent-gap> [https://perma.cc/BSH7-25ZS].

white supremacist violence, housing and employment discrimination, and illegal election interference. Indeed, as economic and social activity increasingly move online, platforms' overly broad interpretations of Section 230 in designing their practices can expand opportunities for anti-Black discrimination and increase civil rights violations.

Part II of this Article details how Section 230 buttresses the freedom of platforms to moderate third-party content and analyzes the benefits and challenges of content moderation to Black communities. On one hand, Section 230 benefits Black communities by supporting platforms' ability to address, downrank, and remove—without fear of legal liability—a broad range of unsavory but lawful content that the First Amendment generally prevents government from regulating. Such content includes disinformation about voting, impersonating Black people online, hate speech, and white supremacy organizing. On the other hand, Section 230 presents challenges to Black communities by incentivizing platforms to overenforce platform guidelines against Black users and profit from anti-Black content that violates platform guidelines.

Part III analyzes several proposed reforms, including notice-and-takedown proposals, disclosure requirements, and carve-outs to immunity for civil rights laws, algorithmic recommendations, advertisements, and larger platforms. Many of these reforms address some but not all of the challenges faced by Black communities. Further, certain reforms could result in unintended harms, such as overmoderation of Black user content, and should be carefully tailored to minimize those harms. Part III also examines “content neutrality” proposals that purport to advance user “free speech,” which would generally harm Black communities by discouraging platforms from removing disinformation, discrimination, hate, and other harmful content. Despite technology's potential to liberate by ushering in a postracial future, our digital society reflects, and in some instances amplifies, race inequality and intolerance.²⁴

24. Catherine Powell, *Race and Rights in the Digital Age*, 112 *AJIL UNBOUND* 339, 339 (2018) (expressing skepticism concerning the liberatory potential of technology to move society into a postracial future, at least at this juncture, given the entrenchment and structural nature of race inequality both off- and online).

I. BLACK COMMUNITIES AND PLATFORM IMMUNITY FOR THIRD-PARTY INFORMATION

This Part analyzes the opportunities and challenges to Black communities of Section 230(c)(1)'s immunity to platforms for third-party information. While few Black people own lucrative technology platforms or have extensive equity shares in the sector, Black people have benefited in other ways. Section 230's immunity has arguably facilitated Black political activism, entrepreneurship, and artistic creativity. At the same time, however, Section 230(c)(1) has facilitated significant challenges to Black communities, including (1) anti-Black harassment; (2) white supremacist violence; (3) platforms' overly broad constructions of Section 230 that attempt to narrow civil rights protections in housing, employment, and credit; and (4) foreign influence in elections and voter deception and intimidation.

A. Opportunities to Black Communities Supported by Platform Immunity

Section 230(c)(1)'s immunity arguably has resulted in tech platforms providing virtual spaces that Black activists have used to build community, organize and engage in social activism, and amplify issues previously discounted by traditional media.²⁵ These virtual spaces have also allowed Black entrepreneurs and creators to find customers and audiences and realize revenues.

Each day, on average, online platforms host millions of new posts, comments, videos, and other content. Absent legal immunity, the argument goes, tech platforms likely would be much more restrictive in the content that could be posted to minimize their litigation risk, and Black users would be adversely affected.²⁶ Black perspectives that might seem controversial or unworthy of attention may

25. In passing Section 230, Congress found that the internet and tech platforms "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3).

26. See Kim, *supra* note 17, at 926-27 ("Congress recognized that if websites were held liable for content posted by others, it would impose an enormous burden on them.").

not be broadly disseminated, resulting in less rich and less comprehensive information about Black communities.

As a hypothetical example, absent Section 230 immunity, a tech platform may downrank a Black Lives Matter activist's post that describes police officers who use force to kill civilians as "murderers" for fear that police unions or other opponents of police reform could sue the tech platforms to extract damages for defamation.²⁷ Tech platforms would fear not only successful lawsuits but also meritless, harassing lawsuits designed to impose litigation costs on tech platforms to disincentivize them from hosting videos showing police violence or advocating for a reduction in police budgets. Such meritless lawsuits could prod platforms to deprioritize or remove criticism of police and silence Black activists.

While this Part details some of the opportunities Black communities purportedly enjoy because of Section 230(c)(1) immunity, skeptics could claim advertising revenues and other factors primarily drive platforms to provide these opportunities. These skeptics could argue that there is insufficient evidence that platforms would shut down or more heavily moderate virtual spaces for Black communities if Section 230(c)(1) were reformed.²⁸

For example, many other nations have intermediary liability regimes that provide less protection than Section 230(c)(1), and platforms continue to provide virtual spaces for users to organize and engage in commerce. Australia, India, and the Philippines, for example, have provisions that hold platforms accountable only for content of which the platforms are aware or have actual

27. See Ashley Johnson & Daniel Castro, *Proposals to Reform Section 230*, INFO. TECH. & INNOVATION FOUND. 5 (Feb. 22, 2021), <https://www2.itif.org/2021-230-report-5.pdf> [<https://perma.cc/7VXA-Z4GD>] ("[R]epealing Section 230 would negatively impact the free speech of marginalized populations Online services would be disinclined to host content relating to controversial political movements such as #MeToo or Black Lives Matter.").

28. Those who fear that overmoderation will accompany reform cite the sex trafficking carve-out added to Section 230. See Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> [<https://perma.cc/YG6H-4P94>] (asserting that the amendment enacted to add sex trafficking to the list of Section 230 exceptions caused many platforms to remove online personals sections, which prompted sex workers to move from the internet to the streets to find work and made them less safe). There are legitimate questions, however, about the extent to which sex work content is analogous to antiracist content.

knowledge.²⁹ New Zealand and South Africa have notice-and-takedown provisions that require platforms that receive notice about unlawful content to remove it within a reasonable period.³⁰ Similarly, the European Union extends immunity to platforms provided that they expeditiously remove or disable access to illegal content upon receiving notice of it.³¹ Section 230 advocates have failed, skeptics could argue, to show that platforms provide fewer online opportunities to marginalized communities in these other nations than those enjoyed by Black communities in the United States.³²

Skeptics may also assert that the contributions of Section 230(c)(1) to Black activism, entrepreneurship, and creativity are overstated because First Amendment expressive and associational protections provide a baseline for platforms to provide a venue for Black activism, community building, entrepreneurship, and creativity. Further, the precise scope of benefits attributable to Section 230 immunity alone is difficult to ascertain. The *New York Times* and many media outlets that do not enjoy Section 230 protection, for example, showed videos of unwarranted police violence against George Floyd and other Black people.³³

Applauding social media platforms that enjoy increased traffic and revenues by hosting Black activists, entrepreneurs, and artists,

29. See Ashley Johnson & Daniel Castro, *How Other Countries Have Dealt With Intermediary Liability*, INFO. TECH. & INNOVATION FOUND. 1-2 (Feb. 22, 2021), <https://www2.itif.org/2021-section-230-report-4.pdf> [<https://perma.cc/9CSW-K67K>].

30. See Harmful Digital Communications Act 2015, s 24 (N.Z.); Electronic Communications and Transactions Act of 2002 § 77 (S. Afr.).

31. Regulation (EU) of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act) 2022 O.J. (L 277) 1, 6 [hereinafter EU Digital Services Act] (extending immunity to providers who, “upon obtaining actual knowledge of ... illegal activities or illegal content, act expeditiously to remove or to disable access to that content”); see also Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 CHI. J. INT’L L. 115, 115 (2023) (providing an overview of the Digital Services Act and explaining that the EU directive will have a global impact on users—including in the United States—because large social media companies will likely moderate content on a global scale).

32. Note that a litigious culture may distinguish the United States from many nations with more relaxed intermediary liability regimes, and any deep examination of this issue should analyze the intermediary liability regimes of nations with litigation per capita rates comparable to or greater than those in the United States.

33. See, e.g., *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/FLB2-K4SD>].

skeptics could argue, discounts the agency and contributions of Black organizers who risk arrest and civil lawsuits from police, as well as the initiative and creativity of Black entrepreneurs and artists.³⁴ Indeed, the contributions of platforms' Section 230(c)(1) subsidy to Black political, social, economic, and creative opportunities are questionable because platforms currently remove and deprioritize Black content disproportionately despite Section 230(c)(1)'s protection from litigation.³⁵ Further, because tech companies generally resist detailed disclosure of their platform design and moderation choices (facilitated by Section 230),³⁶ there is no way to determine the extent to which the online opportunities currently enjoyed by Black communities would significantly shrink if Section 230 were amended.

While all these points have merit, and it is difficult to determine precisely which online opportunities Black communities would lose if the United States were to adopt a more relaxed intermediary liability regime, this Part chronicles some of the opportunities that may be supported, in part, by Section 230(c)(1) as it currently exists.

1. Facilitating Black Activism, Social Change, and Identity

Section 230(c)(1) immunity has facilitated the development of social media platforms that have been essential to many Black political activists. Social media platforms have provided opportunities for Black activists to transcend the barriers of geography and time to connect with similarly minded people, exchange concerns and strategies in affirming spaces, and coordinate social action.

Perhaps the most generous account of Section 230(c)(1) asserts that the provision allows Black communities an opportunity to disseminate their own information via social media, provide a more

34. See *Doe v. McKesson*, 339 So. 3d 524, 532 (La. 2022) (deciding that officer injured at protest had grounds to file a lawsuit against Black Lives Matter protest organizer DeRay McKesson); Kalyn Womack, *Supreme Court Says BLM Activist Can Be Sued for Injury of Louisiana Officer*, ROOT (Mar. 28, 2022), <https://www.theroot.com/supreme-court-says-blm-activist-can-be-sued-for-injury-1848712064> [<https://perma.cc/AG5H-BP9Q>].

35. See *infra* Part II.B (analyzing content moderation challenges to Black communities).

36. See FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 61 (2015); Susan Benesch, *Nobody Can See Into Facebook*, ATLANTIC (Oct. 30, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/facebook-over-sight-data-independent-research/620557/> [<https://perma.cc/C2LT-LCXN>].

nuanced understanding of Black life, and hold traditional media outlets (and tech platforms) accountable for their biases.³⁷ Due to Section 230, this argument goes, Facebook, Instagram, and other tech platforms do not fear legal liability for hosting posts, videos, and other content.³⁸ Removing Section 230(c)(1) protections could prompt tech platforms to insert automated gatekeepers to more rigorously prereview and uprank or downrank online content, which could impair Black political activism and perpetuate misleading narratives and stereotypes about Black communities.

According to a 2020 Pew survey, 60% of Black and 53% of Latino users said social media was very or somewhat important to them for getting involved in political and social issues, compared with just 37% of white social media users.³⁹ Similarly, relative to white social media users, Black social media users were 45% more likely to say they posted a picture to support a cause, 50% more likely to encourage others to take action on important issues, 55% more likely to look for information about rallies or protests, and 120% more likely to use hashtags related to a social or political issue.⁴⁰

The emergence of the Black Lives Matter movement illustrates the significance of open social media platforms to Black political engagement.⁴¹ The term “#BlackLivesMatter” appeared in July 2013 as a hashtag following frustrations by activist Alicia Garza on Facebook over George Zimmerman’s acquittal for shooting Black teenager Trayvon Martin.⁴² As Garza and her friends Patrice

37. See Danielle K. Brown, Summer Harlow, Victor García-Perdomo & Ramón Salaverría, *From #Ferguson to #Ayotzinapa: Analyzing Differences in Domestic and Foreign Protest News Shared on Social Media*, 21 MASS COMMUN & SOC’Y 606, 607-11 (2018).

38. Brief of Scholars of Civil Rights & Social Justice as Amici Curiae in Support of Respondent at 10, *Gonzalez v. Google*, 598 U.S. 617 (2023) (No. 21-1333) [hereinafter *Civil Rights Scholars Amicus Brief (Gonzalez)*] (“Thanks to [Section 230], platforms did not fear that hosting [content raising awareness of police violence] would lead to civil liability.”).

39. Brooke Auxier, *Activism on Social Media Varies by Race and Ethnicity, Age, Political Party*, PEW RSCH. CTR. (July 13, 2020), <https://www.pewresearch.org/short-reads/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/> [https://perma.cc/NNG7-ZAGT].

40. See *id.*

41. Black Lives Matter is a part of a broader global trend in online engagement by oppressed communities. See, e.g., Munmun De Choudhury, Shagun Jhaver, Benjamin Sugar & Ingmar Weber, *Social Media Participation in an Activist Movement for Racial Equality*, 10 INT’L AAAI CONF. ON WEB & SOC. MEDIA 92, 93 (2016).

42. *The Hashtag #BlackLivesMatter First Appears, Sparking a Movement*, HIST.: THIS DAY IN HIST. (July 12, 2021), <https://www.history.com/this-day-in-history/blacklivesmatter->

Cullors and Opal Tometi built a network of activists using the name Black Lives Matter, the phrase and hashtag were adopted by activists nationwide—particularly after the police killings of Michael Brown in Ferguson, Missouri, and Eric Garner in New York in 2014.⁴³

The #BlackLivesMatter hashtag spiked on Twitter (now known as X) in response to major news events, such as Eric Garner dying in police custody in 2014,⁴⁴ the decision not to indict Ferguson police officers in the shooting death of Michael Brown in 2014,⁴⁵ the killing of five police officers following protests in Dallas in 2016, the acquittal of the Minnesota police officer who shot and killed Philando Castile in 2017, and the shooting and killing of Stephon Clark by Sacramento police officers in 2018.⁴⁶

On May 25, 2020, at or around 8 p.m., seventeen-year-old high school junior Darnella Frazier used her smartphone to record Minneapolis police officer Derek Chauvin kneeling on George Floyd's neck for nine minutes and twenty-nine seconds and killing him.⁴⁷ A few hours later, the young Black woman uploaded the video to Facebook, and it went viral.⁴⁸ The video exposed the deceit of initial official police accounts of the incident, and it fueled the racial justice movement.

Social media was central to #BlackLivesMatter organizing efforts in mobilizing internal and external resources, building coalitions among and between #BlackLivesMatter groups and other social

hashtag-first-appears-facebook-sparking-a-movement [https://perma.cc/QA47-VWVN].

43. See *id.*; MONICA ANDERSON, SKYE TOOR, LEE RAINIE & AARON SMITH, PEW RSCH. CTR., *ACTIVISM IN THE SOCIAL MEDIA AGE 3* (2018), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/07/PI_2018.07.11_social-activism_FINAL.pdf [https://perma.cc/QRX4-SNEM] (“#BlackLivesMatter has become an archetypal example of modern protests and political engagement on social media.”).

44. MONICA ANDERSON & PAUL HITLIN, PEW RSCH. CTR., *SOCIAL MEDIA CONVERSATIONS ABOUT RACE 17* (2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/08/PI_2016.08.15_Race-and-Social-Media_FINAL.pdf [https://perma.cc/Y62M-JZQV].

45. See Michael Doyle & William Douglas, *Social Media Help Take Ferguson Protests National*, MCCLATCHY WASH. BUREAU (Nov. 26, 2014, 5:56 PM), <https://www.mcclatchydc.com/news/crime/article24776848.html> [https://perma.cc/DW2N-QCW9].

46. See ANDERSON ET AL., *supra* note 43, at 16.

47. See Margaret Sullivan, *By Bearing Witness—and Hitting ‘Record’—17-Year-Old Darnella Frazier May Have Changed the World*, WASH. POST (Apr. 20, 2021, 6:27 PM), https://www.washingtonpost.com/lifestyle/media/darnella-frazier-george-floyd-trial/2021/04/20/9e261cc6-a1e2-11eb-a774-7b47ceb36ee8_story.html [https://perma.cc/HHX3-B3LM].

48. See *id.*

movements, and successfully educating casual observers about the problem and the need for structural police reform.⁴⁹ Social media allowed participants to process their thoughts, lower negativity and anger, and build a collective identity that fueled the activism.⁵⁰

Research demonstrates the direct correlation between social media activism and offline protests and demonstrations.⁵¹ Social movements signal their power in part by illustrating numbers,⁵² and social media allowed Black activists to connect with millions of people across geographic and racial boundaries in ways that other tactics and tools (for example, messaging apps) did not provide. This organizing and the disclosure and dissemination of information have allowed Black political activists to hold public officials accountable and advance transparency.

Further, by eliminating traditional media gatekeepers, social media allows Black communities an opportunity to disseminate their own information, provide a more nuanced understanding of Black life, and hold traditional media outlets (and tech platforms) accountable for their biases.⁵³ For example, extensive research has found that social media content provided more humanizing and diverse visual representations of the 2020 Black Lives Matter protests than the mainstream television news, which tended to show protesters as homogenous (Black) and violent.⁵⁴

49. See DEEN FREELON, CHARLTON D. MCILWAIN & MEREDITH D. CLARK, CTR. FOR MEDIA & SOC. IMPACT, BEYOND THE HASHTAGS: #FERGUSON, #BLACKLIVESMATTER, AND THE ONLINE STRUGGLE FOR OFFLINE JUSTICE 5 (2016), https://cmsimpact.org/wp-content/uploads/2016/03/beyond_the_hashtags_2016.pdf [<https://perma.cc/YNF6-NKB6>] (“Evidence that activists succeeded in educating casual observers came in two main forms: expressions of awe and disbelief at the violent police reactions to the Ferguson protests, and conservative admissions of police brutality in the Eric Garner and Walter Scott cases.”).

50. See Choudhury et al., *supra* note 41, at 93.

51. See *id.* at 101 (“[A]ctivism on social media predicted future protests and demonstrations that commenced on the streets throughout the country.”).

52. ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 190-91 (2017) (discussing size and scale of social movements as an important, though not sufficient, measure of power).

53. Social media can positively change the negative patterns that dominate mainstream coverage. See Brown et al., *supra* note 37, at 607 (explaining that social media can positively change the negative patterns that dominate mainstream coverage).

54. Gregory Gondwe & Sima Bhowmik, *Visual Representation of the 2020 Black Lives Matter Protests: Comparing US Mainstream Media Images to Citizens’ Social Media Postings*, ONLINE J. COMM’N & MEDIA TECHS. Oct. 2022, at 1, 7-8; Danielle K. Brown & Summer Harlow, *Protests, Media Coverage, and a Hierarchy of Social Struggle*, 24 INT’L J. PRESS/POL.

Granted, platforms also engage in content moderation that studies indicate disproportionately silence Black voices.⁵⁵ Due to tech companies' lack of transparency,⁵⁶ it is difficult to comprehensively assess the extent to which Black people are fairly depicted on social media platforms. The misrepresentation of Black communities documented in mainstream media may also occur disproportionately on sites like Parler. Nevertheless, the agency afforded to Black communities on social media allows for more rebuttal, correction, and elevation of Black perspectives than with traditional media.

Social media has also allowed for the development of a plurality of diverse voices and identities within the Black community, including at intersections of race and gender, which has enriched discourse within Black communities.⁵⁷ For example, social media facilitated the growth of the #SayHerName campaign, which highlighted that Black women like Breonna Taylor⁵⁸ are also victims of police and anti-Black violence (while police violence against Black women was not previously covered as intensively).⁵⁹ Before the

508, 521 (2019); Danielle K. Brown & Rachel R. Mourão, *No Reckoning for the Right: How Political Ideology, Protest Tolerance and News Consumption Affect Support Black Lives Matter Protests*, 39 POL. COMM'N 737, 738 (2022); Summer Harlow, *Framing #Ferguson: A Comparative Analysis of Media Tweets in the U.S., U.K., Spain, and France*, 81 INT'L COMM'N GAZETTE 623, 637-38 (2019); Kathleen Bartzen Culver & Douglas M. McLeod, "Anti-Riot" or "Anti-Protest" Legislation? *Black Lives Matter, News Framing, and the Protest Paradigm*, 4 JOURNALISM & MEDIA 216, 226-27 (2023); Marcia Mundt, Karen Ross & Charla M. Burnett, *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, SOC. MEDIA + SOC'Y, Oct.-Dec. 2018, at 1, 6-7.

55. See *infra* Part II.B.

56. See PASQUALE, *supra* note 36, at 38-40; Benesch, *supra* note 36.

57. See Minjie Li, *Visual Social Media and Black Activism: Exploring How Using Instagram Influences Black Activism Orientation and Racial Identity Ideology Among Black Americans*, 99 JOURNALISM & MASS COMM'N Q. 718, 734 (2022); DEEN FREELON, LORI LOPEZ, MEREDITH D. CLARK & SARAH J. JACKSON, KNIGHT FOUND., *HOW BLACK TWITTER AND OTHER SOCIAL MEDIA COMMUNITIES INTERACT WITH MAINSTREAM NEWS* 38-39 (2018), https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/136/original/TwitterMedia-final.pdf [<https://perma.cc/X94R-JLK5>].

58. See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 13, 2023), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/PKQ6-3JYJ>].

59. See Kimberlé Crenshaw, *The Urgency of Intersectionality*, TED Talk at TEDWomen 2016 (Oct. 2016) (video and transcript available at https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality [<https://perma.cc/LCB7-ND6Y>]); see also Jason Parham, *A People's History of Black Twitter, Part II*, WIRED (July 22, 2021, 8:00 AM), <https://www.wired.com/story/black-twitter-oral-history-part-ii-rising-up/> [<https://perma.cc/H5FE-7T9B>]; SARAH J. JACKSON, MOYA BAILEY & BROOKE FOUCAULT WELLES, #HASHTAG

purchase of Twitter by Elon Musk in October of 2022, the community known as “Black Twitter” connected, normalized, and fueled the growth of distinct communities such as Black women,⁶⁰ Black feminists,⁶¹ and Black gay men.⁶²

2. Empowering Black Entrepreneurs and Creatives

Platforms that enjoy Section 230(c)(1) immunity have helped Black-owned businesses connect with customers and have facilitated an entrepreneurial class of Black musicians, directors, podcasters, and other creatives.

While Black Americans are more likely than others to start a business, the bulk of Black-owned businesses are small and have limited revenues.⁶³ Black-owned businesses account for only 2.3% of U.S. businesses with employees,⁶⁴ and the vast majority of Black businesses—95%—have no employees.⁶⁵ Black Americans account for about 13% of the U.S. population,⁶⁶ but since the pandemic

ACTIVISM: NETWORKS OF RACE AND GENDER JUSTICE 52-55 (2020).

60. Terah J. Stewart, “Where We Are, Resistance Lives”: Black Women, Social Media, and Everyday Resistance in Higher Education, J. COMMITTED TO SOC. CHANGE ON RACE & ETHNICITY, Fall 2019, at 1, 25.

