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WEBINAR

GONZALEZ V. GOOGLE AND THE FATE OF SECTION 230

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Quinta Jurecic: All right. Thank you, everyone, for joining us today. I'm delighted to be here with a great panel to discuss Gonzalez v. Google, a Supreme Court case that will be hearing oral argument next week, and I think which it's fair to say very well may change the future of the internet. I'm Quinta Jurecic, I'm a fellow in governance studies at Brookings and a senior editor at Lawfare. And with us today on our panel, we have Hany Farid, a professor at the University of California, Berkeley, with a joint appointment in electrical engineering and computer sciences in the School of Information. Daphne Keller, the director of the program on platform regulation at Stanford University's Cyber Policy Center, Alan Rozenshtein, an associate professor of law at the University of Minnesota Law School and a senior editor at Lawfare, and Benjamin Wittes, a senior fellow in governance studies at Brookings and editor in chief at Lawfare. And as a reminder, before we begin, while you're watching, you can submit questions to us via Twitter by tagging at Brookings Gov with the hashtag fate of Section 230— a little ominous— or email events at Brookings dot edu and we'll do our best to get to your questions at the end of the discussion.

So I want to start off with some scene setting. I introduced this as talking about Gonzalez v. Google, but we're actually talking about two Supreme Court cases here that are interlinked. Gonzalez, and another case, Twitter v. Taamneh, and the court will be hearing arguments in both of those cases next week. Gonzalez directly involves a statute that I think it's fair to say used to be relatively obscure for mainstream audiences, but which many people, if you've been following the news, you probably have heard a great deal about lately, which is, of course, Section 230. So, Hany, I'm going to turn to you first. Can you start us off by just giving us an overview of the statute and then I'll go around the, the virtual table to dive into the specifics of the cases themselves.

Hany Farid: Sure. Thank you, Quinta. It's good to be here with everybody. And I think you're probably right that this may be one of the most consequential cases in the last 20 years on internet governance, both for good and bad. It depends on how it turns out. So Section 230 dates back to the early days of the Internet, and it was designed to create an environment that would allow the then burgeoning internet to really prosper, particularly around user generated content. The internet we know today, vast swaths of it are being generated by us: YouTube, TikTok, Instagram, Facebook, Twitter, we generate the content. And the idea is that we, the government, said we don't think we should hold the companies, the platforms responsible for every bad thing that happens or is said on the platforms, because if they did, we would never have these types of platforms.

Now, you could argue, well, maybe that wouldn't be so bad, but here we are. And so there's two basic provisions to Section 230 that you should understand. The first is that platforms cannot be held responsible for libelous content that is posted. So if you say something that is libelous or slanderous on Twitter, Twitter is not responsible for that. You are responsible for that. That's number one. And number two is that if a platform decides that they want to take down content because it violates their terms of service, even if that content is protected by the First Amendment, they are absolutely allowed to do that, and you cannot hold them liable for taking down protected speech.

So those are the two parts of Section 230 that have given the companies wide protection to monetize user generated content. Now, some will say that 230 has gone too far, that it has allowed bad actors to do awful things on the internet or to allow people to do awful things. And some people will say, well, it hasn't gone far enough because we want to have this open and free exchange of idea. Gonzalez v. Google is one of the, the first really significant challenges to 230 and whether the companies really, no matter what they do have within the law, of course, have libel protection and are shielded from civil action.

Quinta Jurecic: So, Daphne, I want to go to you next for more of a deep dive into what Gonzalez is about. What are the facts of the case? What are the justices going to be considering?

Daphne Keller: Sure. So both of these cases arise from really horrific facts. Both Gonzalez and Taamneh are the result of terrorist attacks by ISIS in which family members of the plaintiffs died. And they, they came up as separate cases, one about Section 230, which is Gonzalez, and then the section about, and then the second's about if there were no 230, would the platforms be liable under the Anti-Terrorism Act, which is Taamneh. And the plaintiff's theory of liability has really changed throughout the case, including from the cert petition to the briefs. But the as presented to the court, it basically boils down to saying platforms are not liable for content posted by ISIS, but they are liable for recommendation algorithms that promoted that content. And it might be that they're saying any ranking algorithm can create liability, or it might be that they're saying only personalized algorithms that target individuals with content, that they think that those individuals will like create liability. But that's, that's sort of the core of the case.

Of course, the, the problem— one of the many problems— is that the court might choose to answer those relatively narrow questions presented, or it might go off in any number of directions that various amici have suggested the court should do, and that Justice Thomas has suggested he is

interested in doing in, in some prior writings, including really just changing the fundamentals of Section 230.

Quinta Jurecic: So I do definitely want to talk about Justice Thomas. Before we do that, though, let's complete our little background round. Ben, can you give us an overview of the Taamneh case since as Daphne says, it actually doesn't touch 230 and how it relates to Gonzalez?

Benjamin Wittes: Right. So Taamneh is the big sleeper component of this case. While the entire internet community is freaking out in one direction or another over and by the way, in all kinds of different directions at the same time about Gonzalez, Taamneh presents a, a cause of action question under the Anti-Terrorism Act. And it asks the Ninth Circuit, the lower court held that there was an ATA claim against Twitter in this case, but also against Google and Facebook for aiding and abetting a terrorist act even when the, even when the platform was not trying to, that it was not knowingly providing a service that aided the specific act. And even when the service that it provided, which is basically that people could use the platform until they got thrown off when connected to ISIS, even when that service has no direct relationship alleged to the individual terrorist act. This is, the platform argues, flatly inconsistent with the text of the ATA, the Anti-Terrorism Act, which provides for aiding and abetting liability only in situations in which you've aided and abetted the actual act that caused the, the injury.

And, and so it is possible that what will happen here is that if Twitter wins this case, which has nothing to do with Section 230 at all, then the Section 230 issue goes away, in the Google case in Gonzalez, because Google has exactly the same theory of liability in their case, which is to say this aiding and abetting theory under the Anti-Terrorism Act, as Twitter has in the other case. And so it could be that we're all having a giant freak out about the future of the internet that's going to be resolved by kicking this particular can down the road. And we can talk more about that down the road.

Quinta Jurecic: So, Alan, I want to give you a chance to weigh in. I think it's fair to say that a lot of what we're describing here can sound pretty technical. It has to do with liability protections, it has to do with the Anti-Terrorism Act, which is not something that most people have probably heard of. Why are people freaking out about this, to use Ben's language.

Alan Rozenshtein: Well, they're freaking out because Section 230, which was passed in the mid-nineties when the internet was obviously going to be important but was hardly the world historic juggernaut in which we spend every moment of our waking lives, including this one, of course, has

become and again, for better or for worse, the Magna Carta of the internet. It is the foundational document, or at least after the First Amendment is the foundational document. And it is that because it has created essentially or permitted the business model that has become so dominant.

Now, there's a question, and scholars and policy analysts and historians disagree over whether or not this was the only business model through which a vibrant internet could flourish. We can't run the counterfactual, unfortunately, so it's hard to know. But it is nevertheless the case that the internet, as we know it today massively connected with giant platforms that allow each of us to have our, well, it's not even 15 minutes of fame, it's 15 microseconds of fame and connect all of us. That is the direct product of Section 230. And so for the court to after— I'm going to I'm going to get the math wrong— but, you know, almost 30 years at this point to finally weigh in is, on the one hand, inevitable because we do need judicial interpretation of this foundational and frankly, I think fairly ambiguous statute.

But in other ways is, at least from my perspective, quite frustrating because they've just allowed these huge reliance interests to grow for 30 years. And so unless they reaffirm the status quo, which at least I think has some serious problems with it, they're going to cause a huge disruption. Now, whether or not in the long term that's going to be for the better, for the worse. I just don't think anyone knows, frankly. But I think it is correct that this opinion will be the most important Supreme Court opinion about the internet, possibly ever.

