# CARVING OUT EXCEPTIONS: THE NINTH AND THIRD CIRCUITS' LIMITS ON § 230 IMMUNITY—NECESSARY REFORM OR JUDICIAL OVERREACH?

*Yuta Inada**

*Concerns about safety on social media has recently led to calls for regulation against Big Tech companies. As Congress deliberates on the best way to approach such regulation, plaintiffs have tried to utilize current laws to hold these companies liable for content on their platforms. However, they have faced difficulties in litigating their claims due to the broad immunity given to Big Tech companies via § 230 of the Communications Decency Act. Many scholars and lawmakers generally agree that § 230 must be reformed in some way. Some argue for broad change, while others take a more nuanced approach. Regardless of which camp one stands in, one thing is for certain—the debate does not focus on who should make that change. Recently, the Ninth and Third Circuits created and upheld legally questionable exceptions to § 230 to prevent Big Tech defendants from avoiding liability for content posted on their platforms. Although these courts were likely worried about the broad immunities § 230 provided to these companies, this Note argues that their "judicial lawmaking" will have very serious unintended consequences that create confusion in the law and harm the relationship Big Tech platforms have with their users without providing meaningful redress for victims. It is imperative for the Supreme Court to intervene to prevent more appellate courts from creating their own exceptions to the statute and for Congress to fulfill its duty to amend § 230 and limit the almost unqualified immunity that Big Tech companies currently possess. This Note suggests that Congress do so through a limited notice-and-takedown system.*

* J.D. Candidate, Notre Dame Law School, 2026; L.L.B., Hitotsubashi University [一橋大学], 2023. Thank you to Professor Diane A. Desierto and everyone at the Notre Dame Global Human Rights Clinic for helping me think through this issue. Thank you to Professor Roger P. Alford for supervising me through this process. Thank you to all my friends and family for supporting me throughout law school. And finally, a special thanks to the Castellanets for the generosity and kindness they have shown me throughout law school and beyond. All errors are my own.

## INTRODUCTION

In 1995, the victim of anonymous libelous messages on an online bulletin board sued the manager of the online bulletin.[1] The New York state court treated the bulletin board as the *publisher*, not the *distributor*, of libelous messages on the internet because it had been moderating that content.[2] This *Stratton Oakmont* decision created an incentive for internet service providers to not moderate any content on the internet, as they could potentially be held liable for doing so.[3] It also created an incentive for these providers to severely regulate and limit the posts that appeared on their websites.[4] Congress became worried and quickly passed the Communications Decency Act (CDA) in 1996 to overrule *Stratton Oakmont*.[5] The relevant part of the CDA states as follows: "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."[6]

In recent times, the main criticism against § 230 is that it shields social media companies from civil liability for abusive, defamatory, and harmful content on their platforms.[7] Since its enactment, courts have interpreted § 230 "to confer sweeping immunity on some of the largest companies in the world."[8] This has led many scholars to argue in favor of various reforms, amendments, and even outright repeals of the statute. However, as of January 2026, Congress has yet to pass legislation in response to these calls for reform.

Many social media companies have Terms of Service (TOS) which contain forum selection clauses requiring claims to be brought in California state or federal courts.[9] Since the Supreme Court has so far refused to provide guidance on § 230, California courts have taken a prominent role in shaping its interpretation. In *Barnes v. Yahoo!*, the Ninth Circuit created a contractual carve-out to § 230 immunity by

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1 Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

2 *Id.* at *4.

3 Calise v. Meta Platforms, Inc., 103 F.4th 732, 739 (9th Cir. 2024).

4 Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

5 Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133; *Calise*, 103 F.4th at 739.

6 47 U.S.C. § 230(c)(1) (2018).

7 *See, e.g.*, Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 717 (2023).

8 *Calise*, 103 F.4th at 739 (quoting Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 13 (2020) (mem.) (Thomas, J., respecting denial of certiorari)).

9 *See, e.g.*, *Terms of Service*, META § 4.4 (Jan. 1, 2025), https://www.facebook.com/terms/ [https://perma.cc/8P89-DUZG]. *But see Terms of Service*, X at § 6 (Nov. 15, 2024), https://x.com/en/tos [https://perma.cc/KP3N-CG62] (limiting disputes to be held in Texas courts).

allowing a promissory estoppel claim to proceed even though that claim was predicated on a promise by a social media company to monitor third-party content.[10] From then on, the Ninth Circuit has been faithful to *Barnes*.[11] However, the extent to which these decisions limit the broad immunity afforded by § 230 remains unclear.

Even though the majority of Big Tech claims are heard in California courts, the Third Circuit also recently addressed an issue regarding the death of an adolescent girl from TikTok's "blackout challenge."[12] By combining its questionable interpretation of First Amendment jurisprudence with its own interpretation of § 230, the Third Circuit held that TikTok's algorithmic, targeted compilation of other users' speech was its own "first-party speech" and therefore not covered by § 230 immunity.[13] In short, the targeted compilation of others' content subjects Big Tech companies to liability in the Third Circuit, despite what the text of § 230 says.

This Note argues that the Ninth and Third Circuits' exceptions to § 230 do not provide meaningful mechanisms of redress for victims of online abuse. Even more, the Ninth Circuit's expansion of contractual exceptions may discourage social media platforms from communicating or cooperating with victims seeking the removal of harmful content and committing to moderating content on their platforms. In addition, the Third Circuit's interpretation of § 230 immunity may create further confusion in the law.

Part I outlines the jurisprudential history of § 230. Part II looks at the Ninth Circuit's *Barnes* decision, the recent cases affirming that decision, and its scope. Part III argues that the Ninth Circuit's approach, while it may seem to provide redress, will have unintended consequences. It also argues that Congress must act to fix the problem by implementing a limited notice-and-takedown system. Part IV analyzes and critiques the Third Circuit's recent decision in *Anderson*.

10 Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1107–09 (9th Cir. 2009).

11 *Calise*, 103 F.4th at 741.

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

13 *Id.* at 183–84.

## I. OVERVIEW OF § 230

### A. *§ 230 and* Zeran

As outlined in the Introduction, § 230 was created in response to the *Stratton Oakmont* decision. Congress wished to incentivize the interactive computer service (ICS) industry to moderate its content while making it free from liability for doing so.[14] Thus, an ICS is immune from being held liable for information provided by another information content provider under § 230.[15] An ICS is broadly defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[16] Courts have given broad interpretations to this statutory definition.[17] An information content provider is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[18]

One crucial decision following the enactment of § 230 shaped its general interpretation among the circuit courts. This seminal *Zeran* decision broadened § 230 immunity not only to publisher but also to distributor liability. Under traditional defamation law, publishers can be liable for defamatory content on their publications without notice of such defamatory content, while distributors like newspaper vendors and booksellers are liable only if they have notice of a defamatory statement in their publications.[19] In this case, Zeran sued AOL for failing to remove and screen for defamatory anonymous messages.[20] An anonymous user had posted Zeran's phone number on AOL's platform and attached it to an advertisement for T-shirts with offensive slogans about the Oklahoma City bombing, leading to death threats being sent Zeran's way.[21] Zeran repeatedly contacted AOL, which told him that the posts would be taken down, but the posts remained on the site.[22] The

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14 *See* Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)*, 37 BERKELEY TECH. L.J. 757, 775 (2022).

15 47 U.S.C. § 230(c)(1) (2018).

16 *Id.* at § 230(f)(2).

17 VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 3 & nn.23–31 (2021) (noting that courts have held Google, Facebook, Amazon, and Craigslist to be ICSs).

18 47 U.S.C. § 230(f)(3).

19 Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006).

20 Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997).

21 *Id.* at 329.

