



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2021

Abolishing the Communications Decency Act Might Sanitize "Political Biased," "Digitally Polluted," and "Dangerously Toxic" Social Media? - Judicial and Statistical Guidance from Federal-Preemption, Safe-Harbor and Rights-Preservation Decisions

Willy E. Rice

Saint Mary's University School of Law, wrice@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Courts Commons](#), [Judges Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Willy E. Rice, Abolishing the Communications Decency Act Might Sanitize "Political Biased," "Digitally Polluted," and "Dangerously Toxic" Social Media? - Judicial and Statistical Guidance from Federal-Preemption, Safe-Harbor and Rights-Preservation Decisions, 24 SMU Sci. & Tech. L. Rev. 257 (2021).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

Abolishing the Communications Decency Act Might Sanitize “Politically Biased,” “Digitally Polluted,” and “Dangerously Toxic” Social Media?—Judicial and Statistical Guidance From Federal-Preemption, Safe-Harbor and Rights-Preservation Decisions

Willy E. Rice*

ABSTRACT

Sitting and former U.S. Presidents as well as members of the general public, financial, political and educational institutions use social media. Yet, an overwhelming majority of users, content creators, parents, “conservatives,” “progressives,” Democrats and Republicans distrust social media owners. Some critics allege that owners “digitally pollute” platforms by encouraging users to post “corrosive, dangerous, toxic and illegal content.”¹ Other critics assert that service providers’ purportedly objective content-moderation algorithms are biased—discriminating irrationally on the basis of users’ political association, ideology, socioeconomic status, gender and ethnicity.² Republicans and Democrats have crafted roughly twenty bills on this matter.³ In theory, the enacted proposals would “sanitize” social media and end owners’ allegedly irrational practices—by abolishing, reforming or “limiting the scope” of the safe-harbor-preemption defense under the Communications Decency Act § 230.⁴ But, would the proposals actually increase users’ ability to survive a preemption defense and sue providers on the merits? The bills’ sponsors have not carefully weighed this question. To fill the

* Professor of Law & Englehardt Research Fellow, St. Mary’s University School of Law—San Antonio. M.A., Ph.D.—University of North Carolina at Chapel Hill; Postdoctoral Fellow—The Johns Hopkins University; J.D.—The University of Texas at Austin; and an American Bar Foundation Scholar. The author thanks Thomas Wilson Williams, Frank A. Bottini, Jr., Eugene R. Anderson, and Hubert M. Blalock, Jr. for sharing their expertise. In addition, the author thanks several engineers who generously shared their expertise and presentations about “algorithmic content moderation” systems. Unquestionably, each person’s input helped the author to narrow the legal questions, refine the research methodology and perform the analyses in this Article. All omissions or errors are the author’s alone.

1. See *infra* note 23 and accompanying text.
2. See *infra* notes 29–36 and accompanying text.
3. Katherine Klosek, *Section 230 of the Communications Decency Act: Research Library Perspectives*, ASS’N OF RSCH. LIBRS. 3 (June 2021), <https://www.arl.org/wp-content/uploads/2021/07/2021.07.06-Issue-Brief-Section-230-of-Communications-Decency-Act.pdf> [<https://perma.cc/9G5P-VT98>].
4. See *infra* notes 23, 57, 246 and accompanying text.

void, the author conducted a legal and empirical study to glean probative evidence from state and federal courts' section 230 preemption decisions. Among other findings, the analyses reveal: (1) courts are more likely to block only certain users' or content creators' lawsuits when tech companies raise a section 230 preemption defense; (2) judges are more likely to allow a section 230 defense to thwart content creators' tort-based rather than contract-based lawsuits; and (3) content creators are more likely to evade a preemption defense and litigate claims on the merits, if a federal statute contains a safe harbor clause as well as an unequivocal rights-preservation exemption. Hopefully, the findings will provide some "judicial guidance"—when Congress considers whether to abolish, reform or restrict the scope of the CDA's section 230 immunity defense.

I. INTRODUCTION

Debatably, mainstream media comprises the major television networks and newspapers.⁵ From the mid-1950s to the late-1960s, these were "trusted American institutions."⁶ Both news networks and newspapers earned a sixty-six percent credibility rating.⁷ Then, in the early-1970s, mass media's favorability ratings dropped dramatically.⁸ Even more impressive, between 1998 and 2020, polling data revealed that the overwhelming majority of Americans seriously disliked and distrusted the mainstream media.⁹

On the other hand, as mainstream media's credibility and relevance continued to decline, large social media platforms¹⁰ began to appear on the In-

-
5. See Erik Wemple, *Is Fox News Part of the Mainstream Media? It Depends*, WASH. POST, (Mar. 14, 2017), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/03/14/is-fox-news-part-of-the-mainstream-media-it-depends/> [<https://perma.cc/J7DL-J9XC>] ("A Nexis search for 'mainstream news media' or 'mainstream media' . . . yields no results in the 1970s, more than 200 in the 1980s, and then an unfetchable number of hits for [later] decades. . . . [T]he mainstream media [is] . . . simply 'major television networks and newspapers [that] are biased right or left but pretend to be neutral.'").
 6. See JONATHAN M. LADD, *WHY AMERICANS HATE THE MEDIA AND HOW IT MATTERS* 1–2 (2012).
 7. *Id.*
 8. *Id.*
 9. See Megan Brenan, *Americans Remain Distrustful of Mass Media*, GALLUP NEWS (Sept. 30, 2020), <https://news.gallup.com/poll/321116/americans-remain-distrustful-mass-media.aspx> [<https://perma.cc/R6EH-EPK9>] ("[T]he public remains largely distrustful of the mass media. [Forty percent] . . . have 'a great deal' or 'a fair amount' of trust and confidence in the media to report the news 'fully, accurately, and fairly,' while [sixty percent do] 'not very much' trust or '[any] at all.'").
 10. See LADD, *supra* note 6 and accompanying text.

ternet.¹¹ Arguably, MySpace.com was the first and largest platform to emerge at the dawn of the twenty-first century. In 2004, an estimated one million monthly and active users visited the MySpace site.¹² Twenty years later, nearly four billion people regularly access and use one or more social media platforms.¹³ Presently, seventy percent of Americans, or 231.47 million people, have a social media account.¹⁴

Unquestionably, “social media has changed the world”¹⁵—altering how users exchange information, access news, organize political and economic ventures, establish interpersonal relationships, advertise services, and sell products.¹⁶ Yet, the largest owners of social media platforms¹⁷— Facebook, YouTube, WeChat, WhatsApp, Instagram and Twitter— achieved in twenty-five years what mainstream-media owners achieved only after a half century.¹⁸ As of this writing, an overwhelming majority of users—spanning all economic, political, social, educational and religious groups—strongly distrust the owners of the largest social media platforms.¹⁹ Why?

11. See Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media> [<https://perma.cc/DR2H-N58F>].
12. *Id.*
13. See Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2021?*, BACKLINKO (Apr. 26, 2021), <https://backlinko.com/social-media-users#social-media-growth-in-the-us> [<https://perma.cc/9U UW-CM7A>] (“Since its inception in 1996, social media has . . . infiltrate[d] half of the 7.7 billion people in the world. Social network platforms almost tripled their total user base—from 970 million in 2010 to . . . 4.48 billion users in 2021.”).
14. *Id.*
15. See Ortiz-Ospina, *supra* note 11.
16. See *The 7 different types of social media*, BITEABLE, <https://biteable.com/blog/the-7-different-types-of-social-media/> [<https://perma.cc/AR68-G7K2>] (last visited Jan. 14, 2021) (outlining the utilities of various social media platforms).
17. See H. Tankovska, *Global Social Networks Ranked by Number of Users 2021*, STATISTA (Feb. 9, 2021), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [<https://perma.cc/XM5B-VN2E>].
18. See LADD, *supra* note 6 and accompanying text; see also Thomas Aichner, Matthias Grünfelder, Oswin Maurer & Deni Jegeni, *Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019*, 24 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 215, 215 (2021), <https://doi.org/10.1089/cyber.2020.0134> [<https://perma.cc/32ZZ-SFQY>].
19. See Brooke Auxier, *64% of Americans Say Social Media Have A Mostly Negative Effect on the Way Things Are Going in the U.S. Today*, PEW RSCH. CTR. (Oct. 15, 2020), www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/ [<https://perma.cc/VXH5-BJ7A>].

Users, consumers, as well as the owners of mainstream-media, employ various metaphors to explain their strong dissatisfaction.²⁰ First, numerous critics assert seriously and passionately that the largest social media companies are “environmental polluters”—just like many large chemical and energy companies.²¹ Briefly put, the twentieth-century polluters “dumped toxic waste in lakes, streams, rivers and the air.”²² And, critics assert: YouTube, Facebook, Instagram and other big tech companies “digitally pollute the internet ecosystem” by allowing users to post and share highly “corrosive, toxic and illegal content.”²³

20. See Billy Perrigo, *Big Tech’s Business Model Is a Threat to Democracy. Here’s How to Build a Fairer Digital Future*, TIME (Jan. 22, 2021), <https://time.com/5931597/internet-reform-democracy/> [<https://perma.cc/AVW9-WB6G>] (arguing that “[t]he global tide of public opinion is turning against the tech companies,” and offering a metaphor—depicting social media platforms as factories leaking toxic waste and needing plugs and regulations to detoxify more than a decade’s worth of pollution); Bruce Reed & James P. Steyer, *Why Section 230 Hurts Kids, and What To Do About It*, PROTOCOL (Dec. 8, 2020), <https://www.protocol.com/why-section-230-hurts-kids> [<https://perma.cc/EK2C-CAZP>] (observing that a polluter pays compensation to mitigate environmental damage, stressing that the same remedy can help detoxify the online environment, and arguing that social media platforms should be liable for “any content that generates revenue [from] ads that appear alongside harmful content.”); but see Mike Masnick, *Biden’s Top Tech Advisor Trots Out Dangerous Ideas For “Reforming” Section 230*, TECHDIRT (Dec. 9, 2020), <https://www.techdirt.com/articles/20201208/17023245848/bidens-top-tech-advisor-trots-out-dangerous-ideas-reforming-section-230.shtml> [<https://perma.cc/JDT3-PRBA>] (rejecting the “dangerous” environmental-pollution metaphor and stressing that so-called social media “pollution . . . is 1st Amendment protected speech.”).
21. See Roger McNamee, *Opinion: America has Experience Curbing Dangerous Industries. We can do the Same with Tech.*, WASH. POST (Feb. 18, 2021), <https://www.washingtonpost.com/opinions/2021/02/18/regulating-tech-industry-history-roger-mcnamee/> [<https://perma.cc/EV4A-TB9B>].
22. *Id.*
23. See Ryan Tracy & John D. McKinnon, *Congress Gets Fuel to Rein in Big Tech Firms—After Social Media Sparked Capitol Attack, Stripping Back Liability Shield Is on the Table*, WALL ST. J., Jan. 12, 2021, at A6 (arguing that big tech firms must moderate users’ posts or content which can “incite violence,” “riots,” and endanger “the internet ecosystem.”); Ian Weiner, *Civil Rights Laws Will Significantly Benefit From Hirono, Warner, Klobuchar Section 230 Communications Decency Act Reform Proposals*, LAWS, COMM. FOR CIV. RTS. UNDER L. (Feb. 5, 2021), <https://www.lawyerscommittee.org/civil-rights-laws-will-significantly-benefit-from-hirono-warner-section-230-communications-decency-act-reform-proposals/> [<https://perma.cc/ZA8J-TRA7>] (“[The Lawyers’ Committee endorses] the ‘Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms Act.’ . . . This bill would make irresponsible big tech companies accountable for the *digital pollution* they knowingly and

Countless other critics as well as the competitive owners of mainstream media argue that tech companies' purportedly objective and predictively sound "algorithmic content moderation" tools are discriminatory and/or illusive.²⁴ Stated another way, dissatisfied social media users and others assert that tech companies' content-moderation algorithms are inherently biased against certain classes of users.²⁵ For example, in recent years, YouTube removed 500 million comments, deleted 100,000 videos, and terminated 17,000 channels.²⁶ According to YouTube, the offending content providers were spreading "hate speech" against certain classes of people on the basis of

willfully produce."); Steven Hill, *How to Deal with US Social Media: Mr. Biden, Revoke Section 230*, GLOBALIST (Jan. 14, 2021) (emphasis added), <https://www.theglobalist.com/united-states-democracy-social-media-facebook-twitter-youtube-big-tech-misinformation/> [<https://perma.cc/XKJ7-G2M7>] (arguing that "Big Tech Media [should be] responsible and . . . liable for . . . *toxic and illegal content* . . . that is published and promoted [on] their media platforms.").

24. See Céline Castets-Renard, *Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement*, 2020 U. ILL. J.L. TECH. & POL'Y 283, 309–13 (2020) (emphasis added) ("[Social media providers] do more than passively distribute users' content and facilitate users' interactions. . . . [Arguably, their] algorithmic decision-making would be the most effective way to provide perfect enforcement. However, *this is an illusion* . . . [A]utomated decision-making systems are opaque, . . . [producing an] over-removal chilling effect."); see also Jonathan Taplin, *How to Force 8Chan, Reddit and Others to Clean Up*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/opinion/8chan-reddit-youtube-el-paso.html> [<https://perma.cc/E566-H9V7>] (criticizing network providers— Cloudflare, YouTube and Facebook—for allowing certain users to post an allegedly "toxic mix of hatred, violence and . . . conspiracies."); Tom Rogers, *How to Regulate Social Media When There Is No Good Answer*, CNBC (June 8, 2020), <https://www.cnbc.com/2020/06/08/op-ed-how-to-regulate-social-media-when-there-is-no-good-answer.html> [<https://perma.cc/BKL2-UM3U>] (criticizing the president of Facebook for allowing President Donald Trump's allegedly toxic post to remain on the platform while removing others).
25. See Merlyna Lim, *How Biased Algorithms and Moderation Are Censoring Activists on Social Media*, THE NEXT WEB (May 18, 2021, 6:10 AM), <https://thenextweb.com/news/how-biased-algorithms-and-moderation-are-censoring-activists-on-social-media-syndication> [<https://perma.cc/YF42-PD6F>] ("Algorithmic bias may jeopardize some people who are already at risk by wrongly categorizing them as offensive, criminals or even terrorists. . . . While AI is celebrated as autonomous technology, . . . it is inherently biased. The inequalities that underpin bias already exist in society and influence who gets the opportunity to build algorithms and their databases, and for what purpose.").
26. See Sean Burch, *YouTube Deletes 500 Million Comments in Fight Against "Hate Speech"*, THE WRAP (Sept. 3, 2019), <https://www.thewrap.com/youtube-deletes-500-million-comments-in-fight-against-hate-speech/> [<https://perma.cc/8JWG-FEX>].

“age, gender, race, caste, religion, sexual orientation or veteran status.”²⁷ But, critics insist such universal, persistent and questionable moderation practices actually censor adults’ innocent and conversational speech, which is protected under the First Amendment.²⁸

Even more damaging, some users as well as tech companies’ mainstream-media competitors assert platform providers’ content-moderation algorithms *discriminate irrationally* based on users’ political affiliations,²⁹ professional status,³⁰ ideology,³¹ religion,³² ethnicity,³³ activism,³⁴ socioeco-

27. *Id.*

28. *See, e.g.*, Fed. Agency of News LLC, v. Facebook, Inc., 395 F. Supp. 3d 1295, 1303 (N.D. Cal. 2019) (embracing Facebook’s immunity-preemption defense and declaring that plaintiffs’ First-Amendment claim failed because “Facebook is not a state actor, and the First Amendment only applies to state actors or private entities whose actions amount to state action.”).

29. *See* Evelyn Douek, *More Content Moderation Is Not Always Better*, WIRED (June 2, 2021), <https://www.wired.com/story/more-content-moderation-not-always-better/> [<https://perma.cc/DN48-PB2S>] (“Content moderation is eating the world. . . . [T]ens of thousands of users are given the boot in regular fell swoops. . . . They [even] deplatformed . . . the sitting President of the United States.”).

30. *Id.* (“[Social media providers continue] . . . to impose more and more guardrails on what people can say. . . . [Providers] stepped in with unusual swiftness to downrank or *block a story from a major media outlet.*” (emphasis added)).

31. *Id.*

32. *See* Ryan Mac, *Instagram Censored Posts About One of Islam’s Holiest Mosques, Drawing Employee Ire*, BUZZFEED NEWS (May 12, 2021), <https://www.buzzfeednews.com/article/ryanmac/instagram-facebook-censored-al-aqsa-mosque> [<https://perma.cc/ZG34-J44C>] (“Instagram removed posts and blocked hashtags about one of Islam’s holiest mosques. . . . [The] content moderation system mistakenly associated the site with . . . terrorist organizations. . . . The mistake is . . . Instagram and its parent-company Facebook’s latest content moderation failure. . . .”).

33. *Cf.* Aylin Caliskan, *Detecting and Mitigating Bias in Natural Language Processing*, BROOKINGS (May 10, 2021), <https://www.brookings.edu/research/detecting-and-mitigating-bias-in-natural-language-processing/> [<https://perma.cc/4J4E-SAYS>] (“Like other AI algorithms that reflect the status quo, all social groups that [do not comprise] white men are represented as minority groups due to a lack of accurate and unbiased data to train word embeddings. . . . [M]embers of multiple minority groups . . . are strongly associated with various disadvantaging biases”).

34. *See generally* Merlyna Lim & Ghadah Alrasheed, *Beyond a Technical Bug: Biased Algorithms and Moderation Are Censoring Activists on Social Media*, THE CONVERSATION (May 16, 2021), <https://theconversation.com/beyond-a-technical-bug-biased-algorithms-and-moderation-are-censoring-activists-on-social-media-160669> [<https://perma.cc/7MTZ-GJD6>].

conomic status³⁵ and/or facial features.³⁶ To illustrate, a group of interested persons established Red Dress Day to raise awareness about Missing and Murdered Indigenous Women and Girls (MMIWG).³⁷ Some supporters posted pro-MMIWG comments on Instagram.³⁸ In the course of events, the comments mysteriously disappeared from the platform.³⁹ Instagram issued an apology— simply stating that “a technical bug” deleted the posts.⁴⁰ On a different occasion, Facebook— the owner of Instagram—removed women’s posts that mentioned “anything even remotely negative about men.”⁴¹ However, posts that “disparaged or threatened women” remained on Facebook.⁴²

Responding to disgruntled users’, politicians’, and mainstream-media owners’ criticisms, social media companies strongly assert: (1) the Communications Decency Act of 1996 (CDA)⁴³ allows and even encourages companies to moderate social media content;⁴⁴ (2) sophisticated content-moderation tools efficiently, speedily and effectively prevent toxic, dangerous and hateful content from polluting social media platforms;⁴⁵ (3) discrimination is the

35. See Scott Rosenberg & Sara Fischer, *TikTok’s Content-Moderation Time Bomb*, AXIOS (Sept. 23, 2020), <https://www.axios.com/tiktoks-content-moderation-time-bomb-56ed658b-eb4d-4366-a1b6-d4622d1959c3.html> [https://perma.cc/3CKF-9QSN] (“TikTok . . . asked moderators to suppress content from ‘ugly’ or ‘poor’ people to keep undesirable users away from the service.”).
36. *Id.*
37. See Lim & Alrasheed, *supra* note 34 and accompanying text.
38. *Id.*
39. *Id.*
40. *Id.*
41. See Snigdha Bansal, *Facebook Groups Say They Were Censored Just for Using the Word ‘Men’*, VICE (Jan. 14, 2021), <https://www.vice.com/en/article/bvx5p5/facebook-tag-groups-men-misogyny-women-hate-speech> [https://perma.cc/HVC3-VP9W].
42. *Id.*
43. See *generally infra* Part II and accompanying text.
44. See Lauren Feiner, *Big Tech’s Favorite Law Is Under Fire*, CNBC (Feb. 19, 2020), <https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html> [https://perma.cc/BBV7-W744] (“Tech companies have vigorously defended Section 230 [before Congress, stressing that the Act] allows them to remove the most objectionable content from their platforms.”).
45. Cf. Taplin, *supra* note 24 (“[T]wo mass shootings at mosques . . . were live-streamed on Facebook and . . . viewed millions of times on YouTube. . . . [Although Facebook used] A.I. to block 90 percent of the Christchurch streams, . . . Mark Zuckerberg [told] Congress that it might take five to 10 years to perfect these tools. But . . . banning toxic content must become the highest priority at 8chan, Reddit, Facebook and YouTube.”).

very essence of any algorithmic-content-moderation tool;⁴⁶ and (4) the algorithms, however, do not discriminate irrationally against any class of users.⁴⁷

Unsurprisingly, embittered “progressive” and “conservative” users, as well as congressional Republicans and Democrats, summarily dismissed these defenses.⁴⁸ But even more thought-provoking, some mainstream-media owners and analysts—who professedly support First-Amendment protections—have encouraged Congress to enact a mixture of novel and controversial reforms that would arguably interfere with social media owners’ constitutional rights.⁴⁹ Among others, there are several controversial and strongly recommended reforms: (1) Congress should add a broad *private rights of action* exemption to the CDA⁵⁰—like the rights-preservation clauses in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA);⁵¹ (2) the CDA should contain both a broader *rights-preservation* exemption⁵² and a *safe-harbor* defense—like those in the Fed-

46. Cf. Weiner, *supra* note 23 (“For far too long online platforms have . . . allowed misinformation, *algorithmic discrimination*, and online hate to be weaponized. . . . [Our] bill would make irresponsible big tech companies accountable for the *digital pollution* [which] they knowingly and willfully produce, while continuing to protect free speech online.” (emphasis added)).