61. CATHERINE KNIGHT STEELE, DIGITAL BLACK FEMINISM 62-63 (2021).

62. See FREELON ET AL., *supra* note 57, at 46 (“For others, Black Twitter opened up a world of information about identities they did not find being reported on anywhere else [including for] ‘Black women, black feminists, black gay men.’”). With new owner Elon Musk, the future of Black Twitter is uncertain. Compare J.J. McCorvey & Char Adams, *Elon Musk Is Alienating One of Twitter’s Most Valuable Assets: Black Influencers*, NBC NEWS (Dec. 1, 2022, 12:06 PM), <https://www.nbcnews.com/tech/elon-musk-black-twitter-influencers-hate-speech-rcna59474> [<https://perma.cc/KE9Q-6HM5>], with Jason Parham, *Black Twitter Remains Unbothered in Elon Musk’s X*, WIRED (Jan. 29, 2024, 7:00 AM), <https://www.wired.com/story/black-twitter-post-elon-musk-x> [<https://perma.cc/42AU-Y8CA>].

63. DIANA FARRELL, CHRIS WHEAT & CHI MAC, J.P. MORGAN CHASE & CO. INST., SMALL BUSINESS OWNER RACE, LIQUIDITY, AND SURVIVAL 5 (2020), <https://www.jporganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-small-business-owner-race-report.pdf> [<https://perma.cc/5EWZ-FPHU>] (“Black- and Hispanic-owned businesses face challenges of lower revenues, profit margins, and cash liquidity.”).

64. ANDRE PERRY, REGINA SEO, ANTHONY BARR, CARL ROMER & KRISTEN BROADY, BROOKINGS METRO, BLACK-OWNED BUSINESSES IN U.S. CITIES: THE CHALLENGES, SOLUTIONS, AND OPPORTUNITIES FOR PROSPERITY 3 (2022), https://www.brookings.edu/wp-content/uploads/2022/02/Black-business-report_PDF.pdf [<https://perma.cc/ZG9W-YEKN>].

65. *Id.* at 10.

66. *American Community Survey Demographic and Housing Estimates, 2022 5-Year Estimates Data Profiles*, U.S. CENSUS BUREAU (2022), <https://data.census.gov/table/ACSDP5Y2022.DP05> [<https://perma.cc/4JUQ-3JVV>] (indicating a Black population in the

began, Black-owned businesses accounted for 26% of all new online microbusinesses.⁶⁷ One study found that “if Black-owned businesses were able to reach employment parity with all privately held U.S. firms, close to 600,000 new jobs would be created, and \$55 billion would be added to the economy.”⁶⁸

Section 230(c)(1) gives platforms the latitude to host conversations and reviews without fear of legal liability, and platforms assert that this contributes to their ability to provide marketplaces and user-curated promotion that may help smaller Black businesses more effectively compete with larger businesses. Marketplace platforms (such as Amazon, Etsy, eBay, Craigslist, and Uber Eats),⁶⁹ review platforms (such as Yelp, TripAdvisor, and Google Reviews), and social media platforms (such as Facebook and X) can give a Black business exposure to customers through positive reviews and delivering ads that extend far beyond a Black business’s immediate geographic proximity and the audience of a Black business’s website.⁷⁰ A 2022 report found that Black business owners believe that

United States of 12.5%).

67. PERRY ET AL., *supra* note 64, at 13. See generally Donna Kelley, Mahdi Majbouri & Angela Randolph, *Black Women Are More Likely to Start a Business than White Men*, HARV. BUS. REV. (May 11, 2021), <https://hbr.org/2021/05/black-women-are-more-likely-to-start-a-business-than-white-men> [<https://perma.cc/V44B-DBP6>]; Zeninjor Enwemeka, *Black Entrepreneurs Start Businesses at Higher Rates than Other Groups, Analysis Finds*, WBUR (Aug. 17, 2020), <https://www.wbur.org/news/2020/08/17/black-entrepreneurship-research> [<https://perma.cc/53J3-T2Y7>].

68. ASS’N FOR ENTER. OPPORTUNITY, *THE TAPESTRY OF BLACK BUSINESS OWNERSHIP IN AMERICA: UNTAPPED OPPORTUNITIES FOR SUCCESS* 5 (2017), https://aeoworks.org/wp-content/uploads/2019/03/AEO_Black_Owned_Business_Report_02_16_17_FOR_WEB-1.pdf [<https://perma.cc/4726-LT6V>]; see also PERRY ET AL., *supra* note 64, at 4.

69. See, e.g., *Buy Black Store*, AMAZON, <https://www.amazon.com/b?ie=UTF8&node=69662226011> [<https://perma.cc/Q76K-D986>]; see also *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 153 (3d Cir. 2019), *vacated and ordered for rehearing en banc*, 936 F.3d 182 (3d Cir. 2019) (recognizing Amazon’s Section 230 immunity for editorial functions like issuing a product defect warning, but giving no immunity for its sales processes like selling, inspecting, marketing, distributing, testing, and designing).

70. Brief of the Lawyers’ Committee for Civil Rights Under Law and Five Civil Rights Organizations as Amici Curiae in Support of Neither Party at 31, *Gonzalez v. Google, LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333) [hereinafter *Lawyers’ Committee Amicus Brief (Gonzalez)*] (“Third-party marketplace websites have facilitated connection with global markets, democratized access to systems required for business startups, and streamlined logistics.”).

they benefit from digital tools more than other businesses, with 80% viewing the use of digital tools to drive revenue as important.⁷¹

Section 230(c)(1) also protects Black entrepreneurs (as interactive computer service (ICS) users are protected along with ICS providers) from the prospect of costly litigation when a third-party user posts potentially illegal content in the comment section on the business's website, LinkedIn page, Facebook page, or YouTube channel. The costs to small businesses of defending a lawsuit even with Section 230 are significant, with one assessment estimating costs for a motion to dismiss based on Section 230 immunity typically between \$15,000 and \$40,000.⁷² If a claim is not dismissed based on Section 230, litigating a claim through the entire discovery process and trial was estimated to cost from \$100,000 to over \$500,000.⁷³

Platforms that benefit from Section 230(c)(1) immunity have also allowed an entrepreneurial group of Black creators to build audiences, distribute and monetize their creative content, and influence culture.⁷⁴ The creator economy consists of those who use digital technology to produce and/or distribute video, music, podcasts, writing, artisan crafts, and other creative content.⁷⁵ Tech platforms like TikTok, YouTube, and Google Podcasts allow creators to bypass traditional gatekeepers such as agents and managers, commercial music labels, movie studios, print publishers, media

71. CONNECTED COM. COUNCIL, DIGITAL TOOLS CONTINUE TO UNLOCK OPPORTUNITIES FOR U.S. SMALL BUSINESSES 3 (2022), <https://connectedcouncil.org/wp-content/uploads/2022/02/Digital-Tools-Continue-To-Unlock-Opportunities-For-U.S.-Small-Businesses-FINAL.pdf> [<https://perma.cc/G8J6-X5FN>] (finding that 80% of Black-led businesses “view using digital tools to drive revenue as an important part of their business,” compared with 73% overall).

72. Evan Engstrom, *Primer: Value of Section 230*, ENGINE (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs> [<https://perma.cc/LY66-E4Z3>].

73. *Id.*

74. Civil Rights Scholars Amicus Brief (*Gonzalez*), *supra* note 38, at 9 (“Because ‘[p]articipation in the creator economy by women and people of color relies on online ecosystems that give creative people open, low-cost access to potential supporters and followers,’ the ‘creator economy has more diverse and inclusive participation than traditional creative industries.’”); Lawyers’ Committee Amicus Brief (*Gonzalez*), *supra* note 70, at 30 (“Section 230 also empowers influencers and entrepreneurs of color to create lucrative businesses and reach audiences without relying on traditional media or commercial gatekeepers.”).

75. See INST. FOR INTELL. PROP. & SOC. JUST., DIVERSITY AND INCLUSIVENESS IN THE ONLINE CREATOR ECONOMY 2 (2022), <https://iipsj.org/wp-content/uploads/2023/01/IIPSJ-2022-Creator-Economy-Report.pdf> [<https://perma.cc/8833-X9JZ>].

outlets, and art galleries.⁷⁶ Creators monetize their work through direct funding from platforms like YouTube and TikTok, as well as through subscriptions, memberships, advertisements, brand partnerships, and other sources.⁷⁷ While estimates of the size of the U.S. creator economy vary, many put the value in the tens of billions.⁷⁸

One study found that 1.2 million Black Americans (3% of Black Americans) earned \$2.3 billion online in the creator economy in 2020.⁷⁹ Relative to their total share of the prime age (20 to 55) U.S. labor force, Black people were 33.6% more likely to be active participants in the online video economy and 6.4% more likely to actively participate in the podcast economy.⁸⁰ Platforms that enjoy Section 230(c)(1) immunity empower Black creators to engage without the approval and expenses of various gatekeepers—agents, managers, publishers, studio and record executives, and book editors.⁸¹

The creator economy has provided a start for many successful Black artists. Actress, writer, and producer Issa Rae, for example, released the YouTube series *Awkward Black Girl* in 2011, and it went viral.⁸² By 2016, HBO introduced her show *Insecure*, which won critical acclaim and Golden Globe and Emmy nominations.⁸³

76. *Id.* at 21-22.

77. See RICHARD FLORIDA, CREATIVE CLASS GRP., THE RISE OF THE CREATOR ECONOMY 8 (2022), https://www.creativeclass.com/reports/The_Rise_of_the_Creator_Economy.pdf [<https://perma.cc/FV6N-JYVY>].

78. See *id.* at 9 (“[T]he value of the Creator Economy varies depending on what is included in it.”); INST. FOR INTELL. PROP. & SOC. JUST., *supra* note 75 (finding that 11.1 million American creators earned \$23.6 billion in 2020); OXFORD ECON., THE STATE OF THE CREATOR ECONOMY: ASSESSING THE ECONOMIC, SOCIETAL, AND CULTURAL IMPACT OF YOUTUBE IN THE U.S. IN 2022, at 4 (2022), <https://www.oxfordeconomics.com/resource/youtube-us> [<https://perma.cc/P8K6-ZJRH>] (finding that “YouTube’s creative ecosystem contributed more than \$35 billion” to the U.S. economy in 2022 and “supported more than 390,000 full-time equivalent (FTE) jobs”).

79. See INST. FOR INTELL. PROP. & SOC. JUST., *supra* note 75, at 4, 9-10.

80. See *id.* at 10.

81. See *generally No More Gatekeepers*, IDEATO VALUE, <https://www.ideatovalue.com/insp/nickskillicorn/2022/03/no-more-gatekeepers> [<https://perma.cc/G5MS-HNW4>].

82. See Eni Subair, *10 Years After Awkward Black Girl, Issa Rae Discusses the Last Season of Insecure*, VOGUE (Feb. 3, 2021), <https://www.vogue.com/article/issa-rae-interview-last-season-insecure> [<https://perma.cc/NLK9-QHTE>].

83. See *id.*; see also Emmys, *Insecure Awards & Nominations*, TELEVISION ACAD., <https://www.emmys.com/shows/insecure> [<https://perma.cc/VX4Y-XEPB>]; Yong Chavez, *Nominee Profile 2022: Issa Rae, “Insecure,”* GOLDEN GLOBE AWARDS (Jan. 4, 2022), <https://www.goldenglobes.com/articles/nominee-profile-2022-issa-rae-insecure>

Unsigned rapper Lil Nas X released “Old Town Road” on SoundCloud and TikTok in December 2018, and the song quickly went viral.⁸⁴ He was signed by Columbia Records in March 2019, and “Old Town Road” became the longest-running number-one song in the sixty-year history of the U.S. Billboard Hot 100 chart.⁸⁵ Various other successful Black artists first developed a following through Instagram, SoundClick, SoundCloud, Vine, YouTube, and other platforms, including Cardi B, Dave, KSI, Saweetie, Soulja Boy, Nicki Minaj, and The Weeknd.⁸⁶

A generous account of Section 230(c)(1) asserts that the provision allows tech platforms to build spaces to find, discuss, review, and promote Black businesses and Black creators without fear of legal liability.⁸⁷ Black entrepreneurs and creators benefit from this subsidy through low-cost or no-cost marketplaces and user-curated promotion.⁸⁸ From this perspective, scaling back Section 230(c)(1)’s current protections could force tech platforms to scale back tools or increase fees, which could disproportionately burden small Black businesses and Black creators.⁸⁹

[<https://perma.cc/VD28-XELX>].

84. Bethonie Butler, *From TikTok Smash to Billboard Record-Breaker: How ‘Old Town Road’ Gamed the System and Won the Summer*, WASH. POST (Aug. 22, 2019, 7:00 AM), https://www.washingtonpost.com/lifestyle/style/from-tiktok-smash-to-billboard-record-breaker-how-old-town-road-gamed-the-system-and-won-the-summer/2019/08/21/7d355fc8-bf66-11e9-a5c6-1e74f7ec4a93_story.html [<https://perma.cc/B458-54HC>].

85. *See id.*

86. See Anna Sky Magliola, *18 MAJOR Artists Who Found Fame Through Social Media*, RAYO (Feb. 12, 2024), <https://hellorayo.co.uk/kiss/entertainment/music/social-media-artists/> [<https://perma.cc/NGH5-27J8>]; Natalie Stayse Owala, *10 Popular Artists Who Were Discovered on the Internet*, THETHINGS (May 6, 2021), <https://www.thethings.com/10-celebrities-who-were-discovered-on-the-internet> [<https://perma.cc/X87L-9DVC>]; Tori Honoré, *17 Celebs Who Have the Internet to Thank for Their Entire Careers*, BUZZFEED (Mar. 17, 2022), https://www.buzzfeed.com/tori_honore/celebs-who-started-on-social-media [<https://perma.cc/4ZUA-P5JA>].

87. Civil Rights Scholars Amicus Brief (*Gonzalez*), *supra* note 38, at 8-9.

88. *See New Study: Digital Tools Empower Small Businesses and Drive Growth*, CONNECTED COM. COUNCIL (Feb. 1, 2022), <https://www.connectedcouncil.org/new-study-digital-tools-empower-small-businesses-and-drive-growth> [<https://perma.cc/QHU5-LCRE>].

89. *Id.* (“If digital tools disappear or become more expensive, starting and building a business would be even harder for all entrepreneurs ... and doubly limiting for minority entrepreneurs.”) Many Black business owners find that identifying as Black has a positive impact, and platforms like Google, Amazon, and Facebook give businesses an opportunity to identify as Black to customers. *See, e.g., Showcase Your Black-Owned Business to Shoppers*, GOOGLE FOR SMALL BUS., <https://smallbusiness.withgoogle.com/blackowned> [<https://perma.cc/A8W1-FHWW>].

The precise extent to which the online benefits currently enjoyed by Black businesses and Black creators stem from Section 230(c)(1) immunity, however, is unclear. The ability of the internet to transcend geography and organize different communities of interest, for example, are also important factors. Due to Section 230's current exemptions, tech platforms already comply with intellectual property law,⁹⁰ and this compliance infrastructure has not prevented the emergence of the creator class on platforms.⁹¹ A full accounting of the benefits of Section 230 should also factor in new costs to Black businesses and creators imposed by the "digital gatekeepers" that enjoy the Section 230 subsidy, such as new fees and algorithms on platforms like Spotify, Amazon, Uber Eats, and Yelp that may downrank some Black businesses.⁹²

Relatedly, although the creator economy is growing rapidly,⁹³ it has been criticized as enticing young people with hollow prospects of a "career" as an influencer and grossly underpaying artists.⁹⁴ Only 0.5% of all creators earned more than \$100,000 per year, and only 3.1% earned between \$20,001 and \$100,000.⁹⁵ The average Black creator earned only \$1,845 per year (86% as much as the

90. 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

91. See Neda Pop-Andonov, *Creator Economy Market Size: Key Statistics in 2022*, INFLUENCERS CLUB (June 14, 2022), <https://www.influencers.club/2022/06/14/creator-economy-market-size> [<https://perma.cc/7WKF-J5R4>].

92. See, e.g., SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 173-79 (2018) (detailing the story of a Black hairdresser whose business was diminished by Yelp's practices of discarding reviews of her customers who were infrequent Yelp users and charging her fees to remove the links to her competitors on her business's Yelp page); Stacy Mitchell, *Fighting Monopoly Power: Small Business*, INST. FOR LOC. SELF-RELIANCE (July 2020), <https://www.ilsr.org/fighting-monopoly-power/small-business> [<https://perma.cc/A4W6-J7WU>] (noting that "there were more Black-owned businesses in the 1970s than there are now" and explaining the threat of "digital gatekeepers" to small businesses generally).

93. See Pop-Andonov, *supra* note 91.

94. See Symeon Brown, *Hustle and Hype: The Truth About the Influencer Economy*, GUARDIAN (Feb. 24, 2022), <https://www.theguardian.com/fashion/2022/feb/24/hustle-and-hype-the-truth-about-the-influencer-economy> [<https://perma.cc/4R64-LSNU>]; Randall Roberts, *Does Spotify Pay Artists a Fair Rate? Here's What Musicians, Managers and Apple Music Have to Say*, L.A. TIMES (Apr. 19, 2021, 6:00 AM), <https://www.latimes.com/entertainment-arts/music/story/2021-04-19/spotify-artists-royalty-rate-apple-music> [<https://perma.cc/STK4-NQ2B>].

95. INST. FOR INTELL. PROP. & SOC. JUST., *supra* note 75, at 5.

average white creator).⁹⁶ Further, Black creators have alleged that tech platforms profit from Black labor without providing fair compensation and use algorithms that elevate white creators over Black creators.⁹⁷ Black creators have also alleged that they receive fewer brand deals.⁹⁸ As one report on the creator economy acknowledged, “[p]latform algorithms are the new gatekeepers, by silently influencing which content users discover and which creators are essentially de-platformed.”⁹⁹

B. Challenges of Platform Immunity to Black Communities

This Part details activities on platforms that challenge Black communities and that could be more effectively regulated but for Section 230(c)(1) (or but for overly broad constructions of Section 230(c)(1) by platforms). Such activities include white supremacy violence and anti-Black harassment, discrimination in housing and employment, and illegal interference with elections targeted at Black voters.

Currently, Section 230(c)(1) and overly broad interpretations of the provision often deter state and local governments from regulating platforms to more effectively prevent the challenges examined in this Part. The First Amendment does not have the same deterrence effect as Section 230, as it does not prevent the regulation of imminent threats, housing and employment discrimination, foreign spending on elections, voter intimidation, or deceiving voters about the time, place, or manner of elections.¹⁰⁰ Granted, discrimination

96. *Id.* at 11.

97. See, e.g., Chinue Ellis, *Are Black Creators Reaping the Benefits of the Creator Economy?*, THE ORG (Mar. 10, 2023), <https://www.theorg.com/iterate/are-black-creators-reaping-the-benefits-of-the-creator-economy-the-cost-of> [<https://perma.cc/B98H-9HCN>]; Reed Albergotti, *Black Creators Sue YouTube, Alleging Racial Discrimination*, WASH. POST (June 18, 2020, 7:43 PM), <https://www.washingtonpost.com/technology/2020/06/18/black-creators-sue-youtube-alleged-race-discrimination> [<https://perma.cc/B3KB-ZVVB>].

98. See Ashley Carman, *Black Influencers are Underpaid, and a New Instagram Account Is Proving It*, VERGE (July 14, 2020), <https://www.theverge.com/21324116/instagram-influencer-pay-gap-account-expose> [<https://perma.cc/55AU-P5JA>].

99. TAKE CREATIVE CONTROL, CREATOR ECONOMY REPORT: EXECUTIVE SUMMARY 6 (2022), <https://www.takecreativecontrol.org/wp-content/uploads/2022/08/ExecutiveSummary-Final.pdf> [<https://perma.cc/SW8S-CJ4E>].

100. Courts have held that Section 230 immunizes platforms for defamation, negligence, common law privacy torts, tortious interference with contract or business relations,

in some of these areas is already regulated by federal criminal statutes that are technically exempt from Section 230.¹⁰¹ Federal criminal law, however, is often inadequate to deter platforms from hosting the activities due to the difficulty of establishing elements such as platforms knowingly and willfully violating the law beyond a reasonable doubt.

While some may assert that legal regulation is unnecessary because the vast bulk of unlawful anti-Black content is voluntarily addressed through company content moderation teams, such an approach ties the volume of unlawful anti-Black content on platforms to the vacillating nature of economic markets and business decisions. Several recent reports, for example, have noted that widespread layoffs of content moderation employees by large tech companies may result in an increase of dangerous content online.¹⁰²

1. Anti-Black Harassment

Section 230(c)(1) facilitates the disproportionate levels of harassment and intimidation faced by Black users online. Some harassment involves speech that enjoys constitutional protection and cannot be regulated by government, such as hate speech that does not directly incite imminent criminal activity or specifically threaten violence.¹⁰³ This Part focuses on harassment that has little or no constitutional protection and that government has the constitutional power to regulate—like true threats and civil rights

intentional infliction of emotional distress, and deceptive trade practices and false advertising. See Goldman, *supra* note 13.

101. See 47 U.S.C. § 230(e)(1).

102. See, e.g., Hayden Field & Jonathan Vanian, *Tech Layoffs Ravage the Teams that Fight Online Misinformation and Hate Speech*, CNBC (May 27, 2023, 7:02 AM), <https://www.cnbc.com/2023/05/26/tech-companies-are-laying-off-their-ethics-and-safety-teams.html> [https://perma.cc/KXU5-WYEK].

103. See *infra* Part II.A.3.

violations¹⁰⁴—but for which platforms might, nonetheless, claim Section 230 immunity.

“Cyber harassment involves a persistent and repeated course of conduct targeted at a specific person, that is designed to and that causes the person severe emotional distress, and often the fear of physical harm.”¹⁰⁵ While there are federal and state cyber harassment laws that apply to race, they are often underenforced.¹⁰⁶

Assuming victims can overcome the anonymity platforms sometimes provide and identify their harassers, victims may be able to sue harassers for tort claims such as defamation or intentional infliction of emotional distress.¹⁰⁷ However, given the possibility of Section 230(c)(1) immunity from liability for cyber harassment,¹⁰⁸ platforms have reduced incentives to moderate and remove online harassment targeted at Black users.¹⁰⁹ Indeed, recognizing that provocative content drives traffic, Section 230(c)(1) immunity may provide incentives for some platforms to host anti-Black harassment.

Black people are more likely to be harassed online because of their race than white people.¹¹⁰ A 2021 Pew report found, for example, that 54% of Black respondents experienced online

104. See *Counterman v. Colorado*, 143 S. Ct. 2106, 2111-12 (2023) (case involving Facebook messages to a local singer and musician, holding that a statement is a “true threat” that is not protected by the First Amendment if the perpetrator “consciously disregarded a substantial risk that his communications would be viewed as threatening violence”); Danielle Keats Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 CASE W. RESV. J.L. TECH. & INTERNET 1, 8 (2015) (“Cyber harassment often involves categories of speech that enjoy little to no protection.... And, cyber harassment involves speech that the Supreme Court understands as conduct—civil rights violations.”).