22 *Id.*

district court granted AOL's motion for judgment on the pleadings based on § 230.[23]

On appeal, the Fourth Circuit first acknowledged Zeran's argument that § 230 only immunized an ICS from publisher and not distributor liability.[24] Under Zeran's theory, because AOL had notice of the defamatory content posted on its platform, it was liable as a distributor.[25] The court accepted as true that the plain text of § 230 only mentions "publishers."[26] However, the court rejected that argument because distributor liability was merely a subset of publisher liability.[27] In other words, although distributors and publishers may have different standards of liability, they were both within the larger publisher category.[28] It was also impermissible that Zeran sought to hold AOL liable by putting it in the same position as the anonymous party who posted the offensive messages, something which § 230 explicitly prohibited.[29] Finally, the court articulated the policy implications of notice liability. In its view, notice liability would require an ICS to conduct "careful yet rapid investigation" anytime it received notice of potentially defamatory content.[30] Such investigation would be impossible for an ICS due to the sheer amount of information it receives.[31] Since an ICS would not be held liable for the removal of content, it would be incentivized to remove all content upon notice.[32] Moreover, third parties could notify an ICS every time they were displeased with the speech on its platform to create a basis of liability—such a result would be contrary to the statutory purposes of § 230.[33] Therefore, Zeran's claims were barred by § 230.[34] *Zeran* has been widely accepted across both federal and state courts.[35] It is arguably "the most important Section 230

23 *Id.* at 329–30.
24 *Id.* at 331.
25 *Id.*
26 *See id.* at 330.
27 *Id.* at 332.
28 *Id.*
29 *Id.* at 332–33.
30 *Id.* at 333.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* at 332.
35 *See* Kosseff, *supra* note 14, at 776; Barrett v. Rosenthal, 146 P.3d 510, 518 n.9 (Cal. 2006).

ruling . . . and probably the most important court ruling in Internet Law."[36]

### *B. § 230's History in California*

*Zeran* has been very influential in shaping California jurisprudence surrounding § 230 immunity.[37] In fact, both the Ninth Circuit Court of Appeals and California state courts have cited *Zeran* more times than any other federal appellate or state court.[38] At the same time, the Ninth Circuit has created two exceptions to the sweeping immunity upheld in *Zeran*. Under the first exception, which is not the focus of this Note, an ICS cannot claim § 230 immunity when it, even partially, develops or creates harmful content. This "exception" is not truly an exception because the text of § 230 only immunizes an ICS from being liable for "information provided by another information content provider."[39] Second, an ICS cannot claim § 230 immunity when the plaintiff's claim is not based on holding the ICS liable as a publisher. This is where the contractual exception fits in, which allows a plaintiff to hold an ICS liable if it made a promise regarding harmful content on its platform but breached that promise to act.

An important case that clarified the first exception was *Fair Housing Council v. Roommates.com*. Although the case also involved the Fair Housing Act (FHA), the Ninth Circuit first had to address the § 230 immunity defense raised by Roommates.com three years earlier.[40] Roommates.com was a website that allowed individuals to locate

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36 Kosseff, *supra* note 14, at 777 (quoting Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 3 (2017)).

37 *See, e.g.*, Hassell v. Bird, 420 P.3d 776, 786 (Cal. 2018) (explaining that California Courts of Appeal have advanced an understanding of § 230 similar to that of *Zeran*); *Barrett*, 146 P.3d at 519 (Cal. 2006) (concluding that *Zeran*'s "construction of the term 'publisher' is sound"); Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 376 (Cal. Ct. App. 2021) (discussing *Barrett*'s express agreement with *Zeran*); Batzel v. Smith, 333 F.3d 1018, 1027 & n.10 (9th Cir. 2003) (Although not reaching the question of whether § 230 encompasses both publisher and distributor liability, noting that "every court to reach the issue has decided that Congress intended to immunize both distributors and publishers."), *overruled by* Gopher Media LLC v. Melone, 154 F.4th 696 (9th Cir. 2025).

38 Viewing the citing references for *Zeran* on Westlaw.com shows 26 cases in California courts, far more than any other jurisdiction. Zeran v. America Online, Inc. Citing References, Westlaw Advance, https://1.next.westlaw.com/RelatedInformation/I25742fa1943111d9bdd1cfdd544ca3a4/kcCitingReferences.html?docSource=a5b25792e939405bafcae5c9e55cdf8f&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=84dabc2ec6224a15b713666bf40807b7&originationContext=citin [https://perma.cc/37MK-6P59] (last visited Mar. 4, 2026).

39 47 U.S.C. § 230(c)(1) (2018).

40 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc).

potential roommates.[41] New users of the site were required to fill in a questionnaire indicating their preference for a roommate, including number of children, gender, and sexual orientation.[42] Roommates.com then displayed these answers in users' profiles, which other users could search and view.[43] Several housing agencies sued the operators of Roommates.com for violating the FHA, which prohibits advertisements for the sale or rental of a dwelling that indicate any preference based on sex, familial status, or other protected characteristics.[44]

Because Roommates.com created the questionnaires, the Ninth Circuit held that it was "undoubtedly the 'information content provider' as to the questions and [could] claim no immunity for posting them on its website."[45] Furthermore, § 230 "d[id] not grant immunity for inducing third parties to express illegal preferences."[46] The dissent argued that the third parties using the website were themselves content providers, but the majority reasoned that just because third parties contributed to unlawful content did not mean that an ICS could not develop it as well.[47] Thus, by requiring users to provide a limited set of information to use the website, the website became not merely a publisher of discriminatory content but a developer of it as well.[48] Roommates.com was responsible for the illegal pages posted onto its website because "every such page is a collaborative effort between [Roomates.com] and the subscriber."[49] However, the Ninth Circuit limited its holding by specifying that a website's "neutral tools," like a search engine that filtered content based on user input, would not be considered content development.[50]

It is important to note a crucial difference between *Roommates.com* and third-party content posted on social media sites like Facebook. Although Facebook asks questions about its users to create profiles, the questions are not discriminatory in nature. In *Roommates*, the FHA explicitly prohibited the advertising of housing based on race, sex, and gender. Facebook and X do not perform functions like

41 *Id.* at 1161–62.
42 *Id.* at 1161.
43 *Id.* at 1161–62.
44 42 U.S.C. § 3604(c) (2018).
45 *Roommates.com*, 521 F.3d at 1164.
46 *Id.* at 1165.
47 *Id.*; *id.* at 1180–82 (McKeown, J., dissenting).
48 *Id.* at 1166 (majority opinion).
49 *Id.* at 1167.
50 *Id.* at 1169, 1167–69.

Roommates.com and looking for someone to be their friend or acquaintance based on their gender or race is not illegal. Therefore, ICSs like Facebook and X do not "develop" the content on their platforms, and regardless, that content (usernames, gender, sex, race) is not the content alleged to be unlawful in cases against these Big Tech companies.

