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**IT'S ALL IN THE GAME(STOP):
SOCIAL MEDIA, MEME STOCKS, AND SECTION 230 OF THE
COMMUNICATIONS DECENCY ACT**

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ABSTRACT

In the age of the internet and social media, stock trading has shifted to new, largely unregulated platforms. This Article will discuss the applicability of Section 230 of the Communications Decency Act to social media fueled meme stock rallies that cause stock-price bubbles. It argues that reforms to Section 230 of the Communications Decency Act are warranted. While strict liability is an onerous and undesirable standard for social media platforms to abide by when monitoring finance-related activity, some rollback of Section 230's safe harbor provisions and a more active role by the Securities Exchange Commission (SEC) would strike a balance between strict liability and total immunity, which appears to be the present standard. The Article concludes that reforms to Section 230 are needed to hold platforms accountable for content they host that is intended to manipulate the stock market.

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INTRODUCTION

In the twenty-first century, the buying, selling, and trading of stocks has evolved alongside advances in computer technology and new methods of social interaction. Today, stock trading is easier than ever before and market actors have access to unprecedented levels of information, both about the market and about each other.¹ But this unprecedented access to information is not an unalloyed good: on social media platforms, retail traders can exchange ideas that fuel speculative bubbles. These bubbles occur when numerous traders purchase stocks en masse, lose faith in their investment and then sell the asset, also en masse.² More specifically, a speculative bubble is a “sharp, steep rise in prices that is fueled by market sentiment and momentum, more than underlying fundamentals,” although the initial appeal of the asset often arises from its engaging fundamentals.³ The effects of these bubbles have varied, from causing minor turbulence limited to a specific commodity to causing farther-reaching market dislocation.⁴

This kind of speculative trading has been largely associated with penny stocks and with the 1990s “Dot-com Bubble.”⁵ But

¹ For instance, stock traders have free access to major online news outlets, to social media platforms and spaces dedicated to discussing stocks, and to e-trading platforms. For a discussion of how platforms are related to stock prices, see, e.g., Jason Rechel, *How Social Media Moves Markets: Analyzing GameStop (GME) Using Social Listening Data*, SPROUT SOCIAL (Jan. 28, 2021), <https://sproutsocial.com/insights/gamestop-stock-social-media/>; Lasse Heje Pedersen, *Game On: Social Networks and Markets* (Oct. 4, 2021) (unpublished manuscript) (available on SSRN), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794616.

² Alexandra Twin, *Speculative Bubble*, INVESTOPEDIA (Jan. 5, 2021), <https://www.investopedia.com/terms/s/speculativebubble.asp>.

³ *Id.*

⁴ Compare ANNE GOLDFAR, *TULIPMANIA: MONEY, HONOR, AND KNOWLEDGE IN THE DUTCH GOLDEN AGE 1-7* (2007) (arguing that while the Dutch “tulipmania” speculative bubble truly did occur, it did not cause the dramatic crash that popular culture associates with the phenomenon) with JOHN KENNETH GALBRAITH, *THE GREAT CRASH, 1929 206* (1955) (arguing that the stock market crash of 1929 that sparked the Great Depression was due in large part to a “speculative orgy”).

⁵ See *Penny Stock*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/penny-stock/> (last visited Nov. 9, 2021) (“A penny stock is a common share of a small . . . company that is traded at a low price. . . . The stocks are inherently speculative due to their high volatility and low liquidity. In addition, these stocks are frequently used in fraudulent activities” such as “pump and sump schemes, where their prices are manipulated by the stock promoters.”); Joe Nocera, *Dot-com Survivors Have Wisdom for the GameStop Crowd*, PITTSBURGH POST-GAZETTE (Mar. 14, 2021, 12:00 AM),

recently, social media has facilitated the rise of meme stocks—stocks that are popularized on social media platforms and trade “more on hype than its underlying fundamentals.”⁶ Examples of meme stocks include Kodak, which fueled stock buying when it announced it would manufacture coronavirus drugs; Hertz, a rental car company that filed for bankruptcy but subsequently tried to issue new stocks when retail investors began to buy up shares; and Nikola, an as-yet-unproven electric vehicle manufacturer.⁷

GameStop, the formerly ailing (but possibly revitalizing)⁸ video game retailer, is another recent example of a meme stock at the center of a speculative bubble—the so-called “Reddit Rally” of January 2021. Retail traders on the Reddit forum r/WallStreetBets banded together to buy GameStop stock, causing the price to soar. This frenzy also spread to other social media channels. The bubble burst and the stock price plummeted, although it has since rebounded.

The United States Congress and the Securities Exchange Commission (SEC) investigated the trading rally in its aftermath.⁹

<https://www.post-gazette.com/opinion/insight/2021/03/14/Dot-com-survivors-have-wisdom-for-the-GameStop-crowd/stories/202103070013>.

⁶ Thomas Niel, *9 Meme Stocks that Social Media Won't Shut Up About*, NASDAQ (Feb. 12, 2021, 1:54 PM), <https://www.nasdaq.com/articles/9-meme-stocks-that-social-media-wont-shut-up-about-2021-02-12>.

⁷ Cristin Flanagan et al., *Year of the Meme Stock*, ECON. TIMES (Dec. 27, 2020, 11:47 PM), <https://economictimes.indiatimes.com/markets/stocks/news/year-of-the-meme-stock-hertz-kodak-nikola-top-list-of-2020-highlights/articleshow/79974289.cms?>

⁸ See Dave Sebastian, *GameStop to Name Chewy Co-Founder as Chairman*, WALL ST. J. (Apr. 8, 2021, 6:44 PM), <https://www.wsj.com/articles/gamestop-to-name-chewy-co-founder-ryan-cohen-as-chairman-11617882866>; Dan Gallagher, *Taking the Games Out of GameStop*, WALL ST. J. (Dec. 9, 2021), <https://www.wsj.com/articles/taking-the-games-out-of-gamestop-11639058405> (noting GameStop's third-quarter revenue growth and pivot towards video game hardware and the metaverse).

⁹ E.g., Ian Sherr & Oscar Gonzalez, *Robinhood's Role in GameStop Stock Spike Scrutinized by Congress*, CNET (Feb. 18, 2021, 4:16 PM), <https://www.cnet.com/personal-finance/investing/robinhoods-role-in-gamestop-stock-spike-scrutinized-by-congress/>; Katanga Johnson, *U.S. SEC "Close" to Publishing Report on GameStop Meme Saga*, REUTERS (Sept. 14, 2021, 9:20 AM), <https://www.reuters.com/business/finance/us-sec-close-publishing-report-gamestop-meme-saga-sec-chair-2021-09-14/> (announcing that the SEC may promulgate new trading rules); *Robinhood CEO Testimony Transcript GameStop Hearing February 18, REV*, <https://www.rev.com/blog/transcripts/robinhood-ceo-testimony-transcript-gamestop-hearing-february-18> (Feb. 18, 2021) (providing a transcript of the February 18, 2021 hearings at time stamp 31:32) (Rep. David Kustoff asking Reddit CEO Steve Huffman whether he saw any “bad actors that caused any role in the GameStop frenzy”).

