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Alissa Donovan

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The Uncertain Fate of Section 230

BY ALISSA DONOVAN / ON APRIL 3, 2023



Photo by dacpro on Vista

At a time when the internet’s potential was almost entirely unknown, members of Congress set forth to protect the diverse discourse, cultural development, and intellectual progression that the internet promised to offer.¹ Congress boasted that the internet and other interactive computer services “flourished” under the realm of minimal governmental regulation.² Therefore, in an effort to protect the continued development of the internet and other interactive computer services—and with them, the furtherance of intellectual progression—Congress enacted 47 U.S.C. §230 (“Section 230”).³ Section 230 was, in part, a response to the interpretation of the Communications Decency Act (“CDA”), which was proposed to limit the growing availability of internet pornography and was feared to have a chilling effect on the internet’s promotion of free expression.⁴ Section 230 was also a response to the case of *Stratton Oakmont v. Prodigy Servs. Co.* which held

that, since Prodigy, the interactive computer service was able to moderate the content posted by third parties, it was liable for that content.⁵ Congress was mindful of the case's implication and feared that CDA would impose greater burdens on interactive computer services which would in turn limit speech posted on these sites.⁶ An amendment to the CDA, Section 230, was then born to grant broad immunity to interactive computer services for third-party content posted on their sites.⁷

Although most members of Congress agree that Section 230 requires adjustments to keep pace with the current industry of technology, Congress has been unable to create a new adaption to reflect this view.⁸ Therefore, courts are required to make their own interpretations about the law. The effect has been only a slight narrowing of the broad immunity granted to tech companies.⁹ Two cases currently pending in the Supreme Court could potentially limit the immunity that tech companies have enjoyed for years.¹⁰ These cases have the potential to change the seemingly limitless immunity, and with it, the internet as we know it.¹¹

The portion of Section 230 that is currently being considered by the Supreme Court states "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹² Effectively, this means that interactive computer services are not considered the publishers of content posted by users on their websites, and therefore cannot be held liable for such content. The practical effect is almost entire immunity from content posted by third parties. Section 230 functions to protect tech companies in two ways: (1) it grants interactive computer services immunity when a third-party user posts something that harms another in some way, and (2) it allows interactive computer services to moderate posts on their websites.¹³ Critics of Section 230 argue that it allows major tech companies to avoid responsibility for harms that they allowed to happen.¹⁴ Alternatively, supporters of the statute state that, without Section 230, companies would take down excessive amounts of content to avoid potential lawsuits, which would universally stifle freedom of expression across the internet.¹⁵ The question in the debate then becomes: to what extent are we willing to grant major interactive computer services immunity due to the fear that another course of action would limit our beloved freedom of expression. As summed up by Justice Kagan, "every other industry has to internalize the costs of misconduct. Why is it that the tech industry gets a pass? A little bit unclear."¹⁶ This is the primary issue of the Section 230 debate.

The first case in front of the Court is *Gonzales v. Google*—the first Section 230 case to ever be heard by the highest Court.¹⁷ The case stems from the Paris

terrorist attacks where a twenty-three-year-old American student studying abroad was killed by an ISIS-connected terrorist group.¹⁸ The victim's family sued Google, Facebook, and Twitter on the basis that the defendant interactive computer services spread content that radicalized users, eventually leading to the terrorist attack where she was killed.¹⁹ The plaintiffs in the case argue that the content posted on YouTube does not qualify for immunity under Section 230 since YouTube's recommendation of certain videos to users qualifies as its own form of free speech.²⁰ The plaintiffs argued that, since Section 230 only protects companies from content posted by third parties and recommendation of videos constitutes a form of expression, YouTube is not immune under Section 230.²¹ The appellate court disagreed with the plaintiffs, holding that the company was protected by Section 230.²² One of the main questions that the Supreme Court is considering within this case is whether a YouTube algorithm that recommends videos to viewers constitutes publishing.²³ If the Court rules in the affirmative, then interactive computer services are not immune from liability concerning harmful content recommendations, such as terrorist propaganda.