105. Citron, *supra* note 104, at 2.

106. *Id.* at 5.

107. *Id.*

108. *Id.* (“Victims may be able to sue their harassers for tort claims There are no deep pockets to go after in cases involving cyber harassment. Under the Federal Communications Decency Act, online platforms are mostly immune from liability for user-generated content.”).

109. Many mainstream companies have content moderation policies that limit harassment. See, e.g., *Harassment & Cyberbullying Policies*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2802268> [<https://perma.cc/A8FK-785H>]; *Community Guidelines*, TIKTOK, <https://www.tiktok.com/community-guidelines/en> [<https://perma.cc/U73V-AXFW>].

110. The survey data and other empirical research on the harms of harassment in this Part do not distinguish between forms of harassment that cannot be regulated by government because they are protected by the U.S. Constitution and other forms of harassment that government can constitutionally regulate, such as harassment that is sufficiently threatening or constitutes conduct rather than speech.

harassment because of their race or ethnicity, compared with 17% of white respondents.¹¹¹ Black people were about twice as likely as white people “to say they were stalked in their most recent online harassment experience.”¹¹²

In general, online harassment can cause “anxiety, depression, sadness, anger, fear, shame, embarrassment, isolation, low self-esteem, paranoia, stomach aches, panic attacks, post-traumatic stress disorder (PTSD), self-harming-behavior, and heart palpitations.”¹¹³ As it regards Black Americans specifically, the 2022 Anti-Defamation League (ADL) online hate and harassment survey found that among those African Americans who had experienced online harassment or were worried about future harassment, 22% had trouble sleeping, had trouble concentrating, or felt anxious.¹¹⁴

Black adolescents often face significant online harassment. Black teenagers were about five times more likely than white teens and twice as likely as Latino teens to report being a target of cyberbullying because of their race or ethnicity.¹¹⁵ Seventy percent of Black teens see cyberbullying as a major problem, compared with only 62% of Latino teens and 46% of white teens.¹¹⁶

When someone is targeted for harassment online, they are more likely to self-censor and withdraw from freely expressing themselves on the platform.¹¹⁷ Bystanders and onlookers are more likely to self-

111. See VOGELS, *supra* note 18, at 9; see also ADL CTR. FOR TECH. & SOC., ONLINE HATE AND HARASSMENT: THE AMERICAN EXPERIENCE 2023, at 19 (2023), https://www.adl.org/sites/default/files/pdfs/2023-12/Online-Hate-and-Harassmen-2023_0_0.pdf [<https://perma.cc/9M7V-49HD>] (finding that Black Americans experienced higher rates of both severe online harassment and any online harassment than other racial or ethnic groups).

112. VOGELS, *supra* note 18, at 24 (“Hispanic (20%) or Black (17%) adults who have experienced online harassment are about twice as likely as their White counterparts (9%) to say they were stalked in their most recent online harassment experience.”).

113. Francesca Stevens, Jason R.C. Nurse & Budi Arief, *Cyber Stalking, Cyber Harassment, and Adult Mental Health: A Systematic Review*, 24 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 367, 371 (2021).

114. ADL CTR. FOR TECH & SOC., *supra* note 111, at 40.

115. EMILY A. VOGELS, PEW RSCH. CTR., TEENS AND CYBERBULLYING 2022 (2022), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2022/12/PI_2022.12.15_teens-cyber-bullying-2022_FINAL.pdf [<https://perma.cc/68F2-59AL>].

116. *Id.*

117. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 196-97 (2014) (detailing situations where online hate speech threatens victims into silence); Mary Anne Franks, *Fearless Speech*, 17 FIRST AMEND. L. REV. 294, 306-07 (2018) (detailing the chilling effects of online harassment, particularly among marginalized communities).

monitor as well to avoid being targeted themselves. Online harassment thereby chills and intimidates the free expression of targeted communities.¹¹⁸ This interference with the equal enjoyment of online businesses can also violate public accommodation laws that extend protections to the internet.¹¹⁹ The proliferation of anti-Black harassment online normalizes anti-Black racism and threatens to erode decades of progress on civil rights.¹²⁰

Racial cyber harassment creates real-world harms. After Taylor Dumpson was inaugurated as the first Black woman student government president of American University (AU), “a masked man hung nooses with bananas inscribed with racist and derogatory messages around the AU campus.”¹²¹ Andrew Anglin of the neo-Nazi website *The Daily Stormer* wrote, “No one feels safe around bananas”; published Ms. Dumpson’s name, photo, and Facebook account; and urged his followers to “troll storm” her.¹²² Ms. Dumpson’s Facebook account and the AU Student Government President accounts were deluged with racist and intimidating messages such as, “I beez prezdent n sheeeit” and “Sheeeit I dindu nuffins she was axing fo it n sheeeit!”¹²³

Ms. Dumpson started to fear for her safety, stopped traveling alone, no longer felt safe studying on campus late at night, lost over 15% of her body weight, and was diagnosed with PTSD.¹²⁴ She filed suit against Anglin for intentional infliction of emotional distress and a violation of the District of Columbia Human Rights Act.¹²⁵ Anglin refused to appear in court, and a federal district court

118. See CITRON, *supra* note 117; Franks, *supra* note 117; see also DAVID BRODY & SEAN BICKFORD, LAWS’ COMM. FOR C.R. UNDER L., DISCRIMINATORY DENIAL OF SERVICE: APPLYING STATE PUBLIC ACCOMMODATIONS LAWS TO ONLINE COMMERCE 6 (2020), <https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf> [<https://perma.cc/4264-Y9V7>].

119. BRODY & BICKFORD, *supra* note 118.

120. See, e.g., Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 7, 2019, 3:51 PM), <https://www.cfr.org/background/hate-speech-social-media-global-comparisons> [<https://perma.cc/9QH6-MQ9T>]; Noëlle Lilley, *Are Social Media Normalizing Campus Racism?*, NATION (May 21, 2018), <https://www.thenation.com/article/archive/is-social-media-normalizing-campus-racism/> [<https://perma.cc/2SQ7-SZAX>].

121. *Dumpson v. Ade*, No. 18-1011, 2019 WL 3767171, at *1 (D.D.C. Aug. 9, 2019).

122. *Id.*

123. *Id.* at *2.

124. *Id.*

125. *Id.*

awarded her compensatory and punitive damages and a restraining order against Anglin.¹²⁶ Anglin defaulted on payments.¹²⁷ Online harassment can cause real harms, and the possibility of Section 230 immunity from liability reduces the incentives of platforms to moderate and remove anti-Black online harassment.

2. *White Supremacist Violence*

Relatedly, Section 230(c)(1) facilitates white supremacists in their efforts to commit violence against Black communities. By preemptively protecting tech platforms from liability, Section 230(c)(1) allows companies to create online havens for white supremacists, even when companies know or have reason to know that a forum is being used to engage in illegal activity. White nationalist organizations can be sued to deter and hinder their future attacks on Black communities,¹²⁸ but, because of Section 230(c)(1) immunity, a tech company that creates a platform it knows white nationalists use to inspire and promote attacks on Black communities generally will not be ordered to pay damages or even deplatform the white nationalists.¹²⁹ This lack of legal accountability means that increasing revenues and appeasing politicians who construe removing hate speech and disinformation as biased content moderation—rather than mitigating threats to safety or other harms—often drive platform decisions to host white supremacists.

126. *Id.* at *9.

127. Mariel Padilla, *Student Wins \$725,000 in Lawsuit over ‘Troll Storm’ Led by the Daily Stormer*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/us/taylor-dumpson.html> [<https://perma.cc/QG9J-8GNJ>] (“[Mr. Anglin] owes a total of nearly \$20 million to three people, but they have yet to see a cent in payments.”).

128. See Denise Lavoie, *Jury Awards \$26M in Damages for Unite the Right Violence*, ASSOCIATED PRESS (Nov. 23, 2021, 10:41 PM), <https://apnews.com/article/violence-lawsuits-race-and-ethnicity-charlottesville-01d9437ec28ed71b4bae293d7e0d815d> [<https://perma.cc/H5GK-K2B9>]; Keith L. Alexander & Rachel Weiner, *Proud Boys to Pay Church \$1 Million for Destroyed ‘Black Lives Matter’ Sign*, WASH. POST (June 30, 2023, 9:21 PM), <https://www.washingtonpost.com/dc-md-va/2023/06/30/black-lives-matter-church-sign-burned-proud-boys/> [<https://perma.cc/4WBU-963V>].

129. While federal crimes are exempt from Section 230(c)(1) immunity, the exemption does not extend to federal and state civil claims and state criminal claims. See 47 U.S.C. § 230(e)(1); see also Yaël Eisenstat & Katie A. Paul, *Yesterday’s Legislation is Failing Us in the Fight Against Tech-Fueled Violence*, TECH POL’Y PRESS (Jan. 31, 2024), <https://www.techpolicy.press/yesterdays-legislation-is-failing-us-in-the-fight-against-techfueled-violence/> [<https://perma.cc/C8NY-2UFU>].

In 2020, the Department of Homeland Security assessed white supremacists as “the most persistent and lethal [terror] threat,”¹³⁰ and the ADL estimated that white supremacists committed about 83% of the extremist-related murders in the United States over the previous decade.¹³¹ In 2021, anti-Black incidents accounted for 30% (3,297 of 10,891) of all hate crimes in the United States—and represented the largest category of hate crimes among all race, ethnicity, ancestry, sexual orientation, gender, religion, and disability categories.¹³²

While the white supremacist movement in the United States includes an evolving collection of groups,¹³³ most white supremacists do not belong to formal groups but are an “amorphous set of individuals connected by complicated networks.”¹³⁴ Enabled by Section 230(c)(1), tech platforms provide the infrastructure that facilitates online radicalization of white supremacists and serves as a “propellant” for violent white supremacists “to share manifestos

130. Betsy Woodruff Swan, *DHS Draft Document: White Supremacists Are Greatest Terror Threat*, POLITICO (Sept. 4, 2020), <https://www.politico.com/news/2020/09/04/white-supremacists-terror-threat-dhs-409236> [<https://perma.cc/FS27-H6GP>]; see also Hannah Allam, *FBI Announces That Racist Violence Is Now Equal Priority to Foreign Terrorism*, NPR (Feb. 10, 2020, 4:17 PM), <https://www.npr.org/2020/02/10/804616715/fbi-announces-that-racist-violence-is-now-equal-priority-to-foreign-terrorism> [<https://perma.cc/9BHD-BZS3>].

131. See *With Hate in Their Hearts: The State of White Supremacy in the United States*, ANTI-DEFAMATION LEAGUE (Mar. 3, 2017), <https://www.adl.org/resources/report/hate-their-hearts-state-white-supremacy-united-states> [<https://perma.cc/698P-BWN8>]; see also CTR. ON EXTREMISM, ANTI-DEFAMATION LEAGUE, *MURDER AND EXTREMISM IN THE UNITED STATES IN 2022*, at 6 (2023), <https://www.adl.org/sites/default/files/pdfs/2023-02/Murder-and-Extremism-in-the-United-States-in-2022.pdf> [<https://perma.cc/3LBK-DULW>].

132. See FBI Crime Data Explorer, *Hate Crime in the United States Incident Analysis*, FBI (2021), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/hate-crime> [<https://perma.cc/DG58-JVSM>] (choose “2021” from the dropdown under the “Hate Crime in the United States Incident Analysis” heading); *2021 Hate Crime Statistics*, U.S. DEP’T OF JUST. (Oct. 30, 2023), <https://www.justice.gov/hatecrimes/2021-hate-crime-statistics> [<https://perma.cc/CK9Z-8Q84>]. This number is likely low due to underreporting of hate crimes against Black communities. See David Nakamura, *Latest FBI Data on Hate Crimes Plagued by Lack of Reporting Nationwide*, WASH. POST (Dec. 12, 2022, 3:19 PM), <https://www.washingtonpost.com/national-security/2022/12/12/us-hate-crimes/> [<https://perma.cc/EJ52-DYQP>].

133. See *White Nationalist*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> [<https://perma.cc/CL5L-3SUY>].

134. Daniel Byman, *When Hate Goes Viral*, FOREIGN POL’Y (Mar. 23, 2022, 12:27 PM), <https://foreignpolicy.com/2022/03/23/white-supremacist-terrorism-social-media-internet/> [<https://perma.cc/7VU7-L8SD>].

and promote their violent acts in hopes of gaining personal infamy and encouraging others to follow suit.”¹³⁵

In 2022, for example, eighteen-year-old Payton Gendron killed ten people and injured three others in a grocery store in Buffalo, New York.¹³⁶ Gendron indicated in his online manifesto that he targeted the grocery store because it was in an area with a high concentration of Black residents (eleven of Gendron’s victims were Black).¹³⁷ The manifesto also revealed that he was motivated by “great replacement theory” beliefs about a conspiracy to replace white people with people of color in the United States,¹³⁸ and that his inspiration to commit the crime “began upon viewing on the 4chan website a brief clip of a [2019] mass shooting at a mosque in Christchurch, New Zealand.”¹³⁹

Gendron also wore a camera to livestream the shooting on Twitch¹⁴⁰—a platform owned by Amazon—both to motivate himself and to inspire others to commit similar acts of racial violence.¹⁴¹ Although Twitch took down the stream within two minutes,¹⁴² others copied the video, and it was still being shared on Facebook and X two days after the attack.¹⁴³ Due to Section 230(c)(1), Twitch

135. WILLIAMS ET AL., *supra* note 19, at 9; *see also* Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1024, 1042-45 (2021) (discussing the correlation between hate speech online, virulent nationalism, and violence against Black people).

136. Ben Collins, *The Buffalo Supermarket Shooting Suspect Allegedly Posted an Apparent Manifesto Repeatedly Citing ‘Great Replacement’ Theory*, NBC NEWS (May 14, 2022, 11:41 PM), <https://www.nbcnews.com/news/us-news/buffalo-supermarket-shooting-suspect-posted-apparent-manifesto-repeate-rcna28889> [<https://perma.cc/EV6W-YU42>].

137. *Id.*

138. *Id.*

139. NEW YORK AG INVESTIGATIVE REPORT, *supra* note 19, at 3.

140. Sara Fischer & Ina Fried, *Live Streaming Motivated the Buffalo Shooter*, AXIOS (May 16, 2022), <https://www.axios.com/2022/05/16/live-streaming-buffalo-shooter> [<https://perma.cc/R6YE-33N7>] (“‘Live streaming this attack gives me some motivation in the way that I know that some people will be cheering for me,’ the shooter said during his racist video rant during the attack.”).

141. NEW YORK AG INVESTIGATIVE REPORT, *supra* note 19, at 9, 31.

142. Brian Stelter & Sharif Paget, *Twitch Says Livestream of Buffalo Mass Shooting Was Removed in Less Than 2 Minutes*, CNN (May 15, 2022, 1:30 PM), <https://www.cnn.com/2022/05/15/business/twitch-livestream-buffalo-massacre/index.html> [<https://perma.cc/PUG9-E49J>].

143. Chloe Mayer, *Facebook, Twitter Batling Buffalo Shooting Video 48 Hours On*, NEWSWEEK (May 16, 2022, 11:43 AM), <https://www.newsweek.com/buffalo-shooting-video-online-facebook-twitter-social-media-response-1706961> [<https://perma.cc/R63M-QMZS>].

had limited incentives to prevent the violent content from appearing on its platform in the first place.

In response to the attack, New York’s Attorney General produced a report that concluded (1) fringe platforms like 4chan fuel radicalization,¹⁴⁴ (2) mass shooters use livestreaming to instantaneously magnify terror within communities and to incite others to similar violence,¹⁴⁵ and (3) some mainstream platforms were slow in removing copies of the shooting video and in adequately disclosing how they moderate racist content.¹⁴⁶ The report recommended that Congress reform Section 230 so that immunity is limited to companies that take reasonable steps to prevent unlawful violent criminal content from appearing on their platforms.¹⁴⁷

In response to a wrongful death lawsuit filed in 2023 against Amazon, Google, Discord, 4chan, Meta, Snapchat, and other platforms in New York state court,¹⁴⁸ the companies asserted that Section 230 prevents a court from considering whether their actions contributed to the Buffalo murders.¹⁴⁹

3. Platforms’ Section 230 Constructions that Attempt to Narrow Civil Rights Protections in Housing, Employment, and Credit

Meta has claimed that Section 230(c)(1) immunizes it from liability for civil rights violations.¹⁵⁰ The Ninth Circuit recently

144. NEW YORK AG INVESTIGATIVE REPORT, *supra* note 19, at 24-25.

145. *See id.* at 31-33.

146. *See id.* at 34-38.

147. *Id.* at 43-44.

148. Bill Hutchinson, *Loved Ones Sue Social Media Companies Over Buffalo Massacre*, ABC NEWS (May 12, 2023, 4:28 PM), <https://abcnews.go.com/US/lawsuit-social-media-companies-buffalo-massacre/story?id=99223375> [<https://perma.cc/3SZT-DG9S>].

149. Andy Paden, *5/14 Lawsuit Against Social Media Companies Can Move Forward, According to Recent Decision*, WGRZ (Mar. 18, 2024, 11:08 PM), <https://www.wgrz.com/article/news/special-reports/buffalo-mass-shooting/514-lawsuit-against-social-media-companies-can-move-forward-according-to-recent-decision/71-206c4c7a-c511-4577-8f33-3e80f51424fb> [<https://perma.cc/P2XP-7ECL>] (“The platforms argued that the case should be dismissed due to a U.S. law called Section 230.... Elmore said he expects that the platforms will appeal the decision.”).

150. *See Vargas v. Facebook, Inc.*, No. 21-16499, 2023 WL 4145434, at *2-3 (9th Cir. June 23, 2023) (holding that the Facebook Ad Platform was not entitled to Section 230 immunity because lawsuit alleged Facebook’s platform design and algorithms contributed to discrimination).

rejected this claim and concluded that Facebook materially contributes to discrimination in designing platforms that facilitate discrimination by users and in developing and employing data collection practices and algorithms that steer housing, employment, and financial services opportunities toward white users and away from Black users.¹⁵¹ Nevertheless, if tech companies continue to develop their platforms using such broad constructions of Section 230(c)(1), the platforms can facilitate discrimination against Black communities and deepen existing racial disparities, particularly where the “black box” nature of many algorithms obscures the extent to which they are materially contributing to such discrimination.¹⁵²

Indeed, Section 230(c)(1) has been interpreted by courts to prevent the application of some civil rights laws to online platforms that would normally apply to traditional media outlets. The federal Fair Housing Act, for example, prohibits discrimination in housing advertisements by both advertisers and media outlets that run the ads.¹⁵³ Thus, the *New York Times* has been held liable for publishing a real estate company’s ads featuring only white models because the ads suggest the housing is closed to Black people.¹⁵⁴ In contrast, a federal court held that Section 230(c)(1) prevented Craigslist from being sued under the Fair Housing Act for providing an electronic posting area for those wanting to rent out housing and running

151. *See id.*

152. *See* Sylvain, *Discriminatory Designs on User Data*, *supra* note 17 (examining Section 230(c)(1)’s facilitation of racial inequality in housing markets); *see also* Kim, *supra* note 17, at 869-73 (examining Section 230(c)(1)’s facilitation of racial and gender inequality in labor markets).

153. 42 U.S.C. § 3604(c) (making it illegal to make or publish advertisements to rent or sell a dwelling “that indicates any preference, limitation, or discrimination based on race”); *Advertising and Marketing*, U.S. DEP’T OF HOUS. & URB. DEV.: FAIR HOUS. & EQUAL OPPORTUNITY, https://www.hud.gov/program_offices/fair_housing_equal_opp/advertising_and_marketing [<https://perma.cc/9678-9ZKX>] (“In nearly all housing, including private housing, public housing, and housing that receives federal funding, the Fair Housing Act prohibits the making, printing and publishing of advertisements that indicate a preference, limitation or discrimination because of race.”).

154. *See* *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 998 (2d Cir. 1991) (holding the *New York Times* liable for violating the Fair Housing Act for publishing an advertisement for an apartment building featuring only white models); *see also* *United States v. Hunter*, 459 F.2d 205, 221 (4th Cir. 1972) (holding that a weekly newspaper that published a classified ad for an apartment in a “white home” violated the Fair Housing Act).

some notices that proclaimed “NO MINORITIES.”¹⁵⁵ Craigslist did not actively participate in the discrimination by steering housing ads away from Black users or toward white users, and it provided unlimited access to the ads on the site.¹⁵⁶ The court emphasized that Craigslist *caused* “postings only in the sense of providing a place where people can post,” much like Microsoft may provide word processing software and Dell may provide a computer that owners use to create discriminatory notices.¹⁵⁷

When platforms are alleged to be more than passive transmitters and instead make a material contribution to the underlying legal violation, however, Section 230(c)(1) immunity may not be warranted. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, a federal court held that Section 230 immunity was *not available* to prevent a discrimination claim against a website that required users looking for roommates to answer questions about their gender and sexual orientation and used this data to match the users with roommates.¹⁵⁸ The court held that immunity was unavailable because the website became “much more than a passive transmitter of information provided by others”¹⁵⁹ and instead became a co-developer that contributed materially to the alleged illegality.¹⁶⁰

Despite the fact that Meta has made a material contribution to discriminatory ad targeting, it has consistently attempted to evade the holding of *Roommates* and has instead attempted to stretch the holding of *Craigslist* to its platforms by claiming it cannot be compelled to comply with civil rights laws because Section 230(c)(1) exempts the platforms from legal liability.

155. See Chi. Laws.’ Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 668, 672 (7th Cir. 2008); Adam Liptak, *The Ads Discriminate, but Does the Web?*, N.Y. TIMES (Mar. 5, 2006), <https://www.nytimes.com/2006/03/05/weekinreview/the-ads-discriminate-but-does-the-web.html> [<https://perma.cc/6SR9-7C94>].

156. See Statement of Interest of the United States of America at 14, Nat’l Fair Hous. All. v. Facebook, Inc., No. 18-cv-02689 (S.D.N.Y. filed Aug. 17, 2018).

157. *Craigslist*, 519 F.3d at 671-72.

158. 521 F.3d 1157, 1161-62, 1175 (9th Cir. 2008).

159. See *id.* at 1166.

160. See *id.* at 1167-68. Subsequent litigation on the merits concluded that it is not a violation of federal or California fair housing law for people to indicate gender, religious, or other status preferences for people who will live in a home with them. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012).