Numerous class actions have been filed against e-trading platform Robinhood and against Reddit user Keith Gill, who allegedly promoted the stock on the platform.¹⁰ The SEC recently concluded its investigation but made no recommendation, thus underscoring the capacity for further analysis of the issue of meme stock regulation.¹¹

Indeed, while the GameStop trading frenzy became emblematic of meme stock trading frenzies, the phenomenon of social media-fueled trading rallies is likely to reoccur—and it already has.¹² For this reason, a legislative or regulatory solution is warranted. Instead of solely regulating meme stock trading through securities laws or regulation of individual traders,¹³ some commentators have proposed broader reforms to Section 230 of the Communications Decency Act to regulate social media platforms that facilitate meme stock trading frenzies.¹⁴

¹⁰ See, e.g., Class Action Complaint at 22, *Iovin v. Gill*, No. 3:21-CV-10264-MGM (D. Mass. Feb. 16, 2021) (a class action against Keith Gill); *Robinhood Faces Over 30 Class-Action Suits for Pausing ‘Meme Stock’ Buys*, BURNS & WILCOX (Feb. 10, 2021), <https://www.burnsandwilcox.com/insights/robinhood-faces-over-30-class-action-suits-for-pausing-meme-stock-buys/>.

¹¹ Paul Kiernan & Alexander Osipoovich, *SEC’s GameStop Report Questions ‘Game-Like’ Trading Apps*, WALL ST. J. (Oct. 18, 2021, 6:21), <https://www.wsj.com/articles/gamestop-trading-frenzy-tested-resilience-of-markets-sec-says-11634589000>; Thornton McEnery, *After 9 Months of Investigation into GameStop Stock Frenzy, the SEC Concludes that Things Got Crazy for a Second There*, MARKETWATCH (Oct. 18, 2021), <https://www.marketwatch.com/story/after-9-months-of-investigation-into-gamestop-stock-frenzy-the-sec-concludes-that-things-got-crazy-for-a-second-there-11634592761>.

¹² Bailey Lipschultz, *Meme We Go Again! Wall Street Pros Fuel Latest Meme-Stock Rally*, AL JAZEERA (Aug. 25, 2021), <https://www.aljazeera.com/economy/2021/8/25/meme-we-go-again-wall-street-pros-fuel-latest-meme-stock-rally>.

¹³ See, e.g., Joshua F. Bautz, *What Is the SEC Going to Do About GameStop?*, N.Y. STATE BAR ASS’N J., Mar.–Apr. 2021, at 16, 18–19.

¹⁴ See, e.g., Ramsey Khabbaz, *Online Platforms Have Become Chaos Machines. Can We Rein Them In?*, HARV. BUS. REV. (Feb. 3, 2021), <https://hbr.org/2021/02/online-platforms-have-become-chaos-machines-can-we-rein-them-in>; see also Michael D. Smith & Marshall Van Alstyne, *It’s Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230>; Tom Hals, *Analysis: Robinhood and Reddit Protected from Lawsuits by User Agreement, Congress*, REUTERS (Jan. 30, 2021, 4:20 AM), <https://www.reuters.com/article/us-retail-trading-robinhood-liability-an/analysis-robinhood-and-reddit-protected-from-lawsuits-by-user-agreement-congress-idUSKBN29Z0HI>. For a general overview of arguments in favor of content moderation on platforms, including Reddit, see generally James Grimmelman, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 94 (2015).

This Article proceeds in three parts. Part I explains why regulation of stock-related discussions on social media may be necessary. Part II addresses the applicability of Section 230, as currently enacted, to regulating social-media-fueled meme stock speculation. Part III discusses some proposed revisions to Section 230 and how they might apply to this issue. The Article concludes by raising broader issues concerning content moderation and the role of social media in society.

I. WHY REGULATE PLATFORMS AND MEME STOCK TRADING?

In the aftermath of the GameStop bubble, some have criticized the so-called gamification of the stock market.¹⁵ Gamification is the “application of typical elements of game playing to other areas of activity, typically as an online marketing technique to encourage engagement with a product or service.”¹⁶

Gamification of investing has been facilitated by Robinhood’s easy to use and aesthetically pleasing platform in conjunction with the proliferation of social media communities such as r/WallStreetBets whose members communicate via short posts and memes.¹⁷ More specifically, the addictive, entertaining interface “encourages immediacy and frequent engagement” akin to a real-life casino.¹⁸ Robinhood CEO Vlad Tenev has hotly contested the idea that Robinhood gamifies stock trading, but Robinhood has nevertheless been widely associated with this phenomenon.¹⁹ Likely in response to this criticism, Robinhood

¹⁵ See, e.g., Siddarth Shrikanth, ‘Gamified’ Investing Leaves Millennials Playing with Fire, FIN. TIMES (May 6, 2020), <https://www.ft.com/content/9336fd0f-2bf4-4842-995d-0bcbab27d97a>; but see Erik Gordon, *Why Gamified Trading is Good for the Stock Market*, FORTUNE (Jul. 28, 2021, 4:00 PM), <https://fortune.com/2021/07/28/robinhood-ipo-meme-stocks-gamification/>.

¹⁶ *What is Gamification in ITSM?*, INVENSIS (internal quotation marks omitted), <https://web.archive.org/web/20210120140807/https://www.invensislearnin.com/articles/itil/what-is-gamification-in-itsm>.

¹⁷ Annie Massa & Tracy Alloway, *Robinhood’s Role in the ‘Gamification’ of Investing*, BLOOMBERG (July 15, 2021, 9:00 PM), <https://www.bloomberg.com/news/articles/2020-12-19/robinhood-s-role-in-the-gamification-of-investing-quicktake>.

¹⁸ Cyrus Farivar, *Gambling Addiction Experts See Familiar Aspects in Robinhood App*, NBC NEWS (Jan. 30, 2021, 3:00 AM) (internal quotation marks omitted), <https://www.nbcnews.com/business/business-news/gambling-addiction-experts-see-familiar-aspects-robinhood-app-n1256213>.

¹⁹ See Sohini Podder, *Robinhood to Scrap Confetti Animation on App After ‘Gamification’ Criticism*, REUTERS (Mar. 31, 2021, 11:35 AM), <https://www.reuters.com/technology/robinhood-scrap-confetti-animation-app-after-gamification-criticism-2021-03-31/>.

announced that confetti animation would no longer show on the app page once a user makes a trade.²⁰

The gamification of stock trading is not necessarily problematic; in some ways, it is a positive trend. For instance, it has “dramatically lower[ed] the cost of brokerage services,” allowing anybody to trade stocks even if they do not have access to local financial services.²¹ And it is “far more socially beneficial for someone to speculate on stocks” than to gamble in a traditional sense.²² Even buying the most well-researched stock issued by the most fundamentally sound company is a risk in some sense, and the stock market relies on people and institutions willing to take these risks. Thus, gamification may entice people to invest who would not otherwise do so, giving them the opportunity to accumulate wealth that they otherwise would not have had access to.