47. *Id.*

48. Cf. Mark MacCarthy, *Back to the Future for Section 230 Reform*, LAWFARE (Mar. 2, 2021), <https://www.lawfareblog.com/back-future-section-230-reform> [<https://perma.cc/G6NQ-23A6>] (“Reform of Section 230 of the Communications Decency Act is on the agenda for both . . . Congress and the Biden administration. . . . Some conservative[s] . . . want to exempt sex trafficking and child sexual abuse material [from Section 230 immunity]. . . . Progressives . . . want platforms to be less hostile toward speech from marginalized groups . . . [and] make Section 230 immunity contingent on a *court’s determination of reasonable content moderation practices*.” (emphasis added)).

49. Cf. Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html> [<https://perma.cc/PU2Y-RPBH>] (“It’s an article of faith . . . that more speech is better. . . . But increasingly, scholars of constitutional law as well as [mainstream media] . . . are beginning to question the way we . . . think about the First Amendment’s guarantee of free speech. . . . [I]n the United States and other democracies, there is a different kind of threat. . . . It encompasses the mass distortion of truth and overwhelming waves of speech from extremists that smear and distract. . . . [S]ocial media sites . . . function as the public square. . . . [But social media sites also] leaned on First Amendment principles to keep secret the identities of people who appear to abuse their services.”).

50. See generally *infra* Part V and accompanying text.

51. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2018).

52. See generally *infra* Part V and accompanying text.

eral Arbitration Act (FAA);⁵³ and (3) the CDA’s current *safe-harbor defense* should be severely weakened.⁵⁴

Presently, state and federal courts interpret the CDA’s section 230 immunity provision broadly.⁵⁵ Understandably, tech companies celebrate the pro-immunity rulings for rational reasons: (1) a successful section 230 defense efficiently, quickly and effectively preempts users’ and other plaintiffs’ direct- or vicarious-liability lawsuits—before any theory of recovery can be litigated on the merits; and (2) a successful defense reduces significantly tech companies’ legal expenses.⁵⁶ Therefore, in light of social media owners’ asymmetrical advantages, Senate and House members have introduced at least twenty bills that would “abolish, reform or limit the scope” of the CDA’s immunity defense.⁵⁷ Even more interesting, mainstream-media owners have also suggested some possibly “self-serving” reforms.⁵⁸

53. 9 U.S.C. §§ 1–16; *see also infra* Part V and accompanying text.

54. *See* Taplin, *supra* note 24 (asserting that politicians can stop the spread of on-line hatred by revising the safe harbor provisions of the Communications Decency Act).

55. *See* Shiamili v. Real Est. Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011); *see also* Feiner, *supra* note 44 (“Attorney General William Barr . . . [told] a gathering of the National Association of Attorneys General . . . [that section 230 of the Communications Decency Act] has been interpreted quite broadly by the courts.”).

56. *See e.g.*, MacCarthy, *supra* note 48 (observing that social media providers may secure immunity without extended court proceedings by invoking Section 230(c)(1), which immunizes any action if a provider simply removes or filters content).

57. *See generally* Kiran Jeevanjee et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/3MFQ-GPTF>] (reporting that “[a] flurry of bills were introduced in Congress between 2020 and 2021” and disclosing that the Tech, Law, & Security Program at the American University-Washington College of Law and at Duke University’s Center on Science & Technology Policy are partnering to track all proposed section-230 legislation).

58. *Compare* Taplin, *supra* note 24 (“[T]he largest corporations in the world—Google, Apple, Facebook and Amazon—[behave like] CBS, Fox, NBC or ABC. . . . Changing the safe harbor laws . . . would incentivize Facebook and YouTube to take things like the *deep-fake* . . . [and] church shooting videos more seriously. Congress must revisit the safe harbor statutes [to ensure] that active intermediaries are held legally responsible for the content on their sites.”), *with* Jonathan Cook, *We Can Defeat the Corporate Media’s War to Snuff Out Independent Journalism*, COMMON DREAMS (May 18, 2021), <https://www.commondreams.org/views/2021/05/18/we-can-defeat-corporate-medias-war-snuff-out-independent-journalism> [<https://perma.cc/VGJ6-33R4>] (“More and more journalists are [leaving] . . . as corporate media becomes increasingly unprofitable. . . . [Corporate media works extremely hard to characterize] new

In theory, the reforms would increase content creators' and other complainants' ability to circumvent a section 230 federal preemption defense and sue platform providers on the merits in state and federal courts.⁵⁹ Still, important questions have emerged: Should Congress amend the CDA by seriously considering and adopting a "mirror-image" of the CERCLA's rights-preservation and safe harbor provisions? Would adding an FAA-like and unambiguous *private-right-of-actions* exemption actually enhance dissatisfied users' or content providers' capacity to evade Google's, Facebook's or Amazon's preemption defense and litigate *all types* of common-law and statutory claims in state or federal courts?

Briefly put, as of this writing, CDA reformers have not carefully weighed these and related questions. Therefore, this Article's purpose is narrow: to help Congress fashion more balanced CDA section 230 reforms—by adding a user-friendly, *private-rights-of-actions* exemption and by weakening social media companies' current *safe-harbor-immunity defense*. And, to help reach either goal, this Article presents judicial guidance and statistically significant findings which were gleaned from an extensive analysis of all reported CDA cases as well as from random samples of FAA and CERCLA federal preemption decisions.

Part I begins the discussion by briefly outlining the various types of social media providers and platforms. This part also outlines the types of first- and third-party claims that plaintiffs have filed against social media owners and content creators. Part II presents a brief history of the Communications Decency Act and its stated purpose. More narrowly, Part II reviews the CDA's safe harbor or immunity-protection clause and discusses the intended scope of platform providers' direct and vicarious liabilities under section 230. Necessarily and respectively, Parts III and IV present examples of judicial splits surrounding a hybrid question: whether section 230 absolutely immunizes social media service providers from *direct* as well as *secondary liability* under *all types of common-law and statutory theories of recovery*. Unexpectedly, several claim-specific rifts appear among and between state and federal courts—even though social media users and third parties are generally less likely to prevail against tech companies in federal-preemption trials. Part V presents a short review of the proposed section 230 reforms—

technology as a threat to media's freedoms. This [is a] self-serving argument. . . . Facebook and Twitter [rival] corporate media . . . for news dissemination. . . . [In response, corporate media assassinates the character of] dissident journalists and browbeat the social media platforms that host them. . . . Too often it is the *critical thinking* of dissident journalists that is maligning as 'fake news.'" (emphasis added)).

59. *Cf. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“[I]mmunity is an immunity from [a lawsuit] rather than a mere defense to liability and. . . is effectively lost if a case is erroneously permitted to go to trial.”).

focusing carefully on the proposed private rights of action exemption and a modified safe harbor provision.

There is one additional preliminary remark. As reported earlier, state, and federal courts declare broadly that section 230(c)(1) protects social media companies from secondary liability when users' tortious content harms third parties.⁶⁰ Still, some courts are likely to shelter tech companies from secondary-liability lawsuits—based on whether the providers hosted, curated, displayed, edited, or created the allegedly tortious content.⁶¹

Even more importantly, as of this writing, several procedural and substantive questions beg for answers: (1) whether state or federal courts are more likely to protect service providers from users' "direct liability" lawsuits, (2) whether social media providers are significantly more likely to secure immunity in trial or appellate courts, (3) whether social media companies or content providers are significantly more likely to be liable for causing tortious injuries, and (4) whether third-party complainants' common-law or statutory claims increase social media companies' likelihood of becoming secondarily liable for content creators' intentional torts.

Part VI, therefore, presents the statistically significant findings of an empirical study. The study measures the independent, combined, and concurrent influences of various factors—theories of recovery, types of third-party claims, types of safe-harbor defenses and rights-preservation exemptions, types of social media users, and types of third-party victims—on the dispositions of CDA section 230 preemption decisions in state and federal courts.

The Article concludes by encouraging members of Congress to weigh carefully the "judicial guidance"—which was gleaned from the decisions—as well as the statistically significant findings before abolishing, reforming or limiting the scope of section 230. The reported findings are clear: Congress's simply adding CERCLA- and FAA-like provisions to the CDA will not substantially increase content providers' likelihood of evading tech companies' preemption challenges. On the other hand, Congress's adding a broader private-rights-of-actions exemption to the CDA would probably increase users' likelihood of gaining access to and receiving various remedies in state and federal courts.

60. *See Barrett v. Rosenthal*, 146 P.3d 510, 518 (Cal. 2006) (observing that a broad reading of section 230(c)(1) immunity has been accepted in federal and state courts); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (stressing that a majority of federal circuits protect service providers from vicarious liability under any theory of liability for third-party users' harmful or injurious content); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (noting that courts have construed section 230 immunity provisions broadly in legal disputes arising from the publication of a user-generated content).

61. *See Pace, v. Baker-White*, 432 F. Supp. 3d 495, 503–06 (E.D. Pa. 2020) (suggesting that CDA section 230 cases appear along a continuum where internet service providers' and users' "editorial control" determines the viability of an immunity defense).

II. AN OVERVIEW OF SOCIAL MEDIA PLATFORMS AND TYPES OF PROVIDERS' INTERFERENCES, EDITORIAL PRACTICES AND CONTROLS

A cursory search of the Internet would retrieve numerous websites—categorizing and explaining various types of social media platforms.⁶² Generally, “social media” comprises advertising, blogging, book-marketing, content-curation, consumer-shopping, consumer-review, image-sharing, media-sharing, publishing, social-networking, sharing-interests and video-hosting platforms.⁶³ YouTube and Vimeo are video-hosting sites.⁶⁴ Facebook, Twitter and LinkedIn are social-networking platforms.⁶⁵ Yelp! and TripAdvisor are social-review sites.⁶⁶ Rover and AirBnB are shared-economy platforms, which help consumers to locate goods and rentals.⁶⁷ And, Instagram and Snapchat are popular image-sharing platforms.⁶⁸

Perhaps, social media companies only *provide* platforms rather than *use* them. But, indisputably, only social media owners can *decide* what appears on their platforms.⁶⁹ Consequently, state and federal courts weigh a continuum of practices to determine whether or not owners simply *control* just the location, display or prominence of users' content.⁷⁰ Or, stated another way, courts evaluate an array of activities to assess whether “internet service providers” create and publish “new” content—before deciding whether to immunize companies from users' and third parties' lawsuits.⁷¹

Ranging from very minimum to substantial interferences, the following continuum comprises the universe of tech companies' allegedly unfair and

62. See, e.g., Laura Wong, *Nine Types of Social Media and How Each Can Benefit Your Business*, HOOTSUITE (Sept. 2, 2021), <https://blog.hootsuite.com/types-of-social-media/> [<https://perma.cc/6A2N-8T9U>]; Garima Kakkar, *What Are the Different Types of Social Media?*, DIGITAL VIDYA, <https://www.digitalvidya.com/blog/types-of-social-media/> [<https://perma.cc/N8L3-EUB3>] (last visited Jan. 17, 2022).

63. Wong, *supra* note 62; Kakkar, *supra* note 62.

64. *The 7 Different Types of Social Media*, *supra* note 16.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *Pace v. Baker-White*, 432 F. Supp. 3d 495, 503–04 (E.D. Pa. 2020) (reaffirming that CDA section 230 immunizes “internet service providers” rather than “content providers” from liability and reporting that platform providers' levels of editorial controls appear along a continuum, “ranging from merely hosting, curating, or positioning content [to] editing, . . . framing, and creating content.”).

70. *Id.*

71. *Id.*

controversial practices: (1) hosting or republishing users' content;⁷² (2) curating, selecting and excluding users' content;⁷³ (3) positioning, increasing or decreasing the prominence of content providers' information;⁷⁴ (4) judging, editing or modifying users' content;⁷⁵ (5) soliciting and retaining editorial control over content creators' information;⁷⁶ (6) adding commentary or deleting users' comments or posts;⁷⁷ and (7) intentionally and materially creating, providing and/or assembling content to generate sales and profit.⁷⁸

Generally, under the CDA, tech companies are not publishers or content creators, if they merely host or republish users' content.⁷⁹ Contrarily, courts are more likely to declare that tech companies are content providers, if those entities create, assemble, and/or display content to generate profits.⁸⁰ However, whether tech companies are platform providers—when they engage in

72. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137–40 (S.D.N.Y. 1991) (concluding that the defendant was immune from liability).

73. See *Reit v. Yelp! Inc.*, 907 N.Y.S.2d 411, 412–13 (N.Y. Sup. Ct. 2010) (immunizing Yelp! against a dentist's defamation claims, where the site had selectively removed positive reviews, but inserted negative reviews of the dentist's practice).

74. See *Small Just. LLC v. Xcentric Ventures LLC*, 2014 WL 1214828, at *7–8 (D. Mass. 2014) (concluding that Xcentric's attempt to increase the prominence of its site among retrieved listings on Google's search did not make Xcentric a content provider), *aff'd*, 873 F.3d 313 (1st Cir. 2017).

75. See *Dimeo v. Max*, 433 F. Supp. 2d 523, 527 (E.D. Pa. 2006) (declaring that defendant was immune even though he selected, removed, and altered third-party posts or content on his message boards), *aff'd*, 248 F. App'x 280 (3d Cir. 2007).

76. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 49–53 (D.D.C. 1998) (concluding that defendants were immune even though they selected, edited, and published the users' content); See also *Obado v. Magedson*, 612 F. App'x 90, 93 (3d Cir. 2015); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120–24 (9th Cir. 2003).

77. See *Shiamili v. Real Est. Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1019 (N.Y. 2011) (granting immunity where defendants added a non-defamatory headline to objectionable third-party posts).

78. See *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016) (declaring that Gawker—an online tabloid—was a “content provider” and not immune under CDA section 230 after Gawker encouraged its employees to post comments on the site about a sexual-assault acquittee, just to drive online traffic); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1166–67 (9th Cir. 2008) (finding that the website created allegedly defamatory content by soliciting and assembling users' preferences, applying a “material contribution or collaborative” test, and declaring that the website's owner was not immune from liability).

79. See *Pace, v. Baker-White*, 432 F. Supp. 3d 495, 503–06 (E.D. Pa. 2020).

80. *Id.*

other practices—has generated severe judicial splits.⁸¹ Below, the discussion addresses the more narrow question of whether social media companies are content creators when they *intentionally* and *actively* solicit, select, evaluate, edit or add commentary to users' content.⁸²

III. THE COMMUNICATIONS DECENCY ACT AND THE PURPORTED SCOPE OF SOCIAL MEDIA OWNERS' IMMUNITY FROM LAWSUITS

A. Brief Overview: The Communications Decency Act's Purpose and Standards

In 1996, Congress revised the Telecommunication Act.⁸³ The revisions included the CDA, excerpted in 47 U.S.C. § 230, and was fashioned to prevent minors from accessing or reviewing indecent material on the Internet.⁸⁴ Although the Supreme Court declared that certain sections of the CDA violated the free-speech prong of the First Amendment, section 230(c) was not disturbed.⁸⁵ Debatably, the CDA has only two safe harbor provisions.⁸⁶ One immunizes internet service providers from users' *direct-liability* lawsuits; and, the other clause immunizes social media providers from *secondary-liability* lawsuits.⁸⁷

1. Section 230(c)(1) and the Scope of Platform Providers' Immunity

The controversial and highly litigated section 230(c)(1)⁸⁸ reads in relevant part: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁸⁹ Or, stated differently, a social media provider is not

81. *Id.* at 505 ("In some cases, defendants engage in editing or make editorial judgments, which *triggers arguments* about what constitutes content editing versus content creation." (emphasis added)).

82. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 51–52 (D.D.C. 1998) (stressing that section 230 provides "immunity even where the interactive service provider has an *active, even aggressive role* in making available content prepared by others." (emphasis added)).

83. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. §§ 223, 230).

84. *See id.*

85. *See* Reno v. ACLU, 521 U.S. 844, 857–58, 882–886 (1997).

86. 47 U.S.C. § 230(c).

87. *Id.*

88. 47 U.S.C. § 230(c)(1).

89. *Id.*

a “publisher” of any content, if a third party—user, commentator, agent, consumer, freelance author or speaker—provides the content.⁹⁰

Why did Congress enact section 230(c)(1)—a safe-harbor defense provision?⁹¹ During the Internet’s early development, any person could be *directly* or *secondarily liable* for defamation, if he or she knowingly or unknowingly published harmful speech on websites.⁹² Thus, for economic and other rational reasons,⁹³ Congress decided to treat social media providers *unlike* the owners of mainstream media.⁹⁴ Then, as now, owners of newspapers, magazines, television and radio stations will be vicariously liable, if (1) the owners publish or distribute users’ or freelance writers’ obscene or defamatory words, and (2) the tortious words injure a third party.⁹⁵

Without doubt, the federal circuits and state courts are remarkably divided over whether section 230(c)(1) gives platform providers “broad immunity” against *all* common-law and statutory lawsuits, if social media users’, subscribers’, employees’ or agents’ content injure third-party claimants.⁹⁶ To illustrate, the First, Fourth and Tenth Circuits have declared that section 230(c)(1) creates federal immunity against *any cause of action* that would make service providers responsible for content creators’ tortious conduct.⁹⁷ The Seventh Circuit, however, has repeatedly rejected or questioned the pro-

90. *See id.*

91. *See generally id.*

92. *See* *Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003); *see also* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *6–7 (N.Y. Sup. Ct. May 24, 1995) (allowing the plaintiff to advance a vicarious liability action against Prodigy after a third party posted an allegedly libelous statement about the plaintiff on Prodigy’s electronic bulletin boards).

93. *See* 47 U.S.C. § 230(a)–(b); *see generally* *Batzel*, 333 F.3d at 1027 (“Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.”).

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

95. *Id.*

96. *Infra* notes 97–98.

97. *See* *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (declaring that section 230 immunity should be broadly construed); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328–30 (4th Cir. 1997) (declaring that section 230 immunizes platform providers from liability—under any cause of action— if content providers are liable); *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 984–85 (10th Cir. 2000) (same); *see also* *E-Ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) (reaffirming that the CDA section 230(c)(1) provides general immunity from social-media lawsuits).

position that section 230(c)(1) provides broad immunity for social media companies.⁹⁸

Furthermore, the Court of Appeals for the Ninth Circuit's contradictory opinions have only exacerbated the confusion.⁹⁹ In *Batzel v. Smith*¹⁰⁰ and *Barnes v. Yahoo!, Inc.*,¹⁰¹ the Ninth Circuit concluded that section 230(c)(1) does not create "broad immunity" for platform providers.¹⁰² However, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,¹⁰³ the Ninth Circuit declared section 230(c)(1) grants general immunity from secondary liability.¹⁰⁴

2. Section 230(c)(2)(A) and the Stated Scope of Providers' Immunity

Now, consider the CDA's second safe harbor clause—section 230(c)(2)(A).¹⁰⁵ It reads in relevant part: "No provider . . . of an interactive computer service shall be . . . liable [for voluntarily acting] in *good faith* [and restricting persons'] access to. . . *obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable* [material, even if] such material is constitutionally protected."¹⁰⁶

98. See *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (questioning whether section 230(c)(1) creates any form of immunity); Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 669–71 (7th Cir. 2008) (same); City of Chi. v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir. 2010) (declaring that section 230(c)(1) does not create immunity of any kind).