Quinta Jurecic: Yeah, that's a strong statement. So I think that before we go more into the weeds, it would be helpful to just give a sense of why now. As you said, Alan, the Supreme Court has never opined on Section 230, there is a pretty robust body of case law, Section 230 I think really only since I would probably put it at 2017, 2018 has become this sort of political football that's constantly tossed around. People are suddenly talking about revising it and did successfully revise it in 2018 with a limited carve out when previously, as you said, it had kind of been the Magna Carta. And we generally don't, don't think about revising the Magna Carta.

So I want to throw this out to all of you. I'll start with Ben just because he's starting at counterclockwise on my screen, why you think we're suddenly addressing these questions in a serious high-profile way, both politically and on the court now. So, Ben, let me start with you.

Benjamin Wittes: So I think the legal reason and the political reason are different. The legal reason is that the Ninth Circuit kind of forced it to by, there are, there and the Second Circuit, there

have been a series of decisions starting with the Taylor Force decision and now the ninth Circuit decision in Taamneh slash Gonzalez, where there has been while the cases, the majorities have gone the same way as the other courts, there have been powerful dissents that have channeled some of the concerns that people have about whether the cases or the underlying consensus is correct in its, in, in its degree. And I think that prompted the court to take a look, combined with the fact that Justice Thomas has flagged his own quite eccentric I think anxieties about the, the law that are different from the ones that Judge Katzmann, Judge Berzon and Judge Gould in the ninth and second circuits reflect.

The political reason is different, and of course they are related. The political reason is that everybody has decided since 2016 that they hate platforms, and the platforms used to be everybody's darlings, and we all used to believe that whatever happened that was bad in the world, you certainly couldn't blame the platform on which it happened because they were engines of growth. And now we blame them for everything from, you know, with no judgment as to whether here they deserve the blame for these things; election interference by the Russians, eating disorders, disinformation, abuse and bullying, hate speech. We have lots of things that we blame platforms for, rightly or wrongly, targeted advertising, and, and so the idea that they should be immune for the bad stuff that other people does, do on them is just less politically intuitive than it was five years ago.

And so I think there are, and by the way, different communities, in the conservative world, the platforms are to blame for liberal bias and content moderation. And in the, you know, everybody blames them for different things. And yet what the common thread is, is a certain anxiety about the idea that the platforms have this, I'm going to say impunity in the form of immunity. And, you know, that's, I think that's just a reflection of a changed political environment with respect to the popularity of these companies. We used to see them as the, you know, the village square, and now we see them as big, powerful, scary corporations. And you, you respond differently to those things.

Quinta Jurecic: Yeah. So, Alan, let me, let me go to you next. And also if you can speak a little more to what exactly Justice Thomas' argument is, because I do think that's important in queuing up our discussion on Gonzalez.

Alan Rozenshtein: Sure. So just to add just one point to what Ben said, and I agree with his analysis completely, I think I might also add a somewhat pedestrian, but I do think important point, which is that I think you have a new generation of justices. They are somewhat younger; they are just

as internet-obsessed as the rest of us. And so I think that this is one of these issues in which the justices have not a personal stake, obviously they're not platforms or anything like that, but I think they perhaps viscerally understand this issue more than previous generations of justices, of justices did. I think this is one where the justices come in not just with their own legal thoughts, but their own just personal views, because, again, they're presumably just as obsessed with Twitter and, you know, use Google as, as the rest of us.

And as to what Justice Thomas's concerns are, I think he has a couple. So I think one concern he has is that, that the platforms are not playing it straight, as it were, with respect to Section 230. And the idea here is that on certain views of Section 230, views that I think are not correct, but one can see their intuitive plausibility, Section 230 is kind of a bargain on the one hand, where platforms get all these protections, both for what their users post and what they take down, but platforms have to be quote unquote, neutral with how they use that authority.

Now, just to be very clear, for all my Section 230 friends in the audience who are tearing their hair out, that is an objectively, I think, incorrect view of Section 230, both in terms of the law as written and the law as intended. But to be frank, Section 230 has drifted on both sides, far away from what I think the original purpose of the law was, so everyone kind of grafts on their own anxieties onto Section 230. And this is one that is particularly prevalent among conservative and conservative legal circles. And so it's not that surprising that it would bubble up to Justice Thomas.

I think he has another concern, and I think this one is much more valid, that Section 230, that, that the Section 230 regime that we are operating under— and we can talk more about this later, I don't want to get too much of the details now— but the Section 230 regime that we're operating under is not actually the Section 230 regime that was initially intended, that Section 230 is where the liability protection is a fairly narrow limitation on specifically publisher liability, but that in principle preserves other types of common law liability and that the regime that we live under is really because of a maybe the most famous Section 230 case, the Zoran case that was in the mid-nineties, just after Section 230 was enacted, in which the Fourth Circuit interpreted it very, very broadly, in a decision that ultimately was just sort of kind of quickly adopted by all the other circuits. And then by the time the platforms had suddenly gotten enormous in the early 2000s, the courts were kind of too afraid to look into this issue anymore and they didn't want to deal with it. And so they adopted that.

And so I think Justice Thomas has and I think these are very legitimate basic worries about whether or not Section 230 was interpreted correctly in the original in the first generation of cases. And he, I think, would like to go back to that original understanding, which is very, very in line with how Justice Thomas generally thinks about law and the Constitution, which is that the original understanding should be the dominant interpretation, whatever the policy objections might or might not be to that.

Quinta Jurecic: Daphne, any thoughts on that?

Daphne Keller: So I think kind of going back to the question of why they took this case at this time where we started, I don't think anyone knows. You know, I have probably talked to 20 deep experts and heard 20 different opinions. It might be the time was just ripe, it might be that somebody thought that the context of terrorism would shift votes. But, but I do think that they probably didn't know what they were getting into, that probably there's a lot of appetite on the court for a case about 230, just like the basics of 230. And instead, what they took was a case about this sort of different question about ranking. And just as an illustration of how big this is, the amicus briefs, a lawyer named Michael Quinn put together a great spreadsheet of all of the amicus briefs with the word count, and it's over 500,000 words of people weighing in on this.

But I think, you know, if this is a good time to speak to sort of like the merits of the case, I don't think at the end of the day, this should be different from a basic 230 case, because the goal of 230 is to encourage platforms to engage in content moderation and ranking algorithms are the tools for so much of the important content moderation. You know, they are what shapes what people see on effectively, like the front page of the internet. Without ranking algorithms, news feeds on Facebook or Twitter would be really different, you know, the recommendations on YouTube drive 70% of the video views, TikTok would be nothing without a ranking algorithm.

And so if you lose 230 immunity and you lose the sort of freedom to do content moderation or that the immunities in those front-page features on the platforms, then all of the problems that 230 has kept at bay come for those features. You know, suddenly the over removal that we know from, you know, stacks of studies results from liability regimes like this that comes for the newsfeeds. And so the results for a MeToo or a BlackLivesMatter or an emerging artist, you know, a lil Nas X, suddenly things look very different. You don't see those emerging voices and you do see, you know, overly cautious, self-protective content moderation within those ranked features, which I think has both the

obvious speech impact, but also has really foreseeable disparate impact on, on marginalized communities.

