



**Sec. 230
Communications
Decency Act
(CDA)**



CY 5240 Midterm Paper ~ Spring 2023

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Table of Contents

.....	0
<i>Introduction</i>	2
<i>The Cyberlaw Issues</i>	2
Questions	2
Section 230 of the Communications Decency Act (CDA) of 1996: An Overview	4
<i>The Case</i>	7
Lower Court	7
Outcome	9
Appellate Court	10
Laws	10
Court Analysis	11
Outcome	12
Supreme Court	13
Petitioner Oral Arguments	13
Respondent's Oral Arguments	16
<i>Predictions</i>	19
<i>References</i>	23
<i>Team members</i>	24

Introduction

On November 13, 2015, three Islamic State of Iraq and Syria (ISIS) terrorists gunned down 19 people at La Belle Équipe restaurant in Paris, France, including Nohemi Gonzalez; a 23-year-old California State University-Long Beach student who was studying abroad. This was a part of a series of ISIS perpetuated attacks in France during which a total of 130 individuals were killed and nearly 400 wounded. ISIS, which had been designated as a foreign terrorist organization (“FTO”) in accordance with the Immigration and Nationality Act¹ “issued statements claiming responsibility for the attacks, including audio and video messages posted on YouTube, a free online video platform owned and operated by Google”² (defendant).

The group posted “radicalizing videos”⁴ on the YouTube. The videos posted by ISIS (content creator) included Google-supplied advertisements which generated revenue for both Google and ISIS. Three years later, based on the revenue sharing between Google and the content creator, Ms. Gonzalez’s estate and family, led by Reynaldo Gonzalez (plaintiff), brought a civil case against Google LLC in the United States District Court, N.D.Ca on August 15, 2018.

The Cyberlaw Issues

Questions

Many questions are raised by this case:

1. *Is Google liable regarding the death of Nohemi Gonzalez under the Anti-Terrorism Act (“ATA”), 18 U.S.C. §2333⁵, based on Google’s ownership and operation of YouTube?*

¹ “8 U.S.C.A. § 1189 - Designation of Foreign Terrorist Organizations.”, *id.* at ¶¶ 82-153 (December 17, 2004)

² Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1154 (N.D. Cal. 2017)

⁴ Reynaldo Gonzalez v. Google, No. 21-1333, *Brief for Petitioners* Page 9 (S.Ct. 2021)

⁵ “18 U.S.C.A § 2333 – Antiterrorism Act: Civil remedies”, (October 3, 2018)

2. *Does the YouTube Platform qualify as “material support or resources”⁶ for acts of terrorism for the purposes of determining Google’s liability under 18 U.S.C. §2333(a)⁷(d)⁸?*
3. *Is Google liable under 18 U.S.C. §2333(a) for knowingly providing “material support” to the content creator while knowing that the content creator “is a designated terrorist organization..., that the organization has engaged or engages in terrorist activity..., or that the organization has engaged or engages in terrorism”⁹?*
4. *Did Google violate §2339A and §2339B of the Antiterrorism Act (ATA) by creating “new and unique” targeted content for ISIS’s accounts “by choosing which advertisement to combine with the posted videos with knowledge about the viewer” and sharing revenue generated through the ads with ISIS?¹⁰*
5. *Did Google violate 18 U.S.C. § 2339C(c)¹² by concealing the provision of material support and resources to a designated foreign terrorist organization?*
6. *Did Google provide goods, funds or services to ISIS which violates the terrorism sanctions regulations issued pursuant to the International Emergency Economic Powers Act (“IEEPA”)¹³ and Global Terrorism Sanctions Regulations¹⁴?*

Google contends “that Section 230 of the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230(c)(1)¹⁵, bars any claim that seeks to hold an online service provider liable for injuries allegedly resulting from its hosting of third-party material. It also argues that all of the plaintiffs’ claims are insufficiently pleaded.”¹⁶

