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Section 230 Under Fire: The Supreme Court and Congress Weigh Narrowing Internet Service Providers' Immunity for Content Posted by Others

By Jim Rosenfeld, Adam Sieff, and Shontee Pant

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The Supreme Court will soon hear oral argument in *Gonzalez v. Google LLC*, No. 21-1333, a case that may diminish or destroy 47 U.S.C. § 230's robust protections for online speech. Considered by many to have provided "the twenty-six words that created the internet," Section 230 shields online publishers and platforms from liability for hosting user-generated content. Section 230 advocates fear an adverse ruling in *Gonzalez* could have devastating consequences, and at minimum hamstring the internet medium from reaching its potential to provide the "vast democratic forums" the Court once heralded. *Reno v. ACLU*, 521, U.S. 844, 868-69 (1997). Its critics claim Courts have construed the immunity far too broadly, allowing terrorist and hate groups to flower online and tech companies to censor unpopular viewpoints. And a growing bipartisan coalition in Congress—wary, for divergent reasons, of what its members have decided are the predations of "Big Tech"—appears intent on gutting Section 230's protections regardless of what the Court decides.

This article reviews how *Gonzalez* came before the Court, discusses the principal arguments that the parties and *amici* have raised, and previews proposed Congressional actions.

Background

In November 2015, three terrorists associated with ISIS shot and killed a U.S. citizen named Nohemi Gonzalez in a Paris bistro. Ms. Gonzalez's father and estate sued Google under the Anti-Terrorism Act, 18 U.S.C. § 2333, claiming that YouTube (a Google subsidiary) materially contributed to his daughter's death. YouTube had published and neglected to timely remove ISIS recruitment videos, even though the

videos violated YouTube's terms of use. Plaintiffs argued Section 230 did not immunize Google from liability because the recommendations were provided by Google's "own" algorithms, and thus their claims did not treat Google as the publisher of third-party content. The United States District Court for the Northern District of California rejected Gonzalez's argument and dismissed the case based on the Section 230 immunity.

Applying the established three-part test for Section 230 immunity and following its prior decision involving algorithmic content recommendation in *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1095-96 (9th Cir. 2019), the Ninth Circuit held that Section 230 bars claims like Gonzalez's that are based on injuries suffered as a result of an interactive computer service's decision to publish third-party content, even when provided through a recommendation algorithm. *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021). Judge Berzon wrote separately to "join the growing chorus of voices calling for a more limited reading of the scope of Section 230 immunity." *Id.* at 913 (Berzon, J., concurring). Pointing to Judge Katzmann's partial dissent in *Force v. Facebook*, 934, F.3d 53 (2d Cir. 2019), Judge Berzon explained that if not bound by Ninth Circuit precedent, she would have held that "the term 'publisher' under [S]ection 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." *Id.*

The Supreme Court granted certiorari on the issue Judge Berzon raised: "Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?"

The Parties' Arguments

Petitioners' opening brief began by reframing the question presented to ask: "Under what circumstances does the defense created by [S]ection 230(c)(1) apply to recommendations of third-party content?" Petitioners' answer was "none"; they presented three arguments that no such circumstances exist: First, Section 230 does not apply to claims based on *recommendations* of third-party content because such

claims do not treat a defendant as a "publisher or speaker." Second, a recommendation is an internet service's *own speech* and is therefore not covered by Section 230's protections for the publication of third-party speech. Third, and relatedly, Section 230 does not apply to recommendations because, when an internet service makes a recommendation, it is *not acting in its neutral capacity* as a provider of an interactive computer service.

Google responded that Petitioners' claims were properly barred because, in substance, they alleged injuries that ultimately derived from the publication of third-party content. Noting that nothing in Section 230's text supported the Petitioners' narrow construction, it argued that the Ninth Circuit (like the Second Circuit) correctly held that claims based on the alleged amplification of third-party content still seek to impose liability on an internet service based on its actions as the "publisher or speaker" of that content. Google also rejected Petitioners' contention that recommended content was first-party as opposed to third-party speech, in part by drawing a distinction between recommendations based on relevancy and recommendations based on endorsement. Maintaining that its "Up next" feature was a relevancy-based recommendation, Google explained that the feature was a neutral tool that did not cross the line into first party speech.

Notably, Google also argued that the Supreme Court need not decide this case at all if it reverses in a parallel statutory interpretation case—*Twitter v. Taamneh*, No. 21-1496—that will be argued before the Court on the same day.

Amici's Arguments

Amici also sparred over the appropriate test the Court should adopt to determine the scope of Section 230(c)(1)'s protections and debated the consequences a ruling for Petitioners would impose upon speakers and listeners who depend on the internet.

Channeling Justice Thomas's statement respecting the denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13, 14-16 (2020) (Thomas, J.), U.S. Senator Josh Hawley (R-MO) argued that Section 230 should be understood only to immunize online platforms from *publisher* liability and not *distributor* liability.

Free speech advocates took issue with this approach. Chamber of Progress and its fellow non-profit group amici, for instance, explained that "[t]his false dichotomy fails to recognize that intermediaries may both select and distribute content, and thus bear characteristics of both editors and distributors—even within the context of a single publication decision." Their brief argued that online intermediaries do not forfeit the Section 230 immunity when they exercise their First Amendment rights to select and promote content.

The United States attempted to stake out a middle ground, essentially arguing that the traditional three-part test for Section 230 immunity is the correct one, but that the test is not met where liability is alleged to result from a platform's *own speech* to recommend particular third-party content (as opposed to that third-party content itself).