99. See generally *Batzel*, 333 F.3d 1018; *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

100. 333 F.3d at 1018.

101. 570 F.3d at 1096.

102. See *Batzel*, 333 F.3d at 1031 n.19; *Barnes*, 570 F.3d at 1100 ("Looking at the text [of subsection (c)(1)], it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content . . .").

103. 521 F.3d 1157.

104. *Id.* at 1170–71 (stressing that any activity or question—involving whether to exclude third parties' online post or material—is perforce immune under section 230); see also *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 389–90 (2006) (declaring that immunity under section 230 applies to a variety of tort claims).

105. 47 U.S.C. § 230(c)(2)(A).

106. *Id.* (emphasis added).

Unlike section 230(c)(1)'s purportedly "broad immunity" protection, section 230(c)(2)(A) provides only limited immunity against a lawsuit.¹⁰⁷ Therefore, dissatisfied content creators or third-party plaintiffs may file direct actions against tech companies—without worrying excessively about whether the CDA will preempt their lawsuits.¹⁰⁸ And tech companies will be directly liable, if they failed to employ good-faith practices when moderating allegedly objectionable, harassing, or excessively violent content.¹⁰⁹

Regrettably, section 230 does not define "good faith," "lascivious," "objectionable," and other important terms.¹¹⁰ But even more regrettably, sections 230(c)(1) and 230(c)(2)(A) do not state affirmatively the types of circumstances under which social media companies could be *directly* or *secondarily liable* for tort-based, contract-based or statutory violations.¹¹¹ Therefore, as discussed below, sections 230(c)(1), 230(c)(2)(A) and 230(f)(3) have generated serious judicial splits, surrounding the scope of social media companies' immunity against direct- and secondary-liability lawsuits.¹¹²

107. See *E-Ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) (reaffirming that the CDA section 230(c)(2) provides "*specific immunity*" against social-media lawsuits (emphasis added)).

108. See *id.* ("If [a] publisher's motives are irrelevant and always immunized by [section 230](c)(1), then [section 230](c)(2) is *unnecessary*. [Courts are] *unwilling* to read the statute in a way that renders the good-faith requirement *superfluous*." (emphasis added)).

109. *Id.*

110. *Id.* at *2 (accepting the argument that good faith is a question of fact). Compare *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 607–08 (N.D. Ill. 2008) (embracing the view that spam is objectionable content and stressing that a *subjective test* must be applied to determine whether social media content is "otherwise objectionable"), with *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 884 (N.D. Cal. 2015) (refusing to adopt YouTube's *completely subjective* reading of "otherwise objectionable" and embracing the term's ordinary meaning in light of the Communications Decency Act's context, history, and purpose).

111. See 47 U.S.C. § 230(c)(1)–(2)(A).

112. *Infra* Part III.

III. CONFLICTING SAFE-HARBOR RULINGS—SECONDARY-LIABILITY ACTIONS AND THE SCOPE OF SOCIAL MEDIA COMPANIES' IMMUNITY UNDER CDA §§ 230(C)(1) AND 230(F)(3)

Generally, secondary liability is a common-law, tort-based principle.¹¹³ Under certain conditions, an individual may be secondarily liable for another individual's intentional and tortious conduct.¹¹⁴ Or, stated another way, an otherwise "innocent" actor may be liable for a "deviant" actor's tortious conduct under common-law and statutory vicarious-liability theories.¹¹⁵ In addition, to determine whether the CDA sections 230(c)(1) and 230(f)(3) preempt users' secondary-liability lawsuits, courts have fashioned and applied competing theories—the encouragement of content development theory,¹¹⁶ the inducement of illegal content test,¹¹⁷ the material content contribution test,¹¹⁸ and the revenue-sharing, aiding and abetting doctrine.¹¹⁹ Put simply, these latter doctrines have spawned an extraordinary amount of confusion and a patchwork of conflicting judicial decisions.¹²⁰

A. Judicial Conflict—The Scope of Social Media Entities' Immunity Under Common-Law and Statutory Vicarious Liability Theories

Theoretically, the CDA section 230(c)(1) *completely* shelters social media companies from secondary-liability claims, when content creators' intentional torts injure third-party claimants.¹²¹ But should section 230(c)(1)

113. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 69 (5th ed. 1984); see also Sverker K. Högberg, *The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law*, 106 COLUM. L. REV. 909, 914 (2006).

114. See RESTATEMENT (SECOND) OF TORTS § 876, cmt. b, illus. 4 (AM. L. INST. 1979).

115. See Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1366 (2006) (discussing the doctrines of vicarious liability and contributory liability); see generally *infra* Part III (A)–(C) and accompanying text.

116. Bartholomew & Tehranian, *supra* note 115; see also *Jones v. Dirty World Ent. Recordings LLC (Jones V)*, 755 F.3d 398, 412–14 (6th Cir. 2014) (explaining the "encouragement test of immunity" or the "encouragement theory of development").

117. *Jones V*, 755 F.3d at 412–14.

118. *Id.*

119. See *infra* Part III (C).

120. See *infra* Part III.

121. See, e.g., *Jones V*, 755 F.3d at 407 (stressing that at its core, section 230 immunizes service providers from "publisher-liability and notice-liability defama-

totally immune platform providers from secondary-liability claims, if companies actively and intentionally encourage content providers to develop, create or display allegedly tortious information?¹²² This narrow question has produced not only a substantial amount of debate among critics and users but also between mainstream and social media owners.¹²³ This question has also spawned an extraordinary amount of confusion and conflicting decisions among federal courts,¹²⁴ as well as between state and federal courts.¹²⁵

Arguably, case-specific facts and courts' selective application of the above-mentioned secondary-liability doctrines have fostered the split rulings surrounding the scope of platform providers' immunity under section 230(c)(1).¹²⁶ Thus, reconsider the *common-law* doctrine of vicarious liability.¹²⁷ Generally, corporate or business entities are not vicariously liable for their agents or employees' intentional torts—verbal assaults, defamatory statements, intentional infliction of emotional distress, fraud, trespass, con-

tion” lawsuits when providers “publish, withdraw, postpone or alter content,” and provides protection against litigation costs, potential liability and litigants who “would chill free speech”).

122. See *infra* note 123 and accompanying discussion.

123. See generally Yaël Eisenstat, *How to Hold Social Media Accountable for Undermining Democracy*, HARV. BUS. REV. (Jan. 11, 2021), <https://hbr.org/2021/01/how-to-hold-social-media-accountable-for-undermining-democracy> [<https://perma.cc/8L7V-78SL>] (“The storming of the U.S. Capitol Building . . . by a mob of Trump insurrectionists was shocking. . . . [T]he biggest social media companies—[including] Facebook—are absolutely complicit. [The companies allowed] an insurrection to be planned and *promoted* on their platforms.” (emphasis added)); *Facebook Is Complicit in Deadly Kenosha Shootings for Failing to Block Online Hate Group*, COLOR OF CHANGE (Aug. 26, 2020), https://colorofchange.org/press_release/color-of-change-facebook-is-complicit-in-deadly-kenosha-shootings-for-failing-to-block-online-hate-group/ [<https://perma.cc/ES28-QNS6>] (alleging that “Facebook *knowingly* allowed the . . . Kenosha Guard to use the social media platform *to encourage* an armed response to protests in Kenosha, Wisconsin” (emphasis added)); Barbara Ortutay & Tali Arbel, *Social Media Platforms Face a Reckoning Over Hate Speech*, AP NEWS (June 29, 2020), <https://apnews.com/article/6d0b3359ee5379bd5624c9f1024a0eaf> [<https://perma.cc/W7DS-K3T6>] (“For years, social media platforms have . . . hosted an explosion of hate speech. . . . [Recently], the Trump Reddit forum . . . was banned because it *encouraged* violence.” (emphasis added)).

124. See *supra* note 123 and accompanying text; *infra* notes 128–184 and accompanying text.

125. See *infra* notes 128–184 and accompanying text.

126. See *infra* notes 134–184 and accompanying text.

127. See *infra* notes 128–134 and accompanying text.

version or the misappropriation of third parties' property.¹²⁸ However, corporate entities are vicariously liable, if they *control* or receive pecuniary benefits from their agents', servants' or employees' tortious conduct.¹²⁹

On the other hand, under various *statutory* doctrines of vicarious liability,¹³⁰ a corporate entity is vicariously liable, only if the entity (1) intentionally encourages, induces, promotes or facilitates a tortfeasor's invasive conduct;¹³¹ (2) refuses to terminate or restrict the offensive conduct;¹³² and (3) profits financially and vicariously from the tortfeasor's conduct.¹³³ Generally, under the latter theories, the scope of a principal's "control" is not a relevant element.¹³⁴

Perhaps, state and federal courts should always apply a statutory vicarious-liability doctrine rather than the common-law doctrine to determine whether tech companies are secondarily liable. Why? Section 230(c)(1) does not create an employer-employee, a principal-agent, or a master-servant relationship between social media providers and content creators.¹³⁵ Thus,

128. *See Auer v. Paliath*, 17 N.E.3d 561, 565–66 (Ohio 2014) (outlining common-law rules and reaffirming that a master is vicariously liable if an agent's or servant's intentional tort *facilitates* or *promotes* the master's business).

129. *Id.*

130. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982) (stressing that a contributory infringement theory requires proof of *an intent to induce* another to infringe a trademark or a contributory infringer's continuing to supply goods or services to a known tortfeasor who infringes on a trademark); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261–64 (9th Cir. 1996) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–35 (1984)) (explaining that vicarious liability may be imposed in virtually all areas of law, reaffirming that statutory doctrines of secondary liability emerged from common law principles, and stressing that a party who provides a forum and *facilitates* a third-party seller's copyright infringement may be vicariously liable).

131. *See Metro–Goldwyn–Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–41, 938 n.12, (2005) (carving out an exception to a "safe harbor" rule for persons who intentionally distribute a copyright-infringement product and holding that vicarious liability may arise from [one] *actively encouraging a third party* to use a product for an infringing purpose. "[One who clearly and affirmatively] distributes a device with the object of *promoting* its use to infringe [a] copyright . . . is liable for the resulting acts of infringement by third parties." (emphasis added)).

132. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

133. *Id.*

134. *See Fonovisa*, 76 F.3d at 261–64; *Metro*, 545 U.S. at 936–41; *Shapiro*, 316 F.2d at 307.

135. *See Batzel v. Smith*, 333 F.3d 1018, 1030–31 (9th Cir. 2003) (stressing that the proper focus of an analysis under section 230(c)(1) is whether a tech company

courts' deciding whether tech companies "*control*" users' purportedly injurious content should rarely be the focus of an inquiry.¹³⁶ Yet, judicial splits have emerged when state and federal courts apply a statutory vicarious-liability doctrine to resolve disputes involving a secondary-liability claim, which is coupled with a federal-preemption defense.¹³⁷ Why? Some courts have applied inappropriately and injudiciously common-law, agency, master-servant and control principles to decide the disagreements.¹³⁸

To illustrate, under the common law, a principal exercises control over a tortfeasor and his conduct, only if (1) the tortfeasor is a servant or an agent, and (2) the principal has a legal right as well as the ability to stop or limit the servants' or agents' tortious conduct.¹³⁹ Curiously, federal courts in California, Idaho, Texas, and Virginia have allowed third parties to commence lawsuits against social media providers, who failed to control the tortious activities of non-servants and non-agents—"subscribers,"¹⁴⁰ "unpaid forum moderators,"¹⁴¹ "forum moderators"¹⁴² and "advertisers."¹⁴³ Also, an Illinois

is a provider of an *interactive computer service* as defined in section 230(f)(2) of the statute); *Doe ex rel. Doe v. Bates*, No. 5:05CV91, 2006 WL 8440858, at *10 (E.D. Tex. Jan. 18, 2006) (stressing that the proper analysis focuses on whether an information content provider—as defined in section 230(f)(3)—provided the allegedly tortious information).

136. *Batzel*, 333 F.3d at 1030–31; *Doe*, 2006 WL 8440858 at *10.

137. *See infra* notes 140–144, 146–149 and accompanying discussion.

138. *See infra* notes 140–143 and accompanying discussion.

139. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171–73 (9th Cir. 2007) (declaring that a defendant—who has not directly infringed on a copyright—may be liable for contributory infringement if the defendant (1) has knowledge of another's infringing conduct, and (2) induces, causes, or materially contributes to that conduct); *Id.* at 1173–75; *see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005) (concluding a defendant's right and ability to supervise a direct infringer determines the presence or absence of "control" under a common-law vicarious liability test).

140. *See Perfect 10, Inc. v. Giganews, Inc.*, No. CV11–07098 AHM (SHx), 2013 WL 2109963, at *13 (C.D. Cal. Mar. 8, 2013) (declaring that plaintiff satisfied the "control" element and stated a claim for vicarious liability against Giganews for copyright infringement committed by Giganews' subscribers).

141. *See Cornelius v. Deluca*, No. 1:10–cv–027–BLW, 2010 WL 4923030, at *4 (D. Idaho Nov. 29, 2010) (holding that plaintiffs state a cognizable vicarious liability claim if they allege in good faith that: (1) the forum moderator was the platform provider's agent or representative, (2) the provider knew that the moderator posted disparaging comments about the third party's products, (3) the platform provider knew the forum moderator made and posted the comments, and (4) the provider unreasonably failed to remove the comments).

142. *See Wiswell v. VerticalScope, Inc.*, No. A-11-CA-737-SS, 2012 WL 13136295, at *1–5 (W.D. Tex. Aug. 1, 2012) (noting that the litigants disputed

court permitted a negligent supervision cause of action to advance against a platform operator who failed to stop an unsupervised employee's harmful conduct.¹⁴⁴

But, other federal courts in California as well as in Virginia, Washington and Wisconsin have applied a common-law control theory and declared that section 230(c)(1) shields platform providers from statutory vicarious-liability claims.¹⁴⁵ These latter courts, however, have given varying and thought-provoking explanations: (1) the platform provider and California-based "online moderator" did not form a principal-agent relationship;¹⁴⁶ (2) Google and its infringing advertisers did not exercise joint control over the Virginia-based company's products;¹⁴⁷ (3) Yahoo! did not wield any control over its subscribers' websites when the subscribers allegedly used the complainant's name without permission;¹⁴⁸ and (4) eBay did not exercise any control over a book publishing company, that allegedly sold a prisoner's book and violated the author's intellectual property rights.¹⁴⁹

whether the platform provider paid the forum moderator, but allowing the vicarious liability claim because the moderator was provider's agent or employee who had "authority" to ban users, enforce forum rules, and regulate the forum).

143. See *GEICO v. Google, Inc.*, 330 F. Supp. 2d 700, 705 (E.D. Va. 2004) (applying principal-agent theory of liability, finding that Overture and the advertisers control the appearance of advertisements on Overture's page and concluding that GEICO stated a claim for vicarious infringement against Overture).
144. Cf. *Lansing v. Sw. Airlines Co.*, 980 N.E.2d 630, 636–41 (Ill. App. Ct. 2021) (declaring that Southwest is an "interactive computer service provider" and allowing the third-party aggrieved's negligent supervision cause of action to proceed in light of the employee's apparent authority as well as threatening and harassing misconduct).
145. See *infra* notes 146–148.
146. See *Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2003) (finding that a California-based nonprofit Network could not be vicariously liable for a moderator's allegedly offensive comments).
147. See *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 165 (4th Cir. 2012) (citing *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1150 (7th Cir. 1992)) (finding that the social-media company and third parties did form an apparent or actual partnership and rejecting plaintiff's vicarious liability trademark infringement theory).
148. See *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 885 (E.D. Wis. 2009) (citing *Hard Rock*, 955 F.2d at 1150)) (finding that Yahoo! and the infringers did not have an apparent or actual partnership and precluding the computer service provider's secondary liability under a vicarious liability or contributory infringement theory).
149. See *Casterlow-Bey v. eBay, Inc.*, No. 3:17-CV-05687-RJB, 2017 WL 6733724, at *6 (W.D. Wash. Dec. 29, 2017) (concluding that plaintiff failed to satisfy the "first sale doctrine," thereby precluding the need to decide whether the CDA

B. Judicial Conflicts—The Scope of Platform Providers’ Immunity Under the Material Contribution Test and the “Hybrid” Content Development and Encouragement Doctrine

Once more, section 230(c)(1) shields platform owners from secondary-liability lawsuits, if social media creators’ or users’ allegedly tortious comments harm third parties.¹⁵⁰ Nevertheless, section 230(f)(3) contains an implied “development” exception or provision: a platform owner qualifies as an “information content provider” and becomes potentially liable if the owner *develops* tortious content.¹⁵¹

Without doubt, the implied “content development” exception has engendered several challenging questions: Does YouTube morph into an “information content provider” if YouTube simply *encourages* its users to *develop* allegedly tortious content?¹⁵² Do Yelp! and TripAdvisor become content creators if they merely *encourage* users to craft and *post* highly offensive reviews on the companies’ social-review sites?¹⁵³ Should eBay evade secondary liability if the company *intentionally develops* algorithms which *encourage* users’ discriminatory pricing and sales?¹⁵⁴ Should Facebook elude secondary liability if the company’s intentionally modified content-moderation algorithms *encourage* users to *develop* injurious content?¹⁵⁵

First, what is the “content development” test?¹⁵⁶ To uncover the answer, consider the social-media dispute and litigants in *Jones v. Dirty World Entertainment Recordings, LLC (Jones III)*.¹⁵⁷ Sarah Jones is a resident of Ken-

section 230 (c)(1) preempted plaintiff’s contributory-liability, copyright-infringement claims against eBay).

150. *See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) (interpreting section 230 and defeating third parties’ efforts to secure secondary liability damages from a website owner); *DiMeo v. Max*, 248 F. App’x 280, 281–82 (3d Cir. 2007) (declaring that the owner of a website message board was not liable for offensive third-party comment).

151. 47 U.S.C. § 230(f)(3).

152. *See infra* Part III (C) and accompanying text.

153. *See generally* *Reit v. Yelp! Inc.*, 907 N.Y.S.2d 411, 414–15 (N.Y. Sup. Ct. 2010) (immunizing Yelp! against a dentist’s defamation claims, where the site had selectively removed positive reviews, but inserted negative reviews of the dentist’s practice).

154. *See generally* *Casterlow-Bey*, 2017 WL 6733724, at *6 (refusing to decide whether the CDA section 230(c)(1) preempted plaintiff’s contributory-liability, copyright-infringement claims against eBay).

155. *See infra* Part III(C) and accompanying text.

156. *See Jones V*, 755 F.3d 398, 413 (6th Cir. 2014) (discussing the material contribution test).

157. *Jones v. Dirty World Entertainment Recordings, LLC (Jones III)*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012). It is important to stress that the dispute between

tucky.¹⁵⁸ She is also a former teacher and an ex-member of the Cincinnati BenGals—the cheerleading squad for the Cincinnati Bengals.¹⁵⁹ Dirty World, LLC owned and Nik Lamas-Richie managed the infamous www.TheDirty.com website.¹⁶⁰ Simply put, Richie encouraged visitors and users to upload anonymous comments, photographs, and videos.¹⁶¹ Afterwards, Richie selected, edited and published certain comments.¹⁶²

In the course of events, an anonymous user posted a negative comment about Jones on the website.¹⁶³ Richie refused to remove the assertedly tortious post.¹⁶⁴ In response, Sarah sued Dirty World and Richie in the District Court for the Eastern District of Kentucky.¹⁶⁵ She raised multiple tort-based claims: defamation, libel *per se*, false light, and the intentional infliction of emotional distress.¹⁶⁶ The defendants filed a motion to dismiss, arguing that the CDA section 230(c)(1) barred the claims.¹⁶⁷ To reach a decision, the district court reexamined the language in section 230(f)(3) and fashioned a two-pronged “encouragement theory of development.”¹⁶⁸ The theory asserts: A website owner becomes a “content creator or developer” and secondarily liable if (1) the owner intentionally encourages or invites a third party to post illegal, invidious or tortious comments, and (2) the owner ratifies, adopts or embellishes the third party’s comments.¹⁶⁹

Applying the rule, the district court rejected the defendants’ motion to dismiss.¹⁷⁰ Ultimately, a jury decided in favor of Sarah.¹⁷¹ Dirty World and Richie appealed to the Sixth Circuit Court of Appeals.¹⁷² To interpret the meaning of “development” in section 230(f)(3), the appellate court rejected the district court’s encouragement of development test and applied the Ninth

Sarah Jones and Dirty World has a long procedural history, generating five reported decisions.

