No. 21-1678

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TYRONE HENDERSON, SR., GEORGE O. HARRISON, JR., AND ROBERT MCBRIDE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLANTS,

V.

THE SOURCE FOR PUBLIC DATA, L.P., D/B/A PUBLICDATA.COM; SHADOWSOFT, INC.; HARLINGTON-STRAKER STUDIO, INC.; AND DALE BRUCE STRINGFELLOW,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court for the Eastern District of Virginia at Richmond, Case No. 3:20-cv-00294-HEH
The Honorable Henry E. Hudson

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1(a)(2), The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") and the National Fair Housing Alliance ("NFHA") make the following disclosures:

1. The Lawyers' Committee and NFHA are private non-profit organizations, neither of which has a parent corporation.
2. No publicly held corporation or other publicly held entity owns more than 10 percent of the Lawyers' Committee's or NFHA's stock or has a direct interest in the outcome of this litigation.
3. This case did not arise out of a bankruptcy proceeding.

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STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, non-profit, national racial justice organization founded at the request of President John F. Kennedy in 1963 to enlist the private bar's leadership and resources in combatting racial discrimination and vindicating the civil rights of Black Americans and other racial and ethnic minorities.[1] The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law; the organization frequently participates as *amicus curiae* to protect the interests of these communities. *See, e.g.*, Br. for the Nat'l Women's Law Center et al. as *Amici Curiae* in Support of Resp'ts, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255); *Bryant v. Woodall*, 1 F.4th 280, 282 (4th Cir. 2021), *as amended* (June 23, 2021); *Int'l Refugee Assistance Project v. Trump*, 961 F.3d 635, 638 (4th Cir. 2020).

The Lawyers' Committee has an interest in this case because the scope of Section 230 of the Communications Decency Act cannot be allowed to substantially and adversely impact the manner and extent to which civil rights laws can be enforced against discriminatory practices occurring through the Internet. The

[1] Plaintiffs-Appellants consent to the filing of this brief. Defendants-Appellees take no position. No party authored this brief in whole or in part, and no one other than *amici*, its members, and its counsel contributed funds or other support for the brief.

Lawyers' Committee's Digital Justice Initiative works at the intersection of racial justice, technology, data, and privacy. The Initiative combats online discrimination and unfair or deceptive data practices targeting Black Americans and other communities of color. *See, e.g.*, *Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020); *Dumpson v. Ade*, No. 18-1011, 2019 WL 3767171 (D.D.C. Aug. 9, 2019); Br. of *Amici Curiae* Lawyers' Comm. for Civil Rights Under Law and the Wash. Lawyers' Comm. for Civil Rights & Urban Affairs in Support of Neither Party, *Freedom Watch, Inc. v. Google, Inc.*, 816 Fed. Appx. 497 (D.C. Cir. 2020) (No. 19-7030); Br. of *Amicus Curiae* Lawyers' Comm. for Civil Rights under Law Supporting Pl., *Opiotennione v. Facebook, Inc.*, No. 19-cv-07185-JSC, 2020 WL 5877667 (N.D. Cal. Oct. 2, 2020); David Brody & Sean Bickford, *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce*, Lawyers' Comm. for Civil Rights Under Law (Jan. 2020) https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf. The Lawyers' Committee is committed to opposing racial discrimination wherever it occurs, online or offline.

The National Fair Housing Alliance ("NFHA") is a consortium of approximately 167 private, non-profit, fair housing organizations, state and local civil rights groups, and other organizations dedicated to fair housing. NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all

people through leadership, homeownership, credit access, tech equity, education, member services, public policy, community development, and enforcement initiatives. Relying on the Fair Housing Act and other civil rights laws, NFHA undertakes important enforcement initiatives in cities and states across the country and participates as amici to further its goal of achieving equal housing opportunities for all.

