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If You Can't Beat Them, Get Even: A Proposal to Level the Playing Field Between Social Media Platforms and Their Wrongfully Removed Users

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If You Can't Beat Them, Get Even

A PROPOSAL TO LEVEL THE PLAYING FIELD BETWEEN SOCIAL MEDIA PLATFORMS AND THEIR WRONGFULLY REMOVED USERS

INTRODUCTION

On December 14, 2017, Avi Lan and Addie Bentov Lan, a middle-aged couple who lived in a scenic town an hour outside of Tel Aviv, became known in Israel as the couple that defeated Facebook.[1]

Lan, a former journalist and newspaper editor, and Bentov Lan, a former social media manager, created *Statusim Metzaytzim*,[2] their Facebook page, in 2010.[3] The page, which amassed more than seven hundred thousand followers in its first five years of operation, contained a collection of content found across the Internet, including memes, videos, jokes, and commentary on Israeli society.[4] In order to support their activities on the page, the Lans occasionally promoted a small number of posts for payment.[5] However, this practice violated a provision of Facebook's Terms of Service, which, at the time,

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[1] *See* Oded Yaron, *"Wow, Nitzahnu et Facebook!:" Beit HaMishpat Horeh Le-Facebook Le-hehayot et Statusim Metzaytzim* [*"Wow, We Beat Facebook!:" Court Orders Facebook to Reinstate Statusim Metzaytzim*], HAARETZ (Dec. 14, 2017), https://www.haaretz.co.il/captain/net/1.4704708 [https://perma.cc/5JJ7-WSMT]; Anat Bein-Leibovich, *Avi Lan Nitzeyah et Facebook: Amud "Statusim Metzaytzim" Hozer La-Avir* [*Avi Lan Beat Facebook: "Statusim Metzaytzim" Brought Back on Air*], GLOBES (Dec. 14, 2017), https://www.globes.co.il/news/article.aspx?did=1001215753 [https://perma.cc/22FH-5CUC]. Note that on October 28, 2021, Facebook changed its company name to Meta. Salvador Rodriguez, *Facebook Changes Company Name to Meta*, CNBC (Oct. 28, 2021, 2:18 PM), https://www.cnbc.com/2021/10/28/facebook-changes-company-name-to-meta.html [https://perma.cc/4YZY-6UWS]. Meta encompasses the Facebook app, which has retained its name. Kari Paul, *Facebook Announces Name Change to Meta in Rebranding Effort*, GUARDIAN (Oct. 28, 2021, 4:06 PM), https://www.theguardian.com/technology/2021/oct/28/facebook-name-change-rebrand-meta [https://perma.cc/J6RM-V5RY]. This note will refer to Meta as Facebook when referencing events prior to the name change.

[2] Translated as "Tweeting Statuses."

[3] CivC (DC TA) 50870-05-15 Lan v. Facebook Inc., 2 (2017) (Isr.).

[4] *Id.*; Statusim Metzaytzim (@Sta2sim), FACEBOOK, https://www.facebook.com/lan2lan.sta2sim. [https://perma.cc/MNU9-6R9P].

[5] CivC (DC TA) 50870-05-15 Lan v. Facebook Inc., 2 (2017) (Isr.). Lan and Bentov Lan alleged that they disclosed in the rules section of the page that some posts that appeared on *Statusim Metzaytzim* were promotional content. *Id.*

prohibited third-party advertisements on Pages unless Facebook granted permission in advance.[6]

On January 14, 2015, Roy Goldberg, a reporter for the Israeli newspaper *Globes*, broke the story about the Lans' acceptance of payment to promote content without disclosing to users which posts were sponsored.[7] Examples of such instances included companies paying *Statusim Metzaytzim* to repost customer service complaints against their competitors.[8] While this practice is not illegal in Israel,[9] Goldberg characterized the Lans' conduct as improper and exploitative.[10] In addition, it constituted a breach of Facebook's Terms of Service because users are not allowed to receive direct payment to post content, since doing so deprives Facebook of the opportunity to take a cut of the advertising fee.[11] Goldberg reached out to Facebook to provide a comment for the article, and Facebook subsequently shut down the page two days after the article came out—without providing warning or notice to the Lans.[12] The Lans attempted to contact Facebook several times, telling the company they were unaware that their conduct violated Facebook's Terms of Service, promising to cease their violative behavior, and requesting that Facebook reactivate the page.[13] In response, Facebook informed the Lans that *Statusim Metzaytzim* would remain permanently closed.[14] The Lans' personal pages were also removed for one month, which Facebook argued was justified because of its right to suspend or terminate user accounts when such users violate the spirit of the Terms of Service.[15]

The Lans subsequently sued Facebook in the District Court of Tel Aviv, alleging that Facebook breached its contract with them by taking down *Statusim Metzaytzim* without

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[6] Users first encounter Facebook's Terms of Service when they register for their accounts. *Id.* at 9.

[7] Roy Goldberg, *Kama Oleh Le-Pharsem Status be-"Statusim Metzaytzim?"* [*How Much Does It Cost to Promote a Status on "Statusim Metzaytzim?"*], GLOBES (Jan. 14, 2015), https://www.globes.co.il/news/article.aspx?did=1001000792 [https://perma.cc/7FNR-554B].

[8] *Id.*; *see Israeli Facebook Page Camouflages Sponsored Content*, YNET (Jan. 14, 2015, 7:18 PM), https://www.ynetnews.com/articles/0,7340,L-4615200,00.html [https://perma.cc/RY93-QZ9A]. The Lans purportedly charged approximately 7,500 NIS (approximately $2,400) per post, with the largest recorded sponsorship being 84,000 NIS (approximately $27,000) to promote ten short videos. Goldberg, *supra* note 7.

[9] *See* TEHILLA SHWARTZ ALTSHULER & TUVAL CHESLER, ISR. DEMOCRACY INST., REGULATING BRANDED CONTENT IN THE ISRAELI MEDIA (2014), https://en.idi.org.il/publications/6854 [https://perma.cc/CBW7-HKM6].

[10] Goldberg, *supra* note 7.

[11] CivC (DC TA) 50870-05-15 Lan v. Facebook Inc., 5–6 (2017) (Isr.).

[12] *Id.* at 2.

[13] *Id.*

[14] *Id.* at 2–3.

[15] *Id.* at 3, 13.

notice.[16] Unlike other Anglo-American legal systems, in Israel, contracts of adhesion,[17] like Facebook's Terms of Service, are regulated by statute.[18] Under these laws, courts are required to annul or modify any conditions of adhesion contracts that either (1) unfairly disadvantage the nondrafting party or (2) provide an unjust advantage to the drafting party that will likely be at the nondrafting party's expense.[19] Certain clauses are presumed to be "unduly disadvantageous," such as provisions that confer an unreasonable right upon the stronger party to rescind, suspend, defer performance, or alter any material obligation.[20]

The Lans relied upon this law to assert that Facebook's Terms of Service were fundamentally unfair and that Facebook's behavior constituted bad faith.[21] Although the Lans admitted that accepting payment for sponsored posts violated Facebook's Terms of Service and acknowledged that Facebook maintained the contractual right to shut down their page without notice, they argued that they should have been given an opportunity to cure the breach before the page was removed.[22] In addition, they claimed that Facebook's ability to remove pages constituted an unduly disadvantageous condition in Facebook's favor because the right was unilateral, and Facebook was not required to communicate the alleged violation to the terminated users before kicking them off the platform.[23]

Facebook, in turn, countered that the Lans materially breached its Terms of Service, which entitled the company to remove the page without advance notice or clarification.[24] The company asserted that its policy of banning page administrators from taking direct compensation for sponsored content was

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[16] The Lans also alleged violations of privacy law, willful defamation, exploitation of monopoly power, and violation of their freedom of expression. *Id.* at 3–4.

[17] Defined as contracts in which some or all of their conditions were determined in advance by one party for the purpose of signing many such contracts in the future. § 2, The Standard Contracts Law, 5743–1982 (Isr.). With technology services, the user has no choice other than to accept the contract if he or she wants to create and maintain an account. *See, e.g.*, *Terms of Service*, FACEBOOK [hereinafter *Facebook Terms of Service*], https://www.facebook.com/terms.php [https://perma.cc/84AE-4RTD] ("[I]f you do not agree to our updated Terms and no longer want to be a part of the Facebook community, you can delete your account at any time.").

[18] *See* § 2, The Standard Contracts Law, 5743–1982 (Isr.); Jonathan Yovel & Ido Shacham, *Israeli Contract Law: An Overview*, *in* INT'L CONT. MANUAL 1, 20–21 (2014).

[19] § 3, The Standard Contracts Law, 5743–1982 (Isr.).

[20] *Id.* § 4(2). This statute also established a Tribunal for Standard Contracts, which is empowered to hear cases concerning adhesion contracts and can amend such contracts independently of any particular dispute. *See id.* § 6; Yovel & Shacham, *supra* note 18, at 4.

[21] CivC (DC TA) 50870-05-15 Lan v. Facebook Inc., 3–4 (2017) (Isr.).

[22] *Id.* at 9–10.

[23] *Id.* at 3.

[24] *Id.* at 5–6.

intended to ensure that users are aware when posts are promoted and to enable Facebook to monitor the sale of advertisements on the platform.[25] Facebook maintained that the Lans' false representation of sponsored content as organic hurt users and that their practice of directly providing an advertising channel on Facebook without looping Facebook in caused the company to lose revenue.[26]

On December 14, 2017, the District Court of Tel Aviv found in favor of the Lans, ordering Facebook to reinstate *Statusim Metzaytzim* and pay the plaintiffs' legal fees and costs.[27] The judge noted that the Lans' acceptance of payment to sponsor posts, while a violation of the Terms of Service, did not constitute a material breach of contract because it did not significantly damage Facebook's business, given that the plaintiffs only made a few thousand dollars from the scheme in comparison to Facebook's many billions of dollars in annual revenue.[28] In contrast, the removal of *Statusim Metzaytzim* and the Lans' personal pages deprived them of their income and caused them serious emotional harm since the page represented their life's work.[29] In addition, the judge took note of the fact that the Terms of Service were entirely one-sided and that Facebook held all of the power with respect to drafting and enforcement.[30] Although Facebook appealed this judgment to Israel's Supreme Court, the company ultimately settled with the Lans, and *Statusim Metzaytzim* remains live today.[31]

Apart from their success in battling one of the largest social media platforms in the world, the Lans' experience of having their pages removed from a social media platform without notice or warning is not unique among modern-day internet users. "Deplatforming"[32] became a contentious topic in

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[25] *Id.* at 9.

[26] *Id.* at 5.

[27] *Id.* at 10. Plaintiffs' other claims were rejected. *See id.* at 14.

[28] *Id.* at 10.

[29] *Id.*

[30] *Id.* at 12. Notably, despite acknowledging the imbalance of power between Facebook and its users, Judge Cohen did not address whether the unilateral termination provision was unduly advantageous to Facebook because, by holding that the Lans' breach was not material, Facebook impermissibly breached its own Terms of Service by removing the page without notice and providing an opportunity to cure. *Id.* at 10–12.

[31] Dori Ben Israel, *Statusim Metzytzim: Avi Lan Kiphel Et Facebook Kemo She-Ish Lo Hitzliah Le-Phanav* [*Tweeting Statuses: Avi Lan Forces Facebook to Capitulate Unlike Anyone Before Him*], MIZBALA (Dec. 23, 2019), https://mizbala.com/news/121649 [https://perma.cc/MQ66-U354]; Statusim Metzaytzim, *supra* note 4.