In 2016, journalists at *ProPublica* purchased an ad that was targeted to Facebook users who were house-hunting and excluded users who had an African American “ethnic affinity.”¹⁶¹ The ad was approved fifteen minutes after the journalists placed their order.¹⁶² A year later, after Facebook purported to fix the problem, *ProPublica* again successfully bought rental housing ads that excluded Black Americans.¹⁶³

Litigation ensued, and Facebook has consistently attempted to invoke Section 230 to evade responsibility. For example, one typical court filing claimed that Section 230 “stands as an insurmountable obstacle” to holding Facebook legally liable for violating fair housing laws and stated: “Advertisers, not Facebook, are responsible for both the content of their ads and what targeting criteria to use, if any. Facebook’s provision of these neutral tools to advertisers falls squarely within the scope of CDA immunity.”¹⁶⁴ After a series of cases in which the parties settled before a court could determine whether Facebook’s advertising system was entitled to Section 230 immunity,¹⁶⁵ a federal district court held that Section 230 shields

161. Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016, 1:00 PM), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race> [<https://perma.cc/ZS83-HZ7M>].

162. *Id.*

163. Julia Angwin, Ariana Tobin & Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017, 1:23 PM), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> [<https://perma.cc/6944-JU9X>].

164. Defendant’s Notice of Motion & Motion to Dismiss First Amended Complaint; Memorandum of Points & Authorities in Support Thereof at 2, 5, *Onuoha v. Facebook, Inc.*, No. 16-cv-06440 (N.D. Cal. filed Apr. 3, 2017).

165. AM. C.L. UNION, SUMMARY OF SETTLEMENTS BETWEEN CIVIL RIGHTS ADVOCATES AND FACEBOOK 1-2 (Mar. 19, 2019), https://www.aclu.org/wp-content/uploads/document/3.18.2019_Joint_Statement_FINAL.pdf [<https://perma.cc/PK8P-YJGM>] (restricting the types of attributes that can be used on Facebook to select an audience for employment, housing, and credit advertisements); Stipulation & Order for Dismissal at 1, *Nat’l Fair Hous. All. v. Facebook, Inc.*, No. 18-cv-02689 (S.D.N.Y. filed Feb. 6, 2019). Separately, the Justice Department sued Meta claiming the use of discriminatory algorithms lead to targeted housing advertisements, leading to a settlement before a Section 230 defense was raised. Press Release, U.S. Dep’t of Just., Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising (June 21, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-ground-breaking-settlement-agreement-meta-platforms-formerly-known> [<https://perma.cc/26NT-72Z2>]; Roy L. Austin, Jr., *Expanding Our Work on Ads Fairness*, META (June 21, 2022), <https://about.fb.com/news/2022/06/expanding-our-work-on-ads-fairness/> [<https://perma.cc/FYK7-Q4R6>].

Meta from liability for Fair Housing Act violations.¹⁶⁶ On appeal in *Vargas v. Facebook, Inc.*, the Ninth Circuit reversed the district court, reasoning in an unpublished opinion that:

Facebook created an Ad Platform that advertisers could use to target advertisements to categories of users....

....

As the website’s actions did in [*Roommates.com*], Facebook’s own actions “contribute[d] materially to the alleged illegality of the conduct.” Facebook created the categories, used its own methodologies to assign users to the categories, and provided simple drop-down menus and toggle buttons to allow housing advertisers to exclude protected categories of persons.... Facebook was “much more than a passive transmitter of information provided by others; it [was] the developer, at least in part, of that information.”¹⁶⁷

While the Meta/Facebook litigation is the most prominent example of a platform attempting to deploy an overly broad construction of Section 230 to justify immunity from civil rights laws, there is a larger problem. Federal civil rights laws in housing, employment, and financial services prohibit not only intentional discrimination but also practices that have a racially disparate impact—such as platform design, data collection practices, and algorithms that facilitate discrimination.¹⁶⁸

166. *Vargas v. Facebook, Inc.*, No. 19-cv-05081, 2021 WL 3709083, at *4 (N.D. Cal. Aug. 20, 2021), *rev’d and remanded*, No. 21-16499, 2023 WL 4145434 (9th Cir. June 23, 2023).

167. No. 21-16499, 2023 WL 4145434, at *2-3 (9th Cir. June 23, 2023) (citations omitted).

168. See Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (1976) (prohibiting credit discrimination); 42 U.S.C. § 3604 (prohibiting housing discrimination); 24 C.F.R. § 100.500 (2023) (prohibiting discriminatory impact in housing); 42 U.S.C. § 2000e-2 (prohibiting employment discrimination); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971) (holding that even absent discriminatory intent, an employer may not use job requirements that bear no relation to job performance that have a discriminatory impact); see also U.S. CONST. amend. XV (prohibiting voting discrimination); Voting Rights Act, 52 U.S.C. § 10101. While courts are continuing to consider the scope of civil rights statutes in the context of emerging technologies, several federal agencies have recognized that emerging technologies that have a discriminatory impact are not exempt from federal civil rights protection. See EQUAL EMP. OPPORTUNITY COMM’N, SELECT ISSUES: ASSESSING ADVERSE IMPACT IN SOFTWARE,

Many other tech companies have designed their platforms in ways that enable advertisers to target their audiences and allow the tech company to exert significant control in collecting data and deploying algorithms (for example, auction functions) to determine which users actually see particular ads.¹⁶⁹ While some online targeting of Black users does not violate federal or state law and actually benefits Black communities (for example, voter mobilization and information about sickle cell anemia treatments), retaining the socially valuable benefits of lawful ad targeting should not be contingent on subjecting Black communities to discriminatory and unlawful ad targeting in housing, employment, and lending.

Beyond advertising platforms like Facebook, “gig economy” or “sharing economy” platforms that offer short-term rentals, freelancing services, and ride-sharing services offer emerging opportunities for discrimination.¹⁷⁰ Job-matching platforms such as LinkedIn, Monster, and ZipRecruiter use algorithms to match job seekers and

ALGORITHMS, AND ARTIFICIAL INTELLIGENCE USED IN EMPLOYMENT SELECTION PROCEDURES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2023), <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial> [<https://perma.cc/UVS8-P3R2>]; Press Release, U.S. Dep’t of Just., Justice Department Files Statement of Interest in Fair Housing Act Case Alleging Unlawful Algorithm-Based Tenant Screening Practices (Jan. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-fair-housing-act-case-alleging-unlawful-algorithm> [<https://perma.cc/TXD2-K737>] (summarizing statement filed by the Justice Department and the Department of Housing and Urban Development (HUD)); CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION CIRCULAR 2022-03, at 1 (2022), https://files.consumerfinance.gov/f/documents/cfpb_2022-03_circular_2022-05.pdf [<https://perma.cc/8H2R-RBZD>] (explaining that the requirements of the Equal Credit Opportunity Act, which prohibits discrimination based on race to any aspect of a credit transaction, apply to credit decisions based on complex algorithms).

169. See, e.g., Lee, *supra* note 17 (“This is not just a Facebook problem, as Google, Twitter, and even LinkedIn have similar tools that enable advertisers to target their audiences.”); Amit Datta, Anupam Datta, Jael Makagon, Deirdre K. Mulligan & Michael Carl Tschantz, *Discrimination in Online Advertising: A Multidisciplinary Inquiry*, 81 PROC. MACH. LEARNING RSCH. 20, 30-33 (2018) (examining various ad targeting and delivery functions on Google ad serving platform).

170. Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 BERKELEY TECH. L.J. 1183, 1184-85 (2017) (examining platform design that facilitates user bias with ride-hailing services, short-term rentals, freelancing services, dating, and other online services); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1293 (2017) (“On many platform economy platforms, providers rate users after a real-life interaction, increasing the likelihood that the ratings will reflect the conscious or unconscious bias of the provider entering the rating.”).

employers.¹⁷¹ These platforms are sometimes designed in ways that facilitate discrimination by users against other users—through the use of photos, names, and rating systems—and preventing discrimination through litigation against individual employers is often unworkable.¹⁷² The platforms themselves sometimes use data collection and algorithms that have the potential to facilitate discrimination.

By functioning as the key intermediaries for access to jobs, housing, and financial services, these platforms determine which users will have access to what information and play an increasingly significant role in shaping equal opportunity.¹⁷³ Following the reasoning of the Ninth Circuit’s ruling in *Vargas v. Facebook, Inc.*, tech companies generally should not be entitled to Section 230 immunity when the companies materially contribute to unlawful discrimination, either through the design of their platform or the discriminatory impact of their data collection or algorithms.

A similar analysis may be warranted in the context of consumer protection laws, particularly in light of the disproportionately high level of Black consumers who are victims of fraud.¹⁷⁴ The Federal

171. Kim, *supra* note 17, at 879-81.

172. See Michael Todisco, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 127 (2015), https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/03/67_Stan_L_Rev_Online_121_Todisco.pdf [<https://perma.cc/SWW9-SC5R>] (summarizing efforts by the National Fair Housing Alliance to file over 1,000 complaints against discriminatory online postings and concluding “that pursuing complaints against the thousands of discriminatory advertisers who use the internet” was infeasible).

173. Kim, *supra* note 17, at 869 (“Online platforms increasingly operate as key intermediaries in the markets for employment, housing, and financial services—what I refer to as opportunity markets. Predictive algorithms are also used in these markets to segment the audience and determine precisely what information will be delivered to which users. The risk is that in doing so, these intermediaries will direct opportunities in ways that reproduce or reinforce historical forms of discrimination.”).

174. Several platforms have claimed that Section 230 immunizes them from liability for consumer protection violations, and courts have generally rejected this argument when the platforms make material contributions to the illegal activity. See, e.g., *In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, 625 F. Supp. 3d 971, 993-95 (N.D. Cal. 2022) (finding that platforms contributed to illegal gambling by selling virtual chips through their platforms and that this was sufficient to overcome Section 230 immunity); *Hiam v. HomeAway.com, Inc.*, 267 F. Supp. 3d 338, 346-47 (D. Mass. 2017) (rejecting state consumer protection and common law aiding and abetting fraud against HomeAway (VRBO), finding that Section 230 immunized HomeAway from some claims involving fraud of vacation rental owner but not from claims arising from HomeAway’s rental guarantee policy).

Trade Commission revealed that Black communities are disproportionately victims of deceptive practices and fraud, particularly with regard to payday loan applications and student debt relief programs.¹⁷⁵ Using information provided by online lead generators, for example, companies have used phony payday loans to illegally access consumer bank accounts and withdraw fees without consumers' consent.¹⁷⁶ In analyzing consumer complaints regarding financial products or services submitted to the Consumer Financial Protection Bureau (CFPB), the CFPB found that “[c]ensus tracts with the highest share of Black or African American consumers submit the most complaints.”¹⁷⁷

While these issues are incredibly significant to Black communities, it is important to note that not all courts have recognized that platform design made a material contribution to illegality in ways that removed 230(c)(1) immunity¹⁷⁸ and that more work is needed to clarify this area of law.

4. Illegal Election Interference

While the First Amendment protects various unsavory activities used to influence elections, some activities do not enjoy significant First Amendment protection and are prohibited by law. For example, foreign spending on deceptive ads targeted at Black voters to influence elections, voter intimidation, and deceiving voters about

175. FED. TRADE COMM'N, *SERVING COMMUNITIES OF COLOR: A STAFF REPORT ON THE FEDERAL TRADE COMMISSION'S EFFORTS TO ADDRESS FRAUD AND CONSUMER ISSUES AFFECTING COMMUNITIES OF COLOR* 3, 40 (2021), https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf [<https://perma.cc/X8PP-HQ67>]. Black communities filed higher percentages of reports related to credit bureaus, banks and lenders, used auto sales, and debt collection. *Id.* at 3, 43-44.

176. *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Sues Online Payday Lender for Cash-Grab Scam (Sept. 17, 2014), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-online-payday-lender-for-cash-grab-scam/> [<https://perma.cc/XLJ6-65HH>].

177. CONSUMER FIN. PROT. BUREAU, *CONSUMER COMPLAINTS THROUGHOUT THE CREDIT LIFE CYCLE, BY DEMOGRAPHIC CHARACTERISTICS* 4 (2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-complaints-throughout-credit-life-cycle_report_2021-09.pdf [<https://perma.cc/UD9S-3AR9>].

178. *See, e.g.*, *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 589 (S.D.N.Y. 2018) (rejecting plaintiff's manufacturing defect and negligent design claims when platform provides “neutral assistance’ or tools and functionality that are available equally to bad actors and the app’s intended users” (citation omitted)).

the time, place, and manner of elections can all constitute illegal interference with democracy. Unfortunately, many state and local governments are likely deterred from regulating platforms to prevent these activities due to Section 230(c)(1).¹⁷⁹

For example, on Election Day 2016, the operators of the Williams & Calvin Facebook page—ostensibly two Black men from Atlanta who ran a popular Facebook page focused on Black media and culture—paid for and posted a Facebook ad targeted at Black users.¹⁸⁰ The ad proclaimed: “We don’t have any other choice this time but to boycott the election. This time we choose between two racists. No one represents Black people. Don’t go to vote.”¹⁸¹

After the November 2016 election, an investigation revealed that the Williams & Calvin Facebook account was fake and was set up and operated by the Russian Internet Research Agency (the “Russian Agency”).¹⁸² While African Americans made up just 12.7% of the U.S. population in 2016,¹⁸³ 37.04% of the unique Facebook pages believed to be created by the Russian Agency targeted Black audiences,¹⁸⁴ and Black audiences accounted for over 38% of the ads

179. See, e.g., Joshua Yim, *Section 230 and Fake News*, NW. UNIV. L. REV.: NULR OF NOTE (Apr. 12, 2018), <https://blog.northwesternlaw.review/?p=868> [<https://perma.cc/TF9Q-768H>] (“Despite public outcry for Facebook to be held accountable [for Russian disinformation campaigns], it is largely shielded from liability by Section 230.”).

180. YOUNG MIE KIM, PROJECT DATA, UNCOVER: STRATEGIES AND TACTICS OF RUSSIAN INTERFERENCE IN US ELECTIONS: RUSSIAN GROUPS INTERFERED IN ELECTIONS WITH SOPHISTICATED DIGITAL CAMPAIGN STRATEGIES 3 (2018), https://journalism.wisc.edu/wp-content/blogs.dir/41/files/2018/09/Uncover.Kim_v.5.0905181.pdf [<https://perma.cc/KQP6-KGHV>].

181. *Id.* at 9.

182. See Benjamin Fearnow, *Williams & Calvin: Pro-Trump Facebook Stars Reportedly Worked for Kremlin, Accounts Removed*, INT’L BUS. TIMES (Oct. 10, 2017, 1:51 PM), <https://www.ibtimes.com/williams-kalvin-pro-trump-facebook-stars-reportedly-worked-kremlin-accounts-removed-2599559> [<https://perma.cc/J3H2-F7L2>] (noting the “personal” account for Calvin Johnson last posted in 2015); see also Deen Freelon, Michael Bossetta, Chris Wells, Josephine Lukito, Yiping Xia & Kirsten Adams, *Black Trolls Matter: Racial and Ideological Asymmetries in Social Media Disinformation*, 40 SOC. SCI. COMPUT. REV. 560, 560 (2022) (using a computational analysis of 5.2 million tweets by the Russian government-funded “troll farm” known as the Internet Research Agency to find that presenting as a Black activist is “the most effective predictor of disinformation engagement by far”).

183. *American Community Survey Demographic and Housing Estimates, 2016 1-Year Estimates Data Profiles*, U.S. CENSUS BUREAU (2016), <https://data.census.gov/table/ACSDP1Y2016.DP05> [<https://perma.cc/5KCP-5UXS>] (indicating a Black population in the United States of 12.7% in 2016).

184. See RENEE DIRESTA, KRIS SHAFFER, BECKY RUPPEL, DAVID SULLIVAN, ROBERT MATNEY, RYAN FOX, JONATHAN ALBRIGHT & BEN JOHNSON, NEW KNOWLEDGE, THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY 21 (2019), <https://digitalcommons.unl.edu/cgi/>

purchased by the Russian Agency, 46.96% of the user impressions, and 49.84% of the user clicks.¹⁸⁵ Although federal law prohibits foreign nationals from spending any money in connection with U.S. elections,¹⁸⁶ the Russian Agency paid Facebook 1,350,489 rubles (about \$20,257) for 1,087 different ads for two Black audience segments.¹⁸⁷ Russian spending on disinformation targeted at Black voters on social media platforms continued in the 2020 election cycle.¹⁸⁸

Several states also have laws prohibiting domestic actors from deceiving voters (including Black voters) about voting requirements and procedures,¹⁸⁹ and the federal Voting Rights Act also prohibits domestic actors from intimidating, threatening, or coercing any person for voting or attempting to vote.¹⁹⁰

viewcontent.cgi?article=1003&context=senatedocs [https://perma.cc/5JME-CSZ9]; see also PHILIP N. HOWARD, BHARATH GANESH, DIMITRA LIOTSIU, JOHN KELLY & CAMILLE FRANÇOIS, UNIV. OXFORD, COMPUTATIONAL PROPAGANDA RESEARCH PROJECT: THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018, at 6 (2018), https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2018/12/The-IRA-Social-Media-and-Political-Polarization.pdf [https://perma.cc/6TPX-BYWG] (indicating that Facebook provided data on 3,393 individual ads published from 2015 to 2017 that it believed originated from the Russian Agency to the U.S. Senate Select Committee on Intelligence, and the U.S. House Permanent Select Committee on Intelligence released details on 3,517 of such ads).

185. See HOWARD ET AL., *supra* note 184, at 23 tbl.4 (providing raw numbers of the twenty audience segments on Facebook targeted by the Russian Agency, including the two audience segments of “African American Politics and Culture” and “Black Identity and Nationalism”).

186. 52 U.S.C. § 30121(a); 11 C.F.R. § 110.20(b) (2024).

187. See Overton, *supra* note 17, at 1796.

188. OFF. OF INTEL. & ANALYSIS, U.S. DEP’T OF HOMELAND SEC., BULL. IA-45571-20, RUSSIA LIKELY TO CONTINUE SEEKING TO UNDERMINE FAITH IN U.S. ELECTORAL PROCESS 1-2 (2020).

189. See, e.g., 10 ILL. COMP. STAT. 5/29-4 (2024) (penalizing “[a]ny person who, by ... deception ... knowingly prevents” another from voting or registering to vote); N.M. STAT. ANN. § 1-20-9 (2024) (prohibiting “printing, causing to be printed, distributing or displaying false or misleading” information relating to the voting or election process); VA. CODE ANN. § 24.2-1005.1A (2024) (considering it a misdemeanor to “[knowingly] communicate ... false [election] information [to a registered voter] ... about the date, time, and place of the election, or the voter’s precinct, polling place, or voter registration status”). For references to many of these statutes, see Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 359, 369-71 (2010) (“Although voter intimidation and deception are similar and statutes exist specifically for intimidation and fraud, no federal legislation directly addresses deception.”).

190. 52 U.S.C. § 10307(b); see *Nat’l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 120-21 (S.D.N.Y. 2023) (finding a violation of the Voting Rights Act because robocalls targeted at Black communities were intimidating, threatening, and coercive, and concluding that the conduct was ineligible for First Amendment protection because it constituted a “true threat”).

Due to Section 230(c)(1), however, states and localities likely refrain from regulating platforms to prevent foreign spending on elections, voter deception about voting requirements and procedures, or voter intimidation, even when the platforms make a material contribution to the illegality by, for example, using data collection and algorithms to deliver problematic content disproportionately to Black voters.¹⁹¹

II. BLACK COMMUNITIES AND PLATFORM IMMUNITY FOR CONTENT MODERATION

As a result of judicial interpretations that Sections 230(c)(1)-(2) provide platforms immunity for content moderation, private platforms can downrank or remove anti-Black content that poses challenges to Black communities.¹⁹² Section 230's immunity for content moderation also allows platforms to freely uprank and promote content that benefits Black communities, such as content that corrects anti-Black disinformation and repudiates anti-Black racism.

At the same time, however, Section 230 also gives platforms immunity to engage in discriminatory content moderation with little recourse—including disproportionately removing Black user content

191. See Overton, *supra* note 17 (explaining that Section 230 does not limit the power of states to hold social media companies legally responsible for using data collection and algorithms to target protected classes of voters with suppressive ads, and that Congress should explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting).

192. Section 230(c)(2) explicitly states that platforms shall not be held liable for voluntary actions “taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A). Following the Fourth Circuit’s decision in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), courts have widely interpreted Section 230(c)(1) to empower platforms to both leave up and take down (or uprank or downrank) third-party content. See, e.g., *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (“[I]f a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A).”); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted the CDA to establish broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’” (quoting *Zeran*, 129 F.3d at 330)).

that complies with platform guidelines.¹⁹³ The provision also gives platforms the latitude to refuse to remove anti-Black content that violates platform guidelines—which platforms sometimes do to engage users and generate ad revenue or to appease powerful politicians.¹⁹⁴

A. Benefits to Black Communities of Content Moderation

Section 230's immunity for content moderation arguably has resulted in tech platforms providing virtual spaces that are much safer and more hospitable for Black communities.

While Section 230(c)(1) often provides platforms immunity for displaying unlawful content of third parties that harms Black communities,¹⁹⁵ the express terms of Section 230(c)(2) and judicial interpretations of Section 230(c)(1) extend immunity to platforms that downrank and remove the content (or refuse to do so).¹⁹⁶ Such unlawful content includes harassment that threatens specific violence toward Black users; white supremacist incitement of violence; housing and employment discrimination; unfair consumer practices; foreign national spending on U.S. elections; voter intimidation; and disinformation about the time, place, and manner of elections.¹⁹⁷

This Part will focus on a different type of content that Section 230 allows private platforms to freely moderate: constitutionally

193. Arguably there is a point at which such activity may cross a line and violate public accommodations laws or § 1981 if it amounts to purposeful discrimination against Black patrons of that business. See 42 U.S.C. § 2000a(a) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.”); *id.* § 1981(a) (“All persons ... shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens.”).

194. Platforms sometimes refuse to remove content that violates platform guidelines. For example, Elon Musk posted and refused to remove a digitally altered “deepfake” video that insidiously manipulated a campaign ad for the 2024 Democratic presidential nominee, Vice President Kamala Harris, by using an AI-generated spoofed voice of Harris describing herself as “the ultimate diversity hire”—in violation of X’s terms of service. See Catherine Powell, *Deepfake of Kamala Harris Reups Questions on Tech’s Self-Regulation*, COUNCIL ON FOREIGN RELS.: NET POL. (Aug. 1, 2024, 2:18 PM), <https://www.cfr.org/blog/deepfake-kamala-harris-reups-questions-tech-self-regulation> [<https://perma.cc/ZP9G-T69G>].