NFHA has long had an interest in ensuring that Section 230 of the Communications Decency Act is interpreted to allow housing discrimination on the internet to be effectively redressed through the Fair Housing Act and other civil rights laws. *See* Br. of *Amici Curiae* Nat'l Fair Hous. All. et al. in Support of Plaintiffs-Appellees, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007) (Nos. 04-56916, 04-57173); Br. of *Amici Curiae* Nat'l Fair Hous. All. & Lawyers' Comm. for Civil Rights Under Law in Support of Plaintiff-Appellant, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (No. 07-1101). NFHA's Tech Equity Initiative is a multi-faceted effort designed to eliminate bias in algorithmic-based systems used in housing and financial services and advance effective policies for regulating AI tools. NFHA and its members have brought some of the preeminent cases dealing with housing discrimination on the internet. *See,*

e.g., Compl., *Nat'l Fair Hous. All. v. Facebook, Inc.*, 1:18-cv-02689 (S.D.N.Y. Mar. 27, 2018).

INTRODUCTION

The district court's interpretation of Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("§ 230"), departs both from the expressed intent of Congress and from years of precedent. And it is dangerous. Under § 230, a defendant that is claiming immunity for information published on its interactive computer service ("ICS") must show that the information in question was "provided" by another information content provider ("ICP").

Here, no other ICP "provided" the information at issue. Thus, the district court improperly conferred immunity on Defendants under § 230 in the absence of any allegation that the information at issue was "provided" to Defendants by an ICP, as the statute requires for immunity to apply. *See* 47 U.S.C. § 230(c)(1). Further, the district court simply ignored the legal significance of Defendants' material contributions to the development of the information at issue in this case. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc) (A party loses § 230 immunity "if it contributes materially to the alleged illegality of the conduct."). Finally, and most fundamentally, the district court failed to distinguish between the actions of a website that passively displays information provided by a third party ICP (which §

230 generally immunizes) and the affirmative conduct of a website operator that is unlawful independent from displaying that information online (which § 230 does not immunize). *See, e.g.*, *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139–40 (4th Cir. 2019) (holding that product liability is not immunized by § 230).

If affirmed, the district court's deviations from the statutory text, congressional intent, and precedent of § 230 would have grave implications for the enforcement of civil rights laws online. "Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims for . . . race discrimination, we should be certain that is what the law demands." *Malwarebytes, Inc. v. Enigma Software Grp. USA*, 141 S. Ct. 13, 18 (2020) (Thomas, J., statement respecting denial of certiorari) (citation omitted).

Anti-discrimination statutes stretch back over a century, encompassing not just the products of the Civil Rights Movement, but of the Civil War and Reconstruction as well. When considering the Civil Rights Acts of 1866 and 1871, the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, Title IX, and state and federal public accommodations laws, it is clear that the ability to effectively enforce these laws in an Internet-enabled economy depends upon § 230 extending *only so far as Congress intended, and no further*. *See Whitman v. Am.*

Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Absent a clear and unambiguous directive from Congress that it intends to profoundly alter 150 years of anti-discrimination laws, this Court must reverse the erroneous decision of the district court.

ARGUMENT

I. THE DISTRICT COURT'S DECISION IS CONTRARY TO PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTE

Congress enacted § 230 in 1996 to provide limited immunity for the "provider or user" of an ICS against claims seeking to hold them liable for the speech of others. 47 U.S.C. § 230. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1).

Section 230 defines an ICS as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." *Id.* § 230(f)(2). It defines an ICP 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). For example, Twitter provides an ICS, and its users—rather than Twitter

itself—act as "another information content provider." *Jones v. Twitter, Inc.*, No. CV-RDB-20-1963, 2020 WL 6263412, at *3 (D. Md. Oct. 23, 2020).

A single website can function as an ICS, an ICP, or both, depending on the facts and context. An ICS can also be an ICP, and therefore lose immunity, by "creat[ing] or develop[ing]" information "in whole or in part," 47 U.S.C. § 230(f)(2), even if the information was initially provided by some other ICP in another form. *See Roommates.com*, 521 F.3d at 1168 ("[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."). Whether a defendant is purely an ICS (and entitled to immunity) or is also an ICP (and not entitled to immunity, regardless of whether it is also an ICS), is not an inherent property of the defendant, but rather, it depends on the specific actions taken by the defendant in a specific context.

Accordingly, to decide if § 230 immunizes a claim, a court must determine "1) whether Defendant is a provider of an interactive computer service; 2) if the postings at issue are information provided by another information content provider; and 3) whether Plaintiff's claims seek to treat Defendant as a publisher or speaker of third party content." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008), *aff'd*, 591 F.3d 250 (4th Cir. 2009).