⁶ “18 U.S.C.A § 2339A – Providing material support to terrorists”, (December 22, 2009)

⁷ “18 U.S.C.A § 2333(a) – Antiterrorism Act: Civil remedies - Action and jurisdiction”, (October 3, 2018)

⁸ “18 U.S.C.A § 2333(d) – Antiterrorism Act: Civil remedies - Liability”, (October 3, 2018)

⁹ “18 U.S.C.A § 2339B – Providing material support or resources to designated foreign terrorist organizations”, (June 2, 2015)

¹⁰ *Gonzalez v. Google LLC*, 2 F.4th 871, 881 (9th Cir. 2021)

¹² “18 U.S.C.A. §20339C(c) – Prohibition against the financing of terrorism: Concealment”, (March 9, 2006)

¹³ “International Emergency Economic Powers Act”, 50 U.S.C. §§ 1701-1707

¹⁴ “Global Terrorism Sanctions Regulations”, 31 CFR Subt. B, Ch. V, Pt. 594

¹⁵ “47 U.S.C.A. §230(c)(1) – Protection for private blocking and screening of offensive material: Treatment of publisher or speaker”

¹⁶ *Gonzalez v. Google, Inc.*, 335 F.4th 1156, 1164 (N.D.Ca August 15, 2018)

Section 230 of the Communications Decency Act (CDA) of 1996: An Overview

Section 230 of the Communications Decency Act (CDA), hereafter known as “Section 230”, has been in the news for more than one reason. Critics argue that it is both a boon and bane to interactive computer services. It helps the industry: avoid responsibility for harmful content posted on their platforms, protect the freedom of speech of their content creators, and encourage innovation amongst their users.

“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”¹⁷ Examples include: blogging platforms (Blogger, WordPress), social media (Facebook, Twitter), media creation and sharing platforms (YouTube, Soundcloud), and file sharing services (Dropbox, Google Drive). Hereafter, ‘interactive computer service(s)’ shall be known as ‘platform(s)’.

Section 230(c)(1) protects platforms from liability stemming from content posted by any third-party users.

Section 230(c)(1) - *“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”*¹⁹

This implies platforms are not responsible for any user-generated or user-posted content. Platforms consider this protection essential for their growth and development.

Section 230(c)(2) immunizes platforms from liability for any kind of defamation or legal violations resulting from user actions involving their services. Neither are they held liable for any actions they take “in good faith” regarding content moderation.

¹⁷ “47 U.S.C.A. § 230(f)(2) – Definitions: Interactive computer service” (West)

¹⁹ “47 U.S.C.A. §230(c)(1)”

Section 230(c)(2) – *“No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily 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, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”*²¹

Google believes Section 230(c)(1)(2) frees them from liability in the Gonzalez case.

However, the plaintiffs believe that Google’s actions weighed against the Antiterrorism Act [18 U.S.C.A § 2333], Federal Criminal Statutes 18 U.S.C. § 2339A, § 2339B(a)(1), § 2339C(c), Federal Global Terrorism Sanctions Regulations [31 CFR Subt. B, Ch. V, Pt. 594], and the International Emergency Economic Powers Act (IEEPA) [50 U.S.C. §§ 1701-1707] are sufficient merit for suit.

18 U.S.C.A § 2333(a) provides for a private right of action for damages sustained in an act of international terrorism.

18 U.S.C.A § 2333(a) – *“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees”.*²²

²¹ 47 U.S.C.A. §230(c)(2)

²² “18 U.S.C.A § 2333(a) – Antiterrorism Act: Civil remedies - Action and jurisdiction”, (October 3, 2018)

18 U.S.C.A § 2333(d) places liability on those who aid or abet an act of international terrorism by knowingly providing substantial assistance.

*18 U.S.C.A § 2333(d) – “In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism”.*²³

18 U.S.C. § 2339A prohibits the provision of “material support or resources” to terrorists in the form of personnel, services, and equipment.