[32] Defined as the removal of a user's account from a social media site. *See* Quinta Jurecic, *The Ringmaster Is Gone*, ATLANTIC (last updated May 10, 2021, 10:33 AM), https://www.theatlantic.com/ideas/archive/2021/05/facebooks-trump-ban-effects/618818/ [https://perma.cc/E7SF-XNJ8].

the United States after Facebook and Twitter deactivated former President Donald Trump's accounts in response to his encouragement of the storming of the Capitol on January 6, 2021.[33] As this note will discuss, deplatforming and "shadowbanning" has impact on users across all the major social media platforms.[34]

Although many users' accounts are terminated and much content is removed for harmful or abusive behavior, platforms most often take down posts that are seemingly benign for reasons ranging from corporate strategy to political posturing.[35] For example, several days after Meta announced its plan to build out a virtual reality world called the Metaverse,[36] an Australian artist with fewer than one thousand followers who owned the handle @metaverse on Instagram[37] found that her account was disabled when she tried to log in.[38] In addition, TikTok and

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[33] Jake Lahut, *Trump Recorded 3 Takes of His January 6 Video, 'Veering Off the Script' Each Time, Upcoming Book Says*, INSIDER (July 15, 2021), https://www.businessinsider.com/trump-january-6-video-very-special-three-takes-insurrection-2021-7 [https://perma.cc/FJ7W-DHPR]; Katya Maruri, *Facebook Oversight Board Upholds Decision to "Deplatform" Trump*, GOV'T TECH. (May 6, 2021), https://www.govtech.com/policy/facebook-oversight-board-upholds-decision-to-deplatform-trump [https://perma.cc/HZH8-SJ5C]; Peter Allen Clark, *Twitter Permanently Suspends President Donald Trump's Account*, TIME (Jan. 8, 2021), https://time.com/5928170/twitter-bans-donald-trump/ [https://perma.cc/X2N4-5CK3]. The Facebook Oversight Board later backed the company's decision to remove Trump's account but with the caveat that Facebook must decide if it would make the ban permanent or restore Trump's account within the next six months. Maruri, *supra* note 33. Facebook subsequently decided to ban Trump for two years starting from the date of the initial ban, with the option to extend if the company determines that there is a continued risk to public safety. Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, META (June 7, 2021), https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/ [https://perma.cc/G2AU-TL67]; *see also* Hannah Denham, *These Are the Platforms That Have Banned Trump and His Allies*, WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/ [https://perma.cc/NE2W-K7RN].

[34] "Shadowbanning" is defined as when a user's posts are hidden on a social media platform, but the user's account is not removed. Stacey McLachlan, *7 Ways to Avoid Getting Shadowbanned on Social Media*, HOOTSUITE (Sept. 22, 2021), https://blog.hootsuite.com/shadowban/ [https://perma.cc/FUX8-24GH].

[35] *See* Merlyna Lim & Ghadah Alrasheed, *Beyond a Technical Bug: Biased Algorithms and Moderation Are Censoring Activists on Social Media*, 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/LG9K-ALAH].

[36] *See Introducing Meta: A Social Technology Company,* META (Oct. 28, 2021), https://about.fb.com/news/2021/10/facebook-company-is-now-meta/ [https://perma.cc/S66Y-TWY2].

[37] Instagram is owned by Meta. *See Instagram from Meta,* META, https://about.facebook.com/technologies/instagram/ [https://perma.cc/E66B-SVZM].

[38] Maddison Connaughton, *Her Instagram Handle Was 'Metaverse.' Last Month, It Vanished*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/13/technology/instagram-handle-metaverse.html [https://perma.cc/F7L4-53VN]. The account was restored in December 2021 shortly after the New York Times reached out to Meta for comment. *Id.* A spokesperson for the platform stated "that the account had been incorrectly removed for impersonation." *Id.* (internal quotation marks omitted).

Facebook have both come under fire for suppressing disabled users' content for the sake of reducing instances of cyberbullying,[39] while activists and supporters raising awareness for causes like Missing and Murdered Indigenous Women and Girls and Black Lives Matter have found their posts deleted without any explanation at all.[40] Further, as large platforms increasingly rely on algorithms—which tend to be biased against certain types of users—to police users' content, the potential for wrongful terminations without notice or recourse continues to grow.[41] For example, in late March of 2022, an unknown number of Facebook accounts were removed without notice due to what appeared to be an algorithmic glitch, which a Facebook spokesperson acknowledged was an error.[42]

Acknowledging the danger of allowing automated systems to make decisions about content removal, in April 2022 the European Union agreed to promulgate the Digital Services Act.[43] While the final text of the law is not yet available, the EU stated that the law will provide users with the critical ability "to challenge platforms' content moderation decisions and seek redress" through EU members' domestic courts or through out-of-court mechanisms.[44] In addition, platforms will be required to explain why they have removed content.[45] Platforms with more

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[39] Elena Botella, *TikTok Admits It Suppressed Videos by Disabled, Queer, and Fat Creators*, SLATE (Dec. 4, 2019, 5:07 PM), https://slate.com/technology/2019/12/tiktok-disabled-users-videos-suppressed.html [https://perma.cc/7BXL-UGDG]. TikTok commented that its policies were an attempt to reduce the risk of cyberbullying, while a Facebook employee remarked that "some people see disability as disturbing." *Id.*

[40] Lim & Alrasheed, *supra* note 35.

[41] James Vincent, *Facebook Is Now Using AI to Sort Content for Quicker Moderation*, VERGE (Nov. 13, 2020), https://www.theverge.com/2020/11/13/21562596/facebook-ai-moderation [https://perma.cc/MV2F-F25E]; *see also* Deepa Seetharaman & Jeff Horwitz, *Facebook Creates Teams to Study Racial Bias, After Previously Limiting Such Efforts*, WALL ST. J. (July 21, 2020), https://www.wsj.com/articles/facebook-creates-teams-to-study-racial-bias-on-its-platforms-11595362939 [https://perma.cc/6R2D-LUPK]; *see generally* Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, PHILOSOPHY & TECH. (2020), https://link.springer.com/article/10.1007%2Fs13347-020-00429-0 [https://perma.cc/35N4-KQE9] (explaining how social media platforms use algorithms to assist with content moderation).

[42] Veronica Irwin, *Facebook Account Randomly Deactivated? You're Not Alone*, PROTOCOL (Apr. 1, 2022), https://www.protocol.com/bulletins/facebook-account-deactivated-glitch [https://perma.cc/47DC-SENQ].

[43] *See The Digital Services Act Package*, EUROPEAN COMM'N, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package [https://perma.cc/SG6Q-5KCM]; *see also* James Vincent, *Google, Meta, and Others Will Have to Explain Their Algorithms Under New EU Legislation*, VERGE (Apr. 23, 2022), https://www.theverge.com/2022/4/23/23036976/eu-digital-services-act-finalized-algorithms-targeted-advertising [https://perma.cc/6JX9-PZBL].

[44] *Digital Services Act: Commission Welcomes Political Agreement on Rules Ensuring a Safe and Accountable Online Environment*, EUROPEAN COMM'N (Apr. 23, 2022) [hereinafter *Digital Services Act Press Release*], https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545 [https://perma.cc/ZU4H-YEA2].

[45] *Id.*; *see also* Vincent, *supra* note 43.

than forty-five million users in the EU will be subjected to the highest level of obligations under the law, with the expectation that they will assume responsibility for removing illegal content.[46] Once voted into law, the act will apply to all companies within fifteen months of enactment or starting on January 1, 2024, whichever is later.[47]

In the United States, however, there is no official federal or state procedure to appeal account terminations, despite the fact that such actions can cause users to suffer serious financial damage and emotional harm.[48] In addition, platforms are often able to escape liability for their wrongful actions, including wrongful account terminations, under Section 230 of the Communications Decency Act (also known as CDA 230), which provides a safe harbor for internet services providers' decisions to remove or retain content on their platforms.[49] That said, change appears imminent.

This note argues that the United States should enact a statute inspired by Israel's Standard Contracts Law to ensure that the power differential between social media platforms and users is fairly balanced and that platforms provide a transparent appeals process for users who believe that their accounts have been wrongfully terminated. This law would declare provisions that allow platforms to arbitrarily disable or terminate accounts to be presumptively void, mandate disclosure of reasons for account removal to users, and require platforms with more than five million users to give notice to users whose accounts will be terminated when possible and maintain a substantive appeals process. Such a law would provide a clearer framework for judges adjudicating breach of contract claims against social media platforms for wrongful account terminations and would hold such companies accountable for removing accounts without notice, reason, or recourse.

Part I of this note will provide a history of Section 230 and assess current criticism of the law. Part II will look at the unsuccessful theories plaintiffs commonly use to argue against account terminations and will examine why their claims fail. Part III will analyze the Terms of Service agreements of the major social media platforms used by adults in the United

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[46] *Digital Services Act Press Release*, *supra* note 44.

[47] *Id.*

[48] *See* Rory Van Loo, *Federal Rules of Platform Procedure*, 88 UNIV. CHI. L. REV. 829, 875–77 (2021) (arguing that the federal government should implement procedures to adjudicate disputes on Internet platforms).

[49] Communications Decency Act of 1996, Pub. L. No. 104–104, 110 Stat. 133 (codified as amended in scattered sections of 18 and 47 U.S.C).

States. Part IV will assess two account removal cases predicated upon a breach of contract theory and explore, more broadly, the arguments plaintiffs should be able to raise successfully under US law as it exists today. Finally, Part V will propose a model law that would regulate Terms of Service agreements to ensure that users are not oppressed by contractual provisions over which they have no ability to negotiate.

I. THE PAST, PRESENT, AND FUTURE OF SECTION 230

A. The History of Section 230

In response to the growing popularity of the internet, Congress enacted Section 230 in 1996 as part of the Communications Decency Act.[50] Congress stated that the law aligned with US policy "to promote the continued development of the [i]nternet" and "to preserve the vibrant and competitive free market that presently exists for the [i]nternet and other interactive computer services."[51] To accomplish this, Congress felt that it was crucial to "maximize user control over" the information they provided to their social networks.[52]

As such, Section 230 provides "interactive computer services"[53] with immunity from civil liability for actions taken "in good faith" to block access to content that the provider or users consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[54] In addition, the law states that interactive computer services cannot be treated as the "publisher or speaker of any information provided by another information content provider."[55] Courts have held that Section 230 precludes liability when a user sues an interactive computer service under a state cause of action for behaving as a publisher or speaker—essentially, for making decisions to remove or sustain content.[56]

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[50] 47 U.S.C. § 230. The law was intended to respond to cases like *Stratton Oakmont, Inc. v. Prodigy Services. Co.*, in which a website was found to be legally responsible for content posted on its message boards. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

[51] § 230(b)(1)–(3).

[52] *Id.* § 230(b)(3).

[53] Defined as "any information service, system or access software that provides or enables computer access by multiple users to a computer server." *Id.* § 230(f)(2).

[54] *Id.* § 230(c)(2); *see* Barnes v. Yahoo, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009).

[55] § 230(c)(1). An "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3) (internal quotation marks omitted).

[56] *See Barnes*, 570 F.3d at 1101. That said, courts have held that Section 230 does not shield platforms from immunity when plaintiffs were seeking to hold them liable

B. Criticism of Section 230

In recent years, Section 230 has been criticized by both Republicans and Democrats for conflicting reasons, making it unlikely that comprehensive reform will pass anytime in the near future. Republican legislators who oppose Section 230 believe that it is problematic because it allows large social media platforms to "censor the views they disagree with."[57] Senator Josh Hawley has sponsored several bills to address this concern, such as the Ending Support for Internet Censorship Act, which would remove the immunity that large social media platforms receive under Section 230 unless they submit to an external audit that would prove "by clear and convincing evidence" that their content moderation algorithms and practices are "politically neutral."[58] In the House, the Protecting Constitutional Rights from Online Censorship Act, sponsored by Republican Congressman Scott DesJarlais, proposed an amendment to Section 230 that would prohibit social media platforms from "restrict[ing] access to or the availability of" users' posts, as long as such posts constituted protected speech under the Constitution.[59] Users who feel that their content was

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for either their own publication of content or for actions unrelated to content publication and removal. *See, e.g.*, Lemmon v. Snap, Inc., 995 F.3d 1085, 1094 (9th Cir. 2021) ("[O]ur case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools."); Oberdorf v. Amazon.com Inc., 930 F.3d 136, 153 (3d Cir. 2019), *appeal dismissed per stipulation* (holding that Section 230 immunity did not protect the defendant from liability for its role in the sale of a defective item that caused injury); Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158, 175–76 (2d Cir. 2016) (deciding that a defendant was not entitled to Section 230 immunity for the creation and development of false news sites, because the plaintiff was seeking to hold it accountable for its own actions rather than those of third parties); Doe v. Internet Brands, Inc. 824 F.3d 846, 851 (9th Cir. 2016) (holding that Section 230 did not bar a failure to warn claim brought by a rape victim against a website that neglected to remove the profiles of known offenders who repeatedly used the website to find and attract new victims).

