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Hello, everyone.

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I'm Lawrence Walters of Walters Law Group, and I'll be your presenter here today. It's been a few years since I've done one of these LexVid CLE presentations. And it's good to be back. I appreciate all the positive feedback on my prior presentations. It's much appreciated. We've got a good one for you here today. It's entitled section 230, the First Amendment of the internet. When I first started dealing with section 230 issues 20 years ago, very few people ever heard of the law, including many lawyers. But now you can hardly go a day without hearing about section 230. In the news, or in the headlines. It's gotten more attention than just about any other federal law these days. And it's become very important for lawyers to learn about, because as we'll see, it can affect many different practice areas and fields that lawyers practicing in their daily practice. And it will certainly become an issue anytime you're dealing with any sort of online computer service. So turning to slide two. So what is section 230? And why is it such a big deal? A single sentence of Section 230 is largely responsible for creating the internet as we know it. These 26 words on the slide allowed the internet to flourish, and develop into the web 2.0 that we all know and use every day. This immunity is responsible for the development and operation of platforms like hosts and social media sites. Blogs, dating sites, like match.com are plenty of fish, online marketplaces like Amazon or eBay, service platforms like Airbnb, or thumbtack. Slide three, those 26 words along with the rest of Section 230 can impact numerous claims that lawyers deal with routinely. The immunity provided to online service providers, bars, almost all civil claims, and even some criminal prosecutions. As long as the content that is posted is posted by a third party user, as we'll see, service providers have the ability to with immunity, remove or alter or hide content, or even how to display content, or to decide whether to issue or terminate an account to a user.

Lawyers bringing claims must understand the scope and the relevance of Section 230. Because you don't want to be that state court lawyer that asserts a claim against an online service provider, only to find out that your claim is completely barred by section 230. And we've seen it many times. Attorneys threaten these claims only to realize that section 230 provides a complete bar to any kind of recovering. In the early days of our practice, we had to develop a form letter that explained what section 230 was and why none of the claims that were being asserted, whatever survive in court and would be immediately dismissed. At the end of this course, you won't be that lawyer, you will know the bounds of Section 230 what claims are prohibited and what claims are allowed against online service providers. Now, I'll be using the term online service providers or platform operators to describe the types of entities protected by section 230. The statute, as we'll see actually uses the term interactive computer service providers, which is a bit cumbersome, so I'll be referring to them as platforms or online service providers. You'll also see these companies referred to sometimes as online intermediaries. That all means the same thing. And that's simply a company that operates to allow third parties to post and publish content on a platform. And with the popularity of social media sites, like blogs and review sites and platforms like Amazon. This includes most websites that we use every day. The scope of Section 230 also, as I mentioned, extends to criminal prosecution. So that can be very important to know when advising a computer service on any potential criminal concerns at the state level. But most importantly, section 230 protects important first amendment rights and the free expression rights of the users. If this immunity did not exist, platforms would be forced to engage in widespread censorship of their user content to avoid endless litigation and criminal prosecution based on the content of user posts. And finally, section 230 protects online innovation by allowing platforms to launch without the constant threat of litigation and essentially being sued out of existence.

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Slide for a separate section of Section 230, called the Good Samaritan provisions encourages platforms to take down illegal content or offensive content without being sued for the decisions to remove or hide or delete that content. This part of the law allows online service providers to remove content that's obscene, lewd, lascivious, filthy, excessively violent, harassing, and otherwise objectionable. Now that last portion of Section 230 is good samaritan provision allows online service providers to remove virtually any content that is inconsistent with their terms of service, or that they simply don't want on their business model, given the nature of the platform. If this were not so, online service providers would be required to publish anything that user submitted, and potentially be responsible for it, if section 230 did not exist, so this good samaritan provision allows for the removal or deletion or hiding or blocking of content that the service provider doesn't want on the platform. So slide five, before we get too deep in the substance of this, I'd like you to imagine a world without section 230. It would be a world without social media platforms like Facebook, Instagram and Twitter. The legal risks associated with posting social media posts by third parties would simply be too great. There would also be no online seller