*18 U.S.C. § 2339A – “Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation ... or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title... A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.”*²⁴

18 U.S.C. § 2339C(c) prohibits the knowing concealment or disguise of “the nature, location, source, ownership, or control of any material support or resources, or any funds or proceeds of such funds ... knowing or intending that the support or resources are to be provided, or knowing that the support or resources were provided,” in violation of 18 U.S.C. § 2339B, or “...by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out...any other act intended to cause death or serious bodily injury to a

²³ “18 U.S.C.A § 2333(d) – Antiterrorism Act: Civil remedies - Liability”, (October 3, 2018)

²⁴ “18 U.S.C.A § 2339A – Providing material support to terrorists”, (December 22, 2009)

civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

The Case

Lower Court

In *Gonzalez v. Google* (2018)²⁵, the Gonzalez family alleged that Google, through the YouTube platform, aided and abetted ISIS by “knowingly permitting ISIS to post on YouTube hundreds of radicalizing videos inciting violence and recruiting potential supporters to join the ISIS forces then terrorizing a large area of the Middle East, and to conduct terrorist attacks in their home countries.”²⁶ The plaintiffs contend ISIS used YouTube to recruit, plan, incite, and coordinate terror attacks, for private messaging amongst jihadists, threat communications, propaganda, and terror and intimidation campaigns.²⁷ Many videos depicting gruesome depictions of ISIS prisoner executions and videos used to amplify the fear and intimidation of the terror attacks which appeared as YouTube video recommendations were presented as evidence. The plaintiff alleges that ISIS disseminated an attack message prior and after the Paris attack via YouTube.

The plaintiffs made six claims (See [Questions](#)). The court dismissed the first four claims based on the Section 230’s immunity provision [47 U.S.C. § 230(c)(2)] which specifically “immunizes providers of interactive computer services against liability arising from content created by third parties.” The plaintiff improperly asserted that the claims in the third amended complaint (TAC) were not barred by § 230(c)(2). Specifically, that section did not provide immunity to Google for violation of the Antiterrorism Act as it was abrogated by the Justice Against Sponsors of Terrorism Act (JASTA) [PL 114-222, September 28, 2016, 130 Stat 852]. JASTA “created a new exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. § 1602, which does not incorporate the noncommercial tort exception’s entire tort rule and, unlike the FSIA’s

²⁵ *Gonzalez v. Google*, 335 F.Supp.3d 1156 (August 15, 2018)

²⁶ Reynaldo GONZALEZ, et al., Petitioners, v. GOOGLE LLC, Respondent., 2022 WL 17418474 (U.S.), 9

²⁷ *Ibid*.

terrorism exception, does not require that the defendant be designated a state sponsor of terrorism by the Secretary of State, 28 U.S.C.A. § 1605B(b)”²⁸. The court held that JASTA does not repel §230(c)(1).

Moreso, the plaintiff asserts that the statute for immunity does not apply outside the territorial jurisdiction of the United States. “The court applied the RJR Nabisco/Morrison framework in concluding that the focus of section 230(c)(1) is on limiting civil liability, and that here, the location of the conduct relevant to that focus is in this district, where the litigation is filed and where immunity is sought.”²⁹ Since the terrorist attack took place in France outside the United States, the extraterritorial application of section 230(c)(1) which the plaintiff had claimed did not apply in this case.

Furthermore, § 230(e)(1)’s federal criminal law exceptions to § 230 only applies to private civil claims based on federal criminal statutes. The court held that section 230(c)(1) protects Google as a provider of an interactive computer service from liability due to materials posted by a third-party (ISIS), rejecting the plaintiff’s claim that Google is a publisher or speaker of “new content”. The court rejected the allegation that Google allowed ISIS and its followers to publish terrorist related videos on YouTube, providing ISIS with a powerful tool for spreading terrorist messages, thereby violating the material support statutes. The arguments in the second amended complaint where the plaintiff alleged that violation of 18 U.S.C. § 2333(a) and (d) by Google allows for compensation for damages were also rejected by the court. The court held that violation of ATA doesn’t make Google responsible for third-party contents. They also rejected the claim of Google as publisher, arguing that targeted ad algorithms were content neutral therefore Google had not contributed to the material videos posted by ISIS.