[57] *Sen. Cruz: Big Tech Believes There Is No Power That Can Constrain Them*, TED CRUZ: U.S. SEN. FOR TEX. (Dec. 11, 2020), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-big-tech-believes-there-is-no-power-that-can-constrain-them [https://perma.cc/9G7K-FWPL].

[58] S. 1914, 116th Cong. (2020).

[59] H.R. 83, 117th Cong. (2021). Content that is not protected by the Constitution includes "sexually explicit material that violates fundamental notions of decency," and some commercial speech, including speech that is misleading or relates to illegal activity. *See* United States v. Williams, 553 U.S. 285, 288 (2008); Florida Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995). That said, hate speech is protected by the First Amendment. Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'") (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929)).

wrongfully removed would be able to sue for between $10,000 and $50,000 in damages.[60]

Conversely, some Democrats believe that legislation is necessary to hold internet service providers accountable for failing to remove objectionable content and misinformation.[61] For example, President Joe Biden, while on the 2020 campaign trail, called for Section 230 to be revoked and for internet companies and their CEOs to be held civilly and criminally liable for certain problematic content.[62] Other Democrats have proposed more moderate approaches. The SAFE TECH Act, sponsored by Senators Mark Warner, Amy Klobuchar, Mazie Hirono, and Tim Kaine, would eliminate Section 230's applicability to ads and paid content; strip internet service providers' immunity in wrongful death actions and actions for stalking, harassment, and intimidation; and enable victims to seek injunctive relief in cases where alleged misuse of a provider's services by a third party could cause emotional, physical, and financial harm.[63] The most recent proposal, titled the Justice Against Malicious Algorithms Act, seeks to hold platforms with more than five million individual monthly visitors liable for "knowingly or recklessly" making "personalized recommendation[s] that 'materially contributed to a physical or severe emotional injury to any person.'"[64]

The divergence between Republican and Democratic proposals makes it unlikely that reforms to Section 230 will pass. The following section will explore how some states are addressing the regulatory vacuum around regulating internet speech.

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[60] H.R. 83, 117th Cong. (2021).

[61] *See* Ashley Johnson & Daniel Castro, *Proposals to Reform Section 230*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/proposals-reform-section-230; Eli Blumenthal & Queenie Wong, *Joe Biden Slams Facebook, Calls Zuckerberg a 'Real Problem,'* CNET (Jan. 17, 2020), https://www.cnet.com/news/joe-biden-slams-facebook-calls-zuckerberg-a-real-problem-in-new-york-times-interview/ [https://perma.cc/E9KD-3TP2].

[62] Editorial Board, Opinion, *Joe Biden: Former Vice President of the United States*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html [https://perma.cc/6SM7-FYGP] (quoting President Biden as saying in response to a question about Facebook's power, "Section 230 should be revoked, immediately should be revoked . . . For Zuckerberg and other platforms . . . [i]t should be revoked because . . . [i]t is propagating falsehoods they know to be false").

[63] *See* S. 299, 117th Cong. (2021).

[64] Chris Mills Rodrigo, *House Democrats Announce Bill to Rein In Tech Algorithms*, HILL (Oct. 14, 2021, 10:32 AM), https://thehill.com/policy/cybersecurity/576729-house-democrats-announce-bill-to-rein-in-tech-algorithms [https://perma.cc/5MDS-6LRR].

C. State Proposals for Internet Reform

Beyond the proposed Section 230 amendments from federal legislators, two states have passed bills that would impose restrictions on social media platforms' content moderation practices. First, Florida Governor Ron DeSantis signed Senate Bill 7072 into law on May 24, 2021.[65] This law would have required social media platforms to publish the standards they use to determine how to "censor, deplatform, and shadow ban;" to apply such standards consistently; to give users thirty days' notice before changing its rules, terms, and agreements; and to notify users before censoring or shadow banning a user's content or removing a user's account.[66] Shortly after DeSantis signed it, however, trade associations representing internet platform companies sued, and a federal district court judge in the Northern District of Florida enjoined enforcement of the law and declared it unconstitutional.[67] The court found that Florida was unable to identify an interest compelling enough to justify restricting the First Amendment rights of social media platforms, nor was the statute narrowly tailored enough to serve the State's purported interest of leveling the playing field on both sides of the political spectrum.[68] In May 2022, the Court of Appeals for the Eleventh Circuit affirmed the district court's opinion of the law's unconstitutionality, finding that even the largest social media platforms are private actors that are allowed to use discretionary editorial judgment.[69] To that end, the court held that forcing these platforms to provide a "thorough rationale" for their content moderation decisions violates the First Amendment.[70]

Similar to Florida, in September 2021, Texas passed a law that prohibited social media platforms with more than fifty million active users from "censor[ing] a user . . . based on the viewpoint of the user" unless that user's content related to the sexual exploitation or abuse of children, to threats of violence targeted against specific groups, or to general criminal activity.[71]

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[65] *See* Staff, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS, 46TH GOVERNOR OF FLA. (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/ [https://perma.cc/Z94F-YXMB].

[66] FLA. STAT. § 501.2041.

[67] NetChoice, LLC v. Moody, 546 F. Supp.3d 1082, 1095 (N.D. Fla. 2021).

[68] *Id.* ("[T]his is an instance of burning the house to roast a pig.").

[69] NetChoice, LLC v. Att'y Gen., 34 F.4th 1196, 1223 (11th Cir. 2022).

[70] *Id.* at 1203.

[71] TEX. CIV. PRAC. & REM. CODE ANN. §§ 143A.002, 143A.006 (2021); James Pollard, *Texas Sued Over Bill Stopping Social Media Companies from Banning Users for Political Views*, TEX. TRIB. (Sept. 22, 2021, 11:00 AM), https://www.texastribune.org/2021/09/21/texas-social-media-law/ [https://perma.cc/8734-KDV5].

As in Florida, trade associations representing the platforms sued, and a federal district court judge granted a preliminary injunction to prevent this law from going into effect in early December 2021 because of the "irreparable harm" the absence of content moderation would cause to social media platforms and their users.[72] However, unlike the Eleventh Circuit, the Court of Appeals for the Fifth Circuit lifted the injunction, determining that it would issue a final ruling after the lower court had issued a final decision on the merits of the case.[73] Until then, the Fifth Circuit determined, the law could go into effect.[74] In late May 2022, the Supreme Court vacated the Fifth Circuit's stay of the preliminary injunction, once again enjoining enforcement of the law until resolution of the suit.[75]

On September 16, 2022, the Fifth Circuit decided to uphold Texas's law.[76] In doing so, the court "reject[ed] the idea that corporations have a freewheeling First Amendment right to censor what people say."[77] The majority found that the removal of individuals' speech on the platform does not constitute speech itself but should be considered conduct instead.[78] As such, Texas is constitutionally permitted to limit platforms' "censor[ship]" as conduct.[79] The court also maintained that Section 230's language bolsters this understanding of censorship as conduct because it states that platforms must not "be treated as the publisher or speaker" of the content they host,[80] reflecting Congress's judgment at the time of law's enactment that platforms do not engage in speech when they make decisions concerning the content that they host.[81]

As it stands, the status of these regulations is in flux. Because of the current circuit split, affected parties may soon

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[72] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1117 (W.D. Tex. 2021).

[73] NetChoice, LLC v. Paxton, No. 21-51178, 2022 WL 1537249 (5th Cir. May 11, 2022) (per curiam).

[74] *Id.*; *see also* Chris Marchese, *NetChoice Opposes the 2-1 Split Fifth Circuit Order to Lift the Injunction on HB 20*, NETCHOICE (May 11, 2022), https://netchoice.org/netchoice-opposes-the-2-1-split-fifth-circuit-order-to-lift-the-injunction-on-hb-20/ [https://perma.cc/XL6U-6YG4].

[75] NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1715–16 (2022); *see* Amy Howe, *Divided Court Blocks Texas from Enforcing Social Media Law*, SCOTUSBLOG (May 31, 2022, 7:18 AM), https://www.scotusblog.com/2022/05/divided-court-blocks-texas-from-enforcing-social-media-law/ [https://perma.cc/6EB9-68X4].

[76] NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022).

[77] *Id.* at 445.

[78] *Id.* at 448.

[79] *See id.* at 451.

[80] *Id.* at 465 (citing 47 U.S.C. § 230(c)(1)).

[81] *Id.*at 465–66. As of October 12, 2022, the Fifth Circuit has enjoined H.B. 20 yet again, pending the Supreme Court's potential review of this case. NetChoice LLC v. Paxton, No. 21-5178 (5th Cir. Oct. 12, 2022).

petition the Supreme Court for certiorari to determine the constitutionality of these laws.[82] In Justice Alito's dissent to the Supreme Court's vacatur of the Fifth Circuit stay of the injunction, he stated that "[i]t is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies."[83] That said, he was persuaded that Texas put forth a convincing case that HB 20 is constitutional because it does not require social media platforms to host particular messages but simply "refrain from discrimination," and it only applies to social media services with more than fifty million active users that hold themselves out as public platforms.[84] If the Supreme Court grants certiorari in either case, it is possible that its ruling could change First Amendment jurisprudence with respect to the regulation of social media platforms.

D. The Future of Federal and State Social Media Regulation

At the federal level, given the divisiveness of Section 230,[85] it seems unlikely that Congress will pass any major amendments to the law in the near future. However, some Supreme Court justices have proposed that social media platforms' role as private players—as opposed to state actors—be rethought.[86] In *Knight First Amendment Institute at Columbia University v. Trump*, the Knight First Amendment Institute at Columbia University sued then-President Trump for blocking several individuals on Twitter, arguing that the social media platform constituted a public forum under the First Amendment and that Trump thus interfered with those individuals' freedom of speech by limiting their ability to view and directly reply to the President's tweets as well as participate in broader comment threads.[87] While the Court held the

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[82] *See* Eric Goldman, *Supreme Court Restores Injunction Against Texas HB 20!—NetChoice v. Paxton*, TECH. & MKTG. L. BLOG (June 1, 2022), https://blog.ericgoldman.org/archives/2022/06/supreme-court-restores-injunction-against-texas-hb-20-NetChoice-v-paxton.htm [https://perma.cc/8WAJ-DKTF].

[83] NetChoice, LLC v. Paxton, 142 S. Ct. at 1717 (Alito, J., dissenting).

[84] *Id.*

[85] *See* Emily Birnbaum, *What to Make of a Year of Divisive Section 230 Proposals*, PROTOCOL (Dec. 30, 2020), https://www.protocol.com/section-230-2020 [https://perma.cc/N65R-GJGR].

[86] *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221, 1224 (2021) (Thomas, J., concurring).

[87] Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 232–33, 238–40 (2d Cir. 2019). The Second Circuit affirmed the lower court's ruling that former President Trump did not violate the First Amendment because he did not prevent the individuals he blocked from speaking on the platform altogether, and the actions the

challenge as moot after President Biden won the 2020 election, Justice Thomas published a notable concurrence in which he asserted that large social media platforms should be regulated as common carriers.[88] If social media platforms were to be deemed common carriers, then they would be subjected to special regulations, which would potentially include a requirement to serve anyone who wants to use the platform.[89] In addition, Justice Thomas,[90] as well as Justice Alito in his dissent in *NetChoice, LLC v. Paxton*,[91] analogized the issue to that discussed in *PruneYard Shopping Center v. Robins*, in which the Court found that shopping centers open to the public are not allowed to prohibit members of the public from passing out pamphlets or seeking signatures.[92]

The opportunity for the Court to directly address social media regulation will likely arise in response to Florida and Texas's social media laws. If the Supreme Court declares laws like Texas's and Florida's to be constitutional under the First Amendment, then Section 230 will need to be amended to address this new reality. In addition, if Congress follows Justice Thomas's suggestion to regulate social media platforms as common carriers, then Section 230 will cease to exist as we understand it today.

