

# Content Moderation and the Supreme Court

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October 18, 2022

# 47 U.S.C. § 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 ... 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;”

# *Gonzalez v. Google*

2 F.4th 871 (9th Cir. 2021)

- *Held*, Section 230 bars claims against Google for recommending ISIS content to users
- The content is created by users, not by Google, and Google's recommendations do not contribute to the content's illegality
- Dissent: Google “affirmatively sent a message ... to users that individuals who enjoy watching ISIS content may also be interested in joining its ranks”

# Florida SB 7072

- Platforms may not “deplatform” political candidates or “use post-prioritization or shadow banning algorithms” on content by or about a candidate
- Platforms may not “censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast”
- etc.

# *NetChoice v. Moody*, 34 F.4th 1196 (11th Cir. 2022)

- *Held*, S.B. 7072's content-moderation provisions violate the First Amendment
- The platforms are private actors engaged in the exercise of “editorial judgment,” like newspapers and parades
- S.B. 7072 is content-based and fails strict scrutiny because “private actors have a First Amendment right to be ‘unfair’—which is to say, a right to have and express their own points of view”

# Texas HB 20

- Platforms “may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on” the user or expression’s viewpoint
- Exceptions for federal authorization, incitement and threats, sexual exploitation referrals, and “unlawful expression”

# *NetChoice v. Paxton*

49 F.4th 439 (5th Cir. 2022)

- *Held*, HB 20 is constitutional
- “[T]he Platforms want to eliminate speech—not promote or protect it.”
- Section 230, by not treating platforms as “publishers,” shows that they aren’t speakers
- The platforms are common carriers, like railroads and telephone companies

# The Supreme Court gets involved

- May 31: Supreme Court vacates (5-4) an earlier Fifth Circuit order in *Paxton*
- September 21: cert petition filed in *Moody*
- October 3: Supreme Court grants cert in *Gonzalez*
- October 21: brief in opposition due in *Moody*
- December 15: cert petition due in *Paxton*



# Some observations

- The *Gonzalez* plaintiffs want platforms to do *more* content moderation; Texas and Florida want platforms to do *less* content moderation
- Spam and abuse are everywhere online and require aggressive content moderation
- The ideological polarity of must-carry rules is in the middle of a 180° turn

# Discussion