The fifth and sixth allegations assert “Google knowingly and willfully engaged in transactions with, and provided funds, goods, or services to or for the benefit of, Specially Designated Global Terrorists ... including ISIS, its leaders, and members...Google violated IEEPA ‘when it received property or interest in property of ISIS and its operatives’ and ‘permit[ed] any access to

²⁸ “Justice Against Sponsors of Terrorism Act (JASTA)”, 31 A.L.R. Fed. 3d Art. 4 (Originally published in 2018)

²⁹ Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156, 1167 (N.D. Cal. 2018), aff’d sub nom. Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021)

ISIS property that came into Google's possession (including inter alia downloading or copying videos, which are not traditional publishing functions).”³⁰; through so doing, Google violated §2339C(c) and §2339B. The concealment claim by the plaintiff “seeks to hold Google liable for failing to prevent ISIS and its supporters from using YouTube and failing to remove ISIS-related content from YouTube. As with the prior claims, the IEEPA claim ‘requires recourse to that content’ to establish any causal connection between YouTube and the Paris attack, and ‘inherently requires the court to treat [Google] as the ‘publisher or speaker’”³¹.

Upon review of the entirety of § 230, the court concluded that the immunities in section 230(c) protect the first amendment while concurrently promoting e-commerce “interests on the Internet while also promoting the protection of minors.”

As to having proximate cause under the ATA for points three through six pursuant to §2333(a), which “authorizes a private right of action for damages sustained in an act of international terrorism”, the court requires the plaintiff to establish a direct relationship between the injuries suffered and the defendant’s acts. Since the plaintiff failed to plead proximate causation, the §2333(d) claims were dismissed under §230.

Outcome

The court held that Google is not liable for the death of Nohemi Gonzales by alleged failure to prevent and stop ISIS videos from appearing on its YouTube platform, nor did the court find Google liable for claims of providing material resources. The Communication Decency Act (CDA) barred any such claim. Additionally, placement of targeted advertisements along ISIS related contents by YouTube did not create new content and thus did not make YouTube an information content provider. The claims related to proximate cause did not satisfy the proximate cause standard of the ATA.

³⁰ Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156, 1175 (N.D. Cal. 2018), aff’d sub nom. Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021)

³¹ Ibid.

However, the court granted the plaintiff one final chance to amend its claims related to the plaintiff's revenue sharing claims, since it could not determine whether further amendment would be successful.

Appellate Court

Unhappy with the ruling, the Gonzalez estate decided to appeal. Many appeals were consolidated. The family of a Jordanian victim who was killed in the Turkey nightclub shootings, and the family of a victim of the San Bernadino Shootings joined in the appeal. All the attackers had ties to ISIS. Joining Google as appellees were Twitter, Inc. and Facebook, Inc. The crux of this case involves the interpretation and application of [§230\(c\)\(2\)\(A\)](#) in the context of claims that online platforms constitute material support to terrorists by failing to remove extremist content. The appellants argued that Google and other online platforms were aware of the existence of extremist content residing on their platforms and should have taken steps to remove it.³² The appellants claimed that the failure to do so contributed to the radicalization of terrorists who carried out attacks that resulted in the death of their family members. The court had to determine whether §230 immunized respondents from liability for the alleged failure to remove the extremist content.

Laws

The appellate court refocused on interpretation and application of §230 of the CDA and its immunity provisions, as well as the applicability of the ATA and JASTA to the claims brought by the plaintiffs, in specific as to whether: the platforms are liable for content created by third-party users, and if there exists a cause of action against the platforms for providing material support to terrorists either as terrorist organization or as a foreign states.

