

No. 24-271

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

X CORP.,

PLAINTIFF-APPELLANT,

v.

ROBERT BONTA, in his official capacity as Attorney General of California,

DEFENDANT-APELLEE.

Appeal from the United States District Court for the Eastern District of California

No. 2:23-cv-01939-WBS-AC (Hon. William B. Shubb)

**BRIEF OF AMICUS CURIAE ASIAN AMERICANS ADVANCING
JUSTICE | AAJC IN SUPPORT OF DEFENDANT-APPELLANT
AND AFFIRMANCE**

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INTEREST OF *AMICUS CURIAE*¹

Asian Americans Advancing Justice | AAJC (“Advancing Justice-AAJC”) is a nonprofit, nonpartisan organization that seeks to create an equitable society for all. Through organizing, education, advocacy, and litigation, Advancing Justice-AAJC works to further civil and human rights and empower Asian American communities. Advancing Justice-AAJC is a leading expert on issues of importance to the Asian American community, including telecommunications and technology, voting, census, educational equity, immigrant rights, and anti-racial profiling.

¹ Pursuant to Fed. R. App. P. 29, all parties consent to the filing of this brief. No person or entity other than amicus and its counsel authored this brief in whole or in part. No person or entity other than amicus and its counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

X Corp. challenges a common-sense transparency law, AB 587, with significant benefits to the consumer users of social media platforms, including millions of Asian Americans. In enacting the law, California exercised the same authority permitting “[i]nnumerable federal and state regulatory programs requir[ing] the disclosure of product and other commercial information.” *Am. Beverage Ass'n v. City of S.F.*, 871 F.3d 884, 892 n.4 (9th Cir. 2017).

The law advances substantial government interests in ensuring that Asian American consumers—like others who use social media—are “fully informed about the terms” of their transactions with social media platforms, including “platforms’ content-moderation policies.” *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1230 (11th Cir. 2022). In particular, AB 587 contains important requirements in furtherance of these consumers’ interests. First, the law mandates that social media platforms publish their terms of service (the “TOS Requirement”), allowing consumers to understand if the platform imposes any content moderation policies. And second, the law requires social media platforms to prepare reports detailing the results of their content moderation policies set forth in those terms of service (the “TOS Reports”), allowing consumers to understand as a practical matter the effects of the platform’s content moderation policies and whether the platform is indeed complying with its own stated policies.

Though all users would benefit from these disclosures, they are especially important for Asian American users. Particularly since the outbreak of the coronavirus pandemic, Asian Americans have encountered harassment online; research shows that between 2020 and 2021, anti-Asian harassment surged at rates well beyond that targeting other demographics. And it remains a persistent problem, even four years after the pandemic's outbreak. Asian American users should be able to understand whether the platforms to which they provide their time and money will address these serious concerns.

AB 587's disclosures concerning misinformation are also essential for Asian American users, and especially those with limited English proficiency (LEP). Available data suggest that social media do not enforce content moderation evenly across languages, with the result that a great deal of misinformation proliferates unchecked. LEP Asian Americans also tend to rely on platforms specific to their language communities, like WeChat, where content moderation is largely non-existent in the United States. Understanding the vigor (or lack thereof) with which a platform enforces its community standards regarding misinformation provides important context for assessing the reliability of information on those platforms.

Finally, amicus submits this brief to underscore the danger that X Corp.'s interpretation of Section 230 poses to civil rights protections for Asian Americans and other marginalized communities. As in other contexts, federal and state civil rights laws apply online provided they do not treat a defendant as "a publisher or speaker of third-

party content.” 47 U.S.C. § 230(c)(1). Those protections are as important as ever. Yet X’s proposed reading of Section 230 would upend this longstanding distinction between a platform’s own conduct and that of third parties, replacing it with immunity for virtually any conduct with some nexus to third-party content—no matter how far removed.

ARGUMENT

Ultimately, AB 587 is a routine consumer disclosure regulation that provides transparency into whether social media platforms are moderating content in a way that conforms with their promises to do so. The reporting requirements are narrow yet provide important information to consumers, particularly those in vulnerable communities. Advancing Justice-AAJC respectfully urges this Court to uphold the decision of the district court.

I. AB 587’s Commercial Speech Regulations Serve an Important Consumer Protection Purpose.

Visitors to social media platforms are in effect engaging in consumer transactions, providing their time, attention, and data in exchange for content. Because of this relationship between the platforms and consumers, AB 587 is properly viewed as commercial disclosure for the benefit of consumers.

A. Social Media Platforms Engage in Consumer Transactions With Their Users—Including Millions of Asian Americans.

Those who use social media platforms are consumers, regardless of whether they pay a monetary fee for the service. Through the content users make and the time they spend on the platforms, social media companies have made billions of dollars.

Asian Americans represent a large plurality of social media users, and, as 37 percent of X Corp.’s users—by far the largest racial demographic on the platform—likely represent its largest revenue-generating consumer base.² They, like other social media users, have a direct economic relationship with the social media platforms where they spend their time and money, which the TOS agreement governs. In fact, the company made \$4.51 billion in advertising revenue targeting X users in 2021 (then-Twitter users), and \$571.8 million in data licensing and other revenue in 2021.³ To further capitalize on its success, X Corp. launched a three-tiered *paid* subscription version of its standard user account in 2023.⁴

Regardless of whether consumers using X Corp. are subscribing or otherwise paying money, they are still supplying X Corp. with their time, attention, and data – valuable consideration. Understandably, then, the California Consumer Privacy Act (CCPA), which was specifically enacted to address online corporations and consumers,

² Jeffrey Gottfried, *Americans’ Social Media Use*, PEW RESEARCH CENTER (Jan. 31, 2024) <https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/> [https://perma.cc/A8Y8-3DP7].