marketplaces like Amazon or eBay, or Craigslist. The liability associated with the advertising and selling of products would be too large and would simply overtake the sites and caused them to shut down or maybe only do business with carefully vetted large sellers of products and services. There would also be nowhere to get feedback on services and products that you might want to purchase in the marketplace. So there would be no Yelp or ripoff report or avo.com that many lawyers use and rely upon for reviews and business. The connectivity and service referral tools that most of us use on a regular basis, like Uber, or Airbnb or Zillow, or doordash, would never have launched, their lawyers would had to have told them that the legal risks of litigation and liability, potential criminal prosecution would all be too great to take on the risk of launching a new platform like that. So in short, there would be no web 2.0 that we know today, we'd be back in the era of individual websites operated by individual website operators with no connectivity, no user content, no social media sites, and no referral tools. So slide six, the best place to start with any discussion of Section 230 is what the law looked like before section 230 was passed. This was the early 90s when the internet was just starting to flourish. And people had moved past AOL and chat rooms and started to recognize the real full potential of the internet and communications online. Anyone with access to the internet can launch their own website, or participate in online discussions with the entire world. online service providers were also starting to recognize the opportunity provided by launching platforms that allowed third party users to communicate but they were operating in uncharted territory from a legal perspective. The closest analogy that the courts could draw was to print publishers like newspapers or magazines. That seemed like a natural comparison. And the courts went with that for a little while until they started to dig into how the internet really operates and functions. Unlike a newspaper that might consider publishing say 25 to 50 articles in a particular periodical. online platforms publish content from millions of authors. The content change minutes to minute, the analogy simply did not work. The online platform providers could not vet and evaluate the content

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flowing through their servers on such a massive scale. nor could they really be expected to any effort to do that would slow down the pace of user communications to a point where would come to a screeching halt. online platform providers could not be in a position to determine whether or not something was true, or whether somebody had the rights to a particular piece of content, or whether a particular complaint was valid. Every time a complaint was launched, or every time a piece of content was published on their servers. The flow of data through an online platform is simply too enormous. Nothing like the print world had ever seen. platform operators were simply not newspaper editors. We needed a new legal construct to address this new communication platform the likes of which the world had never seen. Slide seven so let's take a look at a couple of cases from the pre section 230 environment This will help illustrate the problem Congress needed to address. So as I mentioned before section 230 online platform providers were treated like print Newspaper Publishers and newspapers and magazines. In the print world, those editors

are responsible for the content they publish, and they can be sued for things like defamation or invasion of privacy, violation of publicity rights, and intentional infliction of emotional distress. The two major cases from this era helped shape the legal environment for the cases to come. And the first is the chubby versus compuserve. case. In that case, compuserve provided a newsgroup forum, which hosted a defamatory article published by rumor mill about a competing newsletter that was developed by the cubby. Cubby then sued compensator for defamation. And that case, the court held that platforms could be subject to defamation claims for their hosted content. And that was a pretty significant development because that created some substantial liability for online service providers. However, the court there said as a mere distributor of the defamatory material rather than a publisher of it. The court analogized a host as a distributor as opposed to a publisher, the ISP could only be liable if the distributor knew or had reason to know of the defamatory nature of the hosted content. In that case, the court found that there was no liability because there was no evidence that compuserve had reviewed the content that it hosted on its platform. This naturally discouraged online service providers from engaging in any effort to identify or that defamatory material on their servers. The next most important pre 230 case was the Stratton Oakmont versus prodigy case referenced on the slide. prodigy was not so lucky as compuserve due to their efforts to create a family friendly service that filtered user content and tried to make it safe for users. In that case, a user of prodigies money talk bulletin board made a defamatory post, claiming that Stratton Oakmont and its president committed criminal and fraudulent acts related to an IPO. Here the plaintiff showed that prodigy did in fact exercise editorial control over the bulletin board in a few ways. One, it created and posted user content guidelines on the site, saying what you can and can't post. It enforced those guidelines by what they called board leaders or what would be called now moderators, people who looked at the content and tried to identify the problematic material. And finally, they use some automated screening software to remove offensive language from the site. In that case, the court held that project could be liable for defamation, since it made a good faith effort to identify objectionable material, and that the court had said in that case, prodigies conscious choice to gain the benefits of editorial control has opened it up to greater liability than compuserve and other computer networks that made no such choice. So the net result of those two cases was to encourage a complete hands off approach and a notice and takedown regime where platforms could be liable for their content only if it was called to their attention, or if they found out about it somehow. Also, the more content moderation that the platform did, the more likely they would be liable. This created what is known as the moderators dilemma. Platforms were encouraged to open themselves up to any content on the site at all, with no moderation or controls. lest they be punished for actively searching for offensive or illegal content. The moderators were in a dilemma do we moderate? Do we not moderate? Do we look for bad content, do we not. And that caused a significant problem for platform operators. At the same time, these cases also created what's known as an opportunity for the hecklers veto,

