ENERGY & COMMERCE
CHAIR RODGERS

MEMORANDUM 4/9/2024

To: Members, Subcommittee on Communications and Technology
From: Majority Staff
Re: Communications and Technology Subcommittee Hearing

I. INTRODUCTION

On Thursday, April 11, 2024, at 1:00 p.m. (ET), the Subcommittee on Communications and Technology will hold a hearing in 2123 Rayburn House Office Building. The title of the hearing is "Where Are We Now: Section 230 of the Communications Decency Act of 1996." The following witnesses are expected to testify:

II. WITNESSES

- Dr. Mary Anne Franks, Professor of Intellectual Property, Technology, and Civil Rights Law, George Washington University Law School
- Ms. Mary Graw Leary, Professor of Law, The Catholic University of America School of Law, and Visiting Professor of Law, The University of Georgia School of Law
- Dr. Allison Stanger, Professor of International Politics and Economics, Middlebury College

III. BACKGROUND

Section 230 was enacted as part of the Communications and Decency Act of 1996 (CDA) after a court held an online service provider liable for defamatory content posted by a user on its message boards.[1] In *Stratton Oakmont v. Prodigy Services,* the court concluded that the service provider was a "publisher" because it exercised editorial control over its users by utilizing software and forum moderators to control the content on its message boards.[2]

As a result of this ruling, Internet Service Providers (ISPs) could be held liable for the content posted on a website by a third-party user if the ISP engaged in any content moderation or removal practices. ISPs would have to choose between subjecting themselves to liability or not moderating their websites at all. Then-Representatives Chris Cox (R-CA) and Ron Wyden (D-OR) feared this could lead to the denigration of the Internet, leading to CDA Section 230.[3]

IV. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996

[1] Pub. L. 104-104, Title V, Subtitle A. https://www.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf
[2] *Stratton-Oakmont, Inc. v. Prodigy Services Co. (May 1995). See,* https://h2o.law.harvard.edu/cases/4540
[3] Congressional Research Service, "Section 230: An Overview," https://crsreports.congress.gov/product/pdf/R/R46751

Congress originally enacted Section 230 to regulate obscenity and indecency on the Internet. Today, Section 230 is seen as an essential underpinning of the modern Internet and as critical to the explosive growth of websites that facilitate user-generated content, such as social media platforms. Section 230 protects Internet platforms from (1) liability for content created by users of their services and (2) for their decisions to moderate or remove user-generated content. Specifically:

- Section 230(c)(1) states that providers and users of an interactive computer service shall not be treated as a publisher or speaker of any information provided by another information content provider.[4]
- Section 230(c)(2) states that interactive service providers and users are not liable for any good faith actions to restrict or remove access to material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[5]

This dual liability protection is often referred to as the "sword" and the "shield." The "sword" being the ability to moderate and remove content and the "shield" being the liability protection for content posted by users. [6]

In 2017, Congress amended the scope of Section 230 immunity for the first time as part of the Allow States and Victims to Fight Online Sex Trafficking Act (SESTA/FOSTA).[7] The change allows victims to file private civil suits against persons or organizations that promote or facilitate prostitution or sex trafficking and established criminal penalties for those who promote or facilitate prostitution and sex trafficking through their ownership, management, or operation of online platforms.

Despite Section 230's success in contributing to the growth of the Internet ecosystem, there is bipartisan concern that the law has had unintended consequences, such as enabling terrorist activity and recruitment, promoting the exploitation of minors, and allowing discrimination and harassment.[8] There is also concern over how the websites moderate content, with some arguing that platforms moderate content too much, while others arguing that platforms do not moderate content enough.[9]

V. SECTION 230 IN THE COURTS

Although the Supreme Court struck down much of the CDA in 1997,[10] Section 230 has been upheld. Federal courts, beginning with the Fourth Circuit in *Zeran v. America Online, Inc.*,[11] have applied Section 230's liability protection broadly in a myriad of circumstances and

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[4] 47 U.S.C. § 230(c)(1).
[5] 47 U.S.C. § 230(c)(2).
[6] The Wall Street Journal, "Section 230: What It Is and Why Politicians Want to Change It," https://www.wsj.com/articles/section-230-what-it-is-and-why-politicians-want-to-change-it-11616664601.
[7] Pub. L. 115-164, 132 Stat.1253. https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf.
[8] Danielle Draper, "Summarizing the Section 230 Debate: Pro-Content Moderation vs. Anri-Censorship" https://bipartisanpolicy.org/blog/summarizing-the-section-230-debate-pro-content-moderation-vs-anti-censorship/.
[9] *Id.*
[10] *Reno v. ACLU*, 521 U.S. 844 (1997).
[11] 129 F.3d 327 (4th Cir. 1997).

activities conducted by social media platforms. Courts have granted platforms immunity for selecting,[12] editing,[13] and recommending content.[14] Some courts have even granted immunity to platforms for their design.[15] And some courts have collapsed Section 230(c)(1) and (c)(2), granting immunity for removal decisions regardless of whether the content was objectionable or removed in good faith.[16]