Therefore, although partial development of content does create an exception to § 230 immunity, its application is quite limited in the context of Big Tech litigation. Although plaintiffs have argued that the algorithmic amplification of harmful content by an ICS constitutes the partial development or creation of content, many courts have been hesitant to accept such arguments.[51]

## II. The Ninth Circuit's Contractual Carve-Out to § 230 Immunity

### A. *Barnes v. Yahoo*

A California case which created the second exception is *Barnes v. Yahoo!, Inc.*[52] In *Barnes*, the Ninth Circuit refused to apply § 230 immunity to a state contract law claim based on an ICS's promise to remove third-party content.[53] Here, the plaintiff's ex-boyfriend created fake profiles of the plaintiff on Yahoo's website featuring nude images of her that were taken without her knowledge and directed male correspondents to these profiles.[54] A local news station was about to air this story when Yahoo contacted Barnes promising that it would take down the profiles.[55] Yahoo did not fulfill this promise, and the profiles finally disappeared after the plaintiff commenced suit against Yahoo two months later.[56] The plaintiff sued for promissory estoppel, and the court reasoned that because the plaintiff "does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counterparty to a contract . . . [c]ontract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention

51 *See, e.g.*, Force v. Facebook, Inc., 934 F.3d 53, 68–69 (2d Cir. 2019); Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1098 (9th Cir. 2019); Prager Univ. v. Google LLC, 301 Cal. Rptr. 3d 836, 847 (Cal. Ct. App. 2022); Wozniak v. YouTube, LLC, 319 Cal. Rptr. 3d 597, 617 (Cal. Ct. App. 2024). *But see* Anderson v. TikTok, Inc., 116 F.4th 180 (3d Cir. 2024) (holding TikTok liable for algorithmic amplification of video that led to a minor's death).

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

53 *Id.* at 1107.

54 *Id.* at 1098.

55 *Id.* at 1098–99.

56 *Id.* at 1099.

to be legally obligated to . . . remov[e] . . . material from publication."[57]

Moreover, the court explained that because promisors implicitly manifest their intention that courts will enforce their promises, they agree to depart from the baseline rules, including § 230.[58] However, the court also mentioned that "general monitoring polic[ies]" on the part of an ICS does not suffice for contractual liability.[59] Regarding this point, the court stated, "This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound."[60] This issue with "general monitoring policies" is elaborated on later in the Note.[61]

It is unclear if *Barnes* applies to *any* claim based on a definite promise by an ICS to a user. From the plain text of the decision itself, that seems to be the case. If so, *Barnes* provides a strong mechanism for plaintiffs to circumvent § 230 immunity. Whether *Barnes* provides such a large exception to § 230 is discussed further in this Note. To begin, below are several decisions by the Ninth Circuit trying to grapple with the *Barnes* decision.

### *B. Recent Decisions Upholding Barnes*

Both federal district courts and the Ninth Circuit have been faithful to the *Barnes* decision. For example, in *Berenson v. Twitter*,[62] a California district court upheld a plaintiff's breach of contract and promissory estoppel claims despite Twitter's § 230 defense.[63] In this case, the plaintiff posted several viral tweets about COVID vaccines.[64] Twitter soon updated its COVID-19 misinformation guidelines, which prompted the plaintiff to reach out to the Vice President of Twitter, who assured the plaintiff personally that his tweets would not be impacted by the new policy.[65] Soon after, five of the plaintiff's tweets were labeled as misleading, against the Vice President's assurance and without Twitter even following the labeling procedures on its new COVID

57 *Id.* at 1107.
58 *Id.* at 1108–09.
59 *Id.* at 1108.
60 *Id.*
61 *See infra* Section II.C.
62 *See* Berenson v. Twitter, Inc., No. C 21-09818, 2022 WL 1289049 (N.D. Cal. Apr. 29, 2022).
63 *Id.* at *2–3.
64 *Id.* at *1.
65 *Id.*

guidelines.[66] The plaintiff's account was locked soon thereafter.[67] The court noted that § 230 "precludes liability for removing content and preventing content from being posted that the platform finds would cause its users harm, such as misinformation regarding COVID-19."[68] Despite this, the district court held that because the plaintiff sought to hold Twitter liable "as the counter-party to a contract, as a promisor who had breached," the plaintiff's claims could proceed past a motion to dismiss.[69] The combination of Twitter's breach of its new COVID policy within its TOS and the "specific and *direct*" assurances given by the Vice President were sufficient for the court to find in the plaintiff's favor.[70]

In *Calise v. Meta Platforms Inc.*, Meta's § 230 defense failed because Meta manifested its intent to be legally obligated to combat scam advertisements separate from its status as a publisher.[71] The plaintiff sued Meta for allowing scam advertisements on its platform despite its TOS and community guidelines promising to "[c]ombat harmful conduct" and remove any "content that purposefully deceives, willfully misrepresents or otherwise defrauds or exploits others for money or property."[72] The court began by explaining that "[o]ur post-*Barnes* decisions faithfully applied its holding" and stated that contract-based claims survive § 230 immunity.[73] The court also tried to clarify *Barnes* by stating that in *Barnes*, "Yahoo specifically promised that it would remove the indecent profiles, and Barnes relied on that promise to her detriment," which led to contractual liability for Yahoo.[74] Finally, the court created a test for when § 230 immunity would not bar a contract claim. According to this test, if the right from which the duty springs is separate from the ICS's status as a publisher, like an agreement, then § 230 immunity will not apply.[75] However, if the duty from this right, like an agreement, obliges the defendant to monitor third-party content or alter it, that is barred by § 230.[76] This second prong adds to the confusion because it seems to reverse its own holding and the one in *Barnes*, since the contractual obligations in both would have obliged

66 *Id.*
67 *Id.*
68 *Id.* at *2 (citing 47 U.S.C. § 230(c)(2)(A) (2018)).
69 *Id.* (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1107 (9th Cir. 2009)).
70 *Id.* at *2, *2–3.
71 Calise v. Meta Platforms Inc., 103 F.4th 732, 743 (9th Cir. 2024).
72 *Id.* at 736 (alteration in original).
73 *Id.* at 741.
74 *Id.* at 740–41.
75 *Id.* at 742.
76 *Id.*

the monitoring of third-party content.[77] Finally, the court did not refer to the "general monitoring policies" wording used in *Barnes*.

Regardless, the Ninth Circuit has continued to affirm the *Barnes* decision without limiting its scope. In another recent case, the plaintiffs sued YOLO, an anonymous messaging app service, when they received hateful and harassing messages on the platform, causing some users distress and eventually self-harm.[78] The Ninth Circuit prefaced its analysis by stating that § 230 could not provide general immunity for all third-party claims because all conduct by social media platforms and ICSs involves some form of third-party publishing conduct.[79] Thus, "[t]he proper analysis requires a close examination of the duty underlying each cause of action to decide if it 'derives from the defendant's status or conduct as a publisher or speaker.'"[80] Next, the court clarified the two-step test articulated in *Calise*. The first step asks whether the right from which the duty springs "stem[s] from the platform's status as a publisher" or if "it spring[s] from some other obligation, such as a promise or contract."[81] The second step asks what "this duty requir[es] the defendant to do."[82] If it requires the ICS to moderate content to fulfill its duty, § 230 immunity applies.[83] What matters is not the name of the cause of action, but whether the duty invoked by the plaintiff derives from publishing conduct.[84]

Here, YOLO represented to the plaintiffs in its "statements" that it would unmask and ban abusive users, something it failed to do.[85] Although the court explained that it is an open question whether YOLO has any defenses to enforcement of its promise, the court could not "say that § 230 categorically prohibits Plaintiffs from making the [contractual] argument."[86] It also explained that the district court oversimplified the § 230 analysis by dismissing the claim solely because it involved third-party postings.[87] Because YOLO made a promise to

77 *See* Eric Goldman, *Ninth Circuit Does More Damage to § 230–Calise v. Meta*, TECH. & MKTG. L. BLOG (June 6, 2024), https://blog.ericgoldman.org/archives/2024/06/ninth-circuit-does-more-damage-to-section-230-calise-v-meta.htm [https://perma.cc/76CC-Y3FR].

78 Estate of Bride v. Yolo Techs., Inc., 112 F.4th 1168, 1173 (9th Cir. 2024).

79 *Id.* at 1176.

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

81 *Id.* at 1177.

82 *Id.* (alteration in original) (quoting Calise v. Meta Platforms Inc., 103 F.4th 732, 742 (9th Cir. 2024)).