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meaning somebody could simply submit a complaint to a service provider complaining about some material, and they would essentially be forced to take it down. Because as soon as they know about it, they can be potentially liable for it. And so this type of regime could be misused by competitors or enemies are anybody that wants to enforce their version of value and decency on the internet against an online platform provider. So the incentive to engage in no moderation by platforms was becoming a political problem for Congress, as a result, largely of the cyber porn Panic of the 1990s and Congress's concern about easy access to adult material by minors on the internet. With no incentive to filter the content. It was expected to very quickly proliferate online. So Congress realized that it had to do something pretty quickly and this was unsustainable. So slide eight. Before we get into what section 230 says, I want to mention the First Amendment underpinnings of Section 230. For decades, the courts have recognized that that constitutional there are constitutional concerns with forcing distributors of protected speech to self censor this contest that dates back to the Bantam Books case back in 1963, or where Rhode Island had created a commission to identify problematic books, and then notify the police that these books were bad. And thus, there was an incentive for the booksellers to not sell those particular books. And the court found that that was problematic, it was not sufficiently protective of first amendment rights and needed a constitutional fix. Other courts have recognized the first amendment rights of platform operators to make editorial decisions, like section 230 does. And that's the Prager University cases. One is 951 fed their 991 from the Ninth Circuit in 2020. Freedom watch versus Google 816 fed a PBX 497 from the DC circuit. So there are already cases that recognize the First Amendment supports what section 230 does. Why isn't that enough? Why isn't the fact that that the First Amendment allows for these principles to be enforced or recognizes these underpinnings sufficient to protect online service providers? Well, this gets into the heart of the matter. Section 230 is an immunity. platforms are not required to litigate novel or complex issues of constitutional law, every time they get sued. For a piece of user content, the threat and exposure to litigation would be enough to force self censorship, broad self censorship of any user content. And that would result in intolerable burdens, both free expression and platform operations. So the look we're all lawyers, so we know what it takes to litigate a case to conclusion, the burdens of discovery and the expense to the parties of litigating a case, section 230 is different section 230 is an immunity. And it's designed to cut these burdens short so that platforms are not exposed to the burdens and expensive litigation, as we will see.

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Turning to slide nine, interestingly, section 230 was a bit of an accident by Congress and unplanned immunity. In some ways. The house was pushing the communications decency Act, which was a law that was designed to prohibit all indecent content on the internet. The Senate was pushing for protections of online service providers and deregulation of the internet to allow it to flourish as a new Bastion for user communication and free speech. And so there was political