³² Gonzalez v. Google, 2 F.4th 871 (9th Cir. 2021)

Court Analysis

The court examined whether [§230](#) provided immunity to the appellees against the appellants' claims of providing material support to terrorists under the Justice Against Sponsors of Terrorism Act ([JASTA](#))³³ and their claims of wrongful death and negligence.

The court first considered the purpose and scope of §230, which provides immunity to providers of "interactive computer services" from content provided by third parties.³⁴ The court cited [§230\(c\)\(1\)](#), which states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."³⁵ The court noted that the purpose of this provision is to encourage the development of online platforms for the exchange of ideas, while also protecting providers from liability for third-party content.

However, the court also noted that [§230\(c\)\(2\)\(A\)](#) provides an exception to immunity for claims arising from the provider's own conduct, such as its decision to remove content.³⁶ The court reasoned that this provision suggests that Congress did not intend to provide immunity for all types of claims against providers.

The appellants claimed that the providers were negligent in failing to remove extremist content from their platforms, which ultimately led to the terrorist attacks. The court analyzed the claims under California law and noted that a claim of negligence requires a showing that a defendant owes the plaintiff a duty of care, that the duty was breached, and that the breach caused the plaintiff's injury.³⁷

The appellants also claimed that the providers provided material support to terrorists by allowing them to use their platforms to disseminate extremist content. The court analyzed this claim under the [Anti-Terrorism Act \(ATA\)](#), which provides a civil cause of action for victims of terrorism.³⁸

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

The court noted that to establish a claim under the ATA, the appellants must show that the respondents knowingly provided material support or resources to a foreign terrorist organization, and that the support was a substantial factor in the terrorist act.

The appellants brought a claim for emotional distress and wrongful death, alleging that the appellees' actions were a direct cause of their loved ones' death. The court analyzed this claim under California law, which provides that an emotional distress and wrongful death claim can be brought when a person's death is caused by the wrongful act or neglect of another.

The appellants claimed the providers created a public nuisance by allowing extremist content to remain on their platforms. The court noted that, under California law, a public nuisance claim requires a showing that the defendant's conduct interfered with the use and enjoyment of public property, or a public right. The court ruled that the appellants' claims did not seek to hold the providers liable for third-party content, but rather for their own conduct in providing material support to a terrorist group.

Outcome

The court affirmed in part and reversed and remanded in part.³⁹ The majority ruled that:

[Section 230\(c\)\(1\)](#) of the Communications Decency Act (CDA) provides immunity to interactive computer service providers for claims based on third-party content. This immunity extends to claims based on a provider's "failure to edit" or "exercise any control" over third-party content. Therefore, the plaintiffs' claims against the providers for allegedly providing material support to ISIS through the publication of third-party content are barred by §230(c)(1) of the CDA.

The plaintiffs' claims for aiding and abetting under the ATA are also barred by §230(c)(1) of the CDA. The court held that allowing the appellants to hold the providers liable for allegedly aiding and abetting ISIS through the publication of third-party content would be equivalent to holding them liable as a publishers or speakers of that content, which is precisely the kind of liability that §230(c)(1) was designed to preclude. The appellants' claims for direct liability under the ATA

³⁹ Ibid.

were also dismissed. The court held that the appellants had not adequately alleged that the providers' conduct met the ATA's definition of providing material support to terrorists. Specifically, the court held that the appellants had not shown that the appellees provided material support to ISIS with the intent to further ISIS's terrorist activities, as required by the ATA. The majority reaffirmed the broad immunity provided to interactive computer service providers under Section 230, clarifying that this immunity extends to claims based on a provider's alleged "aiding and abetting" of third-party content, and emphasized that the establishment of liability under the ATA for providing material support to terrorists requires proof of intent to further terrorist activities.

Supreme Court

The Gonzalez estate has not given up. They are appealing to the U.S. Supreme Court. They argue that Google is not only liable under the Antiterrorism Act (ATA), but under the Alien Tort Statute (ATS) [28 U.S.C.A. §1350] as well.