³ X (then-Twitter) 2021 Form 10-K (hereinafter “X Form 10-K”), *available at* <https://www.sec.gov/Archives/edgar/data/1418091/000141809122000029/twtr-20211231.htm> [https://perma.cc/ZQ2Z-Y5T3].

⁴ X, *About X Premium*, <https://help.twitter.com/en/using-x/x-premium> [https://perma.cc/3EH4-AB3R].

recognizes the value that digital media users provide corporations by their very *use* of a digital platform. *See* Cal. Civ. Code § 1798.140(i) (defining consumer as “California resident”); *id.* at § 1798.140(ad) (defining “sale” to include provision “by electronic or other means, a consumer’s personal information by the business to a third party for monetary or *other valuable consideration*” (emphasis added)).

Here, although X Corp.’s products have a monetary price of zero dollars in some cases, X users still “purchase” X Corp.’s products by parting with their time, their attention, and their personal data when visiting the X platform or engaging with its online tools and services. This is the “purchase price” X Corp. receives, and that time, attention, and data has value.

Indeed, the time and attention made available by X users for advertisers have proven immensely valuable to X Corp.’s bottom line. In 2021, the average X user spent 35 minutes per day on X.⁵ That same year, X had an estimated 37 million adult U.S. users.⁶ Assuming an opportunity cost equal to the federal minimum wage⁷—a very conservative assumption—U.S. X users supply more than \$155 million dollars per day of their time and attention in exchange for access to X Corp.’s products.

⁵ Jack Shepherd, *23 Essential Twitter (X) Statistics You Need to Know in 2024*, The Social Shepherd (last updated Feb. 26, 2024) <https://thesocialshepherd.com/blog/twitter-statistics#:~:text=Americans%20Spend%20an%20Average%20of%2035%20Minutes%20Per%20Day%20on%20Twitter&text=Following%20TikTok%2C%20where%20users%20spend,minutes%20per%20day%20on%20Twitter> [<https://perma.cc/PED7-QTDS>].

⁶ X Form 10-K, *supra*, note 3.

⁷ The federal minimum wage is \$7.25 per hour. U.S. Dep’t of Lab., *Minimum Wage*, <https://www.dol.gov/general/topic/wages/minimumwage> [<https://perma.cc/8ZJA-D3ZQ>].

B. Because the Relationship With Social Media Platforms is a Consumer Transaction, AB 587’s Disclosure Requirements Are Commercial Speech.

Because X and other social media platforms are engaging in consumer transactions with their millions of users, users are entitled to be “fully informed about the terms of [those] transaction[s]” and not “misled about the platforms’ content-moderation.” *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1230 (11th Cir. 2022).

Accordingly, AB 587 is best viewed as a consumer disclosure requirement that allows consumers to make informed decisions about not just whether the platforms promise content moderation, but whether they actually in fact perform content moderation. The TOS Report is therefore appropriately viewed as commercial speech—like many other consumer protection requirements.

Commercial speech can take many forms and has never been limited to only speech that “propose[s] a commercial transaction,” such as advertisements. *See Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (holding that a nutritional guide is commercial speech); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983) (finding that informational pamphlets that “cannot be characterized merely as proposals to engage in commercial transactions” were still commercial speech). While courts have employed different tests to determine if speech is commercial, the Ninth Circuit has never found any approach to be dispositive.⁸ Rather, courts should

⁸ In *Ariix*, this Court applied the factors put forward in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983), which in turn established that there is “strong support” that speech should be characterized as commercial where “[1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation.” *Id.* at 66–67. Ultimately, however, the Ninth Circuit, in accordance with the Supreme Court in *Bolger*, recognized that the *Bolger* factors are “guideposts” that “are not dispositive.” *Ariix*, 463 U.S. at 1116.

“try to give effect to a common-sense distinction between commercial speech and other varieties of speech.” *Ariix*, 985 F.3d at 1115–16; *see, e.g., Stark v. Patreon, Inc.*, 656 F. Supp. 3d 1018, 1033-34 (N.D. Cal. 2023) (finding commercial speech where audiovisual content platform shared user data with a third party).

Applying that “common sense” distinction, the TOS Report falls squarely in the category of commercial speech, for the reasons the District Court explained. In so concluding, the District Court’s ruling is in line with precedent governing other consumer disclosure requirements. And appropriately so: The disclosure requirement is similar to the way that a government-mandated ingredients list (the Reports) concerning a juice beverage (the social media platform) allows consumers to evaluate the claim that what they are consuming is “100 percent juice” (the Terms of Service).⁹ Furthermore, failing to apply the commercial speech doctrine to run-of-the-mill disclosure requirements would contravene the purpose of protecting commercial speech at all: “assist[ing] consumers and further[ing] the societal interest in the fullest possible dissemination of information.” *Central Hudson Gas Elec. v. Public Serv. Comm’n*,

⁹ *See CTIA - The Wireless Ass’n v. City of Berkeley, California*, 928 F.3d 832 (9th Cir. 2019) (upholding city ordinance requiring cell phone retailers to inform prospective cell phone purchasers of risks of harm associated with cell phones and recognizing that other “substantial interests” may likewise justify such compelled speech); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22-24 (D.C. Cir. 2014) (holding government interests in compelling country-of-origin disclosures is constitutional even where the interest served is *not* to correct deception but to provide additional transparency to consumers); *Maryland Shall Issue, Inc. v. Anne Arundel Cnty. Maryland*, 91 F.4th 238, 247 (4th Cir. 2024) (upholding compelled speech as constitutional and recognizing “since *Zauderer*, courts unanimously have broadened the scope of the State’s interest to other governmental interests, including “protecting human health.”); *Small Bus. Fin. Ass’n v. Hewlett*, No. 2:22-cv-08775, 2023 WL 8711078, at *6 (C.D. Cal. Dec. 4, 2023) (holding ordinance requiring disclosures to consumers is constitutional where they “will help small businesses understand the cost of [financial products] and do comparison shopping.”).