tension between the two bodies. And ultimately, the bill was put together in both the communications decency act and section 230 into one bill called the communications decency act of 1996. And that bill prohibited all indecent content on the internet, and also included these immunities that we'll discuss for online service providers. Now, the ACLU sued against the communications decency act provisions, but did not sue to enjoin the section 230 provisions and ultimately the ACLU was successful in their lawsuit and the Supreme Court in 1997. And ACLU vs. Reno, Reno versus ACLU, struck down the communications decency act provisions leaving section 230 intact. So this bill that was designed to be a balance between ridding the Internet of indecent communications, and protecting online service providers was cut in half and only the decency or in decency provisions were struck down by the court, section 230 was not challenged. So it remained and therefore allowed the internet to flourish, and allowed for the development of web 2.0 that we know today. The turning to slide 10. Let's get into the specifics of Section 230. And what it says first, section 230 was based on certain findings of Congress. Ideally, Congress had identified that the internet was a rapidly developing medium that it created extraordinary advances in the availability of educational and informational resources that platforms offer a great degree of user control over the content. The Internet offers a forum for true diversity of political discourse and opportunities for cultural development. The Internet flourishes with a minimum of governmental regulation, and Americans are increasingly relying on interactive media for politics, education and entertainment, more so than even television or newspapers. So with that Congress identified certain policies, they wanted to promote the development of the internet. They wanted to preserve the free market unfettered by state or federal regulation, encourage the development of technology maximize user control, and remove disincentives for blocking content, like the notice and takedown regime and the earlier cases we discussed. And they threw in vigorous enforcement of federal law enforcement as they commonly do. So in so in slide, sorry, slide 11. Here we have the text of Section 230. This is what resulted. Most important parts of it are on this slide. And the first portion, Section C, is by far the most important. This is again, the 26 words that created the internet. The section created the broad immunity for platforms that publish third party speech, platforms would now be immune from claims arising from a content of user posts. So unlike a newspaper or magazine, that can be sued for defamatory stories, online platforms are now immune from those claims. And this immunity extends far beyond defamation claims, as we'll see to any type of tort or statutory claim or common law claim unless specifically exempted, and we'll talk about the exemptions. I commonly refer to Section 230 as an immunity, as most lawyers that practice in this area do. But the courts have not really settled on what that means yet. Is it a real immunity like sovereign immunity or qualified immunity, where you get an immediate appeal? If you lose, where you cannot proceed past the initial pleading, you're entitled to an immediate decision on whether or not immunity applies. Some courts find that that's the case that it's like an immunity. And other courts interpret the law as more of an affirmative defense that needs to be actually proved like any other affirmative defense. So those issues are all kind of developing in the courts. Most often, it doesn't come up, because the courts typically find in favor of Section 230 immunity. So you know, that

gets appealed. And it typically happens

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pretty early at the pleading stage. But a lot of those issues are still being developed in the courts. But Congress did realize that immunity from publication of third party content was not enough. So there's more in Section 230 on the slide. And they wanted to make sure that platforms would not be punished for the decisions to remove content, or to terminate user accounts or to alter or hide content. So section 230 includes the provisions of C two A, which is on the slide, the Good Samaritan provisions that talk about immunity for actions taken in good faith to block hide, remove or edit user content. This is viewed more as a safe harbor than an immunity by the courts. If content moderation is done in good faith, and the material falls into one of the categories listed on the slide, the platform operators immune if it decides to remove or alter or terminate that content. The last category the otherwise objectionable, as I mentioned, allows broad removal writes by any of the platforms and has generated much of the recent controversy over viewpoint censorship by big tech, and that they are protected from their decisions to remove content, even based on viewpoint. Now, section, C two B is the final piece of Section 230 immunities regime, it provides protection for content moderation tools. So that section allows companies to develop virus protection software or malware blocking tools, without being liable to the providers of dangerous software, or viruses. Now, as you might expect, you know, some of the providers are not happy about being included on that list. And so they're likely to complain about it or even Sue about it. And Congress recognized that so they provided protection to the developers of those tools to allow for an encouraged broad development of these content moderation tools, without the threat of constant lawsuits over who's included as a malware provider. Aside from those provisions, section 230 has a notice provision that basically says you need to advise users, the existence of parental filtering tools, and their availability on the internet. So basically, that can be accomplished by including a section in your user agreement as a service provider saying to users, hey, you can find parental filtering tools on the internet. Alright. So these this combination of immunity, content moderation, and user filtering, option notifications, make section 231 The most consequential and successful statutes passed by Congress in the early days of the Internet, and allowed many of the online platforms that we use today to develop. Alright, section. I'm sorry, slide 12. This is the the early cases a couple of early cases dealing with section 230 immunity. I won't go that into them in detail in light of time, but I would encourage you to take a look at them. Essentially, the courts right off the bat recognize that section 230 provided broad immunity to online service providers that this immunity was not limited to defamation claims. The courts rejected this idea that online service providers were similar to magazines or newspapers rejected the notice and takedown regime and rejected the distributor analogy that was used in the earlier cases and found that section 230 carves out a special place for online service providers and allows them to remain immune from claims based on content posted by users. One of the key quotes from the Blumenthal versus drudge case is when the court said that Congress decided not

to treat providers of interactive Computer Services like other information providers, or such as magazines or newspapers, or television or radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material, written or prepared by others. While Congress could have made a different policy choice, it opted to hold interactive Computer Services liable for their failure to edit, withhold, or restrict access to offensive material disseminated through their medium. So if you look at these cases, you'll see that Congress passed the law, the courts interpreted it very broadly, and online service providers remained protected from virtually all claims associated with user content, or the filtering of user content.