158. *Jones III*, 840 F. Supp. 2d at 1009–10.

159. *Id.*

160. *Jones V*, 755 F.3d at 402–03.

161. *Id.*

162. *Id.*

163. *Jones III*, 840 F. Supp. 2d at 1009–10.

164. *Id.*

165. *Id.*

166. *Jones V*, 755 F.3d at 402.

167. *Id.*

168. *Jones IV*, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013).

169. *Id.* at 821–22.

170. *Id.* at 823.

171. *Jones V*, 755 F.3d at 402.

172. *Id.*

Circuit’s material contribution test.¹⁷³ Under the latter doctrine, an otherwise “innocent” website owner becomes responsible and liable for developing content, only if the owner materially contributes to illegal behavior.¹⁷⁴

In the end, the Sixth Circuit accepted the defendants’ argument and declared that section 230(c)(1) barred Jones’s claims.¹⁷⁵ Still, the Sixth Circuit presented a highly questionable explanation for rejecting the district court’s novel test.¹⁷⁶ It reads:

An encouragement test would inflate the meaning of “development.” . . . Many websites . . . *encourage* users to post particular types of content. . . . Under an encouragement test of development . . . websites would lose the immunity [defense] . . . and be subject to hecklers’ suits. . . . Moreover, under the district court’s rule, courts would . . . have to decide what constitutes “*encouragement*” . . . [which] is *certainly more difficult to define*. . . . [T]he muddiness of an encouragement rule would cloud [matters].¹⁷⁷

Perhaps, the Sixth Circuit’s analysis and conclusion are less-than-persuasive, because the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits have explicitly rejected the notion that section 230 unequivocally bars secondary liability lawsuits.¹⁷⁸ Moreover, the same federal appellate courts have given lower courts unequivocal discretion to apply a “content inducement theory” when deciding section 230 preemption disputes.¹⁷⁹ Briefly put, under the latter test, a social media owner is secondarily liable for *inducing* a content provider to create or post illegal content.¹⁸⁰

173. *Id.* at 413.

174. *See id.* at 413–16.

175. *Id.* at 417.

176. *Id.* at 414–15 (emphasis added).

177. *Jones V*, 755 F.3d at 414–15 (emphasis added).

178. *See, e.g., Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1st Cir. 2007); *DiMeo v. Max*, 248 Fed. App’x 280, 282 (3d Cir. 2007); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420–22 (5th Cir. 2008); *Chi. Laws.’ Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc); *F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

179. *See, e.g., Universal Commc’n*, 478 F.3d at 421; *DiMeo*, 248 Fed. App’x at 282; *Nemet Chevrolet*, 591 F.3d at 257; *Doe*, 528 F.3d at 420–22; *Chi. Laws.’ Comm.*, 519 F.3d at 671–72; *Johnson*, 614 F.3d at 792; *Fair Hous. Council*, 521 F.3d at 1175; *Accusearch*, 570 F.3d at 1199.

180. *See, e.g., Universal Commc’n*, 478 F.3d at 421; *DiMeo*, 248 Fed. App’x at 282; *Nemet Chevrolet*, 591 F.3d at 257; *Doe*, 528 F.3d at 420–22; *Chi. Laws.’*

Therefore, arguably, the encouragement theory of development test and the content inducement test are the same theory.¹⁸¹ Why? Courts in the Sixth Circuit¹⁸² and numerous federal appellate courts¹⁸³ have used *encouraging* and *inducing*, as well as *encouragement* and *inducement*, interchangeably—finding no material or legal distinction between the synonyms.

Conceivably, unless Congress clarifies or repeals section 230(f)(3), the troublesome “development of information” phrase¹⁸⁴ will continue to produce uncertainty and judicial splits surrounding three questions: (1) whether a social media entity is secondarily liable for actively and intentionally *encouraging* creators to *post already developed and illegal content* on the entity’s platform;¹⁸⁵ (2) whether a platform provider is secondarily liable for

Comm., 519 F.3d at 671–72; *Johnson*, 614 F.3d at 792; *Fair Hous. Council*, 521 F.3d at 1175; *Accusearch*, 570 F.3d at 1199.

181. See *infra* notes 182–183 and accompanying text.

182. See *e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“One infringes contributorily by intentionally inducing or encouraging direct infringement”); *Mich. Motor Techs. LLC v. Volkswagen Aktiengesellschaft*, 472 F. Supp. 3d 377, 386 (E.D. Mich. 2021) (embracing the proposition that absent an affirmative act of encouragement, a party may not be charged with inducement).

183. *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 798 (5th Cir. 2017) (embracing the proposition that absent an affirmative act of encouragement, a party may not be charged with inducement); *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1071 (9th Cir. 2013); *Sanofi v. Watson Labs, Inc.*, 875 F.3d 636, 646 (Fed. Cir. 2017) (“The evidence . . . supports the finding of intentional encouragement of infringing use and, therefore, of inducement.”). Substantially more support for this assertion emerged after searching Westlaw’s “FedCtApp” database and submitting the query: *adv: (inducement inducing /s encouragement encouraging) % criminal crime*.

184. See *Jones V*, 755 F.3d 398, 409 (6th Cir. 2014) (embracing the views that (1) an overly inclusive interpretation of “development” in section 230(f)(3) would impose secondary liability on website operator for *merely displaying* or allowing one to access content that a third party developed; and (2) a very broad reading of “development” would defeat the CDA’s purposes and swallow section 230’s core immunity protection).

185. See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 560 (N.C. Ct. App. 2012) (stressing that a website owner who encourages the publication of unlawful material does not expose the owner to legal action); *DiMeo*, 248 F. App’x at 281 (affirming the lower court’s holding that a website’s owner who hosted allegedly defamatory material was entitled to section 230(c)(1) immunity); *S.C. v. Dirty World LLC*, No. 11–CV–00392–DW, 2012 WL 3335284, at *4–5 (W.D. Mo. Mar. 12, 2012) (holding that an entity’s mere encouragement of defamatory posts is insufficient to defeat CDA immunity); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 475–76 (E.D.N.Y. 2011) (concluding that the website did not lose immunity for encouraging consumers to post negative comments); *Glob. Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz.

intentionally *encouraging* content creators to *develop* “new” and illegal content;¹⁸⁶ and (3) whether a company is secondarily liable for *constructing or modifying* a social media platform, which *encourages* or *induces* third parties to post offensive content.¹⁸⁷

C. Judicial Conflicts—The Scope of Social Media Companies’ Immunity Under Federal Aiding and Abetting Statutes

The doctrine of aiding and abetting is a “well-known and well-defined” secondary liability theory.¹⁸⁸ Stated briefly, aiding-and-abetting liability may arise under federal and state common law.¹⁸⁹ Under federal tort law, a person becomes an aider and abettor as well as secondarily liable, if (1) a principal commits a “wrongful act that causes an injury”; (2) the aider and abettor had general knowledge about the principal’s illegality or tortious activity; and (3) the aider and abettor provided substantial assistance—which helped the principal to commit the wrongful act.¹⁹⁰ Under state common law, a complainant

2008) (holding that operator of consumer review website did not lose section 230(c)(1) immunity simply for encouraging third parties to post defamatory content).

186. *Compare Accusearch*, 570 F.3d at 1199 (10th Cir. 2009) (declaring that section 230 provided no immunity against secondary-liability lawsuit for a website operator who encourages the development of offensive content); *Fair Hous. Council*, 521 F.3d at 1164–65.; and *Jones III*, 840 F. Supp. 2d 1008, 1010–13 (E.D. Ky. 2012), with *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (concluding that a service provider was immune from liability after fashioning dating-service profiles, a questionnaire and encouraging posters to create all assertedly offensive content).
187. *Compare Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (holding that a website operator may be deprived of immunity if the operator “designs” its website to be a portal for defamatory material), with *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (deciding that a website operator does lose its immunity merely because the website’s construction and operation might encourage or influence offensive third-party postings) (quoting *Goddard v. Google*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *1 (N.D. Cal. 2008)).
188. *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1020 (7th Cir. 2002); *see also Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 415 (3d Cir. 2003); *Decker v. SEC*, 631 F.2d 1380, 1387–88 (10th Cir. 1980).
189. *See, e.g., Stutts v. De Dietrich Grp.*, No. 03-CV-4058 (ILG), 2006 WL 1867060, at *12 (E.D.N.Y. June 30, 2006); *Conn. Nat’l Bank v. Giacomi*, 659 A.2d 1166, 1178 n.28 (Conn. 1995) (stressing that tort principles of aider and abettor liability already exist under state common law).
190. *See Halberstam v. Welch*, 705 F.2d 472, 477–78 (D.C. Cir. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. L. INST. 1977)).

must prove fairly similar elements to prevail in an aiding-and-abetting action.¹⁹¹

To be sure, Congress has enacted numerous criminal aiding-and-abetting statutes.¹⁹² In recent years, disgruntled Americans as well as congressional members have alleged that the owners of Google, Facebook, Twitter and other large platforms violate aiding-and-abetting statutes by helping domestic and international “criminals” to commit exceedingly serious crimes.¹⁹³ Some complainants have tried to sue large tech companies. However, appellate courts are divided over the question of whether the CDA section 230 prevents victims, survivors, and estates from suing social media entities for violating certain aiding-and-abetting statutes.

For example, as the Author was penning this Article, the Ninth Circuit delivered an extremely long and thoughtful aiding-and-abetting opinion in *The Estate of Noheми Gonzalez v. Google, LLC*.¹⁹⁴ Arguably, the opinion will prove to be newsworthy and highly educational. Why? In *Noheми* as well as in *Force v. Facebook, Inc.*,¹⁹⁵ the underlying facts, aiding-and-abetting claims, and CDA-preemption disputes are nearly identical. Yet, the Second and Ninth Circuits’ preemption analyses and conclusions deviated substantially.

First, consider the aiding-and-abetting statutes and relevant facts in *Force*. In 1990, Congress enacted the Anti-Terrorism Act (ATA).¹⁹⁶ The act

191. See, e.g., *Casey v. U.S. Bank Nat’l Ass’n*, 26 Cal. Rptr. 3d 401, 405 (Cal. Ct. App. 2005) (reaffirming that secondary liability may be imposed “if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance . . . or (b) gives substantial assistance to the other in accomplishing a tortious result and the person’s own conduct . . . constitutes a breach of duty to the third person.”) (quoting *Fiol v. Doellstedt* 58 Cal. Rptr. 2d 308, 312 (1996)).

192. See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (outlining the history of early common law and aiding and abetting statutes); David D. Dodge, *Clients and Their Creditors*, ARIZ. ATT’Y, Mar. 2004 at 10, 11 (listing numerous federal aiding and abetting statutes involving concealment of assets, 18 U.S.C. § 152; bankruptcy fraud, 18 U.S.C. § 157; and the fraudulent transfer of debts, 28 U.S.C. § 3304).

193. See generally MacCarthy, *supra* note 48 (discussing CDA reforms which will impose secondary liability on social-media companies who aid and abet persons who commit acts of international terrorism); Feiner, *supra* note 44 (showing that, in general, Democrats are most concerned about getting big social media companies to take down terrorism-related content, and that Republicans allege social media companies censor conservative viewpoints).

194. 2021 WL 2546675, at *879 (9th Cir. June 22, 2021).

195. 934 F.3d 53 (2d Cir. 2019).

196. Anti-Terrorism Act of 1990, Pub. L. No. 1-1-519, § 132, 104 Stat. 2240 (1990) (codified as amended at 18 U.S.C. § 2333(a)).

imposes liability if a person materially supports “terrorism,”¹⁹⁷ gives resources to a “foreign terrorist organization,”¹⁹⁸ and conceals the support or resources.¹⁹⁹ In 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA).²⁰⁰ Stated briefly, JASTA amended the ATA by adding section 2333(a), which imposes civil liability for one’s aiding and abetting “terrorism.”²⁰¹ Under JASTA, an “American national” may commence a lawsuit “in any appropriate district court of the United States” if an “act of international terrorism” injures a national or her estate, survivors, or heirs.²⁰² And, if the national prevails, she *shall* recover damages, and costs and attorney’s fees.²⁰³

Between 2014 and 2016, a “designated foreign terrorist organization” killed Taylor Force and four other American nationals who were visiting a “foreign country.”²⁰⁴ The alleged foreign criminals posted content on “Facebook’s foreign facilities,” which were “located outside the United States.”²⁰⁵ In the course of events, the deceased victims’ surviving relatives and estates sued Facebook.²⁰⁶ The complaint was filed in the District Court for the Eastern District of New York.²⁰⁷

Among other claims, the *Force* survivors alleged Facebook was civilly and secondarily liable under JASTA sections 2339A and 2339B for aiding and abetting a “foreign terrorist organization.”²⁰⁸ More precisely, the survivors argued that Facebook’s “advertising algorithms and remarketing technology” allowed Facebook and the paramilitary group to generate and share revenues.²⁰⁹ Therefore, allegedly, the funds materially helped the “terrorist organization” to commit terroristic acts.²¹⁰ Facebook moved to dismiss the

197. 18 U.S.C. § 2339A.

198. 18 U.S.C. § 2339B.

199. 18 U.S.C. § 2339C.

200. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 18 U.S.C. § 2333(d)).

201. 18 U.S.C. § 2333(a).

202. *Id.*

203. *Id.*

204. *Force v. Facebook, Inc.*, 934 F.3d 53, 73–74 (2d Cir. 2019) (disclosing that the “terrorist organization” was the para-military wing of Hamas and the “foreign country” was Israel).

205. *Id.*

206. *Id.* at 57.

207. *Id.*

208. *Id.* at 61 n.10.

209. *Id.* at 58–59.

210. *Force*, 934 F.3d at 58–59 (2d Cir. 2019); *see also Force v. Facebook, Inc.*, 304 F. Supp. 3d 315, 326 (E.D.N.Y. 2018) (alleging that Facebook violated 18

claim, asserting that the survivors and estates failed to state a cognizable claim.²¹¹ The district court agreed, and the plaintiffs appealed.

Before the Second Circuit Court of Appeals, the principal question was whether the CDA section 230(c)(1) shielded Facebook from an aiding-and-abetting action.²¹² In the end, the Second Circuit concluded that section 230(c)(1) preempted the parents' and relatives' JASTA claims. The appellate court declared that Facebook was not a publisher and did not provide any information for the "foreign terrorists."²¹³ But, what about the plaintiffs' shared-revenue, aiding-and-abetting claim? Did Facebook share profits, which helped the paramilitary group to terrorize and murder American nationals? Regrettably, the Second Circuit did not give a thorough analysis or persuasive answer. Instead, the appellate court gave a curt and less-than-judicious response, stating that JASTA "provides no obstacle—explicit or implicit—to applying section 230."²¹⁴

Now, consider the *Estate of Nohemi*, which presents markedly similar facts, but a decidedly different preemption-immunity ruling. On November 13, 2015, a different "foreign terrorist organization" killed nineteen people who visited a bistro in Paris, France.²¹⁵ Nohemi Gonzalez—a visiting American citizen and university student—was one of the victims.²¹⁶ Ultimately, the "Paris terrorists" posted audio and video messages on YouTube and claimed responsibility for the attacks.²¹⁷

Gonzalez's surviving family members sued Google, Inc., who owns and manages YouTube.²¹⁸ Among multiple claims, the survivors alleged that Google was secondarily liable for aiding and abetting Gonzalez's murderers.²¹⁹ In particular, the survivors maintained that Google violated JASTA sections 2339A and 2339B, by knowingly sharing advertising revenue with a "foreign terrorist organization."²²⁰ The survivors stressed that Google (1) re-

U.S.C. § 2339C(c) by giving material resources to terrorist and concealing the resources).

211. *Force*, 934 F.3d at 61.

212. *Id.* at 57.

213. *Id.* at 61.

214. *Id.* at 72.

215. *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1160–62 (N.D. Cal. 2018) (reporting that the "foreign terrorist organization" was the Islamic State of Iraq and Syria and the "foreign country" was France).

216. *Id.*

217. *Id.* at 1161.

218. *Id.*

219. *Id.*

220. *Id.* at 1162–63 ("Plaintiffs allege that Google creates 'new unique content' for viewers and earns revenue 'by incorporating ISIS posted videos along with advertisements.'").

viewed and approved the terrorists' videos, (2) "monetized" the terrorists' videos on YouTube, (3) derived revenue from the advertisements when users viewed the videos, and (4) shared a percentage of the generated revenue with the terrorist organization.²²¹

Consequently, from the survivors' perspective, "Google's material support was the proximate cause of Gonzalez's death."²²² Google filed a motion to dismiss the aiding-and-abetting claim, arguing that section 230 of the CDA blocked the civil action.²²³ Alternatively, Google argued that the survivors' claim was insufficiently pleaded.²²⁴ The federal district court rejected Google's procedural defense but accepted the substantive defense.²²⁵ The case was appealed. And a major question before the Ninth Circuit Court of Appeals was whether the survivors' JASTA action was preempted.²²⁶ The Ninth Circuit said no, concluding that section 230 does not immunize Google from aiding-and-abetting claims that arise from illegal revenue-sharing activities.²²⁷

Curiously, the *Nohemi* court stated that the revenue-sharing dispute "appears to be one of first impression for the courts of appeal."²²⁸ Yet, a close reading of the facts in *Force* reveals that revenue-sharing liability was a central claim.²²⁹ Importantly, both Facebook and Google prevailed against the respective survivors' revenue-sharing claim. But even more importantly, Facebook's section 230 preemption defense worked. Google's preemption defense did not.²³⁰ Debatably, for future survivors and social media companies, the *Force* and *Nohemi* courts' conflicting *procedural* rulings have spawned more confusion surrounding a different secondary liability question: whether the CDA section 230 immunizes tech companies from any "aiding

221. *Gonzalez v. Google, Inc.*, 335 F. Supp. at 1162.

222. *Id.* at 1160.

223. *Id.* at 1179.

224. *Id.*

225. *Id.* (concluding that the plaintiffs did not allege any direct causal connection between the Paris attack, ISIS's single YouTube video, and any shared revenue between ISIS and Google).

226. *Gonzalez v. Google LLC*, 2 F.4th 871, 880(9th Cir. 2021).

227. *Id.*

228. *Id.*

229. *Force v. Facebook, Inc.*, 934 F.3d 53, 58–59, 61 (2d Cir. 2019).

230. *Gonzalez*, 2 F.4th at 898–99 (concluding that section 230 does not bar the Gonzalez survivors' aiding and abetting claims which allegedly arose from Google's sharing revenue with a terrorist organization— ISIS).

and abetting terrorism” lawsuit under JASTA sections 2339A, 2339B or § 2339C(c).²³¹

IV. CONFLICTING SAFE-HARBOR RULINGS—CONTRACT-BASED ACTIONS AND THE SCOPE OF SOCIAL MEDIA ENTITIES’ IMMUNITY UNDER SECTIONS 230(C)(1) AND 230(C)(2)(A)

Customarily, owners of social-networking, media-sharing, consumer-review, and video-hosting platforms require users to “accept” certain terms and conditions which appear in online agreements.”²³² For example, in *Teatotaler, LLC v. Facebook, Inc.*,²³³ the controversial terms-of-use provision stated:

You agree that we won’t be responsible . . . for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to [the Terms of Use], even if we know they are possible. This includes when we *delete your content, information, or account*.²³⁴

Generally, this type of standardized agreement is a valid and enforceable contract.²³⁵ Thus, in recent years, users and content creators have commenced numerous contract-based actions against social media companies alleging that the platform owners breached a standardized contract, a stand-alone promise and/or the implied covenant of good faith and fair dealing.²³⁶

To defend against contract-based lawsuits, tech companies have raised a preemption-immunity defense, citing section 230(c)(1) and/or section 230(c)(2)(A) of the CDA.²³⁷ Under section 230(c)(2)(A), social media providers are generally sheltered against lawsuits. But, there is a proviso: platform owners must act in “good faith” when deciding whether to block or

231. 18 U.S.C. § 2339C(c) (prohibiting the knowing concealment of “the nature, location, source, ownership, or control” of any support, resources, or funds. . .in violation of section 2339B.).