447 U.S. 557, 561-62 (1980). AB 587 provides added clarity to consumers by standardizing transparency – not unlike the standard food labeling requirements that easily permit consumers to compare caloric information and other nutrients.

C. AB 587’s Terms of Service Reporting Requirement Is Substantially Justified and Satisfies the *Zauderer* Test.

The TOS Reports are constitutionally permissible under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), as the District Court correctly held. ECF No. 36 at 4. Under *Zauderer*, governmentally compelled commercial disclosures are constitutionally permissible under the First Amendment where they are (1) “purely factual and uncontroversial,” (2) “not unjustified or unduly burdensome,” and (3) “reasonably related to a substantial government interest.” *See Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 477 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1749 (2023).

Here, the first factor is readily met, as the TOS Reports are “purely factual”—the Reports require social media companies to identify their existing content moderation policies, if any, related to the specified categories and the required statistics required “constitute objective data concerning the company’s actions.” *Id.* Additionally, the required disclosures are uncontroversial in that they do not require the corporation to express any particular viewpoint. *See id.* A platform that does not want to engage in content moderation simply does not have to promise its consumers that it will.

The two other factors here are met too: the Reports are neither “unjustified” given the significant threats impacting Asian American users on social media platforms,

nor “unduly burdensome” (indeed, X Corp. has produced similar reports for more than a decade)¹⁰, and they are “reasonably related” to the legitimate and “substantial government interest” in ensuring that the digital marketplace is fair, transparent, and safe for especially impacted users, including millions of Asian American adults and children. *See id.*

1. The Requirement Promotes a Substantial Government Interest in Informed Consumer Choice.

AB 587 promotes a substantial government interest in assisting millions of Asian American, and other, users in making informed choices about which social media platforms to use. *CTLA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019) (“*Zauderer* requires that the compelled disclosure further some substantial—that is, more than trivial—governmental interest.”); *NetChoice*, 34 F.4th at 1230 (approving state interest in ensuring users are not “misled about [social media] platforms’ content-moderation” practices). This information is essential because these platforms are, “for many, ‘the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast

¹⁰ Twitter Transparency Report (“[T]oday [on July 2, 2012] we’re unveiling our first Twitter Transparency Report. Inspired by the great work done by our peers @Google...”), captured by the internet archive on May 14, 2023, *accessible at* <https://web.archive.org/web/20130514053025/https://blog.twitter.com/2012/twitter-transparency-report>; *see also* Anti-Defamation League, *Platform Transparency Reports – Just How Transparent?* (Feb. 2, 2024) (YouTube and Meta (formerly Facebook) have published quarterly transparency reports about user activity, including abuse, since at least 2017; Snapchat since 2015; LinkedIn since 2019; TikTok and Pinterest since 2021), <https://www.adl.org/resources/blog/platform-transparency-reports-just-how-transparent> [<https://perma.cc/Z3CW-GS7X>].

realms of human thoughts and knowledge.” *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022) (quoting *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017)).

Specifically, as discussed below, in the face of widespread misinformation and discriminatory online harassment—especially that targeted at Asian Americans—the challenged disclosures provide consumers with information about the reliability of the information they encounter and the likelihood that they will encounter identity-based “stalking, physical threats, doxing [and] sustained harassment” on a particular platform.¹¹ No one can reasonably dispute the significance of consumer choice under these circumstances.

Accordingly, AB 587 addresses problems that are not only “potentially real” but *actually* real, which more than satisfies the standard for commercial speech. *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 767 (2018) (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l. Regulation*, 512 U.S. 136, 146 (1994)).

2. AB 587 Helps Asian American Consumers Make Informed Decisions About the Safety of Social Media Platforms in the Face of Significant Online Discrimination and Harassment.

AB 587 advances a substantial interest in informing consumers, including Asian Americans, about the content-moderation practices on social media platforms so they can make an informed consumer choice between those platforms.

Discrimination and harassment on social media platforms is widespread and has grown over time. A 2021 Pew Research Center survey found significant increases

¹¹ Queenie Wong, *Anti-Asian hate and harassment increased online, survey finds*, CNet.com (Mar. 24, 2021), <https://www.cnet.com/tech/tech-industry/anti-asian-hate-and-harassment-increased-online-survey-finds/> [<https://perma.cc/P58E-DN74>].

between 2014 and 2021 in the number of users reporting experiences with online physical threats (from 7 percent in 2014 to 14 percent in 2021), stalking (7 percent to 11 percent), sustained harassment (6 percent to 11 percent) and sexual harassment (5 percent to 11 percent).¹² Another 2021 Pew survey concluded that, among the 41 percent of U.S. adults who “personally experienced online harassment,” three-quarters of them identified a “[s]ocial media site” as the source.¹³

Asian Americans in particular have faced online harassment, driven in part by the spread of racist and xenophobic conspiracy theories blaming Chinese Americans for the spread of the coronavirus pandemic.¹⁴ In a 2021 Pew survey, 40 percent of Asian Americans reported online harassment; 14 percent of Asian Americans reported experiencing “stalking” and 11 percent reported “sustained harassment.”¹⁵ These numbers likely underrepresent the scope of the problem as “Asian adults were

¹² Emily A. Vogels, *The State of Online Harassment*, PEW RESEARCH CENTER (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> [https://perma.cc/V2TW-KP3S].