195. See *supra* Part I.B.

196. See, e.g., *Zeran*, 129 F.3d at 330.

197. See *supra* Part I.B.

protected “lawful but awful” activities that challenge Black communities.¹⁹⁸ Due to Section 230, platforms can downrank or remove various racialized disinformation,¹⁹⁹ such as non-Black users pretending to be Black (digital blackface),²⁰⁰ posts encouraging Black people to “boycott the election” and “not vote,”²⁰¹ misinformation that voter fraud is rampant in Black communities,²⁰² misinformation about COVID-19 targeted at Black communities,²⁰³ some forms of hate speech,²⁰⁴ and the promotion of white supremacy ideology like the great replacement theory.²⁰⁵ Although much of this content would likely be constitutionally protected from government restrictions,²⁰⁶ Section 230 offers explicit protection from liability to private platforms when they remove or downrank the material.

Further, while the First Amendment empowers private platforms to remove, downrank, promote, or uprank content,²⁰⁷ platforms assert that Section 230’s procedural differences allow for more

198. See Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. ONLINE (2022), <https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/> [<https://perma.cc/5TUM-57J9>].

199. Racialized disinformation refers to “[i]nformation that is deliberately false or misleading, intended specifically to exploit wedge issues related to race, racial justice, or communities of color.” *Racialized Disinformation*, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y, <https://mediamanipulation.org/definitions/racialized-disinformation> [<https://perma.cc/4Q99-F5DN>].

200. See Whitney Tesi, *When Disinformation Becomes ‘Racialized,’* ABC NEWS (Feb. 5, 2022, 8:55 AM), <https://abcnews.go.com/Technology/disinformation-racialized/story?id=82400863> [<https://perma.cc/988S-N2GU>].

201. See Overton, *supra* note 17, at 1795, 1803.

202. See Brandon Tensley, *The Racist Rhetoric Behind Accusing Largely Black Cities of Voter Fraud*, CNN (Nov. 20, 2020, 12:03 PM), <https://www.cnn.com/2020/11/20/politics/trump-giuliani-black-cities-analysis/index.html> [<https://perma.cc/NA4M-G3LM>].

203. See BRANDI COLLINS-DEXTER, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y, *CANARIES IN THE COAL MINE: COVID-19 MISINFORMATION AND BLACK COMMUNITIES 4* (2020), <https://shorensteincenter.org/wp-content/uploads/2020/06/Canaries-in-the-Coal-Mine-Shorenstein-Center-June-2020.pdf> [<https://perma.cc/HCV7-P4DH>].

204. See Wilson & Land, *supra* note 135, at 1054.

205. See Steven Lee Myers & Stuart A. Thompson, *Racist and Violent Ideas Jump From Web’s Fringes to Mainstream Sites*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/technology/fringe-mainstream-social-media.html> [<https://perma.cc/T3Y5-4PWY>].

206. See *Mary Anne Franks Testimony*, *supra* note 14.

207. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2406 (2024) (“When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.”).

efficient and effective content moderation.²⁰⁸ Each day many platforms host millions of new posts, comments, videos, and other content, and because platforms can quickly remove or downrank anti-Black content or deplatform offenders without fear of protracted litigation, tech platforms can arguably provide safer and more hospitable environments for Black communities. One could argue that absent Section 230's content moderation provisions, both unlawful and "lawful but awful" anti-Black content would be more rampant.

While Americans broadly support some forms of robust content moderation,²⁰⁹ a greater share of Black Americans than others value safe and welcoming online spaces rather than those where users can post whatever comes to their minds.²¹⁰ Greater shares of Black Americans than white Americans believe that tech platforms can effectively address harassment by proactively deleting harassing posts and temporarily or permanently suspending harassers.²¹¹

Granted, even absent Section 230's protections, many platforms would likely remove white supremacy propaganda, hate speech, and discriminatory service providers in order to maintain a strong brand, appeal to a broad audience, and maximize revenues. Media outlets and other companies generally enjoy longstanding power to set their own terms and conditions for their services, and often no

208. See Goldman, *supra* note 13, at 39-42.

209. A majority of U.S. adults believe that social media companies should never allow intentionally misleading information about health and medical issues (85%), intentionally misleading information on elections and political issues (81%), false statements that harm someone's reputation (79%), and hate speech (64%). See KNIGHT FOUND. & GALLUP, INC., FREE EXPRESSION, HARMFUL SPEECH AND CENSORSHIP IN A DIGITAL WORLD 6 (2020), https://knightfoundation.org/wp-content/uploads/2020/06/KnightFoundation_Panel6-Techlash2_rprt_061220-v2_es-1.pdf [<https://perma.cc/UUR7-68QU>].

210. See Maeve Duggan, *1 in 4 Black Americans Have Faced Online Harassment Because of Their Race or Ethnicity*, PEW RSCH. CTR. (July 25, 2017), <https://www.pewresearch.org/short-reads/2017/07/25/1-in-4-black-americans-have-faced-online-harassment-because-of-their-race-or-ethnicity/> [<https://perma.cc/XL77-NPTR>] ("Blacks are also more likely to say it is more important for people to feel safe and welcome online than to be able to speak their minds freely (68% vs. 31%). Whites are more evenly divided on this question (51% vs. 48%), as are Hispanics (52% vs. 46%).").

211. See VOGELS, *supra* note 18, at 37 (survey showing that Black respondents are more likely than white respondents to believe that the following would be very effective in helping to reduce harassment or bullying on social media: proactive deletion of harassing posts (57% vs. 36%), temporary suspension of harassers (45% vs. 28%), and permanent suspension of harassers (58% vs. 49%).

clear theory of liability exists to challenge these content moderation decisions.²¹²

While it is difficult to determine the precise amount of anti-Black content that would no longer be moderated absent Section 230, acknowledging anti-Black content that can be moderated under Section 230 is important to analyzing the costs and benefits of Section 230 to Black communities.

1. *Reducing Disinformation*

Section 230 immunity for content moderation incentivizes tech platforms to reduce disinformation targeted at Black communities. This reduction in disinformation allows for more informed discussion and civic engagement within Black communities that center around real issues that affect Black communities.

From 2016 to about 2020, a group of domestic non-Black extremists infiltrated a debate within the Black community about #Blaxit (Black people’s exit) and set up fake accounts pretending to be Black users.²¹³ The extremists distributed memes branded in yellow and black designed to mimic Black Lives Matter, created an official Blaxit logo, and took other steps “to create the impression of an emergent movement of African repatriation by a group of Black Americans.”²¹⁴ As one participant indicated, “[t]his is like catfishing an entire race.”²¹⁵

212. *But see* H.B. 20, 87th Leg., 2d Called Sess. (Tex. 2021) (generally prohibiting platforms with more than fifty million active users from removing or downranking content based on a user’s viewpoint (unless authorized to do so under federal law or to prevent sexual abuse or harassment, incitement of crime, threats of violence targeted against a class, or unlawful expression, and allowing enforcement by private claims or the state attorney general)); S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (prohibiting platforms with over 100 million users or annual revenues over \$100 million from deplatforming or reprioritizing the content of political candidates or journalistic enterprises). As discussed above, these laws were at issue in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399-407 (2024) (vacating and remanding because lower courts failed to conduct a proper analysis of facial First Amendment challenges to Texas and Florida laws regulating platform content moderation, but observing that “Texas is not likely to succeed in enforcing its law” because “a State may not interfere with private actors’ speech to advance its own vision of ideological balance”).

213. *See* Brandi Collins-Dexter, *Butterfly Attack: Operation Blaxit*, MEDIA MANIPULATION CASEBOOK (Oct. 16, 2020), <https://mediamanipulation.org/case-studies/butterfly-attack-operation-blaxit> [<https://perma.cc/9MXA-DADU>].

214. *Id.*

215. *Id.*

Digital blackface—online racial impersonation of Black people—is popular in part because of its effectiveness in spreading confusion and discrediting authentic movements.²¹⁶ According to one study, presenting as a Black activist is the “most effective predictor of disinformation engagement by far.”²¹⁷

However harmful, digital blackface is likely speech that enjoys First Amendment protections and cannot be prohibited by government.²¹⁸ Section 230’s immunity provisions boost tech platforms’ rights to engage in content moderation so that platforms can freely remove the accounts of users engaging in “digital blackface.”²¹⁹ Indeed, many large platforms have guidelines prohibiting identity misrepresentation.²²⁰

The First Amendment might protect a political candidate targeting Black voters with false messages about his opponent on social media to deter Black voter turnout.²²¹ The First Amendment also protects the right of a platform to refuse to associate with or promote such false messages. Section 230 buttresses this power by providing preemptive procedural immunity for platforms that downrank such messages or reject such ad buys, and many platforms have guidelines prohibiting false claims to discourage voting.²²²

216. *See id.*

217. Freelon et al., *supra* note 182.

218. Speech does not lose First Amendment protection simply because it is false outside of special contexts (for example, impersonating an officer, committing financial fraud, or perjury). *See United States v. Alvarez*, 567 U.S. 709, 717, 719-21 (2012).

219. *See Tesi*, *supra* note 200.

220. *See, e.g., Facebook Community Standards: Account Integrity and Authentic Identity*, META, <https://transparency.fb.com/policies/community-standards/account-integrity-and-authentic-identity/> [<https://perma.cc/94Z5-S26H>]; *Impersonation Policy*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2801947> [<https://perma.cc/4P95-N582>]; *Community Guidelines: Integrity and Authenticity*, TIKTOK (Mar. 2023) [hereinafter *TikTok Integrity and Authenticity Guidelines*], <https://www.tiktok.com/community-guidelines/en/integrity-authenticity/> [<https://perma.cc/XFH6-Q3RX>].

221. *See Care Comm. v. Arneson*, 766 F.3d 774, 784-85 (8th Cir. 2014); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 151-52 (2014); *Alvarez*, 567 U.S. at 719.

222. *See, e.g., Elections Misinformation Policies*, YOUTUBE HELP (June 2, 2023) [hereinafter *YouTube Elections Misinformation Policies*], <https://support.google.com/youtube/answer/10835034> [<https://perma.cc/C6LQ-VS7C>]; *Facebook Community Standards: Misinformation*, META, <https://transparency.fb.com/policies/community-standards/misinformation> [<https://perma.cc/S3K7-NTMB>]; *TikTok Integrity and Authenticity Guidelines*, *supra* note 220.

Section 230 also ensures that platforms face no liability for removing false claims of voter fraud,²²³ which were often aimed at discounting the legitimacy of Black votes in the aftermath of the 2020 presidential election.²²⁴ These claims fueled the “election denier” movement and efforts to enact more restrictive voting procedures in many states.²²⁵

Black people were undercounted by more than 3% in the 2020 Census and by 2% in the 2010 Census (white people were overcounted in both years),²²⁶ and Section 230 supports platforms’ First Amendment and other rights to freely remove content discouraging census participation.²²⁷

Platforms also moderate content to address medical disinformation. Black people were disproportionately affected by COVID-19—particularly early in the pandemic.²²⁸ Online misinformation about the virus and vaccines was “targeted directly at [Black communities] by outsiders [and developed] organically within specific Black communities.”²²⁹ A study by Brandi Collins-Dexter using digital ethnography to track how disinformation moves across tech platforms identified predominant narratives—including that “Black

223. Many platforms have guidelines prohibiting the posting of content aiming to mislead voters about the time, place, means, or eligibility requirements for voting, false claims to discourage voting, false claims of voter fraud, and incitement to interfere with voting procedures or democratic processes. *See, e.g., YouTube Elections Misinformation Policies*, *supra* note 222.

224. *See* Ashley Nguyen, Kayla Ruble & Tim Craig, *Anger Builds in Black Community Over Trump’s Claims of Voter Fraud in Big Cities*, WASH. POST (Nov. 20, 2020, 9:43 PM), https://www.washingtonpost.com/national/2020/11/20/f0d11954-2b71-11eb-9b14-ad872157ebc9_story.html [<https://perma.cc/CJ7R-TEWA>]; Tensley, *supra* note 202.

225. *See* Nguyen et al., *supra* note 224; Tensley, *supra* note 202.

226. Eric Jensen & Timothy Kennel, *Who Was Undercounted, Overcounted in the 2020 Census?*, U.S. CENSUS BUREAU (Mar. 10, 2022), <https://www.census.gov/library/stories/2022/03/who-was-undercounted-overcounted-in-2020-census.html> [<https://perma.cc/W5HD-SGBQ>].

227. Many platforms have guidelines prohibiting suppression of census participation. *See, e.g., Misinformation Policies*, YOUTUBE HELP, <https://support.google.com/youtube/answer/10834785> [<https://perma.cc/DE9K-ZHJS>]; *Facebook Community Standards: Misinformation*, *supra* note 222; *TikTok Integrity and Authenticity Guidelines*, *supra* note 220.

228. Nambi Ndugga, Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths, Vaccinations, and Treatments by Race/Ethnicity as of Fall 2022*, KAISER FAM. FOUND. (Nov. 17, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-cases-and-deaths-vaccinations-and-treatments-by-race-ethnicity-as-of-fall-2022/> [<https://perma.cc/WBL8-M5XS>].

229. COLLINS-DEXTER, *supra* note 203, at 3.

people could not die from COVID-19” and that “[t]he virus could be contained through use of herbal remedies.”²³⁰ Section 230 allowed platforms to remove these dangerous messages.²³¹

2. *Updating Practices and Algorithms to Prevent Discrimination*

In addition to supporting platforms’ rights to remove disinformation targeted at Black users, Section 230 immunity for content moderation also supports platforms’ freedom to update their platform design, policies, algorithms, and other tools to more effectively prevent discrimination (including but not limited to detecting and downranking or removing anti-Black users, hate speech, white supremacy organizing, and racialized disinformation).

For example, after data suggested that some hosts on Airbnb were disproportionately rejecting Black guests,²³² Airbnb required that all of its users agree to “treat everyone in the Airbnb community—regardless of their race, religion, national origin, ethnicity, disability, sex, gender identity, sexual orientation, or age—with respect, and without judgment or bias.”²³³ Airbnb has denied access to or removed from its platform more than 2.5 million people for declining to agree to the statement.²³⁴

The company reduced opportunities for discrimination by displaying guest photos to hosts only after they accept a booking request, allowing booking of most rooms without prior host approval, and

230. *Id.*

231. Many platforms have guidelines prohibiting contradicting expert consensus on safe medical practices. *See, e.g., Medical Misinformation Policy*, YOUTUBE HELP, <https://support.google.com/youtube/answer/13813322> [<https://perma.cc/XHF6-YHE9>]; *Facebook Community Standards: Misinformation*, *supra* note 222.

232. *See, e.g., Benjamin Edelman, Michael Luca & Dan Svirsky, Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON., Apr. 2017, at 1, 2 (finding that guests with distinctively Black American names were 16% less likely to be accepted relative to identical guests with distinctively white names).

233. *Community Policy: General Questions About the Airbnb Community Commitment*, AIRBNB [hereinafter *Airbnb Community Commitment Questions*], <https://www.airbnb.com/help/article/1523> [<https://perma.cc/5DKM-53JL>].

234. AIRBNB, A SIX-YEAR UPDATE ON AIRBNB’S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION 7 (2022), <https://news.airbnb.com/wp-content/uploads/sites/4/2022/12/A-Six-Year-Update-on-Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion-12122022.pdf> [<https://perma.cc/2YSS-U9CF>].

expanding the ability of users to flag negative content on message threads and accommodation listing descriptions.²³⁵ In response to data suggesting that non-Black hosts were earning more than Black hosts even after controlling for location, quality, and other factors,²³⁶ Airbnb deployed a tool that uses machine learning to help hosts set competitive rates, which reduced (but did not completely close) the gap between rates earned by Black and white hosts.²³⁷

3. *Removing Hate Speech and White Supremacists*

Although the First Amendment generally does not allow government to restrict hate speech unless it directly incites imminent criminal activity or specifically threatens violence targeted at a person or group,²³⁸ it protects the rights of non-government actors to refuse to associate with or promote speech against their will. Section 230 buttresses this right of platforms to downrank and

235. See LAURA W. MURPHY, THE LEADERSHIP CONF. ON CIV. & HUM. RTS., THE RATIONALE FOR AND KEY ELEMENTS OF A BUSINESS CIVIL RIGHTS AUDIT 29 (2021), <https://www.civilrightsdocs.info/pdf/reports/Civil-Rights-Audit-Report-2021.pdf> [<https://perma.cc/4HEB-2WDK>]; Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html> [<https://perma.cc/YD6P-59SG>]; *Airbnb Community Commitment Questions*, *supra* note 233 (requiring all within the Airbnb community to treat everyone with respect and without bias regardless of protected class status); see also David Koenig, *Airbnb Will Change Process to Fight Discrimination in Oregon*, AP NEWS (Jan. 6, 2022, 6:44 PM), <https://apnews.com/article/business-oregon-lawsuits-discrimination-race-and-ethnicity-61665bf6a28849bf92703e6df15b8ca2> [<https://perma.cc/X4NQ-3KME>] (responding to a lawsuit brought by three African American women by indicating that hosts in Oregon will start seeing an Oregon guest's initials in place of the guest's first name until a booking request is confirmed).

236. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* § 1 (Harvard Bus. Sch., Working Paper, Paper No. 14-054, 2014), https://www.hbs.edu/risk/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf [<https://perma.cc/JK8W-FHED>] (finding that non-Black hosts in New York City could charge 12% more on average than Black hosts).

237. Lane Lambert, *White Airbnb Hosts Earn More. Can AI Shrink the Racial Gap?*, FORBES (Aug. 11, 2021, 8:00 AM), <https://www.forbes.com/sites/hbsworkingknowledge/2021/08/11/white-airbnb-hosts-earn-more-can-ai-shrink-the-racial-gap/?sh=1085a47d4a62> [<https://perma.cc/24ZE-GL4T>].

238. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *United States v. White*, 670 F.3d 498, 513 (4th Cir. 2012).

remove hate speech and white supremacy rhetoric, and to deplatform users who spew such ideas.²³⁹

Over the past forty years, the white supremacy movement has used platforms to recruit and radicalize Americans, strategize, upload videos and manifestos, fundraise, and promote their principles of white cultural and genetic superiority—often for free.²⁴⁰ In the 1980s, white supremacists recognized the value of online computer bulletin boards to connect and strategize, and they built out hundreds of websites in the 1990s.²⁴¹

In the 2000s, white supremacists developed communities on mainstream platforms like Facebook, MySpace, YouTube, and X.²⁴² Algorithms developed by these platforms to show users content they are most likely to read, watch, and click accelerated the spread of white supremacy.²⁴³

Public pressure encouraged mainstream platforms to strengthen their content moderation policies and content filters, and utilizing power reinforced by Section 230, several platforms did so.²⁴⁴ Meta, for example, defines hate speech attacks as “dehumanizing speech;

239. See *Twitter, Inc. v. Superior Ct. for S.F.*, No. A154973, 2018 Cal. App. LEXIS 1248, at *4, *9-10 (Cal. Ct. App. Aug. 17, 2018) (finding that Section 230 barred an unfair trade practices claim by a white supremacist Twitter user whose account was permanently suspended for violating “the Twitter Rules against being affiliated with a violent extremist group”); *White Nationalist Jared Taylor Sues Twitter Over Ban*, BBC (Feb. 22, 2018), <https://www.bbc.com/news/technology-43154727> [<https://perma.cc/7T5Y-5LUC>].

240. See Byman, *supra* note 134; ANTI-DEFAMATION LEAGUE, *supra* note 131.

241. See WILLIAMS ET AL., *supra* note 19, at 5.

242. See *id.* at 6.

243. See Myers & Thompson, *supra* note 205 (“For all the efforts some major social media platforms have made to moderate content online, the algorithms they use—often meant to show users posts that they will read, watch and click—can accelerate the spread of disinformation and other harmful content.”).

244. See, e.g., *Facebook Community Standards: Hate Speech*, META, (2024) <https://transparency.fb.com/policies/community-standards/hate-speech/> [<https://perma.cc/9T9G-9DVY>]; *Hate Speech Policy*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2801939> [<https://perma.cc/H866-TUBG>]; *Hateful Conduct*, X: HELP CENTER (Apr. 2023) [hereinafter *X Hateful Conduct Policy*], <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/A4WB-YNCD>]; *Community Guidelines: Overview*, TIKTOK (Mar. 2023), <https://www.tiktok.com/community-guidelines/en/> [<https://perma.cc/U73V-AXFW>]. Many platforms also have guidelines restricting dangerous organizations. See, e.g., *Violent Extremist or Criminal Organizations Policy*, YOUTUBE HELP, <https://support.google.com/youtube/answer/9229472> [<https://perma.cc/8CED-QJ96>]; *Facebook Community Standards: Dangerous Organizations and Individuals*, META, <https://transparency.fb.com/policies/community-standards/dangerous-individuals-organizations/> [<https://perma.cc/77UM-AVX7>].

statements of inferiority, expressions of contempt or disgust; cursing; and calls for exclusion or segregation.”²⁴⁵ Mainstream platforms often prohibit users from engaging in dehumanizing comparisons (for example, comparing people to apes, savages, primitives, sexual predators, or criminals) and generalizations and stereotypes (for example, blackface or suggesting that a group has mental or moral deficiencies).²⁴⁶ Platforms often ban hateful imagery such as swastikas²⁴⁷ and incitement of harassment or violence against protected classes.²⁴⁸

B. Challenges to Black Communities from Content Moderation

Just as content moderation supported by Section 230 benefits Black communities, it can also present challenges to Black communities. Section 230 enables platforms to disproportionately remove Black content and deploy discriminatory content moderation algorithms with limited legal recourse.²⁴⁹ Section 230 makes it difficult for Black communities to challenge platform moderation decisions to disseminate anti-Black content that clearly violates the platform’s own community guidelines—whether due to indifference or the platform’s interest in catering to a valuable advertising demographic or a powerful political constituency.

Section 230 also effectively protects tech companies’ refusals to disclose the details motivating tech companies’ moderation choices because its immunity shield means that cases do not get to discovery, so the public finds out very little about their inner workings. This “black box” prevents Black communities from gaining a sufficient understanding of moderation choices to effectively challenge them in court or in public debate.²⁵⁰ Without transparency, for example, Black users do not really know why a platform is taking down a Black Lives Matter video, whether a platform is consistently enforcing a community guideline, or whether a platform

245. See, e.g., *Facebook Community Standards: Hate Speech*, *supra* note 244.

246. *Id.*

247. See, e.g., *X Hateful Conduct Policy*, *supra* note 244.

248. *Id.*

249. See discussion *infra* Part II.B.1.

250. See PASQUALE, *supra* note 36, at 38-40; Benesch, *supra* note 36.

is becoming more fair or less fair in its depictions of Black people.²⁵¹ This lack of transparency—which is caused by the platforms themselves—also makes it difficult to fully evaluate the consequences of adopting a particular Section 230 reform.