28 U.S.C.A. §1350 – “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁰

Petitioner Oral Arguments

The petitioner claims that §230 does not apply to recommendations of third-party created material, and that the lower courts have mistakenly interpreted “publisher” in [§230\(c\)\(1\)](#) to have its everyday meaning instead of the narrow sense drawn from defamation law. The petitioner further argues that §230 does not protect a defendant if it sends to a user content which the user did not actually request. In the brief, they make four main arguments as to why [§230\(c\)\(1\)](#) should not provide protection and immunity to internet publishing platforms such as YouTube:

⁴⁰ 28 U.S.C.A. § 1350

- I. Section 230(c)(1) does not apply to a recommendation of third-party content if the plaintiff's claim does not “treat[]” the defendant as the “publisher or speaker” of that third-party content⁴¹. To support this argument, the petitioners point to the language of the Section, which states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴² The petitioners argue that for [§230\(c\)\(1\)](#) to apply, the plaintiff's claim must treat the defendant as the publisher or speaker of the third-party content. In this context, a publisher communicates the defamatory statement to the public. They argue that when interpreting [§230\(c\)\(1\)](#), courts should use this definition of “publisher” as it reflects the intention of Congress to limit the scope of [§230\(c\)\(1\)](#). They argue that the thumbnails are generated by YouTube, and they can be held liable for some part of content. They further argue that even if “publisher” is given its everyday meaning, many claims based on recommendations do not treat the defendant as the “publisher” of the third-party content, as the defendant is not the one who is communicating the content to the public. To support this argument, the petitioner cites various cases from courts of appeals that have held that [§230\(c\)\(1\)](#) does not provide immunity for claims based on recommendations that do not treat the defendant as a publisher or speaker of the third-party content.⁴³
- II. Section 230(c)(1) states that no provider or user of an interactive computer service shall be treated as the publisher or speaker of “any information provided by another information content provider.” The petitioner argues that this language implies that the Section does not apply to information provided by the defendant itself. They also argue that URLs and notifications are “information” under [§230\(c\)\(1\)](#) and are

⁴¹ Gonzalez v. Google LLC, Oral Argument at 82, 118

⁴² [§230\(c\)\(1\)](#)

⁴³ Force v. Facebook, Inc., 934 F.3d 50 (2d Cir. 2019); Dyroff v. Ultimate Software Group, Inc., 934 F.3d 1093 (9th Cir. 2019), cert. denied 140 S.Ct. 2761 (2020)

provided by the defendant itself, and thus should not be covered under the Section.⁴⁴ The petitioners also contend that under [§230\(c\)\(1\)](#) neutrally-created information is “information” which is not provided by another information content provider, and thus, should also not be covered by [§230\(c\)\(1\)](#). To support this argument, they cite various cases from courts of appeals which have held that URLs and notifications are “information” under [§230\(c\)\(1\)](#) and that neutrally created information is also “information” under the section.⁴⁵

- III. Since a defendant is not acting as a “provider...of an interactive computer service” when making a recommendation, the [§230\(c\)\(1\)](#) defense should not apply. They point to the language of the Section which states that, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁶ To support this argument, the petitioner cites the Second Circuit’s opinion in *Force v. Facebook, Inc.*, 934 F.3d 63 (2d Cir. 2019), and the Ninth Circuit’s opinion in *Prager University v. Google, LLC*, 938 F.3d 1264 (9th Cir. 2019). The Second Circuit held that [§230\(c\)\(1\)](#) applies to the dissemination of third-party material even in the absence of a user request. The Ninth Circuit held that [§230\(c\)\(1\)](#) applies if a website sends a user third-party material which the recipient had not requested. The petitioner also cites the Ninth Circuit’s opinion in *Johnson v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003), which held that the defense provided by [§230\(c\)\(1\)](#) does not apply if the defendant is not acting as a provider of an interactive computer service.
- IV. Congress has sought to achieve a balance between protecting covered entities from liability and maintaining state authority over civil and criminal matters through Section 230.⁴⁷ The petitioners argue that the ambiguity of the Section should be resolved by applying traditional methods of statutory construction, not by favoring