¹³ Emily A. Vogels, *Online harassment occurs most often on social media, but strikes in other places, too*, PEW RESEARCH CENTER (Feb. 16, 2021), <https://www.pewresearch.org/short-reads/2021/02/16/online-harassment-occurs-most-often-on-social-media-but-strikes-in-other-places-too/> [https://perma.cc/FS5F-H8KG].

¹⁴ Queenie Wong, *Coronavirus sparks a different kind of problem for social networks*, CNet.com (Mar. 25, 2020), <https://www.cnet.com/tech/tech-industry/on-twitter-facebook-and-tiktok-racism-breaks-out-amid-coronavirus-pandemic/> [https://perma.cc/Y4BF-LJTW]; see also Fatemeh Tahmasbi, et al., “Go Eat a Bat, Chang!”: *An early look on the emergence of sinophobic behavior on web communities in the face of COVID-19*, COMPUTERS AND SOCIETY 14 (Mar. 3, 2021), available at <https://arxiv.org/pdf/2004.04046.pdf> [https://perma.cc/D2C6-NTP6] (“The dissemination of hateful content, and in particular Sino-phobic content, is a cross-platform phenomenon that incubates both on fringe Web communities as well as mainstream ones.”).

¹⁵ Emily A. Vogels, *supra* note 12, at 2.

interviewed in English only.”¹⁶ Among youth, Asian Americans were the “most likely to report increased [cyberbullying] victimization during the pandemic,” rising to 23.5 percent in 2021 from 7.4 percent in 2019 and 13.9 percent in 2016.¹⁷

Another study found that “the more a social media user believes their most used daily social media is fair, accurate, presents the facts, and is concerned about the public...the more likely that user is to believe Chinese [sic] pose a realistic and symbolic threat to America.”¹⁸ This strongly suggests TOS Reports may even *reduce* these invidious harms to users.

Moreover, the harassment has not abated though the pandemic emergency has resolved: A 2022 survey observed a “dramatic increase in harassment” of Asian Americans between 2021 and 2022, which “followed a spike the previous year in severe

¹⁶ Emily A. Vogels, *Personal Experiences with Online Harassment*, PEW RESEARCH CENTER (Jan. 13, 2021), www.pewresearch.org/internet/2021/01/13/personal-experiences-with-online-harassment/ [<https://perma.cc/E4SJ-HR2K>]; *id.*, at note 3 (conceding that the sample “may not be representative of the overall Asian population”).

¹⁷ Justin W. Patchin & Sameer Hinduja, *Cyberbullying Among Asian American Youth Before and During the COVID-19 Pandemic*, J. of Sch. Health 4 (Sept. 16, 2022), available at https://www.researchgate.net/profile/Justin-Patchin/publication/364355724_Cyberbullying_Among_Asian_American_Youth_Before_and_During_the_COVID-19_Pandemic/links/634ef0bf96e83c26eb346504/Cyberbullying-Among-Asian-American-Youth-Before-and-During-the-COVID-19-Pandemic.pdf [<https://perma.cc/FQ53-ZKDY>].

¹⁸ Stephen M. Croucher, et al., *Prejudice Toward Asian Americans in the Covid-19 Pandemic: The Effects of Social Media Use in the United States*, 5 FRONTIERS IN COMMUNICATION 39 (Jun. 2020), available at https://www.researchgate.net/publication/342128832_Prejudice_Toward_Asian_Americans_in_the_Covid-19_Pandemic_The_Effects_of_Social_Media_Use_in_the_United_States [<https://perma.cc/L9GR-BAZH>].

harassment [physical threats, sustained harassment, stalking, sexual harassment, doxing, swatting] toward Asian Americans (17 percent in 2021, up from 11 percent in 2020).¹⁹ A 2023 survey found no meaningful reduction in those statistics.²⁰

The online hate Asian Americans endure is both personally harmful and substantially affects their ability to meaningfully use those platforms and engage in speech.²¹ For example, these experiences produce “negative mental health outcomes,” such as “anxiety, depression, and [secondary traumatic stress].”²² It is therefore understandable that, when confronted with online discrimination, users may choose to

¹⁹ Anti-Defamation League, *Online Hate and Harassment: The American Experience 2022*, CENTER FOR TECHNOLOGY AND SOCIETY (Jun. 2022), <https://www.adl.org/sites/default/files/pdfs/2022-09/Online-Hate-and-Harassment-Survey-2022.pdf> [https://perma.cc/YH5Y-AVHL].

²⁰ Anti-Defamation League, *Online Hate and Harassment: The American Experience 2023*, CENTER FOR TECHNOLOGY AND SOCIETY (Jun. 2023), <https://extremismterms.adl.org/sites/default/files/pdfs/2023-12/Online-Hate-and-Harassment-2023-0-0.pdf> [https://perma.cc/AP99-EA6J].