232. See *infra* notes 233–234 and accompanying text.

233. 242 A.3d 814 (N.H. 2020).

234. *Id.* at 819 (emphasis added).

235. Cf. *id.* at 816 (highlighting that a social media user’s allegation that an operator deleted its account in violation of the terms of service was sufficient to state a breach of contract claim).

236. See *infra* notes 242–268 and accompanying text.

237. 47 U.S.C. § 230(c)(2)(A); see also *Fyk v. Facebook, Inc.*, 808 Fed. App’x 597, 598 (9th Cir. 2020) (rejecting the argument that granting section 230(c)(1) immunity to Facebook renders section 230(c)(2)(A) mere surplusage, reaffirming that section 230(c)(2)(A) provides an additional shield from liability and stressing that person who cannot take advantage of subsection (c)(1), perhaps because they developed the content may take advantage of subsection (c)(2)).

delete content creators' purportedly "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" reviews, comments or videos.²³⁸ Certainly, some plaintiffs have filed a contract-based action alleging specifically that tech companies breached the implied covenant of good faith and fair dealing by allowing users to post or share purportedly "dangerously toxic and injurious" comments, images and videos.²³⁹

Courts generally agree that a successful CDA preemption-immunity defense does not depend upon whether a user's or content provider's theory of recovery sounds in tort, contract, or equity.²⁴⁰ Instead, the *substance* of a legal claim—rather than its *label*—determines whether a federal statute preempts a state-law theory of recovery.²⁴¹ Yet, after analyzing hundreds of CDA-immunity decisions, evidence strongly suggests that some courts allow more than the "substance of a legal claim" to shape their rulings. What is the evidence? Consider the breach-of-contract claims in *Teatotaller*, *Murphy v. Twitter, Inc.*²⁴² and *Schneider v. Amazon.com, Inc.*²⁴³ Briefly put, those decisions illustrate that state and federal courts are divided over the question of whether sections 230(c)(1) and 230(c)(2)(A) preclude certain users' or content creators' contract-based lawsuits.

For example, in *Murphy* and *Schneider*, the appellate courts of California and Washington declared that section 230 barred the complainants' breach-of-contract actions.²⁴⁴ On the other hand, in *Teatotaller*, the New Hampshire Supreme Court issued a contradiction, concluding that section 230 did not preclude the plaintiff's litigating a breach-of-contract action

238. 47 U.S.C. § 230(c)(2)(A); *see also Fyk*, 808 Fed. App'x at 598.

239. *See, e.g., Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003) (providing an example of plaintiffs filing a breach of contract action against AOL for allegedly allowing subscribers to post defamatory information about the plaintiff).

240. *See, e.g., Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 780–81 (Cal. Ct. App. 2001) (rejecting the argument that section 230 immunity is limited to tort claims and holding that the immunity extends to a taxpayer's action for declaratory and injunctive relief); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Green*, 318 F.3d at 471; *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 539 (E.D. Va. 2003).

241. *See, e.g., Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820–21 (Tex. 1995) (stressing that a certain cause of action might escape preemption while a particular claim may not, since a cause of action's name is irrelevant).

242. 274 Cal. Rptr. 3d 360 (Cal. Ct. App. 2021).

243. 31 P.3d 37 (Wash. Ct. App. 2001).

244. *Murphy*, 274 Cal. Rptr. 3d at 367, 369, 375 (declaring that section 230 barred the user's breach of contract); *Schneider*, 31 P.3d at 41–42 (declaring that section 230 barred the author's breach of contract action against Amazon, for allegedly failing to remove negative reviews about the author's book).

against Facebook.²⁴⁵ Why is this split problematic? The substance of the Amazon, Facebook and Twitter contract-based claims were identical. Even more importantly, the Supreme Courts of California, New Hampshire and Washington have embraced the same common law principles of contract.²⁴⁶ Yet, these latter courts examined the same claims and delivered conflicting section 230 preemption-immunity rulings. In addition, the same breach-of-contract claim has produced a preemption-immunity conflict between the Courts of Appeals for the Third and District of Columbia Circuits.²⁴⁷

As stated earlier, breach-of-promise or promissory estoppel claims have also generated conflicting section 230 rulings.²⁴⁸ For instance, in *Barnes v. Yahoo!, Inc.*,²⁴⁹ Cecilia Barnes terminated a lengthy relationship with her boyfriend.²⁵⁰ In response, he fashioned and posted an unauthorized “Barnes profile page” on Yahoo’s website, which contained implicit “sexual solicitations.” Barnes instructed Yahoo’s agent to delete the page. The agent promised that she would share the controversial statements with the appropriate

245. *Teatotaler, LLC v. Facebook, Inc.*, 242 A.3d, 814, 819 (N.H. 2020) (concluding that the allegations were sufficient to state a breach of contract claim, and section 230(c)(1) did bar the action).
246. *See* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988) (reaffirming long-settled contract principles); *In re Town of Bedford*, 142 N.H. 637, 640 (1998) (reaffirming that courts must apply traditional principles of contract interpretation to determine contracting parties’ intention); *Bennett Veneer Factors, Inc. v. Brewer*, 441 P.2d 128, 132 (Wash. 1968) (applying general contract principles).
247. *Compare* *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (concluding that section 230(C)(1) barred plaintiff’s action in part after refusing to “transform” the plaintiff’s tort claim into a breach of contract claim), *with* *Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003) (concluding that AOL did not waive a section 230 immunity defense and deciding that the plaintiff failed to state viable breach of contract claim against AOL for its allegedly failing to delete other subscribers’ defamatory chat-room statements); *Compare Klayman*, 753 F.3d at 1354, *with* *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1061, 1064–66 (N.D. Cal. 2016) (dismissing a breach of contract claim under section 230), *and* *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1199, 1201 (N.D. Cal. 2009) (dismissing a breach of contract claim alleging that Google’s search engine did not comport with the terms of use agreement), *and* *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119–20 (N.D. Cal. 2020) (concluding that section 230(c)(1) precluded plaintiffs’ breach of contract action).
248. *See, e.g., Promissory Estoppel*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise.”); *Sun-Pac. Enters., Inc. v. Girardot*, 553 S.E.2d 638, 642 (Ga. Ct. App. 2001).
249. 570 F.3d 1096 (9th Cir. 2009).
250. *Id.* at 1098.

managers, who would take care of the matter.²⁵¹ Purportedly, Barnes relied on the express promise. The offensive profile, however, was not deleted immediately.²⁵²

Therefore, approximately two months later, Barnes filed a breach-of-promise action against Yahoo.²⁵³ The platform owner raised a section 230 immunity defense. The Ninth Circuit rejected the defense, declaring that section 230(c)(1) did not bar Barnes's promissory estoppel claim.²⁵⁴ In *Obado v. Magedson*²⁵⁵ and *Herrick v. Grindr*,²⁵⁶ the Third Circuit's and the Southern District of New York's respective rulings mirror the Ninth Circuit's decision in *Barnes*.²⁵⁷ Conversely, in *King v. Facebook, Inc.*,²⁵⁸ *Brittain v. Twitter, Inc.*,²⁵⁹ and *Murphy v. Twitter, Inc.*,²⁶⁰ the federal and state courts refused to embrace the Ninth Circuit's ruling. Instead, those tribunals accepted Facebook's and Twitter's arguments and declared that section 230(c)(1) blocked the users' promissory-estoppel lawsuits.²⁶¹

Perhaps, the most bewildering and incompatible section 230 decisions have arisen when content creators sued the *same* social media provider in the *same court* and raised the *same theory of recovery*. To illustrate, in *Lancaster v. Alphabet Inc.*,²⁶² *Darnaa, LLC v. Google, Inc.*,²⁶³ and *Enhanced Athlete*

251. *Id.* at 1099.

252. *Id.*

253. *Id.*

254. *Id.* at 1109.

255. 612 F. App'x 90 (3d Cir. 2015).

256. 306 F. Supp. 3d 579 (S.D.N.Y. 2018).

257. *See Obado*, 612 F. App'x at 94 (affirming the district court's dismissal of plaintiff's promissory estoppel claim on the merits after finding that the CDA barred other claims); *Herrick*, 306 F. Supp. 3d at 595 n.13 (addressing the merits of the plaintiff's promissory estoppel claim because the plaintiff alleged that Grindr was liable for its own content).

258. 2019 WL 4221768 (N.D. Cal. Sept. 5, 2019).

259. 2019 WL 2423375 (N.D. Cal. June 10, 2019).

260. 274 Cal. Rptr. 3d 360 (Cal. Ct. App. 2021).

261. *King*, 2019 WL 4221768, at *1, *3–5 n.1 (dismissing the user's promissory estoppel action under section 230(c)(1) after Facebook removed the user's posts, suspended his account, and allegedly discriminated against the user and other "black activists"); *Brittain*, 2019 WL 2423375, at *3–4 (dismissing the user's promissory estoppel action under section 230(c)(1) after Twitter allegedly suspended the user's four accounts); *Murphy*, 274 Cal. Rptr. 3d at 363, 380 (declaring that section 230 barred the user's promissory estoppel action).

262. 2016 WL 3648608 (N.D. Cal. July 8, 2016).

263. 2016 WL 6540452 (N.D. Cal. Nov. 2, 2016).

Inc. v. Google LLC,²⁶⁴ disgruntled content creators sued Google and its parent—Alphabet, Inc. The actions were filed in the Northern District of California and, in each complaint, the creators alleged that Google breached the implied covenant of good faith and fair dealing by irrationally deleting or interfering with the creators’ videos on YouTube.²⁶⁵ In *Darnaa* and *Enhanced Athlete*, the federal district court in San Jose declared that sections 230(c)(1) and 230(c)(2) did not bar the creators’ lawsuit.²⁶⁶ However, in *Lancaster*, as well as in *Federal Agency of News LLC, v. Facebook, Inc.*,²⁶⁷ the same San Jose court declared that section 230(c)(1) blocked the creators’ lawsuits based on the implied covenants of good faith and fair dealing.²⁶⁸

In light of these findings, an important question arises: Why do courts issue such conflicting preemption rulings when deciding whether content providers may litigate contract-based claims on the merits? Part VI presents empirically based and extralegal explanations. But, consider a plausible legal explanation. *Some* courts’ apply a questionable syllogism; it begins with the premise that under the CDA § 230(c)(1), social media entities are “interactive computer service” providers.²⁶⁹ Section 230(c)(2) gives service providers a *statutory right* to block and screen offensive material.²⁷⁰ Providers’ standardized “Terms of Services” contracts incorporate the statutory right to delete and remove offense information.²⁷¹ Therefore, section 230(c)(1) gives services providers *absolute immunity against all contract-based lawsuits*.²⁷²

264. 479 F. Supp. 3d 824 (N.D. Cal. 2020).

265. See *Lancaster*, 2016 WL 3648608, at *5; *Darnaa*, 2016 WL 6540452, at *1, *8; *Enhanced Athlete Inc.*, 479 F. Supp. 3d, at 830–31.

266. See *Darnaa*, 2016 WL 6540452, at *1, *8 (deciding that section 230(c)(1) did not preclude the implied covenant of good faith and fair dealing claim after Google removed plaintiff’s music videos from YouTube); *Enhanced Athlete*, 479 F. Supp. 3d at 830–31 (declaring that section 230(c)(1) and section 230(c)(2) did not bar plaintiff’s breach of implied covenant of good faith and fair dealing claim after Google removed plaintiff’s videos on YouTube and terminate its accounts).

267. 432 F. Supp. 3d 1107 (N.D. Cal. 2020).

268. See *Lancaster*, 2016 WL 3648608, at *5 (dismissing the breach of covenant of good faith and fair dealing claim, after Alphabet Inc., Google Inc., and YouTube allegedly harassed the user by hacking and intercepting her electronic communications); *Fed. Agency of News*, 432 F. Supp. 3d at 1119–20 (concluding that section 230(c)(1) precluded plaintiffs’ breach of an implied covenant of good faith and fair dealing claim).

269. 47 U.S.C. § 230(c)(1); see e.g., *Lancaster*, 2016 WL 3648608, at *5.

270. 47 U.S.C. § 230(c)(2).

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

272. See e.g., *Lancaster*, 2016 WL 3648608, at *5 (stressing that the CDA section 230(c)(1) precludes any claim that attempts to impose liability on service providers] for removing videos from [YouTube or other social media platforms”]);

However, assume that section 230(c)(1) expressly or impliedly gives social media companies *absolute* immunity against contract-based claims. Still, the reasoning is arguably faulty considering the broadly accepted rule that section 230(c)(1) immunizes platform providers against only secondary-liability actions.²⁷³ Contract-based actions, however, are quintessential first-party, direct- or primary-liability actions.²⁷⁴

V. COMPETING CONGRESSIONAL BILLS TO ABOLISH OR AMEND SAFE-HARBOR DEFENSES AND BOOST RIGHTS-PRESERVATION REMEDIES UNDER THE COMMUNICATIONS DECENCY ACT

As stated earlier, within as well as beyond the United States, there are widely shared beliefs: (1) social media must be “sanitized”;²⁷⁵ (2) social me-

Zeran, 129 F.3d at 330 (“[L]awsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”); *see also* *Storek & Storek, Inc. v. Citicorp Real Est., Inc.*, 122 Cal. Rptr. 2d 267, 277 (Cal. Ct. App. 2002) (“[I]f defendants were given the right to do what they did by the express provisions of the contract, there can be no breach.”).

273. *See, e.g.*, *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021) (reaffirming the *Barnes* test and stressing that section 230(c)(1) “cuts off liability only when” plaintiffs allege that service providers are secondarily liable for third parties’ offensive information) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009)); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 984–85 (10th Cir. 2000) (reaffirming that section 230(c)(1) provides immunity for civil causes of action based on “information originating with a third party”); *Callahan v. Ancestry.com, Inc.*, No. 20-cv-08437-LB, 2021 WL 2433893, *6 (N.D. Cal. June 15, 2021) (observing that under Section 230(c)(1), service providers are immune only against third-party claims).
274. *Cf. Hill v. Metro. Dev. & Hous. Agency*, No. 01A-01-9109-CH-0034, 90-3615-III, 1992 WL 41709, at *2 (Tenn. Ct. App. Mar. 6, 1992) (concluding that the proper remedy for the plaintiff would be “a direct action for breach of contract”); *United States ex rel. Ryan v. Staten Island Univ. Hosp.*, No. 04-CV-2483(JG)(CLP), 2011 WL 1841795, at *8 n.7 (E.D.N.Y. May 13, 2011) (declaring that party may commence a primary-liability, breach-of-contract action to secure an indemnification award).
275. *See Hill, supra* note 23 (reporting that the EU recently proposed the Digital Services Act and Digital Markets Act, which will not address the extreme toxicity of the digital media platforms); John Owen Nwachukwu, *FG Exposes Those Behind Fake News, Issues Strong Warning*, *DAILY POST* (Feb. 20, 2020), <https://dailypost.ng/2020/02/20/fg-exposes-those-behind-fake-news-issues-strong-warning/> [<https://perma.cc/55MN-8XGQ>] (reporting that the Nigerian government believes “fake news, misinformation and hate speech [are] weapons of choice . . . to create tension in the polity and destabilize the country,” and that Nigeria will implement new “communication regulations” to sanitize social media by monitoring Google, Whatsapp, Twitter, and Facebook); Col-

dia platforms encourage users to post “filthy,” “dangerously toxic,” “highly polluted,” and “politically corrosive” information;²⁷⁶ and (3) social media owners are “politically biased.”²⁷⁷ Some African, Asian, and European governments have introduced or implemented controversial regulations, which are designed to “sanitize social media.”²⁷⁸ Similarly, as of this writing, Senate and House members are considering numerous bills that would force tech companies to “sanitize” their social media platforms.²⁷⁹

A few bills would abolish the Communications Decency Act.²⁸⁰ However, the majority would only amend or clarify certain provisions.²⁸¹ For ex-

leen Wood, *In Central Asia, Politics By Way of Social Media*, THE DIPLOMAT (Feb. 22, 2019), <https://thediplomat.com/2019/02/in-central-asia-politics-by-way-of-social-media/> [<https://perma.cc/96LH-XENW>] (“Kazakh authorities have attempted to sanitize social media as a potential source of discontent and organizing . . . [by creating government-sponsored content]”); Traci Tong, *Hong Kong Has Grabbed Headlines Around the World—Except in Beijing*, THE WORLD (Sept. 29, 2014), <https://www.pri.org/stories/2014-09-29/hong-kong-has-grabbed-headlines-around-world-except-beijing> [<https://perma.cc/34SD-7JS>] (reporting that the Chinese government decided to sanitize social media by blocking users’ access to Instagram and censoring “pro-democracy” content on its Internet and social media sites).

276. See Hill, *supra* note 23; Nwachukwu, *supra* note 275; Wood, *supra* note 275; Tong, *supra* note 275.

277. See Hill, *supra* note 23; Nwachukwu, *supra* note 275; Wood, *supra* note 275; Tong, *supra* note 275.

278. See Hill, *supra* note 23; Nwachukwu, *supra* note 275; Wood, *supra* note 275; Tong, *supra* note 275.

279. See generally Jeevanjee et al., *supra* note 57 (reporting that a flurry of bills were introduced in Congress between 2020 and 2021 and disclosing that the Tech, Law, & Security Program at the American University-Washington College of Law and at Duke University’s Center on Science & Technology Policy are partnering to track all proposed section 230 legislation).

280. *Id.*; see also Theodore Claypoole, *Should CDA Section 230 Be Changed?*, WOMBLE BOND DICKINSON (Jan. 27, 2021), <https://www.jdsupra.com/legalnews/should-cda-section-230-be-changed-9506849/> § 230 [<https://perma.cc/6W9T-HVC8>] (“Both US political parties—when evincing concern about the size and power of digital social media companies—claim that [CDA’s protections against] lawsuits should be abolished. Both Presidents Biden and Trump have advocated for its revocation. Some see this as a simple way to punish Facebook, Google and Twitter for specific disfavored behavior.”); Reed & Steyer, *supra* note 20 (“Washington would be *better off throwing out* Section 230 and starting over.” (emphasis added)).

281. See generally Jeevanjee et al., *supra* note 57 (disclosing that various bills would (1) repeal section 230; (2) limit the scope of safe-harbor immunity; (3) modify the current safe-harbor protections by imposing “new” duty-of-care or quid-pro-quo obligation; and (4) adding a right-preservation clause to protect civil rights and political speech.).

ample, the proposed Curbing Abuse and Saving Expression in Technology (CASE-IT) Act²⁸² would add a *rights-preservation or private-rights-of-action* exemption. If enacted, the exemption would allow users to commence civil action against “dominant companies whose content-moderation policies are inconsistent with the First Amendment.”²⁸³ Even more titillating, a widely discussed suggestion would add a broad *rights-preservation* exemption to the CDA²⁸⁴—like the *private-rights-of-action exemption* in the CERCLA.²⁸⁵ Still, another extensively discussed proposal would add a *hybrid* rights-preservation and safe-harbor clause to the CDA—like the savings clause in the Federal Arbitration Act.²⁸⁶

282. *See id.* (Republican representatives sponsored and introduced the Curbing Abuse and Saving Expression in Technology (CASE-IT) Act on October 30, 2020. The bill was referred to the House Committee on Energy and Commerce.).