The district court erred in three ways in applying this test, each of which independently merits reversal. *First*, it did not analyze whether the information at

issue was "provided" by a third party, a statutory prerequisite for immunity, or if it was only "published" by Defendants. 47 U.S.C. § 230(c)(1). *Second*, while the district court correctly identified Defendants (particularly, PublicData.com) as providers of an ICS, it failed to recognize that Defendants were *also* acting as an ICP of the information at issue, because Defendants "create[d] or develop[ed]" the information at least "in part." *Id.* §§ 230(c)(1), (f)(2). *Third*, the district court misunderstood the nature of Plaintiffs' claims, which arise from Defendants' statutory obligations, irrespective of whether Defendants are the speakers or publishers of another ICP's information. *Id.* § 230(c)(1).

A. There Is No § 230 Immunity Where, As Here, The Content In Question Was Not "Provided By" A Third Party

Section 230 immunity applies only in circumstances where the content at issue was "provided by another information content provider." *Id.* Here, no one "provided" the content to Defendants; they actively searched for specific content, located the content in the possession of third parties, took the content, and processed it for the purpose of populating their website and furthering their business objectives. JA15–16, 29–31. Because of these affirmative actions, Defendants are not merely passive conduits for information provided by a third party, and, therefore, are not entitled to immunity under § 230. By holding otherwise, the district court erred by ignoring both the text and purpose of the statute.

The district court did not properly consider whether the offending information was actually "provided by" another ICP to the Defendants, as required by § 230. *See* 47 U.S.C. § 230(c)(1). Section 230 only "provides immunity for claims against providers of interactive computer services . . . 'as the *publisher or speaker of any information provided by another information content provider*.'" *Erie Ins.*, 925 F.3d at 139 (quoting 47 U.S.C. § 230(c)(1)) (emphasis in original). The verb "provided" requires "some active role by the 'provider' in supplying the material to a 'provider or user of an interactive computer service.'" *Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir. 2003).

In this case, Plaintiffs do not allege, nor do Defendants contend, that any other ICP "provided" the content to Defendants. Rather, it was *Defendants* who proactively went out to acquire specific information from third parties, and "assemble, parse, summarize, and format all of the public records and upload them onto [PublicData.com]." JA15. But for Defendants' affirmative actions, this information would not have appeared on Defendants' website, PublicData.com. The fact that a third party makes information available on *their own* platform (like a court publishing criminal records on its website) does not mean that such a party is an ICP *providing* that information to *every* website on the Internet, simply because anyone theoretically could copy the information and upload it to another website.

Congress chose to say "provided by" not "created by" or "first published" when it drafted § 230. *See* 47 U.S.C. § 230(c)(1); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). One who creates content and/or actively pulls information from a third party and then decides to publish such information on their own ICS becomes an ICP, because it is "providing" the information to the ICS. *See F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (finding that there is no immunity where an ICS's "actions were intended to generate such content."). Here, Defendants—not a third party—searched for, located, and uploaded the information at issue to PublicData.com. JA15–16, 29–31. Defendants' active involvement in the selection of the information and the choice to publish it defeats § 230 immunity.

B. Section 230 Was Never Intended To Immunize Actors That Participate In The Unlawful Activity

Section 230 affords immunity only when the defendant is not the ICP of the content at issue. It does not protect those who "create" or "develop" the offending content "in whole or in part." 47 U.S.C. § 230(f)(3); *see also Roommates.com*, 521 F.3d at 1166. Here, while Defendants operate an ICS, they are also an ICP with respect to the content at issue.