But there is good reason to think that gamification of the stock market should be tempered. As the GameStop rally made clear, gamification makes retail traders vulnerable to misinformation if their main source of information regarding meme stocks comes from social media. Relying on these platforms may result in imprudent trades and large losses.²³ Other potentially negative ramifications of stock market gamification include unanticipated increased tax rates for short-term holders, gambling addictions, and portfolios lacking in diversity, which may limit returns.²⁴ Finally, “casino-style ‘investing’ in GameStop and similar corporations harms the economy and the stock market” by

²⁰ Caitlin McCabe, *Robinhood to Remove Controversial Digital Confetti from Trading App*, WALL ST. J. (Mar. 31, 2021, 7:11 PM),

https://www.wsj.com/articles/robinhood-to-remove-controversial-digital-confetti-from-trading-app-11617195612?mod=lead_feature_below_a_pos1.

²¹ James J. Angel, *GameStonk: What Happened and What to Do About It* 32 (Georgetown Univ. McDonough Sch. of Bus., Research Paper No. 3782195, 2021), <https://papers.ssrn.com/sol3/papers.cfm?id=3782195>.

²² *Id.*

²³ Sheelah Kolhatkar, *Robinhood’s Big Gamble*, NEW YORKER (May 10, 2021), <https://www.newyorker.com/magazine/2021/05/17/robinhoods-big-gamble>; see also Caitlyn McConnell, *Robinhood and the Gamification of the Stock Market*, MCGILL BUS. REV. (July 29, 2020), <https://mcgillbusinessreview.com/articles/robinhood-and-the-gamification-of-the-stock-market>.

²⁴ George J. Ziogas, *The Gamification of the Stock Market: Hidden Dangers Every Investor Needs to Know About*, MEDIUM: DIGIT. DIPL. (Sept. 17, 2020), <https://medium.com/digital-diplomacy/the-gamification-of-the-stock-market-hidden-dangers-every-investor-needs-to-know-about-5951fc6e8e15>.

increasing volatility and enabling speculation.²⁵ This phenomenon has led to some extreme reactions, including self-harm.²⁶

While much of the content on r/WallStreetBets appears to have been legitimate, non-speculative discussion of GameStop, some content seemed explicitly aimed at encouraging others to buy its stock solely to turn a quick profit and disadvantage institutional investors, who had taken short positions in the stock. In other words, this content was posted with an intent to manipulate the stock market.²⁷ But even if this particular meme stock rally did not violate any securities laws, it is not difficult to imagine that groups of meme stock traders could band together in the future to buy en masse solely to turn a quick profit. Indeed, as e-trading and social media technologies facilitate greater connections among people, such incidents are likely to happen again. For this reason, regulation of meme stock trading content ought to be considered. A tension exists more broadly between the fact that society encourages people to save for retirement early and invest, and the fact that mass speculation and wild, uninformed meme stock trading are against the public interest.

II. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

One way to regulate meme stock trading is to regulate the social media platforms hosting misinformation and manipulative content. This can be accomplished by relying on Section 230 of the Communications Decency Act. Because social media platforms have largely been considered publishers by U.S. courts, Section 230 almost certainly immunizes Reddit from civil liability for any of its users' posts that would violate U.S. securities laws.²⁸ Current

²⁵ Casey Epstein, *Stopping GameStop's "GameStonk": Why Courts Must Confront GameStop Colluders and Prohibit Open-Market Manipulation*, MINN. L. REV.: DE NOVO BLOG (Feb. 3, 2021), <https://minnesotalawreview.org/2021/02/03/stopping-gamestops-gamestonk-why-courts-must-confront-gamestop-colluders-and-prohibit-open-market-manipulation/>.

²⁶ McConnell, *supra* note 23.

²⁷ See u/Player896, *Bankrupting Institutional Investors for Dummies, ft GameStop*, REDDIT: WALLSTREETBETS (Sept. 19, 2020, 6:03 AM), https://www.reddit.com/r/wallstreetbets/comments/ivs6dw/bankrupting_institutional_investors_for_dummies/; Yun Li, *GameStop, Reddit and Robinhood: A Full Recap of the Historic Retail Trading Mania on Wall Street*, CNBC (Jan. 30, 2021, 10:14 AM), <https://www.cnbc.com/2021/01/30/gamestop-reddit-and-robinhood-a-full-recap-of-the-historic-retail-trading-mania-on-wall-street.html>.

²⁸ Eric Peterson, *Section 230 Enabled Reddit to Challenge Wall Street*, WASH. TIMES (Feb. 4, 2021), <https://www.washingtontimes.com/news/2021/feb/4/section-230-enabled-reddit-to-challenge-wall-stree/> (arguing that Reddit played the same role as the Prodigy forum platform in the *Stratton Oakmont* case—hosting manipulative and defamatory content, respectively, for which Prodigy was

Section 230 precedent makes it unlikely that social media platforms will be viewed differently from internet service providers (ISPs), who are considered publishers and thus are immunized under Section 230. The following section describes Section 230 as written, discusses how social media platforms might fall outside its safe harbor and evaluates potential legislative reforms.

Section 230 was “[d]rafted in the early years of internet commerce” in order to solve the catch-22 faced by online platforms in the context of defamation lawsuits: choosing to moderate apparently defamatory content and being vulnerable to lawsuits by the content poster, or not moderating any content and being vulnerable to lawsuits by the defamed individual.²⁹ Section 230 contains safe harbor provisions for platforms that opt to moderate content and for those that do not.³⁰ In order to be eligible for this safe harbor, the defendant must be (1) “a provider or user of an interactive computer service;” (2) who is sued as a “publisher or speaker” and (3) the information at issue is “provided by another information content provider.”³¹

More specifically, Section 230 states that “No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”³²

Section 230 renders interactive service providers safe from civil liability for not moderating content posted on their platform by third parties while also shielding ISPs from liability for moderating content they find objectionable. Though social media did not exist when Section 230 was enacted in the 1990s, courts

held civilly liable by a New York state court). *Stratton Oakmont* was overruled when Section 230 was passed. See *CDA 230: Legislative History*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Nov. 9, 2021).

²⁹ U.S. DEP’T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?: KEY TAKEAWAYS AND RECOMMENDATIONS 1–2 (2020), <https://www.justice.gov/file/1286331/download>.

³⁰ 47 U.S.C. §§§§ 230(c)(2)(A)–(B).

³¹ KATHLEEN ANN RUANE, CONG. RSCH. SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 1–2 (2018), <https://fas.org/sgp/crs/misc/LSB10082.pdf>.