However, as explored below, while Section 230 immunizes platforms for their decisions regarding content, it does not necessarily provide them with the same shield from liability for actions they take towards users' accounts.[93]

II. AN OVERVIEW OF CURRENT CASE LAW

Generally, complaints regarding wrongful account terminations are almost always dismissed in the defendant's favor in the early stages of litigation.[94] Section 230 plays a significant, although not dominant, role in these dismissals.[95] A

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former president took to supervise the interactive features of his account did not constitute government speech. *Id.* at 238–40.

[88] *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring).

[89] *Id.* at 1222.

[90] *Id.* at 1224.

[91] NetChoice, LLC v. Paxton, 142 S. Ct. at 1717 (Alito, J., dissenting).

[92] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980).

[93] *See* King v. Facebook, Inc., 572 F. Supp. 3d 776, 795–96 (N.D. Cal. 2021) (noting that a plaintiff's claim of wrongful content removal was barred by Section 230, but that she may have a viable claim for breach of contract because Facebook had not given her the reason for her account's removal).

[94] Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 198–99 (2021).

[95] *Id.* at 200.

study of account termination cases conducted by Eric Goldman, a professor at the University of Santa Clara School of Law, and Jess Meiers, one of his law students, found that plaintiffs' claims typically fit into four categories: (1) "unconstitutional censorship" by the platform in violation of the First Amendment, (2) discriminatory and "biased content moderation" in violation of the Civil Rights Acts, (3) breach of contract, and (4) other claims.[96]

Of the categories of lawsuits, unconstitutional censorship and discriminatory content moderation claims failed almost universally.[97] Judges typically found complaints of censorship untenable because First Amendment claims, which must allege that a state actor took an action to restrict free speech in order to be successful, do not apply to internet companies, which are private entities, despite their large size and public-facing nature.[98] For example, in *Prager University v. Google LLC*, the most famous case in this category, PragerU sued YouTube and Google, its parent company, for tagging some of PragerU's videos as restricted[99] and demonetizing others, meaning that third parties were not allowed to advertise on those videos.[100] PragerU alleged that YouTube was a state actor because it performs a public function by hosting user-generated content.[101] The court held otherwise, maintaining that the sheer fact a platform hosts

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[96] *Id.* at 198 (analyzing cases against major Internet providers concerning account termination and removal).

[97] *Id.* at 221–24.

[98] *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991, 996–99 (9th Cir. 2020) (maintaining that YouTube does not become a state actor by inviting public discourse on its platform); Huber v. Biden, No. 21-cv-06580-EMC, 2022 WL 827248, at *3–4 (N.D. Cal. Mar. 18, 2022), *appeal docketed*, No. 22-15443, (9th Cir. Mar. 25, 2022) (determining that a social media company's decision to remove a user's account for posting vaccine misinformation was not state action, nor was it joint action that could be attributed to an alleged conspiracy with the White House, since the company's Terms of Service give it the authority to terminate accounts); O'Handley v. Padilla, No. 21-CV-07063-CRB, 2022 WL 93625, at *11 (N.D. Cal. Jan. 10, 2022) (rejecting a plaintiff's argument that Twitter's removal of certain content constituted state action because "Twitter's Terms of Service gave it unlimited authority to remove or discipline accounts"); Perez v. LinkedIn Corp., No. 5:20-cv-07238, 2021 WL 519379, at *2 (N.D. Cal. Feb. 5, 2021) (holding that the plaintiff could not sustain a First Amendment claim against a social media company, which was a private actor); Zimmerman v. Facebook, Inc., No. 19-cv-04591-CV, 2020 WL 5877863, at *2 (N.D. Cal. Oct. 2, 2020) (deciding that Facebook's joint action with government entities and role as a public-facing platform do not make it a public square); *see also* Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 991–92 (2017); Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech* 3–4, 11–12 (Hoover Inst. Working Grp. on Nat'l Sec., Tech., & L., Aegis Series Paper No.1902).

[99] YouTube places some videos in Restricted Mode if they contain "potentially mature content" such as videos about drugs and alcohol, sexually explicit situations, or extreme violence. *See Prager*, 951 F.3d at 996.

[100] *Id.*

[101] *Id.* at 995.

millions of users does not mean it serves a public function that subjects it to constitutional scrutiny.[102]

In addition, in 2019, the Supreme Court held that under the First Amendment media outlets cannot be forced to carry content.[103] In *Manhattan Community Access Corp. v. Halleck*, DeeDee Halleck and Jesus Papoleto Melendez, who produced a movie about the public access channels' neglect of the East Harlem community, sued the Manhattan Neighborhood Network (MNN), which oversaw four public-access channels in New York City, after they were suspended from using the public access channels and from the channels' services and facilities more broadly in response to complaints about the film's content.[104] The Court held that MNN was not a state actor, despite the fact that it had a license from New York City to operate public access channels.[105] As such, MNN could not be forced to air content because that would violate MNN's own First Amendment rights.[106] Applying this logic to social media platforms in account termination cases, plaintiffs would actually be violating platforms' own constitutional rights and running afoul of the compelled speech doctrine[107] by forcing platforms to keep accounts live in violation of their own community standards.[108]

Similarly, discrimination claims often fail because plaintiffs are typically unable to demonstrate precisely that the platforms discriminated against them, rather than simply choosing to remove their speech because it violated the platform's respective community standards.[109] In addition, these plaintiffs often attribute the discrimination to their majority characteristics such as Christianity or heterosexual orientation, and many of these accounts were terminated for abusing minority populations.[110] For example, in *Wilson v. Twitter*, the plaintiff, who used his Twitter account to post antigay hate speech, alleged that Twitter closed his account "based on [his]

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[102] *Id.* at 998.

[103] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019).

[104] *Id.* at 1927.

[105] *Id.* at 1931–32.

[106] *Id.* at 1933.

[107] *See* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 359–60 (2019).

[108] *See* Keller, *supra* note 98, at 12, 15–16.

[109] *See, e.g.*, Lewis v. Google LLC, 461 F. Supp. 3d 938, 945 (N.D. Cal. 2020) ("[Plaintiff] alleges that Defendants are censoring and demonetizing his videos because of Defendants' opposition to Plaintiff's Christian religio[n]"), *aff'd*, 851 F. Appx. 723 (9th Cir. 2021); *see also* Goldman & Miers, *supra* note 94, at 203–04.

[110] Goldman & Miers, *supra* note 94, at 203.

heterosexual expressions" as well as his Christian beliefs.[111] The court found that the plaintiff was unable to state a plausible discrimination claim for many reasons, in large part because heterosexuality is not a protected class for the purposes of the Civil Rights Act and because he was unable to show that Twitter was aware of his religious beliefs and discriminated against him on the basis of such beliefs.[112]

What many of the unsuccessful claims against platforms for account terminations have in common is that the plaintiffs' arguments focus on platforms' ability to moderate content under the law.[113] In contrast, breach of contract claims focus on the relationship between the platform and user, making the case that the offending platform's behavior violates its obligations to its users under its own Terms of Service.[114] That said, while social media platform defendants in such cases may be less likely to receive Section 230 immunity,[115] plaintiffs will still encounter roadblocks when attempting to state a claim because even if they can show that their accounts were removed without cause, they will also need to convince a court that Terms of Service provisions enabling platforms to terminate user accounts at will should be void and unenforceable.[116] The next section will look closely at the form and substance of platforms' Terms of Service agreements and assess what rights users have as parties to these contracts.

III. THE ANATOMY OF PLATFORM TERMS OF SERVICE AGREEMENTS

A. The Form of Platform Terms of Service

When a user creates an account on any internet platform, one of the first things they will encounter are the Terms of

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[111] Wilson v. Twitter, No. 3:20-cv-00054, 2020 WL 3410349, at *1 (S.D. W. Va. May 1, 2020).

[112] *Id.* at *12–13.

[113] *See, e.g.*, *Prager*, 951 F.3d at 995 ("PragerU . . . claims YouTube's outsize power to moderate user content is a threat to the fair dissemination of 'conservative viewpoints and perspectives on public issues.'").

[114] *See, e.g.*, Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 367–68 (Ct. App. 2021) ("[Plaintiff] . . . requests a declaratory judgment that Twitter has breached its contractual agreements with [Plaintiff] and similarly situated users.").

[115] *See* Michelle Jee, *New Technology Merits New Interpretation: An Analysis of the Breadth of CDA Section 230 Immunity*, 13 HOUS. BUS. & TAX. L.J. 178, 190 (2013).

[116] *See infra* Part V.

Service. [117] Typically governed by California law,[118] Terms of Service bind users to a platform's rules,[119] and a platform, in turn, commit to provide services to its users.[120] Users will typically see agreements in one of two forms, or a combination thereof: "browsewraps," which are terms and conditions that are accessible through a hyperlink and to which a user theoretically assents simply by using the website or application, or "clickwraps," which requires a user to click an "I agree" box after being presented with the service's terms and conditions.[121] Typically, when browsewrap or clickwrap agreements arise in litigation, plaintiffs seek to demonstrate that they never really assented to the terms, since they merely ticked a box and did not actually read the contracts.[122] These cases, which plaintiffs bring

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[117] Cadie Thompson, *What You Really Sign Up for When You Use Social Media*, CNBC (May 20, 2015, 3:15 PM), https://www.cnbc.com/2015/05/20/what-you-really-sign-up-for-when-you-use-social-media.html [https://perma.cc/5LZG-G3M8].

[118] *See, e.g.*, *Terms of Service*, YOUTUBE [hereinafter *YouTube Terms of Service*], https://www.youtube.com/static?template=terms [https://perma.cc/P8LS-5Q6G] ("All claims arising out of or relating to these terms or the Service will be governed by California law, except California's conflict of law rules."); *Terms of Use*, INSTAGRAM [hereinafter *Instagram Terms of Use*], https://help.instagram.com/581066165581870 [https://perma.cc/86UZ-3G3D] ("The laws of the State of California, to the extent not preempted by or inconsistent with federal law, will govern these Terms and any claim, without regard to conflict of law provisions."). California law governs these Terms of Services because the companies behind these platforms are headquartered in California. *See, e.g.*, Mae Rice, *Inside Twitter's Fun and Functional San Francisco Headquarters*, BUILT IN SF (Feb. 18, 2020), https://www.builtinsf.com/2020/02/18/twitter-office-san-francisco [https://perma.cc/Q2C9-RD57]; *Meta HQ Aerial View*, META, https://about.facebook.com/media-gallery/offices-around-the-world/facebook-hq-aerial-view/ [https://perma.cc/E4Y4-M4VV].

[119] *See, e.g.*, *Twitter Terms of Service*, TWITTER [hereinafter *Twitter Terms of Service*], https://twitter.com/en/tos [https://perma.cc/7FQ2-ENU7] ("You may use the Services only if you agree to form a binding contract with Twitter."); *User Agreement*, LINKEDIN (Aug. 11, 2020) [hereinafter *LinkedIn Terms of Service*], https://www.linkedin.com/legal/user-agreement [https://perma.cc/2KWX-NSWZ] ("You agree that by clicking 'Join Now', 'Join LinkedIn', 'Sign Up', or similar, registering, accessing or using our services (described below), you are agreeing to enter into a legally binding contract with LinkedIn.").

[120] *See, e.g.*, *Instagram Terms of Use*, *supra* note 118 ("We agree to provide you with the Instagram Service.").