Immunity for Defendants' conduct in this case is also contrary to the congressional intent behind § 230. Congress intended to immunize platforms for

liability arising from hosting third party content, not for illegal actions to which the platform materially contributes. *See Id.* at 1163. Section 230 was enacted, in significant part, as "a response to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where an interactive computer service was held liable for defamatory comments made by one of its two million users." *Russell v. Implode-Explode Heavy Indus. Inc.*, No. DKC-08-2468, 2013 WL 5276557, at *4 (D. Md. Sept. 18, 2013). Congress was concerned about platforms being held liable because of the conduct of their users, rather their own conduct. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

There is no such immunity where, as here, an ICS also acts as a "provider" or content creator, even in part. 47 U.S.C. § 230(c)(1). When a defendant acts as "more than a passive publisher or neutral intermediary," *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20-CIV.-8668-VM, 2021 WL 4254802, at *7 (S.D.N.Y. Sept. 17, 2021), and "contributes materially to the alleged illegality of the conduct," *Roommates.com*, 521 F.3d at 1168, the ICS is acting as an ICP with respect to the content in question. *See, e.g.*, *Accusearch*, 570 F.3d at 1197; *see also Jones v. Dirty World Entm't Recordings*, 755 F.3d 398, 409 (6th Cir. 2014).

For example, a website operator that "edits in a manner that contributes to the alleged illegality—such as by removing the word 'not' from a user's message . . . in

order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune." *Jones*, 755 F.3d at 411 (quoting *Roommates.com*, 521 F.3d at 1169). Similarly, an ICS that materially contributes to the injurious nature of the content, or repackages the content as its own, can no longer can claim the immunity afforded to a passive ICS by § 230. *See, e.g.*, *Accusearch*, 570 F.3d at 1199. In *Accusearch*, a website hired researchers to find illegal telephone records, compiled the results of the search, and forwarded that compilation to paying customers. *Id*. at 1191. There, the Tenth Circuit held that Accusearch was an ICP, and therefore not entitled to § 230 immunity, because it "developed" the illegal information by hiring researchers to find the phone records, and then making those records available to the public. *Id*. at 1198-99.

Here, Defendants similarly acted as an ICP because they intentionally transformed specific information—which they sought out from disparate sources—into (allegedly inaccurate) summary reports. JA15–16, 29–31. Defendants, like Accusearch, are not mere passive conduits for information; rather, they actively sought out information and used it to *create* offensive content in the form of inaccurate and incomplete background reports. *See id.*; *see also Accusearch*, 570 F.3d at 1191, 1199. This active role in content development makes Defendants an ICP, with respect to that content, and therefore, ineligible for immunity under § 230.

Defendants also act as an ICP when they create summary reports that do not accurately reflect the underlying information and/or make changes to content that alters its meaning. *See* JA15–16, 29–31; *e.g.*, *Gilmore v. Jones*, 370 F. Supp. 3d 630, 663 (W.D. Va. 2019) (denying immunity where defendants allegedly created some of the defamatory content by adding headlines and comments to articles written by others). For example, Plaintiffs allege Defendants failed to include the fact that certain charges had been *nolle prossed*. JA37–38. Such a material omission substantially alters the meaning of the content, and Defendants' active decision to modify the original content makes them an ICP, eliminating § 230 immunity. The *Roommates.com* court found that similar material omissions showed that the defendant was "directly involved in the alleged illegality and thus not immune." 521 F.3d at 1169. Just as § 230 does not immunize a website operator who "remov[es] the word 'not' from a user's message reading '[Name] did *not* steal the artwork' in order to transform an innocent message into a libelous one," neither does it immunize Defendants' conduct here. *Id*.

C. Plaintiffs Do Not Seek To Hold Defendants Liable In Their Capacity As A Publisher Or Speaker Of Another's Content

Plaintiffs' claims do not rely on treating the Defendants as a publisher or speaker, a requirement for § 230 immunity. Instead, Plaintiffs' claims arise from Defendants' violation of their duties that are entirely independent of whether they are operators of an ICS under § 230. By providing its customers with background

reports on specific individuals (for a fee), Defendants function as a *consumer reporting agency* under the Fair Credit Reporting Act, 15 U.S.C. § 1681 ("FCRA"). Indeed, pursuant to FCRA, Defendants have a duty, as a consumer reporting agency, to: (1) respond to the Plaintiffs' requests for information, 15 U.S.C. § 1681g; (2) notify Plaintiffs that their information had been included in a report regarding employment, *id.* § 1681k(a); and (3) obtain a certificate to certify that the requesters of the information complied with FCRA, *id.* § 1681b(b)(1). Plaintiffs made those requests, which triggered Defendants' FCRA obligations. *See, e.g.*, JA17, 33.