83 *Id.*

84 *Id.* at 1178.

85 *Id.*

86 *Id.* at 1179.

87 *Id.*

ban users who violated the TOS, the plaintiffs relied on that promise to their detriment, and the underlying duty relied upon was a promise (although content moderation would be one of the solutions for YOLO to fulfill its promise), the § 230 defense failed against the contractual misrepresentation claims.[88]

Overall, the Ninth Circuit's contractual carve-out to § 230 as articulated in *Barnes* and developed through *Calise* and *YOLO Techs* demands close scrutiny of the plaintiff's claim. Initially, a promise to moderate third-party content seems to be covered by § 230 as it relates to the editorial functions of a publisher. However, if one follows *YOLO Techs*'s reasoning (and not what it said), a cause of action based on such a promise would hold an ICS liable for a legally enforceable promise and not for publishing conduct. For example, if the right from which the duty springs is a contractual one, and the duty requires the defendant to keep its promise, then § 230 would not apply even if that promise required the defendant to monitor third-party content. In fact, the Ninth Circuit explained that "[e]ven if those promises regard content moderation, the promise itself is actionable separate from the moderation action."[89] If an ICS makes a promise to a plaintiff regarding content moderation and it fails to deliver on that promise to the plaintiff's detriment, the Ninth Circuit's reasoning would almost always allow a claim to circumvent § 230 immunity.

### C. *Scope of the Barnes Decision*

Given the Ninth Circuit's reasoning above, claims based on clear-worded promises are likely to be able to defeat a § 230 defense regardless of whether that promise obliges the defendant to monitor third-party content. However, the Ninth Circuit has not clarified the extent to which this exception applies to claims based on an ICS's TOS. For example, if the TOS of an ICS's social networking service are indeed promises, a subsequent breach could impose liability on the ICS against the millions of users that it has on its platforms. In *YOLO Techs*, part of the plaintiff's contractual claim was YOLO's breach of its "statements" to its application.[90] These were not TOS per se, but they seem analogous to the "general monitoring policies" deemed to be insufficient for a contractual claim to succeed in *Barnes*. The Ninth Circuit made no mention of this contradiction, only stating that its decision did not "make all violations of [an ICS's] own terms of service into actionable claims."[91] It held that its decision did not expand the

88 *Id.*
89 *Id.* at 1182.
90 *See id.* at 1173.
91 *Id.* at 1182.

liability present under *Barnes* and *Calise*.[92] Apart from these words of caution, *YOLO Techs* did not explain how *Barnes* applied to TOS claims.

The Ninth Circuit did recently address *YOLO Techs* in the context of Grindr's general statement that "it would maintain a 'safe and secure environment for its users.'"[93] In contrasting *YOLO Techs* and *Barnes*, the court held that such statements were not specific promises, but "a description of its moderation policy," which was protected under § 230.[94] Compared with the promise to "take down indecent profiles" in *Barnes* and "unmask the identities of users" in *YOLO Techs*, the promise in *Grindr* was "too general to be enforced."[95] Accordingly, the Ninth Circuit likely does not differentiate between TOS and direct assurances, but rather looks to the *specificity* of the promises given by an ICS. It follows that specific assurances in a platform's TOS could rise to the level where it provides a plaintiff a cause of action that can circumvent § 230 immunity.

Despite the Ninth Circuit's application of *YOLO Techs* to an ICS's TOS, it is still unclear which TOS provisions would be specific enough to hold an ICS liable. In *Lloyd v. Facebook, Inc.*, a California district court held that although § 230 does sometimes bar contract claims, a breach of contract claim will not necessarily be barred even if the alleged contract or promise relates to an ICS's actions as a publisher.[96] Still, the court dismissed the claim because Meta's TOS "merely stat[ed] that Facebook does not allow users to post harmful content and that they will remove them," which meant they were general monitoring policies that were held to be insufficient for a claim in *Barnes*.[97] The exact TOS provision in *Lloyd* stated:

> We employ dedicated teams around the world and develop advanced technical systems to detect misuse of our Products, harmful conduct towards others, and situations where we may be able to help support or protect our community. If we learn of content or conduct like this, we will take appropriate action—for example, offering help, removing

92 *Id.*

93 Doe v. Grindr Inc., 128 F.4th 1148, 1154 (9th Cir. 2025).

94 *Id.*

95 *Id.*

96 Lloyd v. Facebook, Inc., No. 21-cv-10075, 2022 WL 4913347, at *8 (N.D. Cal. Oct. 3, 2022).

97 *Id.* at *9.

content, removing or restricting access to certain features, disabling an account, or contacting law enforcement.[98]

This provision seems more specific than the one in *Grindr*, as it explicitly and specifically promises to act against violations of Meta's Community Guidelines. There are even specific examples of the actions Meta will take. Despite this, these terms were too general to be enforceable. Since this case is on appeal to the Ninth Circuit,[99] it will be interesting to see if it deems this provision to be specific enough for it to circumvent § 230. Such a decision would presumably expand contractual liability against ICSs and further limit the applicability of § 230 immunity.

However, even if the Ninth Circuit explicitly decides that claims based on an ICS's TOS are actionable, an issue would still remain. Many of these TOS contain liability exculpation clauses.[100] In California, limitation-of-liability clauses are generally enforceable unless they are unconscionable or against public policy.[101] Facebook's and X's limitation-of-liability clauses have both been held to be enforceable.[102] Therefore, plaintiffs still face hurdles even if they are able to frame the TOS contractual claim as one based on a specific promise.

## III. Implications of the Ninth Circuit's Approach

### A. *Potential Redress for Online Abuse Victims*

It is unclear to what extent the Ninth Circuit's contractual exception provides redress to victims of online harm. Many of the recent cases dealing with the exception, including *Calise* and *YOLO Techs*, are still too recent for a decision on remand. Moreover, other cases are likely settled once an appellate court rules in the plaintiff's favor against immunity. However, *Barnes was* litigated on remand based on the promissory estoppel claim. On remand, Yahoo argued that the plaintiff failed to demonstrate reliance on the alleged promise and a substantial change in position.[103] The district court ruled against Yahoo, explaining that the plaintiff had called the reporter and told

98 *Id.*

99 Lloyd v. Facebook, Inc., No. 21-cv-10075, 2025 WL 409386 (N.D. Cal. Jan. 13, 2025), *appeal filed*, No. 25-268 (Jan. 15, 2025).

100 *See, e.g.*, META, *supra* note 9, at § 4.3; X, *supra* note 9, at § 5.

101 Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1037 (N.D. Cal. 2019).

102 *See id.* at 1038; Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 377–381 (Cal. Ct. App. 2021). *But see also* Shared.com v. Meta Platforms, Inc., No. 22-CV-02366, 2022 WL 4372349, at *4 (N.D. Cal. Sep. 21, 2022) (holding limitations provision as unenforceable when there was a claim for fraud or willful injury).

103 Barnes v. Yahoo!, Inc., No. 05-926, 2009 WL 4823840, at *2 (D. Or. Dec. 11, 2009).

them that Yahoo was going to remove the indecent profiles, thus "diffus[ing] the story," because she relied on Yahoo's promise to remove the indecent profiles.[104] Furthermore, there was a substantial change in the plaintiff's position because "plaintiff's position could have . . . substantially changed in that the profiles remained on the web longer than they would have absent plaintiff's reliance."[105] Although the court noted that some of these conclusions were somewhat speculative, it found that the plaintiff alleged sufficient facts to withstand a motion to dismiss.[106]

Therefore, it is possible that the Ninth Circuit's exception puts pressure on ICSs and that plaintiffs who have enough facts to prove promissory estoppel or breach of contract may succeed in obtaining judgments against an ICS. However, satisfying every element of the *Barnes* test is increasingly difficult because, as explained below, there is no incentive for an ICS to communicate with and promise users that it will take down certain content and subject itself to potential contractual liability. Furthermore, the mere possibility of an ICS becoming liable for promises on its TOS incentivizes it to promise close to nothing on them.

