Evaluating *Gonzalez* and *Taamneh*: Why Tech Companies Should Still Be Concerned

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The internet has revolutionized the way in which we consume and spread information, especially with the rise of social media. The far-reaching way which social media giants such as Facebook, Twitter, and Google impact our daily lives has drawn increasing criticism in recent years from both sides of the political aisle. Nevertheless, curbing the power of these internet companies through litigation is particularly difficult, in part due to the broad protection of Section 230 of the Communications Decency Act ("CDA") of 1996. The media nervously followed two recent Supreme Court cases, *Twitter, Inc. v. Taamneh* and *Gonzalez v. Google, LLC.*, anticipating that they could upend Section 230. Ultimately, the Court declined to address the issue in its holdings, and the media declared victory for internet companies. However, the danger for social media companies is far from over because Congress has expressed its willingness to reexamine Section 230, and outside of the U.S., international pressure will likely impact the way global social media companies operate.

Section 230 was originally envisioned as a way to encourage a safer, more ethical internet by shielding fledgling internet service providers ("ISPs") from liability for any content posted by third parties on their websites.[1] The CDA was passed in response to several court cases attempting to expand publisher-distributor jurisprudence to include content posted on the internet. In particular, a New York case decided only a year before the statute was passed, *Stratton Oakmont v. Prodigy*, motivated legislators to provide special protection for ISPs.[2] In that

[1] Samuel Won, *A More Reasonable Section 230 of CDA: Imposing a Pre-Defined Duty of Care Requirement on Online Platforms*, 57 Ga. L. Rev. 1413, 1426 (2023).
[2] *Id.*

case, Stratton Oakmont, a securities firm, sued Prodigy, an early ISP, for defamatory statements posted on their site.[3] The court found that Prodigy was liable as a publisher of defamatory statements because Prodigy used an editorial board to monitor the site for any profanity or otherwise harmful content.[4] Therefore, the court argued, Prodigy was not only a distributor of content, but a publisher, because the ISP exercised greater control over the site, thus "open[ing] it up to greater liability" than other networks that declined to monitor their sites.[5] In effect, ISPs would be penalized for any active role they played in moderating their sites.

Legislators feared *Stratton* and other related cases would discourage ISPs from making any effort to rid their sites of harmful content in case they would be liable for anything they may have missed.[6] Thus, Section 230 of the CDA was born, which specifically overruled *Stratton* by providing that ISPs would not be liable for "any action taken in good faith to restrict access" to harmful content on their sites, including material that is "obscene, … excessively violent, harassing, or otherwise objectionable."[7] Without this protection, early ISPs might have collapsed under the costs of litigation, even if they ultimately received a favorable ruling. This blanket immunity was essential to the development of the internet as we know it today, earning Section 230's subsequent characterization as "the twenty-six words that created the internet."[8]

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[3] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Telecommunications Act of 1996 (Communications Decency Act), Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-34 (codified at 47 U.S.C. § 230), *as recognized in Shiamil v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1017 (N.Y. 2011).

[4] *Id.*

[5] *Id.*

[6] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 Fordham L. Rev. 401, 405 (2017).

[7] 47 U.S.C. § 230(c)(1).

[8] Stephen Engelberg, *Twenty-Six Words Created the Internet. What Will it Take to Save it?*, ProPublica (Feb. 9, 2021, 2:00 PM), https://www.propublica.org/article/nsu-section-230.

However, in 2023, many believe that the internet is no longer in need of this special protection. For instance, the social media networks named in *Gonzalez* and *Taamneh*, Facebook, Twitter, and Google, are some of the largest companies in the world, with over 2 billion active users combined, a far cry from the early ISPs that Section 230 was aimed at protecting.[9] Additionally, despite legislators' hopes that Section 230 would promote a safer internet, some "Bad Samaritan" websites exploit the blanket immunity to promote content on their sites that would be defamatory or otherwise actionable.[10] Also, advances in technology make identifying and removing certain harmful content easier than ever, such as emerging AI-based systems, or content-moderation systems like PhotoDNA, which can scan images and identify sexually explicit material to crack down on child abuse.[11] Depending on the content shared on social media platforms, there are viable options to better monitor the sites for harmful content. Because of this, critics of Section 230 argue the time has come to remove the internet's special protection from liability.

Amidst the growing debate over Section 230, the Supreme Court heard two cases challenging social media companies' liability shield. *Taamneh* and its companion case, *Gonzalez*, share similar facts and arguments alleged by the plaintiffs, centering around terrorist attacks in Turkey in 2017[12] and France in 2015[13] respectively. ISIS claimed responsibility for both attacks.[14] Plaintiffs in both suits argued that the social media companies, Twitter, Facebook, and Google, were liable for the attacks because ISIS used their platforms "as tools for recruiting,

[9] *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023).
[10] Citron, *supra* note 6, at 416.
[11] Won, *supra* note 1, at 1448-50.
[12] *Twitter*, 598 U.S. at 478.
[13] *Gonzalez v. Google, LLC.*, 598 U.S. 617, 619 (2023).
[14] *Id.*; *Twitter*, 598 U.S. at 479.

fundraising, and spreading their propaganda."[15] The plaintiffs alleged that the social media companies knew that ISIS was using their sites but did not remove them.[16] Because of the advertisements on ISIS's videos, tweets, and posts, the companies profited from the terrorist group's use of their platforms.[17] Additionally, the plaintiffs alleged that Youtube, owned by Google, reviewed videos posted by ISIS and approved advertisements on those videos, as well as sharing ad revenue with the terrorist group.[18]