So I think it's, what we're looking at here is a case that is really about the very content moderation that CDA 230 is supposed to immunize. And the idea that it is, that immunity goes away because it is achieved using algorithms, for example, is sort of a denial of how the internet works and is ahistorical as the brief from Cox and Wyden, the drafters of CDA 230 said in their amicus brief to the court. Similarly, there's an idea in some of the briefs and even in the, the opinions below, that outranking algorithms might be immunized, but only if they are neutral, which again is the opposite of what CDA 230 was supposed to do. It was intended to encourage platforms to moderate content in a way that is not neutral, in a way that does reflect, you know, a preferences about content or an attempt to connect users with the particular content they want to see. So I think that the, the plaintiff's theory here is, you know, I think it's wrong as a textual matter, but, but also as a matter of what 230 was supposed to do. If you take away the immunity from ranking algorithms that really sort of guts what 230 was supposed to do in the first place.

Quinta Jurecic: Hany?

Hany Farid: I think everybody got, said what what they what I wanted to hear in terms of why now. But I want to speak to two things here. So one is part of the why now is I think we've all woken up 20 years later and the internet's not great. I mean, lots of great things on the Internet, lots of great things have come from technology. But I think a lot of us are looking around being like there is a lot of nastiness and ugliness on the internet, child sexual abuse, terrorism, nonconsensual porn, fraud, misinformation, disinformation, hate speech, bullying. It's just, it's sort of ugly. And I think there is this sense that this is not the internet that we signed up for or that we want. And maybe it's time to start thinking about how to make the internet a more civilized place. Now, whether the justices thought this or not, I can't say.

I want to come back and talk about what Daphne was talking about, I think that's this is sort of the nugget of it, these recommendation algorithms. And here's my thing, is that it's, I think it's absolutely Daphne is right that you can't say you can't have recommendation algorithms. So to me, it's not algorithmic curation. It's the objective function of the algorithmic curation. So, for example, when I go to Google or Bing or any search engine, I want the most relevant information with respect to my search. And so does Google, right? Because that's what gets me coming back to their site. So

Google is incentivized to list on the front page the most relevant things that will, that I'm looking for and to eliminate spam and malware and harmful content. So in that regard, their interests and my interests are aligned very nicely in a, in a search, right.

Now, when it comes to a Facebook, a YouTube, a TikTok or or where the, the metric is not, what do I find most relevant, it's how do I keep my eyeballs on the platform for as long as possible to deliver ads and to monetize. So there the objective function's a little bit different. It's not really about relevance or civility or honesty or being informed or entertained, it's about engagement. And now we get to the rub of it, which is that we know, and we know this from Facebook's internal studies, we know this from all the studies is that the closer and closer content gets to violating terms of service, so it it's violence, it's salacious, it's conspiratorial, it's nasty, it's ugly, the more users engage. And the platforms know this, right? So what they do is that they recommend content that is more problematic because it drives user engagement. It's just A B testing. This is how they got there.

And so to me, the issue should not be, are you liable for recommendation algorithms or not? It should be, what are the objectives of the recommendation algorithms. And if the objectives are maximize user engagement and whatever that takes, whether that's terrorist activity, whether that's nonconsensual porn or child sexual abuse or disinformation, we are going to recommend it because the humans keep clicking, well, then I think that's an interesting question that we should ask. Well, do you have a liability for that. As opposed to we choose to recommend things that are relevant and diverse viewpoints, well, I think that's different.

So I think I think the, the, the of many of the briefs sort of missed the point here. I don't think it really is about recommendation algorithms, which, by the way, are completely different depending on what type of platform you're on, I think it's what are you trying to maximize in the recommendation algorithms? And as it turns out, social media is maximizing user engagement. And that is what is leading to a lot of the problems on the platforms. And there I think it's fair to say, well, okay, now let's have a conversation about it.

Daphne Keller: If, if I could just jump in and respond briefly. I think what Hany just said is incredibly important. Like this question about whether algorithms that optimize for engagement are driving amplification of harmful or even illegal content, it's a huge policy question. It is not something that I think drives a different interpretation of Section 230. It's not something that should change the outcome of this case. It's definitely something that policymakers should be thinking about.

But, but to go to, and, and to be clear, like, I think there are ways of coming at that using privacy law, you know, using question, theories of user's autonomy and power to shape their own preferences and communicate them and, you know, maybe make that a condition of using their data. There are interesting ways to come at it that aren't about Section 230, but also going to this, this issue about the algorithms [cuts out; connection lost] loading borderline content, the content that comes closest to violating the rules, we know about this in part because of a blog post that Facebook did, explaining how, number one, that happens, and number two, they use their algorithms to try to correct for it and push that content back down again. So the algorithms are both, you know, creating the problem and they are the tool to try to correct for the problem, which I think leaves us still needing algorithms in there somewhere.

Hany Farid: Yeah. Daphne, you said something that, sorry, Quinta, I'm going to jump in really quickly here, you said something—.

Quinta Jurecic: Please, go ahead.

Hany Farid: Really important here, and I agree, I think this is a more interesting discussion around the privacy issue, because everything we are talking about recommendations understand that these recommendations are being driven by several things. One is my viewing habits, not just on the platform but also off the platform. So the Facebooks of the world track you everywhere you go. And on these devices as well. So what are the things that I've looked at? Where am I? What am I reading? What am I looking at, how long am I lingering and also what other people are doing relative to me.

So I think it's really interesting to come at this from a privacy question, too, because the reality is, is that it is pretty easy to drive people into very deep rabbit holes based on these really incredible systems that are vacuuming up every morsel of personal data and then pushing us into these different directions. And that's, in fact, what happened in Gonzalez. Somebody got at least partially radicalized on YouTube and committed a horrific crime, and that's where things sort of went sideways. So I like this idea of coming at this from a privacy side as well, and maybe avoiding some of the messiness of the 230 debates, which, by the way, I agree with Ben at the very beginning saying that this has gotten very politicized.

Benjamin Wittes: Yeah, just, just a point of clarification. It actually isn't the allegation in Gonzalez or Taamneh that somebody was radicalized, that the people who did this, these acts were radicalized as a result of Facebook. That's, that's why the Taamneh case is so important. The

allegation is that in general, YouTube allowed ISIS to use its site too profligately. And in general, people got radicalized and some of those radicalized people did a horrible thing.

So I want to say a couple of things about the, the merits in in and the very gentle dispute between Hany and Daphne here. I am, have long been attracted conceptually to the idea that the algorithmic promotion of material on these platforms should not be protected by 2030. And the theory of it goes, and as I would have articulated it until relatively recently, hey, you're immunized for carrying the material, but when you do, when you write an algorithm to promote X over Y, and the result is something that's really damaging, the, the pro anorexia, the individual pro anorexia video doesn't cause anybody to starve herself to death. But if you get no pun intended, fed a steady diet of pro anorexia videos, that's actually the special sauce of the algorithm, not the result of the individual video. And that's the special sauce that is the platform's contribution.

And so in the language of the statute, you're not treating them as a publisher of the content. You're treating them as a publisher of a promotional mechanism that may itself have some significant damage, cause some significant damage. So that is effectively the position, insofar as I understand it, of the plaintiffs. And I want to come back to that in a moment. It's also much more clearly the position of the solicitor general, and I think it has some, some intuitive appeal just at a logical, commonsense level. That said, when you read the briefs, one thing that really jumps out at you is how they do not provide a stable rule of decision.

And, you know, as somebody who, I find this argument appealing, but I don't— and I've spent a fair bit of quality time with the briefs— I cannot figure out under what circumstances who would win. And that scares the crap out of me as somebody who, you know, like, thinks about the legal system, you do want a stable rule. And I think part of the reason that this is the case is that the case is not well presented. And one of the reasons for that is Taamneh, which is that you don't even know, we don't even know that but for 230, there would be a claim stated because there's no real causal relationship alleged between the bad outcome and the platform's conduct.

And so my view of the, of the, the merits of this is that Gonzalez at its core presents a super hard question that should not be adjudicated and decided until somebody presents it better. These plaintiffs should lose, irrespective of whether 230 protects Google or not. They should lose because they're nowhere near being a claim under the ATA. And so why not wait to decide the scope of 230

until there's a real case where the algorithm can be reasonably said to have caused, the algorithm as opposed to the videos can be reasonably said to have caused the damage.