³² 47 U.S.C. §§ 230(c)(1)–(2).

have interpreted it as applying to contemporary social media platforms, possibly by “stretch[ing] Section 230’s safe harbor far beyond what its words, context, and purpose support.”³³ Social media platforms have largely been protected under Section 230, but some courts have urged Congress to reevaluate this immunity.³⁴

Currently, there are several exceptions to Section 230 protection listed in Subsection 230(e). As is pertinent to the GameStop rally, Section 230 does not provide immunity from liability under federal criminal laws, such as securities laws.

A. Social Media Platform Liability for Content Intended to Manipulate Stock Prices

Many politicians and regulators have called for reforms to Section 230 in the wake of the GameStop Reddit rally. Some have paid particularly close attention to the intersection between the securities laws, securities issuers (such as publicly traded companies), and Section 230.³⁵

³³ Danielle Keats Citron, *Section 230’s Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018) (first citing *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); then citing *S.C. v. Dirty World LLC*, No. 11-CV-00392-DW, 2012 WL 3335284 (W.D. Mo. March 12, 2012)), <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties> (arguing that “courts have extended immunity from liability to platforms that . . . solicited illegal content while ensuring that those responsible could not be identified.”); *see also, e.g., Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (finding that the defendant social media platform was not liable for negligently facilitating the meeting between a 13-year-old girl and a sexual predator because the alleged negligence involved third-party content).

³⁴ *See Gonzalez v. Google LLC*, 2 F.4th 871, 913 (9th Cir. 2021) (Berzon, J., concurring) (“[I]f not bound by Circuit precedent I would hold that the term ‘publisher’ under section 230 reaches only traditional activities of publication and distribution—such as deciding whether to publish, withdraw, or alter content—and does not include activities that promote or recommend content or connect content users to each other. I urge this Court to reconsider our precedent *en banc* to the extent that it holds that section 230 extends to the use of machine-learning algorithms to recommend content and connections to users.”).

³⁵ *See Sheri Wardwell, Communications Decency Act Provides No Safe Harbor Against Antifraud Liability for Hyperlinks to Third-Party Content Under the Securities and Exchange Act*, 6 WASH. J.L., TECH. & ARTS 49, 49–50, 56–60 (2010) (arguing that Section 230 and the securities laws must be harmonized such that Section 230 does not impede the effectiveness of criminal securities law enforcement and platforms may be criminally liable for securities fraud, given Congress’s intent in passing the Communications Decency Act and subsequent judicial interpretation).

1. Social Media Platforms as Information Content Providers?

If social media platforms are information content providers (ICPs) as opposed to interactive computer services, they would not be eligible for Section 230's safe harbor.³⁶ An information content provider is "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."³⁷ Some have argued that the distinction made by some courts between ISPs and ICPs suggests that the latter may not be protected under Section 230's safe harbor.³⁸ Currently, "social media companies are considered platforms, meaning they are not liable for third-party content," but some have argued that they ought to be considered publishers in the context of defamatory content.³⁹ If they were considered publishers, they would likely fall outside Section 230's safe harbor and could be held liable for user content.

For example, companies are not protected by the safe harbor when they make "material editorial contribution[s]," such as creating a questionnaire and requiring users to fill it out in order to post on a web forum.⁴⁰ In contrast, companies that merely host content created entirely by third parties are protected.⁴¹ Companies that make more moderate contributions—for instance, by soliciting content for a newsletter—may also be ineligible for safe harbor protection.⁴²

³⁶ Bryan J. Davis, Comment, *Untangling the Publisher Versus Information Content Provider Paradox of 47 U.S.C. 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75, 76–78 (2002).

³⁷ 47 U.S.C. § 230(f)(3).

³⁸ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); see also *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006) (finding that Yahoo! became a publisher or speaker by misleadingly sending out false or non-existent dating profiles to induce more users to continue using its dating service); Tanner Bone, *How Content Moderation May Expose Social Media Companies to Greater Defamation Liability*, 98 WASH. U. L. REV. 937, 952–53 (2021) ("[C]ourts . . . have generally not made much of a distinction between social media companies which exercise editorial discretion and those that do not. However, there are signs that this distinction could eventually be made. Notably, the Seventh Circuit has long questioned the practical effects of failing to hold websites and ISPs which exercise editorial control to a different standard than those that do not.").

³⁹ Bone, *supra* note 38, at 947.

⁴⁰ Wardwell, *supra* note 35, at 61 (discussing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc)).

⁴¹ *Id.* at 60–61 (discussing *Zeran*, 129 F.3d at 330).

⁴² See *Hy Cite Corp. v. badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142 (D. Ariz. 2005).

With respect to social media platforms' role—Reddit, in particular, but also other companies more generally—in the GameStop trading frenzy, social media platforms could possibly be considered an ICP if courts find that these companies solicit content. For example, in *Hy Cite Corp.*, the plaintiff dinnerware vendor sued the defendant operator of a website called the Rip-off Report.⁴³ The Rip-off Report, which featured anonymous, user-posted complaints about businesses, also “encourage[d] users who want[ed] to do more than simply post complaints to become ‘Rip-off Reporters’” who investigated businesses and posted complaints non-anonymously.⁴⁴ The defendant argued that it had Section 230 immunity since it was an interactive computer service.⁴⁵ But at the motion to dismiss stage, the court held that Section 230 immunity did not shield the defendant not only because it created some of the content hosted on the website, but also because the defendant “solicit[ed] individuals to submit reports with the promise that individuals may ultimately be compensated for their reports,” making the defendant responsible for this content.⁴⁶

During the GameStop trading uptick, Reddit did nothing so dramatic as create a questionnaire that formed the basis of r/WallStreetBets users' posts about GameStop's stock or their opinions on its future. But other social media platforms do solicit user content, just as the defendant did in *Hy Cite Corp.* Facebook asks users “What's on your mind,” prompting users to create posts. YouTube and other video-sharing platforms have built their own “in-house talent agencies” that “scout creators who can become the next digital superstars” and “sustain [YouTube's] explosive growth.”⁴⁷ As in *Hy Cite Corp.*, where Rip-off Reporters had the potential to be compensated, YouTube creators are compensated through sharing ad revenue with the company.⁴⁸ Reddit makes itself out to be “the front page of the internet,” indicating that they are asking users to find and post about various happenings in the world, similarly to the *Hy Cite Corp.* defendants.⁴⁹ If this did count as soliciting content, then some

⁴³ *Id.* at 1144–45.

⁴⁴ *Id.* at 1145.

⁴⁵ *Id.* at 1147.

⁴⁶ *Id.* at 1148–49 (internal quotation marks omitted).

⁴⁷ Tripp Mickle, *How YouTube Makes Sure Its Hitmakers Don't Stumble*, WALL ST. J. (Oct. 15, 2021, 5:30 AM), <https://www.wsj.com/articles/how-youtube-copied-hollywood-to-win-video-makers-loyalty-11634290200>.