²¹ See, e.g., Celeste Ng, *When Asian Women Are Harassed for Marrying Non-Asian Men*, The Cut (Oct. 12, 2018), <https://www.thecut.com/2018/10/when-asian-women-are-harassed-for-marrying-non-asian-men.html> [https://perma.cc/5LKS-UEYS].

²² Alyan Layug, et al., *The Impacts of Social Media Use and Online Racial Discrimination on Asian American Mental Health: Cross-sectional Survey in the United States During COVID-19*, 6 JOURNAL OF MULTICULTURAL FORMATION RESEARCH 9 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9488547/> [https://perma.cc/3SFH-AP3W].

self-censor, whether in the form of “refrain[ing] from voicing their opinion,”²³ deleting their profile, or withdrawing entirely from that online forum.²⁴

Against the context of this harassment, AB 587’s TOS Requirement and TOS Reports will provide crucial information to consumers in the digital marketplace, arming consumers with information to make their own decisions about where to spend their time and their money. In particular, AB 587 arms Asian Americans with the knowledge about how social media platforms, such as X, are working to protect them (or not). Knowing how social media websites regulate this kind of speech is especially important in deciding which platforms Asian Americans wish to use.

²³ Magdalena Celuch et al., *Self-censorship among online harassment targets: the role of support at work, harassment characteristics, and the target’s public visibility*, INFORMATION, COMMUNICATION & SOCIETY (Dec. 11, 2023), available at <https://www.tandfonline.com/doi/full/10.1080/1369118X.2023.2289978> [<https://perma.cc/5NCH-UA7>].

²⁴ Maeve Duggan, *Online Harassment Part 3: Responses to Online Harassment*, PEW RESEARCH CENTER (Oct. 22, 2014), <https://www.pewresearch.org/internet/2014/10/22/part-3-responses-to-online-harassment/> [<https://perma.cc/2DV6-PK88>] (finding that “13 percent [of users] changed their username or deleted their profile,” “10 percent withdrew from an online forum” and “8 percent stopped attending certain offline events or places”); cf. Pamela P. Chiang, *Emotional Response and Behavioral Coping Associated with Experienced and Media Discrimination Among Asians and Asian Americans in the United States*, 15 RACE & SOCIAL PROBLEMS 115, 122 (2023), available at <https://link.springer.com/article/10.1007/s12552-022-09362-7> [<https://perma.cc/XD9K-PY8U>] (“Although subtle discrimination might not trigger immediate anxiety or worry . . . it appears to induce avoidance and withdrawal behaviors.”).

3. **Content Moderation Transparency Provides Asian American Consumers Important Tools in Assessing Reliability of Information Online.**

Promoting transparency about how social media platforms address misinformation is also a substantial government interest. The availability of that information is essential for Asian Americans—and all social media users. Misinformation both contributes to the discrimination Asian Americans face and misleads them as a means to “maintain and expand existing power structures and inequities.”²⁵ Only if users are able to meaningfully assess a platform’s misinformation policies can they make determinations about the reliability of the claims they encounter on that platform.

Misinformation is of particular concern to Asian American communities and other communities with substantial limited-English proficiency (LEP) populations.²⁶ One reason is that “platforms are less likely to flag disinformation in non-English languages” such that, more than the average user, Asian American voters are “bombarded with misleading and false information from questionable sources.”²⁷ With

²⁵ Asian American Disinformation Table, POWER, PLATFORMS, & POLITICS: ASIAN AMERICANS & DISINFORMATION 7 (2022), https://www.asianamdisinfo.org/wp-content/uploads/2022/08/AsianAmDisinformation_LandscapeReport2022.pdf [<https://perma.cc/KT23-BABW>].

²⁶ About two-thirds of Asian Americans “speak a language other than English at home.” Stella K. Chong, et al., *Social Media Use and Misinformation Among Asian Americans During COVID-19*, 9 *Frontiers in Public Health* (Jan. 14, 2022), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8795661/#s1title> [<https://perma.cc/38SV-6JLE>].

²⁷ Testimony of Emily Chi, Asian Americans Advancing Justice | AAJC, *A Growing Threat: The Impact of Disinformation Targeted at Communities of Color: Hearing Before the U.S. House of Representatives Subcommittee on Elections, Committee on*

remarkable impunity, Asian-language content in the form of YouTube videos, X posts, and Facebook posts has promoted a variety of conspiracy theories,²⁸ ranging from promoting the notion that the 2020 election was “stolen” to claims that the California gubernatorial recall election was “rigged.”²⁹ On YouTube, channels with “hundreds of thousands of subscribers have promoted conspiracy theories “about election fraud,

House Administration (Apr. 28, 2022); Asian American Disinformation Table, POWER, PLATFORMS, & POLITICS: ASIAN AMERICANS & DISINFORMATION 10 (2022), https://www.asianamdisinfo.org/wp-content/uploads/2022/08/AsianAmDisinformation_LandscapeReport2022.pdf [https://perma.cc/KT23-BABW] ; see also Avaaz, *How Facebook can Flatten the Curve of the Coronavirus Infodemic* (Apr. 15, 2020), https://avaazimages.avaaz.org/facebook_coronavirus_misinformation.pdf [https://perma.cc/UBQ6-RU7J] (finding that in 2020 “Facebook ha[d] not yet issued warning labels on 68 percent of the Italian-language content and 70 percent of Spanish-language content [they] examined, compared to 29 percent of English-language content.”); see also M. Estrada, *Dozens of Spanish-language election fraud YouTube videos demonstrate the platform’s toothless policies*, MEDIA MATTERS (Oct. 10, 2022), <https://www.mediamatters.org/spanish-language-media/dozens-spanish-language-election-fraud-youtube-videos-demonstrate-platforms> [https://perma.cc/PU8Y-WRCN]; Tom Simonite, *Facebook Is Everywhere; Its Moderation Is Nowhere Close*, WIRED (Oct. 25, 2021), <https://www.wired.com/story/facebooks-global-reach-exceeds-linguistic-grasp/> (discussing language gaps in moderating Arabic-language content).