Plaintiffs allege Defendants ignored those requests and allowed the information to be purchased by their customers. Plaintiffs were harmed because those FCRA violations caused them to lose employment opportunities. JA17, 30, 33. Defendants' FCRA obligations do not vary regardless of whether they regurgitated data provided by someone else, copied data from elsewhere, materially altered data created by others, or created new data out of whole cloth. By alleging violation of these FCRA duties, Plaintiffs' claims do not turn on whether Defendants are regarded as the publisher or speaker of information provided by someone else, and therefore, § 230 does not apply. *See Erie Ins.*, 925 F.3dat 140; *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021) ("[T]hough publishing content is 'a but-for cause of just about everything' Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a

'publisher or speaker.'" (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016)).

Courts around the country have consistently refused to expand § 230 to immunize legal obligations that do not stem from an ICS's actions as a passive conduit for third parties to share information. *See Erie Ins.*, 925 F.3d at 140 (no § 230 immunity for Amazon selling defective product); *Lemmon*, 995 F.3d at 1092 (no § 230 immunity for a claim that a social media platform's design is negligent, which "does not seek to hold Snap liable for its conduct as a publisher or speaker," even if content is being presented through that design by user); *Internet Brands*, 824 F.3d at 854 (no § 230 immunity for failure to warn claim); *Accusearch*, 570 F.3d at 1201 (no § 230 immunity for deceptive trade practices claim); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009) (no § 230 immunity for promissory estoppel claim).

Plaintiffs allege Defendants willfully violated their rights under FCRA—rights that exist independent of the Defendants' status as a "publisher" or anything else. The district court's failure to recognize that departs from the well-established judicial consensus.

II. AFFIRMANCE OF THE DISTRICT COURT'S DECISION COULD IMPERIL THE ENFORCEMENT OF CIVIL RIGHTS LAWS

The extension of § 230 immunity endorsed by the district court could have severe, unintended repercussions for the enforcement of civil rights laws, such as the

Voting Rights Act of 1965, 52 U.S.C. §§ 10301 *et seq.* ("VRA"); the Ku Klux Klan Act of 1871, 42 U.S.C. §§ 1985, 1986 ("KKK Act"); the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (1968) ("FHA"); the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* (2010) ("ECOA"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1991) ("Title VII"); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (1986) ("Title IX"), and state and federal public accommodations statutes.

A. The District Court's Decision Threatens Enforcement Of The Voting Rights Act And Ku Klux Klan Act

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The growing role of digital spaces in our lives offers novel means by which bad actors can threaten that right, and the VRA and KKK Act play valuable roles in curtailing these harms. Section 11(b) of the VRA and Section 2 of the KKK Act provide private rights of action against those who use force, intimidation, or threats to interfere with voting rights. 52 U.S.C. § 10307(b); 42 U.S.C. § 1985(3). Further, Section 6 of the KKK Act establishes vicarious liability for any person who knows of a 42 U.S.C. § 1985 violation, has the ability to aid in preventing it, and neglects to do so. 42 U.S.C. § 1986. The district court's decision risks extending § 230 immunity to bad actors who knowingly aid and abet online voter suppression.

Those risks are not hypothetical. In *National Coalition on Black Civic Participation v. Wohl*, the Southern District of New York considered claims arising from the use of robocalls as a voter suppression mechanism. 498 F. Supp. 3d at 463. The calls at issue included intimidating and misleading information designed to deter Black voters. *Id.* at 467. The *Wohl* court granted a temporary restraining order finding that the defendants who plotted and sent the robocalls engaged in voter intimidation in violation of the VRA and the KKK Act. *Id*. at 489. As an intervenor, New York State added a new defendant: the company that provided the other defendants with the ability to make the robocalls. *Wohl*, 2021 WL 4254802, at *1. The robocall provider moved to dismiss the claims against it by contending it enjoyed immunity under § 230. *Id.* at *5. The court disagreed and denied the motion to dismiss. *Id*. at *10.