⁴⁸ *Id.*

⁴⁹ REDDIT, <https://www.reddit.com/best/> (last visited Nov. 9, 2021) (showing “the front page of the Internet” as the link to click when a computer user Googles the search term “Reddit” to navigate to the website); *see also* Ben Wink,

social media platforms could be deemed to be outside the bounds of the existing Section 230 safe harbor. And in fact, this kind of behavior ought to be considered solicitation because platforms depend on the creation of user-generated content, designing their platforms to not only attract users, but to capture their sustained attention and thus drive up the company's advertising revenue.⁵⁰

Moreover, content moderation today—unlike in the early days of Section 230—goes beyond simply removing or flagging some posts: On some platforms, the user experience is shaped by algorithmic content moderation, in turn helping some types of content trend on platforms and facilitating user engagement with this content.⁵¹ In so doing, this could support the idea that social media platforms *do* have a hand in creating content on their platforms. Social media platforms utilize algorithms that give certain content preferential treatment, leading to specific types of content being promoted while other types are obscured.⁵² The more a post is “liked” or viewed, the more algorithms favor it, creating a negative feedback loop that drives more likes and viewership at the expense of other posts. And of course, since they are designed by humans, content filtering and moderation algorithms may incorporate their designers' biases.⁵³

The nature of social media platforms such as Reddit complicate such analyses. Reddit is not algorithmically moderated: its content is more akin to “crowd-sourced post-industrial news.”⁵⁴ Reddit is composed of different subreddits—forums that are dedicated to particular topics and to which users can anonymously post text, photos, and links. As Professor Grimmelmann notes, “Reddit's users moderate primarily by voting on content”—by either upvoting or downvoting individual posts. but this system “depends on finely machined, distributed,

How Reddit Day Traders Are Using the Platform to Upend the Stock Market and Make Money in the Process, BUS. INSIDER (Jan. 27, 2021, 3:12 PM), <https://markets.businessinsider.com/news/stocks/reddit-day-traders-wallstreetbets-gamestop-gme-rally-upending-stock-market-2021-1>.

⁵⁰ See Megan McCluskey, *How Addictive Social Media Algorithms Could Finally Face a Reckoning in 2022*, TIME (Jan. 4, 2022), <https://time.com/6127981/addictive-algorithms-2022-facebook-instagram/>.

⁵¹ See Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck Trying to Stop Them.*, WALL ST. J. (Jan. 17, 2021, 7:00 AM), <https://www.wsj.com/articles/social-media-algorithms-rule-how-we-see-the-world-good-luck-trying-to-stop-them-11610884800>.

⁵² See Bone, *supra* note 38, at 954.

⁵³ See, e.g., Rebecca Heilweil, *Facebook is Taking a Hard Look at Racial Bias in Its Algorithms*, VOX (July 22, 2020, 1:12 PM), <https://www.vox.com/recode/2020/7/22/21334051/facebook-news-feed-instagram-algorithm-racial-bias-civil-rights-audit>.

⁵⁴ Grimmelmann, *supra* note 14, at 94.

ex post, . . . human annotation, used as an input to centralize automatic filtration.”⁵⁵ And in addition to these automated moderation mechanisms, each subreddit is overseen by human moderators, who enjoy broad editorial discretion in policing individual subreddits. These moderators are necessary to keep each subreddit functioning but are neither compensated nor employed by Reddit.

As a result, the ISP/ICP distinction may not only be legally irrelevant in general,⁵⁶ but also may not even apply to a decentralized, user moderation driven platform like Reddit. Therefore, Congress should reevaluate this issue.

2. On Balance, Section 230 as Currently Enacted and Interpreted Is Unlikely to Result in Social Media Platforms’ Liability for Content Intending to Manipulate the Market

Overall, it is unlikely that current interpretations of Section 230 will result in platforms’ liability for market-manipulative content. Only under the Seventh Circuit’s so-called “definitional” interpretation of Section 230,⁵⁷ or if social media platforms were to be considered akin to distributors rather than publishers of content (which is not explicitly foreclosed by the statute),⁵⁸ some social media platforms may not be considered publishers eligible for immunity. But even under this minority interpretation, without Congressional amendment to Section 230, courts will be left to interpret which platforms are ISPs and which are ICPs, which, given the rapid shifts in technology and algorithmic content-driving methods, could be both difficult to ascertain and

⁵⁵ *Id.*

⁵⁶ David Greene, *Publisher or Platform? It Doesn’t Matter*, ELEC. FRONTIER FOUND. (Dec. 8, 2020), <https://www.eff.org/deeplinks/2020/12/publisher-or-platform-it-doesnt-matter>; but see Hannah Hapeman, *Shifting Trends in the Interpretation of Section 230—New Strides in Social Media Liability*, SYRACUSE L. REV. (June 3, 2021), <https://lawreview.syr.edu/shifting-trends-in-the-interpretation-of-section-230-new-strides-in-social-media-liability/>.

⁵⁷ Ellen Smith Yost, *Social Support for Terrorists: Facebook’s “Friend Suggestion” Algorithm, Section 230 Immunity, Material Support for Terrorists, and the First Amendment*, 37 SANTA CLARA HIGH TECH. L.J. 301, 317 (2021) (“[T]he Seventh Circuit . . . considers [Section] 230(c)(1) a ‘definitional provision’ that provides no immunity. Instead, the section ‘limits who may be called the publisher of information that appears online’ and is a defense to liability under actions that depend upon status as a ‘publisher.’”).

⁵⁸ U.S. DEP’T OF JUST., *supra* note 29, at 17 (“Distributors, such as libraries and newsstands, are held liable only if they knew or should have known the content was unlawful. And accessories, such as printing presses, are generally not held liable for defamation. Section 230 provides that internet services shall not be treated as a ‘publisher or speaker’ of content provided by third parties. Although this language says nothing about distributor liability, courts have interpreted Section 230 broadly to immunize online platforms from liability arising from their publication of third-party content even when the providers had actual notice that content was unlawful and thus could have been held liable at common law as distributors.” (emphasis omitted)).

could lead to disparate results across jurisdictions. Accordingly, it should be Congress that updates and clarifies the distinction between ISPs and ICPs, and the extent to which that distinction is legally significant under Section 230. Such potential reforms are discussed in the next section.

III. PROPOSED REFORMS TO SECTION 230 AND THEIR APPLICABILITY TO REDDIT RALLIES

As discussed in the preceding Subpart, it seems as though Reddit, as in interactive computer service, is currently shielded from civil liability under Section 230(c)(1), despite the potential for holding Reddit liable under the federal crimes exception for violating the securities laws. However, various individuals and institutions have called for the reform of Section 230 generally, as well as in the wake of the GameStop trading frenzy. This section describes and analyzes these proposals and how they might regulate platforms hosting speculative content.