⁴⁴ *Gonzalez v. Google LLC*, Oral Argument at 107

⁴⁵ *Dyroff v. Google, Inc.*, 934 F.3d 1092 (9th Cir. 2019); *Force v. Facebook, Inc.*, 934 F.3d 72 (2d Cir. 2019)

⁴⁶ [§230\(c\)\(1\)](#)

⁴⁷ *Gonzalez v. Google LLC*, Oral Argument at 47

one or the other of the important interests at stake. They cite various cases from courts of appeals that have held that federal statutes which might preempt state laws should be construed narrowly to avoid inconsistency. The petitioner also cites precedent from the Supreme Court which holds that statutes which reflect a legislative compromise should be interpreted using traditional methods of statutory construction [*New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 543 (2019)]. They also cite various cases from courts of appeals which held that federal statutes which might preempt state laws should be construed narrowly to avoid inconsistency: *Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) and *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).⁴⁸

Overall, the petitioners present a compelling case for why Section 230 should not be interpreted using a presumption of either broad or narrow construction. The petitioners' arguments are well-reasoned and should be considered by the Supreme Court when making a ruling in this case.

Respondent's Oral Arguments

Respondent Google LLC argues that Section 230 does apply to recommendations of third-party created material. They are asking the U.S. Supreme Court to deny the certiorari petition. Google makes several persuasive points:

- I. There is no circuit split and both the Second and Ninth Circuits have reached the same conclusion – that online platforms can invoke [§230](#) for features that display third-party content based on user inputs. They argue that given the consistent application of [§230](#) to various types of online platforms and its applicability to search engines, YouTube should be able to invoke the same protections to defend itself from liability for features that display content based on user inputs since its recommendation algorithms are similar to those used in search engines.⁴⁹ Google

⁴⁸ *Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)

⁴⁹ *Gonzalez v. Google LLC*, Oral Argument at 47, 98

notes that the Second and Ninth Circuits both agree [§230](#) covers “targeted recommendations” of content that third parties created [Force v. Facebook, 934 F.3d 59 (2d Cir. 2019)]. Even if there were some differences in reasoning between the two circuits, that would be more reason for the Court to allow the issue to “percolate” so the issue can be fully vetted. The circuit consensus on the wider questions of when a defendant is “treated as the publisher” and whether claims of liability involving traditional editorial functions preclude liability under [§230](#) is outlined, noting that all six cases cited by the petition, supposedly splitting with the Second and Ninth Circuits, grant [§230](#) protection; even the petitioner agrees that [§230](#) bars claims of liability which involve traditional editorial functions. The brief notes that the Second and Ninth Circuits will not be the last courts to weigh in on [§230](#) as the underlying claims can be brought in many venues, meaning the Court would be deciding based on a case which may not be the best elucidation of the issue.

- II. The case presents multiple vehicle issues which make it unsuitable for consideration by the Supreme Court. The complaint fails to identify which YouTube features are allegedly subjecting YouTube to liability, and the context of the petitioners' claims introduces additional vehicle issues. Additionally, Congress is currently considering more than a dozen proposals to amend [§230](#) which may resolve the questions posed in this case. Therefore, the Supreme Court should decline to hear this case due to a lack of clarity and a potential for resolution through legislative action.
- III. The circuits’ uniform conclusion that [§230](#) applies to neutral algorithms displaying recommended content is correct. As such, the petition for certiorari should be denied. The respondent claims that Section [§230\(c\)\(1\)](#) bars claims treating it as the publisher or speaker of third-party content, and that the content must have been provided by “another information content provider.” YouTube’s circa-2015 technology falls comfortably within the heartland of publishing, as it uses a sidebar tool to show videos automatically added to the user’s queue based on user inputs like viewing history. The respondent also argues that [§230\(f\)\(2\)](#) defines “interactive computer

service” to include “software . . . or enabling tools” that “pick, choose, analyze, . . . search, subset, organize, reorganize, or translate content.”⁵⁰