I'd like to give one example of such a case that I think we, the kind of thing we should wait for. My anorexia video example. A person who's, I'm being morbid, but we're talking about dead people in the terrorism context, let's do it in the eating disorder context, too. A person whose next of kin says, my daughter died not because of the content of any one video, but because YouTube served nothing but pro anorexia videos for two years. So she died as a result of the algorithm, not as a result of the third party submitted content. That is an extremely hard case, and I don't think the Supreme Court should decide this issue, this issue is basically asking for an advisory opinion.

Until you have a case where you can reasonably say, allege— it doesn't have to be proven, of course— but until you can allege that the algorithm is causing the damage, I think you're just asking for an advisory opinion. And I think even Daphne and Hany and I, who may disagree about the appropriate disposition of the result of that case, might be able to agree, let's wait until that case actually presents and that issue really presents before you decide anything.

Quinta Jurecic: So we've, we've talked a lot about amicus briefs. And before we go further, I want to flag two particular amicus briefs for, for the viewers. One of the ACLU, which Daphne is on and one from the Counter Extremism Project with Hany is on. And if you're interested in what we're discussing here today, I definitely recommend that you take a look at those because it's super useful sketching out of the different positions we've set out here.

Alan, I want to give you a chance to weigh in and ask you particularly about the brief coming from the Justice Department, which Ben just mentioned, which I think kind of tries to thread the needle here. I don't know if I was convinced about how successfully it does that, that work, but what did, what did you make of that?

Alan Rozenshtein: Sure. And let me first just respond to the last point Ben made. I think it's an interesting one. And I agree with Ben that these are not the best vehicles procedurally and factually for this case. And for the question of what does Section 230 mean? I disagree with Ben, though, about the, the idea that the court should use as an opportunity to basically duck the issue. And the reason for that is that what Section 230 means is not going to be something that will be easier to figure out when the question is better presented. This is fundamentally a legal and policy dispute that needs to be resolved one way or the other. And it's not something that if the court avoids

dealing with it now, it will go away. Because, as Ben pointed out, the anorexia video, the self-harm video, the racist video, I mean, you can just go on and on and on will happen over and over and over again.

And so I think the, the alternative to the court dealing with this issue now is not never dealing with it again or dealing with it in a better way that will lead to a better outcome. We'll just be exactly here, right, in three years. But let's just be here now instead of in three years, right. Now, the question of well, under Article three, courts can't give advisory opinions. That is certainly true. But what counts as an advisory opinion is itself highly contestable, and if you actually look through American history and American jurisprudence, there are plenty of things that one might argue were ultimately advisory opinions because for better or for worse, right, the court is the final arbiter on these, on these issues. Right. Whether it should be is a different question.

I want to, I'll get to that a little bit later, with respect to 230. Now, as to the issue of the solicitor general's brief, I do think it is quite interesting because I do think to Ben's point, it does articulate in the clearest way a possible distinction. That distinction being the difference between publicizing information or publicizing user content and actively recommending that. The problem I find with that distinction is not that it's not a plausible one, but it doesn't strike me as any more plausible than a million other distinctions that you could make in the context of of 230, right. We can say that publicizing is different than publishing, or we can say that publicizing is part of what publishers do, because, of course, a publisher doesn't publish in a vacuum. A publisher then selects often which audience to send that information to.

So it's not that we can't draw the line there. The question is, why should we draw the line there? Now, I think what the, what the, what the solicitor general would say is, well, because that's the best line to draw on given the overall purposes of the statute, right. Well, the solicitor general will have their own view. Daphne, for example, will have a different view. Right. Earlier in this conversation, she said, well, the purpose of the statute is to encourage a kind of moderation. And we need, we need maximum algorithmic, or I don’t want to put words in Daphne's mouth, but we need a lot of algorithmic flexibility on the part of the platforms to do this.

Okay, so now we have the problem of dueling, dueling purposes. And this gets me to sort of what is my and I apologize, I'm a law professor, so my temptation to go meta is always present there, this is, this to me has been my takeaway from thinking about this issue sort of generally for a long

time, and most recently in the context of this case, right. I think what the Supreme Court should do is it should decide the issue on in such a way as to maximize the chance of Congress getting involved and reenacting, whatever the 2023 version of our grand section 230 compromise should be.

In my view, Section 230 is a fundamentally ambiguous statute across most of the dimensions that we care about. It's ambiguous because it's very hard to know as the solicitor general admits, what it means to treat someone as a publisher or speaker. It's ambiguous because it's actually not clear what Section 230 meant when they said publisher; did they mean publisher versus distributor or do they mean publisher, including distributor? There are actually very good reasons to think both of those options might be true, right? It's ambiguous. And this is, I think, really underappreciated because Section 230 was part of a much larger internet package. It was, it was not technically part of the Communications Decency Act, but it was enacted essentially kind of in tandem with that as an alternative to a different, much more censorious proposal that would have made it basically illegal to send obscene, you know, information in a way that children could access, a law that was then made on, or declared unconstitutional by the court.

So then the question is, okay, well, so do we understand then 230 in isolation of that broader congressional purpose that it was part of, or do we understand 230 based only on 230. Do we understand 230 as was understood then? Or do we ask Ron Wyden and what he meant 30 years ago, right. All of these ambiguities to me mean that and this is not surprising, a law passed when we barely understood how the internet worked, could not possibly have predicted anything important or anything useful about how the internet should work in 2023. Now we can all have our own opinions on the policy. I find myself flip flopping constantly about what I think about the underlying policy. It depends on which side of the bed I woke up on, right. Because I think this is just a really hard problem. But we have a mechanism for dealing with these sorts of hard problems where there are weighty interests, speech interests, harm interests, this interest that interest, private interests, right, public interests. It's the democratic process.

And so then you ask, okay, well, what interpretation of Section 230 would most likely lead to Congress getting involved? And there and here I'm drawing on the work of a Harvard Law professor, Einer Elhauge, who has done this sort of thinking about statutory interpretation in general, but not about 230 in particular, the way you do it is you pick the interpretation that harms the most powerful interest group, not because the most powerful interest group is a bad interest group, right? Or

because they're necessarily wrong, but because they're the ones who have the best access to the lobbyists.

So on this logic, what I think the court should do is in these kinds of cases where it's not an obvious section 230 answer, they should interpret Section 230 very narrowly. Right. And they should do that so that Facebook and Google and Twitter have a heart attack and they react to that by calling their members of Congress and forcing this, using all of their political capital to force this onto the congressional agenda. And then we can have a horrible, messy, miserable policy debate that will make everyone absolutely apoplectic. Which is to say, we will solve this through democracy.

Quinta Jurecic: So that's, there's definitely a certain contrarian appeal to that approach.

Alan Rozenshtein: I'm trying, I'm trying to alienate everybody simultaneously.

Quinta Jurecic: Exactly. Exactly. So what I will say and I'm curious what other folks think is that that makes sense to me on a sort of very high level. You know, this is how civics and democracy is supposed to work level. But what I worry about is what happens in the interim, because Daphne mentioned, you know, there are a lot of studies that show what happens when platforms begin over filtering, moderating more aggressively, which we've seen they do when the liability shield is limited. And so you can potentially end up in a situation where a lot of speech that perhaps shouldn't be taken down is taken down.

And that's not only potentially harmful just in terms of, you know, the vibrant conversations on the internet, but it can be materially harmful to people in a lot of different ways. And that that is a very real cost to your, your sort of, you know, just let it all shake out and see, see what happens. So, Daphne, I'm driving a little bit from something you said earlier, I'm curious if you have any thoughts here.