[121] *See* Kurtis A. Kemper, Annotation, *Validity, Construction, and Application of Browsewrap Agreements*, 95 A.L.R. 6th 57 § 2 (2014). Many of today's social media platforms' Terms of Service agreements employ features of both. *See, e.g.*, *Happening Now—Join Twitter Today*, TWITTER, https://twitter.com/ [https://perma.cc/6EBS-454M]; *Sign Up*, FACEBOOK, https://www.facebook.com/ [https://perma.cc/P4DL-6G8F]; *see also* Fteja v. Facebook, Inc., 841 F. Supp. 829, 837–38 (S.D.N.Y. 2012) (determining that Facebook's Terms of Use has elements of both a clickwrap, because it requires users to click "sign up" to assent, and browsewrap, because users do not actually need to click through the agreement to sign up).

[122] *See, e.g.*, Nicosia v. Amazon.com, Inc., 834 F.3d 220, 236 (2d Cir. 2016) (deciding that a "reasonably prudent" person may not know that the terms of use would govern his or her transaction in a case where the user was told that by placing an order, she agreed to the company's conditions of use and subsequently was led to a page to place her order); Sgouros v. Transunion Corp., 817 F.3d 1029, 1035–36 (7th Cir. 2016) (maintaining that a court cannot assume that the act of clicking a box demonstrates that a person has notice of all a contract's contents, meaning that assent cannot necessarily

in federal and state courts all over the country, see mixed results. Some courts, such as the Second Circuit in *Specht v. Netscape Communications Corp.*, find these agreements unenforceable because of the low likelihood that users actually read them.[123] Others, such as Maine's Supreme Court in *Sarchi v. Uber Technologies Inc.*, will find them enforceable only if there is a high likelihood that the user at least viewed them, the screen displaying the Terms is uncluttered so that they can be easily spotted, and there is an "[e]xplicit manner of expressing assent."[124] And outside of the United States, as was the case with the Lans, even when users are presumed to have read the Terms of Service, they may be found unenforceable as applied against users if a court determines that the platform's measures to remedy an alleged breach are unfair.[125]

However, other courts do not take issue with the fact that most users do not read the Terms of Service. For example, in *Fteja v. Facebook*, in which the plaintiff argued that he had not agreed to Facebook's Terms of Service because he could not remember doing so, the court determined that the Terms of Service were sufficiently visible for an internet user to examine them if he wished, rendering them valid because of the plaintiff's constructive knowledge.[126] Similarly, in *Meyer v. Uber Technologies, Inc.*, the Second Circuit held that a warning on Uber's payment screen telling the user, in a print contrasting with the screen's background, that "by creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with links to both, provided the user with sufficient notice of the contract to constitute assent upon the user's creation of the

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be shown simply by a user's act of clicking a button indicating agreement); Thornton v. Uber Techs., Inc., 858 S.E.2d 255, 259–60 (Ga. Ct. App. 2021), *cert. denied*, (Oct. 5, 2021) (stating that a platform must demonstrate that the terms and conditions were visible to a particular user upon sign-up or were sent to the user when updated to demonstrate assent); *In re* Zappos.com, Inc. Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058, 1063–64 (D. Nev. 2012) (holding that assent could not be demonstrated without direct evidence that a plaintiff clicked on the terms of use before creating an account); *see also* Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309 (2003); Kemper, *supra* note 121.

[123] *See, e.g.*, Specht v. Netscape Comms. Corp., 306 F.3d 17, 32 (2d Cir. 2002) (finding that binding oneself to such an agreement is not analogous to real-world "arms-length bargaining"); Be In, Inc. v. Google Inc., No. 12-CV-03373-LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013) ("The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.").

[124] Sarchi v. Uber Tech. Inc., 268 A.3d 258, 267–68 (Me. 2022).

[125] CivC (DC TA) 50870-05-15 Lan v. Facebook, Inc., 12 (2017) (Isr.).

[126] *Fteja*, 841 F. Supp. at 839.

account.[127] And in *Zaltz v. JDate*, the court noted the fact that the plaintiff needed to check a box stating "I confirm that I have read and agreed to the Terms and Conditions of Service," which clearly linked to the terms, was sufficient to denote acceptance of her contract with the website.[128]

Users seeking to hold a social media platform accountable for wrongful account suspension or removal will want a court to find the contract, in form, to be valid and enforceable.[129] That said, they will need the court to find provisions that allow the platform to suspend or remove accounts at will *unenforceable*; otherwise, any platform will remain within its rights to do with user accounts whatever they please.[130] On the one hand, a platform can claim that termination rights are bilateral, since users can cancel their accounts whenever they wish.[131] On the other hand, while a user who has removed his or her account can reactivate the account within a finite period of time[132] or simply create a new one if he or she wishes in the future,[133] fighting removal by a platform can be far more onerous.[134]

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[127] Meyer v. Uber Techs., Inc., 868 F.3d 66, 77–78 (2d Cir. 2017) (internal brackets omitted).

[128] Zaltz v. JDate, 952 F. Supp. 2d 439, 454 (E.D.N.Y. 2013).

[129] *See* Ebeid v. Facebook, Inc., No. 18-cv-07030-PJH, 2019 WL 2059662, at *7 (N.D. Cal. May 9, 2019) (maintaining that a plaintiff must allege the existence of a valid contract as an element for pleading a claim for breach of contract under California law).

[130] *See, e.g.*, Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 377 (Ct. App. 2021) (holding that a platform's contractual provision stating that it could terminate user accounts at will was enforceable).

[131] *See, e.g.*, *Instagram Terms of Use*, *supra* note 118 ("If you do not want to agree to these or any updated Terms, you can delete your account."); *Twitter Terms of Service* ("You may end your legal agreement with Twitter at any time by deactivating your accounts and discontinuing your use of the Services."); *LinkedIn User Agreement* ("Both you and LinkedIn may terminate this Contract at any time with notice to the other.").

[132] *See, e.g.*, *Reopening Your Account*, LINKEDIN (Jan. 15, 2021), https://www.linkedin.com/help/linkedin/answer/3222/reopening-your-account?lang=en [https://perma.cc/BY73-3HGF] ("In most cases we can reopen your account if it's been closed less than 14 days."); *Help With Account Reactivation*, TWITTER HELP CTR., https://help.twitter.com/en/managing-your-account/trouble-reactivating-twitter-account#:~:text=Deactivated%20accounts%20can%20be%20reactivated,for%20iOS%20or%20Android%20app [https://perma.cc/EA95-XKL6] ("Deactivated accounts can be reactivated within 30 days of deactivation by logging in with account username (or email address) and password on twitter.com or through your Twitter for iOS or Android app.").

[133] *See, e.g.*, *Delete Your Account*, INSTAGRAM HELP CTR., https://help.instagram.com/370452623149242 [https://perma.cc/TRC9-RDME] ("After your account is deleted, you can sign up again with the same username or add that username to another account as long as it hasn't been taken by a new person on Instagram.").

[134] *See, e.g.*, *Appeal An Account Suspension of Locked Account*, TWITTER HELP CTR., https://help.twitter.com/forms/general [https://perma.cc/8M9D-UXRU] (noting that the "support team is experiencing some delays for reviews and responses"); *Unable to Access a Google Product*, GOOGLE ACCT. HELP https://support.google.com/accounts/contact/suspended?p=youtube&visit_id=637699142572500835-3305587467&rd=1 (last visited Aug. 20, 2022) (stating that YouTube will only respond to account

The ability of platforms to unilaterally terminate user accounts relying upon Terms of Service agreements can be problematic as platforms increasingly turn to algorithms to make decisions about which accounts to remove.[135] For example, in June 2020, Facebook inadvertently terminated hundreds of user accounts of antiracist skinheads and members of the ska and reggae communities.[136] Although Facebook publicly recognized that it was a mistake and corrected the mass deletion, the company did not explain why it happened.[137] Given Facebook's own admission in its Terms of Service that it relies heavily on automation to moderate content,[138] theories abound that the platform's automation confused these individuals with "far-right neo-Nazi skinheads."[139] Similarly, Republican Nevada Senate candidate Sam Brown suddenly found that his Twitter account was permanently suspended without any warning in the fall of 2021.[140] Twitter acknowledged that this move had occurred in error and noted that it resulted from "systems that find and remove multiple automated spam accounts in bulk."[141] Such incidents indicate that automated moderation systems are not yet able to distinguish at scale between accounts that are truly harmful to users at large and those that are not.

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removal appeals if it needs more information or has additional information to share). This argument is similar to when an employer claims that it is entitled to fire an employee without cause when employment is at-will because employees working under such employment contracts are also entitled to quit their jobs. *See, e.g.*, Newsom v. Glob. Data Sys., Inc., 12-412, p. 4 (La. App. 3 Cir. 12/12/12); 107 So. 3d 781, 785 ("Without a specific contract or agreement which establishes a fixed term of employment, an 'at will' employee is free to quit at any time without liability to his or her employer and, likewise, may be terminated by the employer at any time, provided that the termination does not violate any statutory or constitutional provision."). However, many courts will allow cases to move forward if they believe that the decision to terminate the employee was in bad faith. *See, e.g.*, Banko v. Apple Inc., 20 F. Supp. 3d 748, 759–60 (N.D. Cal. 2013) (allowing an employee's claim of wrongful termination to move forward because the employment agreement and the employer's common practices implied that employees could only be fired for good cause).

[135] *See* Chloe Hadavas, *Why We Should Care That Facebook Accidentally Deplatformed Hundreds of Users*, SLATE (June 12, 2020, 2:12 PM), https://slate.com/technology/2020/06/facebook-anti-racist-skinheads.html [https://perma.cc/PF33-32Q5].

[136] *Id.*

[137] Jon Fingas, *Facebook Suspended Hundreds of Anti-Racist Skinheads and Musicians*, ENGADGET (June 10, 2020), https://www.engadget.com/facebook-bans-anti-racist-skinheads-182048875.html [https://perma.cc/FW86-9VLQ].

[138] *See Facebook Terms of Service*, *supra* note 17 ("[W]e develop automated systems to improve our ability to detect and remove abusive and dangerous activity that may harm our community and the integrity of our Products.").

[139] Hadavas, *supra* note 135.

[140] Joseph A. Wulfsohn, *GOP Senate Candidate Sam Brown Fires Back at Twitter as Tech Giant Admits His Account Was Banned by 'Mistake'*, FOX NEWS (Oct. 4, 2021), https://www.foxnews.com/media/sam-brown-twitter-banned-mistake [https://perma.cc/SH4U-TJSL].

[141] *Id.*

B. How Deplatforming Harms Users

When major social media platforms remove a user's account, that user may suffer both emotional and financial damage. For example, as the court noted in *Lan v. Facebook*, *Statusim Metzaytzim* constituted the Lans' life's work to that point.[142] As a former journalist, Avi Lan had taken great pride in his ability to establish "one of the leading communications bodies" in Israel.[143] Deplatforming can also cause financial damage. In *Teatotaller v. Facebook*, the removal of a New Hampshire café owner's Instagram account, which had over two thousand followers, caused the business to lose revenue and customers,[144] likely by limiting its reach and ability to advertise. For users who have not breached a platform's Terms of Service, such losses are unwarranted and unfair.

C. Platforms' Obligations Towards Their Users

The Terms of Service agreements of the major social media platforms in the United States[145] exhibit several significant commonalities. First, the primary exchange of value between user and platform is the user's assent to view ads posted by the platform providing the services.[146] Behind that advertising is data; users willingly share troves of information with these platforms ranging from their names and email addresses[147] to their interests and precisely where they are

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[142] CivC (DC TA) 50870-05-15 Lan v. Facebook Inc., 3–4 (2017) (Isr.).

[143] Sahar Shushan, *Aharei she-Nehsaf Ki Makhru Statusim be-Kesef: Ha-Amud "Statusim Metzaytsim" Husar me-Facebook* [*After It Was Revealed That They Were Selling Posts for Money: The Page "Tweeting Statuses" Was Removed from Facebook*], YNET (Jan. 16, 2015), https://www.ynet.co.il/articles/0,7340,L-4615755,00.html [https://perma.cc/NGN4-S5AQ].

[144] Teatotaller, LLC v. Facebook, Inc., 242 A.3d 814, 816–18 (N.H. 2020); Annie Ropeik, *Teatotaller Café Owner Takes Facebook to N.H. Supreme Court over Instagram Account Deletion*, N.H. PUB. RADIO (Jan. 20, 2020), https://www.nhpr.org/post/teatotaller-caf-owner-takes-facebook-nh-supreme-court-over-instagram-account-deletion [https://perma.cc/V8MJ-BN7X].