Both cases were dismissed by the District Court for failure to state a claim, but were appealed to the Ninth Circuit. The Court of Appeals affirmed the ruling in *Gonzalez*, holding that Section 230 barred the plaintiffs' claim.[19] However, *Taamneh* was reversed because plaintiffs plausibly alleged that the defendants "aided and abetted" the terrorist group under the Justice Against Sponsors of Terrorism Act (JASTA).[20]

When both cases were granted certiorari, the media eagerly speculated that the Supreme Court might upend Section 230 and expand internet companies' liability. Clickbait headlines surrounded the discussion about the case in the general public, with concerns that the Supreme Court's decisions could "break the internet."[21] Ultimately, however, the Court sidestepped the issue by declining to address Section 230 at all, instead dismissing both cases for failure to state a claim. In *Taamneh*, the Court held that the plaintiffs did not sufficiently allege that the

[15] *Twitter*, 598 U.S. at 481.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 505.
[19] *Gonzalez*, 598 U.S. at 621.
[20] 18 U.S.C. § 2333.
[21] *E.g.*, Ian Millhiser, *The Supreme Court Decides Not to Break the Internet*, Vox (May 18, 2023, 2:31 PM), https://www.vox.com/politics/2023/5/18/23728529/supreme-court-google-twitter-clarence-thomas-isis-taamneh-gonzalez.

defendants "consciously and culpably" participated in the acts of terror.[22] Despite the defendants' use of algorithms to recommend ISIS's videos and other posted content, the Court determined that the social media companies were simply "passive" and acting as mere "bystanders" to the ISIS attacks, which is not enough to claim liability under JASTA.[23] Similarly, in *Gonzalez*, the Court decided against commenting on Section 230, determining that under their ruling in *Taamneh*, the plaintiffs failed to state a claim.[24]

The decisions in *Gonzalez* and *Taamneh* demonstrate that the Supreme Court is hesitant to interfere with Section 230 and impose greater liability on social media companies. As Justice Kagan noted during oral testimony for *Gonzalez*, the Supreme Court Justices are "not the nine greatest experts on the internet."[25] The Court's unwillingness to make waves in this matter suggests the fate of Section 230 is left in Congress's hands. Members of both parties have already shown their readiness to reexamine the law.[26] Possible amendments have been proposed to narrow the protection of Section 230, including imposing a reasonableness standard.[27] Additionally, pending cases regarding state laws in Texas and Florida restricting social media companies from moderating speech could force the Supreme Court to go further than it was willing to in *Taamneh* and *Gonzalez*.[28]

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[22] *Twitter*, 598 U.S. at 506.
[23] *Id.* at 500.
[24] *Gonzalez*, 598 U.S. at 621.
[25] Daphne Keller, *Carriage and Removal Requirements for Internet for Internet Platforms: What Taamneh Tells Us*, 4 J. Free Speech L. 87, 101 (2023).
[26] Laura Feiner, *House Republican Staff Outline Principles to Reform Tech's Liability Shield*, CNBC (Apr. 15, 2021, 12:50 PM), https://www.cnbc.com/2021/04/15/house-republicans-outline-principles-for-reforming-section-230.html.
[27] Citron, *supra* note 6, at 419.
[28] Jeff Kosseff, *The Internet Speech Case the Supreme Court Can't Dodge*, Wired (Aug. 7, 2023, 9:00 AM), https://www.wired.com/story/tech-policy-netchoice-scotus/.

Finally, because social media companies operate globally, international law could impact the ways these companies function in the coming years. Specifically, the Digital Services Act ("DSA"), recently passed by the European Union ("EU"), forces internet companies to do more to regulate illegal speech on their sites.[29] Under this law, social media companies are required to remove illegal speech once it is reported.[30] While the DSA only began regulating internet companies in early 2023, the impact of the law can be estimated from examining the Brussels Effect. Following the terrorist attacks in Paris and Brussels in 2015, major internet companies Facebook, Twitter, Youtube, and Microsoft, voluntarily adopted a code of conduct to monitor and remove hate speech from their platforms after threats of greater regulation from the EU.[31] Following the platforms' adoption of the code, the companies changed the way in which they operated their platforms globally, a phenomenon subsequently labeled the Brussels Effect.[32] The internet companies found that it was easier to comply with the code globally rather than confining it to countries within the EU. The DSA will likely have a similar consequence on the way social media platforms operate.

Because of these outside factors, the Supreme Court's decisions in *Gonzalez* and *Taamneh* are not a conclusive victory for social media companies as one might initially assume. In fact, it appears as if social media companies have won the battle but are losing the war. Section 230's increasing unpopularity from both parties strongly suggests Congress will narrow internet companies' protection from liability, and pending cases regarding recent state laws in Florida and Texas could also chip away at that blanket immunity. Additionally, notwithstanding

[29] Dawn Nunziato, *The Digital Services Act and the Brussels Effect on Platform Moderation*, 24 CHI. J. INT'L L. 115 (2023).
[30] *Id.* at 116.
[31] Nunziato, *supra* note 29, at 120-121
[32] *Id.*

the challenges social media companies could face from changing U.S. law, international pressure, particularly from the EU's DSA, will likely result in changes to the way major social media sites function in the near future.