The *Wohl* court first expressed skepticism as to whether the robocall provider was in fact an ICS, a prerequisite to § 230 immunity. *Id*. at *7. Yet, the court continued its analysis and determined that the defendant company nevertheless "acted as more than a passive publisher or neutral intermediary in the circumstances of this case." *Id*. The company "did not merely transmit the robocall message," but instead, it actively aided the other defendants by identifying target zip codes to receive the robocalls and "discussed the content or purpose of the robocall message" with the other defendants. *Id.* at *8. The company "crossed the line from just 'taking

actions . . . to . . . display . . . actionable content' and instead have 'responsibility for what makes the displayed content [itself] illegal or actionable.'" *Id.* at *9 (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020)) (alternations in original). Indeed, in its prior ruling on the preliminary injunction, the *Wohl* court explained the substantial harms that those defendants could inflict:

> Defendants carry out electoral terror using telephones, computers, and modern technology adapted to serve the same deleterious ends [as the KKK]. Because of the vastly greater population they can reach instantly with false and dreadful information, contemporary means of voter intimidation may be more detrimental to free elections than the approaches taken for that purpose in past eras, and hence call for swift and effective judicial relief.

Wohl, 498 F.Supp.3d at 464.

If the district court's decision is affirmed here, a company that actively provides mass email or messaging services to send voter intimidation emails or social media messages to Black voters might nevertheless be treated as only an ICS—rather than an ICP—and thus be afforded § 230 immunity. If such a company knows that its client is sending voter suppression messages and works with them to target the delivery of those messages to Black communities, that is a violation of the VRA and/or KKK Act. As the *Wohl* court held, § 230 is not, and should not be, a barrier to the preservation of fundamental rights.

B. The District Court's Decision Threatens The Enforcement Of Public Accommodations Laws

The district court failed to consider whether the content in question was "provided" to the Defendants by another party, an essential element of § 230 immunity. In doing so, the district court disregarded the required analysis and dangerously broadened the reach of the immunity. If affirmed, such a precedent could undermine the efficacy of public accommodations laws that protect people against discrimination by private businesses. Many states' public accommodations statutes include provisions that prohibit businesses from advertising that they do not serve protected classes and from communicating information designed to make protected classes feel unwelcome. *See, e.g.*, W. Va. Code § 5-11-9(6)(B); Colo. Rev. Stat. § 24-34-601(2)(a); N.Y. Exec. Law § 296.2(a). In addition to online communications by brick-and-mortar companies, West Virginia's public accommodations statute could be applied to online-only businesses as well, given its broad construction. *See Israel v. W. Va. Secondary Sch. Activities Comm'n*, 388 S.E.2d 480, 488–89 (W.Va. 1989). At least 23 other jurisdictions apply their public accommodations laws beyond classic brick-and-mortar businesses. *See* Brody & Bickford, *supra*.[2]

[2] Since the publication of this report, Nevada and the District of Columbia have amended their laws to apply online as well. *See* Nev. Rev. Stat. § 651.050 (2021);

Federal law provides similar protections. Indeed, Title II of the Civil Rights Act of 1964 makes it unlawful to "withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive" any person of the right to patronize public accommodations free from discrimination and segregation. 42 U.S.C. § 2000a-2. The Civil Rights Act of 1866 protects the rights of all persons to enjoy "all benefits, privileges, terms, and conditions" of commercial contracts free from race discrimination. 42 U.S.C. § 1981.

If allowed to stand, the district court's reasoning would create a bizarre and incoherent regime of § 230 immunity around these laws. Suppose a restaurant owner posted a racist screed on her website saying that she will not serve people of color. This would violate public accommodations statutes, whether the restaurant owner found it elsewhere or wrote it herself. But the district court's analysis, in contravention of precedent, suggests that if the business owner simply copied and pasted the exclusionary statement from somewhere else—such as from another website, or even a racist manifesto—she would not be held liable. *Contra Accusearch*, 570 F.3d at 1198-99 (no immunity for harmful use of repackaged information acquired from third parties). This would be the outcome even if the reposted language was identical to the otherwise illegal language and had an

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Bella Evangelista and Tony Hunter Panic Defense Prohibition and Hate Crimes Response Amendment Act of 2020, D.C. Law 23-283.

identical effect. Alarmingly, the district court's unprecedented analysis may lead to a grant of immunity even if the owner altered the text of the manifesto in meaningful ways, such as by changing it to refer to race instead of religion, omitting a source attribution, or "summarizing" it. *Contra Roommates.com*, 521 F.3d at 1169 (no immunity for materially altered statement). This application would be incompatible with precedent and incongruent with Congress's intent in enacting § 230. *See supra* Section I.B.