Content moderation is not a single rule but a complex network of rules, practices, policies, mission statements, and incentives that interact with each other and apply to various types of content in different contexts. The unchecked deference to platform decisions required by Section 230 is not enjoyed by newspapers or most private companies, non-profit entities, philanthropic institutions, or governmental entities.²⁵²

Even absent Section 230's content moderation immunity and its procedural benefits to tech companies in litigation, tech companies have significant autonomy in moderating content on their platforms thanks to the First Amendment.²⁵³ A platform could still promote anti-Black content to engage more users and attract more advertising dollars, or to placate a powerful congressional committee chair with regulatory jurisdiction over the tech company. Regardless of Section 230, a platform could continue to discriminate against Black users in downranking and removing content, particularly outside of the approximately two dozen states that either explicitly apply state public accommodations laws to online commerce or would likely do so if their courts were to consider the issue.²⁵⁴ The First Amendment

251. See, e.g., Jason Parham, *TikTok and the Evolution of Digital Blackface*, WIRED (Aug. 4, 2020, 6:00 AM), <https://www.wired.com/story/tiktok-evolution-digital-blackface/> [<https://perma.cc/2MTD-X792>].

252. *Mary Anne Franks Testimony*, *supra* note 14, at 48-49.

253. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2406-07 (2024) (holding that platform content moderation constitutes expression that receives First Amendment protection, and that a Texas law intended to “correct the mix of speech” on platforms does not pass even a less stringent intermediate form of First Amendment review); *Mary Anne Franks Testimony*, *supra* note 14, at 48-49 (explaining that social media platforms are private entities with the First Amendment right to “fact-check, label, remove, ban, and make other interventions as they see fit about the content on their sites”); see also Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 490, 494-97 (2016) (observing the irony that while Section 230 prevents platforms from being treated as speakers, when government officials attempt to regulate how content appears, platforms have a “convenient identity crisis” and claim to be speakers that enjoy full First Amendment protections, and proposing platforms relinquish First Amendment defenses in order to enjoy full Section 230 protections).

254. See BRODY & BICKFORD, *supra* note 118, at 1-3. As discussed above, there may be a point at which purposeful discrimination against Black patrons of an online business violates

and the shortcomings of legal protections against discrimination online are essential considerations in analyzing legal reforms and other incentives that might prompt platforms to make better content decisions for Black communities.

1. Discriminatory Content Moderation

Section 230 protects platforms' broad discretion to remove and downrank disproportionately large amounts of content from Black users and develop and deploy discriminatory moderation algorithms.

Black users experience disproportionate levels of account removals by social media platforms.²⁵⁵ Facebook employees, for example, revealed that internal company research showed that U.S.-based Black Instagram users were about 50% more likely “to have their accounts automatically disabled by the moderation system than those whose activity indicated they were white.”²⁵⁶ Another study of Facebook, Instagram, X, YouTube, and other social media sites found that Black users were 60% more likely to have their accounts removed than white users.²⁵⁷

While conservatives and transgender people are more likely than other groups to experience removal of their content,²⁵⁸ conservative participants' content was more often removed because it violated site guidelines.²⁵⁹ Transgender and Black participants' content was often removed despite complying with site guidelines or falling into

public accommodations laws or Section 1981. *See* 42 U.S.C. §§ 1981(a), 2000a(a).

255. *See* Haimson et al., *supra* note 20, at 6.

256. Olivia Solon, *Facebook Ignored Racial Bias Research, Employees Say*, NBC NEWS (July 23, 2020, 3:29 PM), <https://www.nbcnews.com/tech/tech-news/facebook-management-ignored-internal-research-showing-racial-bias-current-former-n1234746> [<https://perma.cc/93M4-99T2>]; *see also* Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), <https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability> [<https://perma.cc/ZX3V-XHCX>] (describing how advertisers on Facebook have used the platform to discriminatorily target users).

257. *See* Haimson et al., *supra* note 20, at 13 (finding that “16% of Black participants had accounts removed as compared to 10% of white participants”).

258. *See id.* at 1.

259. The conservative content that was removed was most likely to be offensive content, misinformation, adult content or nudity not following platform guidelines, and hate speech. *Id.* at 16-17.

content moderation gray areas.²⁶⁰ Researchers also found that the Black user content most often removed involved racial justice (for example, complaints about white supremacy) or feminist viewpoints (for example, complaints about sexual harassment).²⁶¹

Section 230 protects platforms' freedom to develop and deploy automated content moderation tools that perpetuate anti-Black biases. Algorithms rely on large amounts of training data, and these datasets are susceptible to biases on the basis of race.²⁶² Many platforms' content moderation systems and censorship tools fail to recognize cultural nuances—thus disproportionately silencing Black users.²⁶³

For example, some Black users claim that they “can’t talk about racism on Facebook without risking having their posts removed and being locked out of their accounts,” and that Facebook has arbitrarily decided “that talking about racism is racist.”²⁶⁴ TikTok apologized after its algorithm flagged as inappropriate phrases like “Black Lives Matter,” “supporting black excellence,” and “pro black,” but did not flag “white supremacy,” “supporting white excellence,” and “pro white.”²⁶⁵ One study found that X’s content moderation algorithms are more than twice as likely to flag as offensive posts

260. *Id.* at 1.

261. *See id.* at 19-20.

262. CAREY SHENKMAN, DHANARAJ THAKUR & EMMA LLANSÓ, CTR. FOR DEMOCRACY & TECH., DO YOU SEE WHAT I SEE? CAPABILITIES AND LIMITS OF AUTOMATED MULTIMEDIA CONTENT ANALYSIS 26-28 (2021), <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf> [<https://perma.cc/SH9R-TV3K>].

263. Lawyers’ Committee Amicus Brief (*Gonzalez*), *supra* note 70, at 28 (“The content moderation systems of many platforms lack the ability to recognize cultural nuances not rooted in a white, male, straight context, resulting in disproportionate silencing of users of color and other underserved groups.”).

264. Jessica Guynn, *Facebook While Black: Users Call It Getting ‘Zucked,’ Say Talking About Racism Is Censored as Hate Speech*, USA TODAY (July 9, 2020, 6:17 PM), <https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/> [<https://perma.cc/88TS-FJBV>].

265. Charlotte Colombo, *TikTok Has Apologized for a ‘Significant Error’ After a Video That Suggested Racial Bias in Its Algorithm Went Viral*, BUS. INSIDER (July 8, 2021, 1:28 PM), <https://www.businessinsider.com/tiktok-racism-algorithm-apology-creator-marketplace-ziggy-tyler-2021-7> [<https://perma.cc/FZ8M-GZB3>].

written in Black vernacular,²⁶⁶ and another study that included two Cornell researchers came to a similar conclusion.²⁶⁷

While part of the disproportionate removal of Black content may stem from faulty content moderation algorithms and datasets, it may also stem from a platform’s vision of intentionally creating a “harmonious” community free of reminders of racial privilege and systemic inequality.

Indeed, moving forward, platforms may use the autonomy supported by Section 230 to more aggressively downrank and remove Black content that highlights contemporary and historical instances of racism, systemic inequality, racial equity, and diversity and inclusion. At least sixteen states have enacted legislation restricting discussions of racial justice, critical race theory, and racial injustice in American history (for example, *The 1619 Project*) by entities such as public schools, state universities, state government entities, public contractors, and grant recipients.²⁶⁸ Despite having protection from litigation under Section 230’s immunity for liability for third-party content powers, some platforms decided to exercise Section 230’s content moderation powers to restrict information about abortion after the Supreme Court overturned *Roe v. Wade*.²⁶⁹ Some states are working to restrict university spending

266. Maarten Sap, Dallas Card, Saadia Gabriel, Yejin Choi & Noah A. Smith, *The Risk of Racial Bias in Hate Speech Detection*, 57 PROC. ANN. MEETING ASS’N FOR COMPUTATIONAL LINGUISTICS 1668, 1671-72 (2019).

267. Thomas Davidson, Debasmita Bhattacharya & Ingmar Weber, *Racial Bias in Hate Speech and Abusive Language Detection Datasets*, 3 PROC. WORKSHOP ON ABUSIVE LANGUAGE ONLINE 25, 29-30 (2019).

268. *Welcome to the #TruthBeTold Campaign*, AFR. AM. POL’Y F., <https://www.aapf.org/truthbetold> [<https://perma.cc/Z6ST-WPA9>] (describing how state-level legislation prohibiting discussions of racial equity developed after the repeal of President Trump’s ban of federal trainings and programs that address systemic racism). In 2022, Florida enacted the Individual Freedom Act (also known as the “Stop WOKE Act”), which prohibited workplace training or school instruction that teaches about unconscious bias or that people are privileged based on race, specifically prohibited teaching *The 1619 Project*, and stated that such trainings or lessons constitute discrimination. See Individual Freedom Act, ch. 2022-72, §§ 1-2, 2022 Fla. Laws 534, 535-39; see also Janai Nelson, Opinion, *Ron DeSantis Wants to Erase Black History. Why?*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/31/opinion/ron-desantis-black-history.html> [<https://perma.cc/QF7P-YJHJ>]; Press Release, Office of Governor Ron DeSantis, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/> [<https://perma.cc/285K-A73T>].

269. See Katharine Trendacosta, *Abortion Information Is Coming Down Across Social*

on diversity, equity, and inclusion initiatives and restrict companies from maintaining corporate environmental, social, and governance (ESG) principles (which often include diversity, equity, and inclusion assessments),²⁷⁰ and in these states platforms could start to downrank or remove such content from users' screens.

2. Promoting Anti-Black Activity for Revenue or Political Gain

The broad power of Section 230 gives Black communities little recourse when platforms decide to violate their own guidelines and disseminate anti-Black content. Although platforms enjoy First Amendment rights to promote anti-Black materials, a comprehensive analysis of Section 230's additional substantive and procedural benefits should acknowledge the costs to Black communities of platforms promoting anti-Black content.²⁷¹

Despite public interest in reducing disinformation and hate speech, some mainstream platforms have been reluctant to reduce white supremacy content because doing so "will indirectly reduce content from conservative publishers and users, leading to charges of bias."²⁷² Company public policy executives also sometimes overrule company content moderation teams to weaken misinformation

Media. What Is Happening and What Next, ELEC. FRONTIER FOUND. (July 28, 2022), <https://www.eff.org/deeplinks/2022/07/abortion-information-coming-down-across-social-media-what-happening-and-what-next> [<https://perma.cc/3554-87AK>] (describing how Facebook's broad community standards contributed to the removal of posts related to abortion).

270. Taylor Telford, *Critics of Corporate Diversity Efforts Emerge, Even as Initiatives Falter*, WASH. POST (Apr. 1, 2023, 10:19 AM), <https://www.washingtonpost.com/business/2023/04/01/woke-capitalism-esg-dei-climate-investment/> [<https://perma.cc/8Yaq-URFX>]; Ishan K. Bhabha, Lauren J. Hartz, Katie Wynbrandt & Savannah E.B. McNeily, *Client Alert: State Anti-DEI Initiatives Are Gaining Momentum: What Does It Mean for Your Organization?*, JENNER & BLOCK (Feb. 23, 2023), <https://www.jenner.com/en/news-insights/publications/state-anti-dei-initiatives-are-gaining-momentum-what-does-it-mean-for-your-organization> [<https://perma.cc/MW8T-5WUF>].

271. See *infra* notes 344-45 and accompanying text describing how courts have interpreted Section 230(c)(1) to give platforms broad discretion in moderating content.

272. Byman, *supra* note 134. This reluctance to intervene facilitates not only content that is explicitly anti-Black but also anti-Black propaganda strategies that use tactics such as "keyword squatting." See Brandi Collins-Dexter & Joan Donovan, *How a Racialized Disinformation Campaign Ties Itself to the 1619 Project*, COLUM. JOURNALISM REV. (Mar. 11, 2021), <https://www.cjr.org/opinion/1776-keyword-squatting-right-wing-media.php> [<https://perma.cc/3KH7-LDQY>] (finding that right-wing media co-opted the keyword "1619," writing typically negative coverage three times more than left-wing sources, which skewed the top search results on Google and YouTube).

and hate speech policies so that conservative users will be less adversely affected.²⁷³ In addition to appeasing powerful political figures and their constituencies, financial incentives may drive a mainstream platform to promote anti-Black content, as divisive and hateful content maximizes user engagement and ad revenue.²⁷⁴

Section 230 also subsidizes white supremacists in setting up and monetizing their own extremist platforms. As public pressure encouraged mainstream platforms to strengthen their content moderation policies and content filters, many white supremacists migrated to fringe platforms—such as 8chan, Gab, MeWe, Rumble, Signal, and Voat—that allow for overtly racist and violent content.²⁷⁵ While the First Amendment may protect white supremacists who set up these platforms, Section 230 provides to white supremacists additional subsidies for their content moderation decisions, including procedural advantages (for example, early dismissals of lawsuits) and substantive protections (for example, immunity to liability from lawsuits for defamation, deceptive trade practices, unfair advertising, and coordinated harassment campaigns).²⁷⁶

273. See Ryan Mac & Craig Silverman, “Mark Changed the Rules”: How Facebook Went Easy on Alex Jones and Other Right-Wing Figures, BUZZFEED NEWS (Feb. 22, 2021, 1:14 PM), <https://www.buzzfeednews.com/article/ryanmac/mark-zuckerberg-joel-kaplan-facebook-alex-jones> [<https://perma.cc/G4K3-Y8GP>]; Keach Hagey & Jeff Horwitz, *Facebook’s Internal Chat Boards Show Politics Often at Center of Decision Making*, WALL ST. J. (Oct. 24, 2021, 2:34 PM), <https://www.wsj.com/articles/facebook-politics-decision-making-documents-11635100195> [<https://perma.cc/5B3H-GBN6>].

274. *A Country in Crisis: How Disinformation Online is Dividing the Nation: J. Hearing Before the Subcomms. on Comm’ns & Tech. and Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 116th Cong. 5 (2020) (testimony of Hany Farid, Ph.D., Professor, University of California, Berkeley) (“[T]he vast majority of delivered content is actively promoted by content providers based on their algorithms that are designed in large part to maximize engagement and revenue.... These algorithms have learned that divisive, hateful, and conspiratorial content engages users and so this type of content is prioritized, leading to ... increased anger, hate, and intolerance, both online and offline.”).

275. WILLIAMS ET AL., *supra* note 19, at 7-11; Myers & Thompson, *supra* note 205.

276. The Supreme Court has held, however, that the First Amendment does not prevent the government from denying a public subsidy such as a tax-exempt status to a private entity engaged in racial discrimination. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

III. THE IMPLICATIONS OF SECTION 230 REFORMS FOR BLACK COMMUNITIES

This Part analyzes the implications of popular Section 230 reforms for Black communities. While various commentators have analyzed Section 230 reform proposals broadly,²⁷⁷ this Part will focus on the unique impact of the proposals on Black communities.

Generally, Democrats have asserted that platforms inadequately remove disinformation and hate speech and advance Section 230 reforms that encourage tighter content moderation, while Republicans have argued that platforms are politically biased in labeling content as misinformation or hate speech and often push for Section 230 reforms that would compel platforms to loosen their content moderation policies.²⁷⁸ Surveys find Black Americans are slightly more likely to support the ability of individuals to sue platforms for third-party actions on the platforms.²⁷⁹

277. See, e.g., Johnson & Castro, *supra* note 27, at 1-2; Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Quinta Jurecic, Brian Lim, Irene Ly, Matt Perault, Etta Reed, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Brady Worthington, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Sept. 19, 2023), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/3YGA-HASU>]; VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 30-36 (2021); Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, BROOKINGS (Sept. 21, 2021), <https://www.brookings.edu/articles/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/> [<https://perma.cc/W338-RZPZ>]; *117th Congress: How Do the Section 230 Reform Proposals Rate? A Section 230 Evaluation Scorecard*, PUB. KNOWLEDGE, <https://publicknowledge.org/how-do-the-section-230-reform-proposals-rate-a-section-230-evaluation-scorecard/> [<https://perma.cc/8QBF-R98C>]; *118th Congress: How Do the Section 230 Reform Proposals Rate? A Section 230 Evaluation Scorecard*, PUB. KNOWLEDGE, <https://publicknowledge.org/section-230-evaluation-scorecard-118-congress/> [<https://perma.cc/9SKY-ZW69>]; CHRISTOPHER BATES, ORRIN G. HATCH FOUND., A REVIEW OF PROPOSALS TO REFORM SECTION 230, at 4, 7 (2021), <https://static1.squarespace.com/static/5e2072f645f53f254017e846/t/6151f9b0f5ebbd32e8c9ed0e/1632762293414/oghf+section+230+report+by+chris+bates+2021+final.pdf> [<https://perma.cc/QW3M-SSK3>].

278. Johnson & Castro, *supra* note 27 (explaining traditional positions of President Trump and most conservatives, and President Biden and those on the left); see also BATES, *supra* note 277.

279. VOGELS, *supra* note 18, at 34 (finding that 45% of Black adults favor the ability of online harassment victims to sue platforms where harassment occurred, compared with 41% of Latinx and Asian adults and only 28% of white adults); National Poll on Tech Companies by Data for Progress and Vox, FILES FOR PROGRESS (Jan. 2021), https://www.filesforprogress.org/datasets/2021/1/dfp_vox_tech_polling.pdf [<https://perma.cc/8DVG-XLHZ>] (indicating that

Completely repealing Section 230 without replacing it with a different intermediary liability structure that provides some platform immunity for third-party content and content moderation is not the answer.²⁸⁰ Doing so could impair political activism, entrepreneurship, and creative artistry within Black communities and could result in additional disinformation, discrimination, hate speech, and white supremacy organizing and violence—all of which are detailed above. However, complete inaction is unacceptable because an unreformed Section 230 would continue to subsidize platforms to facilitate illegal harassment, white supremacist violence, discrimination, and election interference, as well as discriminatory content moderation and “lawful but awful” activities such as hate speech and white supremacy organizing.

Even if many of the reforms below are adopted, platforms would not be automatically liable for all claims brought against them. Plaintiffs would still need to establish the requisite legal elements, just as they do against defendants that do not enjoy Section 230 immunity.²⁸¹ Also, even when a plaintiff establishes a platform’s culpability and liability, judges could apportion damages between a platform and other responsible parties—such as third-party users of the platform.

Granted, any reform intended to help Black communities could result in unintended consequences that harm Black communities.²⁸²

44% of Black Americans, 45% of Latinos, and 38% of white people think that tech companies should be more legally liable for content users post on their sites). *But see* MORNING CONSULT., NATIONAL TRACKING POLL #2112020, DECEMBER 03-07, 2021, CROSSTABULATION RESULTS 156-57 (2021), https://assets.morningconsult.com/wp-uploads/2021/12/14092202/2112020_crosstabs_MC_TECH_SOCIAL_MEDIA_REGULATIONS_Adults_v1_AUTO.pdf [<https://perma.cc/CGS2-K6XU>] (finding that a larger share of Black Americans (37%) than white Americans (31%) *strongly support* allowing social media companies to be held at least somewhat liable in courts and lawsuits for the actions of their users, but that a larger share of white Americans (68%) than Black Americans (58%) *either strongly support or somewhat support* allowing social media companies to be held at least somewhat liable in courts and lawsuits for the actions of their users).

280. *But see* Abandoning Online Censorship Act, H.R. 8896, 116th Cong. § 2(a) (2020) (legislation introduced that would repeal Section 230); A Bill to Repeal Section 230 of the Communications Act of 1934, S. 2972, 117th Cong. § 1(a) (2021) (same).

281. *See* Brief of Amici Curiae the Cyber Civil Rights Initiative & Legal Scholars in Support of Petitioners at 5, *Gonzalez v. Google, LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333) [hereinafter *Cyber Civil Rights Initiative Amicus Brief (Gonzalez)*] (“[T]he absence of immunity is not synonymous with the presence of liability.”).

282. *Cf. Romano, supra* note 28 (asserting that the amendment enacted to add sex

Even minimal additional legal exposure, for example, could result in platform overmoderation—not only because of possible damage awards but also because of the difficulty of quickly and efficiently assessing legal risk (for example, it is easier to remove content about excessive force by a police officer against Black communities than to determine that it is not defamatory) and litigation costs (including to defend against nuisance lawsuits).²⁸³ As a result, reforms should be carefully tailored to minimize adverse harms to Black communities.

Also, despite several cases establishing that platforms lack immunity when their algorithms, datasets, or designs materially contribute to discrimination and other illegality,²⁸⁴ some companies continue to operate as though they enjoy Section 230 immunity for this activity.²⁸⁵ This challenge may continue to grow with the expansion of generative artificial intelligence and other technologies.²⁸⁶ Reforms should explicitly clarify that platforms do not enjoy Section 230 immunity when their algorithms, datasets, or designs materially contribute to unlawful discrimination and other illegality. In the absence of statutory reform, courts should consistently follow the material contribution test and recognize the ways that platform design, data collection, and algorithms make material

trafficking to the list of Section 230 exceptions caused many platforms to remove online personals sections, prompted sex workers to move from the internet to the streets to find work, and made them less safe); Melissa Gira Grant, *The Real Story of the Bipartisan Anti-Sex Trafficking Bill That Failed Miserably on Its Own Terms*, NEW REPUBLIC (June 23, 2021), <https://newrepublic.com/article/162823/sex-trafficking-sex-work-sesta-fosta> [<https://perma.cc/M2J7-DP9V>].

283. See Johnson & Castro, *supra* note 27, at 4 (“Instead of just removing content that clearly violates the law or their terms of service, they would also likely remove any content that falls into a gray area ... because to not do so would mean risking legal trouble.”).

284. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (“[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it *contributes materially* to the alleged illegality of the conduct.” (emphasis added)); Vargas v. Facebook, Inc., No. 21-16499, 2023 WL 4145434, at *2-3 (9th Cir. June 23, 2023) (rejecting Facebook claims that Section 230 immunized it from claims for discriminatory ad distribution); Lemmon v. Snap, Inc., 995 F.3d 1085, 1093 (9th Cir. 2021) (refusing to apply Section 230 immunity to a negligent design lawsuit for an application that encouraged users to drive at high speeds and post the speed).

285. See Melany Amarikwa, *Social Media Platforms’ Reckoning: The Harmful Impact of TikTok’s Algorithm on People of Color*, 29 RICH. J.L. & TECH., 69, 96-97, 99 (2023).