Daphne Keller: Well, I think Alan has more faith in Congress than I do. And I, I wish I shared that faith. Certainly, you know, what we have seen with attempted 230 reforms so far is this very familiar dynamic where Democrats largely support proposals that would cause platforms to take down more bad stuff or that are intended to have that result, although often they're drafted in ways that lead to very bad unintended consequences as happened with FOSTA-SESTA, the one 230 reform that Congress passed. So we have, you know, Democrats broadly proposing to take down more, Republicans broadly proposing rules that would cause platforms to take down less and leave more content up. And so it's very hard to find things that can move forward.

The exceptions tend to be either laws that are about harm so grievous that both sides of the aisle can come together on them like child safety or sex trafficking or potentially laws that are not about preferencing one kind of content or another, but rather about improving the processes by which platforms do content moderation, giving users appeals, publishing transparency reports, other transparency measures to give researchers access to data, etc. So those things seem like they could plausibly go forward. But I think if the Court just got rid of 230 for these vast swaths of the internet, all the parts that are shaped by ranking algorithms, we would not see Congress coming together on a wise solution, we might well see the stalemate we have now.

And then we would see number one, states stepping into the breach and passing really wild laws like the ones that we've seen in Texas and Florida, and number two, cases going to litigation for courts to resolve it. And I think that these questions are uniquely bad for judicial resolution for a couple of reasons. One is there's a whole human rights literature on, on this and that kind of broad consensus around wanting things like procedural protections. And if you're going to have platform liability for user speech, then you want a mechanism where users can find out when their content has been taken down, especially if it was, came down at government behest or as a result of law and legal pressure. You know, users have a right to appeal, they have transparency, all of those things. Those are mechanisms that a court can't create in litigation. Those are mechanisms that only lawmakers can create.

And when courts resolve questions about platform liability for user content, almost always they are hearing from the plaintiff who is a person harmed by online content and the platform which wants to avoid liability. And they are not hearing from the absent third party, which is the speaker or the aggregate interests of online speakers who are going to be affected by the outcome of the case. So there are always effectively three parties or three interests, and courts are only hearing from two of them. And that is not a mechanism for, for getting to wise laws.

Quinta Jurecic: So Ben and Hany, I'm, Hany yeah, please go ahead.

Hany Farid: I want to chime in on first of all, I really like Alan's point, but I also agree with Daphne, I don't have a lot of confidence in Congress. If you look at the bills being proposed around 230, they're hyper, hyper partisan. So I do worry that in this political climate, I'm concerned that Congress may make things worse, although I, like Alan's just set it on fire and see what happens proposal. I want to make a point here, which is, several, I think Quinta you said that if we remove

some liability, there is a concern that the platforms will over moderate and reduce speech. And I think that's a valid point.

But I also want to make the point that content moderation can also increase voices. When you have rules of the road, you will get more engagement. So, for example, on Twitter today, something like 10% of users are responsible for 80% of tweets. This is not, as Musk says, the town square. It's not a town square. It's a relatively small number of people dominating the conversation. And if you've been on Twitter and you've been bullied or harassed or threatened, you're like, look, screw this, I'm out of here.

And so sometimes, yes, there may be some voices that get squashed with moderation, but it also may create an environment where more voices come in. And I think we have to think about the other side of that coin when we think about these regulations is that right now, we sort of have the bully's pulpit. Yes, anybody can say anything they want on Twitter, but that also means a lot of people don't go to Twitter. And I'd like to hear from exactly those voices. Not, not the jerks and the trolls.

Quinta Jurecic: Ben, did you want to weigh in on this? Okay, Ben, Ben can't speak. So, Ben, Ben has been silenced. In exactly the—.

Benjamin Wittes: It's started working again. No, I don't need to speak on this. And now that my computer's working, I'm not panicking anymore.

Quinta Jurecic: Okay, excellent.

Hany Farid: That was, that was the definition of content moderation, Ben.

Quinta Jurecic: For the record, that was not me.

Benjamin Wittes: Inaudible moderation. But yes, I was, I was silenced.

Quinta Jurecic: So, so Daphne, you mentioned these state level laws about content moderation in Florida and Texas. And I know you've been doing some serious thinking about how that litigation might interact with Gonzalez. So for viewers who haven't been following these cases are laws in both those states that would, I think it's fair to say, pretty severely limit what kind of moderation platforms could do in those states, as well as transparency requirements. The court is currently, I believe, considering whether to hear those cases. It did kick the can down the road a little bit, so they're not going to hear them this term, but they are on the table. So Daphne, let me turn it over to you for your thoughts on those and how they interact with Gonzalez, which on the face of it, concerns a very different legal issue.

Daphne Keller: Yes. So these are two cases, Netchoice v. Paxton out of Texas, and Netchoice v. Moody out of Florida. They are both about as you said, Quinta laws passed in those state legislatures that in various ways require platforms to carry content they don't want to. So it's what we call a must carry law in the, in the trade. And also, they both have platform transparency mandates. And both laws, platforms challenge both laws saying that they violated the platform's own First Amendment rights to set editorial policy and decide what speech to carry, which is pretty well supported by a Supreme Court precedent about actors like cable companies, for example. You know, aggregators of third-party content do get First Amendment rights in what they select and organize.

So platforms won on their First Amendment challenge in the district court in both cases. And then at the circuit court level, we got these wildly divergent rulings from the Fifth Circuit upholding Texas's law. And the, Alan has a great post about that ruling, by the way, on Lawfare if people want to know more about the Fifth Circuit ruling. And then the 11th Circuit struck down the must carry provisions in the Florida law. So there's a circuit split and it's a big, important issue. And everybody was assuming the court was going to take that case, those cases this term. And then Gonzalez and Taamneh kind of came out of left field and the court took those instead.

But we're looking at some really interesting conflicts and points of overlap between the cases. And I'm not sure that the court has focused on that or if the solicitor general's office, which is, the court asked for an opinion from them on whether they should take cert on the Netchoice cases, I'm not sure if the Solicitor General's office has focused on, on those overlaps. So just to say a little bit more about the carriage mandates, Texas requires that content moderation be viewpoint neutral, which there's some dispute about what that means. But I think it probably means that if you want to take down pro-anorexia videos, you also take down the anti-anorexia videos. If you want to leave up anti-gun violence content, you have to also leave up the pro-gun violence content.

And I don't think that the legislators in Texas appreciated just how ugly all the speech is that they, you know, the barely lawful, lawful but awful speech is that they opened the door to. And I don't think the Fifth Circuit did either. The Fifth Circuit has these crazy lines where it says, oh, the platforms are obsessed with terrorism. But, you know, obviously this is a case about political speech. It's not, this law, if they have to carry everything that's lawful and be viewpoint neutral about it, they're going to have to carry a lot of speech that's very much the kind of content at issue in the Taamneh and Gonzalez cases. Or very you know, even if you say, oh, that you take down the illegal terrorist

content, there's still all of this content that could create tort liability, like in Ben's example about pro-anorexia content. And, and Texas is saying that platforms have to carry that or be neutral about it.

Florida has a slightly different requirement. They say platforms have, they might require neutrality, they say consistency, so maybe they have a rule like Texas's. But they definitely say that platforms can take down almost nothing that is said by political candidates, people talking about political candidates or journalists with those very broad weird definition of journalism. And so if I'm talking about a political candidate in Florida and I make pro-anorexia statements or pro-terrorist statements, platforms can't take that down. And so there's a, both, you know, that's wild. These are really crazy laws. Also, while the lawmakers presented them as common carriage laws, they are not common carriage laws. They are laws in which the lawmakers, legislators in Florida and Texas set their own preferences in various ways about what speech have to be carried. I have an article in the Chicago Law Review on that if people are interested, it's called 'Lawful but Awful."