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Slide 13 Now we can talk about some of the claims that are barred by section 230. Then we'll get into what claims are allowed by section 230 are exempted from the immunity. Section 230 prohibits a wide variety of claims, as I alluded to this slide identifies some of the categories. We talked about defamation. Advertising liability claims, claims for providing adult materials to minors, whether based on nuisance or negligence theories, discriminatory housing ads, threats, terrorism, products, liability, even state criminal prosecution. This next slide 14, illustrates some of the cases that address each of these issues and the categories. So we talked about Zerrin, and dredge earlier, advertising got an example of Gentry versus eBay 121 Cal reporter second 703. The adult content cases providing content to minors, the nuisance got Kathleen versus city of Livermore 87 Cal app fourth 684 discriminatory housing ads, a very famous case Chicago lawyers committee for civil rights versus Craigslist. 519 fed third, six, six. As I mentioned, section 230, also protects against state criminal prosecution. And one of the targets of that type prosecution has historically been backpage.com. We'll talk more about them in a minute. But there have been some cases involving attempted prosecution of backpage or efforts to hold back page liable for violating criminal laws and Back Page had prevailed in those cases. And therefore, section 230 was interpreted to apply even to state criminal prosecution. So for example, you've got back page versus Hoffman 2013 Westlaw 4502097. out of New Jersey, this slide gives you a kind of an overall view of the types of claims and the cases associated with the broad scope of Section 230 immunity, as interpreted by the courts. Section 15 slide 15. Importantly, there are some limitations on the scope of Section 230 immunity, both from the statute itself and from court interpretations. So first, let's talk about the limitations on civil claims. one specific limitation on immunity is patent infringement. So you can still bring patent infringement claims against online service providers without running into section 230. immunity. Trademark Infringement, same thing, not barred by section 230 immunity. This can be a problem if user content includes trademarked images. Oftentimes, the online service provider has no idea that the trademarks are being used or posted by third parties, yet, the claims are not barred by section 230. So these trademark claims can fall Kind of a doughnut hole left by section 230, where the online service provider can be liable for user posted content. If it includes somebody's trademark. There are other elements of the claim that needs to be proved but it's not barred by section 230. publicity rights, this one is a little more

difficult because publicity rights claims can be treated either as intellectual property or a common law tort not involving intellectual property. If state law interprets the claim to be one that involves intellectual property under state law, then it could be barred by section 230 likely would be barred by section 230. Because section 230 includes a carve out that says that it has no effect on intellectual property laws. So you have to look at how publicity rights are interpreted in the particular court of the state that you're dealing with to determine if the claim is barred. Finally, copyright infringement claims are not barred by 230. This one is important, because there could be all kinds of copyright infringement claims brought based on infringing material posted by third party users. That problem is addressed by a different statute, called the DMCA the Digital Millennium Copyright Act 17 USC 512 C, which provides a safe harbor a separate type of safe harbor for copyright infringement claims so long as the online service provider registers designated agent with the copyright office and posts notice and takedown policy and adopts a repeat infringer policy. But that's a different area of the law, and deals exclusively with copyright infringement. For our purposes, it's important to know that copyright infringement claims are not barred by section 230.

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All right, slide 16. So aside from the civil limitations on section 230, section 230 makes it clear that it does not apply to federal criminal prosecution. So all federal crimes are fair game to assert against an online service provider. And there have been some federal criminal prosecutions against online service providers, including claims brought against websites such as escorts.com, and my red book calm and rent boy calm, largely involving alleged prostitution or money laundering occurring on the site as a result of the third party user advertisements found on those sites. And those cases would not be barred by section 230. They were all resolved by way of please. So we don't know how the courts would rule. There is an open question as to whether or not claims federal criminal prosecution that is based on violation of state law would be barred by section 230. So here, we're talking about kind of a house of cards, if the state criminal prosecution would be barred, but the federal criminal violation requires that you prove a violation of state criminal law. Is the whole prosecution barred? It's a question that has not been answered by the courts has not been litigated. But it's a potential issue that could come up. Also, as as of April 2018, due to an amendment to Section 230, created by foster acesta, that we'll talk about, there are other criminal claims that are not barred by section 230. So these include actual civil claims that are brought under Section 1595, which is the sex trafficking law, state criminal prosecution if it constitutes a violation of a new federal prostitution law that we'll talk about state criminal prosecution if it violates sex trafficking laws, and state ag actions called parents per tie actions, which are essentially, state attorney general efforts to enjoin or prosecute violations of state law for the interests of the state. All right, now, slide 17. Now that we know what claims are covered by section 230, and the statutory exemptions, let's talk about how people try to get around section 230. immunity and what claims might be allowed?