### *B. Unintended Consequences*

The contractual exception creates incentives for ICSs not to make direct assurances to the users of their platforms. *Barnes* may seem helpful in the abstract, but an ICS can either disclaim any intent to be bound or direct its employees to never make affirmative statements (such as promises or assurances) to third parties.[107] This may have the effect of making ICSs even less willing to remove content that their platform's users deem inappropriate or harmful. Furthermore, reporting mechanisms and direct lines of communication will likely become less helpful in getting content taken down. This is already the case with large social media platforms such as Facebook and X.[108]

To add on, the Ninth Circuit's willingness to (even if it has not done so yet) expand the scope of *Barnes* to an ICS platform's TOS will

104 *Id.*at *4.

105 *Id.* *5.

106 *Id.*

107 *See* Jeffrey R. Doty, *Choose Your Words Wisely: Affirmative Representations as a Limit on § 230 Immunity*, 6 WASH. J.L. TECH. & ARTS 259, 268–69 (2011).

108 *See, e.g.*, Julie Posetti, Diana Maynard & Kalina Bontcheva, *Maria Ressa: At the Core of an Online Violence Storm*, *in* THE CHILLING: A GLOBAL STUDY OF ONLINE VIOLENCE AGAINST WOMEN JOURNALISTS 97, 113–14 (Julie Posetti & Nabeelah Shabbir eds., 2022).

have net negative effects for platform users. Once a plaintiff brings a claim against an ICS based on its TOS, it incentivizes the ICS to update its TOS to prevent other plaintiffs from relying on that exact provision. For example, the TOS provision that was at issue in *Lloyd* is different from the current version.[109] This may seem like a coincidence, but there are other examples. In *King*, the plaintiff sued Meta for the disabling of her account without cause.[110] The TOS provision at issue stated, "If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account."[111] The district court noted that "[a]lthough the Terms of Service do give Facebook some discretion to act . . . the Court is not convinced at this juncture that that discretion is entirely unrestrained."[112] It explained that since the TOS provided a standard on when an account should be disabled, Meta's discretion must be guided by that standard and not entirely left to Meta's discretion.[113] However, the claim was eventually dismissed on § 230 grounds.[114] Despite the dismissal of the claim, the current TOS have changed, with the words "in our discretion" added after the words "[i]f we determine."[115] Therefore, there is at the very least correlation between litigation based on an ICS's TOS and the increased ambiguity in certain TOS provisions. The two examples above worked to reduce Meta's commitment to removing certain harmful content on its platforms, at least in terms of what appears on its TOS. Overall, the contractual exception works to disincentivize an ICS from self-regulating and collaborating with its users in removing harmful content.

109 *Compare* Lloyd v. Facebook, Inc., No. 21-cv-10075, 2022 WL 4913347, at *9 (N.D. Cal. Oct. 3, 2022) ("If we learn of content or conduct like this, we will take appropriate action—for example, offering help, removing content, removing or restricting access to certain features, disabling an account, or contacting law enforcement."), *with* META, *supra* note 9, at § 1.5 ("If we learn of content or conduct like this, *we may take appropriate action* based on our assessment *that may include*—notifying you, offering help, removing content, removing or restricting access to certain features, disabling an account, or contacting law enforcement." (emphasis added)).

110 King v. Facebook, Inc., 572 F. Supp. 3d 776, 781 (N.D. Cal. 2021).

111 *Id.* at 788.

112 *Id.* at 788–89.

113 *Id.* at 789.

114 *Id.* at 795.

115 META, *supra* note 9, at § 4.2.

### *C. A Potential Solution*

The Ninth Circuit's contractual exception can be likened to a much narrower, more complicated way of achieving a notice-and-takedown system. Scholars have long advocated for modification to the CDA.[116] One of the most popular proposals[117] is a notice-and-takedown provision similar to the ones present in the internet laws of several other countries.[118] Essentially, the notice-and-takedown system imposes liability on an ICS if it receives notice of harmful content (either from the government or a user of its platform, for example) and refuses to take it down within a reasonable amount of time.[119] Currently, an ICS is under no duty to remove allegedly harmful content even if it receives actual notice of such content under § 230.[120] A notice-and-takedown system would essentially create liability for content an ICS knows is harmful.

However, one of the greatest criticisms against a notice-and-takedown system is its vulnerability to abuse. First, an ICS must decide whether the notice of harmful content is credible. Given the threat of liability if an ICS decides not to act on a report, the ICS has an incentive to respond and take down any content that is reported even if the report is not credible. This is the "over-removal" issue that opens up the possibility of excessive censorship.[121] In fact, the Digital Millenium

116 *See, e.g.*, Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 411 (2013) (recommending a modified notice-and-takedown provision to be included in the CDA); Kosseff, *supra* note 14, at 798–801 (recommending an emphasis on transparency in the CDA debate); Kimberly A. Fry, Note, *The Fate of Section 230*, 22 COLO. TECH. L.J. 361, 391 (2024) (arguing for the complete replacement of § 230). *But see* Kevin Case, Comment, *Enough with Exceptions: Why Congress and the Courts Should Stop Chipping Away at Section 230 Immunity*, 28 GEO. MASON L. REV. 1487, 1512 (2021) (arguing against judicial and congressional modification to § 230).

117 *See, e.g.*, Michael L. Rustad & Thomas H. Koenig, *The Case for A CDA Section 230 Notice-and-Takedown Duty*, 23 NEV. L.J. 533 (2023).

118 *See, e.g.*, Tokutei denki tsūshin ekimu teikyōsha no songai baishō sekinin no seigen oyobi hasshinsha jōhō no kaiji nikansuru hōritsu [Purobaida Sekinin Seigen Hō] [Provider Limitation of Liability Act], Law No. 137 of 2001, https://www.japaneselawtranslation.go.jp/en/laws/view/4443 [https://perma.cc/JBA5-6Q6L]; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2)(b) (India).

119 *See, e.g.*, Rustad & Koenig, *supra* note 117, at 586.

120 *See* 47 U.S.C. § 230 (2018).

121 Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M. L. REV. 451, 474–76 (2021) (criticizing the notice-and-takedown provision in the Digital Millenium Copyright Act (DMCA)).

Copyright Act (DMCA) contains such a provision.[122] In that context, it has been suggested that "rapid takedown compounds the problem and 'creates an incentive for copyright claimants to file dubious takedown claims.'"[123]

There is significant debate over whether a notice-and-takedown system would work in the context of § 230.[124] It is theoretically possible to impose a more limited notice-and-takedown system that may not cause ICSs to over-regulate their platforms. For example, § 230 could implement a DMCA-style deficient notice system, in which an ICS would not have to respond to frivolous reports that do not satisfy stringent criteria[125] and counter-notices could be filed for those who believe their content was wrongfully reported and taken down by a platform.[126] This would strike a balance between social media companies that do not want to respond to every report of harmful content and free speech activists who do not want their speech to be wrongfully censored. Of course, certain interpretations of the "stringent criteria" could lead to unfavorable results, for example, if they are too stringent and no report ever leads to harmful content being taken down. In addition, counter-notices may become too burdensome to file. However, the former problem could be partially resolved by limiting the "stringent criteria" to tortious or criminal content, thereby creating a basis in the law for such criteria.[127] A third-party attorney could then review reports of harmful content and only contact the social media company about the reports fulfilling the legal criteria. As for the latter problem, ICSs could create simple online mechanisms for filing counter-notices, perhaps by using secure online forms.