283. *Id.*

284. *Cf.* Nicole Karlis, *Senator Amy Klobuchar: Social Media Sites Should Be Fined If They Can’t Discard Bots*, SALON (Feb. 26, 2018), <https://www.salon.com/2018/02/26/senator-amy-klobuchar-social-media-sites-should-be-fined-if-they-cannot-discard-bots/> [<https://perma.cc/2GW8-XVFT>] (reporting that the senator espouses a retributive punishment system for social-media companies which is akin to what industrial companies face when they dump toxic waste and create a “Superfund site”); Lisa H. Macpherson, *Addressing Information Pollution with a “Superfund for the Internet”*, INFO. SOC’Y PROJECT, YALE L. SCHOOL (Mar. 2, 2021), <https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/addressing-information-pollution-superfund-internet> [<https://perma.cc/L3SE-WMLU>] (arguing that platforms are toxic and similar to the “toxic chemicals that industrial companies dumped into fresh water,” encouraging Congress to establish a “superfund for toxic social media, waste sites,” like the Environmental Protection Agency’s 1980 Superfund); McNamee, *supra* note 21 (“Facebook, Google and Twitter aided the insurrection at the U.S. Capitol and . . . amplify hate speech, disinformation and conspiracy theories. . . . Beginning in 1960, Congress passed a series of laws to address air pollution, water pollution, [and] environmental remediation. . . . The culture and business model of some Internet platforms pose a clear and present danger to . . . public health and our democracy. We must reform this industry to protect ourselves[.]”).

285. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675).

286. *See* Mark MacCarthy, *A Dispute Resolution Program for Social Media Companies*, BROOKINGS (Oct. 9, 2020), <https://www.brookings.edu/research/a-dispute-resolution-program-for-social-media-companies/> [<https://perma.cc/6AKA-PM3X>] (“New ideas for digital governance are most urgent [to address] the information disorder within the social medial industry [as well as] hate speech and disinformation . . . on the largest platforms. . . . Congress should establish a non-governmental industry-public authority under the supervision of a federal regulatory commission to provide affordable and efficient arbitration and medi-

Once more, Congress enacted the CERCLA and other federal environmental-protection laws to help cleanup highly polluted and dangerous environments.²⁸⁷ Therefore, the CERCLA's rights-preservation exemption allows aggrieved persons to sue polluting industries.²⁸⁸ Also, under certain conditions, the FAA's savings provision allows complainants to seek certain contract- and tort-based remedies in a court of law rather than in an arbitral proceeding.²⁸⁹

ation services to social media companies to satisfy this obligation for independent review."); Rogers, *supra* note 24 ("[H]ere is a modest proposal to . . . redress false, wrongful or defamatory speech—without centering any censorship power within social media company . . . and without repealing Section 230. . . . [Congress could create] a special fast-track arbitration system for social media [speech-related disputes.]").

287. See generally Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Review of 2007–2008 Insurance Decisions*, 41 TEX. TECH L. REV. 1013, 1069–74 nn.570–630 (2009) [hereinafter Rice, *2007–2008 Insurance Decisions*] (discussing toxic pollution, the CERCLA's history, and Super-Funds claims from an insurance-defense perspective); Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Selective Review and Analysis of the Panels' 2010–2011 Insurance-Law Opinions*, 44 TEX. TECH L. REV. 733, 795–812 nn.583–748 (2012) [hereinafter Rice, *2010–2011 Insurance Law Opinions*] (discussing toxic-pollution and CERCLA Super-Funds claims from an insurance-defense perspective).
288. Rice, *2007–2008 Insurance Decisions*, *supra* note 287; Rice, *2010–2011 Insurance Law Opinions*, *supra* note 287.
289. See generally Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act—1941–1993*, 43 CATH. U. L. REV. 399, 431–35 nn.147–168 (1994) [hereinafter Rice, *McCarran-Ferguson Act*] (presenting numerous decisions and explaining the interplay between the FAA and the McCarran-Ferguson Act); Willy E. Rice, *Courts Gone "Irrationally Biased" in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Application Forms and Marginalizing Consumer-Protection, Antidiscrimination, and States' Contract Laws: A 1925–2014 Legal and Empirical Analysis*, 6 WM. & MARY BUS. L. REV. 405, 483–93 nn.568–600 (2015) [hereinafter Rice, *Irrationally Biased*] (discussing the FAA's savings clause and presenting empirical and statistical arguments against enforcing mandatory-arbitration clauses); Willy E. Rice, *Unconscionable Judicial Disdain For Unsophisticated Consumers And Employees' Contractual Rights?—Legal And Empirical Analyses of Courts' Mandatory Arbitration Rulings And The Systematic Erosion of Procedural And Substantive Unconscionability Defenses Under The Federal Arbitration Act, 1800–2015*, 25 B.U. PUB. INT'L L.J. 143, 148–54 nn.27–49 (2016) [hereinafter Rice, *Unconscionable Judicial Disdain*] (discussing the FAA's savings clause and outlining legal, historical and empirical arguments against enforcing mandatory-arbitration clauses).

Thus, reconsider the question: Would adding a CERCLA-like rights-preservation exemption to the CDA actually enhance disgruntled users' ability to sue large social media companies? And if so, would state or federal courts be more or less likely to compel Google, YouTube, Facebook and Amazon to remove allegedly toxic, polluted and politically biased content from their platforms? Would adding an FAA-like rights-preservation exemption actually enhance dissatisfied content providers' ability to circumvent Google's, Facebook's or Amazon's federal preemption-defenses and litigate *all types* of common-law and statutory claims in state and federal courts? Alternatively, would a hybrid FAA-like *safe-harbor and rights-preservation* clause just force discontented content creators to circumvent an FAA-preemption defense rather than a CDA-preemption defense? In the next section, the legal analyses and empirical findings will provide some plausible answers to these timely questions.

VI. AN EMPIRICAL STUDY—THE EFFECTS OF EXTRAJUDICIAL AND LEGAL FACTORS ON THE DISPOSITIONS OF SOCIAL-MEDIA, SAFE-HARBOR AND RIGHTS-PRESERVATION DISPUTES IN STATE AND FEDERAL COURTS

To repeat an earlier observation, “progressive” as well as “conservative” content creators strongly dislike and criticize the section 230 immunity defense.²⁹⁰ Therefore, responding to constituents' concerns, Republicans and Democrats have introduced various bills.²⁹¹ But, a central question has emerged: whether Congress' adding an unambiguous rights-preservation exemption and weakening the current safe-harbor defense would actually increase social media plaintiffs' ability to litigate or arbitrate various legal claims on the merits.

Usually, when deciding any federal preemption dispute, two principles guide federal and state courts' inquiries: (1) a case-by-case analysis must be employed to determine whether plaintiffs may defeat a preemption defense,²⁹² and (2) a factual analysis— involving a thorough examination of probative facts and legal claims—must occur rather than a reflexive applica-

290. See generally Jeevanjee et al., *supra* note 57.

291. See generally *id.*

292. See, e.g., *Backpage.com, LLC v. Hawley*, No. 4:17-CV-1951 PLC, 2017 WL 5726868, at *11 (E.D. Mo. Nov. 28, 2017) (stressing that a court must consider disputed facts as well as conduct a factual inquiry and detailed legal analysis when determining whether the CDA preempts state-law claims); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 562 (N.C. Ct. App. 2012) (concluding that none of the trial court's factual analysis precluded the online seller's immunity under the CDA section 230). See also *In re Bentz Metal Prods. Co.*, 253 F.3d 283, 285 (7th Cir. 2001) (stressing that whether a federal statute preempts a state law claim requires a “case-by-case factual analysis.”); *Blair v. Medtronic, Inc.*, No. 3:15-cv-01678-SC, 2015 WL 5728050, at *3 (N.D. Cal. Sept. 20, 2015)

tion of rules.²⁹³ These principles, however, have generated another question: What types of information would qualify as probative or relevant facts? Stated simply, courts have not fashioned or adopted a clearly defined or universal standard.

Nevertheless, a rather large cluster of randomly selected CDA section 230 decisions suggests some of the most “*relevant or probative facts*” appear under the following labels: types of social media plaintiffs, types of social media defendants, social media litigants’ geographic locations, social media complainants’ underlying common law and statutory causes of action, and social media defendants’ affirmative defenses.²⁹⁴ Therefore, the author decided to conduct a study of courts’ CDA section 230 decisions in light of the substantially heated and political debate over whether Congress should abolish, amend, or restrict the CDA’s immunity defense. Perhaps, federal and state courts’ analyses and conclusions can provide some meaningful “judicial guidance” as Congress weighs numerous CDA-reform bills.

A. Data Sources, Sampling Procedures, and Background Attributes of Social Media and Other Relevant Litigants

Following standard research methodologies, the Author crafted a null hypothesis: no statistically significant difference exists between social media owners’ and dissatisfied content creators’ likelihood of winning federal-preemption disputes in state and federal courts. An alternate hypothesis states:

(reaffirming that even a preliminary review of preemption disputes requires a close factual analysis to determine whether federal law preempts the claims).

293. See, e.g., *Hawley*, 2017 WL 5726868, at *11; *Hill*, 727 S.E.2d at 562; see also *In re Bentz Metal Prods. Co.*, 253 F.3d at 285; *Blair*, 2015 WL 5728050, at *3.

294. Cf. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (reaffirming that defendant must establish *three factors* in order to secure immunity under the CDA section 230: (1) Defendant is a *provider* or *user* of an interactive computer service; (2) defendant is a *publisher* or *speaker* of information in the *underlying cause of action*; and (3) a third-party creator provided the controversial information); *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 388–89 (Cal. Ct. App. 2006) (same); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (examining “*particular facts*” to determine whether *Roommates* qualified as a “content provider” and concluding that the company was not immunized from liability (emphasis added)); *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 322 (D.N.J. 2015) (“The salient issues . . . are whether [d]efendant is *immune from liability* under the Communications Decency Act, 47 U.S.C. § 230 . . . and whether [p]laintiff has otherwise pled *sufficient facts to state claims for negligence*” (emphasis added)); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011) (examining “*particular facts*” to determine whether Facebook qualified as an “information content provider” and, thus, exposed to liability (emphasis added)).

“*case-specific facts*” or “*extralegal factors*”²⁹⁵ are more likely to explain any statistically significant difference between tech companies’ and various social media complainants’ likelihood of prevailing in federal-preemption trials.

To secure a sample of section 230 preemption cases, the Author crafted two simple queries: (1) communications decency act and (2) communications decency act and immunity. The queries were executed on Lexis-Nexis, Thomson-Westlaw, and Google-Scholar platforms. The goal was to uncover every reported and unreported decision involving the Communications Decency Act. Ultimately, the searches generated 215 “on-point” decisions.²⁹⁶

There is more. For nearly three decades, the Author has sampled, analyzed, and coded hundreds of judicial decisions involving insurance-law, class-action, and consumer-protection quarrels.²⁹⁷ Several articles have been published.²⁹⁸ A happenstance review of numerous variables in the Author’s database uncover a well-defined federal preemption variable, which is associated with every judicial decision. A search retrieved two groups of CER-

295. See, e.g., *Recent Publications*, 124 HARV. L. REV. 1343, 1344 (2011) (emphasis added) (reviewing and reporting an author’s empirical findings: “[The author employs] an expertise in political science and a robust understanding of legal analysis to illuminate the impact [of extrajudicial factors on the decision in a case. . . . [The author] sketches a divided federal court system where . . . [appellate courts are] more sympathetic to the facts of a case than the policy-driven Supreme Court.”).

296. On Westlaw, the restricted query—SY(“communications decency act”)—retrieved a list of 202 “on-point” cases. Later searches of Lexis-Nexis and Google-Scholar produced thirteen additional cases (last visited Jan. 14, 2021).

297. See Rice, *McCarran-Ferguson Act*, *supra* note 289, at 399, 431–35 nn.147–68 (presenting numerous decisions and explaining the interplay between the FAA and the McCarran-Ferguson Act); Rice, *Irrationally Biased*, *supra* note 289, at 405, 483–93 nn.568–600 (discussing the FAA’s savings clause and presenting empirical and statistical arguments against enforcing mandatory arbitration clauses); Rice, *Unconscionable Judicial Disdain*, *supra* note 289, at 143, 148–54 nn.27–49 (discussing the FAA’s savings clause and outlining legal, historical and empirical arguments against enforcing mandatory-arbitration clauses); Rice, *2007–2008 Insurance Decisions*, *supra* note 287, at 1013, 1069–74 nn.570–630 (discussing toxic-pollution and CERCLA Super-Funds claims from an insurance-defense perspective); Rice, *2010–2011 Insurance Law Opinions*, *supra* note 287, at 733, 795–812 nn.583–748 (discussing toxic-pollution and CERCLA Super-Funds claims from an insurance-defense perspective).

298. See Rice, *McCarran-Ferguson Act*, *supra* note 289, at 399, 431–35 nn.147–68; Rice, *Irrationally Biased*, *supra* note 289, at 405, 483–93 nn.568–600; Rice, *Unconscionable Judicial Disdain*, *supra* note 289, at 143, 148–54 nn.27–49; Rice, *2007–2008 Insurance Decisions*, *supra* note 287, at 1013, 1069–74 nn.570–630; Rice, *2010–2011 Insurance Law Opinions*, *supra* note 287, at 733, 795–812 nn.583–748.

CLA and FAA preemption cases—584 and 240, respectively. These latter cases are also included in the present study. Therefore, the sample size is $N=1,039$.²⁹⁹ Perhaps, comparing courts' dispositions of "observed" or known CDA, FAA, and CERCLA preemption quarrels will help answer the question of whether Congress should abolish the CDA's current safe-harbor provision and add FAA- and CERCLA-equivalent rights-preservation exemptions to the CDA.

The Author also applied another widely used methodology to analyze the content or information in each reported case.³⁰⁰ Multiple binary (0,1) or "dummy"³⁰¹ variables were created. Ultimately, the binary data were inserted into a large matrix. Various statistical procedures were applied to analyze the data and, the results are displayed below in four tables.

B. Federal Preemption Disputes and the Characteristics of Social Media and Other Litigants in State and Federal Courts

Table 1 presents several clusters of information about content creators, users and third parties who filed lawsuits against social media providers and other defendants in state and federal courts. The categories are: *types of federal preemption statutes, courts' geographic locations, types of social media and other plaintiffs, types of social media and other defendants, social media and other plaintiffs' underlying theories of recovery, types of safe-harbor and rights-preservation defenses, and the dispositions of disputes.*

First, *federal* rather than *state* courts are more likely to resolve litigants' CDA-related disagreements. The statistically significant percentages are

299. The 1039 cases' names and citations cannot be included here. Briefly, the footnote would be exceedingly and prohibitively long, exceeding 6000 words. However, a large Excel database of the sampled cases, citations and multiple Stata-Program working files—containing procedures, tables, and statistics—are stored at the Author's location and/or with this law journal's office.

300. See generally Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 77, 88, 90–91 nn.58, 103, 111–12 (2008) (presenting a history and description of Professor Rice's published content and statistical analyses of common-law and statutory questions of law); Daniel T. Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L.J. 1990, 2010–13 (2013) (embracing and discussing content analysis); Robert E. Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 PUB. OPINION Q. 230, 237 (1967).

301. Briefly, each subcategory is an independent binary (0, 1) or "dummy" variable. See Claudia M. Landeo & Kathryn E. Spier, *Irreconcilable Differences: Judicial Resolution of Business Deadlock*, 81 U. CHI. L. REV. 203, 223 n.54 (2014) (discussing probit analysis and the construction of binary (0,1) or "dummy variables"); WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 116–18 (5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis).

58.6% and 41.4%, respectively. In addition, *parents* and *relatives* as well as *professional* and *governmental entities* are more likely to settle social media and other disputes in state courts.

“Undisputed, Specific and Relevant” Facts or Predictors	State Courts (N = 502)	Federal Courts (N = 537)	(N = 1039)
FEDERAL PREEMPTION STATUTES:			
Communications Decency Act	41.4	58.6 *	(N = 215)
Federal Arbitration Act	48.8	51.2	(N = 584)
CERCLA	53.3 *	46.7	(N = 240)
COURTS’ GEOGRAPHIC LOCATIONS:			
East	33.5	66.5 ***	(N = 245)
Midwest	53.0	47.0	(N = 234)
South	57.0 ***	43.0	(N = 206)
Southwest	41.0	59.0 ***	(N = 81)
West	53.5	46.5	(N = 273)
SOCIAL-MEDIA & OTHER PLAINTIFFS:			
Parents & Relatives	68.4 *	31.6	(N = 19)
Minor Children	50.0	50.0	(N = 24)
Professionals	55.0 *	45.0	(N = 102)
Government Entities	52.5	47.5	(N = 236)
Businesses Entities & Others	45.1	54.9 *	(N = 658)
SOCIAL-MEDIA & OTHER DEFENDANTS:			
Social-Media Internet Providers	36.6	63.4 *	(N = 101)
Social-Media Content Creators	52.5 *	47.5	(N = 114)
Other Business & Corporate Entities	50.0	50.0 *	(N = 824)
SOCIAL MEDIA & OTHER PLAINTIFFS’ UNDERLYING THEORIES OF RECOVERY			
Intentional-Tort Actions	49.0	51.0	(N = 196)
Negligence-Based Actions	44.4	55.6	(N = 412)
Contract-Based Actions	51.7	48.3	(N = 431)
SAFE-HARBOR & RIGHTS SAVINGS DEFENSES:			
CDA-Safe Harbor-Vicarious Liability	53.6	46.4	(N = 97)
FAA-Savings Clause-Unconscionability	60.0	40.0	(N = 215)
CERCLA-Saved Environmental State Rights	53.3	46.7	(N = 240)
DISPOSITIONS FROM PLAINTIFFS’ VIEWPOINT WITHOUT CONTROLS FOR OTHER FACTORS:			
Favorable Outcomes	65.5 ***	55.5	
Unfavorable Outcomes	34.5	44.5 ***	

Levels of statistical significance for the Chi Square test: *** $p \leq .0001$ ** $p \leq .001$ * $p \leq .05$

[†]Comprehensive Environmental Response, Compensation and Liability Act of 1980

[‡]There were only 552 cases in the database—which raised these “defenses” or “retorts.”

The corresponding percentages are 68.4%, 55.0% and 52.5%. Conversely, *social media* and *other business entities* are more likely (54.9%) to litigate in federal courts.

An even more interesting finding, however, appears under the heading “types of social media and other defendants.” Generally, platform providers are defendants. But, users and content providers can also be CDA defendants or co-defendants. Thus, Table 1 reveals that platform providers are more

likely (63.4%) to be defendants in federal courts. On the other hand, users and content creators are more likely (53.5%) to be defendants in state courts.

Two additional and highly probative³⁰² findings also appear in the table, although they are not statistically significant: almost equal percentages of *underlying tort and contract based causes of action* are filed in state and federal courts. Additionally, CDA, FAA, and CERCLA litigants are substantially more likely to raise safe-harbor and rights-preservation arguments in *state courts* than in *federal courts*. Respectively, the reported percentages are 53.6%, 60.0%, and 53.3%.

Finally, the last two rows in Table 1 present a statistically significant finding, which arguably arose from state and federal courts' weighing and applying other factors rather than foundational principles of law. Without controlling for any other legal or extralegal factor, plaintiffs—including social media complainants—are statistically and exceedingly more likely (65.5%) to prevail both procedurally and substantively in state courts. However, in federal courts, plaintiffs' likelihood of prevailing drops ten percent and defendants' probability rises. The percentages are 55.5% and 44.5%, respectively.

C. Bivariate Relationships Between Predictors and the Dispositions of Preemption Disputes Under the Communications Decency Act

Why are social media complainants more or less likely to win section 230 immunity quarrels, depending on the types of courts? To find a reasonably persuasive answer, consider Table 2 and the displayed bivariate relationships between various predictors and the dispositions of preemption disputes. First, review the two columns of percentages that appear under the heading "State Trial Courts' Disposition of Actions."

302. See *Probative Evidence*, BLACK'S LAW DICTIONARY 579 (7th ed.1999) (defining "probative evidence" as evidence that tends to prove or disprove a disputed issue).