But U.S. Senator Ron Wyden and former U.S. Representative Christopher Cox, co-authors of Section 230, rejected the government's attempt to define the category of non-immune, recommendation-based claims under the theory that a recommendation constitutes a new piece of "information" ineligible for immunity. The Section 230 co-authors argued that the government's position lacked statutory support—a point that Meta Platforms, Inc. and a group of Internet Law Scholars also made—and also that, as Chamber of Progress argued as well, there is no intelligible basis to differentiate *publication* from *recommendation*, particularly in the Internet medium.

Turning to the case's broader implications, several state attorneys general argued that a decision broadly interpreting Section 230 to reach promotion, recommendation, and distributor liability would upset federalism principles by risking the preemption of a wide range of state laws and claims.

Briefs from the Product Liability Advisory Council and Washington Legal Foundation responded that the scope of Section 230 is broad by design, and that while the state attorneys general may dislike the scope of Section 230's protections, that is simply a disagreement with the policy Congress enacted.

And numerous online service providers including Meta, Twitter, and Reddit, along with an array of social justice advocates including the LGBT Tech Institute and the Global Project Against Hate and Extremism, separately argued that eliminating Congress's

chosen protections as they relate to the promotion of content would functionally eliminate all of Section 230's protections, deprive Internet users of the value social media provides, and disproportionately harm speakers on society's margins.

Potential Congressional Action

Whatever the Supreme Court decides, it could be moot if the bipartisan coalition opposed to Section 230 in Congress can unite on an approach to reforming the statute.

U.S. Senator Sheldon Whitehouse (D-RI) captured the sentiment of many legislative reformers in an extended essay published in 2022. *See* Sheldon Whitehouse, "Section 230 Reforms," in Lee C. Bollinger and Geoffrey Stone, eds., *Social Media, Freedom of Speech, and the Future of our Democracy* 103-118 (2022). Calling Section 230 "outdated," he proposed to repeal and replace it with (i) a "notice-and-takedown system for illicit content," (ii) mandatory "transparency requirements" to permit the government and "white hat researchers" acting as "private inspectors general" to identify "deliberate misinformation campaigns" and inspect online service providers' algorithms for "weaknesses," and (iii) a narrowed immunity from suit not applicable as a defense to claims involving paid third-party advertisements, sponsored third-party content, or claims involving the promotion or amplification of third-party content by a platform's own algorithm.

Though Senator Whitehouse has yet to introduce a bill to this effect, several bills have been recently proposed to expressly or impliedly limit or eliminate Section 230. These include, but are not limited to the following:

- HR 8612 would limit Section 230(c)(2)'s availability as a defense only to cases where an interactive computer service removes actually unlawful material.

- HR 7613 would replace Section 230 with a law which would require interactive computer services to provide "reasonable, non-discriminatory access" to their platforms. Platforms with more than 10 million worldwide monthly users would be designated "common carriers" with forced-carry obligations. A "Good Samaritan" takedown defense akin to the current Section 230(c)(2) would be available to remove certain specified content—like unlawful content, and content that promotes terrorism or harassment—but only to platforms that do not otherwise

downrank or remove content. The bill would also create a private right of action for aggrieved internet users and state attorneys general.

- HR 7819 and its companion bill S 2725 would withdraw Section 230 protections from online firearms marketplaces, defined to include interactive computer services that permit third-parties to exchange information to facilitate firearms and ammunition transactions.

- HR 6544 and its companion bill S 3538 would amend Section 230 so that interactive computer services cannot claim Section 230 as a defense to claims involving the proliferation of child sexual abuse material.

- HR 5596 would eliminate Section 230's immunity where interactive computer services have "materially contributed to a physical or severe emotional injury to any person" by making a personalizing recommendation of harmful third-party content, or by amplifying harmful third-party content through their content moderation algorithms. These limitations would not apply to recommendations made in response to a "user-specified" search, to platforms with fewer than 5 million monthly visitors, or to web-hosting sites and data storage platforms.

- HR 5449 would establish a federal tort that supersedes Section 230 permitting private suits against social media platforms for publishing content that causes "bodily injury to children" or otherwise "harm[s] the mental health of children" under the age of 16.

- S 7972 would simply repeal Section 230 in its entirety.

- S 2448 would create an exception to Section 230's protections for platforms that use algorithms to promote "health misinformation," to be defined by the Department of Health and Human Services, unless the platform uses "neutral" content curation methods (i.e., by ordering content chronologically). The bill would only take effect during the remainder of the COVID-19 public health emergency.

- HR 3827 would establish that Section 230(c)(1) does not provide a defense for the removal of content, and narrow the scope of Section 230(c)(2) to protect only content removal made in accordance with their published content policies. Platforms would need to justify their removal of content, and provide an opportunity for a user to respond, unless the removal was necessary for public safety.

These proposals have not historically gained traction, but in January 2023, President Biden published a *Wall Street Journal* op-ed calling for Section 230 reforms alongside a raft of other regulations intended to rein in "Big Tech." Given the President's stated position, we should expect more bills proposing Section 230 reform in the new divided Congress—including some that could make headway toward passage.

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Whatever happens with Section 230, it is important to remember the law exists to bolster underlying First Amendment protections for intermediaries. Though the dilution or loss of Section 230's protections would pose severe consequences for online speech, those underlying protections would remain. There is still "no basis," as the Supreme Court recognized in *Reno*, 521 U.S. at 870, "for qualifying the level of First Amendment scrutiny that should be applied" to the internet medium. Should Section 230 fall or diminish, those protections would become paramount.

Jim Rosenfeld is a partner, Adam Sieff is a counsel, and Shontee Pant is an associate in the media litigation practice at Davis Wright Tremaine LLP. Robert Corn-Revere, Ambika Kumar and Adam Sieff of DWT submitted an amicus brief on behalf of Chamber of Progress and other organizations in Gonzalez.