Returning to the Ninth Circuit's contractual carve-out, the *Barnes* rule tries to incentivize content moderation similar to the notice-and-takedown system, but in a stricter, less useful, and potentially harmful

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122 Digital Millenium Copyright Act, Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2877–86 (1998) (codified as amended at 17 U.S.C. § 512 (2018)).

123 Brown, *supra* note 121, at 476 (quoting Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 178 (2010)).

124 For articles supporting such a system, see, for example, Michael P. Goodyear, *Is There No Way to the Truth? Copyright Liability as a Model for Restricting Fake News*, 34 HARV. J.L. & TECH. 279, 303 (2020) (recommending implementing a modified counter-notice system under the DMCA for § 230); Avery Bertagna, Note, *Accountability in the Metaverse: The Need for A Notice and Takedown System Under Section 230*, 56 TEX. TECH L. REV. 369 (2024); and Rustad & Koenig, *supra* note 117, at 606–11 (proposing their own notice-and-takedown system for § 230). For those against, see, for example, Brown, *supra* note 121; and Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 B.Y.U. L. REV. 1435, 1476–77 (2022).

125 *See* Rustad & Koenig, *supra* note 117, at 609–10.

126 Goodyear, *supra* note 124, at 297, 304.

127 *See* Rustad & Koenig, *supra* note 117, at 609.

manner. First, an ICS is required to remove content not just when it is notified of such content, but when the ICS also affirmatively makes a "well-defined offer" to the reporter that it will remove such content. Put in other words, an ICS must willingly open itself up to liability for it to have a legal obligation to remove reported content. Under a notice-and-takedown system, an ICS would be subject to liability if it only had notice of the harmful content, regardless of whether it notified the reporter that it would take down such content. ICSs are not altruistic, and *Barnes* incentivizes them to be less helpful to the public. Second, because of the first point, the number of victims the rule provides redress to is quite limited. Although the Ninth Circuit may have expressed willingness to hold an ICS liable for breaches of its TOS, *Barnes* rejects its applicability to "general monitoring policies." Not only does this incentivize ICSs to make sure their TOS are as vague as possible, but only those plaintiffs with concrete evidence of a promise by an ICS will be able to obtain redress. The number of such plaintiffs is sure to decrease as ICSs refrain from making any sort of promise to their users. On balance, the redress *Barnes* gives to victims of abuse on online platforms does not outweigh the disincentives it provides for ICSs to work with their victims.

Content moderation and ICS liability are obviously massive issues considering the problematic content on social media. This Note proposes that the limited notice-and-takedown provision of the DMCA could provide a potential solution that avoids the shortcomings of the Ninth Circuit's solution in *Barnes*. Not only does the limited notice-and-takedown provision strike a balance between the stakeholders' competing interests, but it does not disincentivize ICSs from being helpful. A limited notice-and-takedown provision also avoids the pitfalls of private self-regulation (or lack thereof). It is no secret that misinformation, hate speech, and extremist content abound on platforms like Facebook and X.[128] Elon Musk recently diminished the role content moderation plays on X and Meta followed suit soon thereafter.[129] Congress may be able to curb the issues arising from such private self-

128 *See, e.g.*, Jillian C. York, Paige Collings & David Greene, *Meta's New Content Policy Will Harm Vulnerable Users. If It Really Valued Free Speech, It Would Make These Changes*, ELEC. FRONTIER FOUND. (Jan. 9, 2025), https://www.eff.org/deeplinks/2025/01/metas-new-content-policy-will-harm-vulnerable-users-if-it-really-valued-free [https://perma.cc/ZT2G-D54G]; David Lauer, *Facebook's Ethical Failures Are Not Accidental; They Are Part of the Business Model*, 1 AI & ETHICS 395 (2021).

129 *See* Kate Conger, *Meta Turns to Community Notes, Mirroring X*, N.Y. TIMES (Jan. 7, 2025), https://www.nytimes.com/2025/01/07/business/meta-community-notes-x.html [https://perma.cc/B6RC-8LLR].

regulation by implementing a limited notice-and-takedown system. In any event, such action cannot come from the judiciary.

### *D. The Answer Must Lie with Congress*

Given the large amount of problematic content on these Big Tech platforms and the debate surrounding § 230 reform, the Ninth Circuit may have had good intentions in creating its own exception. However, as espoused by the Supreme Court, the judiciary is

> vested with the authority to interpret the law; [it] possess[es] neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not [its] job to protect the people from the consequences of their political choices.[130]

Congress is best equipped with the resources to create a clear and explicit rule that can cut back on the lack of content moderation on ICS platforms. Much of the debate around § 230 involves *congressional* amendments to the statute, not *judicially* carved exceptions to it.[131] With a statute as broad as § 230, it is difficult for courts to produce a rational justification for any sort of exception to it. After all, the text of the statute and its legislative history make clear "the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others."[132] Any exception to such a statute will be narrow, unclear, and carry with it unintended consequences the likes of which Congress is more adept to take into account. This Note suggests that Congress follow the limited notice-and-takedown approach, but for such a complex problem, *any* solution by Congress is better than a solution from the judiciary.

Of course, such cliché arguments against judicial activism will not prevent courts from trying to hold ICSs responsible for third-party content on their platforms. The recent developments seen in the Third Circuit exemplify that very fact.

130 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012).

131 *See, e.g.*, Alex S. Rifkind, Note, Dyroff v. Ultimate Software Group, Inc.*: A Reminder of the Broad Scope of § 230 Immunity*, 51 GOLDEN GATE U. L. REV. 49, 53 (2021) (arguing that § 230 "is antiquated and should be narrowed *by Congress* to foster greater accountability" (emphasis added)); Nicholas Bradley, Note, *Something for Nothing: Untangling A Knot of Section 230 Solutions*, 2022 CARDOZO L. REV. DE NOVO 58, 78 (claiming that "the only solution is a government solution"); Rustad & Koenig, *supra* note 117, at 586 ("Congress should update CDA Section 230 to address its excesses.").

132 Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998).

## IV. RECENT DEVELOPMENTS IN THE THIRD CIRCUIT: *ANDERSON V. TIKTOK*

The Third Circuit recently rejected TikTok's § 230 defense concerning harmful third-party content it amplified on its platform through its algorithms.[133] Before moving onto the Third Circuit's reasoning behind its decision, it is necessary to explain the recent Supreme Court rulings on the § 230 issue.

Two cases recently pending before the Supreme Court on the § 230 issue were *Moody v. NetChoice* and *NetChoice v. Paxton. Moody* concerned Florida S.B. 7072, which prohibited certain content-moderation restrictions against politicians and journalists by social media platforms.[134] The Eleventh Circuit held that because the bill restricted "editorial discretion"[135] given to social media platforms and "interferes with [the] platforms' own 'speech,'" it was likely unconstitutional under the First Amendment.[136] In its view, "a social media platform itself 'spe[aks]' by curating and delivering compilations of others' speech."[137] Moreover, it reasoned that § 230(c)(2)(A)'s protections for ICSs did not require them to provide indiscriminate service and therefore "they [were] not common carriers with diminished First Amendment rights."[138]

*Paxton* concerned Texas H.B. 20, which similarly prohibited large social media platforms from censoring speech based on certain viewpoints.[139] The Fifth Circuit held that because the bill affected censorship instead of free speech, it was not facially unconstitutional.[140] Moreover, because § 230 did not treat platforms like traditional publishers, platform censorship was not considered an infringement to free speech under the First Amendment.[141] The Fifth Circuit also addressed the Eleventh Circuit's decision to the contrary in *Moody* four months earlier. While noting that Texas's and Florida's laws were dissimilar, the Fifth Circuit argued that "editorial discretion" was not

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

134 NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1206–07 (11th Cir. 2022), *cert. granted in part*, 144 S. Ct. 478 (2023), and *cert. denied*, 144 S. Ct. 69 (2023).