²⁸ Tate Ryan-Mosley, *The internet is excluding Asian-Americans who don’t speak English*, MIT TECHNOLOGY REVIEW (May 4, 2021), <https://www.technologyreview.com/2021/05/04/1024507/asian-american-language-justice-online-hmong/> [https://perma.cc/WWB3-5BY7]; see also Kimmy Yam, *Right-wing disinformation ramps up on WeChat ahead of midterms, report finds*, NBC NEWS (Oct. 3, 2022), <https://www.nbcnews.com/news/asian-america/right-wing-disinformation-ramps-wechat-ahead-midterms-report-finds-rcna50539> [https://perma.cc/689F-F92T].

²⁹ See, e.g., @ChooLucia, Twitter.com (Sept. 13, 2021, 11:48 PM), <https://twitter.com/ChooLucia/status/1437624240396775424> [https://perma.cc/HD5B-SLVR].

Hunter Biden’s relationship with China . . . , and the Chinese Communist Party’s meddling in the [2020] presidential election.”³⁰

The failure of social media to evenly enforce their own policies in Asian languages is so significant that it has also contributed to violence abroad. In Myanmar, for example, the military and radical nationalist groups used Facebook to incite a genocide against Rohingya Muslims.³¹ Over the course of several years, Facebook consistently failed to enforce its own policies on hate speech and credible violence.³² Though there were many factors at work, one was Facebook’s dearth of native Myanmar language speakers.³³ Facebook also failed to act against bot networks promoting anti-Muslim violence in Sri Lanka—again, in part because of language issues: the platform did not have enough Sinhala or Tamil-speaking content moderators.³⁴

³⁰ Terry Nguyen, *The challenge of combating fake news in Asian American communities*, VOX.COM (Nov. 27, 2020), <https://www.vox.com/identities/21579752/asian-american-misinformation-after-2020> [https://perma.cc/9Y2L-A3AK].

³¹ *Myanmar: Facebook’s systems promoted violence against Rohingya; Meta owes reparations*, Amnesty Int’l (Sept. 29, 2022), <https://www.amnesty.org/en/latest/news/2022/09/myanmar-facebooks-systems-promoted-violence-against-rohingya-meta-owes-reparations-new-report/> [https://perma.cc/C6GC-X6HT].

³² *Id.*

³³ Alex Warofka, *An Independent Assessment of the Human Rights Impact of Facebook in Myanmar*, Meta (Nov. 5, 2018), <https://about.fb.com/news/2018/11/myanmar-hria/> [https://perma.cc/U7K8-QVLG].

³⁴ Miranda Sissons and Alex Warofka, *An Update on Facebook’s Human Rights Work in Asia and Around the World.*, Meta (May 12, 2020), about.fb.com/news/2020/05/human-rights-work-in-asia/ [https://perma.cc/Z9G2-94LP]; Tate Ryan-Mosley, *The US’s online language gaps are an urgent problem for Asian-Americans*, MIT Technology Review (May 4, 2021), <https://www.technologyreview.com/2021/05/04/1024507/asian-american-language-justice-online-hmong/> [https://perma.cc/5YFT-BD7U].

In the absence of in-language support on “mainstream” platforms like Facebook or X, many LEP Asian Americans “tend to use social media platforms that enable communication in their native languages,”³⁵ like WeChat, WhatsApp, KakaoTalk, and Line, where misinformation is commonplace.³⁶ Bad actors use these media to exploit the fears and lived experiences of Asian Americans, misrepresenting facts about voting, anti-Asian hate, or affirmative action as wedges to sow division between Asian Americans and other communities of color.³⁷ For example, shortly before the 2020 general election, an image went viral on WeChat—a social media app popular among Chinese Americans—claiming that the federal government was going to “dispatch” armed forces and close all businesses in anticipation of riots.³⁸

³⁵ Stella K. Chong, et al., *supra* note 26.

³⁶ Jenn Fang, *Social media sites popular with Asian Americans have a big misinformation problem*, PRISM (May 26, 2021), <https://prismreports.org/2021/05/26/social-media-sites-often-used-by-asian-americans-have-a-big-problem-with-right-wing-misinformation/> [https://perma.cc/9J35-PQVQ].

³⁷ *See, e.g.*, Testimony of Emily Chi, Asian Americans Advancing Justice | AAJC, A Growing Threat: The Impact of Disinformation Targeted at Communities of Color: Hearing Before the U.S. House of Representatives Subcommittee on Elections, Committee on House Administration (Apr. 28, 2022), <https://www.advancingjustice-aajc.org/publication/testimony-house-representatives-hearing-growing-threat-impact-disinformation-targeted> [https://perma.cc/5A36-746N]; *see also* Kimmy Yam, *Viral images show people of color as anti-Asian perpetrators. That misses the big picture*, NBC (Jun. 15, 2021) <https://www.nbcnews.com/news/asian-america/viral-images-show-people-color-anti-asian-perpetrators-misses-big-n1270821> [https://perma.cc/F34V-XZP4]; Kimmy Yam, *Experts say framing affirmative action as anti-Asian bias is ‘dangerous’*, NBC (Jan. 25, 2022) <https://www.nbcnews.com/news/asian-america/experts-say-framing-affirmative-action-anti-asian-bias-dangerous-rcna13544> [https://perma.cc/7UY3-PWZR].

