

SAPRONOV & ASSOCIATES, P.C.
ATTORNEYS AT LAW

info@wstelecomlaw.com
www.wstelecomlaw.com

1300 I STREET, NW, SUITE 400
WASHINGTON, D.C. 20005
TEL. 770.309.0462

5555 GLENRIDGE CONNECTOR SUITE 200
ATLANTA, GEORGIA 30342
TEL. 770.399.9100

CLIENT & FRIENDS ALERT¹

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CONTENT REGULATION IN THE AGE OF MISINFORMATION

Much Ado About “Section 230” - Nothing (For Now) Has Happened

In the next year the Supreme Court is going to rule on four cases that will ring in a new era for the First Amendment in the United States. The first round of this battle has been fought and won by the proponents of free speech online, however that is just the beginning.

I. Anticipating the U.S. Supreme Court Review.

With much fanfare, since October 2022 when the U.S. Supreme Court granted certiorari in *Gonzalez v. Google LLC*, we had anticipated a review of Section 230 of the Communications Decency Act (“Section 230”).² Enacted in 1996, Section 230, also known as the “Liability Shield,” essentially immunizes online platforms such as Google, Twitter, and others from publisher or speaker liability for posting third party content. The 9th Circuit Court of Appeals Decision had granted § 230 immunity to Google against claims that it was liable for aiding and abetting a terrorist act by having posted an ISIS recruitment video on YouTube. The Court had also made a similar ruling in a companion case, *Twitter v. Taamneh*. The U.S. Supreme agreed to hear both cases.

In comments in a prior 2020 case,³ Justice Clarence Thomas had questioned whether the decades old Liability Shield was read too broadly in providing sweeping immunity to online companies today. The U.S. Supreme Court’s grant of certiorari in both *Gonzalez* and *Twitter* left many technology companies and social media platforms in fear (in retrospect much exaggerated) that its review of Section 230 would upend the Internet.

But the review never happened. In *Twitter*, the Supreme Court held that the plaintiffs failed to state a claim for aid and abet liability under the Antiterrorist Statute without reaching the scope

¹ While accurate to the best of our knowledge, this alert is not a legal opinion and is not to be treated as legal advice. Please contact us if you have any questions regarding this disclaimer.

² 47 U.S.C. §230.

³ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020), certiorari denied.

of Section 230. As the underlying claims were similar in both cases, the Court also remanded *Gonzalez* back to the 9th Circuit in the light of the *Twitter* decision, leaving Section 230 – at least for now – unchanged.

Here is what to look for next.

II. Pending Content Moderation Cases.

A. Certiorari Granted

The U.S. Supreme Court has agreed to hear two cases⁴ which question whether public officials are acting as government officials when they block people on their personal social media accounts when those accounts are used to communicate with the public – and if this blocking is a violation of the First Amendment.

Oral arguments will likely be held this fall, with a decision to expected next year.

B. Pending Petitions for U.S. Supreme Court Review

Two additional cases⁵ seek to challenge state law regarding content moderation, which would limit the power of the largest social media platforms to moderate users’ speech and require them to disclose these practices.

Petitions for Writ of Certiorari have been filed with the Supreme Court, which has not yet accepted or denied review.

III. Out Next Webinar.

While the U.S. Supreme Court’s end run around the Liability Shield leaves its application to modern day technology platforms uncertain, the pending cases involving content moderation leave much to talk about. It is also conceivable that one of them may percolate up to the U.S. Supreme Court with better facts, as Justice Brown Jackson wrote in her *Twitter v Taamneh* concurrence a different set of facts might lead to a different outcome.

As we approach the next U.S. election, speech on technology platforms could take center stage, leaving the question of who may or may not moderate (or manipulate) it all the more important. We plan to reconvene our latest webinar, “*Content Moderation in the Age of Misinformation*,” to address many remaining questions about the future of free speech online. Once again, we thank colleagues Joseph Srouji, Martyn Roetter, Josh Turner and Ashkhen Kazaryan for their expert analyses of these timely controversial topics.

Stay tuned.

⁴ *O’Conner-Ratcliff v Garnier* (Docket No. 22-324); *Lindke v. Freed* (Docket No. 22-611).

⁵ *NetChoice v Paxton* (Docket NO. 22-555); *NetChoice v. Moody* (Docket No. 22-393).