



Revising Section 230 in Congress and the Courts

Section 230 is one of the most important, controversial, and debated aspects of internet law. Sometimes referred to as the [26 words that created the Internet](#), Section 230 is a statute included in the Communications Decency Act (CDA) of 1996. While the Supreme Court found the CDA unconstitutional in 1997, Section 230 was deemed severable and allowed to remain in place. It provides legal immunity to online platforms that host third party content, allowing companies to moderate content on their platforms in good faith without fear of being sued by disgruntled users. In practice, this means that if someone is upset about what another person posts online, they are unable to sue the platform but must take it up with the other user directly.

Representatives Chris Cox and Ron Wyden wrote Section 230 in response to difficult questions that arose in the early days of the Internet. Who is responsible for online speech? If a website allows users to publicly post their thoughts online, is the website responsible and liable for that content, similar to a newspaper with an editor? Or, is the individual user responsible and the website similar to a bookstore, with less control over the content? What happens if a website starts to moderate the content that users post? If they are moderating the content, are they claiming responsibility, and should they therefore accept liability?

One of the impetuses for Section 230 was the [1995 case](#) which ruled that because Prodigy, an online platform with user generated content, began to make editorial decisions by moderating third party content, it was liable for content that appeared on its platform, and could be sued for libel, defamation, and other speech-related accusations. Section 230 was Congress' response to this ruling, hoping to both encourage online content moderation and reward good faith actors with immunity from content-based lawsuits. The statute worked well and allowed startups and small businesses to grow rapidly and turn into some of the most profitable and well known companies in the world.

However, some tech observers believe that Section 230 has worked a little too well. Since the law went into effect more than 25 years ago, court rulings have expanded liability protections beyond the

original intent of the statute. An original goal of Section 230 was to allow online platforms to moderate undesirable content on their websites without fear of being sued by users. [A series of cases have broadened](#) such liability protections to be so powerful that lawsuits seeking to hold online platforms accountable for broader topics (beyond their content moderation decisions) [have been dismissed](#) in very early stages. In practice, Section 230 has become a shield that protects online platforms from many different lawsuits and legal complaints, not just content moderation decisions. For the first time in many years, the Supreme Court has an opportunity to weigh in on the legality of the expansion of liability protections in two different court cases.

[Gonzalez v. Google](#) and [Twitter v. Taamneh](#) are the latest online liability lawsuits to reach the Supreme Court. Heard on February 21, [Gonzalez](#) focuses on platform recommendation systems and whether or not companies can be held liable for the content promoted by algorithms. Specifically, this case will decide whether or not YouTube bears some responsibility for a deadly ISIS attack because the platform featured ISIS content and videos, some of which appeared in the recommended section. Heard on February 22, [Twitter](#) examines whether Twitter violated the Justice Against Sponsors of Terrorism Act for aiding and abetting terrorism by featuring and recommending terrorist content on its own platform.

The effects of the potential rulings from these cases could impact every internet user. From the oral arguments, the Justices seemed to take these cases seriously and acknowledged the importance of nuance and the delicacy of the questions presented in each case, as well as the broader implications of any decision. They [discussed](#) the significant potential impact of re-interpreting judicial philosophy and suggested that Congress may be the better venue for amending Section 230 protections. Justice Kagan even [admitted](#) that the Justices are not "the nine greatest experts on the Internet."

If the Court were to completely revoke Section 230, policy analysts have warned of two very different approaches, on extreme ends of the spectrum, which online platforms may take to avoid liability. Fearing lawsuits from users that have had their posts taken down,

some platforms may opt to cease moderating content in order to avoid all liability. With no content moderation, the argument goes, every harmful, objectionable, offensive, but still technically legal speech, photo, and video would proliferate on online platforms for all users to see.

On the other side, liability-fearing platforms could overcorrect and moderate anything and everything that is controversial or objectionable, but not illegal. In order to avoid lawsuits over harmful content, platforms taking this approach would remove anything that could potentially offend anyone, resulting in highly controlled, sanitized versions of websites and apps. Either approach would diminish many of the positive aspects of digital life and content creation, and result in a worse overall online experience for most users.

While it is important to consider the complexities of what changes might mean on a technical and legal level, it is also important to acknowledge the experiences of users that have felt victimized or unheard. A full endorsement of the current interpretation of Section 230 protections would leave many people that have faced online harm feeling dissatisfied and helpless to seek recourse. Real people have experienced real harms that online platforms have played some role in, and an increase in transparency and accountability around the ways they plan to mollify those issues is a reasonable expectation.