[145] In the United States, as of April 2021 the top five most-used social media platforms among adults were YouTube, Facebook, Instagram, Pinterest, and LinkedIn. *See* Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ [https://perma.cc/RHX5-55CQ].

[146] *See, e.g.*, *Facebook Terms of Service*, *supra* note 17 ("Instead of paying to use Facebook . . . you agree that we can show you ads that business and organizations pay us to promote on and off the Facebook Company Products.").

[147] *See, e.g.*, Mary Madden et al., *Part 2: Information Sharing, Friending, and Privacy Settings on Social Media*, PEW RSCH. CTR. (May 21, 2013), https://www.pewresearch.org/internet/2013/05/21/part-2-information-sharing-friending-and-privacy-settings-on-social-media/ [https://perma.cc/QYW2-ER7R] (finding in a survey of

located at various points in the day.[148] This data is what makes the value proposition of social media worthwhile to advertisers—they can target users almost down to the precise individual they want to buy their product.[149]

This marketing ability is unprecedented in recent history, and our legal system has yet to account for the value of consumer data and the power that it gives to the platforms that leverage it on a massive scale.[150] However, several courts maintain that platforms are entitled to enormously one-sided Terms of Service provisions because the services provided are "free" for users.[151] Such a claim is untenable in light of the fact that the data users offer to platforms in exchange for access to these services is of immense value.

Second, platforms retain broad discretion with respect to account terminations.[152] While all platforms state they will remove accounts for violations of the Terms of Service,[153] users' accounts may also be terminated if the platform determines that the user "create[s] risk or legal exposure."[154] Additionally, on Facebook, Instagram, and Pinterest, users whose accounts are terminated will often not receive notice of this action until they try to log in.[155]

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teenagers that ninety-two percent post their real names on social media, while fifty-three percent post their email addresses).

[148] Ciara Wake, *3 Ways That Social Media Knows You Better Than Your Friends and Family Do*, EMERGING MEDIA 360 (2017), https://www.loyola.edu/academics/emerging-media/blog/2017/3-ways-that-social-media-knows-you-better-than-your-friends-and-family-do [https://perma.cc/CT4T-TZUH].

[149] *See* Natasha Lomas, *Researchers Show Facebook's Ad Tools Can Target a Single User*, TECHCRUNCH (Oct. 15, 2021), https://techcrunch.com/2021/10/15/researchers-show-facebooks-ad-tools-can-target-a-single-user/ [https://perma.cc/L7FW-RWVH].

[150] *See* Guillaume Desjardins, *Your Personal Data Is the Currency of the Digital Age*, CONVERSATION (Sept. 24, 2020), https://theconversation.com/your-personal-data-is-the-currency-of-the-digital-age-146386 [https://perma.cc/AZL9-GKEV] (describing how digital platforms profit from monetizing user data and turning the consumer into the product).

[151] *See, e.g.*, Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2015 WL 7753406, at *5 (N.D. Cal. Dec. 2, 2015) (noting that YouTube's Terms of Service, which stated that YouTube was not liable to users for terminating their accounts, were valid because the platform "offer[ed] a service for free").

[152] *See, e.g.*, *Instagram Terms of Use*, *supra* note 118 ("We can refuse to provide or stop providing all or part of the Service to you . . . if you create risk or legal exposure for us."); *Terms of Service*, PINTEREST [hereinafter *Pinterest Terms of Service*], https://policy.pinterest.com/en/terms-of-service [https://perma.cc/S8YZ-DW3E] ("Pinterest may terminate or suspend your right to access or use Pinterest for any reason on appropriate notice. We may terminate or suspend your access immediately and without notice if we have a good reason.").

[153] *See Facebook Terms of Service*, *supra* note 17; *Instagram Terms of Use*, *supra* note 118; *Pinterest Terms of Service*, *supra* note 152.

[154] *Instagram Terms of Use*, *supra* note 118.

[155] *See My Personal Facebook Account Is Disabled*, FACEBOOK HELP CTR., https://www.facebook.com/help/103873106370583?ref=tos [https://perma.cc/B3R9-TES7]; *What Can I Do If My Instagram Account Has Been Disabled?*, INSTAGRAM HELP CTR., https://help.instagram.com/366993040048856 [https://perma.cc/242L-XGKQ]; *Account*

Third, the appeals processes are generally opaque.[156] Although the platforms all provide a form through which a user can contest a removal decision,[157] Terms of Service agreements do not mandate that appellants receive a response should they make such an inquiry.[158] In many instances, they never will.[159] For example, while Facebook specifically maintains an Oversight Board to review certain controversial deplatforming cases,[160] such as former President Donald Trump's ban in January 2021,[161] the Oversight Board only reviews a miniscule percentage of moderation decisions.[162] That means there could be thousands of accounts mistakenly removed by Facebook's automation, and because the individuals who own those accounts are unlikely to have their cases heard before the Oversight Board, they may have no recourse at all other than the courts.[163]

Suspension, PINTEREST HELP CTR., https://help.pinterest.com/en/article/account-suspension [https://perma.cc/5V98-DGAT].

[156] *See Get More Help*, PINTEREST HELP CTR, https://help.pinterest.com/en/contact?current_page=about_you_page&appeals=account_suspension [https://perma.cc/63ST-G22G] (displaying a bare bones form for a user to request help from Pinterest for a suspended account).

[157] *See, e.g.*, *id.*

[158] *See, e.g.*, *Instagram Terms of Use*, *supra* note 118 ("We can refuse to provide or stop providing all or part of the Service to you . . . if you create risk or legal exposure for us."); *YouTube Terms of Service*, *supra* note 118 (specifying that YouTube generally provides users with the reason for termination or suspension and allows users to appeal using a form, but does not indicate that YouTube will respond to such appeals); *Pinterest Terms of Service*, *supra* note 152 ("We reserve the right to refuse service to anyone, but we will provide appropriate notice.").

[159] *See* Christine Fisher, *YouTube's Appeal Process Is Largely Ineffective*, ENGADGET (Feb. 28, 2020), https://www.engadget.com/2020-02-28-youtube-video-removal-appeal-process.html [https://perma.cc/Q36K-9FUL].

[160] *Oversight Board*, FACEBOOK OVERSIGHT BD., https://oversightboard.com/ [https://perma.cc/JJM4-WFQC].

[161] *Oversight Board Upholds Former President Trump's Suspension, Finds Facebook Failed to Impose Proper Penalty*, FACEBOOK OVERSIGHT BD. (May 2021), https://oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty/ [https://perma.cc/6WW5-HTJE].

[162] Tim De Chant, *Facebook Users Can Now Petition Oversight Board to Remove Content*, ARS TECHNICA (Apr. 13, 2021), https://arstechnica.com/tech-policy/2021/04/facebook-users-can-now-petition-oversight-board-to-remove-content/ [https://perma.cc/HV6L-BMZW] (noting that the Board had only ruled on approximately .003% of posts moderated for violating hate speech policies alone).

[163] In August 2022, Meta reported that it is building a customer service division to address user complaints about content and account removal. Kurt Wagner, *Facebook Is Building a Customer-Service Group to Field Content Complaints*, BLOOMBERG (Aug. 25, 2022; 12:00 PM), https://www.bloomberg.com/news/articles/2022-08-25/facebook-meta-is-building-a-customer-service-group-for-content-complaints [https://perma.cc/JWJ2-J78M]. However, this effort is in its early stages, and Meta has not announced a release date. *Id.*

IV. ACCOUNT REMOVAL AND BREACH OF CONTRACT IN CASE LAW

When deciding breach of contract cases against platforms for wrongful account removal, courts typically assess the explicit language of the Terms of Service agreements to determine whether there is a reason that a platform's broad account removal rights under the contract should be disregarded.[164] While most courts typically grant motions to dismiss on the basis of Section 230 immunity[165] or on the ground that the broad Terms of Service provisions entitle platforms to remove accounts at will,[166] many courts are unwilling to find that these agreements create affirmative obligations for social media platforms at all.[167] This section will explore, in further detail, how two courts have addressed plaintiffs' arguments for breach of contract in wrongful account termination cases.

A. Teatotaller, LLC v. Facebook, Inc.

Teatotaller is a café in Somersworth, New Hampshire that aspires to make the town "an epicenter of joy, art, and human liberation."[168] Dubbed as a "[q]ueer, [h]ipster [o]asis of [t]ea, [c]offee, and [p]astry [g]oodness,"[169] Teatotaller has received dozens of positive reviews from visitors across the internet, with people particularly appreciating its Thai Bubble Tea.[170] But in June 2018, Teatotaller's Instagram account, which had more than two thousand followers, was suddenly removed from the platform without warning and allegedly without

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[164] *See, e.g.*, Young v. Facebook Inc., 790 F. Supp. 2d 1110, 1116–17 (N.D. Cal. 2011) (maintaining that courts must examine particular contractual provisions and the parties' implied obligations); Cox v. Twitter, Inc., No. 2:18-2573-DCN-BM, 2019 WL 2513963, at *4 (D.S.C. Feb. 8, 2019) (noting that Twitter's Terms of Service allow Twitter to terminate a user's account "at any time for any or no reason").

[165] *See, e.g.*, Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 369–72 (Ct. App. 2021) (finding that Section 230 precluded the plaintiff's claim against Twitter for wrongful account termination because Twitter's removal of her account was a decision it made as a publisher).

[166] *See, e.g.*, *Cox*, 2019 WL 2513963, at *8 ("[T]he Defendant reserves the right to suspend or even terminate a user's account or cease providing the user with all or part of its Services 'at any time for any and no reason.").

[167] Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1064 (N.D. Cal. 2016) (finding that "Facebook's Terms of Service place restrictions on users' behavior [but] do not create affirmative obligations") (internal quotation marks omitted).

[168] *Teatotaller Café, Bakery, and Venue*, TEATOTALLER, https://teatotallercafe.com/ [https://perma.cc/MR44-HLRT].

[169] *Teatotaller*, MAINVEST, https://mainvest.com/b/teatotaller-concord [https://perma.cc/5ECS-AQE2].

[170] *Teatotaller*, YELP, https://www.yelp.com/biz/teatotaller-somersworth [https://perma.cc/FDN3-GJTM].

reason.[171] When Teatotaller reached out to Facebook, the company refused to provide Teatotaller with a clear reason for removal, nor did it provide a way to appeal or contact a company representative directly.[172] The business, which used Instagram as its primary customer acquisition platform, claimed it suffered direct losses as a result of the account termination.[173]

After its unsuccessful outreach to the platform, Teatotaller sued Facebook in New Hampshire's small claims court for breach of contract, seeking damages and restoration of its account.[174] Facebook moved to dismiss the complaint on several grounds, including that it was "barred under Section 230(c)(1) . . . which immunizes [it] from claims that seek to hold it liable for deciding whether to publish, withdraw, postpone or alter content."[175] The lower court granted Facebook's motion, holding that Facebook was entitled to immunity under Section 230 for the actions alleged by Teatotaller.[176] Teatotaller subsequently appealed to the New Hampshire Supreme Court, which reversed and allowed Teatotaller's case against Facebook to proceed.[177]

In making this finding, the New Hampshire Supreme Court applied the three-prong test first adopted in *Barnes v. Yahoo!* to determine if Section 230 immunity applied to Facebook in this case.[178] Under that framework, to be protected from liability, the defendant internet provider must show that it is: "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."[179] Here, while Facebook satisfied the first prong and Teatotaller satisfied the third, the second

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[171] *Teatotaller*, LLC v. Facebook, Inc., 242 A.3d 814, 816 (N.H. 2020); Ropeik, *supra* note 144.

[172] *Teatotaller*, 242 A.3d at 816.

[173] *Id.* at 816–17; Ropeik, *supra* note 144.

[174] *Teatotaller*, 242 A.3d at 816; Ropeik, *supra* note 144.

