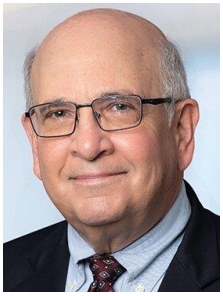
Justices Should Nix Section 230 Immunity For Tech

By **Douglas Mirell** (October 26, 2023)



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Earlier this year, the U.S. Supreme Court passed up an opportunity to challenge the scope of the federal law that confers immunity upon website platforms hosting third-party content.

For over a quarter century, Section 230 of the Communications Decency Act has said social media websites shall not "be treated as the publisher or speaker of any information provided by another information content provider."

In Twitter Inc. v. Taamneh and Gonzalez v. Google LLC, the Supreme Court **rejected** claims on May 18 that these and other platforms, like YouTube and Facebook, should be stripped of their immunity from liability when they employ algorithms that recommend user-generated articles and videos that promote terrorism.

Instead, the court ducked a direct confrontation by finding the plaintiffs in both cases had failed to state a claim for aiding-and-abetting terrorism in violation of the Justice Against Sponsors of Terrorism Act.

However, on Sept. 29, the court **agreed** to decide two new cases that again present an opening to curtail the broad immunity enjoyed by platforms under Section 230.

In Moody v. NetChoice LLC and NetChoice v. Paxton, the justices will confront laws enacted by Florida and Texas that prohibit social media companies from removing content based upon a user's viewpoint.

In particular, these statutes seek to regulate major platforms by restricting their ability to engage in content moderation and by requiring that they provide individualized explanations for certain of their content moderation policies.

The Texas law bars social media platforms with at least 50 million active users from blocking, removing or demonetizing content based on the views of the platform's users.

Florida's statute, the Stop Social Media Censorship Act, prohibits social media companies from banning political candidates and journalistic enterprises.

Both laws were challenged in federal court by technology companies who asserted that the First Amendment guarantees their right to control the speech they host.

While the U.S. Court of Appeals for the Fifth Circuit upheld the Texas law's constitutionality in September 2022, the U.S. Court of Appeals for the Eleventh Circuit blocked Florida from enforcing most of that law's restrictions. In the wake of this circuit conflict, the Supreme Court asked the Biden administration to weigh in on the dispute.

Upon the recommendation of U.S. Solicitor General Elizabeth Prelogar, the Supreme Court agreed to take up two questions:

- Do the provisions of these laws regulating tech companies' ability to remove, edit or arrange the content on their platforms violate the First Amendment?

- Does the requirement that these companies provide individualized explanations for their removal or editing decisions violate the First Amendment?

In its amicus curiae **brief**, the government made but one passing reference to Section 230. In attempting to explain how content moderation is a constitutionally protected form of expression, the brief states:

> [W]hat makes the platforms' content-moderation choices expressive is not that the platforms adopt as their own or assume legal responsibility for each individual piece of content posted by users; it is that they choose whether and how to present that content by selecting, curating, and arranging it.

But what the brief fails to fully appreciate is that the content presentation function is every bit as much a part of any publisher's editorial decision making as is the creation of the content itself.

In the world of traditional print media, it is equivalent to deciding what stories will appear on the front page of a newspaper, under what headline, accompanied by what photograph, and with what prominence.

In this context, it is helpful to recall what the Supreme Court itself said nearly 50 years ago in Miami Herald Publishing Co. v. Tornillo.

The issue in Tornillo was whether a Florida law guaranteeing a political candidate's right to reply to a newspaper's criticism violated the First Amendment. In a unanimous opinion authored by then-Chief Justice Warren Burger, the court held this right-of-reply statute unconstitutional.

The rationale underlying this landmark ruling is critical. As Burger wrote:

> A newspaper is more than a passive receptable or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.

And, as the Miami Herald court also observed:

> Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on government powers.

The key to applying this conceptual framework to today's internet environment lies in recognizing that social media platforms are every bit as much publishers as was the Miami Herald.

Indeed, the government's amicus brief recognizes this crucial similarity, saying social media platforms use the same type of editorial discretion to curate content that publishers use to run news articles.

Precisely because they are acting like publishers when they moderate content, these tech companies necessarily risk relinquishing the immunity they've enjoyed under Section 230 because they are deemed not to be publishers under that federal law.

Assuming the Supreme Court sides with the social media platforms in the pending Moody and Paxton cases, it would benefit Congress to revisit Section 230 by recognizing the hypocrisy inherent in allowing these platforms to be treated as immune pipelines when they post user-generated content, but as publishers only when they engage in the quintessentially editorial function of removing, editing or arranging that very same content.

It is long past time for online publishers to be treated the same as those who produce our newspapers, magazines, books, and TV and radio programs.

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