B. Executive Branch Proposals: The Department of Justice's Proposed Modifications to Section 230 in The Ramseyer Draft Legislative Reforms to Section 230

The Department of Justice (DOJ) has proposed three Section 230 reforms in its 2020 report. First, a “bad Samaritan” carve-out for any social media platform that “purposefully facilitates or solicits third-party content or activity that would violate federal criminal law.” This proposal, if adopted, would likely help curtail social-media-fueled speculative bubbles. As discussed earlier, Reddit has a laissez-faire, decentralized attitude towards content moderation. Under the new proposal, if Reddit became aware that its users were participating in a likely-illegal pump and dump scheme, or that users on finance forums were leading inexperienced traders astray with bad stock tips, that would no longer immunize them from liability under the DOJ’s proposed carveout for those who purposefully facilitate criminal activity on the platform.

The DOJ’s other proposals changes to Section 230 would likely be less effective at holding accountable for the financial misconduct of their users. For example, the DOJ also proposes that *Stratton Oakmont* “continue to be overruled.”⁵⁹ Without

⁵⁹ *Id.* at 22 (discussing *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)). In *Stratton Oakmont.*, a pre-Section 230 case, the defendant platform Prodigy hosted a forum called MoneyTalk. *Stratton Oakmont*, 1995 WL 323710 at *1. On MoneyTalk, users discussed the stock market. *Id.* The plaintiff was a hedge fund infamous for its pump and dump schemes. *Id.* On MoneyTalk, users called the plaintiff a “cult of brokers who either lie for a living or get fired,” prompting the plaintiff to sue both the

Section 230, as some have pointed out, Reddit would likely be liable for the speech of its users, assuming some users illegally manipulated the market through their posts.⁶⁰ A total return to *Stratton Oakmont*—the defamation case naming a message board as a defendant that prompted Section 230’s enactment—is undesirable. It would expose platforms to civil liability for posts they did not create, condone, or of which they had no actual knowledge if they retained content moderation guidelines. This strict liability standard would be too onerous for platforms to realistically implement, opening them up to expensive lawsuits and preventing users from engaging in online communities. Moreover, it would disincentivize platforms from having any content moderation guidelines, which may lead to more “Reddit Rallies” than before. But the GameStop trading frenzy on Reddit and other platforms suggests that a partial return to *Stratton Oakmont* might be warranted in order to hold social media companies accountable for conduct on their platforms that falls short of an actual criminal violation but is detrimental to the economy and puts gullible users at risk of gambling away their savings on meme stocks.

One means of implementing this suggestion is to treat algorithm- and human-based content moderation differently under Section 230.⁶¹ Perhaps this suggestion could be implemented by amending Section 230 to impose an obligation on platforms to monitor for and remove the sort of content that led to the Reddit Rally (and would, presumably, allow for civil liability if another rally happened, because Reddit failed to make reasonable efforts to moderate r/Wallstreetbets). In so doing, the platform would be incentivized to more effectively oversee moderators, asking them to take down content that runs afoul of the SEC’s market manipulation laws and to refrain from posting inflammatory, speculative, and encouraging posts. On a platform like Reddit, where each subreddit is self-governing and dedicated to a particular topic, this kind of heightened moderation might be possible, particularly if moderators themselves have specialized financial knowledge that would allow them to recognize manipulation and promotion of risky stocks with weak fundamentals. This solution would nevertheless be challenging

user and the platform for defamation. *Id.* The New York Supreme Court found that the platform itself was liable for defamation as a publisher, in part because the platform had posted content moderation guidelines. *Id.* at *6–7. Section 230 was passed partially in response to this holding and overruled the case. U.S. DEP’T OF JUST., *supra* note 29, at 22.

⁶⁰ See Peterson, *supra* note 28.

⁶¹ Professor James Grimmelman has suggested this change as a general reform to Section 230. Grimmelman, *supra* note 14, at 106.

because individual moderators may not be incentivized to take such action, even if a relatively more laissez-faire platform like Reddit oversaw individual forums more closely.

C. Legislative Branch Proposals to Section 230 Reforms: The Platform Accountability and Consumer Transparency Accountability Act and the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act

Two recent bills aimed at reforming Section 230 are particularly illustrative of both the myriad of ideas floating through Congress about how to change this legislation and the inadequacies of many of these reform proposals.⁶²

First, in March 2021, Senators Brian Schatz and John Thune reintroduced the Platform Accountability and Consumer Transparency (PACT Act), which is “bipartisan legislation to update Section 230 of the Communications Act.”⁶³ Some proposed updates under the Platform Accountability and Consumer Transparency Act which include “[e]xempting the enforcement of federal civil laws from Section 230 so that online platforms cannot use it as a defense when federal regulators . . . pursue civil actions online” and “[a]llowing state attorneys general to enforce federal civil laws against online platforms.”⁶⁴ The draft bill would also require platforms to publish clarified content moderation and acceptable content guidelines for users.⁶⁵ Additionally, it would amend Section 230 by requiring the government to bring lawsuits to establish that certain content violated civil or criminal laws, forming the basis for government takedown requests.⁶⁶

Second, the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act (SAFE TECH Act), like the PACT Act, amends and narrows the scope of Section 230’s safe harbors. The SAFE TECH Act adds more exceptions for federal or

⁶² For a discussion of various types of proposed Section 230 reforms, see Ashley Johnson & Daniel Castro, *Proposals to Reform Section 230*, ITIF (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/proposals-reform-section-230>.

⁶³ Press Release, Brian Schatz, U.S. Sen. for Hawai‘i, U.S. Senate, Schatz, Thune Reintroduce Legislation to Update Section 230, Strengthen Rules, Transparency on Online Content Moderation, Hold Internet Companies Accountable for Moderation Practices (Mar. 17, 2021), <https://www.schatz.senate.gov/news/press-releases/schatz-thune-reintroduce-legislation-to-update-section-230-strengthen-rules-transparency-on-online-content-moderation-hold-internet-companies-accountable-for-moderation-practices>.

⁶⁴ *Id.*

⁶⁵ PACT Act, S. 4066, 116th Cong. § 5(a) (2020), <https://www.congress.gov/116/bills/s4066/BILLS-116s4066is.pdf>.

⁶⁶ *Id.*

state civil rights, antitrust, and stalking or harassment laws, international human rights laws, and civil wrongful death actions.⁶⁷ The proposed act would also “specify that an online platform may only be shielded from liability for ‘any speech’ posted by a third party, rather than ‘any information;’” would not apply to “paid content;” and, unlike the PACT Act, would allow Section 230 to be asserted as an affirmative defense in a civil enforcement action.⁶⁸

Both the PACT and SAFE TECH Acts propose solutions that could address the issue of social media-fostered market manipulation. First, the PACT Act’s provision for government-initiated civil lawsuits to form the basis of takedown requests would safeguard securities-related speech. More specifically, this provision would be helpful in ensuring that the concern about potentially illegal market manipulation was legitimate and backed by law, rather than determined by unhappy users or private platforms themselves. As for the SAFE TECH Act, its provision for platforms to raise Section 230 as an affirmative defense would similarly ensure that platforms would have the opportunity to put forth a legitimate reason for leaving the content unmoderated. Still, neither of these proposals explicitly address the issue of content intended to manipulate the market.