Courts today generally apply a three-part test to determine whether Section 230 immunity applies: (1) the platform must be a "provider or user of an interactive computer service," (2) which the plaintiff is treating as a "publisher or speaker" of (3) content "provided by another information content provider."[17]

A. Gonzalez v. Google LLC

On February 21, 2023, the Supreme Court considered *Gonzalez v. Google LLC* to determine whether Section 230 immunizes online platforms from being held liable for algorithmically recommending third-party content to users.[18] In 2015, Nohemi Gonzalez, a U.S. citizen, was one of 130 people killed by a terrorist attack in Paris, France. The day after, the terrorist group Islamic State of Iraq (ISIS) claimed responsibility by issuing a written statement and releasing a YouTube video. Gonzalez's father filed an action against Google claiming the company aided and abetted international terrorism by allowing ISIS to use YouTube "to recruit members, plan terrorist attacks, issue terrorist threats, instill fear, and intimidate civilian populations."[19] Specifically, the action alleges that Google assists ISIS in spreading its message because it uses computer algorithms that suggest content. Gonzalez argued that Section 230 should not apply to these recommendations. Some news reports believe the Court seemed skeptical of reinterpreting Section 230.[20] The Supreme Court declined to rule on whether targeted recommendations by a social media company's algorithm would fall outside the liability of Section 230. [21]

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[12] *See, e.g., Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 403 (6th Cir. 2014) (granting immunity to a platform that selected and commented on content submitted third parties that it chose to post).
[13] *See, e.g.*, *Batzel v. Smith*, 333 F. 3d 1018 (9th Cir. 2003) (granting immunity to a platform that edited portions of an email before posting that email on its website and listserv).
[14] *See, e.g.*, *Force v. Facebook, Inc*., 934 F. 3d 53, 65 (2d Cir. 2019) (granting immunity to Facebook for recommending content by terrorists).
[15] *See, e.g.*, *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 591 (2d Cir. 2019) (granting immunity to a platform for a claim that it designed its application without safety features to prevent harassment and impersonation); *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (C.D. Cal. 2020) (granting immunity to a platform for a claim that its product encouraged reckless driving).
[16] *See, e.g.*, *Sikhs for Justice, Inc. v. Facebook, Inc*., 697 Fed. Appx. 526 (9th Cir. 2017) (affirming a lower court's grant of immunity that said "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune'" under §230(c)(1)").
[17] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009).
[18] Gonzalez v. Google LLC, 21-1333.
[19] Gonzalez v. Google LLC, Supreme Court Docket No. "21-1333," Cornell Law School, https://www.law.cornell.edu/supct/cert/21-1333
[20] Brian Fung and Tierney Sneed, "Supreme Court to hear major copyright case involving Google," CNN Business, https://www.cnn.com/business/live-news/supreme-court-gonzalez-v-google-2-21-23/index.html
[21] Gonzalez v. Google LLC, Supreme Court Docket No. "21-1333," SCOTUSblog, https://www.scotusblog.com/case-files/cases/gonzalez-v-google-llc/

B. Twitter Inc. v. Taamneh

On February 22, 2023, the Supreme Court considered *Twitter Inc. v. Taamneh* to determine whether social media platforms can be held liable for aiding and abetting terrorism for failing to remove content and accounts promoting it.[22] In 2017, Jordanian citizen Nawras Alassaf died in the attack on the Reina nightclub in Istanbul where a gunman affiliated with ISIS killed 39 people. Alassaf's relatives sued Twitter for aiding and abetting ISIS by failing to remove terrorist content on its platform and promoting its circulation. The lower courts barred this claim, citing Section 230. In May 2023, the Supreme Court issued a unanimous opinion declining to impose secondary liability on social media companies for failing to prevent ISIS from using their platforms for recruiting, fundraising, and organizing.[23]

C. Moody v. NetChoice, LLC and NetChoice, LLC v. Paxton

On February 26, 2024, the Supreme Court considered two cases to determine if it is a violation of the First Amendment for a State to restrict how social media platforms moderate content and require them to provide notice and an explanation to users when they do.[24] In 2021, Florida and Texas both enacted laws that limited how social media platforms could moderate content provided by users of the platforms. Both States' laws required platforms to notify a user when they modified that user's content and explain why they modified the content. NetChoice – on behalf of social media companies – claims that the two laws violate social media companies' First Amendment rights.[25]

VI. KEY QUESTIONS

- How has the landscape of online content and user behavior evolved since the enactment of Section 230, and what challenges does this pose to the current legal framework?
- What role does Section 230 play in shaping the responsibilities and liabilities of Big Tech in addressing harmful content, misinformation, and hate speech?
- What are the potential benefits and drawbacks of different reform proposals to amend Section 230?

VII. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Kate O'Connor or Giulia Leganski of the Committee Staff at (202) 225-3641.

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[22] *Twitter, Inc. v. Taamneh*, 21-1496.
[23] *Twitter, Inc. v. Taamneh*, 598 U. S. ____ (2023).
[24] Amy Howe, "Justices take major Florida and Texas social media cases," SCOTUSblog, https://www.scotusblog.com/2023/09/justices-take-major-florida-and-texas-social-media-cases/
[25] Moody v. NetChoice, LLC.