[175] *Teatotaller*, 242 A.3d at 817 (alteration in original) (internal quotation marks omitted).

[176] *Id.*

[177] *Id.* at 816.

[178] *Id.* at 820–21 (citing Barnes v. Yahoo!, 570 F.3d 1096, 1100–01 (9th Cir. 2009). In *Barnes*, the plaintiff had sued Yahoo for its failure to remove fake profiles that her ex-boyfriend had created on the platform for the purpose of harassing her under theories of negligent provision of services and promissory estoppel, since she had relied on representations from Yahoo employees that they would have the profiles removed. *Barnes*, 570 F.3d at 1099. The court held that Section 230 barred the negligence claim but not the promissory estoppel claim because the promissory estoppel claim did not seek to hold Yahoo liable as a "publisher or speaker of third-party content," but "as the counter-party to a contract" or "promisor who has breached." *Id.* at 1105, 1107, 1109.

[179] *Teatotaller*, 242 A.3d at 820–21 (quoting *Barnes*, 570 F.3d at 1100–01).

was less certain.[180] Although courts frequently treat determinations to remove content as publication decisions, Teatotaller based its claim on Facebook's alleged breach of specific promises it made in its Terms of Use (to provide the user with services), rather than simply its removal of Teatotaller's page.[181] Because the plaintiff's claim related to Facebook's actions as a service provider of accounts rather than as a content publisher, Section 230 did not immunize the platform from its actions.[182] Consequently, the court held that it could not dismiss the case at such an early stage.[183]

B. King v. Facebook, Inc.

Adrienne Sepaniak King is a Hawaii-based lawyer who maintained a personal Facebook account for approximately ten years.[184] On November 17, 2020, she discovered that her account was disabled.[185] Two days later, Facebook messaged King to inform her that it had disabled her account and that she had thirty days to submit more information to the platform before the account would be permanently deleted.[186] King's son, who lived with her, reached out to Facebook and was told that King's account "did not follow our Community Standards"—without specifically stating the provision she violated—and that the decision could not be reversed.[187] King's son continued to appeal the process within Facebook.[188] In March 2021, he received a message saying that King "should have been told what is the policy area they were violating," but the representative, apart from apologizing that the appeals process took so long, did not provide more details.[189] The Kings subsequently sued Facebook in federal court on several grounds, including breach of contract.[190]

Although the court dismissed most of the Kings' claims with prejudice, it dismissed the breach of contract claims without prejudice and gave leave to amend because Section 230 immunity did not apply, although it determined that King must

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[180] *Id.* at 823.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *See Adrienne Sepaniak King*, WHY BECOME A LAWYER, https://whybecomealawyer.com/lawyers/adrienne-sepaniak-king/ [https://perma.cc/5858-VM3G]; King v. Facebook, Inc., 572 F. Supp. 3d 776, 780 (N.D. Cal. 2021).
[185] *King*, 572 F. Supp. 3d at 781.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*

plead "cognizable damages" resulting from Facebook's conduct.[191] While Facebook argued that its Terms of Service gives it "complete and unfettered discretion as to whether to disable an account," the court maintained that Facebook is not permitted to arbitrarily delete accounts because the Terms of Service state that it may "suspend or permanently disable" accounts that have "clearly, seriously, or repeatedly breached our Terms of Policies," thereby articulating the standard that Facebook would presumptively use to make such decisions.[192] Such an exercise of discretion, the court said, should not "entirely eviscerate users' rights" to maintain accounts on the platform if they have not violated the Terms of Service.[193]

Teatotaller and *King* indicate that judicial attitudes towards large social media platforms like Facebook may be changing as their dominance and influence becomes better understood.[194] However, other courts are reluctant to recognize the enormity of the power of large social media platforms vis-à-vis their users. Generally, for plaintiffs, this means that their objections to the fairness of Terms of Service fall on deaf ears.[195]

V. TOWARDS BETTER REGULATION OF TERMS OF SERVICE AGREEMENTS

Today, Terms of Service agreements between social media platforms and users are regulated by a patchwork of judicial decisions. This section will explore the claims that plaintiffs can successfully state in theory and in practice. Next, it will propose a better alternative that would create a unified standard for future courts to evaluate Terms of Service agreements that will help to address the imbalance of power between platforms and users.

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[191] *Id.*at 796. King's Second Amended Complaint was ultimately dismissed in its entirety because she failed to argue that Facebook actually caused the damage she alleged, namely, the deletion of her photos and content in violation Facebook's own Terms of Service, which obligate it to preserve such content. King v. Facebook, Inc., No. 21-cv-04573-EMC, 2022 WL 1188873, at *5–6 (N.D. Cal. Apr. 20, 2022).

[192] *King*, 572 F. Supp. at 788–89.

[193] *Id.*

[194] *See* Adrienne LaFrance, *The Largest Autocracy on Earth*, ATLANTIC (Sept. 27, 2021), https://www.theatlantic.com/magazine/archive/2021/11/facebook-authoritarian-hostile-foreign-power/620168/ [https://perma.cc/HMU3-YJXJ].

[195] *See, e.g.*, Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2015 WL 7753406, at *3 (N.D. Cal. Dec. 2, 2015) ("Because YouTube offers its hosting services at no charge, it is reasonable for YouTube to retain broad discretion over those services and to minimize its exposure to monetary damages."); Song Fi, Inc. v. Google, Inc., 72 F. Supp. 3d 53, 62 (D.D.C. 2014) ("The fact that Plaintiffs lacked bargaining power does not render the entire contract . . . procedurally unconscionable.").

A. Breach of Contract Theories Applicable to Account Terminations

Plaintiffs seeking to demonstrate that their accounts were wrongfully terminated often rely on one or both of two arguments in making their claims: that the platform did not operate in good faith when it undertook the account termination, and that provisions allowing for such unilateral actions are unconscionable under California law. This Section will explore both of these arguments in turn.

1. Good Faith

Parties to contracts have a duty to carry out their contractual obligations in good faith.[196] In most jurisdictions in the United States, this covenant requires parties to perform their duties as specified in the contract in good faith but does not create "substantive duties" for parties beyond those already articulated in their agreements.[197] If a party has discretion over a specific provision, then it is expected to operate in good faith "in setting and performing that contractual term."[198] Parties are supposed to be faithful "to an agreed common purpose" and perform their responsibilities consistently "with the justified expectations of the other party."[199] Parties are not allowed to "do anything which will injure the right of the other to receive the benefits of the agreement."[200]

This covenant plays an important role in resolving disputes when the application of a contract's language appears to create an unfair result.[201] However, claims that platforms have breached the implied duty of good faith when terminating user accounts without articulating a cause are generally not received favorably in US courts. For example, in *Murphy v. Twitter*, the court maintained that because "Twitter's terms of

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[196] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

[197] *See* Damner v. Facebook Inc., No. 20-cv-05177-JCS, 2020 WL 7862706, at *12–13 (N.D. Cal. Dec. 31, 2020) (internal quotation marks omitted); Fagerstrom v. Amazon.com, Inc., 141 F. Supp. 3d 1051, 1066 (S.D. Cal. 2015) (maintaining that the duty of good faith arises "only in connection with specific contractual obligations, and does not give rise to a 'free-floating obligation' of good faith by the parties") (citing Rekhter v. St., Dep't of Soc. & Health Servs., 323 P.3d 1036 (Wash. 2014)).

[198] *Fagerstrom*, 141 F. Supp. 3d at 1066 (quoting *Rekhter*, 323 P.3d at 1041).

[199] SAS Inst., Inc. v. S & H Comp. Sys., Inc., 605 F. Supp. 816, 827 (M.D. Tenn. 1985) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981)).

[200] *Damner*, 2020 WL 7862706, at *13 (internal quotation marks omitted).

[201] Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 561 (2006).

service expressly state that they reserve the right to 'suspend or terminate [users'] accounts . . . for any or no reason' without liability," the platform has no obligation to operate in good faith when deciding whether to terminate user accounts.[202] Similarly, in *Ebeid v. Facebook*, in which a plaintiff's account was suspended for posting a page calling for the recall of the then-British Ambassador to Egypt, the court held that the plaintiff failed to state a breach of contract claim because Facebook retained the contractual right to remove posts and accounts at its own discretion.[203]

As social media companies increasingly turn to algorithms to police their platforms,[204] our understanding of what it means for them to carry out these duties in good faith may need to be reconceptualized. Since the implied covenant holds that parties unilaterally setting out terms have a duty to operate in good faith,[205] drafting provisions that give platforms the ability to arbitrarily remove user accounts without notice or a meaningful appeals process do not appear to be in compliance with the doctrine. In addition, it is difficult to see how allowing algorithms—which have been shown to exhibit bias[206]—to make potentially irreversible decisions regarding user accounts constitutes good faith in performing contractual terms.

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[202] Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 377 (Ct. App. 2021).

[203] Ebeid v. Facebook, Inc., No. 18-cv-07030-PJH, 2019 WL 2059662, at *12–13 (N.D. Cal. May 9, 2019). *But see* King v. Facebook, Inc., 572 F. Supp. 3d 776, 789–90 (2021) (maintaining that the covenant of good faith dictates that Facebook should provide enough information to users when terminating their accounts so that they can properly make an appeal, even though such a duty is not articulated in the Terms of Service).

[204] *See* Vincent, *supra* note 41; Isobel Asher Hamilton, *YouTube Took Down Twice As Many Videos As Usual from April to June Because the Pandemic Forced It to Rely on Moderation Algorithms*, INSIDER (Aug. 26, 2020), https://www.businessinsider.com/youtube-moderators-sent-home-pandemic-uptick-2020-2020-8 [https://perma.cc/3QFG-TCZE]; Seetharaman & Horwitz, *supra* note 41; *see also* Virginia Foggo et al., *Algorithms and Fairness*, 17 OHIO ST. TECH. L.J. 123, 132–34 (2021) (discussing algorithmic bias more broadly); Max N. Helveston, *Reining In Commercial Exploitation of Consumer Data*, 123 PENN ST. L. REV. 667, 684 (2019) (discussing how insurers who use big data analytics are likely to violate good faith norms because they will use such analytics not only to identify which individuals pose larger risks than others, but also who will be less likely to contest an insurer's finding that their claim is not covered). Section 230 also requires that content moderation decisions be made in good faith. 47 U.S.C. § 230(c). Courts have refused to grant immunity when interactive computer services have operated in bad faith. *See, e.g.*, Smith v. Trusted Universal Standards in Elec. Transactions, Inc., No. 09-4567, 2010 WL 1799456, at *7 (D.N.J. May 4, 2010) (holding that blocking a plaintiff's emails from appearing in recipients' inboxes because the plaintiff refused to subscribe to a higher level of service suggested bad faith precluding the defendant from Section 230 immunity).

[205] Fagerstrom v. Amazon.com, Inc., 141 F. Supp. 3d 1051, 1066 (S.D. Cal. 2015).

[206] *See infra* Introduction.

2. Unconscionability

Courts could also find Terms of Service provisions allowing platforms to remove accounts without cause unconscionable. Under California law, a contract is unconscionable if one of the parties involved lacks "meaningful choice" and the contract terms are "unreasonably favorable" to the drafting party.[207] Judges may refuse to enforce unconscionable contracts or void specific unconscionable provisions.[208] To demonstrate unconscionability, a plaintiff must show both procedural and substantive unconscionability.[209] Procedural unconscionability relates to the manner in which the contract was entered into and the respective negotiating power of the parties, while substantive unconscionability is determined by considering whether the terms of the contract themselves are manifestly one-sided or unfair.[210] Courts in California use a sliding scale that reduces the importance of procedural unconscionability if the substantive terms themselves are found to be particularly oppressive.[211] The fact that a contract is one of adhesion does not, by itself, establish unconscionability.[212] However, it does establish some degree of procedural unconscionability that will require a court to "scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided."[213] After showing that the contract is an adhesion contract, a plaintiff could demonstrate procedural unconscionability by establishing that there were a lack of market alternatives or that the terms were a surprise.[214] To show substantive unconscionability, a plaintiff must demonstrate that "the term [is] 'so one-sided as to shock the conscience.'"[215]

The court in *Darnaa, LLC v. Google, Inc.* actually found at least "slight" procedural unconscionability in one plaintiff's case against YouTube for removal of her video, but she was unable to demonstrate the high standard for proving substantive unconscionability.[216] In that case, the court failed to recognize the

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[207] Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 748 (Cal. 2015).

