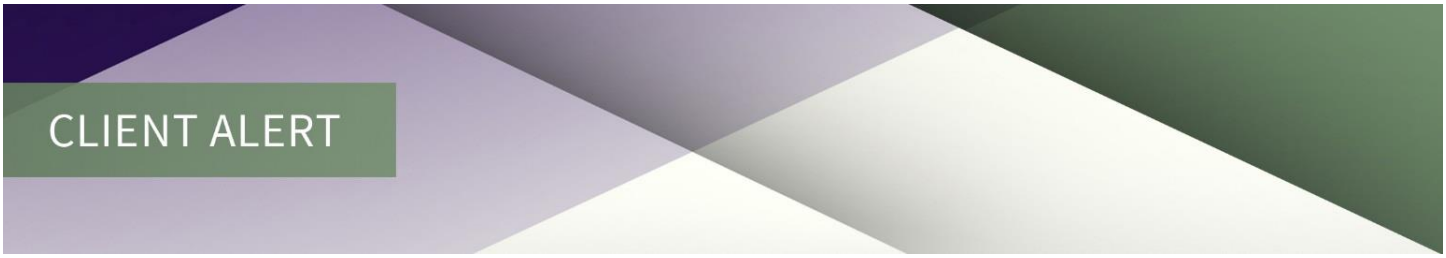

Gonzalez v. Google: The Supreme Court Leaves Section 230 Intact, For Now

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On Thursday, May 18, 2023, the Supreme Court decided *Gonzalez v. Google*, a case in which the Court had originally agreed to review the scope of Section 230 immunity for internet platforms' use of recommendation algorithms.[1] The Supreme Court ultimately did not address that question, leaving the prevailing law on Section 230 immunity unchanged for now.

Rather Than Confront the Section 230 Issues, the Court Resolved *Gonzalez* Based on the Merits of the Plaintiffs' Underlying Civil Aiding-and-Abetting Allegations, as Interpreted in *Twitter v. Taamneh*.

Gonzalez came to the Supreme Court along with *Twitter v. Taamneh*, a parallel case raising nearly identical assertions that internet platforms had violated the civil aiding-and-abetting provisions of the Anti-Terrorism Act (ATA) by allegedly knowingly allowing ISIS and its supporters to use their platforms and "recommendation" algorithms as tools for recruiting, fundraising, and spreading propaganda.[2] Unlike *Gonzalez*, *Taamneh* only raised questions about the merits of the plaintiffs' underlying ATA claims, thus giving the Supreme Court a way to resolve both cases without addressing the scope of Section 230. Ultimately, in *Taamneh*, the Supreme Court held that the plaintiffs' allegations were insufficient to state a claim for liability under the ATA's civil aiding-and-abetting provision.

[1] Willkie filed an amicus brief in *Gonzalez* on behalf of a large group of ideologically diverse internet law scholars.

[2] *See* 18 U.S.C. § 2333(d)(2).

Given the outcome in *Taamneh*, the Supreme Court chose not to answer the Section 230 questions presented in *Gonzalez*.[3] Instead, the Supreme Court vacated the decision below in *Gonzalez* and remanded for further consideration of the plaintiffs' claims in light of *Taamneh*, recognizing that *Taamneh* would likely mean that the *Gonzalez* plaintiffs' claims would state "little, if any, plausible claim for relief."[4]

The Supreme Court's decision in *Gonzalez* at least temporarily relieves concerns in the internet industry that the Court will significantly revise the prevailing understanding of Section 230's application to algorithmic recommendations, which could have subjected platforms to a choice between imposing strict limits on third-party content or risking an onslaught of litigation. Still, the Court may find another vehicle to revisit the application of Section 230 to recommendation algorithms in the next few years, or may have occasion to interpret Section 230 in related contexts. For example, the Court has signaled interest in taking up the challenges to Texas and Florida social media "censorship" laws, having called for the views of the Solicitor General as to cert petitions relating to both laws.[5] The Supreme Court is likely to decide whether to review those challenges by January 2024.

The Supreme Court Vacates the Ninth Circuit's Section 230 Opinion in *Gonzalez.*

In resolving the *Gonzalez* case, the Supreme Court vacated the decision below, returning the state of Section 230 jurisprudence in the Ninth Circuit to the pre-*Gonzalez* status quo. As interpreted by the lower courts, Section 230 continues to provide broad immunity from civil liability for third-party content hosted by internet platforms, so long as the internet platforms use only "content neutral tools" in displaying the third-party content, and do not cross a line into "making a material contribution to [the] creation or development" of third-party content.[6]

Future of Section 230

We are sure to see continued political interest and legal activism around changes to Section 230. Internet companies will have to remain alert to these developments and continue to adapt their Section 230 arguments to defend against legal claims that liability should attach to new features and technologies, including generative AI, which may further blur the line between content generated by the platform and that generated by third parties.

The Supreme Court oral argument in *Gonzalez* may have provided some tentative hints of how internet-platform defendants can strengthen their Section 230 arguments in anticipation of future Supreme Court intervention. For example, defendants can rely on the common-law roots of the statutory language "treat[ment] as the publisher" to counter plaintiffs'

[3] *Gonzalez v. Google, LLC*, No. 21-1333, 2023 WL 3511529, at *2 (U.S. May 18, 2023) (per curiam).

[4] *Id.* at *3.

[5] *See* Nos. 22-277, 22-393, 22-555 (U.S. Jan. 23, 2023).

[6] *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016); *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (en banc).

attempts to premise liability on a platform's use of a recommendation algorithm. And defendants can appeal to the text of Section 230's definitions, which explicitly contemplate functions performed by recommendation algorithms, such as computer programs that "filter," "screen," "pick, choose, analyze," or "display, search, subset, organize, reorganize" third-party content.[7]

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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[7] *See* 47 U.S.C. § 230(f)(4).