But the collision between the cases is if the outcome of Gonzalez and Taamneh is that platforms face liability for leaving this content up or leaving it up in recommendation features, but simultaneously, by leaving it up, they are violating the must carry obligations in Texas and Florida, what does that even mean? Like, what is the world that we live in if the platforms lose in both the case that says now you have to take things down and the case that says now you have to leave those same things up. And I think there are, some people kind of in the European version of this debate, sometimes there's this concept of like, oh, but there's a perfect band of the speech that is, you know, platforms are allowed to leave up and the speech that they have to take down. And as long as platforms get in this right band of like leaving up the right stuff, you know, maintaining civility or something, then things will be fine. So you can have both must carry and must remove laws and then platforms freedom of moderation lies in between.

A, I think that's extremely unrealistic about what platforms can achieve in content moderation, but B, under US First Amendment principles like that's a no go. We, there is nothing suggesting that the government can come along and say on the internet now you are only allowed to say things in this like narrow band of, you know, within lawful speech, you can say the polite things and now the government is going to tell platforms which of those things they can leave up and which to take down. So there's a huge lurking First Amendment issue under all of this and tremendous points of potential conflicts between these two sets of cases.

Alan Rozenshtein: So just to add a few thoughts to Daphne's fabulous description of the next big mess. You know, earlier in our discussion, I said that these decisions will be potentially the most important decisions in history about the internet. And that's true until next year or the year after, when hopefully the Supreme Court hears these net choice decisions. Because, of course, the difference there is that those are First Amendment cases in which the Supreme Court really does get the last say. They are not statutory interpretation cases, which is all, in some sense all quote unquote, all that Gonzalez and Taamneh are.

So, you know, those are, you know, we're playing for keeps now, but it's just, the stakes are even higher when the court, as I'm sure it ultimately will, will hear those cases because Justice Thomas has signaled that he cares a lot about Section 230, Justice Alito has signaled that he cares a lot about the First Amendment issues, as I think he ought to, because they're important and interesting. I totally agree that there is this potential conflict. You know, what happens if the companies can get hammered for taking content down, but then they get hammered in Texas and Florida for leaving it up. You have a very whole complicated, you know, presumably in Florida and, and Texas, the state content moderation restriction laws would then override the, the sort of local tort law. But then, of course, you have federal anti-terrorism law and then you, of course, have interstate disputes. So that could be a potential, potential mess.

It also might depend a little bit on how much the court says about the scope of other parts of Section 230. So the part of Section 230 that we care about in this case is the part that immunizes platforms for the stuff that their users post. The, the second part, right, that immunizes platforms for taking stuff down is not actually at issue in in section in in the in Gonzalez. And there is, there's actually another ambiguity there. The language of Section 230 puts this long, long list of the sorts of things that platforms can take down. And then it has this and otherwise objectionable content.

And so there's this debate, right, classic statutory interpretation debate about how broadly should you interpret that, right. Should you interpret that as just restating the adjectives that are in the text, lewd, lascivious, that sort of stuff, which which reflects the section 230's kind of anti-pornography ancestry, or do you interpret that very, very broadly as to include any in any content that the platforms just don't like? If the court interprets or even in dicta interprets that language very broadly, that might actually preempt in some ways the Texas and Florida laws, because of course the Texas and Florida laws can't violate Section 230, because federal law trumps state law.

So that could be a situation in which the Supreme Court could really kick the First Amendment can down the road, because then the only, only situation in which you could have a must carry requirement under federal law would be if Congress passed it. And there's no universe in which Congress is going to pass such a law. Because again, going to my earlier point, the interest group dynamics are against it, right? The companies like where they are. So there's, there's, there's no, there's no, there's no desire to, to do that. But yes, we will, I suspect we will, we will have this this panel again in 18 months to talk about the next two cases.

Quinta Jurecic: So we're going to go to audience questions in a minute. But before we do that, I know Ben had some more thoughts on the Taamneh case that he wanted to get to. So, Ben, I'm going to turn the floor over to you so you can make your, your case known on how you think the court should rule.

Benjamin Wittes: Yeah. So I just want to say that, you know, Alan's insistence with which I generally agree that this could be the most important internet case ever, internet law case ever is all contingent on the way that the Supreme Court resolves the Taamneh case. Because if the court does the right thing and I want to be, I did not speak about the merits in setting it up, but I want to say like this is a case with a right answer. And the Ninth Circuit got it wrong, and the Supreme Court should reverse that. And if that were to happen, the entire Gonzalez case dissolves like an Alka-Seltzer cube in a in in water.

And so like, I'm taking off my content moderation 230 hat here and putting on my my Lawfare counterterrorism hat. Taamneh is not a hard case. And you know, the Congress passed a law saying that if you aid and abet an act of terrorism, you are liable to a lawsuit by an American citizen who is injured in that act of terrorism, in this case, family, next of kin of people who were killed. That is not in traditional aiding and abetting liability mean, if you know, if I give some assistance in general to the University of Minnesota and Alan Rozenshtein goes and kill somebody, I did not aid and abet the murder. You know, and that is actually what the Ninth Circuit said here. And it is simply incorrect.

And if you read, I mean, I think, you know, there's a really interesting set of briefing on the Gonzalez side of this. The Taamneh side is not that interesting because the case is not that hard. But the entire Gonzalez adjudication depends on the Supreme Court getting Taamneh wrong. And so I just want to emphasize that, you know, if the court were to rule that the plaintiffs have a cause of action in Taamneh, we have a world of hurt, irrespective of, of what it rules in Gonzalez, because

everybody associated with any institution that has ever been said to engage with terrorist groups is suddenly liable for every act of terrorism that has ever happened.

And I'm being hyperbolic in my rhetoric, but it's really not wrong. And, and so I, I just want to emphasize that the Supreme Court can make two big problems go away in the side of this, with the side of this litigation that nobody's spending time on. And they should be able to get nine votes for that. I'm not saying they will, but they should.

Quinta Jurecic: So before we, we go to questions, I think, Daphne, you had one more thing you wanted to add.

Daphne Keller: Yeah, I just want to point out the, um, the federalism implications of both of these cases. So in Gonzalez, plaintiffs' theory would mean that every state's laws are now applicable to platforms telling them when they're liable for content. And then in the Netchoice cases, the states are saying our laws can tell them state by state what they have to leave up. And a world where platforms are trying to honor different speech rules in each of 50 states and a district and some territories is not, I think, a world we really want to be in. I mean, even if they could try to somehow geo block with that degree of granularity, then you run into problems where, as a user, including as a business user of platforms, you don't know if your communications are getting through to your friends and customers on the other side of a state line.

The platforms incentive, I think, is not going to be to figure out the very fine differences in defamation law between Minnesota and Vermont, it will be to pick the lowest common denominator and to the extent possible, just take down everything down to that lowest common denominator. I think there's just all of these crazy things that happen before you even add the must carry laws. You know, you might have something where you're required to carry something in Florida, like if a political candidate in Florida talks about access to abortion, you have to leave it up, but you are required to take it down in Texas under Texas's aiding and abetting law for abortion.

You know, there's just serious state by state fragmentation issues implied by any of these plaintiffs' claims. And formally the platforms have raised this as a claim under the dormant commerce clause in the Netchoice cases. But that part of their argument is parked back at the district court, it's not part of what is being raised to the Supreme Court in the Netchoice cases. And over in Gonzalez, that case is about liability for terrorist content, it's barely even been pointed out to the court what kind

of state-by-state fragmentation plaintiffs are asking for. So I think that's one of the sort of many, many hidden messes within this case, these cases.