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The short answer is it's not easy to do. Section 230 does not allow for creative pleading around barred claims. So examples of this are, you know, Google versus God or God versus Google 640 bed sub second Northern District of California, their Google was sued because Google had suggested certain keywords be used in AdWords advertising by customers, and they were sued as a result of fraud claims. The court rejected the argument based on the fact that the user had to adopt the words suggested by Google as their own content. So even though it might have been Google's suggestion, the user had to take those terms and use them as their own content before the average tising could be published, so the claims were still barred. But the court noted that the plaintiff has not come close to substantiating the labels and conclusions by which she attempts to evade the reach of Section 230, which must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly protracted legal battles. There we get back to the immunity provided by section 230. to essentially be free from litigation not just from liability. Herrick versus Grindr. There a man posted fake profiles on an app and attempt to send users to rape his ex boyfriend. And the the claim was based on products liability against Grindr, alleging that they were selling a defective product. The court rejected that theory under Section 230 cents. The basis of those claims still was the user posted content, the fake profiles and pictures and locations that were included in the fake profiles posted on the site. So you know, it wasn't the site's tools that created the problem. It was the third party user posts, hassle versus bird, five calcif 522. Their Yelp was found to be immune from a default judgment against somebody else ordering Yelp to delete defamatory posts. So there it's important to know that section 230 can even extend to injunctions against non parties, even where the online service provider is not made a party to the suit. And Kenzie versus Yelp. That's another one 836 fed third 12 63/9 circuit rejecting claims of republishing content from another site, providing search engine text and a star rating. That was not sufficient to defeat section 230. immunity. Turning to the issue to the picture on this slide. This is an example of a trump twitter post calling protesters thugs Twitter had actually flagged the tweet for glorifying violence. But here what it shows is that Twitter has immunity for the content of Trump's tweet, but not for the material that's contained in the notification. So an online service provider can be immune for some content, but responsible for others, not an all or nothing thing. So the Trump tweet, that's third party content, Twitter's immune, their own comment and notification about it containing harmful material is Twitter's speech, and it can be held responsible for that. There have been a couple of cases that have allowed this pleading around section 230 immunity. Enigma software versus Malwarebytes. So recent case, involving that seems to be immunity for the moderation tools that we discussed. And there, the claim was based on anti competition anti competition animus was alleged, and that was found to be enough to get around section 230. Barnes versus Yahoo. That was a case of 5/73 to 96, where Yahoo was found to be not immune based on a promissory estoppel argument. Essentially, the user alleged that Yahoo promised to take down content, and as a result, created a promissory estoppel liability theory. And the court said, Well, once Yahoo made that promise, it altered the section 230 baseline and Yahoo could be responsible. That's one of the rare cases where this pleading around section 230

was allowed. Section, slide 18. Here we have some of the courts that have recognized situations where a service provider can be considered a content provider and excluded from section 230.