³⁸ Joe Fitzgerald Rodriguez & Shannon Lin, *Misinformation Image on WeChat Attempts to Frighten Chinese Americans Out of Voting*, PROPUBLICA (Nov. 2, 2020), <https://www.propublica.org/article/misinformation-image-on-wechat-attempts-to-frighten-chinese-americans-out-of-voting> [https://perma.cc/U29G-EDVD].

Transparency concerning how these platforms moderate content would provide important information to users. For example, though WeChat boasts an “acceptable use policy” in the United States that purports to bar misinformation, there is little data suggesting WeChat enforces the policy; rather, “people tracking misinformation say that the platform is largely unmoderated in the US.”³⁹ As a result, it “allows for disinformation to flourish in part because of how users are able to form large, closed groups and post information without being checked or held accountable.”⁴⁰ This is a longstanding problem: a 2018 Columbia Journalism Review article observed that “WeChat [is] especially vulnerable to political misinformation.”⁴¹

In short, AB 587’s disclosure requirements play an important role in assisting Asian Americans—and especially those with limited English proficiency—in assessing reliability of information on social media.

³⁹ Jennifer Conrad, *China’s WeChat Is a Hot New Venue for US Election Misinformation*, WIRED (Oct. 18, 2022), <https://www.wired.com/story/chinese-american-misinformation-midterm-elections-wechat/>.

⁴⁰ Kimmy Yam, *Right-wing disinformation ramps up on WeChat ahead of midterms, report finds*, NBC NEWS (Oct. 3, 2022), <https://www.nbcnews.com/news/asian-america/right-wing-disinformation-ramps-wechat-ahead-midterms-report-finds-rcna50539> [https://perma.cc/CYD4-5935].

⁴¹ Chi Zhang, *WeChatting American Politics: Misinformation, Polarization, and Immigrant Chinese Media*, COLUMBIA JOURNALISM REVIEW (Apr. 19, 2018), https://www.cjr.org/tow_center_reports/wechatting-american-politics-misinformation-polarization-and-immigrant-chinese-media.php [https://perma.cc/AY32-3VBL].

II. Accepting X Corp.’s Theory of Section 230 Immunity Would Undermine Key Civil Rights Protections for Asian Americans and Other Minority Groups.

X Corp.’s assertion of Section 230 immunity to liability for non-compliance with the TOS Report requirement is so broad that it threatens the ordinary enforcement of civil rights laws. Despite robust case law to the contrary, X Corp. claims that Section 230 applies any time liability might “facilitate[] . . . pressure” to alter the platform’s “content moderation standards.” Appellant Br. at 55.

That is not the standard. The current scope of Section 230 immunity is this: social media platforms and other websites cannot be sued for what *others* say on their platform; they remain responsible, however, for their own content and conduct. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). For example, X Corp. cannot be held liable for its users posting defamatory content. *Id.* at 1171.

But social media companies *can* be held liable for playing an active role in discrimination, even if third-party content is also involved or might be tangentially affected. *See, e.g., Vargas v. Facebook, Inc.*, No. 21-16499, 2023 WL 6784359, at *2 (9th Cir. Oct. 13, 2023), *cert. denied*, 2024 WL 674871 (U.S. Feb. 20, 2024) (rejecting Section 230 immunity where Facebook participated “as a co-developer of content and not merely as a publisher of information provided by another information content provider”); *Liapes v. Facebook, Inc.*, 95 Cal. App. 5th 910, 929-930 (2023), *review denied* (Jan. 10, 2024) (denying Section 230 immunity because defendant’s “system that actively shaped the audience [of third-party advertisements] based on protected characteristics” constituted content development); *Roommates.com*, 521 F.3d at 1168 (holding website

liable when its own actions “contribute[d] materially to the alleged illegality of the conduct”).

Under current law, Section 230 plainly does not apply here: X Corp.’s liability properly hinges on its compliance (or not) with the TOS Report requirement, of which it is “the developer” not just in part but entirely. *See Roommates.com*, 521 F.3d at 1162 (noting that Section 230 “immunity applies only” if the website is not also “responsible, in whole or in part, for the creation or development of the offending content” (quoting 47 U.S.C. s. 230(f)(3)). To be sure, the TOS Report *does* relate to underlying third-party content—but it is only *X Corp.*’s, not its users’, conduct and content that gives rise to liability. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) (finding no Section 230 immunity for violation of duty to warn because “[a] post or email warning that Internet Brands generated would involve only content that Internet Brands itself produced”).

To grant immunity here, the Court would need to stretch Section 230 beyond recognition to cover not only third-party content but all of X Corp.’s own conduct if the potential liability might “pressure” the platform to alter its content moderation practices. This is a dangerous proposition that would erase the distinction between liability for third-party content and liability for a platform’s own actions—a distinction upon which civil rights enforcement rests. *E.g., Roommates.com*, 521 F.3d at 1165; *Liapes*, 313 Cal. Rptr. 3d at 346 (concluding Facebook not entitled to Section 230 immunity because its algorithmic discrimination in distribution of third-party content “creates, shapes, or develops content ‘by materially contributing’ to the content’s alleged

unlawfulness”). Immunity does not turn on a prediction that liability could indirectly cause the platform to change how it regulates third-party content.

