Revoking the protection of section 230

Executive Summary

Background: In 1996, Congress sought to protect an interactive computer service provider when voluntarily restricting offensive materials acting as a "Good Samaritan" in an effort to help rid the internet of filth and protect our children from harmful content online. Congress resolved this by delegating regulatory "agency" authority, section 230's civil liability protection, directly to private entities. *Title 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material* passed into law.

The Law: Title 47 U.S. Code § 230 is an administrative law which provides civil liability protection when a private entity takes "any action voluntarily [] in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected". Private entities are acting as regulatory agents of Congress. "Agencies are delegated power by Congress…, to act as agencies responsible for carrying out certain prerogative of the Congress *(block or screen offensive materials).* Agencies are created through their own organic statutes *(section 230)*, which establish new laws, and doing so, creates the respective agencies to interpret, administer, and enforce those new laws. Generally, administrative agencies are created to protect a public interest rather than to vindicate private rights." Section 230 provides Administrative Agency authority (not to be confused with state action) to private entities. An administrative agency is "[a] government body authorized to implement legislative directives *(block or screen offensive materials)* by developing more precise and technical rules *(Community Standards)* than possible in a legislative setting. Many administrative agencies also have [] enforcement responsibilities.*"*

"The non-delegation doctrine is a principle in administrative law that *Congress cannot delegate its legislative powers to other entities*. This prohibition typically involves Congress delegating its powers to administrative agencies or to ***private organizations*** (interactive computer service providers)." In *J.W. Hampton v. United States*, 276 U.S. 394 (1928), the Supreme Court clarified that when Congress does give an agency the ability to regulate, *Congress must give the agencies an* ***"intelligible principle"*** *on which to base their regulations.* "[Justice John] Marshall stated that if Congress delegates quasi-legislative powers to another body, it must provide a "general provision" by which "those who act" can "fill up the details… This became known as providing an "intelligible principle" to which the agency is instructed to conform. The "intelligible principle" could be anything in the "public interest, convenience, or necessity" or considered "just and reasonable." In Mistretta vs. United States, Justice Scalia warned, "the scope of delegation is largely ***uncontrollable by the courts***, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation (i.e., section 230). The major one, it seems to me, is that ***the power to make law cannot be exercised by anyone other than Congress,*** *except in conjunction with the lawful exercise of executive or judicial power*."

Section 230 grants administrative agencies (private entities) under the "intelligible principle" of a **"Good Samaritan"** the authority to create any rule *they* deem to be "in the public interest", solely relying on the agency's (here a private entity's) *own views and policy agenda rather than requiring Congress to set forth objective guidelines.*

The Courts: Justice Thomas preciously noted in Enigma vs. Malwarebytes, "[C]ourts have extended the immunity in §230 far beyond *anything that plausibly could have been intended by Congress*… Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content… Courts have long emphasized non-textual arguments when interpreting §230, ***leaving questionable precedent in their wake***." Most, if not all cases seeking to surpass section 230 immunity, rely on untwisting the "non-textual" "questionable" interpretation of the statute. Most, if not all section 230 cases wind up in the very same California court system, since nearly all major technology companies reside in Silicon Valley. The California courts have consistently failed to address the most natural reading of the text by *giving internet companies immunity for the own content."* Although Justice Thomas welcomed an "appropriate case" stating, "in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms", the Supreme Court denied our (Fyk vs. Facebook) Petition for Writ of Certiorari.

Constitutionality: The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without *Due Process* of law", the internet being no exception. I have personally been denied Due Process by the California courts and United States Supreme Court, when a government authorized "agent" (Interactive Computer Service Provider) took action to deprive me of my liberty and property online, under protection (section 230) of law. Under 5 U.S. Code § 706 - Scope of review, when an agency takes an agency action (the agency here being a private person), "*The reviewing court shall -- hold unlawful and set aside agency action, findings, and conclusions found to be* -- (A.) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B.) contrary to constitutional right, power, privilege, or immunity;…" Section 230 prevents all scope of review by providing "immunity" for any and all agency actions, regardless of whether the action is "arbitrary, capricious, and abuse of discretion or… contrary to constitutional right". In other words, section 230 "protect[s]" *(immunizes – aka denies Due Process)* when an "Interactive Computer Service Provider" *(the agency)* takes *"*any action *(agent action)* to restrict access to or availability of material *(liberty and/or property)* that **the provider**… **considers** *(arbitrary, potential abuse of discretion while relying on the provider's own views and policy agenda)* … whether or not such material is constitutionally protected" *(contrary to constitutional right)*. Section 230 is unconstitutional under the 5th Amendment based on the principles of the Non-Delegation Doctrine and Void for Vagueness Doctrine. "Under [the] vagueness doctrine, a statute is also void for vagueness if a legislature's delegation of authority to judges and/or administrators is so extensive that it would lead to ***arbitrary*** prosecutions (restrictions). Furthermore, section 230 is an *immunity from suit.* According to the restrictive theory "the immunity of the sovereign is recognized with regard to