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So some examples of this is fair housing Council of San Fernando Valley versus roommates calm another famous section 230 case, it's 521. Fed 30 1157. They're the roommates comm site. Last section 230 immunity because it created the categories of housing ads that were found to be discriminatory, such as based on gender or age or marital status or race, you could select these different categories, and you'll find a roommate based on those prohibited categories. Since that was the activity of the site and the content of the site. Section 230 didn't apply. But a couple of other cases, Florida abolitionists versus Back Page 2018 Westlaw at 1587477. That was Middle District of Florida case involving sex trafficking allegations, where the court basically concluded that the backpage operation backpage site had materially contributed to the advertisements posted by the user. That was the allegation in the complaint. There was no finding on the merits. And yet the court said well, this is enough if you allege a material contribution to the The content, then that's enough to take you out of Section 230 immunity, kind of an outlier case. But it you know, we do have some decisions where courts have allowed claimants to plead around section 230 immunity, but it is very rare. Slide 19. Alright, let's talk a little bit about the back page problem. And issues with Back Page largely drove Congress to modify section 230 in 2018, through a law called fast acesta. By way of background on back page. Initially, Craigslist was the number one source of personal advertisings for adult services. And after some battles between Craigslist and State Attorney General's, in which Craigslist was actually winning based on section 230, Craigslist finally gave in to some political pressure and eliminated their adult services section from their site. All that traffic went immediately to backpage, which was the only other larger platform around that allowed for that type of material. So their business exploded, and the state attorney general started to focus on backpage as being a problem. And so they attempted to pursue Back Page backpage was sued many times by survivors of sex trafficking alleging that they contributed to the sex trafficking environment, or allowed people to post ads to traffic minors or coerced victims. And this became a political issue where the State Attorney General's could not get any traction on these cases because of Section 230, which protects platform providers including back page from the content of third party posts. Eventually, the Senate conducted an investigation found all kinds of alleged problems as a result of back pages operation, state of California tried to prosecute them. The case was dismissed initially on section 230 grounds. But then, ultimately, in April 2018, Congress passed fast acesta. And right before that back page was prosecuted. Now Congress had been arguing for years that it needed something like foster acesta to prosecute backpage and to take down that site and sites like it, but at the end of the day, the federal government was allowed to seize the site and take the site down without the need for this new law. However, the law came about anyway. So as we'll see, in slide 20, FOS acesta gives us the current version of Section 230. It made some changes to Section 230

and, and did some other things.

42:34

Basically, it created new carve outs to Section 230 immunity, and created a new subset of federal prohibition on prostitution, it prohibits the promotion or facilitation of prostitution using an interactive computer service. Now, the immediate impact of this new law was to greatly disturb the internet ecosystem, with many sites going dark shutting down completely. Craigslist eliminated its personal ad section completely directly as a result of foster saying there's no way we can know whether or not advertisements on our site somehow related to prostitution, or make prostitution easier, which is the standard imposed by foster acesta. And many other sites either blocked us users or moved overseas, some of them large mainstream sites like Facebook and, and Tumblr and others Instagram, eliminated all sexually oriented content, adopted new guidelines to prohibit either content or discussion or drawings of human sexuality. So this new law created a liability, one that Congress originally tried to prohibit, but one which created an environment for self censorship, and the platform's did. In fact, self censor censor pretty significantly, after Vasa sesto was adopted in April of 2018. There was actually an indictment against the website called city x guide, based on foster sesta. In 2020, there haven't really been any court interpretations of the law other than in one case that will discuss the Woodhall Freedom Foundation case, which found that the law could be adopted, interpreted very broadly to apply to even advocacy efforts, or anything that would make prostitution easier. So slide 21 is the actual text of fastest up and it's fairly long, but the bottom line is that it prohibits the promotion or facilitation of prostitution using a computer service. Before this, there was no similar law, there was no prostitution law. In the federal system, prostitution remains undefined. Nobody knows exactly what Congress intended by prohibiting prostitution in that all the states use somewhat different definitions or places where prostitution is legal, but this statute prohibits, broadly the facilitation or promotion of prostitution using a computer service and then creates some aggravated violations, if more than five people are involved, or if there's some reckless disregard for sex trafficking. There's also some expanded civil liability on slide 22. Talking about new claims that can be brought for anybody who is an aggrieved person. That's a victim of promotion or facilitation of prostitution, mandatory restitution provisions, slide 23. These are the new section 230 carve outs by foster acesta. Basically, any violation of 1591 is a sex trafficking statute can be asserted against an online platform and is not barred by section 230. violation of state law is allowed also not barred by section 230. If the conduct violates section 1591, again, the sex trafficking statute and then finally, violations of state law can be prosecuted against online platforms if the violation constitutes a violation of that 2421 a statute that I showed you the last slide related to promotion or facilitation of prostitution. Slide 24 talks about the state ag actions that are now allowed by the statute, which would not be barred by section 230. A can pursue these claims against online service providers. Slide 25 talks about a legal challenge a constitutional challenge to foster acesta that has been brought by the Woodhall Freedom Foundation, and other plaintiffs,

including Human Rights Watch and archive.org. Our firm is involved in that challenge, and it is proceeding through the courts alleging a violation of the First Amendment and the Fifth Amendment to the Constitution. The case was initially dismissed based on a standing issue. But that was reversed by the Third Circuit Court of Appeal. And the case is now back at the DC Circuit Court. And the case is being briefed on whether or not foster violates the Constitution. So some of these new restrictions and carve outs to Section 230 could be unconstitutional, are being challenged. And we'll see if if they survive the constitutional challenge that's pending.

