

Client Alert: A No-Decision Decision: The Supreme Court Dodges Section 230

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On May 18, the Supreme Court issued a much-anticipated decision in *Gonzalez v. Google LLC*,^[1] the first case in which the Supreme Court has considered the contours of Section 230 of the Communications Decency Act, 47 U.S.C. § 230, known as the “twenty-six words that created the internet.”^[2] The Court declined to address Section 230’s applicability to YouTube’s recommendation algorithm, leaving the current Section 230 protections of algorithmically generated recommendations—as decided by lower courts—in place.

Section 230 provides internet platforms immunity from claims that “treat [them] as the publisher or speaker of” third-party content.^[3] This broad protection allows social media and other platforms to function and make content moderation-related decisions without the threat of liability relating to the user-generated content. However, critics have alleged that it removes accountability from platforms, and lawsuits such as *Gonzalez* have arisen to attempt to narrow the law’s scope.

Gonzalez, along with its companion case *Twitter Inc. v. Taamneh*,^[4] arose out of a series of terrorist attacks by ISIS, resulting in injuries and deaths. The plaintiffs—relatives of the victims—sued Google and Twitter under the Anti-Terrorism Act and Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333 (JASTA), for terrorism-related violations. The plaintiffs alleged, among other things, that ISIS posted links to recruitment videos on YouTube, which YouTube’s computer algorithms then recommended to users.^[5] The Ninth Circuit dismissed the case. It ruled that the majority of plaintiffs’ claims were barred by Section 230, and that others failed on the merits. In relevant part, the court ruled that Section 230 immunized Google from claims based on its recommendation algorithm recommending ISIS videos to users.^[6] In this, it joined other circuits, such as the Second Circuit in *Force v. Facebook*, in holding that algorithmic recommendations were covered by Section 230.^[7]

The Supreme Court granted certiorari on the question of whether and how Section 230 applied to targeted recommendations of third-party content. At the same time, it granted certiorari to *Twitter*, which alleged similar facts to *Gonzalez* but posed the question of whether and how platforms could be liable for JASTA on the merits of that claim. On May 18, the Court issued both decisions. It

rejected the plaintiffs’ JASTA theory of liability in *Twitter*, holding that plaintiffs had not alleged facts stating a claim under that statute. As a result, the Court in *Gonzalez* explicitly declined to address the Section 230 issue in a short per curiam decision, instead noting the claims likely failed on the merits and sending the case back to the lower courts to reconsider in light of the *Twitter* decision. Given the Court’s decision not to decide the issue, the robust Section 230 protections relating to recommendation and ranking algorithms articulated by the lower courts remain in place.^[8]

This decision is yet one more instance in which the Court has declined to rule on the parameters of Section 230, preserving the status quo for the digital ecosystem. However, cases raising similar issues are on the docket for next term. The Court has granted certiorari in two cases raising the issue of whether a public figure’s social media profile may be a public forum. Perhaps more notably, the Court may grant certiorari in two cases considering the First Amendment implications of state laws regulating social media platforms’ content moderation, in which the lower courts have split.^[9] The Court’s decision on these cases may impact platforms’ practices relating to algorithmic recommendations and content moderation more generally.

In the meantime, companies who have availed themselves of Section 230 protections should be aware other threats to Section 230 are lurking. Specifically, legislators on Capitol Hill have been and continue to debate Section 230 reform. Several bipartisan bills seeking to create exceptions or even sunset Section 230 are being discussed, and legislators this session have held hearings on the issue,^[10] perhaps demonstrating an increased momentum on the issue. Senator Richard Blumenthal—who chairs Senate Judiciary Subcommittee on Privacy, Technology & the Law—indicated as much in March of this year, when he stated that bipartisan support for Section 230 reform was growing.

Footnotes

[1] No. 21-1333, 598 U. S. ____ (May 18, 2023), available at https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf

[2] See, e.g., Jeff Kosseff, *The Twenty-Six Words That Created The Internet* (2019).

[3] 47 U.S.C. § 230(c)(1). It also immunizes platforms from claims arising from actions “taken 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.” 47 U.S.C. § 230(c)(2).

[4] No. 21-1496, 598 U. S. ____ (May 18, 2023), available at https://www.supremecourt.gov/opinions/22pdf/21-1496_d18f.pdf

[5] 2 F.4th 871, 881–882 (9th Cir. 2021).

[6] *Id.* at 891–95, 897–99.

[7] 934 F.3d 53 (2d Cir. 2019).

[8] See, e.g., *Force*, 934 F.3d 53; *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019).

[9] See *NetChoice, LLC, v. Att’y General of Fla.*, No. 22-393; *NetChoice, LLC v. Paxton*, No. 22-555. In January 2023, the Court requested the views of the United States from the Solicitor General.

[10] See, e.g., EARN IT Act, S. 1207; STOP CSAM Act, S. 1199; Rebecca Kern, *Senate panel advances STOP CSAM Act*, PoliticoPro (May 11, 2023), <https://subscriber.politicopro.com/article/2023/05/senate-panel-advances-stop-csam-act-00096426> (“[Senator Lindsay Graham] announced plans to introduce legislation with Sen. Sheldon Whitehouse (D-R.I.) in the coming weeks to sunset Section 230 two years after the bill would be enacted into law.”); Press Release, Sen. Richard Blumenthal, Blumenthal & Hawley to Hold Hearing on the Future of Tech's Legal Immunities Following Argument in *Gonzalez v. Google* (Mar. 1, 2023), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-hawley-to-hold-hearing-on-the-future-of-techs-legal-immunities-following-argument-in-gonzalez-v-google>

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