sovereign or public acts of a state, but not with respect to private acts." In other words, states *(here private entities)* should enjoy immunity from suits arising out of the exercise of their ***governmental functions***, but not from suits arising out of the types of activities in which private parties engage." In contradiction to the restrictive theory, section 230 allows both private and governmental function immunity simultaneously. In Barnes vs. Yahoo inc. the 9th Circuit Court determined, "[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." If the 9th Circuit is correct, that would also include unlawful behavior such as antitrust action such was the conclusion in Fyk vs. Facebook. All agency actions cannot logically or legally be immune from suit and an administrative law such as section 230 be Constitutional under the 5th Amendment's Due Process clause.

Case Law: In the Carter vs. Carter coal mining case, Justice Sutherland delivered the opinion, *"[t]he power conferred upon the [PROVIDER] is, in effect, the power to regulate the affairs of an unwilling [USER].* ***This is legislative delegation in its most obnoxious form****; [Section 230 does not confer power] to an official or an official body, presumptively disinterested, but to* ***private persons whose interests may be and often are adverse to the interests of others in the same business*** (Fyk vs. Facebook)*. ... The difference between [operating an interactive computer and advertising service] and regulating (restricting) its production (materials) is, of course, fundamental. The former is a private activity; the latter is necessarily* ***a governmental function****, since, in the very nature of things,* ***one person may not be [e]ntrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment,*** *that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Poultry Corp. v. United States."*

In Conclusion: The Social Media Freedom Foundation (SMFF) non-profit organization was founded for the sole purpose of protecting freedom of expression online. The California Courts have consistently failed to apply and/or resolve the textual interpretation issues surrounding section 230. We are moving away from a textual approach and towards a novel Constitutional approach. The courts denied me Due Process. My case was dismissed under section 230(c)(1). I now have the standing to sue the government itself. In other words, I had to lose my lawsuit in order to gain the standing to pursue the United States Government over section 230's Constitutionality because the statute (section 230) provided immunity to private persons (Facebook) when they "arbitrarily" restricted my liberty and property under "protection" of law. There are fundamental principles in administrative law that an agency must conform to, but in the case of section 230, they do not. The courts must lay down an easily understood "intelligible principle" upon which all of its regulations (Community Standards) must be based. Section 230 maintains the "Good Samaritan" "intelligible principle" (hence the quotes). The agencies regulations and enforcement must be "in the public interest", have measurable bounds and be

uniformly enforced. Antitrust or anticompetitive restrictions are diametrically opposed to being a "Good Samaritan" acting "in the public interest". In addition to enforcement guidelines, all regulatory agents must be US citizens and have no financial interest in the business or entity they are regulating. 47 U.S. Code § 154 - Federal Communications Commission "Qualifications: Each member of the Commission shall be a citizen of the United States. No member of the Commission or person employed by the Commission shall be financially interested [in any company it regulates]." If an agency takes any action, the restricted entity is entitled to his day in court (Due Process). Section 230 specifically precludes any agency action from being subjected to a Scope of Review.

This Constitutional challenge will be filed in the Southern District of Florida and will remain in Florida since we are pivoting away from suing any technology companies who maintain venue in California. We are no longer hoping for California to one day fix the textual mess they have made of section 230. Our focus is instead, focused on Challenging the Constitutionality of section 230 under the 5th Amendment, specifically because service providers are private entities. We will be relying on my standing, which arose out of my previous suit. Carter vs. Carter Coal mining makes clear, a private entity cannot lawfully be entrusted with the authority to regulate the liberty or property of another private entity who is often in the same business. Section 230 plainly lacks any/all Congressional, Executive and/or Judicial oversight and it must be repealed under the 5th Amendment.

This case will present an opportunity for the State of Florida to ally itself with the SMFF and bring an end to section 230's unconstitutional authority. It presents an opportunity to seek injunctive relief heading into a contentious election year and presents an opportunity to align with Congress', the current President's and the former President's goal of ending big technology's reign over free speech and the free market. This case effects everyone who seeks to express themselves online no matter what your political party, age, race or gender may be. This Constitutional Challenge, undertaken by the Social Media Freedom Foundation, on behalf of myself and every other American who has been harmed by section 230's unconstitutional protection, may in fact prove to be one of the most historical cases in modern history.

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