Quinta Jurecic: So it's a fractal of different messes. So. All right, so let's, let's go to questions. So we have a question from Nolan Murray, who asks, are companies benefiting slash profiting from allowing the content— I think we're talking about Gonzalez here— and if so, should they bear some responsibility for such content? I think this is a really important question, and it is something that the petitioners get to in Gonzalez, because one of the issues they raise there is whether Google got ad revenue from videos posted by ISIS on YouTube. So I wanted to open the floor for everyone to weigh in. Alan, it looked like you had something to say there.

Alan Rozenshtein: Yeah, so this is a very interesting question, and it is, I think reflects a deep intuition that a lot of folks have that I think in the one, on one hand is very important to grapple with, on the other hand, can be a bit of a red herring. So the first thing I'd say about that is, yes, in a sense. Well, the first thing I'd say about it is this. Whether or not Google or Twitter were making money off the specific pieces of content that are at issue, they're definitely making money overall. They are, after all, private companies. And so they don't kind of do anything. They don't roll out of bed in the morning unless they can make money. They have decided, you know, maybe out of the goodness of their hearts because of their concern for the public sphere, but let's be honest, they're public companies, so mostly to please their shareholders, that such and such content moderation and such and such algorithmic amplification is profit maximizing. That's like the whole point.

So I think focusing narrowly on whether or not they made money off a particular piece of content is, is not super relevant, except as it might apply within other parts of the law in terms of, let's say, revenue sharing, right. But for the broader Section 230 issue, I think it shouldn't matter that much. And the other reason and kind of the bigger reason I think it shouldn't matter is because the point of Section 230, again, was not to make it, was not actually to make a deal with the companies. It was not a hey, you get this, therefore you do this. It was a judgment about what sort of liability regime would create the best public sphere, right, that balances free expression with minimizing the harms to that, right. Whether someone makes a bunch of money in that process, we can feel morally righteous or angry about, but it's actually not that relevant.

And so, you know, I think while it's understandable where that intuition comes from, we should, I think, try to avoid worrying too much about whether companies are making money when

we're trying to figure out whether they, quote unquote, deserve 230. Because, again, 230 was never a thing for them to deserve or not. It's a thing that we decided because we thought it would be better for our public sphere. And then in the year 2023, we have to decide whether 30 years or 28 years later, it's still good for the public sphere, all things considered.

Hany Farid: I think Alan got that right. I do want to make a point, though, is that it goes to me for about motivation. So, for example, from the earliest days of Facebook and YouTube, they banned legal adult pornography. And so, by the way, when Mark Zuckerberg tells you how much he loves the First Amendment, you should ask him why he takes down perfectly legal speech. This is not a First Amendment issue, all right. They took down adult pornography because it was bad for business because advertisers didn't want their ads running against sexually explicit material. So when it comes to content moderation when it serves their purpose, they seem to be quite good at it. But when it comes to content moderation that deals with, as Daphne was saying, awful but lawful, well, they're not so good at it.

And I don't think that is fundamentally a technological limitation. I think that's a business limitation because the business of the internet, for better or worse, is we, for the most part, give the stuff away for free and we monetize your data. You are not the customer, you are the product, as they say. And so I think it is relevant there. And what I would like for us to have a conversation about is, yes, we should talk about 230 and privacy. But I actually think there's a more interesting conversation here, which is what do we want the business model of the future internet to look like? We have this business model today, this ad driven model, because nobody thought 20 years ago that you can make money on the internet.

In the early days of Google, you're like, you give me everything for free, how are you going to make money? And nobody really saw this surveillance capitalism emerge. And I think it turns out 20 years later, there are great ways to make money. But maybe different business models with that is not pure engagement outreach driving might lead to better ecosystems online, and that would be a really interesting conversation. Last thing is Twitter has only been profitable one year in its existence, so they're not actually making any money. But the other companies are making money.

Quinta Jurecic: Daphne, did you want to weigh in on that?

Daphne Keller: Sure. I'll just, you know, to emphasize the role of advertisers here, you know, that's where the money comes from is from the advertisers. And so if platforms are making content

moderation choices that cause advertisers to take their money elsewhere, that's when they lose money. And we're seeing really increasing organization and pressure from advertising industry bodies, trying very actively to shape platform content moderation practices, which in many cases I think is pushing policies many of us would agree with about what it is that we want to see on Twitter or Facebook.

But it's fundamentally going to be majoritarian at best, right? If, if the rules for online speech are being shaped by the preferences of Unocal, Unocal and Unilever and PepsiCo, that's a very different set of rules than the ones that maybe Congress was envisioning, as Alan described when they enacted CDA 230.

Quinta Jurecic: So next we have a question from Christina Lee, who asks, could intervening to penalize platforms for recommending content have adverse consequences on their ability to uprank high quality information sources and downrank or remove propaganda, cybersecurity threats and foreign misinformation? Could a negative ruling here actually make it harder, not easier for platforms to address abusive content and terrorist threats online? Everyone's nodding, yeah, go ahead. Go ahead.

Benjamin Wittes: Let me kick us off here. This is a real risk. And, and the reason has less to do with 230 C1, than it does with 230 C2, which is the part of Section 230 that immunizes the removal of material, right. So C1 says you can't hold the platform liable for the third party submitted content, and C2 says you can't hold the platform liable for its handling or removal of or filtering of the third party submitted content. And I think there is, it would be very hard to say to the extent that you're penalizing the ranking algorithm for promoting something, you still can't penalize it for the down promotion, which is the C2 component. And the result could be, I don't think it necessarily is, but it could be the perverse effect that that you're just pushing the platforms to very, very standard neutral rules, like most classically reverse chronologically displaying things.

Now, in the case of YouTube, that's literally impossible because they're getting a gazillion things a second. And what I mean, I suppose it could be only from people you follow, but the question of how you would do it is very difficult. But I think if you imagine it as, imagine it on Twitter, for example, you could really disincentivize content moderation. And, and I'm not saying that's an inevitable consequence, but it is a possible consequence and a real risk, I think.

Alan Rozenshtein: So just to add briefly, I would guess that all of us would agree that the answer to the question is yes, you could have these negative effects for the reason that Ben articulated and that actually Daphne articulated earlier in our conversation. I think the question is, what does that mean for what the court should do? Because those are somewhat different questions, I think. You know, the problem for the court is that if it's, if it views its role as interpreting Section 230 so as to make the internet the best that it can be, then it is stuck because it doesn't have that many options. It doesn't have that many levers to pull. All it can do is interpret a few phrases or words in the statute. It doesn't have the ability to create and to rethink what sort of liability regime we might want to have. The only person who could only entity that can really do that is Congress.

Congress can come in, right, and it can say 230 is not working like these notions of publisher and treating, none of this works anymore. We need a totally different system, has to be much more involved. There have to be reporting requirements and safe harbors. Maybe we have to look at the copyright law, which again, everybody hates, but sort of works, you know, caveat on sort of, but it sort of works. And then that is, I think what brings me back to my earlier point, which is I think the Supreme Court could say, look, we're going to limit section 230 and we're, it's going to cause a big mess, we totally understand this, it's going to cause a big mess, but we're in this for the long term. We're thinking five, ten years ahead, right. And we know that the only way that we can solve, quote unquote, this problem in the long term is if we don't take the temptation to just tweak Section 230 every time we think we can make it slightly better, because then you are stuck in a deeply second best situation because Section 230 might just not have enough juice, right.

Like there might just not be enough in the building blocks of Section 230 to create anything like the sort of frankly, really big and complicated regulatory scheme that you might need, right. It is a little crazy, I think that in 2023 we are trying to take the, you know, most important media advance since the printing press and we are trying to regulate it basically entirely, right. With as Jeff Kosseff, who literally wrote the book on Section 230 says, the 26 words that created the internet. And there's a point at which the Supreme Court, I think, just has to stop fiddling with it and, and say, we just got to revamp this thing, even if in the short term it's going to cause a real problem.

