LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, OCTOBER 11, 2022

PERSPECTIVE

GUEST COLUMN

Platform immunity in the crosshairs

By Douglas E. Mirell

"Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms." Transcript of Dec. 16, 2019, editorial board interview of presidential candidate Joe Biden, The New York Times, Jan. 17, 2020.

"Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case." *Jane Doe v. Facebook, Inc.*, 142 S.Ct. 1087, 1088 (March 7, 2022) (Statement of Justice Clarence Thomas respecting the denial of certiorari).

Rarely have Joe Biden and Clarence Thomas agreed upon anything. But their mutual recognition that something must be done to limit the immunity conferred upon website platforms that host third-party content appears finally to have led the United States Supreme Court to take two cases challenging the scope of Section 230 of the Communications Decency Act of 1996.

CDA Section 230 provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider." 47 U.S.C. § 230(c)(1). On Oct. 3, the Court granted certiorari in *Gonzalez v. Google LLC* (21-1333) and *Twitter, Inc. v. Taamneh* (21-1496) – cases that initially dismissed lawsuits brought on behalf of victims killed by terrorism.

In Gonzalez, the family of a 23-year-old U.S. citizen who was killed in an ISIS attack in Paris in 2015 claimed that Google's YouTube service violated the federal Anti-Terrorism Act (18 U.S.C. § 2333) because it recommended videos featuring ISIS terrorists by means of its promotional algorithm. The Ninth Circuit Court of Appeals affirmed the District Court, finding that Section 230 barred Gonzalez's claims. *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021).

In Taamneh, Twitter was sued for violating the Anti-Terrorism Act by relatives of Nawras Alassaf, a Jordanian citizen who was killed in a shooting massacre conducted by ISIS in Istanbul, Turkey, on New Year's Eve of 2017. As in Gonzalez, the Taamneh plaintiffs claimed that ISIS uses "social media platforms to recruit members, issue terrorist threats, spread propaganda, instill fear, and intimidate civilian populations." *Taamneh v. Twitter, Inc.*, 2 F.4th at 883. Though the District Court did not reach the issue of Section 230 immunity, the Ninth Circuit concluded that the trial court had erred by ruling that the plaintiffs failed to state a claim for aiding-and-abetting liability under the Anti-Terrorism Act.

Both cases focus upon the practice employed by platforms (such as YouTube, Google, Facebook and Twitter) that, in a variety of ways, recommend to users that they view user-generated materials such as articles and videos. Those recommendations, in turn, are implemented through automated algorithms which select the specific material to be recommended to a particular user based upon that user's prior browsing history.

Up until now, the Supreme Court had declined invitations to examine the scope of Section 230 immunity. In March 2022, the Court declined to intercede in a lower court decision that found Facebook was not liable for helping an adult man traffic a 15-year-old girl for sex. *See Jane Doe v. Facebook, Inc.*, 142 S.Ct. 1087 (2022). Two years earlier, the Court refused to hear a case in which Enigma Software argued that an internet security company, Malwarebytes, should be liable for labelling Enigma's products malware. *Malwarebytes, Inc. v. Enigma Software Group USA*, LLC, 141 S.Ct. 13 (2020). But those denials of certiorari haven't prevented lower appellate court justices from opining upon the perniciousness of Section 230's seemingly blanket grant of immunity.

In *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), a decision rejecting Anti-Terrorism Act claims by victims, estates, and family members of victims of Hamas terrorist attacks in Israel, then-Chief Judge Robert Katzmann, of the Second Circuit and an appointee of Bill Clinton, opined: "It is undeniable that the Internet and social media have had many positive effects worth preserving and promoting, such as facilitating open communication, dialogue and education. At the same time, … social media can be manipulated by evildoers who pose real threats to our democratic society. … Perhaps Congress will engage in a broader rethinking of the scope of CDA immunity." *Id.* at 88-89 (Katzmann, J., dissenting and concurring in part).

Even more recently, in the Ninth Circuit's own Gonzalez/Taamneh opinion, Judge Marsha Berzon, another Clinton appointee, built upon Chief Judge Katzmann's foundation. She wrote, "I join the growing chorus of voices calling

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for a more limited reading of the scope of Section 230 immunity. … [I]f not bound by Circuit precedent I would hold that the term 'publisher' under section 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." Gonzalez, 2 F.4th at 913 (Berzon, J., concurring).

Some Section 230 proponents such as Eric Goldman, the co-director of Santa Clara University's High Tech Law Institute, see Judge Berzon's argument as creating "a 'false dichotomy,' and that the process of recommending content is one of the traditional editorial functions of a social media network." Nevertheless, even Goldman acknowledges that the question posed by the cases taken by the Supreme Court "goes to the very heart of Section 230." Jeff Kosseff, a cybersecurity law professor at the U.S. Naval Academy, agrees that "the entire scope of Section 230 could be at stake." See Rachel Lerman, "Fight over social media's role in terror content goes to Supreme Court," Washington Post, Oct. 3, 2022.

Perhaps the greatest understatement of the past quarter century is that "the Internet has outgrown its swaddling clothes." *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008). Intensive lobbying and campaign funding by the technology community that dominates our economy, together with typical congressional inertia, have combined to maintain the Section 230 status quo. Is it possible that the Supreme Court will find the bipartisan will to break that gridlock?