Public accommodations laws also protect against third party interference with equal enjoyment of public accommodations. For example, in *Dumpson v. Ade*, a website violated the District of Columbia's Human Rights Act when it incited its followers to engage in online harassment of the first Black female student government president of American University. 2019 WL 3767171, at *1. The website published links to the woman's social media accounts and statements directing its readers to target her—which they did. *Id.* at *1-2. If the defendant website had simply copied the exact same inciting message from another forum and reprinted it to further the incitement, it should not suddenly become immune under § 230, under the theory that it is only republishing content from elsewhere. Precedent and the statutory text preclude § 230 immunity for such a defendant. *See, e.g.*, *Lemmon*, 995 F.3d at 1093 (a defendant can be "liable for its own conduct.") (citation omitted); *Internet Brands*, 824 F.3d at 853 ("CDA does not provide a

general immunity against all claims derived from third-party content."). Yet, under the logic of the district court in this case, § 230 would still immunize liability in this example.

Conduct that is unlawful offline should not be immunized from liability simply because the conduct occurs online. To do so would drastically subvert the intent of anti-discrimination laws. Whether occurring offline or online (where § 230 could potentially apply), the discriminatory harm is the same: denial of service and stigmatic harm protected classes of people. To a person seeking lodging, food, or other services, it makes little difference whether the words turning them away were originally written by the owner herself, an interloper, or are just quoting someone else. Such statements manifest exclusionary *conduct*, and that is what makes them unlawful.

C. The District Court's Decision Threatens Enforcement Of The Fair Housing Act, Equal Credit Opportunity Act, And Title VII

The district court's logic could similarly impair the ability to enforce statutes prohibiting discrimination in housing, credit, and employment. The Fair Housing Act of 1968 ("FHA") prohibits discrimination against individuals in housing rentals, purchasing, and brokerage or financial services related to housing based on color, age, sex, national origin, or religion. 42 U.S.C. §§ 3604–05. Similarly, the ECOA prohibits credit discrimination, and Title VII prohibits employment discrimination. *See* 15 U.S.C. § 1691; 42 U.S.C. § 2000e-2.

The district court's interpretation of § 230 could inhibit the efficacy of the FHA, ECOA, and Title VII, in situations similar to claims brought in recent anti-discrimination cases against Facebook by the U.S. Department of Housing and Urban Development ("HUD") and civil rights organizations. *See, e.g.*, *Dept. of Hous. and Urban Dev. v. Facebook, Inc.*, FHEO No. 01-18-0323-8 (Mar. 28, 2019); *Nat'l Fair Hous. All. v. Facebook, Inc.*, No. 1:18-cv-02689 (S.D.N.Y., Mar. 27, 2018).

In these cases, the plaintiffs alleged that Facebook's advertising platform allowed advertisers to select preferences for their housing, employment, and credit ads that discriminated against users on the basis of their protected characteristics. Facebook's advertising platform plays an integral role in profiling its users, bundling them into cohorts for advertisers, and writing the algorithms that will determine which subsets of a target audience actually receive the ads. The advertisers write the actual ad copy and select which platform-created cohorts to target. In this manner, an ad that is wholly neutral in its content can end up being delivered in a discriminatory fashion. *See generally* Ava Kofman & Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, ProPublica (Dec. 13, 2019), https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement.

Under the district court's logic, the fact that an advertiser writes the ad copy on their own, which is subsequently published by the advertising platform, may be sufficient to grant § 230 immunity—ignoring the fact that it is the deliberate manner in which the platform actively steers the content toward or away from certain demographics that is the crux of the unlawful discrimination. *See Roommates.com*, 521 F.3d at 1167; *Wohl*, 2021 WL 4254802, *9. This case should not endanger what has been settled law for almost 50 years without a clear and unambiguous directive from Congress. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973) (newspaper can be liable for sex segregating employment ads).

