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Tech Takeaways: SCOTUS Weighs in on Pivotal Tech Cases

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The Supreme Court heard oral argument last week in cases that will have extensive implications for online platforms, and, more broadly, for internet speech across the board. *Gonzalez v. Google*, in particular, may result in a first-of-its-kind clarification of the scope of 47 U.S.C. § 230.

Section 230 protects online platforms by, *first*, stating that they shall not be "treated as the publisher or speaker" of any content posted by third parties, and *second*, clarifying that this immunity also applies when online platforms moderate and remove content. The question presented in *Gonzalez v. Google* was whether online platforms can assert 47 U.S.C. § 230 immunity against claims brought under the Antiterrorism Act alleging content curation algorithms facilitate terrorist acts. A second, related case not directly implicating § 230, *Twitter v. Taamneh*, was also heard this week, and could have similar implications — it similarly deals with whether platforms can be held liable for aiding and abetting terrorism for failing to remove content and accounts promoting it.

The *Gonzalez* Petitioners' main contention at oral argument was that, in generating thumbnails and using algorithms to display them to users, Google – through YouTube – generates and communicates its *own* content and therefore may not rely on § 230's liability shield, which is only available as a defense to claims premised on *third-party* content.

Thought not a party, the Department of Justice also participated. In December, the DOJ filed an amicus brief asking the Court to vacate the appeals court ruling that had found Section 230 protected Google from being liable under U.S. antiterrorism law. At oral argument, the DOJ argued a sort of middle ground – that Section 230's protections should be read more broadly than Petitioners' claim, while also distinguishing between platforms' *speech* and their *conduct*. Its main contention was that courts frequently rely on § 230 to dismiss claims that would more properly be dismissed for failure to adequately allege a violation of the substantive law underlying a plaintiff's claim. In other words, the DOJ urged the Supreme Court to correct an *overuse* of 47 U.S.C. § 230's liability shield, and it minimized concerns about a potential barrage of new lawsuits. And in any event, the DOJ argued that *Congress*, not the courts, should worry about any possible message that would be sent to potential plaintiffs about the costs and benefits of litigating against online platforms.

Certain members of the Court – Justices Roberts and Kavanaugh, in particular – seemed not to buy this argument. In questioning the DOJ, Justice Roberts indicated the DOJ's congressional primacy argument did not give sufficient attention to the likelihood that Antiterrorism Act claims would be far outnumbered by, for instance, antitrust claims. The DOJ's response was that such antitrust claims may very well have merit, and that it would be inappropriate to allow § 230 to chill antitrust enforcement. The oral argument therefore presented the DOJ with an unexpected opportunity to weigh in on antitrust policy, even if briefly.

The Supreme Court also addressed arguments from the Respondent, Google, which supported an expansive reading of § 230 immunity. In a nutshell, Google emphasized that § 230 was enacted in part to preserve and stimulate the free market, and argued that the Supreme Court should not dial back the expansive protections lower courts have settled on. Relatedly, it argued that Congress, not the Supreme Court, should take the first pass at calibrating internet safety policy and online platform immunity.

In this way, both sides attempted to frame their respective positions as an appeal to the primacy of Congress in policymaking. It remains to be seen which side's framing will prevail.

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