D. Implementing an Actual Knowledge Standard: Reddit Users’ Potentially Unlawful Manipulation of the Market

Some have suggested that Congress adopt an actual knowledge standard akin to the European Union’s requirement that platforms report illegal content once they obtain actual knowledge that illegal activity is occurring on their platforms.⁶⁹ Under this proposed reform, if Reddit had actual knowledge that its users violated the securities laws against market manipulation, Reddit would not be included in the safe harbor. But it is unclear whether Reddit actually turned such a willfully blind eye to the Reddit rally as it was happening, let alone had actual knowledge of or contributed to securities law violations. Reddit representatives have testified to Congress about Reddit’s role in the incident. Unsurprisingly, they professed the company’s

⁶⁷ SAFE TECH Act, S. 299, 117th Cong. § 2 (2021), <https://www.congress.gov/117/bills/s299/BILLS-117s299is.pdf>.

⁶⁸ Kyle Gutierrez & Joan Stewart, *Three Ways the SAFE TECH Act Would Amend Section 230*, JD SUPRA (Mar. 24, 2021), <https://www.jdsupra.com/legalnews/three-ways-the-safe-tech-act-would-5764508/>.

⁶⁹ See VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10306, LIABILITY FOR CONTENT HOSTS: AN OVERVIEW OF THE COMMUNICATION DECENCY ACT’S SECTION 230 4 (2019).

innocence, framing the r/WallStreetBets crowd as a largely benign group of caring community members.⁷⁰ Reddit CEO Steve Huffman denied any knowledge of illegal activity on the subreddit.⁷¹

The government would need to establish that a social media platform had actual knowledge that the information it was soliciting or creating was solicited or created with the intent of providing information not generally available to the market and that it knew would deceptively cause users to engage in behavior akin to a pump-and-dump scheme, illegal under Section 10(b) of the Exchange Act.⁷² Pump-and-dump schemes occur when one or more persons buy stocks en masse to drive up demand and the share price, then sell the stocks to turn a profit. Made unlawful under Section 10, the offense requires scienter.⁷³

At least in the civil context, the social media posts of have satisfied the scienter requirement in cases against companies by referencing a desire to “disrupt short sellers on the stock market,” for instance, in the SEC’s case against Elon Musk in connection with his tweets about taking Tesla public.⁷⁴ In that case, the court held that two allegations made by the plaintiffs were not themselves enough to adequately plead scienter, but that “they support[ed] the inference of scienter: (1) Defendants had the motive to disrupt short-sellers on the stock market; and (2) Defendant’s quick settlement with the SEC is probative of scienter.”⁷⁵ While some Reddit users seemed to have an honest belief in the strength of GameStop’s fundamentals—for instance, the author of the “Bankrupting Institutional Investors” post—others clearly seemed to be goading traders, with the intention of later purchasing the stock to make the price increase, to the detriment of those with short positions.⁷⁶

Such conduct seems akin to past pump-and-dump social media penny stock schemes. Whether the GameStop trading

⁷⁰ *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 2 (2021) (statement of Steve Huffman, Co-founder and CEO of Reddit), <https://www.congress.gov/117/meeting/house/111207/witnesses/HHRG-117-BA00-Bio-HuffmanS-20210218.pdf>.

⁷¹ *Id.* at 3.

⁷² See Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1605, 1610–11 (2006).

⁷³ Dain C. Donelson & Robert A. Prentice, *Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications*, 63 CASE W. RES. L. REV. 441, 446 (2012).

⁷⁴ *In re Tesla, Inc. Sec. Litig.*, 477 F. Supp. 3d 903, 958 (N.D. Cal. 2020).

⁷⁵ *Id.* at 930.

⁷⁶ See u/Player896, *supra* note 27.

frenzy runs afoul of Section 10 of Securities Exchange Act would likely turn on whether the Reddit users induced others to speculatively buy stocks with the purpose of driving up prices.⁷⁷ As mentioned above, scholars have demonstrated a correlation between social media activity regarding GameStop and an effect on GameStop's price.⁷⁸ The *Tesla* case shows that activity on social media can have real-world effects on stock prices.

Nevertheless, in this case, it seems difficult to prove that Reddit itself actually violated any securities laws, induced people to participate in the Reddit rally, or even were aware of any manipulative posts. This lack of awareness means it lacked actual knowledge, unlike in cases such as *Tesla*. And in any event, regardless of Reddit's actual knowledge or lack thereof, no user has been criminally charged.⁷⁹

E. Analysis of Reforms to Section 230

On balance, suggestions from both the executive and legislative branches could be used to reform Section 230 so that platforms remain available to foster a range of speech, while also being held accountable for speech on their platforms intended to unlawfully manipulate the market. A commonality among all three proposed Section 230 reforms is that they increase the scope of Section 230's carveouts.

The best solution will ultimately be one that is not too onerous for platforms to implement, regardless of size; that does not overly restrict lawful speech; and that does not lead to the "heckler's veto" becoming the predominant means of content moderation. To this end, the ideal Section 230 amendment would: (1) create a specific carveout for securities law violations in order to avoid ambiguity of defining the kinds of civil violations of platform users that would qualify for immunity under Section 230; (2) put the burden on the government, rather than the platform, to establish that the challenged content was unlawful; and (3) require the government to provide platforms with actual knowledge of securities laws violations occurring on their platforms before exempting social media companies from the safe harbor.

⁷⁷ See Robert Armstrong, Opinion, *r/WallStreetBets Throws Down Challenge to Regulators*, FIN. TIMES (Jan. 29, 2021), <https://www.ft.com/content/8a483767-6b55-40a2-b8a6-1439a2f56084>.

⁷⁸ See Angel, *supra* note 21.

⁷⁹ The government can pursue criminal market manipulation charges. See *Market Manipulation ("Pump and Dump") Fraud*, FBI, <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/market-manipulation-pump-and-dump-fraud> (last visited Nov. 5, 2021).

If Section 230 were amended in this way, perhaps SEC's Enforcement Division could become responsible for regularly monitoring well-known platforms hosting stock trading and finance groups. The Enforcement Division could then be responsible for suing in federal court and would need to obtain a final judgment, as the PACT ACT suggests.⁸⁰ The government would have the burden of notifying platforms of posts that violate the securities laws, giving them actual notice that the posts should be moderated or removed entirely. If the platform failed to act in a timely fashion, they could then be liable under a revised Section 230.

This solution would strike a balance between strict liability, which would require extensive and sophisticated monitoring of money-related posts across thousands of subreddits, individual social media groups, etc., and total immunity, which would allow Reddit and other platforms to ignore market manipulation on their platforms. It would also strike a balance between allowing any kind of speech on platforms—such as speech that deliberately exhorts the unaware for the purpose of artificially manipulating stock prices—and inhibiting legitimate discussions of stocks and investing. Productive discussion involving the exchange of opinions about stocks would not seem to violate this proposed carveout because it presumably would not be posted with the intent of causing bubbles. And this solution would avoid treating social media platforms as publishers while recognizing the role these platforms play in the dissemination of unlawful content and misinformation.