The second case pending, *Twitter v. Taamneh*, asks the question of whether Twitter has contributed to terrorism, and does not directly address Section 230.²⁴ Similarly to *Gonzales v. Google*, the case was brought by the family members of a victim of an ISIS-linked attack—the victim in the *Taamneh* case was killed at an Istanbul nightclub in 2017.²⁵ The family of the victim, the plaintiffs, primarily argues that interactive computer services know that their platforms play an important role in ISIS's terrorism efforts and these providers could have taken a more aggressive action to combat pro-ISIS content posted on their sites.²⁶ The action was brought under the Justice Against Sponsors of Terrorism Act ("JASTA") which allows private rights of actions against entities that aid and abet terrorism.²⁷ The root argument is that these internet service providers, by failing to take down the pro-ISIS content posted on their sites, aided and abetted terrorism efforts. The Ninth Circuit ruled in favor of the plaintiffs, and critics argue that this ruling expanded the scope of liability beyond what Congress intended.²⁸ Specifically, critics argue that violating JASTA requires a nexus to a specific act of international terrorism, not merely ISIS's broader criminal enterprise.²⁹ Twitter argued during oral arguments that the family's belief that the interactive computer services could have done more is not enough to support a claim that these interactive computer services are aiding and abetting terrorist groups.³⁰ Although this case is not directly a Section 230 case, the two cases pending are nonetheless connected.³¹ If the Court rules in favor of the tech companies in *Gonzales v. Google*, the plaintiffs in the *Twitter v. Taamneh* case will fail, since the interactive computer services will remain immune to content posted on their site under Section 230.³²

While most cases that make it to the Supreme Court have a clear political divide, the Section 230 debate is largely muddled: Surprisingly, both political sides agree that the statute needs adjustment.³³ The Justices also seem to agree that this is not an issue that they are properly equipped to answer—Congress would likely be in a better position to balance the delicate issues at play within this discussion.³⁴ Nonetheless, the Court is asked to resolve the question, at least temporarily, until Congress can adjust the law itself. The result will undoubtedly impact the internet, though it is impossible to see just how.

Alissa Donovan is a Second Year J.D. candidate at Benjamin N. Cardozo School of Law where she is a Staff Editor on the Cardozo Arts & Entertainment Law Journal. Alissa also serves as the Outreach Coordinator of the Fashion Law Society. She is primarily interested in copyright, trademark, fashion, and entertainment law.

1. See 47 U.S.C. §230(a)(3).
2. See 47 U.S.C. §230(a)(4).
3. See 47 U.S.C. §230(a)(3).
4. See Sara Morrison, Section 230, The Internet Law That's Under Threat, Explained, Vox (Feb. 23, 2023), <https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-supreme-court-social-media> [<https://perma.cc/AB27-X7EC>].
5. Stratton Oakmont v. Prodigy Servs. Co. – INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct. May 24, 1995); see Sara Morrison, Section 230, The Internet Law That's Under Threat, Explained, Vox (Feb. 23, 2023), <https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-supreme-court-social-media> [<https://perma.cc/AB27-X7EC>].
6. See Sara Morrison, Section 230, The Internet Law That's Under Threat, Explained, Vox (Feb. 23, 2023), <https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-supreme-court-social-media> [<https://perma.cc/AB27-X7EC>]. Representative (now Senator) Wyden, who co-authored Section 230, stated that “[w]hat I was struck by then is that is somebody owned a website or a blog, they could be held personally liable for something posted on their site...[a]nd I said then—and it’s the heard of my concern now—if that’s the case, it will kill the little guy, the startup, the inventor, the person who is essential for a competitive marketplace. It will kill them in the crib.”
7. See Sara Morrison, Section 230, The Internet Law That's Under Threat, Explained, Vox (Feb. 23, 2023), <https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-supreme-court-social-media> [<https://perma.cc/AB27-X7EC>].