286. See, e.g., No Section 230 Immunity for AI Act, S. 1993, 118th Cong. § 1 (2023) (waiving immunity under Section 230 for claims and charges related to artificial intelligence).

contributions to illegal discrimination and other unlawful activity that adversely affects Black communities.

Many of the solutions analyzed below have both benefits and shortcomings, and the best solution might combine elements of multiple reforms. Rather than purporting to endorse a single Section 230 reform proposal that will completely and permanently resolve all of the challenges that Black communities have and will face, this Article provides an approach for analyzing and improving the Section 230 reform proposals below, as well as others that are not examined in this Article. Such factors include the effectiveness of a reform in addressing primary challenges to Black communities, clearly understanding the scope of challenges to Black communities that will remain unaddressed by the reform, the likelihood that a reform proposal will exacerbate existing challenges or create new challenges to Black communities, and the potential for a reform to result in overmoderation of Black users or curtail opportunities that Black communities currently enjoy in part due to Section 230. Even if a reform is carefully tailored and on the whole benefits Black communities, it could also trigger a backlash of federal or state proposals that would chill content moderation and result in more online hate speech, white supremacy organizing, and other anti-Black content.

A. *Civil Rights Carve-Outs*

A carve-out could be created that would allow for enforcement of civil rights laws against online platforms.²⁸⁷ Section 230 already creates such exceptions from immunity for federal criminal law, intellectual property law, federal sex trafficking law, and the federal

287. See, e.g., Civil Rights Modernization Act of 2021, H.R. 3184, 117th Cong. § 2(a) (2021) (removing Section 230 immunity for platforms for ads targeted with algorithms that violate civil rights laws); Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act, S. 560, 118th Cong. § 2 (2023) (removing Section 230 protections as a defense in various cases, including cases related to ads and cases alleging violations of civil rights, harassment, or intimidation laws (including those based on race)); Sylvain, *Discriminatory Designs on User Data*, *supra* note 17 (“There is no reason why Congress couldn’t also write in an explicit exception to Section 230 immunity for violations of civil rights laws.”); Overton, *supra* note 17, at 1827 (“Congress should explicitly acknowledge that Section 230 does not provide a defense to federal and state civil rights claims arising from online ad targeting.”).

Electronic Communications Privacy Act of 1986 and similar state laws.²⁸⁸

The interests of Black communities in preventing discrimination are no less significant than the interests of the Motion Picture Association of America in invoking the intellectual property carve-out to prevent unauthorized showings of movies online. A civil rights carve-out could, *inter alia*, allow for more effective enforcement of civil rights laws to ensure that social media platforms do not allow ads for new homes or apartments to be steered toward white users and away from Black users. It would help discourage short-term rental and ride-sharing platforms from disproportionately rejecting Black guests and riders. It could also help address discriminatory algorithms in the employment and criminal justice context. While platform design, data collection, and algorithms that facilitate discrimination should already be understood to constitute a material contribution to illegality that falls outside of Section 230 protections, a civil rights carve-out would make that clear. There is also no reason that federal law should allow an online platform to profit from running a housing ad that says “No Minorities” while rendering the same activity by a hard-copy publication invalid under the Fair Housing Act.

One concern is determining the scope of the civil rights exemption.²⁸⁹ Is the federal Fair Credit Reporting Act, for example, a civil rights law that falls under the exemption? How about state deceptive practice laws that prohibit communicating to voters false information about the time and place of an election? Further, in light of the difficulty in defining what constitutes a civil rights violation in fifty states, the District of Columbia, several territories, and thousands of local jurisdictions, a platform may simply overmoderate and opt to remove any user content related to race on the platform. Turning up the dial on artificial intelligence moderation, however, could result in the downranking or deplatforming of

288. 47 U.S.C. § 230(e)(1)-(5).

289. The problem of lack of clarity in scope also exists under the current exceptions for intellectual property law (which would include state law related to trademarks and trade secrets) and state laws similar to the federal Electronic Communications Privacy Act of 1986. *See id.* § 230(e)(2), (4). *See generally* Johnson & Castro, *supra* note 27.

a lot of good content—including speech of activists that exposes and calls for an end to discriminatory practices.

The civil rights exemption also raises the possibility of unintended consequences, as the exception could include laws that appropriate the “civil rights” label to thwart the interests of Black communities. For example, an online platform may be subject to litigation for hosting a course syllabus that includes links to readings on structural discrimination or *The 1619 Project* simply because Florida labels its prohibition on teaching such matters to be a civil rights law.²⁹⁰

One solution to this challenge would be to confine the scope of the civil rights exception to a few, clearly enumerated federal civil rights laws without extensive litigation, such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1871 Ku Klux Klan Act.²⁹¹ These statutes and others providing civil liability for hate crimes, such as certain provisions of the Violence Against Women Act,²⁹² could help impose accountability in instances in which a platform facilitates hateful violence or deprivation of voting or other specific rights.

While a narrow and clearly enumerated civil rights carve-out might not necessarily lead to liability in every instance of discrimination, it could create an incentive for platforms to embrace design and moderation strategies that would reduce potential liability. At the very least, tech platforms would not get an automatic pass based on Section 230 immunity where the platform’s design, data collection, or algorithms materially contributed to the illegality (as with discriminatory ad targeting and delivery “toward whites and

290. See Individual Freedom Act, ch. 2022-72, § 3, 2022 Fla. Laws 534, 539-45; see also Nelson, *supra* note 268.

291. Some proposed Section 230 reforms have limited the scope of the civil rights exemption to a couple of federal civil rights provisions. See, e.g., Protecting Americans From Dangerous Algorithms Act, H.R. 2154, 117th Cong. § 2 (2021) (removing Section 230 immunity in civil cases involving particular federal civil rights violations (§§ 1980 and 1981) or particular federal terrorism violations if platforms use algorithms to disseminate and amplify content at issue).

292. See, e.g., Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941-42 (current version at 34 U.S.C. § 12361); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 1309, 136 Stat. 840, 929-30 (codified at 15 U.S.C. § 6851).

away from Black users”).²⁹³ Also, a narrow and clearly enumerated civil rights carve-out might not be broad enough to deter platforms from facilitating various other challenges that disproportionately affect Black communities, such as racial harassment that threatens violence and illegal firearm transactions. A carve-out could be enacted for each of these,²⁹⁴ although additional carve-outs could complicate the content moderation compliance process, increase litigation costs, and ultimately result in overmoderation of content of Black users.²⁹⁵

B. Algorithmic Recommendation Carve-Outs

A carve-out could also be created that would remove Section 230 immunity if platforms use algorithms to deliver and amplify content.²⁹⁶

Exempting algorithmically delivered content would address several challenges to Black communities. Platforms have used algorithms to deliver housing and employment ads to white users while steering them away from Black users, to recommend that particular users join white supremacy groups, and to amplify

293. Dariely Rodriguez & David Brody, *Section 230 Requires a Balanced Approach that Protects Civil Rights and Free Expression*, AM. CONST. SOC'Y (Feb. 21, 2023), <https://www.acslaw.org/expertforum/section-230-requires-a-balanced-approach-that-protects-civil-rights-and-free-expression/> [<https://perma.cc/RYP5-THEW>].

294. *See, e.g.*, Accountability for Online Firearms Marketplaces Act of 2021, S. 2725, 117th Cong. § 3 (2021) (removing Section 230 immunity for online firearms marketplaces, including those that facilitate firearms transactions or ads, or make available digital instructions to program a 3D printer to produce a firearm).

295. *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578-79 (1988) (discussing phenomenon when “crystalline rules have been muddied repeatedly by exceptions” so that parties do not know their rights).

296. *See, e.g.*, Platform Integrity Act, H.R. 9695, 117th Cong. § 2 (2022); Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. § 2 (2021); Don't Push My Buttons Act, H.R. 8515, 116th Cong. § 2 (2020); Protecting Americans From Dangerous Algorithms Act, H.R. 2154, 117th Cong. § 2 (2021). The lack of Section 230 protections for third-party content amplified by algorithms does not equate to automatic liability—a plaintiff would still need to establish the elements of the underlying legal claim against the platform. *See, e.g.*, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1215, 1226, 1231 (2023) (finding that plaintiffs did not show that Twitter gave such knowing and substantial assistance to ISIS that they consciously and culpably participated in the alleged tort stemming from the terrorist attack, and that recommendation algorithms did not convert Twitter's passive assistance into active abetting).

divisive content that promotes race-based violence.²⁹⁷ Because platforms often hide algorithms using a “proprietary” black box,²⁹⁸ Black users can rarely assess how algorithms are shaping their own online experience and behavior or the scale of adverse implications for Black communities that stem from Section 230 immunity.

Many platforms’ uses of algorithms are arguably already ineligible for Section 230 immunity under case law because they make a material contribution to illegal activity such as facilitating the discriminatory distribution of housing ads to white users and away from Black users. A statutory reform that explicitly exempts platforms that use algorithms simply formalizes and clarifies the law and ensures that it will be applied more consistently by courts. Exempting algorithms does not hold the platforms accountable for the content of a third-party ad that says “no Blacks” but for their own conduct of developing and implementing data collection procedures and algorithms that steer a housing ad toward white home-seekers and away from Black home-seekers.²⁹⁹ Failing to exempt algorithmic decisions from Section 230 provides platforms a government subsidy that incentivizes them to profit from illegal discrimination and anti-Black activity.

On the other hand, a mechanical rule exempting from Section 230 immunity platforms that use algorithms to deliver content or

297. NOBLE, *supra* note 92, at 175-78; Safiya Noble, *Google Has a Striking History of Bias Against Black Girls*, TIME (Mar. 26, 2018, 4:30 PM), <https://time.com/5209144/google-search-engine-algorithm-bias-racism/> [<https://perma.cc/7EM5-4GSV>].

298. See PASQUALE, *supra* note 36, at 38-40; Benesch, *supra* note 36.

299. DAPHNE KELLER, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV., AMPLIFICATION AND ITS DISCONTENTS 4 & 39 n.4 (2021), https://s3.amazonaws.com/kfai-documents/documents/aa82cf1b16/2.23.2023_-Keller-New-Layout.pdf [<https://perma.cc/DGA2-LSFD>] (“I have argued elsewhere that discrimination claims like this are likely not properly subject to intermediary liability immunities under [Section] 230.... The problem in those cases is ... that platforms introduce harm distinct from that content through their ranking or targeting.”); Lawyers’ Committee Amicus Brief (*Gonzalez*), *supra* note 70, at 6 (emphasizing the importance of not expanding 230 immunity to discriminatory decisions such as “recruiting algorithms that discriminatorily and unlawfully screen women from job opportunities, mortgage approval algorithms that disproportionately and unlawfully reject applications on the basis of race, and facial recognition systems that produce inaccurate matches on the basis of race or sex”). In the oral argument in *Gonzalez v. Google, LLC*, Google’s attorney conceded to Justice Barrett that algorithmic race-based discrimination is not immunized by Section 230 because the discrimination turns on the website’s conduct rather than the third-party speech. See Transcript of Oral Argument at 140-42, *Gonzalez v. Google, LLC*, 143 S. Ct. 1191 (2023) (No. 21-1333).

algorithmically delivered content could cause platforms to scale back their development and use of algorithms that benefit Black Americans. Many platforms would likely assert that due to the large volume of content delivered and moderated via algorithms, a broad algorithmic carve-out would make Section 230 immunity almost worthless in containing discovery and litigation costs and would prompt platforms to drastically reduce opportunities for third-party content on their platforms. This could reduce the number of connections between Black organizers and activists, Black businesses and customers, and Black creatives and their audiences. Black users may have less access to content produced by other Black users that reflects their own political, artistic, and cultural preferences, and instead be deluged with more conventional and safe content vetted by a platform's lawyers.³⁰⁰ Unless the algorithmic exemption explicitly excludes search results,³⁰¹ an algorithmic carve-out could also make it more difficult for Black users to find relevant information online.

A blanket removal of Section 230 immunity for platforms that utilize algorithms could also prompt platforms to scale back their development and use of content moderation algorithms that effectively detect, remove, or downrank hate speech, white supremacists, discriminatory short-term rental hosts and ride-share drivers, and other anti-Black activity.³⁰²

300. Civil Rights Scholars Amicus Brief (*Gonzalez*), *supra* note 38, at 15-16 ("If platforms are liable for the third-party content they recommend, they will only be willing to recommend 'safe' content.... [C]ontent creators from underserved and marginalized groups would be crowded out.").

301. Some proposed algorithmic carve-outs from Section 230 immunity exempt recommendations made in response to a user's search. *See, e.g.*, Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. § 2(a) (2021); Protecting Americans From Dangerous Algorithms Act, H.R. 2154, 117th Cong. § 2 (2021).

302. *See* Cyber Civil Rights Initiative Amicus Brief (*Gonzalez*), *supra* note 281, at 6 (arguing that categorical denial of immunity to platforms using targeted algorithms could dissuade such platforms from using algorithms to remove or reduce the accessibility of harmful material); Civil Rights Scholars Amicus Brief (*Gonzalez*), *supra* note 38, at 20 ("If platforms may be liable for recommending content using a neutral algorithm, it follows that they could be liable for moderating content by the same means."); CTR. FOR DATA ETHICS & INNOVATION, THE ROLE OF AI IN ADDRESSING MISINFORMATION ON SOCIAL MEDIA PLATFORMS 15, 18-20 (2021), https://assets.publishing.service.gov.uk/media/610aab37e90e0706cd12dee8/Misinformation_forum_write_up_August_2021_-_web_accessible.pdf [<https://perma.cc/RJ4S-FCTS>].

To address these issues, an algorithm carve-out could be tailored to a platform’s use of an algorithm that makes a material contribution to the legal violation or harm alleged.³⁰³ Algorithms are simply tools, and rather than engaging in “techno-solutionism” by blaming all algorithms,³⁰⁴ the focus should be on those algorithms that make a material contribution to illegality. Some may assert that algorithms currently fall outside of Section 230 immunity when platforms use them to make a material contribution to illegal activity,³⁰⁵ but clarifying this proper interpretation of the law through statute may allow for judges to apply the material contribution test more consistently in cases involving algorithms.³⁰⁶

While this tailoring would not necessarily exempt from immunity all “lawful but awful” content promoted by algorithms (for example, hate speech and white supremacy organizing)—given the free speech concerns—carving out Section 230 immunity for such algorithmically delivered content may nonetheless implicate the First Amendment if viewed as content-based.³⁰⁷ Also, such tailoring does not fully address thorny questions like the difficulty of precisely defining terms like “algorithm” and “amplification.”³⁰⁸

303. See, e.g., Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. § 2(a) (2021) (removing Section 230 immunity when platforms knowingly or recklessly use an algorithm to make a personalized recommendation of third-party information that “materially contributed to a physical or severe emotional injury to any person”).

304. See Hillary J. Allen, *Fintech and the False Promise of Techno-Solutionism*, COLUM. L. SCH.: THE CLS BLUE SKY BLOG (Jan. 25, 2024), <https://clsbluesky.law.columbia.edu/2024/01/25/fintech-and-the-false-promise-of-techno-solutionism/> [<https://perma.cc/G7HS-5KHA>] (defining “techno-solutionism” as techno-optimism and innovation worship and explaining that this mindset oversimplifies problems and distracts policymakers from real, structural solutions).

305. See *supra* note 174.

306. See *supra* note 178 and accompanying text.

307. Discouraging platforms from using algorithms to amplify and de-amplify lawful speech may infringe on the constitutional rights of platforms. KELLER, *supra* note 299, at 7 (“Laws that reduce visibility of speech face the same strict scrutiny under the First Amendment as laws that ban it outright.”).

308. See Lee, *supra* note 17.

C. Ad Carve-Outs

A reform could remove Section 230 immunity for advertisements—content for which the platform “has accepted payment to make the speech available.”³⁰⁹

The reform proposal would clarify that platforms lack immunity for a significant portion of economic discrimination—housing, employment, and financial services ads steered toward white users and away from Black users.³¹⁰ A disproportionately high level of Black consumers are victims of deceptive practices and fraud—particularly regarding payday lending and student debt relief programs³¹¹—and the ad reform would give tech companies added incentives to vet and monitor advertisers to ensure that their platforms are not being used to facilitate fraud.³¹² The reform proposal would also clearly remove from immunity ads targeted at Black voters with messages like “let’s boycott the election and not vote.”³¹³

Digital ad spending accounted for about 63% of total ad spending in the United States in 2020, and it is expected to reach almost 75% by 2024.³¹⁴ Three companies accounted for over 60% of total digital advertising revenue in the United States in 2022: Google (28.4%),

309. Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act, S. 560, 118th Cong. § 2 (2023). Other proposals would remove immunity for platforms that sell targeted ads, even if the claim does not arise from speech within a particular targeted ad. See Break Up Big Tech Act of 2020, H.R. 8922, 116th Cong. § 2 (2020); Behavioral Advertising Decisions Are Downgrading Services (BAD ADS) Act, S. 4337, 116th Cong. § 2(a) (2020). Another proposal would ban political microtargeting completely. Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. § 2(a) (2020).

310. See Lee, *supra* note 17 (discussing how platforms can “hide behind” Section 230 “to avoid discussing how their platforms affect” issues involving housing, employment, and financial services).

311. See FED. TRADE COMM’N, *supra* note 175.

312. See Lee, *supra* note 17.

313. See, e.g., KIM, *supra* note 180, at 8-9; *Russian Trolls’ Chief Target Was ‘Black US Voters’ in 2016*, BBC (Oct. 9, 2019), <https://www.bbc.com/news/technology-49987657> [<https://perma.cc/TDP9-EW4A>].

314. *Forecast Shows Digital Ad Spending Jumping 25 Percent in 2021 as Economy Recovers*, VISION MONDAY (Apr. 16, 2021, 3:56 PM), <https://www.visionmonday.com/business/research-and-stats/article/forecast-shows-digital-ad-spending-jumping-25-percent-in-2021-as-economy-recovers> [<https://perma.cc/M4X3-G7Q7>] (citing eMarketer data and projections).

Meta (20.4%), and Amazon (11.8%).³¹⁵ There is no reason that the law should prohibit traditional media outlets like the *New York Times* from running housing ads featuring only white models while giving Craigslist, Facebook, and Google immunity to run housing ads that say “NO MINORITIES” or to steer housing ads away from Black users and toward white users. Just like other publishers, online publishers should accept a basic duty of care for content they accept money to publish and disseminate.³¹⁶ Section 230 should not give many of America’s most valuable companies the right to monetize discrimination, deceptive practices, and disinformation and externalize the costs of these activities to Black communities.³¹⁷

Section 230 recognizes that requiring online platforms to police the billions of posts, tweets, comments, images, pictures, videos, and other content that appear on such platforms would be overwhelmingly burdensome, and thus it shields them from liability for passive display of third-party content.³¹⁸ A requirement that online platforms monitor ads, however, requires monitoring of a much smaller universe of content and is reasonable.

Exempting ads from Section 230 immunity, however, would do nothing to prevent harms that are not contained in paid content, such as anti-Black harassment and hate speech, white supremacy organizing and violence, and posts containing disinformation about elections or vaccines in Black communities (which a platform’s algorithms may steer to Black users for free if the content is designed to engage Black users). The advertising exemption would do little to incentivize job recruiting, short-term rental, and ride-sharing companies to design their platforms, data collection processes, and algorithms to minimize discriminatory rejections of

315. *Share of Ad-Selling Companies in Digital Advertising Revenue in the United States from 2020 to 2025*, STATISTA (Mar. 30, 2023), <https://www.statista.com/statistics/242549/digital-ad-market-share-of-major-ad-selling-companies-in-the-us-by-revenue/> [<https://perma.cc/SPJ8-R74V>].

316. Lee, *supra* note 17.

317. Lyle Daly, *The Largest Companies by Market Cap in 2024*, THE MOTLEY FOOL (Apr. 1, 2024, 11:39 AM), <https://www.fool.com/research/largest-companies-by-market-cap/> [<https://perma.cc/9WAV-R57N>] (finding that Alphabet, Amazon, and Meta are all among the top 10 companies in the world by market capitalization); Lee, *supra* note 17 (“This is not about user content, but the monetization of discriminatory content for profit by platforms. Publishers already have liability for advertisements.”).

318. See Kim, *supra* note 17, at 926-27.

Black job applicants, guests, and riders. The exemption would not deter platforms from using anti-Black content to attract users (for example, a white supremacy haven that engages in radicalization and strategies to harm Black communities) and then profiting from advertisements distributed to those users.

Exempting ads from Section 230 immunity may also pose some costs to Black communities. Courts could interpret the ad exemption to allow for liability of sites operated by Black users (such as blogs and small-business websites) that earn extra revenue by allowing third-party ads on their sites organized through services like Google AdSense.³¹⁹ Increased costs and heavier platform restrictions of ads could also impair the ability to disseminate to Black communities information that is essential to civic engagement and public health, such as voter mobilization messages, medical information about sickle cell anemia, and messages to correct disinformation targeted at Black communities.³²⁰

D. Notice-and-Takedown Proposals

A notice-and-takedown reform would require that platforms notified of illegal content remove the content within a reasonable period or lose legal immunity for the content. Notice-and-takedown processes are used for copyright-infringing content in the United States,³²¹ for illegal content in the European Union, New Zealand, and South Africa,³²² and for defamatory content in the United Kingdom.³²³

This Part uses the Internet Platform Accountability and Consumer Transparency Act (the “PACT Act”)—a leading Section 230

319. See Amanda Price, *The Big Impact of Google for Small Business*, BOOSTBLOG (July 29, 2019), <https://www.boostability.com/content/the-big-impact-of-google-for-small-business> [<https://perma.cc/4JE9-CWJR>].

320. See Overton, *supra* note 17, at 1823.

321. 17 U.S.C. § 512(c)-(d).

322. EU Digital Services Act, *supra* note 31 (extending immunity to providers who, “upon obtaining actual knowledge ... of illegal activities or illegal content, act expeditiously to remove or to disable access to that content”); Harmful Digital Communications Act 2015, s. 24 (N.Z.); Electronic Communications and Transactions Act 25 of 2002 § 77 (S. Afr.); Johnson & Castro, *supra* note 29, at 2-3, 5.

323. Defamation Act 2013, c. 26, § 5 (U.K.) (creating notice-and-takedown procedures for defamation).

reform proposal in the United States—to analyze the benefits and shortcomings to Black communities of a typical notice-and-takedown proposal. The PACT Act would require a platform that has notice of content that a federal or state court has determined violates federal criminal law, federal civil law, or state defamation law (“illegal content”) to remove the content or stop the activity within four days.³²⁴ Platforms that fail to do so and have actual knowledge of the illegal content or activity would lose Section 230 immunity for the content or activity.³²⁵

Federal civil law implicates a broad range of federal civil rights, consumer protection, and other laws that protect Black Americans—a platform could no longer run a discriminatory housing ad and invoke Section 230 to claim the platform is immune from the Fair Housing Act.³²⁶ The notice-and-takedown requirement could also cover fringe platforms that lack mainstream content moderation guidelines and are havens for white supremacists and reduce the immunization subsidy they currently enjoy when they promote anti-Black content that violates federal law or state defamation law.