While it would potentially require the SEC to take on additional work via monitoring social media and bringing lawsuits—though the agency already does both—it is more appropriate for a neutral government regulator to take action than for individual moderators to decide when stock talk is getting out of hand or rely on other users to submit takedown requests, which might result in meritless censorship due to this “heckling.” It would be relatively easy for Reddit to respond to SEC requests because of its decentralized, human-oriented moderation strategy—requests could easily be delegated to individual moderators, who would remove the SEC-flagged posts.

⁸⁰ Aaron Mackey, *Even with Changes, the Revised PACT Act Will Lead to More Online Censorship*, ELEC. FRONTIER FOUND. (Mar. 26, 2021), <https://www.eff.org/deeplinks/2021/03/even-changes-revised-pact-act-will-lead-more-online-censorship> (last visited Nov. 9, 2021) (pointing out that the PACT ACT's definition of a “final judgment” could lead to erroneous results if a lower court's ruling is later overturned and advocating for “final judgment” to mean a final judgment on the merits affirmed by an appellate court).

Last, legislators should re-examine what it means to solicit content under Section 230. As James Grimmelman recounts, Reddit explicitly turned a blind eye to the revenge celebrity porn subreddit and only reluctantly shut down the child pornography subreddit.⁸¹ It seems that this willfully blasé attitude could be construed as soliciting people to do things otherwise considered outside the bounds of respectable society because users know Reddit is unlikely to moderate their posts that would be taken down or flagged elsewhere. Courts, however, have not construed the word “solicit” so broadly, nor is such a broad reading apparent from a plain reading of the statute.⁸²

CONCLUSION: A LEGAL ISSUE OR A CONTENT MODERATION ISSUE?

There are numerous challenges in controlling future “meme stock” market manipulation via traditional methods of securities regulation and actions taken by e-trading platforms, both of which—aside from potentially deterring future speculators through enforcement actions—can generally curtail bubbles and speculation only once they begin to inflate. Improved content moderation surrounding securities-related discussions on social media platforms could be a viable method of curbing the tides of speculation while also enabling social media platforms to better protect vulnerable retail traders susceptible to misinformation. On r/WallStreetBets, moderators already impose subreddit-specific rules, including a ban on market manipulation. One moderator has said that moderators “played it safe” when confronted with posts that were not clearly, but could possibly be, illegal, by removing them from view, suggesting that moderators themselves may not always be able to implement their self-imposed content moderation guidelines.⁸³

Commentators on the GameStop frenzy have already begun to highlight the problems with Reddit’s content moderation strategies and the implications for future social media use. They suggest that Reddit should engage in greater monitoring for stock trading frenzies, as opposed to leaving everything up to decentralized, human moderators.⁸⁴ One social media user, a

⁸¹ Grimmelman, *supra* note 14, at 99.

⁸² Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 413–15 (6th Cir. 2014).

⁸³ Paresh Dave et al., *Analysis: GameStop’s ‘Reddit Rally’ Puts Scrutiny on Social Media Forums*, REUTERS (Jan. 29, 2021, 2:48 PM), <https://www.reuters.com/article/us-retail-trading-moderation-idUSKBN29Y2YT>.

⁸⁴ See Issie Lapowsky, *Yes, GameStop Is a Content Moderation Issue for Reddit*, PROTOCOL (Jan. 27, 2021), <https://www.protocol.com/gamestop-reddit-content-moderation>.

former Facebook Chief Security Officer, commented on this potential for future, more dangerous mass movements, tweeting: “I don’t know if any laws were broken this time, but Reddit now has a problem: it is the home for a community of hundreds of thousands of people who have demonstrated the ability to move billions of dollars based upon the urging of, at most, a couple dozen anonymous accounts.”⁸⁵

Such viewpoints have some merit, especially because Reddit forums have hosted more dangerous, clearly illegal content in the past,⁸⁶ and it is easy to see how Reddit could foster mass movements in the future. But perhaps Reddit’s apparent weakness—decentralized, human moderation—could actually be a strength in terms of monitoring Reddit pages for illegal securities manipulation, deception, and other financial misinformation that harms retail investors. Coordination between the SEC, other government regulators, and human content moderators on Reddit could be a workable solution for quelling harmful mass stock trading movements. If the SEC could work directly with Reddit, who could then communicate with the subreddit’s moderators, that could be more efficient and effective than relying on a centralized algorithm that may only imperfectly spot illegally speculative posts.

Further, this coordination also would not prevent the human subreddit moderators from exercising their own judgement, preserving Reddit’s decentralized, libertarian philosophy regarding content moderation. It is true that Reddit users (and social media users generally) may self-censor if they were aware that the government may monitor their posts. However, the SEC may already monitor social media; and, as it stands, there does not seem to be a legally recognized expectation of privacy on a public social media platform.⁸⁷

It may be true that the GameStop trading frenzy had little impact on the overall economy. But future frenzies may have broader impacts. The aforementioned reforms could help hold reckless social media users accountable while helping to ensure that social media platforms remain viable avenues of productive

⁸⁵ *Id.* (internal quotation marks omitted).

⁸⁶ See, e.g., Grimmelmann, *supra* note 14, at 99 (describing a past subreddit dedicated to child pornography).

⁸⁷ See Aaron Boyd, *SEC Wants to Keep Tabs on Social Media Posts That Could Move Markets*, NEXTGOV (Aug. 31, 2018), <https://www.nextgov.com/emerging-tech/2018/08/sec-wants-keep-tabs-social-media-posts-could-move-markets/150954/>; see generally Brian Mund, Note, *Social Media Searches and the Reasonable Expectation of Privacy*, 19 YALE J.L. & TECH. 238, 238-41 (2017) (arguing that “the Fourth Amendment requires a greater degree of privacy protection for social media data” because “[u]nder existing law, social media information communicated through . . . password-protected pages receives no reasonable expectation of privacy.”).

discourse about the economy. Ultimately, it is beneficial for society when individuals invest, save for retirement, and obtain more useful information about the market.

Before these reforms are considered, it may be necessary to resolve existing tensions surrounding social media content moderation and social media regulation. Regulators and private companies will have to decide what falsity and truth really mean in the context of discrete posts; whether social media really is the public square, or whether it is something more private; and whether platforms are responsible for guiding the actions of their users, despite potential impacts on society or the economy. In this sense, problems with social media are recurring and are not limited to the GameStop Reddit rally. But perhaps old problems are new once again with the advent of social media. The economist John Kenneth Galbraith stated of the market in 1929: “free at last from all threat of government reaction or retribution, the market sailed off into the wild blue yonder.”⁸⁸ In the twenty-first century, the question is—this time, should we let it go?

⁸⁸ GALBRAITH, *supra* note 4, at 206 (arguing that the stock market crash of 1929 that sparked the Great Depression was due in large part to a “speculative orgy.”).