8. See *id.*; David McCabe, Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants, *NYT* (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html?searchResultPosition=1> [<https://perma.cc/EB4J-5E37>].
9. See On Air with Kara Swisher, Will Killing Section 230 Kill the Internet?, *New York Magazine* (Feb. 23, 2023).
10. See David McCabe, Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants, *NYT* (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html?searchResultPosition=1> [<https://perma.cc/EB4J-5E37>].
11. See *id.*
12. 47 U.S.C.S. §230; see Joel Thayer, Bad Lawyering Does Not Mean Google is Right About Section 230, *Newsweek* (Mar. 2, 2023), <https://www.newsweek.com/bad-lawyering-does-not-mean-google-right-about-section-230-opinion-1784774> [<https://perma.cc/TG22-X228>].
13. Section 230: The Law at the Center of the Big Tech Debate, *WSD* (Nov. 18, 2020), <https://www.youtube.com/watch?v=FHTc6s5YTbU> [<https://perma.cc/6PK5-6RDG>].
14. See David McCabe, Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants, *NYT* (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html?searchResultPosition=1> [<https://perma.cc/EB4J-5E37>].
15. See *id.*
16. Gonzalez v. Google: Justice Kagan Ribs Court for Lack of Tech Expertise, *YahooNews* (Feb. 21, 2023), <https://news.yahoo.com/gonzalez-v-google-justice-kagan-205753437.html> [<https://perma.cc/Q8BG-3F75>].
17. See On Air with Kara Swisher, Will Killing Section 230 Kill the Internet?, *New York Magazine* (Feb. 23, 2023).
18. See David McCabe, Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants, (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html?searchResultPosition=1> [<https://perma.cc/EB4J-5E37>].
19. See *id.*
20. See *id.*
21. See *id.*
22. See *id.*; Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. June 22, 2021).
23. See On Air with Kara Swisher, Will Killing Section 230 Kill the Internet?, *New York Magazine* (Feb. 23, 2023); Joel Thayer, Bad Lawyering Does Not Mean Google is Right About Section 230, *Newsweek* (Mar. 2, 2023), <https://www.newsweek.com/bad-lawyering-does-not-mean-google-right-about-section-230-opinion-1784774> [<https://perma.cc/TG22-X228>].

24. See David McCabe, Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants, NYT (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html?searchResultPosition=1> [<https://perma.cc/EB4J-5E37>].
25. See Zach Schonfeld, Pro-ISIS Content at Heart of Section 230 Supreme Court Arguments, The Hill (Feb. 15, 2023), <https://thehill.com/policy/technology/3858005-pro-isis-content-at-heart-of-section-230-supreme-court-arguments/> [<https://perma.cc/BDM6-757A>].
26. See id.
27. See id. The act was initially passed by Congress—over Obama’s veto—to allow families 9/11 victims to sue Saudi Arabia.
28. See id.
29. See id.
30. Amy Howe, In Lawsuit Against Tech Companies, Justices Debate What It Means to “Aid and Abet” Terrorism, SCOTUSBlog (Feb. 22, 2023), <https://www.scotusblog.com/2023/02/in-lawsuit-against-tech-companies-justices-debate-what-it-means-to-aid-and-abet-terrorism/> [<https://perma.cc/T6YC-FHUE>].
31. See On Air with Kara Swisher, Will Killing Section 230 Kill the Internet?, New York Magazine (Feb. 23, 2023).
32. See id.
33. See id.; see also Sara Morrison, Section 230, The Internet Law That’s Under Threat, Explained, Vox (Feb. 23, 2023), <https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-supreme-court-social-media> [<https://perma.cc/AB27-X7EC>].
34. See Gonzalez v. Google: Justice Kagan Ribs Court for Lack of Tech Expertise, YahooNews (Feb. 21, 2023), <https://news.yahoo.com/gonzalez-v-google-justice-kagan-205753437.html> [<https://perma.cc/Q8BG-3F75>]; On Air with Kara Swisher, Will Killing Section 230 Kill the Internet?, New York Magazine (Feb. 23, 2023).