In fact, virtually any liability might “pressure” a social media company to alter its content-moderation practices in some way. For example, in *Vargas*, this Court rejected Section 230 immunity in a suit over Facebook’s advertising platform because Facebook “contribute[d] materially to the alleged illegality of the conduct” by “identif[y]ing persons in protected categories and offer[ing] tools that directly and easily allowed advertisers to exclude all persons of a protected category.” No. 21-16499, 2023 WL 6784359, at *3. The court did not consider whether the outcome would influence Facebook to change the way it moderates the content of the advertisements themselves, *id.*, such as by instituting reviews of advertisements to identify discriminatory third-party content (which it did previously in response to EEOC complaints and potential liability).⁴² X Corp.’s approach, however, could compel the opposite result.

Vargas, and similar cases, reached the proper conclusion. Immunity does not apply merely because third-party content is involved somewhere downstream from the TOS Report. *Internet Brands*, 824 F.3d at 853 (rejecting argument that immunities applies where “[p]ublishing activity is a but-for cause” of liability); *accord Airbnb, Inc. v. City & Cnty. of S.F.*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016) (explaining the “correct test

⁴² *Facebook Agrees to Sweeping Reforms to Curb Discriminatory Ad Targeting Practices*, ACLU (Mar. 19, 2019), <https://www.aclu.org/press-releases/facebook-agrees-sweeping-reforms-curb-discriminatory-ad-targeting-practices> [https://perma.cc/5E2T-9SZV]; *Summary of Settlements Between Civil Rights Advocates and Facebook*, ACLU (Mar. 19, 2019), <https://www.aclu.org/documents/summary-settlements-between-civil-rights-advocates-and-facebook> [https://perma.cc/CR96-PRQE].

[for Section 230 immunity] . . . is not whether a challenged activity merely bears some connection to online content[.]”).

Departing from this well-worn standard would undermine civil rights protections, which are essential for Asian Americans who, like other racial minorities, may face discrimination not just by users but by platforms covered by Section 230.⁴³ For example, as recently as 2020, Facebook’s advertising platform allowed advertisers to target or exclude users based on Facebook’s racial categorizations, such as “Asian American (US)”.⁴⁴ Ensuring the vitality of civil rights protections is especially important today as Internet-based tools like machine-learning algorithms and facial recognition technology—which are “trained” on third-party content, *see Tremblay v. OpenAI, Inc.*, No. 23-cv-03223-AMO, 2024 WL 557720, at *1 (N.D. Cal. Feb. 12, 2024) (discussing operation of large language models)—spread into every aspect of our lives, from police enforcement to hiring.⁴⁵ Though useful, these tools can discriminate without proper

⁴³ See Rebecca Heilweil, *Why algorithms can be racist and sexist*, VOX.COM (Feb. 18, 2020), <https://www.vox.com/recode/2020/2/18/21121286/algorithms-bias-discrimination-facial-recognition-transparency> [<https://perma.cc/SRD3-4E4Y>].

⁴⁴ Jinyan Zang, *Solving the problem of racially discriminatory advertising on Facebook*, BROOKINGS INSTITUTION (Oct. 19, 2021), <https://www.brookings.edu/articles/solving-the-problem-of-racially-discriminatory-advertising-on-facebook/> [<https://perma.cc/Y4XW-5UNX>]; Jinyan Zang, *How Facebook’s Advertising Algorithms Can Discriminate By Race and Ethnicity*, TECHNOLOGY SCIENCE (Oct. 19, 2021), <https://techscience.org/a/2021101901/> [<https://perma.cc/N72C-94T8>].

⁴⁵ Jennifer Valentino-DeVries, *How the Police Use Facial Recognition, and Where It Falls Short*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html>; Leon Yin, et al., *OpenAI’s GPT is a Recruiter’s Dream Tool. Tests Show There’s Racial Bias*, BLOOMBERG (Mar. 7, 2024), <https://www.bloomberg.com/graphics/2024-openai-gpt-hiring-racial-discrimination/>.

oversight, reinforcing existing biases and intensifying inequality. Some large-language models, for example, have been found to “associate Muslims with violence.”⁴⁶ And, in 2023, Rite Aid’s facial recognition software incorrectly designated Black, Latino, and Asian customers as “likely to engage” in shoplifting.⁴⁷

This Court should therefore reject X Corp.’s dangerous theory of Section 230 immunity.

CONCLUSION

For the foregoing reasons, Advancing Justice-AAJC respectfully urges the Court to affirm the district court’s decision.

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⁴⁶ Abubakar Abid, et al., *Large language models associate Muslims with violence*, 3 NATURE MACHINE INTELLIGENCE 461 (2021), <https://www.nature.com/articles/s42256-021-00359-2> [<https://perma.cc/T2PF-8YKZ>].

⁴⁷ Johana Bhuiyan, *Rite Aid facial recognition misidentified Black, Latino and Asian people as ‘likely’ shoplifters*, THE GUARDIAN (Dec. 20, 2023), <https://www.theguardian.com/technology/2023/dec/20/rite-aid-shoplifting-facial-recognition-ftc-settlement> [<https://perma.cc/K99S-P73H>].

CERTIFICATE OF SERVICE

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Date: March 20, 2024

/s/ Kristen G. Simplicio
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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