In countries without Section 230, or the very broad protections provided by the First Amendment to the US Constitution, there are quite different approaches to regulating content moderation. Germany's Network Enforcement Act ([NetzDG](#)) is a particularly strict law that requires online platforms to take down illegal speech within as few as 24 hours of being notified of such content. Australia's Online Safety Act empowered the [eSafety Commissioner](#) to hold online platforms accountable by enforcing new industry codes that apply to both children and adults, and potentially impose industry wide standards. And the EU's Digital Services Act ([DSA](#)), which will start to take effect in 2023, will overhaul content moderation for the whole geopolitical bloc and establish transparency and accountability requirements. The DSA would also maintain the [conditional liability exemption](#), which is more narrow than Section 230, and holds platforms accountable for user generated content if they are notified that such content is illegal and do not remove it.

Recently, there was a Congressional attempt to create a narrow exemption to Section 230 protections. In 2018, Congress passed the combined Stop Enabling Sex Traffickers Act and the Allow States and Victims to Fight Online Sex Trafficking Act ([SESTA/FOSTA](#)). The stated intention was to hold websites and platforms that aid or support sex trafficking accountable by making them liable to lawsuits. But the results have been mixed, with some positives and some unintended consequences. A [2021 GAO report](#) found that SESTA/FOSTA had resulted in only one federal prosecution. A separate [legal analysis](#) concluded that the law actually created dangerous working conditions for sexworkers and made it more difficult for police to find victims of trafficking.

There have since been bills introduced (but not advanced) that would [study the impact of SESTA/FOSTA](#) to better inform Congress in future attempts to amend Section 230. It is clear from the SESTA/FOSTA debates and outcomes that any changes to Section 230 should be carefully considered, supported by strong evidence, and the result of sober, thoughtful negotiations conducted in good faith.

Other legislative ideas have been circulating about how to amend, update, and change Section 230 while seeking to avoid repeating the mistakes of SESTA/FOSTA. The Platform Accountability and Consumer Transparency ([PACT](#)) Act is one of the most promising. Introduced by Senators Brian Schatz and John Thune, the bipartisan bill attempts to increase transparency and amend Section 230 by exempting federal civil laws from immunity, just as federal criminal laws are exempted, allowing state attorneys general to bring civil suits, and requiring platforms to take down illegal content. In a recent [FOSI Briefs the Hill webinar](#) about the two current court cases, Senator Wyden's senior advisor shared the original author's two tests for Section 230 reform: no bill should target constitutionally protected speech, nor discourage content moderation practices.

In addition to the potential impacts and unintended consequences discussed above, these cases have the potential to significantly impact online safety for billions of people online. Content moderation is an essential part of modern digital life. There would be an undeniable increase in risk and the potential for harmful interactions if the apps and sites we use were completely unmoderated, where hate speech, misogyny, racism, and abusive speech, pictures, and videos could circulate without constraint. Nor would we find much value or meaning in online experiences that were overly sanitized and devoid of any content that might be deemed controversial. Companies employ large teams of moderators who work full time to remove the worst content online, and that is an effort that should continue to be prioritized. Any changes to Section 230 should be carefully considered in terms of their impact to content moderation, and avoid discouraging or disincentivizing robust moderation practices.

It is significant that so many people are now aware of a very specific statute from a mostly repealed law written almost 30 years ago. Its liability protections have enabled an amazing new online ecosystem that was previously unimaginable. In order to avoid the vast unintended consequences and negative online safety implications, the Court should avoid a broad ruling in both *Gonzalez* and *Twitter*. Congress, not the Court, is the best venue to amend this foundational statute of internet law. Whether through the PACT Act or another bill, Congress' revisions must protect lawful speech and the ability of platforms to moderate content. Updating Section 230 is a rare opportunity and if done thoughtfully, policymakers have the potential to make the Internet stronger, safer, and more closely resembling the online world we'd want for ourselves and our kids.

Andrew Zack
Policy Manager

About FOSI

The Family Online Safety Institute is an international, non-profit organization which works to make the online world safer for kids and their families. FOSI convenes leaders in industry, government and the non-profit sectors to collaborate and innovate new solutions and policies in the field of online safety. Through research, resources, events and special projects, FOSI promotes a culture of responsibility online and encourages a sense of digital citizenship for all.