47:13

The next slide, slide 26. As many viewers of this program know, section 230 is in the news regularly. There are constant efforts to amend or change section 230. Based on a lot of different political reasons, some have a problem with the immunity that's granted for third party content, claiming that it allows platforms to promote things like drugs or terrorism, or other kinds of pet political projects that they want to be able to pursue against online platform providers, as opposed to pursuing the the users who are posting the content. Others complain about the broad filtering, immunities the ability of a platform to be able to delete or hide or terminate any type of content if it's objectionable or inconsistent with its user terms. That has led to allegations of viewpoint censorship, particularly by conservative groups and the current administration that alleged that large tech platforms are not allowing certain voices to be heard, and are being more favorable to one side. Some of these amendments proposed amendment seeks something along the lines of a fairness doctrine requiring both sides to be heard. The reality is that under Section 230, online platforms are not required to be neutral. They do have their own editorial rights to be able to get rid of content or promote certain content over other content. And those rights are also supported by the First Amendment. So it'll be interesting to see whether any of these proposals get traction and are adopted. But there is bipartisan support for changing section 230 currently, and we may see some action in that regard in the very near future. Slide 27. You know, just kind of wrapping up here is some of the the pros and cons of amending section 230 things that should be considered from a policy perspective. You know, the first concern over content moderation by big tech is have platforms gone too far, in shutting down certain political viewpoints. Should they be required by Congress to publish both sides of an argument, as we discussed with the fairness doctrine that has not been enforced and was eliminated in the late 80s. When it comes to television. There's also a renewed interest in protecting children from exposure to age restricted content, or trafficking or for from exploitation by platform users. The courts have have spoken on these governmental efforts to declare adult content illegal or to impose age verification online and all those laws have been invalidated by the courts, both state and federal courts. So it'll be interesting to see whether those efforts continue to be pursued by the governor. But the broader question here is, who should be responsible for the illegal acts of the platform users. The platform is the messenger, and the user is the speaker. So which bears the responsibility? There are arguments now that the platform as the messenger bear some responsibility for the content

posted by the speaker. Some will point to this foster statute and say that that worked so well. By eliminating all the content we want wanted to eliminate and forcing that self censorship, we should do it with other types of content as well, like I mentioned with terrorism, or fentanyl or other types of criminal activity. And then there's a question of whether or not the content being posted is constitutionally protected speech. And not all speech about illegal activity is itself illegal, which is why you can have a magazine like High Times that talks about drug use, even though the use of drugs is illegal. And so you get into very difficult and thorny constitutional grounds when you attempt to restrict user speech about illegal activity, if the activity is not actually taking place. And then there's the issue of viewpoint neutrality, users are not required to be neutral. And platforms have their own first amendment rights to select the content that they want to display or not display. So should we require platforms to be neutral? And if neutrality is required, you know, who makes those decisions as what is neutral? Will it be the FCC or the FTC or some group of government appointed moderators? One of the proposals to change section 230 is the earnest Act, which would create a committee of people that would decide on essentially regulation of the internet and decide what is appropriate content moderation and age verification, blocking tools, issues like that. So we have to be very sensitive to who is making these decisions on behalf of the government if we are going to impose any obligation of neutrality.

52:06

And finally, it's important to consider the online innovation impacts. any effort to impose additional liability on internet platforms will cause a concern by the platform's and possibly even discourage them from launching based on the potential for tremendous civil or criminal liability. So we might not see you know, the next Uber or Lyft, or Airbnb, if section 230 is changed in such a way, so as to create great exposure for new platforms before they launch. So that brings us to the end. Hopefully, you've learned something about section 230. And it was a law that was accidentally created and has resulted in broad protection of free speech rights, both platforms and users, and allowed for filtering and removal of offensive content to maintain the business model that the platform wants to present to the world. There's a number of options on the table to amend section 230. We hope that you've been educated about that issue, as well as the claims that are allowed and the claims that are prohibited by section 230 as well as the recent developments in terms of FOS acesta I thank you for your kind attention, and I hope this has been informative.