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January 24, 2025

# General problem: public or private?

- Formal answer: platforms are privately owned and operated
  - Except when the government orders platforms to remove speech
  - Harder case: government jawboning
- *Marsh/Barron* tradition: some platforms are effectively public
  - So far, never successfully applied to Internet platforms
  - The ideology of this argument is rapidly flipping

# Section 230

# 47 U.S.C. § 230 (“Section 230”)

(c)(1) 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.

(c)(2) No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected ...

# Leaving up and taking down

- (c)(1) provides absolute immunity for *leaving up* UGC
- (c)(2)(A) provides qualified immunity for *taking down* UGC
- Explicit exceptions for federal criminal law, IP, etc.

# Who likes and dislikes Section 230?

- Pro: technology companies
  - They don't want to be sued
- Pro: some scholars
  - They're worried that liability leads to overmoderation
- Con: activists on the left
  - They think Section 230 protects harmful attacks on the vulnerable
- Con: activists on the right
  - They think Section 230 subsidizes left-leaning Big Tech

# A Cavalcade of Caselaw

# *Murthy v. Missouri*, 603 U.S. 43 (2024)

- District Court enjoins a wide range of conduct by a wide range of government officials to pressure platforms to remove posts
- Fifth Circuit narrows but retains the injunction
- Supreme Court reverses: the plaintiffs lack standing because they cannot prove their posts will be removed as result of *government* pressure, rather than the *platforms'* own decisions



# *Moody v. NetChoice*, 603 U.S. 707 (2024)

- State laws require social-media platforms not to discriminate on the basis of viewpoint (TX) or remove posts by candidates (FL)
  - 5th Circuit: the Texas law is constitutional
  - 11th Circuit: the Florida law is unconstitutional
- *Held*, both decisions vacated because these were facial challenges
- But platforms' moderation decisions are generally covered by the First Amendment, so the Texas law is likely unconstitutional

# *Lindke v. Freed*, 601 U.S. 187 (2024)

- Jason Freed is City Manager of Port Huron, MI
- Kevin Lindke posts critical comments on Freed's Facebook page
- Freed blocks Lindke; Lindke sues
- *Held*, a public official is engaged in state action only if (1) they have actual authority to speak on the state's behalf and (2) purported to exercise it when using social media

# *Gonzalez v. Google*, 598 U.S. 617 (2023)

- The plaintiffs sue YouTube, arguing that videos radicalized the ISIS members who killed their relatives
  - Google defends by pointing to Section 230
- The Supreme Court takes the case to decide whether algorithmic recommendations are protected by Section 230
  - But it ducks the issue

# *Anderson v. TikTok*, 116 F.4th 180 (3d Cir. 2024)

- 10-year-old Nylah Anderson watches TikTok videos on the “blackout challenge,” which encourages self-asphyxiation
  - She fatally hangs herself attempting it
  - Her mother sues TikTok for products liability and negligence
- 3d Circuit: Because recommendation is First Amendment-protected expressive activity under *Moody*, recommendations are first-party speech under Section 230
  - TikTok has until February 20, 2025 to petition for certiorari

# *Twitter v. Taamneh*, 598 U.S. 471 (2023)

- Another ISIS social-media case
- The Supreme Court grants certiorari as a companion case to *Gonzalez*, but this time on the platforms' substantive liability
  - Did they “aid[] and abet[], by knowingly providing substantial assistance” to ISIS?
- *Held*, no, the plaintiffs did not “allege that the platforms here do more than transmit information by billions of people”
  - (This is why the court was able to duck in *Gonzalez*)

*Free Speech Coalition v. Paxton*,  
No. 23-1122 (argued Jan. 15, 2025)

- Texas and other states enact age-verification laws, which requires pornographic sites to verify that users are over 18
- FSC sues, arguing that the law conflicts with *Ashcroft v. ACLU*, 542 U.S. 663 (2004) and *Reno v. ACLU*, 521 U.S. 844 (1997), where the court held age verification laws unconstitutional
- The 5th Circuit applies rational basis review and upholds the law
- The Supreme Court seems likely to reverse and hold that a higher standard applies, but not (?) to resolve whether the law satisfies it

# *Ohio Telecom Association v. FCC*

Nos. 24-7000 et al. (6th Cir. Jan. 2, 2025)

- Network neutrality laws prohibit ISPs from discriminating among the traffic they carry
  - They have been on-again, off-again for 25 years!
- They raise serious First Amendment issues (per then-Judge Kavanaugh in 2016), especially after *Moody*
- But the 6th Circuit vacates the FCC's latest network neutrality rules on administrative-law grounds, based on its interpretation of the Telecommunications Act of 1996

# *TikTok v. Garland*, No. 24-656 (U.S. Jan. 17, 2025)

- The Protecting Americans from Foreign Adversary Controlled Applications Act requires TikTok to be divested by January 19, 2025
  - If not, U.S. providers may not provide it with service
- TikTok doesn't divest, but instead sues under the First Amendment
- *Held*, PAFACAA is constitutional, because Congress was concerned about protecting Americans' data from China
- TikTok goes dark, then comes back ... kind of



*The End*