D. The District Court's Decision Threatens Enforcement Of Title IX

It is also possible that the district court's approach, if affirmed, could allow schools and universities to escape their obligations to provide a safe learning environment online free from sex discrimination pursuant to Title IX. 20 U.S.C. § 1681. These obligations, like the FCRA obligations the district court overlooked in this case, exist separately and independently from whether a defendant is being held liable in its capacity as a publisher. The danger of broadening § 230 immunity to protect unlawful conduct online is especially acute today as universities shift to online learning environments where participants can be subjected to racial or sexual

harassment because racial or sexual harassment can happen just as easily in online learning environments as it can offline.[3]

If students engage in online sexual harassment in a school-controlled environment, and the school knows about it but fails to act, the school may be liable. In *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018), this Circuit considered a Title IX sex discrimination claim against a university arising, in part, from harassment of and threats against female students on Yik Yak (an independent, now-defunct, social media platform). *Id*. at 682. The university was aware of the harassment but took no meaningful steps to address the situation. *Id*. at 682–83. In *Hurley*, this Circuit concluded that the facts alleged created a sexually hostile environment and that the university was deliberately indifferent to that hostile environment. *Id*. at 689. Moreover, this Circuit rejected the university's defense that it lacked control over the harassers—which included fellow students—because the harassment took place online: "we cannot conclude that UMW could turn a blind

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[3] *See, e.g.*, David Batty, *Harassment fears as students post extreme pornography in online lectures*, The Guardian (Apr. 22, 2020), https://www.theguardian.com/education/2020/apr/22/students-zoombomb-online-lectures-with-extreme-pornography; Joshua Rhett Miller, *Texas high school student made sexual advances during Zoom class*, NY Post (Aug. 20, 2020), https://nypost.com/2020/08/20/texas-student-made-sexual-advances-at-teacher-during-zoom-class/; Natalie Johnson, *Racist incident during UNC law class raises questions about diversity and inclusion*, Daily Tarheel (Mar. 15, 2021), https://www.dailytarheel.com/article/2021/03/university-law-school-racism.

eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace." *Id.* at 688–89.[4]

The *Hurley* decision did not consider § 230 because the university was not a provider or user of the ICS, so there was no immunity under § 230. Yet, if the facts of *Hurley* were slightly different—e.g., if the school itself was providing the ICS—and the district court's reasoning were applied to such case, that reasoning could create immunity for the school where none should exist.

If the school directly controlled or offered the platform, unlike in *Hurley*, it may be providing or using an ICS. Suppose that a group of students consistently posted sexually harassing comments about a classmate on Blackboard (an online educational connectivity platform) or made sexually harassing comments to the student during a class held on Zoom—two platforms that schools now regularly employ. As in *Hurley*, liability for the university in this context would not entail the university be "treated as the publisher or speaker of any information" provided by a third party. 47 U.S.C. § 230(c)(1). Rather, the university's Title IX liability would stem from its failure to address the harassing conduct of its students. The school's

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[4] In May 2020, the Department of Education adopted new regulations relating to the scope of Title IX which limit liability to conduct within an "education program or activity" controlled by the school. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). Those regulations are currently under review.

liability has nothing to do with whether the university *itself* published or created the harassing content—it would be liable whether the offending content were sent on its email system, posted in fliers on campus, or spoken in a classroom. *See, e.g.*, *Erie Ins.*, 925 F.3d at 139 (no § 230 immunity for product liability); *Lemmon*, 995 F.3d at 1092–93 (no § 230 immunity for negligent design of social media platform); *Internet Brands*, 824 F.3d at 854 (no § 230 immunity for failure to warn violation); *Barnes*, 570 F.3d at 1109 (no § 230 immunity for promissory estoppel claim). But another court applying the district court's unfounded analysis—similarly broad and perfunctory in its analysis of whether the defendant is being treated as a publisher—might fail to appreciate this distinction.

CONCLUSION

For the foregoing reasons, Defendants are not immunized by § 230, and the district court's decision should be reversed.

Respectfully submitted,

Dated: October 15, 2021

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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