135 *Id.* at 1216 (quoting Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998))

136 *Id.* at 1216, 1231.

137 *Id.* at 1217 (alteration in original).

138 *Id.* at 1221.

139 NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022), *cert. granted in part*, 144 S. Ct. 477 (2023).

140 *Id.*

141 *Id.* at 465–66.

constitutionally protected speech, and that even if it were, platform censorship was not akin to the "editorial judgment" concept mentioned in Supreme Court cases.[142]

The Supreme Court issued its decision on these two consolidated cases on July 1, 2024.[143] It vacated and remanded both the Eleventh and Fifth Circuits' decisions because they analyzed NetChoice's facial claims as-applied rather than on a facial basis.[144] It was also harshly critical of the Fifth Circuit's holding that the content choices social media platforms made "[were] 'not speech' at all" and therefore could be regulated free from the First Amendment's restraints.[145] The Court went on to say:

> The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression. And the court was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds. Explaining why that is so will prevent the Fifth Circuit from repeating its errors as to Facebook's and YouTube's main feeds. (And our analysis of Texas's law may also aid the Eleventh Circuit, which saw the First Amendment issues much as we do, when next considering NetChoice's facial challenge.)[146]

After giving a thorough summary of First Amendment jurisprudence, the Supreme Court ruled that "[t]he government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey."[147] The majority concluded by stating that editorial judgments influencing feeds like Facebook's News Feed and YouTube's homepage were protected under the First Amendment and that the Eleventh and Fifth Circuits needed to figure out the scope of applicability of Florida's and Texas's law.[148] After that, they would then "decide which of the law's applications are constitutionally permissible and which are not, and finally weigh the one against the other."[149]

Justice Thomas, in a dissenting opinion from a denial of certiorari in the same year, highlighted the important relationship *NetChoice* has with § 230. He noted that, "[m]any platforms claim that users' content

142 *Id.* at 490.

143 Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2384 (2024).

144 *Id.* at 2394.

145 *Id.* at 2396, 2399 (quoting *Paxton*, 49 F.4th at 466, 494).

146 *Id.* at 2399.

147 *Id.* at 2403.

148 *Id.* at 2409.

149 *Id.*

is their own First Amendment speech. Because platforms organize users' content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech. When it comes time for platforms to be held accountable for their websites, however, they argue the opposite."[150] In other words, ICSs are doubly protected under both the First Amendment, against governmental intrusions on their editorial choices regarding what content appears on their platforms, and § 230, against civil liability for what appears on their platforms.

This "double protection" was picked up by the Third Circuit. In *Anderson v. TikTok*, Anderson sued TikTok after her daughter, Nylah, died from attempting the "blackout challenge" video recommended by TikTok's algorithm.[151] Anderson claimed TikTok was liable for promoting dangerous content to minors, resulting in her daughter's death.[152] The district court dismissed the case, ruling that TikTok was immune under § 230, which shields platforms from liability for content created by third-party users.[153]

Surprisingly, the Third Circuit reversed in a short five-page opinion. First, it outlined § 230 immunity, explaining that the statute immunizes ICSs only for "third-party speech" and not for "their own expressive activity or content (i.e., first-party speech)." [154] Second, because the Supreme Court held in *NetChoice* that platforms engage in first-party speech through their editorial decisions and by compilating other people's speech, TikTok was engaging in such "first-party speech" here.[155] In coming to this conclusion, the Third Circuit took into account the fact that TikTok had conceded that its algorithms were indistinguishable from those addressed in *NetChoice*.[156] These two premises led to the conclusion that § 230 did not provide immunity to TikTok for content posted on its platform.

It is important to take a step back and understand the claim brought by Nylah in the first place. Her estate framed it as a product liability claim, holding TikTok liable for the "sophisticated recommendations algorithms" that "target[] specific users."[157] It makes clear that

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150 Doe ex rel. Roe v. Snap, Inc., 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari) (citations omitted).

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

152 *Id.* at 182.

153 *Id.*

154 *Id.* at 183.

155 *Id.* at 183, 183–84.

156 *Id.* at 183 n.10.

157 Appellant's Reply Brief at 1, *Anderson*, 116 F.4th 180 (No. 22-3061).

the claims do not treat the defendant as a publisher or speaker,[158] but more as a "product designer and seller."[159] Despite the plaintiff's clear claims, the Third Circuit applied the "first-party speech" argument endorsed in *NetChoice* to circumvent § 230 immunity. It is obvious that the facts of this case are tragic. A ten-year-old child lost her life because of the content that TikTok promoted and targeted on its platform. The Third Circuit must have been looking for a way to create an exception to § 230 immunity so that the plaintiff was not left without redress. Having seen the *NetChoice* decision a month earlier, it must have jumped at the first opportunity to apply it. However, the main issue was whether a product liability claim based on algorithmic amplification could circumvent § 230 immunity.

Nevertheless, it is difficult to blame the Third Circuit for evading the product liability question. The overwhelming jurisprudence from other circuits shows that claims based on algorithms do not escape § 230 immunity—the Third Circuit even notes this in its decision.[160] However, the court dismissed all of those cases because they "pre-dated *NetChoice*."[161] By basing its decision on *NetChoice*, the court was able to able to evade persuasive precedent from other circuits and even its own.[162] Initially, *NetChoice* seems like a quick solution to the § 230 problem. After all, if the Supreme Court actually held that an ICS is liable for content it promotes on its algorithms, all the other cases holding otherwise are implicitly overruled. Upon closer inspection, however, the Third Circuit's reliance on *NetChoice* stands on quite dubious grounds and likely does more harm than good.

Most notably, the "first-party speech" argument will not withstand scrutiny by the Supreme Court. A clear counterargument to the Third Circuit's argument would be that the Supreme Court analogized the actions of social media companies to traditional publishers, who also have First Amendment protections, but do not necessarily engage in first-party speech.[163] The First Amendment and § 230 are not mutually exclusive protections given to ICSs. Websites that publish third-party content exercise both First Amendment-protected editorial discretion and benefit from § 230 immunity. The First Amendment prevents

158 *Id.* at 4–5.

159 *Id.* at 6.

160 *Anderson*, 116 F.4th at 184, 185 n.13 (listing cases from other circuits holding that claims based on algorithms do not escape § 230 immunity).

161 *Id.*

162 *Id.* (recognizing a conflict with its own Third Circuit precedent).

163 Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2393 (2024) ("Traditional publishers and editors also select and shape other parties' expression into their own curated speech products. And we have repeatedly held that laws curtailing their editorial choices must meet the First Amendment's requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world.").

government intervention regarding free speech. Section 230 prevents an ICS from being treated as a publisher. Therefore, whether § 230 immunity attaches to the conduct of an ICS has no bearing on whether that conduct enjoys First Amendment protection. In fact, a California district court recently made this very point.[164] This confusing and overlapping analysis between § 230 and the First Amendment by the Third Circuit has been the subject of much criticism.[165] This dubious legal reasoning gives false hope to plaintiffs, all while wasting their time and resources and delaying justice for plaintiffs who already find it hard to find ICSs accountable. Moreover, plaintiffs in similar situations throughout the United States may start to bring cases citing *Anderson*, creating legal uncertainty on the issue.[166]

These consequences are predicated on the assumption that the Supreme Court will not follow the Third Circuit in its reasoning. This Note argues that that will be the case because it is more likely than not that the current textualist, originalist Court will reject such a large carve-out to § 230 that is not based on the text of the statute itself. Furthermore, as mentioned above, the Third Circuit's reasoning is legally questionable and twists the Court's reasoning, making it even less likely that the Court will endorse such a view.