[208] CAL. CIV. CODE § 1670.5(a) (West, Westlaw through Ch. 134 of 2022 Reg. Sess.).

[209] *Sanchez*, 353 P.3d at 748.

[210] *Id.* at 748–49.

[211] *Id.* at 748.

[212] Fisher v. MoneyGram Int'l, Inc., 281 Cal. Rptr. 3d 771, 780 (Ct. App. 2021).

[213] *Id.*

[214] *Id.* at 780–81.

[215] Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2015 WL 7753406, at *3 (N.D. Cal. Dec. 2, 2015) (quoting Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 55 Cal. 4th 223, 246 (2012)).

[216] *Id.* at *2–3.

dominance of YouTube in the video sharing sector,[217] and held that YouTube's Terms of Service were, to a minor degree, procedurally unconscionable because the contract was adhesive, but that the procedural unconscionability was weak because the plaintiff could have publicized her music video on another file-sharing site.[218] Thus, the court decided that YouTube's Terms of Service were not substantively unconscionable.[219] In doing so, it disregarded the fact that users share usage data with YouTube and found that, since users do not need to pay money for YouTube's video sharing service, the company has broad discretion to write one-sided contractual provisions that would otherwise appear unfair, since users are otherwise getting something—the right to user YouTube's platforms—for nothing.[220]

B. Resolving the Power Disparity Between Platform and User

Today, the world's evolving understanding of the increasing power of social media platforms negates the notion that users have freedom of choice when platforms choose to remove their accounts.[221] As social media platforms grow larger and their power more consolidated, consensus is developing within the United States that the major social media platforms have developed what is akin to monopoly power, with just a handful of companies controlling the majority of our digital

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[217] *See* Paige Leskin, *YouTube Is 15 Years Old. Here's a Timeline of How YouTube Was Founded, Its Rise to Video Behemoth, and Its Biggest Controversies Along the Way*, INSIDER (May 30, 2020, 11:00 AM), https://www.businessinsider.com/history-of-youtube-in-photos-2015-10 [https://perma.cc/AGP7-FYLL] (demonstrating YouTube's growth from its founding until Google's reporting of YouTube's independent ad revenue for fiscal year 2019, which amounted to $14 billion and 9 percent of parent company Alphabet's total revenue for that year); Eric Auchard, *YouTube Visits Larger Than Rivals Combined: Survey*, REUTERS (June 27, 2007), https://www.reuters.com/article/tech-youtube-surge-dc/youtube-visits-larger-than-rivals-combined-survey-idUKN2742598120070627 [https://perma.cc/AX2A-ZGGR] (showing that YouTube's US audience share in 2007, eight years before *Darnaa* was decided, was already more than 60 percent).

[218] *Darnaa*, 2015 WL 7753406, at *2.

[219] *Id.*

[220] *Id.* at *5. However, as noted above, users do not receive platforms' services for free because they consent to hand over vast amounts of personal data. *See infra* Part IV.

[221] *See, e.g.*, Tim Peterson, *YouTube Stars Wish YouTube Had More Competition from Other Platforms*, DIGIDAY (July 17, 2019), https://digiday.com/future-of-tv/youtube-stars-wish-youtube-had-more-competition-from-other-platforms/ [https://perma.cc/2V9L-4BVK] (finding that YouTube stars feel that YouTube has too much power over them despite the existence of other video sharing platforms); Jillian York, *Getting Banned from Facebook Can Have Unexpected and Professionally Devastating Consequences*, QUARTZ (last updated July 21, 2022), https://qz.com/651001/getting-banned-from-facebook-can-have-unexpected-and-professionally-devastating-consequences/ [https://perma.cc/9CZF-T6RV] (noting that for many people around the world, Facebook is the only means they have to stay in touch with their contacts).

experiences.[222] Thus, the idea that there is any meaningful choice when users are removed from the main platforms they use to monetize or advertise their services, or even simply to display their art or connect with friends and family, is tenuous.[223]

Therefore, depending on the background facts, a typical wrongful removal case may have elements of both procedural and substantive unconscionability. Procedural unconscionability may be shown because Terms of Service are adhesion contracts, and the major platforms today are so large that there is often no meaningful alternative to which a user can turn.[224] In addition, it may take so long to rebuild a lost following that a user who was wrongfully removed may suffer significant financial harm in the process.[225] Moreover, the fact that a large company with billions of users and thousands of employees can simply employ algorithms to terminate accounts and provide little recourse, even if no breach of the Terms of Service has been shown, is just the sort of behavior that is manifestly unfair, one-sided, and substantively unconscionable.[226]

Given the power disparity between platforms and users as well as the willingness of most courts to uphold platforms' broad termination clauses, this note proposes a legislative solution: that the United States adopt statutory regulations of Terms of Service agreements declaring that clauses allowing social media platforms with more than five million users to terminate accounts without notice or cause are unduly disadvantageous and consequently voidable. Tenuous cause, such as Instagram's ability to terminate accounts that "create risk or legal exposure,"[227] should be considered in the same light as no cause. This law would require platforms to notify users immediately upon their accounts' suspension or termination and provide them with a reasonable range of time in which their appeals will be considered. In addition, this law would mandate that the appeals process for account termination cases be

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[222] Shannon Bond, *New FTC Chair Lina Khan Wants to Redefine Monopoly Power for the Age of Big Tech*, NPR (July 1, 2021), https://www.npr.org/2021/07/01/1011907383/new-ftc-chair-lina-khan-wants-to-redefine-monopoly-power-for-the-age-of-big-tech [https://perma.cc/W45P-SRY3].

[223] *See* Ropeik, *supra* note 144.

[224] *See, e.g.*, Peterson, *supra* note 221 (discussing how YouTube creators feel that they would benefit from a more competitive atmosphere because they feel that they are overly dependent on the platform and want to limit their exposure to potential changes that could disadvantage them in the future).

[225] *See* Teatotaller, LLC v. Facebook, Inc., 242 A.3d 814, 817 (N.H. 2020) ("Teatotaller has 'continue[d] to lose business and customers due to [Facebook's] negligence'" in removing and refusing to reinstate its account).

[226] *See* Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 748 (Cal. 2015).

[227] *Instagram Terms of Use*, *supra* note 118.

meaningful, including a human review. To communicate cause for suspension or termination, the platform must be able to point to a specific provision in the Terms of Service, Community Standards, or other publicly available policies that was violated.

Under this proposed regulation, when a platform terminates a user's account without providing cause, the user will be able to file suit if the platform fails to reinstate their account within a reasonable period of time. Moreover, a court will be able to find that the platform breached its contract to provide services to the user unless the defendant platform can demonstrate that the plaintiff breached its Terms of Service, Community Standards, or other publicly available policies. If successful, the plaintiff will be entitled to prompt reinstatement of their account. In addition, because damages are so difficult to calculate, this note proposes that statutory damages be imposed. The amount of damages would depend on how long the user's account was unusable and whether the account was used for business or personal purposes. However, no matter the amount, the defendant would be required to pay all legal costs.

This solution has numerous advantages. First, it will encourage platforms to improve the quality of their moderation algorithms so they do not delete accounts that are only loosely affiliated with the type of harmful content they wish to remove. That said, platforms will retain the right to remove accounts for violations of their articulated Community Standards, such as posting hate speech or threats of violence.[228] This proposed regulation will not impact what platforms include in their Community Standards but will merely dictate that account suspension and termination decisions be communicated transparently and fairly.

Second, accounts that were removed by mistake will be reinstated more quickly in the face of a meaningful appeals and review process. Historically, when arbitrary account termination decisions have been communicated to the public, platforms have decided to restore the accounts.[229] As such, the threat of a lawsuit may be sufficient to convince platforms to develop more comprehensive notice and appeals procedures. If they do not, their account removal processes resulting in such wrongful terminations will remain in the public eye for the duration of the suit. If the burden of proof falls on the defendant

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[228] *See, e.g.*, *Facebook Community Standards*, META TRANSPARENCY CTR., https://transparency.fb.com/policies/community-standards/ [https://perma.cc/G8X2-4778] ("The Facebook Community Standards outline what is and isn't allowed on Facebook.").

[229] *See, e.g.*, Connaughton, *supra* note 38; Wulfsohn, *supra* note 140.

to demonstrate that an account termination was fair, such suits will last longer, since courts will no longer expediently dismiss suits if the defendant cannot show that its decision was valid. If platforms quickly remedy their mistaken actions in the face of a public suit, there may even be fewer lawsuits in the long term.

Third, this law would leave Section 230 intact by focusing on platforms' contractual obligations towards their users rather than requiring platforms to make specified content moderation decisions. Section 230 has been crucial for the growth of the internet—which has made critical information accessible to billions of people around the world—by ensuring that platforms are not held legally liable for user-generated content over which they have no control.[230] Under this proposal, if a user posts content that violates the platform's standards, nothing will affect its ability to remove these offensive posts. However, the decision to stop providing services to a user altogether will need to be well-founded and based on a user's violation of the contract he or she entered into with the platform.

Most importantly, this proposed solution reduces the disparity between platforms and their users by giving users recourse when platforms make decisions arbitrarily or in error. As a result, the judicial presumption will no longer be in favor of platforms on the basis of contractual provisions giving them broad discretion to do whatever they want. Instead, the platforms that comprise some of the wealthiest companies in the world will bear the legal burden of demonstrating the validity of their practices. In addition, users who suffered as a result of platforms' arbitrary decisions may be recompensed for litigation expenses incurred. Many of the plaintiffs who file suit against platforms do so *pro se*, which leaves them disadvantaged in the face of platforms that can afford to hire the most esteemed law firms in the country.[231] If this proposed legislation is adopted, plaintiffs with meritorious claims may obtain adequate legal representation with the knowledge that they will receive financial compensation for their legal fees if successful in their claims.

CONCLUSION

Legislating unduly disadvantageous provisions in Terms of Service agreements will help level the playing field between platforms and users without running afoul of current US law.

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[230] Derek E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, BROOKINGS INST. (July 1, 2020), https://www.brookings.edu/techstream/how-section-230-reform-endangers-internet-free-speech/ [https://perma.cc/JU64-ESX3].

[231] *See* Goldman & Miers, *supra* note 94, at 199.

Most notably, it draws a clear distinction between users and content. Often, the plaintiffs who sue large social media platforms do so because their content was removed or demonetized, not because their accounts were shut down.[232] However, breach of contract claims are distinct because they speak to the heart of the relationship between platform and user, since the removal of a user's account terminates the contractual relationship between that individual and the platform altogether. As long as these platforms, which are unbelievably wealthy and powerful, claim that users have obligations towards them, then it is difficult to believe that they, in turn, do not owe their users the most basic duty—to keep their accounts open as long as they are not in breach of their Terms of Service. Focusing on the contractual aspect of the relationship also ensures that only meritorious plaintiffs—those who abided by the standards set forth by the platforms—will be able to state a claim for breach of contract in the face of a wrongful account termination.

As social media companies increasingly turn to automation to police their platforms, they must be held accountable when such systems get those decisions wrong. Given that wrongful termination actions are rarely successful in the judicial system as it stands today, Congress must enact a new law to remedy this wrong and provide plaintiffs with viable breach of contract claims against these powerful platforms.

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[232] *See, e.g.*, Divino Grp. v. Google LLC, No. 19-cv-04749-VKD, 2021 WL 51715, at *5 (N.D. Cal. Jan. 6, 2021) ("Plaintiffs allege that, despite YouTube's purported viewpoint neutrality, defendants have discriminated against plaintiffs based on their sexual or gender orientation, identity, and/or viewpoints by censoring or otherwise interfering with certain videos that plaintiffs uploaded to YouTube.").

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