PREDICTORS	Trial Courts' Disposition of Actions From the Perspectives of Social-Media Plaintiffs			Appellate Courts' Disposition of Actions From the Perspectives of Social-Media Plaintiffs		
	Favorable Percent	Unfavorable Percent	(N = 215) Number	Favorable Percent	Unfavorable Percent	(N = 145) Number
SOCIAL MEDIA PLAINTIFFS:						
Business & Corporate Entities	37.1	62.9	(N = 89)	44.7	55.3	(N = 47) ***
Professional Entities	27.1	72.9	(N = 85) **	23.5	76.5	(N = 68)
Governmental Entities	57.1	42.9	(N = 14)	77.8	22.2	(N = 9) ***
Minor Children	10.5	89.5	(N = 19) **	7.1	92.9	(N = 14)
Parents & Relatives	12.5	87.5	(N = 8)	71.4	28.6	(N = 7) ***
SOCIAL MEDIA DEFENDANTS:						
“Online Interactive Service Providers”	43.6	56.4	(N = 101)	52.5	47.5	(N = 59) ***
“Content Creators & Users”	20.2	79.8	(N = 114) ***	22.1	78.9	(N = 86)
PLAINTIFFS' UNDERLYING ACTIONS:						
Contract-Based Actions	30.8	69.2	(N = 13)	45.5	54.5	(N = 11)
Negligence-Based Actions	7.7	92.3	(N = 13)	60.0	40.0	(N = 10) **
Defamation/Libel	23.7	76.3	(N = 59) **	23.1	76.9	(N = 52) **
Conversion/Nuisance	38.9	61.1	(N = 18) **	9.1	90.9	(N = 11) **
Common-Law Bad Faith	19.2	80.8	(N = 26)	28.6	71.4	(N = 14)
False Advertisement	33.3	66.7	(N = 15) **	75.0	25.0	(N = 8) **
Copyright Infringement	53.3	46.7	(N = 15) **	28.6	71.4	(N = 7)
Deceptive Trade Practices	34.2	65.8	(N = 38)	42.9	57.1	(N = 21) **
Civil Rights Claims	55.6	44.4	(N = 18) **	45.4	54.6	(N = 11)
SAFE-HARBOR IMMUNITY DEFENSE:						
Provider Raised the Defense	30.0	70.0	(N = 97)	26.0	74.0	(N = 77) **
Defense Was Not Raised	32.2	67.8	(N = 118)	44.1	55.9	(N = 68) **
JURISDICTIONS:						
State Courts	30.3	69.7	(N = 89)	35.1	64.9	(N = 77) **
Federal Courts	31.7	68.3	(N = 126)	33.8	66.2	(N = 68) **

Levels of statistical significance for the Chi Square test: *** $p \leq .0001$ ** $p \leq .05$

The percentages indicate some key factors are statistically and significantly more likely to increase or decrease social media complainants' likelihood of winning a section 230 controversy. For example, *local and state governmental entities* are more likely to prevail (57.1%) against social media companies in *state trial courts* and *federal district courts*. On the other hand, aggrieveds are statistically and substantially less likely to win federal-preemption disputes when defendants are *interactive service providers* rather than *users or content providers*. The reported percentages are 79.8%, and 43.6%, respectively.

Table 2 also presents two arguably and highly irrational findings. First, *trial and district courts* are statistically and significantly more likely to *block* underlying social media lawsuits if the plaintiffs raise the following claims: breach of contract, negligence, defamation, conversion or nuisance, bad faith, false advertisement, and deceptive trade practices. The reported percentages range between 61.1% and 92.3%. However, a section 230 defense is statistically and significantly *less likely to preempt* users' and content creators' underlying *copyright-infringement* and *civil-rights* lawsuits. The respective percentages are 53.3% and 55.6%.

Now, review the two columns of percentages that appear under the heading "Appellate Courts' Disposition of Actions." Among the appealed CDA-preemption cases, the findings mirror some of those discussed above. For example, on appeal, *local and state governmental entities* as well as *parents and relatives* are statistically and substantially more likely to survive a section 230 preemption defense. The corresponding percentages are 77.8% and 71.4%. Also, before appellate courts, aggrieveds are statistically and substantially more likely to win preemption disputes when defendants are interactive service providers. However, aggrieveds are less likely to prevail when *users or content providers* are defendants. The percentages are 52.5% and 78.9%, respectively.

On appeal, are the effects of plaintiffs' underlying theories of recovery on the dispositions of CDA-preemption suits similar to those in trial and district courts? The answer is no. Courts of appeals are statistically and substantially less likely to preempt plaintiffs' negligence-based and false-advertisement lawsuits. The respective percentages are 60.0% and 75.6%. On the contrary, courts of appeals are more likely to *block* the following lawsuits: breach of contract, defamation, conversion or nuisance, bad-faith, copyright infringement, deceptive trade practices, and civil rights. These latter appellate-court percentages range between 54.5% and 90.9%.

Finally, Table 2 provides a more detailed presentation of an earlier finding. In both *lower and appellate courts*, social media providers rather than content providers are substantially more likely to prevail. The reported percentages range from 64.9% to 69.7%. In contrast, platform providers' likelihood of success decreases appreciably if they fail to raise a safe-harbor-immunity defense in courts of appeals. The percentages are 55.9% to 74.0%, respectively. Again, some reformers strongly suggest that the CDA's safe-

harbor defense should be abolished.³⁰³ Do the latter findings among appellate-court decisions fortify CDA reformers' argument? Should Congress completely repeal the CDA's safe harbor defense and replace it with a broad and user-friendly private-rights-of-actions exemption? The findings and analysis in the next section provide some plausible answers.

D. A Bivariate Analysis—The Relationship Between the Dispositions of Federal Preemption Disputes and Courts' Application of Safe-Harbor and Rights-Preservation Rules

To repeat, arguably extremely powerful and influential mainstream-media owners as well as affiliates of prestigious technology-and-law centers have presented a *serious* suggestion: Congress should weigh the rights-preservation and safe-harbor provisions in the FAA,³⁰⁴ as well as in CERCLA,³⁰⁵ and add substantially equivalent or mirror-image provisions to the CDA.³⁰⁶

Briefly, under the FAA's "savings clause," state and federal courts may not enforce mandatory-arbitration agreements if "grounds . . . exist at law or in equity for the revocation of any contract."³⁰⁷ Thus, in theory, a user or content provider may sue a platform provider in a court of law if an arbitration clause in a "Term of Use" agreement is procedurally or substantively unconscionable.³⁰⁸

Similarly, under CERCLA section 107, a private party may sue a "polluter" for environmental clean-up costs, if the latter improperly dispenses toxic or hazardous waste.³⁰⁹ Additionally, CERCLA section 310(a)(1) allows any person to commence a civil action against any person who allegedly violated "any standard, regulation, condition, requirement, or order" under the act.³¹⁰ And, CERCLA section 310 (c) gives a district court jurisdiction to enforce any standard, order corrective action, and impose civil penalties.³¹¹

Are the influential reformers' recommendations sensible or persuasive? Would simply adding a mirror image of the FAA's savings clause to the CDA statistically and significantly increase content providers' ability to liti-

303. See generally *supra* Part V and accompanying notes and text.

304. *Supra* Part V and accompanying notes and text.

305. *Supra* Part V and accompanying notes and text.

306. *Supra* Part V and accompanying notes and text.

307. 9 U.S.C. § 2.

308. See generally Rice, *Unconscionable Judicial Disdain*, *supra* note 289, at 163–76.

309. 42 U.S.C. § 9607(a)(4) ("[I]ndividuals are liable for . . . (A) all costs of removal or remedial action incurred by the United States Government or a State . . . [and] (B) any other necessary costs of response incurred by any other person.").

310. 42 U.S.C. § 9659(a)(1).

311. 42 U.S.C. § 9659(c).

gate social-media disagreements on the merits? Would adding a CERCLA-equivalent rights-preservation exemption to the CDA increase claimants' likelihood of litigating "toxic social media" disputes in state and federal courts?

PREDICTORS	State Trial Courts' Disposition of Actions From Plaintiffs' Perspectives			State Appellate Courts' Disposition of Actions From Plaintiffs' Perspectives		
	Favorable	Unfavorable	Number	Favorable	Unfavorable	Number
	Percent	Percent		Percent	Percent	
PLAINTIFFS' CAUSES OF ACTION:						
Intentional Torts	37.5	62.5	(N = 96)	38.0	62.0	(N = 87)
Negligence-Based	45.0	55.0	(N = 182) ***	45.7	54.3	(N = 164)
Contract-Based	58.7	41.3	(N = 223) ***	40.0	60.0	(N = 222)
SAVINGS & SAFE-HARBOR CLAUSES:						
CDA-Safe Harbor- <i>Vicarious Liability</i>	32.7	67.3	(N = 52)	29.8	70.2	(N = 47)
FAA-Savings Clause- <i>Unconscionability</i>	65.1	34.9	(N = 129) ***	41.9	58.1	(N = 129)
CERCLA-Saved <i>Environmental Rights</i>	35.4	64.6	(N = 127) ***	47.8	52.2	(N = 111)
PREDICTORS	Federal District Courts' Disposition of Actions From Plaintiffs' Perspectives			Federal Courts of Appeals' Disposition of Actions From Plaintiffs' Perspectives		
	Favorable	Unfavorable	Number	Favorable	Unfavorable	Number
	Percent	Percent		Percent	Percent	
PLAINTIFFS' CAUSES OF ACTION:						
Intentional Torts	32.0	68.0	(N = 100) **	17.7	82.3	(N = 62)
Negligence-Based	42.1	57.9	(N = 228)	42.5	57.5	(N = 160) **
Contract-Based	49.0	51.0	(N = 208) **	37.2	62.8	(N = 199) **
SAVINGS & SAFE-HARBOR CLAUSES:						
CDA-Safe Harbor- <i>Vicarious Liability</i>	26.7	73.3	(N = 45)	20.0	80.0	(N = 30)
FAA-Savings Clause- <i>Unconscionability</i>	52.3	47.7	(N = 86) **	33.7	66.7	(N = 83)
CERCLA-Saved <i>Environmental Rights</i>	39.3	60.7	(N = 112) **	25.0	75.0	(N = 60)
Levels of statistical significance for the Chi Square test: *** $p \leq .0001$ ** $p \leq .01$ * $p \leq .05$						

Consider the information in Table 3. Generally, the table displays the effects of two predictors—*types of causes of action* as well as *types of safe-harbor and rights-preservation* rules—on the dispositions of federal-preemption disputes. First, review the predictors and percentages that appear under the headings “State Trial Courts’ Disposition of Actions” and “Federal District Courts’ Disposition of Actions.” Briefly, in both *state and federal lower courts*, plaintiffs have *greater* and *almost equal* probabilities of circumventing a preemption defense only when they commence contract-based lawsuits. The respective percentages are 58.7% and 49.0%.

But, even more revealing and relevant, in *state and federal trial courts*, plaintiffs have a *greater* likelihood of winning preemption disputes *only if* they raise an *FAA-related rights-preservation* argument. The corresponding percentages are 65.1% and 52.3%. Contrarily, defendants have substantially large probabilities of prevailing when defendants raise a *CDA-safe-harbor defense*—67.3% and 73.3%, respectively— in *state and federal trial courts*. Additionally, defendants’ probabilities also increase substantially when plaintiffs advance a CERCLA rights-preservation argument in *state and federal trial courts*. The percentages are 64.6% and 60.7%, respectively.

Now, consider the two columns of percentages that appear under the headings “State Appellate Courts’ Disposition of Actions” and “Federal Courts of Appeals’ Disposition of Actions.” The results are clear. Without controlling for other factors, defendants are more likely to win federal-preemption quarrels in *appellate courts*. But, even more impressive, defendants are substantially more likely to prevail (1) if they raise a *CDA safe-harbor defense*, or (2) if plaintiffs advance an *FAA-rights-preservation* or a *CERCLA-rights-preservation* argument. The lopsided and pro-defendants percentages range between 52.2% and 80.0%.

In light of these simple bivariate statistics and findings, reconsider the questions: Would adding a *vigorous rights-preservation exemption* to the CDA force companies to “sanitize” social-media platforms by reducing users’ purportedly “toxic,” “defamatory,” and “digitally polluted” information? Would adding an unequivocal *private-right-of-action exemption* also help, say, sitting and former U.S. presidents³¹² to “sanitize” Facebook, Google and Twitter by terminating tech companies’ allegedly “politically biased” and “discriminatory moderation practices”? Without measuring the in-

312. See Cat Zakrzewski & Rachel Lerman, *Trump files class-action lawsuits targeting Facebook, Twitter, and Google’s YouTube over ‘censorship’ of conservatives*, WASH. POST (July 7, 2021 2:45, PM), <https://www.washingtonpost.com/technology/2021/07/07/trump-lawsuit-social-media/> (“Legal experts and business associations immediately criticized the claims, predicting they had little chance of succeeding in court. . . . The suits allege that the companies violated Trump’s First Amendment rights [by] suspending his accounts and . . . [asked] the court to strike down Section 230—a decades-old Internet law that protects tech companies from lawsuits over content moderation decisions. The suits seek unspecified punitive damages.”).

dependent, combined, and simultaneous influences of other variables on the outcomes of social-media-immunity disputes, the probable answer to each question is no.

E. A Two-Stage Probit Analysis of Multiple Factors' Effects on Federal and State Courts' Dispositions of Social-Media-Preemption Disputes

Earlier, we learned that several interrelated section 230 questions are producing judicial splits regarding: (1) whether platform owners are secondarily liable for actively and intentionally encouraging creators to post already-developed and illegal content on the entities' platform;³¹³ (2) whether tech companies are secondarily liable for intentionally encouraging content creators to develop "new" and illegal content;³¹⁴ and (3) whether social media providers are secondarily liable for modifying their platforms, which encourage or induce users to post offensive content.³¹⁵

313. *See Hill v. StubHub, Inc.*, 727 S.E.2d 550, 560 (N.C. Ct. App. 2012) (stressing that a website owner who encourages the publication of unlawful material does not expose the owner to legal action); *DiMeo v. Max*, 248 F. App'x 280, 281 (3d Cir. 2007) (affirming the lower court's holding that a website's owner who hosted allegedly defamatory material was entitled to section 230(c)(1) immunity); *S.C. v. Dirty World, LLC*, No. 11-CV-00392-DW, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2012) (holding that an entity's merely encouraging defamatory posts is insufficient to defeat CDA immunity); *Ascentive, LLC v. Opinion Corp.*, No. 10 Civ. 4433(ILG)(SMG), 2011 WL 6181452, at *20 (E.D.N.Y. Dec. 13, 2011) (concluding that the website did not lose immunity for encouraging consumers to post negative comments); *Glob. Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding that operator of consumer review website did not lose section 230(c)(1) immunity simply for encouraging third parties to post defamatory content).
314. *Compare FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (declaring that section 230 provided no immunity against secondary-liability lawsuit for a website operator who encourages the development of offensive content), *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164-65 (9th Cir. 2008) (same), and *Jones v. Dirty World Ent. Recordings, LLC (Jones III)*, 840 F. Supp. 2d 1008, 110-13 (E.D. Ky. 2012) (same), *with Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (concluding that a service provider was immune from liability after fashioning dating-service profiles, a questionnaire and encouraging posters to create all assertedly offensive content).
315. *Compare Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (holding that a website operator may be deprived of immunity if the operator "designs" its website to be a portal for defamatory material), *with M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (quoting *Goddard v. Google*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *1 (N.D. Cal. 2008)) (deciding that a website operator does lose its immunity merely because the

Most definitely, the Author encourages congressional members to weigh the previously discussed and significant bivariate statistical relationships, the judicial splits, and their implications before amending or repealing the CDA section 230. Still, it is important to remember a truism: statistically significant bivariate relationships do not prove, say, that certain predictor caused courts to issue split decisions. And, bivariate findings do not prove that courts are “irrationally biased” against, say, content creators or social media providers.”³¹⁶

As discussed in a different place, to increase the soundness, as well as the inferential value of an investigator’s research findings, two essential questions must be answered: (1) whether a sample of only reported judicial decisions accurately and completely describe state and federal courts’ propensity to accept or reject, say, defendants’ federal-preemption defense;³¹⁷ and (2) whether courts allow extralegal factors as well as probative facts and legal doctrines to determine the outcomes of procedural or substantive disputes.³¹⁸ Arguably, case-study results are more reliable and useful when investigators (1) test for “selectivity bias” in a sample of cases;³¹⁹ (2) use more

website’s construction and operation might encourage or influence offensive third-party postings).

316. Cf. *Truth versus Truisms*, ECONOMIST (Feb. 7, 2014), <https://www.economist.com/free-exchange/2014/02/07/truth-versus-truisms> [<https://perma.cc/G9ZL-ZAMH>] (agreeing that a comparison of the SP 500’s then-present returns to its full-year returns and the r-squared score were certainly *statistically significant*, yet stressing that the “aphorism” or bivariate relationship did not have any “*predictive power*” (emphasis added)).
317. See Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds’ Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts’ Declaratory Judgments 1900–1997*, 47 AM. U.L. REV. 1131, 1208–09 (1998) [hereinafter Rice, *Declaratory Judgments 1900–1997*] (explaining the inferential limitations associated with a researcher’s analyzing *reported* decisions and using only *simple percentages* to explain judicial outcomes and stressing that unreported decisions must be included in the statistical analysis); Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900–2000*, 35 TORT & INS. L.J. 995, 1088–89 nn.431–32 (2000) [hereinafter Rice, *Declaratory Judgments 1900–2000*].
318. Rice, *Declaratory Judgments 1900–1997*, *supra* note 317; Rice, *Declaratory Judgments 1900–2000*, *supra* note 317.
319. The computation of this statistical test and its relevance have been discussed elsewhere. See G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, 257–71, 278–83 (1983) (discussing “self-selectivity bias” and “other-selectivity bias”); Rice, *Unconscionable Judicial Disdain*, *supra* note 289, at 143, 229 n.560; Rice, *McCarran-Ferguson Act*, *supra* note 289, at 399, 445–49 nn.213–219.

“powerful” inferential statistics;³²⁰ and (3) measure the unique, combined, and simultaneous effects of multiple probative facts on the dispositions of disputes.³²¹

Why should a researcher tests for “selectivity bias” in sample data? As explained elsewhere,³²² some litigants accept lower courts’ adverse rulings and decide not to seek appellate review. Other litigants, however, refuse to accept trial or federal district courts’ unfavorable rulings and contest those decisions in state or federal appellate courts. Thus, a “selectivity bias” inquiry asks whether a difference exists between litigants who “*decide to appeal*” and those who “*decide not to appeal*.” And, if a statistically significant difference exists between the two groups, a researcher can reasonably conclude that unique characteristics— rather than various predictors—explain appellers’ likelihood of prevailing or losing in appellate courts.

Again, the present database comprises numerous “probative facts” about various types of litigants who appealed adverse federal-preemption decisions. The author, therefore, performed a multivariate, two-staged probit analysis.³²³ This statistical procedure tests for “selectivity bias” and determines the unique, shared, and simultaneous effects of several extralegal and legal factors on the outcomes of federal-preemption disputes in state and federal appellate courts.³²⁴

Table 4 presents the results of a multivariate-probit analysis, focusing primarily on the 909 *appellate* decisions in the sample.³²⁵ Five clusters of

320. See MADDALA, *supra* note 319.

321. See *id.*

322. The computation of this statistical test and its relevance have been discussed elsewhere. See MADDALA, *supra* note 319, at 257–71, 278–83 (discussing “self-selectivity bias” and “other-selectivity bias”); Rice, *Unconscionable Judicial Disdain*, *supra* note 289, at 143, 229 n.560; Rice, *McCarran-Ferguson Act*, *supra* note 289, at 445–49 nn.213–19.

323. In several published law journal articles, the author explains and applies probit analysis to uncover the exclusive, combined, and simultaneous effects of multiple factors on the dispositions of various insurance-law disputes in courts of appeals. See Rice, *Declaratory Judgments 1900–2000*, *supra* note 317, at 1088–94 nn.431–32; Rice, *Declaratory Judgments 1900–1997*, *supra* note 317, at 1208–14 n.386–87; see also Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 286–88 nn.406–409 (1986) [hereinafter Rice, *Pre- and Post-Grove City Analysis*]. In addition, the author used StataCorp’s Stata Statistical Software to analyze the data, compute robust standard errors, and generate multivariate-probit coefficients.

324. See Rice, *Declaratory Judgments 1900–2000*, *supra* note 317, at 1088–94 nn.431–32; Rice, *Declaratory Judgments 1900–1997*, *supra* note 317, at 1208–14 n.386–87; see also Rice, *Pre- and Post-Grove City Analysis*, *supra* note 323, at 219, 286–88 nn.406–09.

325. See *infra* table 4.

“probative facts” are illustrated. Also, two distributions of probit values—along with robust standard errors—appear in the table.