This point illustrates why the reasoning in Judge Matey's concurrence in *Anderson v. TikTok* is more appealing. As mentioned earlier, *Zeran* decided that § 230 bars both publisher and distributor liability for ICSs.[167] Judge Matey's concurrence harshly criticizes this decision and argues that social media platforms should be held liable under

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164 Doe (K.B.) v. Backpage.com, LLC, 768 F. Supp. 3d 1057, 1063–64 (N.D. Cal. 2025) ([T]he undisputed core of Section 230 immunity protects a website's moderation decisions, in its role as a "publisher," about which third-party content to remove and which to permit. That those moderation decisions are *also* protected by the First Amendment does not strip them of their Section 230 immunity. To hold otherwise would effectively render the core of Section 230 a nullity, contrary to Congress's intent and the plain language of the statute.).

165 *See, e.g.*, Eric Goldman, *Bonkers Opinion Repeals Section 230 in the Third Circuit*–Anderson v. TikTok, TECH. & MKTG. L. BLOG (Aug. 29, 2024), https://blog.ericgoldman.org/archives/2024/08/bonkers-opinion-repeals-section-230-in-the-third-circuit-anderson-v-tiktok.htm. [https://perma.cc/KFC4-R55T]; Ryan Calo, *Courts Should Hold Social Media Accountable — But Not By Ignoring Federal Law*, HARV. L. REV. BLOG (Sep. 10, 2024), https://harvardlawreview.org/blog/2024/09/courts-should-hold-social-media-accountable-but-not-by-ignoring-federal-law/ [https://perma.cc/8APR-36C5]; Tom McBrien, *In* Anderson v. TikTok*, the Third Circuit Applies Questionable First Amendment Reasoning to Arrive at the Correct Section 230 Outcome*, EPIC (Oct. 10, 2024), https://epic.org/in-anderson-v-tiktok-the-third-circuit-applies-questionable-first-amendment-reasoning-to-arrive-at-the-correct-section-230-outcome/[https://perma.cc/9DTV-GMPY] .

166 *See, e.g.*, *Backpage.com*, 768 F. Supp. at 1063.

167 Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

distributor liability.[168] This means that TikTok would be liable because it knew these "blackout challenge" videos were dangerous and still allowed them to circulate. Whether or not other circuit courts, and eventually the Supreme Court, will choose to overrule/distinguish *Zeran* is uncertain, as many appellate courts still follow *Zeran* and limit distributor liability for ICSs.[169] However, Judge Matey's opinion would not introduce a judicially created exception to a federal statute through misplaced contract or First Amendment principles, but retract a judicially-imposed expansion of § 230 not present in the text of the statute. Such textualist interpretations may be looked upon more favorably by the Supreme Court.

In another purported blow against § 230 immunity, the Third Circuit has done more harm than good. Although the Third Circuit had an opportunity to revisit its decision, TikTok's petition for rehearing en banc was denied.[170] Moreover, TikTok has decided not to pursue a petition for certiorari.[171] Nevertheless, in an interesting turn of events, the case has now been transferred to the Northern District of California to be consolidated into a multidistrict litigation suit,[172] which means the Ninth Circuit, and perhaps the Supreme Court, may now either follow the Third Circuit's line of reasoning or scale back the broad exception created by the Third Circuit.

## CONCLUSION

The § 230 debate continues to rage on. Some argue fervently for a path to provide redress to victims of social media abuse, while others claim: "If we lose Section 230, we stand to lose the internet as we know it."[173] Regardless of which side one stands on, it is difficult to argue for the status quo. Misinformation and hate speech are rampant on the internet while the companies that make it possible for such content to

168 Anderson v. TikTok, Inc., 116 F.4th 180, 191-93 (3d Cir. 2024) (Matey, J., concurring in judgment in part and dissenting in part). Distributor liability is where companies which distribute content are "liable only if the company knew or had reason to know the statement was defamatory." *Id.* at 189. Judge Matey cites Justice Thomas, who is also extremely critical of *Zeran*, multiple times in his opinion. *Id.* at 192.

169 *See, e.g.*, Dyroff v. Ultimate Software Grp., 934 F.3d 1093, 1098 (9th Cir. 2019); Force v. Facebook, Inc., 934 F.3d 53, 63, 65, 70 (2d Cir. 2019); Klayman v. Zuckerberg, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

170 Anderson v. TikTok, Inc., No. 22-3061 (3d Cir. Oct. 23, 2024) (denying reh'g and reh'g en banc).

171 Letter Dated 02/05/2025 to Judge Diamond by Joseph O'Neil, Anderson v. TikTok, Inc., 116 F.4th 180 (3d Cir. 2024) (No. 22-cv-01849).

172 Transfer Order, Anderson v. TikTok, Inc., No. 25-cv-04746 (N.D. Cal. June 2, 2025).

173 Jennifer Stisa Granick, *Is This the End of the Internet As We Know It?*, ACLU (Feb. 22, 2023), https://www.aclu.org/news/free-speech/section-230-is-this-the-end-of-the-internet-as-we-know-it [https://perma.cc/SX45-M2EA].

circulate are held immune. In an age where ICSs enjoy close to absolute immunity for content posted on their platforms, the Ninth and Third Circuits' willingness to take up the role of Congress and carve out legally questionable exceptions to § 230 may seem noble. However, the role of courts is not to make law, but to interpret it. Neither the Ninth nor the Third Circuit stay within this role. Judge Matey's concurrence came close, but with the denial of rehearing en banc, the Third Circuit's majority opinion remains clear. Given the level of judicial activism seen against § 230 at the appellate level, the Supreme Court may seek to intervene, either to affirm the broad immunities provided by the statutes and reject the judicially created exceptions, or to reject *Zeran* and subject ICSs to distributor liability. Either one of these decisions may be what finally pushes Congress to amend § 230. In such an event, Congress should consider implementing the limited notice-and-takedown provision proposed in this Note.

In this context, one question arises: will the President or Congress act before the Supreme Court does? The second Trump administration's stance on Big Tech is not entirely clear. On one hand, Trump called § 230 a "threat to our National Security & Election Integrity" in his first term.[174] On the other, there seems to be no consensus within this administration nor Congress on what to do with the problematic statute.[175] What is for certain, however, is that the Ninth and Third Circuit's decisions have unintended consequences. Whatever their rationales, by creating exceptions to a statute based on questionable interpretations of the law, these courts harm plaintiffs, undermine the stability of the law, and contravene Congress's intent. This form of good-intentioned yet harmful judicial activism cannot continue, and it is up to the nation's lawmakers and highest court to fulfill their duties in preventing it.

174 Lauren Goode, Paresh Dave & Will Knight, *What Donald Trump's Win Will Mean for Big Tech*, WIRED (Nov. 7, 2024, 15:00), https://www.wired.com/story/trump-tech-policy/ [https://perma.cc/83BN-QTMN].

175 *See* Sarah Grevy Gotfredsen, *Whither Section 230 Under Trump 2.0?*, COLUM. JOURNALISM REV. (Dec. 5, 2024), https://www.cjr.org/the_media_today/section_230_trump.php [https://perma.cc/PED6-NSN8]. This does not mean that there has been a lack of proposals, however. Anna Vinals Musquera & J. Scott Babwah Brennen, *What Has Congress Been Doing on Section 230?*, LAWFARE (May 27, 2025, 15:00), https://www.lawfaremedia.org/article/what-has-congress-been-doing-on-section-230 [https://perma.cc/2A98-C4KH].