Hany Farid: I agree with Alan. I wanted to add one thing, if I may, which is that the U.S. is at 350 million people, is about 5% of the world's population. So as we think about the rules we are setting for the rules of the road, we should understand it is a big, diverse world out there and we are

impacting parts of the world that are, don't look like a liberal democracy. And we should think very, very carefully about how 95% of the world is going to be affected by what we do here.

Quinta Jurecic: Yeah, I think that's a great reminder. Thank you. So next question is from John Menton, who asks the question that I think we've kind of been circling around for this entire conversation, and that is how might the Supreme Court decide this case and alter Section 230 in a way that isn't disastrous? He specifies for tech companies, but I think we can extend that to disastrous for, for everyone. So for the purposes of this question, let's take off the table Ben's solution of just reverse [inaudible] and make Gonzalez disappear. If the court is going to change 230, what is the least bad way they could do it?

Hany Farid: I don't know. But I'm going to chime in and I'm sure everybody will disagree with me, but I would like to see a very narrow discussion of recommendation algorithms that are based on highly personalized data, highly specific content that is awful but lawful. I think there should be some liability there. I think the broad protection for basically being a good Samaritan, a bad Samaritan, a neutral Samaritan, I think has led to real problems on the internet. So I would like to see some responsibility for driving people into rabbit holes around things that are harmful for them as individuals, for us as societies, and for us as democracies. I think that's technologically feasible.

The platforms know what they are recommending, what they are not recommending. And I know this because that's what they tell the advertisers when they want to grab money from them to deliver the ads on the content. So I think if we simply changed the objective functions, if we simply change, what are we optimizing for? I think we could have a healthier online ecosystem. I absolutely agree that there are potentially consequences there that are very, very difficult for us to think through. But I would, I think the status quo is not really working, and I'd like to see some small liability that changes the incentives for the tech companies.

Daphne Keller: So there are a lot of briefs among the amicus brief saying roughly what Hany just said, that like there are some algorithms that should create liability, but not all of them or some ranking that should create liability, but not all of it. And you should remand for the, the lower courts to figure that out. And, and I think Ben's point is really important for this. Like, this is not a case where we have any reason to believe that there's some relevant set of facts that are going to emerge that would help us understand the correct dividing line.

You know, at this point, there are no facts in the record, period. And all of us are just, you know, speculating what, what might be a good rule based on what we happen to know about algorithms. And I think many of us, our belief about what the algorithms can accomplish or how good a job they can do of identifying unlawful content is shaped by what vendors say is possible or what ad salespeople tell advertisers is possible. There's just this vast amount of unreliable information out there, and no particular reason to think that a remand in this case would bring the reliable information to bear for, you know, the kinds of real questions that might come up in another case.

Alan Rozenshtein: Yeah, I think that it is, it's very hard to predict this case even more than it's hard to predict most Supreme Court cases, in part because there's no obvious ideological valence here. There are good left wing reasons to like 230 and good reasons to dislike it, and there are good right wing reasons to do the same. So this is, this is kind of what I like to think of as like a open ball, right. And when it comes to the court, and you could see some really interesting cross-cutting coalitions. That also means that the chance for a really split, fractured decision where it's very hard to get consensus on anything is quite high, which is why I suspect that the most likely answer is something along what Hany suggested, which is something super narrow about the most targeted algorithm, algorithms, right.

Maybe they can go even farther and say, and the algorithm has to be such that the, you know, it's so personalized, so targeted, that the company is basically on constructive notice, right. That not just this piece of content will, will jibe with such and such user, but that it's terrorist content, right. And then that will then cause, you know, years of mishegoss at the lower court trying to figure out what in the world that means. It's not the most satisfying answer, but I suspect it's the most likely answer.

And then the question, you know, from my perspective is, is that enough to freak the companies out so much that they go and they cash in all their chips and reopen this issue in Congress? Right. Because if it is, then my then my priors have been satisfied, right. I mean, you know, if you don't have to, if you can, if you can get Congress to clarify without burning the whole House down, right, if you just, you know, set the set the second bedroom slightly on fire, that might be just that might be just fine. And so that is my cloud of plurality guess of what will happen. But who knows?

Quinta Jurecic: All right. Well, we're coming up on time, so I wanted to give you all the space if you have any final thoughts to share with the viewers about, about the case, if there's anything in

particular you're going to be looking for during oral argument that you're going to be keeping an eye out for.

Daphne Keller: I'll go first. So I think it's important to situate this ruling in the broader context of things playing out over the next year or so. So we've talked about the Netchoice cases and how these completely contrary obligations to carry content might come up in the next round of court hearings. But also the ruling in Gonzalez will probably come out June-ish and about a month after that is when all the big platforms have to start complying with the Digital Services Act in the EU, which has a completely different approach to all of this, you know, very procedure-based, very regulatory. And we might wind up with conflicts or weird alignments between what platforms are supposed to do under whatever the Supreme Court says and what we know the DSA says.

At the same time, we're in the middle of all of these layoffs we have at platforms, they are firing the people who would be capable of complying with either the DSA or whatever Gonzalez tells them to do. And we have the Twitter debacle playing out. There's just the layers of chaos and potential for uncertain results from all of this, including the Gonzalez opinion, go very deep.

Hany Farid: I'll also point out that in many ways we are dealing with the problems of the last decade and we have a whole new front emerging on technology, which is the AI revolution. And we haven't really started thinking about this seriously. We need to do better in the future. We dragged our feet to address real online harms and we dragged our feet for 20 years ignoring the problem. And I think that given how fast technology has moved and is continuing to move and seems to be accelerating, we need to do better in the future. We need to get out ahead of these problems and not wait until they get so bad and then we start overreacting to these problems.

Alan Rozenshtein: So for me, my kind of final thought and the thing I'll be looking for in the oral argument is less about the details of this case, though obviously that matters, but what the— for lack of a better term— vibe, is in the Supreme Court about how it thinks about the internet. And what I mean by that is there was a period, I'd say about roughly 20 years from 1997, which is the ACLU v. Reno case, which struck down the censorious parts of the Communications Decency Act to 20, the 2017 Packingham case, which is not that important jurisprudentially, but does have kind of Justice Kennedy talking about the internet. And for those 20 years the, the dominant idea was that the internet is this amazing public square. It's like kind of just a good thing. We should maximize speech, we should maximize freedom, right.

And for lots of reasons, you know, the 2016 election and 20 and January six, I mean, all sorts of things, the last couple of years, I think there's been a cultural change around that. And what I want to know is how is that cultural change filtered into the Supreme Court? Because I think what we don't yet have is a good model for what is the, what is the Supreme Court's theory about the internet, right. We don't know what the Supreme Court's internet law is. And I think this is our first chance to get some clues about how at least different justices think about the Supreme Court, because I think the days of, you know, the internet is this amazing thing, it's a force for free speech good and God bless Silicon Valley, that's over. That's just over. And what's unclear is what comes next.

Benjamin Wittes: I would just like to close us out with the observation that there is one big internet phenomenon that is definitely not protected by Section 230. And that is Chat GPT, which is generating its own content. And it cannot whatever Chat GPT produces cannot be said to return, to merely respond to a user request. It is not third party submitted content, it is algorithmically created content, and Microsoft has just incorporated it into the new Bing. And so this is the next wave, and 230 does not even purport to address it by its terms. And so Hany's point that this is last years or last decades question, not the coming decades question, is clearly, clearly correct. It would be good if we could at least get to some kind of stability on that stuff before we turn the world upside down technologically once again.

Quinta Jurecic: I look forward to that litigation. With that, we're going to close out. Thank you to all the panelists. This has been a great discussion.