Also, the notice-and-takedown reform is not likely to increase costs to platforms in a way that would prompt them to cut back services to Black activists, organizers, entrepreneurs, and creators. Platforms would not be responsible for failing to catch a piece of unlawful content in the billions of items posted every year—they would only be responsible for unlawful content and activity for which they (1) received notice, (2) had actual knowledge that a federal or state court determined violated federal criminal or civil law or state defamation law, and (3) did not remove within a reasonable period.³²⁷

However, the notice-and-takedown proposal does not resolve all of Section 230’s challenges for Black communities. Black users might not be positioned to detect and notify companies of some illegal activity, such as when platforms steer housing ads toward

324. Internet Platform Accountability and Consumer Transparency (Internet PACT) Act, S. 483, 118th Cong. §§ 2, 5(c)(1)(A) (2023).

325. *Id.* § 6(a).

326. *See, e.g., Chi. Laws.’ Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2009).

327. *See* Internet PACT Act, S. 483 §§ 2, 5(c)(1)(A), 6 (requiring that platforms with notice of illegal content remove the content or lose Section 230 immunity for the content).

white users and away from Black users.³²⁸ Also, many Black users will not have the time and resources to obtain a federal or state court order determining that the content or activities violate federal law or state defamation law.³²⁹ And even without a court order, the reform could be abused to silence Black users; for example, a police union may erroneously tell a platform that a “Save Black Lives—De-Unionize the Police” post violates federal law, and a platform may remove the post to avoid the cost of litigation.

Further, the notice-and-takedown reform does not remove Section 230’s immunity subsidy from “lawful but awful” content such as anti-Black hate speech and white supremacy organizing.³³⁰ Notice-and-takedown also continues the Section 230 immunity subsidy to a range of nondefamation state law violations that do not violate federal law, such as domestic political operatives targeting ads at Black communities that provide wrong information about the time, place, and manner of voting.³³¹

E. Content Neutrality Proposals

Content neutrality proposals arise from allegations that tech companies sometimes unfairly apply their guidelines to remove or downrank content created by conservative users. To support the claim that tech companies are targeting based ostensibly on viewpoint, these critics cite guidelines that prohibit disinformation (for example, posts about widespread election fraud and alternative COVID-19 remedies),³³² hate speech (for example, dehumanizing content and stereotypes about Black, transgender, immigrant, and

328. See *supra* Part I.B.3.

329. See Engstrom, *supra* note 72 (finding that litigation costs for a motion to dismiss on Section 230 grounds costs between \$15,000 and \$40,000).

330. The PACT Act does establish a process for filing complaints about content that does not comply with platform guidelines and directs platforms to review the complaints and take “appropriate steps.” Internet Platform Accountability and Consumer Transparency (Internet PACT) Act, S. 483, 118th Cong. § 5(c)(1)(B) (2023).

331. See Goldman, *supra* note 13, at 36-37. Including more state law violations, however, could also lead to unintended consequences, such as Florida suing a platform for posting an employer’s diversity training on systemic racism that violates the technical terms of a new state law. Individual Freedom Act, ch. 2022-72, sec. 1, § 760.10, 2022 Fla. Laws 534, 535-36.

332. See COLLINS-DEXTER, *supra* note 203, at 3.

other protected classes),³³³ and incitement to violence (for example, posts to “stop the steal” leading to the January 6 attack on Capitol Hill).³³⁴ Proponents of content neutrality proposals generally frame these reforms as necessary to prevent tech companies from censoring the speech of conservative users.³³⁵

In Congress, many of the content neutrality reforms would remove “otherwise objectionable” from the list of content that can be freely moderated by platforms under Section 230(c)(2).³³⁶ This poses challenges because much of the content that harms Black communities and that companies freely remove or downrank is “objectionable” but does not always fall neatly into other categories listed (for example, content that is “obscene, lewd, lascivious, filthy, excessively violent, [or] harassing”).³³⁷ Such content includes housing and employment discrimination, white supremacy organizing, hate speech and racially divisive rhetoric, fraud and unfair trade practice scams, and various types of disinformation (for example, disinformation about elections and COVID-19, digital blackface, and deep-fakes). This content neutrality reform could also prevent short-term rental and ride-sharing platforms from freely deplatforming hosts and drivers that engage in anti-Black discrimination.

333. See *Facebook Community Standards: Hate Speech*, *supra* note 244.

334. See WILLIAMS ET AL., *supra* note 19, at 11.

335. See, e.g., *Preserving Free Speech and Reining in Big Tech Censorship: Hearing Before the Subcomm. on Comm’n’s & Tech. of the H. Comm. on Energy & Com.*, 118th Cong. 26-28 (2023) (statement of Seth Dillon, CEO, Babylon Bee).

336. See, e.g., Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression (DISCOURSE) Act, S. 921, 118th Cong. § 2(a)(1)(A), (a)(2)(A) (2023) (amending Section 230(c)(2) by removing the words “otherwise objectionable” and removing Section 230 protections for “dominant market share” platforms that reasonably appear to promote a discernable viewpoint or suppress legitimate speech); Stop the Censorship Act, H.R. 8612, 117th Cong. § 2(2) (2022) (amending Section 230(c)(2) by allowing platforms to use the provision as a defense only when they moderate unlawful material, and removing immunity when platforms moderate offensive but legal material); 21st Century Foundation for the Right to Express and Engage in (FREE) Speech Act, H.R. 7613, 117th Cong. § 2(a) (2022) (completely repealing Section 230 and replacing it with a Section 232, and removing immunity from any platform that increases or decreases the dissemination or visibility of third-party material, except material that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, promoting self-harm, or unlawful”); Preserving Political Speech Online Act, S. 2338, 117th Cong. § 4 (2021) (amending Section 230(c)(2) by limiting the reasons for “good faith” removal of material to content that is obscene, illegal, excessively violent, harassing, threatening, or promoting illegal activity).

337. See 47 U.S.C. § 230(c)(2).

More broadly, these proposed reforms might fall short of their intended objectives because courts have interpreted Section 230(c)(1) to give platforms broad discretion in moderating content.³³⁸ Further, some of the reforms would amend Section 230 to limit Section 230(c)(1) immunity to third-party content and prevent platforms from invoking it to obtain immunity for content moderation.³³⁹

A second set of content neutrality reforms would remove Section 230 immunity for platforms that restrict speech.³⁴⁰ These reforms range from denying immunity for platform moderation of all content other than unlawful material³⁴¹ to denying immunity for platforms that appear to moderate content in a politically biased manner or suppress legitimate speech.³⁴² Despite constitutional constraints that ensure that federal laws like Section 230 preempt conflicting state laws,³⁴³ Texas enacted a statute prohibiting large platforms

338. Following the Fourth Circuit's decision in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), courts have widely interpreted Section 230(c)(1) to empower platforms to both leave up and take down (or uprank or downrank) third-party content. *See, e.g.*, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (“[I]f a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A).”); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted the CDA to establish broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’”) (quoting *Zeran*, 129 F.3d at 330).

339. *See, e.g.*, Protect Speech Act, H.R. 3827, 117th Cong. § 2 (2021) (preventing platforms from using Section 230(c)(1) as a defense in restricting access to or availability of third-party content, striking “otherwise objectionable” as a good-faith justification for platforms to moderate content, and requiring that immunity for content removal requires publishing criteria for content moderation practices); Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. § 2(1) (2020) (amending (c)(1) to not apply to the restriction of access or availability to third-party material, and amending Section 230(c)(2)(A) by removing “otherwise objectionable” as a justification to restrict access to content).

340. *See* Danielle Keats Citron & Mary Anne Franks, *The Internet As a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 61-67 (2020) (detailing the arguments and proposed reforms that equate platform content moderation with impermissible censorship under the First Amendment, and explaining the shortcomings of the arguments).

341. *See, e.g.*, Stop the Censorship Act, H.R. 8612, 117th Cong. § 2 (2022).

342. *See, e.g.*, Curtailing Online Limitations That Lead Unconstitutionally to Democracy's Erosion (COLLUDE) Act, S. 1525, 118th Cong. § 2 (2023); Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression (DISCOURSE) Act, S. 921, 118th Cong. § 2(a)(2) (2023); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2(a)(1) (2019).

343. U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

from removing or downranking content based on a user's viewpoint.³⁴⁴ Florida statutes prohibit large platforms from deplatforming political candidates or deprioritizing their content, and impose fines of \$250,000 per day for platforms that deplatform statewide candidates.³⁴⁵ As the courts are continuing to review the constitutionality of these statutes,³⁴⁶ such legislative measures reflect the underlying anxiety of giving tech platforms significant discretion in determining what content remains posted and what users are permitted to post.

While proponents of content neutrality reforms suggest that private platform content moderation stifles “free speech,” this is inaccurate.³⁴⁷ The First Amendment does not restrict private entities, who themselves have free speech rights.³⁴⁸ As nonstate actors, social media companies currently have the freedom and, crucially, the power to engage in content moderation.³⁴⁹ When users sign up on platforms, they often agree to comply with community standards, such as refraining from using hate speech or dehumanizing speech; engaging with extremist supremacy groups; posting

Constitution or Laws of any State to the contrary notwithstanding.”).

344. TEX. CIV. PRAC. & REM. CODE § 143A.002(a) (West 2023); *see* NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 455, 494 (5th Cir. 2022) (upholding Texas statute mandating viewpoint neutral content moderation by social media platforms), *vacated and remanded sub nom.* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2406-07 (2024) (holding that platform content moderation constitutes expression that receives First Amendment protection and that Texas law does not pass even a less stringent intermediate form of First Amendment review).

345. FLA. STAT. § 106.072(2)-(3) (2024); *id.* § 501.2041(2)(h) (2023); *see* NetChoice, LLC, v. Att’y Gen., Fla., 34 F.4th 1196, 1231 (11th Cir. 2022) (granting a preliminary injunction because it was substantially likely that a Florida statute’s regulation of social media content moderation was unconstitutional), *vacated and remanded sub nom.* Moody v. NetChoice LLC, 144 S. Ct. 2383, 2394 (2024) (vacating with instructions for the Eleventh Circuit to properly analyze NetChoice’s facial First Amendment challenge across a substantial number of the law’s applications instead of just as applied to large platforms like Facebook and YouTube).

346. *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2399-407 (2024) (vacating and remanding because lower courts failed to conduct a proper analysis of facial First Amendment challenges to Texas and Florida laws regulating platform content moderation, but observing that “Texas is not likely to succeed in enforcing its law” because “a State may not interfere with private actors’ speech to advance its own vision of ideological balance”).

347. *See* Citron & Franks, *supra* note 340.

348. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (“[T]he Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.”).

349. *See id.* (“[A] private entity may be considered a state actor when it exercises a function ‘traditionally exclusively reserved to the State.’”) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 252 (1974)). Social media platforms do not exercise this function.

misinformation or violent or graphic content; or engaging in harassment, bullying, or impersonation.³⁵⁰

Requiring that private sector tech platforms equally amplify all lawful content would magnify the current challenges Black communities face on platforms. A great deal of “lawful but awful” content would thrive on platforms like Facebook, X, and YouTube, such as hate speech; swastikas; Holocaust denial; white supremacy radicalization and organizing; violent and graphic video that glorifies the race-based mass killings in places like Buffalo, New York and Columbia, South Carolina; racist manifestos; racialized adult pornography;³⁵¹ deep fakes; medical disinformation; political disinformation; and coordinated campaigns to discourage Black voter turnout by domestic actors.³⁵² Editors of blogs, subreddits, and other online gathering safe spaces devoted to Black issues might be prohibited from deleting the white supremacy comments of an anonymous troll. Currently, because platforms are not state actors and do not have First Amendment obligations, they can freely remove or downrank this material.³⁵³

350. Jon Bateman, Natalie Thompson & Victoria Smith, *How Social Media Platforms' Community Standards Address Influence Operations*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 1, 2021), <https://carnegieendowment.org/2021/04/01/how-social-media-platforms-community-standards-address-influence-operations-pub-84201> [<https://perma.cc/V3TN-GDJK>].

351. Noelle Perdue, *How Porn's Racist Metadata Hurts Adult Performers of Color*, WIRED (Apr. 28, 2021, 8:00 AM), <https://www.wired.com/story/porn-racist-metadata-hurts-adult-performers-of-color/> [<https://perma.cc/7UQ4-FABT>]; see also Aurora Snow, *The Rise of Racist Porn*, DAILY BEAST (June 23, 2018, 9:24 AM), <https://www.thedailybeast.com/the-rise-of-racist-porn> [<https://perma.cc/Q98C-H4TF>].

352. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2405 (2024) (“[I]f Texas’s law is enforced, the platforms could not—as they in fact do now—disfavor posts because they ... support Nazi ideology; ... espouse racism, Islamophobia, or anti-Semitism; ... discourage the use of vaccines; advise phony treatments for diseases; [or] advance false claims of election fraud.”); Brief for Chamber of Progress et al. as Amici Curiae in Support of Emergency Application to Vacate Stay of Preliminary Injunction at 2, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022) (No. 21A720) (“Texas House Bill 20 (HB20) threatens to eviscerate this content moderation overnight.... If a platform allows discussion of matters touching on race, it could not moderate speech glorifying the recent racially-motivated murder of 10 people at a supermarket in Buffalo. Depraved racist ideologies would find safe harbor under HB20, with platforms forced to distribute the ‘viewpoint’ of individuals who assert that those murdered were not worthy of life because of the color of their skin.”).

353. See *Twitter and Other Social Media Sites Slipped on Removing Hate Speech In 2022*, *EU Review Says*, CBS NEWS: MONEYWATCH (Nov. 24, 2022, 1:52 PM), <https://www.cbsnews.com/news/twitter-other-social-media-slip-on-removing-hate-speech-european-union-review/> [<https://perma.cc/KNF8-4KXM>] (explaining how the number of posts flagged for hate speech on Twitter and subsequently removed has diminished over the past year).

The primary objective of Section 230 was to allow platforms to remove harmful content without fear of liability,³⁵⁴ and preventing platforms from removing or de-amplifying anti-Black content undermines the benefits of Section 230.³⁵⁵

Some may suggest that Black communities should favor content neutrality reforms because platforms disproportionately deplatform Black users (including those who comply with site guidelines).³⁵⁶ It is likely, however, that the costs of content neutrality (and the substantially lower content moderation that accompanies it) outweigh the benefits of less arbitrary downranking of content of Black users.

F. Size-Based Carve-Outs and Disclosure Requirements

Several of the reforms above can be combined with each other or with other reforms,³⁵⁷ such as size-based carve-outs or disclosure requirements.

A size-based carve-out, for example, might only regulate platforms with over five million users or \$100 million in annual revenue per year, thereby limiting regulation to larger companies that contribute significantly to the spread of harmful content and are better

354. Cyber Civil Rights Initiative Amicus Brief (*Gonzalez*), *supra* note 281, at 8-11 (“[T]he crafters of Section 230 did not seek to relieve ICSPs of any responsibility for harmful content appearing on their platforms. On the contrary, they intended Section 230 to enable and incentivize ICSPs to moderate content to protect users from harm.”).

355. See Brian Fishman, *Dual-Use Regulation: Managing Hate and Terrorism Online Before and After Section 230 Reform*, BROOKINGS (Mar. 14, 2023), <https://www.brookings.edu/articles/dual-use-regulation-managing-hate-and-terrorism-online-before-and-after-section-230-reform/> [<https://perma.cc/LLC8-HELW>] (“Adjustments to § 230 that compel platforms to focus their enforcement solely on illegal speech will likely lead to more severe harms, including hate speech, celebration of terrorism, and incitement to violence.”).

356. See *supra* notes 262-67 and accompanying text.

357. Various other reform proposals exist. Scholars Danielle Citron and Benjamin Wittes, for example, propose limiting Section 230 immunity to a provider that “takes reasonable steps to prevent or address unlawful uses of its services.” Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 419 (2017). This proposal would encourage companies to take reasonable steps to design their platforms, data collection procedures, and algorithms in ways that avoid unlawful discrimination in housing, employment, lending, voting, and other contexts. The proposal would not, however, stop the Section 230 immunity subsidy to “lawful but awful” activities that harm Black communities, such as hate speech, nonviolent white supremacy organizing, digital blackface, medical disinformation, and domestic political operatives’ deceptive ads targeted to discourage Black users from voting.

situated to bear the costs of building and maintaining the infrastructure to comply with new platform regulations. Size-based carve-outs have been included in a variety of proposed reforms, including civil rights carveouts, algorithm carveouts, ad carveouts, notice-and-takedown proposals, and content neutrality proposals.³⁵⁸

Size-based carveouts would allow small Black start-ups maximum innovation and flexibility without being burdened by regulatory expenses, while also allowing for increased regulation of larger social media and sharing economy platforms where Black users spend a great deal of time.³⁵⁹ One problem, however, is that many threats to Black communities thrive on smaller, niche platforms like 8chan, Gab, and Parler—which are havens for white supremacy. Size-based exemptions allow Section 230 to continue to subsidize anti-Black activity on these platforms.³⁶⁰

Disclosure reforms require that platforms periodically publish information like their content moderation standards and data on their moderation efforts, and are often combined with other Section 230 reforms.³⁶¹ Disclosure requirements may incentivize platforms

358. *See, e.g.*, Protecting Americans From Dangerous Algorithms Act, H.R. 2154, 117th Cong. § 2 (2021); Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. § 2(a) (2021); Internet Platform Accountability and Consumer Transparency (Internet PACT) Act, S. 483, 118th Cong. § 5(e) (2023); Behavioral Advertising Decisions Are Downgrading Services (BAD ADS) Act, S. 4337, 116th Cong. § 2(a) (2020); 21st Century Foundation for the Right to Express and Engage in (FREE) Speech Act, H.R. 7613, 117th Cong. § 2(a) (2022); S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 20, 87th Leg., 2d Called Sess. (Tex. 2021); *see also* Press Release, European Commission, Digital Services Act: Commission Designates First Set of Very Large Online Platforms and Search Engines (Apr. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413 [<https://perma.cc/C8GD-CGBF>] (designating seventeen platforms as Very Large Online Platforms (VLOPs)—for example, Amazon, Facebook, Instagram, LinkedIn, X, YouTube—and two platforms as Very Large Online Search Engines (VLOSEs)—Google and Bing—and requiring that these platforms comply with new obligations under the Digital Services Act).

359. Size-based carve-outs may create a disincentive for Black start-ups to grow beyond a certain size that would subject them to potential liability. One alternative is to apply reforms not to platforms of a minimum size (in terms of monthly users or revenue) but to content that reaches an audience of a certain size. Since content that goes viral is limited, moderating content based on attention metrics would be more manageable, would focus on the most impactful content, and would not significantly deter platform growth. Special thanks to Harvard lecturer and former YouTube engineer Hong Qu for flagging attention metrics.

360. *See Johnson & Castro, supra* note 27, at 6 (“[T]here are smaller online services that profit directly from illegal or abusive third-party content ... and under a size-based carve-out, they would continue to benefit from Section 230 immunity.”).

361. *See, e.g.*, Internet Platform Accountability and Consumer Transparency (Internet PACT) Act, S. 483, 118th Cong. § 5(a) (2023); S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021); H.B.

to engage in responsible moderation of lawful content that challenges Black communities—such as hate speech, white supremacy organizing, and disinformation—without the command and control of government-mandated removal (which may pose constitutional problems).³⁶² Transparency also helps to deal with some of the “black box” mystery about algorithms and content that currently prevents policymakers and Black communities from better understanding the full scope of discrimination, hate speech, disinformation, and other anti-Black content that Section 230 facilitates.³⁶³

When disclosure requirements are overly burdensome, however, they may deter responsible content moderation of hate speech, disinformation, and other content that challenges Black communities. For example, “YouTube alone removed more than a billion comments in a single quarter of 2021.”³⁶⁴ On the other hand, if large platforms can comply with U.S. disclosure requirements using structures they have built to comply with the recently enacted EU Digital Services Act,³⁶⁵ such compliance may not be overly burdensome or result in excessive overmoderation.

CONCLUSION

As detailed above, Section 230’s immunity to platforms for third-party content and for content moderation presents distinct opportunities and challenges for Black communities. An understanding of

20, 87th Leg., 2d Called Sess. (Tex. 2021). Some proposed regulations focus on disclosure. *See, e.g.*, Platform Accountability and Transparency Act, S. 5339, 117th Cong. § 8 (2022); Algorithmic Accountability Act of 2022, H.R. 6580, 117th Cong. §§ 5-6 (2022); *see also* EU Digital Services Act, *supra* note 31, at 49-52.

362. Disclosure requirements are generally subject to less-exacting scrutiny by courts than affirmative limitations on speech. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-51 (2010); *Citizens United v. FEC*, 558 U.S. 310, 366-67, 369 (2010).

363. *See* PASQUALE, *supra* note 36, at 38-40; Benesch, *supra* note 36; Mark MacCarthy, *Transparency is Essential for Effective Social Media Regulation*, BROOKINGS (Nov. 1, 2022), <https://www.brookings.edu/articles/transparency-is-essential-for-effective-social-media-regulation/> [<https://perma.cc/4QHK-BVXD>].

364. *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1230 (11th Cir. 2022), *vacated and remanded sub nom.* *Moody v. NetChoice LLC*, 144 S. Ct. 2383, 2394 (2024) (vacating with instructions for the Eleventh Circuit to properly analyze NetChoice’s facial First Amendment challenge across a substantial number of the law’s applications instead of just as applied to large platforms like Facebook and YouTube).

365. *See* EU Digital Services Act, *supra* note 31, at 49-52 (detailing transparency reporting obligations of platforms and notice-and-action mechanisms).

these opportunities and challenges is helpful in the context of debates to reform Section 230. In considering reforms to Section 230, policymakers and advocates should analyze the effectiveness of a proposal in addressing primary challenges faced by Black communities due to Section 230, the scope of challenges that will remain unaddressed, the likelihood that the proposal will exacerbate existing challenges or create new challenges, and the potential for the proposal to result in overmoderation of Black users or curtail existing opportunities that Black communities enjoy. Reforms should be carefully tailored to address these issues and should explicitly clarify that platforms lack immunity when their algorithms, datasets, or platform designs materially contribute to unlawful discrimination and other illegality.