Independent and Joint Effects of Extrajudicial and Legal Factors on Deciding to Appeal and Outcomes	Litigants Who Decided to Appeal Adverse Preemption Rulings			Results of Federal Preemption Disputes In State and Federal Appellate Courts		
	Probit Values	Robust Std. Errors	Z	Probit Values	Robust Std. Errors	Z
APPELLATE COURTS' LOCATIONS						
Eastern States	-.2737	.1414	1.94 *	-.2992	.1035	2.89 **
Southern States	.6039	.1248	4.84 ***	-.3346	.0753	4.45 ***
Western States	.2074	.1298	-.2068	.0887	2.33 *	
LITIGANTS' LEGAL STATUSES						
Plaintiffs—Small Businesses	.6823	.2680	2.55 **	-.1622	.1289	
Defendants—Users & Third Parties	-1.1298	.5082	2.22 *	.4200	.0682	6.16 ***
PLAINTIFFS' UNDERLYING LEGAL ACTIONS						
Intentional -Tort Actions	-.1549	.1960		.0117	.1236	
Negligence-Based Actions	-.0440	.5082		-.2864	.1989	
INTERACTION EFFECTS —PLAINTIFFS						
Social Media*Professionals	.3126	.4006		.9107	.1187	7.67 ***
Social Media*Small Businesses	.2118	.2680		.5124	.2144	2.39 **
Social Media*Parents	-1.1694	.9151		.1802	.2695	
Social Media*Children	1.3726	.7905		-.6044	.1881	3.21 ***
INTERACTION EFFECTS —DEFENDANTS & UNDERLYING CAUSES OF ACTION						
Social Media*Service Providers	-1.2406	.3594	3.45 ***	.3384	.1734	1.95 *
Social Media*Intentional Torts	-.0417	.4384		-.6829	.1617	4.22 ***
Wald test for independent equations (“selectivity bias”): Chi square = 1.80, p -value >.15						
Levels of statistical significance for the Chi Square test: *** $\leq .001$ ** $p \leq .01$ * $p \leq .05$						
†This total includes federal-preemption disputes involving the CDA, FAA and CERCLA.						

First, examine the probit values which appear under the heading “Litigants Who Decided to Appeal Adverse Preemption Rulings.” Those values answer the question: whether or not the predictors’ independent, joint, and simultaneous effects significantly influenced litigants’ decisions to appeal lower courts’ adverse federal-preemption rulings. The asterisks describe the probit values’ levels of statistical significance.³²⁶ And, the results strongly suggest that some factors substantially influenced litigants’ decisions more than others. To illustrate, litigants who resided in Eastern states were less likely (-.2737) to appeal questionable preemption rulings. Southern litigants, however, were more likely (.6039) to appeal. Also, consider two interesting but unsurprising results: Plaintiffs—small-business owners—were more likely (.6823) to appeal federal-preemption rulings. But, defendants—users and third-party entities—were less likely (-1.1298) to appeal.

Of course, the paramount concern remains: whether or not “selectivity bias” appears in the sample. Or, stated more narrowly, the question is whether there are remarkable differences between, say, social media litigants who decided to appeal adverse section 230-preemption rulings and those who decided not to appeal. To find the answer, a “test for similarities” between the *two distributions of probit values* or two equations was needed. At the bottom of Table 4, a Wald test for independent equations appears. The Chi-square value is not statistically significant. Therefore, it suggests and *only* suggests that no error-generating or significant self-selection bias appears in the sample.

Once more, reconsider the study’s central question: whether appellate courts—intentionally or unintentionally—allow the unique, combined, and concurrent contributions of both legal and extrajudicial predictors to influence the outcomes of federal-preemption disputes. The short answer is yes. Examine the probit values in Table 4 under the heading “Results of Federal Preemption Disputes in State and Federal Appellate Courts.” Nine of the corresponding positive and negative probit values are *statistically significant*.

To be honest, the four positive coefficients were totally unexpected, given that courts of appeals almost universally and consistently declare that the CDA section 230(c)(1) provides *broad* immunity against third-party victims’ lawsuits when large tech companies publish users’ purportedly injurious “toxic comments,” “hazardous videos,” or “filthy pictures.”³²⁷ Briefly,

326. See e.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 100 n.144 (2011) (reporting probit coefficients, t-statistics, standard errors, and the marginal effects of independent and control predictors on individuals’ likelihood of voting, and the representative indicators for the 1%, 5%, and 10% levels of statistical significance).

327. See *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (“Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.”); *Carafano v. Metrosplash.Com*,

the positive coefficients suggest that the predictors *significantly increase complainants'* likelihood of winning federal-immunity disputes.

Therefore, consider the first positive (.4200) probit coefficient. It suggests that *plaintiffs generally* are more likely to win immunity-preemption disputes when the defendants are *content creators* or *third-party entities*. But even more revealing, the positive coefficients — .9107 and .5124, respectively—indicate that *professionals* and *small-business entities* have a greater likelihood of winning CDA-immunity disputes than *other social media users*. Furthermore, the positive and statistically significant .3384 suggests: Plaintiffs are more likely to win federal-preemption disputes when defendants in the underlying lawsuits are *social media providers* rather than *other providers of other goods and services*. Conversely, the negative probit values — -.2992, -.3346, and -.2066 —strongly indicate social media and other complainants are substantially less likely to win preemption disputes in Eastern, Southern, and Western courts of appeals.

Perhaps, among the nine significant findings, the last two are the most surprising and troublesome. Congress passed the CDA to “protect children from sexually explicit internet content.”³²⁸ In fact, the CDA section 230(b)(4) states in pertinent part: “[i]t is the policy of the United States . . . to remove disincentives for the development . . . of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”³²⁹ Yet, the -.6044 coefficient in Table 4 strongly suggests: *Minors and younger children* are statistically and significantly less likely to win section 230 immunity contests. Moreover, the -.6829 value indicates that appellate courts are substantially more likely to shield platform providers from content creators’ or third parties’ *intentional-tort-based* lawsuits.

What explains this apparent contradiction? As reported earlier, Congress amended the CDA in 1995 by adding section 230(c)(1)—the safe-harbor-immunity provision. However, Congress also added section 230(b)(2),³³⁰ finding that “*tort-based lawsuits* [would threaten] freedom of speech in the new and burgeoning Internet medium.”³³¹ The latter provision states in relevant part: “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market . . . for the Internet and other interactive computer services, unfettered by federal or state regulation.”³³²

Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (citing several appellate-court decisions).

328. See *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016).

329. 47 U.S.C. § 230(b)(4).

330. 47 U.S.C. § 230(b)(2).

331. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

332. *Id.*

Consequently, courts must protect the interests of the free market as well as children under sections 230(b)(2) and 230(b)(4), respectively. It appears, however, that courts do not have constitutional powers and/or the technological acumen to protect simultaneously, decidedly, and equally the broader free-markets and narrower children's interests. The Texas Supreme Court provides some support for this argument in a fairly recent opinion, *In re Facebook, Inc. and Facebook, Inc. d/b/a Instagram*.³³³ The supreme court wrote:

[Today, the Internet does not look like it did] when Congress enacted section 230. [The Constitution gives Congress rather than courts the power] to modernize outdated statutes. Perhaps advances in technology [will allow online platforms to police their users' posts more easily, which would reduce providers' liability costs] for failing to protect users On the other hand, . . . [making platform providers vicariously liable] for their users' injurious activity would [encourage providers] to censor "dangerous" content to avoid lawsuits. Judges are poorly equipped to make such judgments.³³⁴

VII. CONCLUSION

Undeniably, social media has altered how the general public as well as financial, political, and educational institutions exchange information, establish relationships, organize ventures, advertise services, sell products, and access news.³³⁵ Yet, an overwhelming majority of Americans distrust social media proprietors, especially the owners of Facebook, YouTube, WeChat, WhatsApp, Instagram, Twitter, and TikTok.³³⁶

Parents, conservatives, progressives, Democrats, and Republicans³³⁷ allege that YouTube, Facebook, Instagram, and other big tech companies are

333. 625 S.W.3d 80 (Tex. 2021).

334. *Id.* at 101 (citing *Dodd v. United States*, 545 U.S. 353, 359–60 (2005) ("It is for Congress, not this Court, to amend the statute if it believes [it is outdated.]")).

335. See Ortiz-Ospina, *supra* note 11 and accompanying text; see also *The 7 Different Types of Social Media*, *supra* note 16.

336. See Auxier, *supra* note 19; Tankovska, *supra* note 17; Larry Dignan, *Facebook, TikTok Least Trusted By Americans, Google Most Trusted, Says Survey*, ZDNET (Mar. 1, 2021), <https://www.zdnet.com/article/facebook-tiktok-least-trusted-by-americans-google-most-trusted-says-survey/> [<https://perma.cc/23MZ-DYCF>].

337. See Perrigo, *supra* note 20 (arguing that social media platforms are like industrial factories—*leaking toxic waste and needing plugs* and regulations to *detoxify its pollution*); Reed & Steyer, *supra* note 20 (observing that polluters pay to mitigate *environmental damage* and that the same remedy can *detoxify the on-*

digitally polluting the internet ecosystem by allowing users to post and share extremely corrosive, toxic, and illegal content.³³⁸ Other critics assert tech companies' supposedly objective content-moderation algorithms are inherently biased.³³⁹ In particular, users and content creators assert: Platform providers' content-moderation tools discriminate intentionally and irrationally on the basis of one's political association, socioeconomic status, gender, religious beliefs, and other impermissible attributes.³⁴⁰

Replying to the criticism, platform providers stress that section 230(c)(2)(A) of the Communications Decency Act encourages tech companies to remove any definitively or potentially "obscene, lascivious, filthy, excessively violent, harassing or otherwise objectionable" content.³⁴¹ Platform providers also maintain that their content-moderation tools actually prevent users' purportedly toxic, filthy, and harassing content from "digitally polluting" social media platforms.³⁴² In addition, platform owners stress that their content moderation algorithms do not discriminate irrationally against any particular class of users.³⁴³

line environment); Tracy & McKinnon, *supra* note 23 (arguing that big tech firms must remove content which *endanger the internet ecosystem*."); Weiner, *supra* note 23 ("This bill would make irresponsible big tech companies accountable for the *digital pollution* they knowingly and willfully produce."); Hill, *supra* note 23 (arguing that large social-media companies should be liable for toxic and illegal content).

338. See Perrigo, *supra* note 20; Reed & Steyer, *supra* note 20; Tracy & McKinnon, *supra* note 23; Weiner, *supra* note 23; Hill, *supra* note 23.

339. See Lim, *supra* note 25 ("While AI is celebrated as autonomous technology, . . . it is inherently biased.").

340. See, e.g., Douek, *supra* note 29 ("[T]ens of thousands of users are given the boot in regular fell swoops. . . . They [even] deplatformed . . . the sitting President of the United States."); Mac, *supra* note 32 ("Instagram . . . blocked hashtags about one of Islam's holiest mosques. . . . [This is] Instagram and its parent-company Facebook's latest content moderation failure."); Lim & Al-rasheed, *supra* note 34; Rosenberg & Fischer, *supra* note 35 ("TikTok . . . asked moderators to suppress content from 'ugly' or 'poor' people to keep undesirable users away from the service.").

341. 47 U.S.C. § 230(c)(2)(A); see also Feiner, *supra* note 44 ("Tech companies have vigorously defended Section 230 . . . [before Congress, stressing that the Act] allows them to remove the most objectionable content from their platforms).

342. Cf. Taplin, *supra* note 24 ([T]wo mass shootings at mosques . . . were live-streamed on Facebook and . . . viewed millions of times on YouTube. . . . [Although Facebook used] A.I. to block 90 percent of the Christchurch streams, . . . Mark Zuckerberg [told] Congress that it might take five to 10 years to perfect these tools. But . . . banning toxic content must become the highest priority at 8chan, Reddit, Facebook and YouTube.").

343. *Id.*

Nevertheless, responding to discontented constituents, more than fifty congressional Republicans and Democrats have crafted approximately twenty bills.³⁴⁴ The bills would repeal, reform, or “limit the scope” of the CDA section 230.³⁴⁵ In theory, the reforms would increase content creators’ ability to survive a federal-preemption defense and sue platform providers on the merits.³⁴⁶ However, as of this writing, CDA reformers have not explained how their competing proposals would actually increase users’ ability to defeat a preemption challenge and allow litigants to seek various common-law and statutory remedies in state and federal courts. Or, stated another way, reformers have not presented any research findings or statistical evidence to support their bills.

Still, it must be emphasized that the legal and quantitative analyses presented in this Article do not prove definitively or otherwise that the proposed reforms will not work. Again, the purpose of this presentation is to share some judicial guidance, which was gleaned from legal and statistical analyses of section 230 and other federal-preemption decisions.

Once more, to “sanitize” social media platforms or remove allegedly “digital pollution,” some proposals would add a broad *rights-preservation* exemption to the CDA,³⁴⁷ like the rights-preservation clauses in the CER-

344. See generally Jeevanjee et al., *supra* note 57 (reporting that “a flurry of bills [were] introduced [in Congress between] 2020 and 2021” and disclosing that the Tech, Law, & Security Program at the American University-Washington College of Law and at Duke University’s Center on Science & Technology Policy are partnering to track all proposed section 230 legislation).

345. *Id.*

346. *Cf. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“[I]mmunity is an immunity from [a lawsuit] rather than a mere defense to liability and . . . is effectively lost if a case is erroneously permitted to go to trial.”).

347. See S. 299, 117th Cong. (as introduced in the Senate on Feb. 8, 2021); see also Press Release, Sen. Mark R. Warner, Sens. Warner, Hirono, Klobuchar Announce SAFE TECH Act to Reform Section 230 (Feb. 6, 2021), <https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230> [<https://perma.cc/F4JV-N5X2>] (“[The enacted bill would] ensure that . . . online communities are not *safe harbors* for [various violations. And, it] would make irresponsible big tech companies [liable] for the *digital pollution* they knowingly and willfully produce.” (emphasis added)); Alexandra Berzon, Shane Shifflett & Justin Scheck, *Exchange—Amazon Has Ceded Control of Its Site—The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J., Aug. 24, 2019, at B1 (disclosing that an investigation found 4,152 “unsafe,” “dangerous,” “contaminated,” “hazardous” and “toxic” products—containing pesticides, lead, and cadmium—on Amazon’s platform. “Some lawmakers have begun calling for more regulation.” But Amazon insists “Section 230 of the CDA shields [it] from liability for what others post.” (emphasis added)).

CLA.³⁴⁸ However, assuming that Congress would add a CERCLA-like “sanitation” provision to the CDA, the previously discussed findings revealed conclusively that the CERCLA’s rights-preservation clauses do not increase complainants’ ability to survive a federal-preemption challenge and litigate cleanup or “sanitation” claims in state or federal courts.³⁴⁹

Another suggested reform would add a hybrid *rights-preservation* and *safe-harbor* provision to the CDA,³⁵⁰ like the frequently litigated section 2 clause in the Federal Arbitration Act.³⁵¹ Why? “Terms of Services” agreements utilized by social media companies are enforceable contracts. Thus, under the FAA, a complaining party may escape mandatory arbitration and litigate a cause of action in a court of law if she survives a platform provider’s safe-harbor-preemption defense.³⁵² However, the present empirical investigation discloses mixed results when companies use an FAA-preemption defense. Generally, in trial and district courts, plaintiffs are more likely to defeat an FAA-safe-harbor defense and receive permission to litigate claims on the merits.³⁵³ On the other hand, state and federal appellate courts are substantially more likely to embrace defendants’ safe-harbor arguments and force complaining contractual parties to arbitrate rather litigate.³⁵⁴

348. 42 U.S.C. § 9601–9675.

349. *See supra* table 3 and the accompanying discussion.

350. *See Rogers, supra* note 24 (“[H]ere is a modest proposal to . . . redress false, wrongful or defamatory speech—without centering any censorship power within social media company . . . and without repealing Section 230. . . . [Congress could create] a special fast-track arbitration system for social media [speech-related disputes]”); *see McCarthy, supra* note 286 (“New ideas for digital governance are most urgent [to address] the information disorder within the social medial industry [as well as] hate speech and disinformation . . . on the largest platforms. . . . Congress should establish a non-governmental industry-public authority under the supervision of a federal regulatory commission to provide affordable and efficient arbitration and mediation services to social media companies to satisfy this obligation for independent review.”).

351. 9 U.S.C. § 2 (“A written provision in any . . . contract evidencing . . . an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” (emphasis added)).

352. *Id.*

353. *See* table 3 and the accompanying discussion; *see also* *Heidbreder v. Epic Games, Inc.*, 438 F. Supp. 3d 591, 597–98 (E.D.N.C. Feb. 3, 2020) (concluding that the arbitration provision in the End User License Agreement was enforceable and granted Epic’s motion to compelling a sixteen-year-old minor to arbitrate an individual basis only breach-of-contract claim, even though the user agreed to the terms while he was a minor child and did not have the legal capacity to accept the contract).

354. *See* table 3 and the accompanying discussion.

Perhaps, a more commonsensical legislative proposal would completely abolish or “limit the scope” of big tech companies’ immunity under the CDA’s safe-harbor provision.³⁵⁵ Why? The findings are clear: barring just a few exceptions, section 230 generally precludes users’ litigating statutory and tort-based claims on the merits in federal and state courts.³⁵⁶ Therefore, Congress should add a user-friendly rights-preservation clause, which would allow users, content creators, and third-party claimants to file specific tort-based and statutory causes of action against large social media providers.

Debatably, an unequivocal private-right-of-action exemption would also achieve two desirable ends: (1) tech companies would increase their efforts to remove users’ purportedly “excessively toxic,” “extremely dangerous,” and “digitally polluted” content; and (2) social media owners would finely adjust their content-moderation tools and end all types of irrational discrimination, allegedly on the basis of users’ political affiliation, ideology, gender, and ethnicity.

Consider a final observation: At any moment in time, approximately fifty-three percent of small businesses—within most industries—are litigating at least one lawsuit.³⁵⁷ Moreover, an estimated fifty percent of large companies are litigating between four and six cases.³⁵⁸ In light of these statistics, some critics ask impliedly: Is it fair to abolish or severely restrict social media companies’ immunity under the Communications Decency Act section 230 and expose those entities potentially to individual and class-action lawsuits. The overwhelming majority of displeased users, parents, congressional members, former and sitting U.S. presidents, as well as the competitive owners of mainstream-media, say yes.³⁵⁹

355. See generally Jeevanjee et al., *supra* note 57 (providing a list); see also H.R. 8896, 116th Cong. (2019–2020) (proposing the Abandoning Online Censorship Act, “a bill to repeal section 230 of the Communications Act of 1934—commonly referred to as the Communications Decency Act—to stop censorship, and for other purposes”), <https://www.congress.gov/bill/116th-congress/house-bill/8896/text?r=8&s=1>. [<https://perma.cc/QVH4-B2JX>] (last visited Jan. 21, 2022).

356. See table 3 and the accompanying discussion.

357. Guest Writer, *Five Reasons Small Businesses Get Sued and How to Avoid Them*, THEBOTTOMLINE (Mar. 11, 2020), <https://www.nationalfunding.com/blog/reasons-businesses-get-sued/> [<https://perma.cc/9Y7U-NJK2>].

358. See NORTON ROSE FULBRIGHT, 2019 LITIGATION TRENDS ANNUAL SURVEY (2019), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/final---2019-litigation-trends-annual-survey.pdf> [<https://perma.cc/Z4PU-SHPY>].

359. See Steven Hill, *Biden Should Revoke Section 230 Before We Lose Our Democracy*, CHI. TRIB. (Jan. 28, 2021), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-section-230-big-tech-congress-pro-repeal-20210128-oxzxs4zqybxniussz5yyt4g74-story.html> [<https://perma.cc/UTF5-JBKU>] (stressing that traditional media does not have ironclad immunity from law-

suit); Taplin, *supra* note 24 (stressing that broadcasters do not have any safe-harbor protection against various lawsuits); Marguerite Reardon, *Section 230: How It Shields Social Media, and Why Congress Wants Changes*, CNET (July 29, 2021), <https://www.cnet.com/news/whats-section-230-the-social-media-law-thats-clogging-up-the-stimulus-talks/> [<https://perma.cc/6Y7P-7MKV>] (stating that President Donald Trump has called for the elimination of section 230); Editorial Board, *Joe Biden Interview*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=NYtcore-ios-share> [<https://perma.cc/9QMH-83H7>] (reporting that Democratic Presidential Nominee Joe Biden is open to revising section 230).