⁵⁰ “47 U.S.C.A. § 230(f)(2) – Definitions: Interactive computer service” (West)

Predictions

Section 230 has long been debated due to the broadness of its protection. In the past, Section 230 has granted near total immunity to websites so long as they do not directly produce the content that they distribute. This interpretation has been upheld and furthered numerous times. It is important to acknowledge the difference between this case and the multitude of other cases which have been dismissed because of Section 230. In this instance, the key question is whether Google's targeted recommendations of third-party content prevents them from receiving the immunity granted by the provision.⁵¹ However, by looking at past case precedent regarding Section 230 while isolating this case from the unique context, it can be seen that these recommendations do not constitute the "direct and palpable" involvement from Google that has been deemed necessary in the past to warrant ignoring the protections granted by Section 230.⁵²

First, one must consider cases in which Section 230 protections have been denied for a computer service provider - namely, where they could have been viewed as an "information content provider... responsible, in whole or in part, for the creation or development of the offending content."⁵³ A prominent example of this, is *Fair v. Roommates*. In *Fair*, the defendant (Roommates) operated a website that served as a platform for people to find roommates when looking for somewhere to live.⁵⁴ This website offered users a questionnaire when creating their profile which included their gender and sexual orientation. This information was shared with subscribers of the website.⁵⁵ The plaintiffs in this case claimed that "requiring subscribers to disclose their sex, family status, and sexual orientation 'indicates' an intent to discriminate against them, and thus runs afoul of... [the Fair Housing Act]."⁵⁶ The court sided with the plaintiffs, claiming that the mandatory and active disclosure of this information to subscribers

⁵¹ *Gonzalez v. Google*, 2 F.4th 871 at 881

⁵² *Fair v. Roommates*, 521 F.3d at 1170

⁵³ 47 U.S.C. Section 230(c)

⁵⁴ *Fair* at 1160

⁵⁵ *Id.* At 1161

⁵⁶ *Id.* At 1164

“indicates” intent to allow discrimination against information owners, claiming that the website had a “direct and palpable” role in encouraging discriminatory behavior.⁵⁷

This detail, the “direct and palpable” nature of Roomates’ behavior, has been cited in similar cases to analyze the nature of computer service providers. In *Goddard v. Google*, the plaintiff alleged that Google was directly aiding in the creation and proliferation of illegal content through their content recommendation algorithm - an argument similar to the underlying argument in *Gonzalez v. Google*.⁵⁸ In *Goddard*, the plaintiff suffered damages from a fraudulent ad posted on Google’s website.⁵⁹ While this, in and of itself, does not absolve Google of the protections granted by Section 230, the plaintiff made note of Google’s recommendation algorithm, (namely, in how it recommends keywords to advertisers), using an example of how entering “ringtone” into Google’s “Keyword Tool” (which seeks to aid advertisers in selecting keywords for their ads) can result in a “free ringtone” being presented to the user.⁶⁰ This, the plaintiff claimed, is not an example of a “neutral” tool that should be protected by Section 230. It instead indicates that Google’s recommendation system is knowingly aware of harmful content which is often provided by Google, (Google is well aware of “the mobile content industry’s unauthorized charge problems”), implying that Google is an active participant in the creation of this harmful content.⁶¹ However, the court ruled that this system of content recommendation does *not* constitute a “direct and palpable” involvement in the creation of harmful content, and therefore should not prevent Google from receiving protection under the CDA.⁶²

In a similar case, *Jurin v. Google*, Google was sued for recommending “Styrotrim” as a keyword to advertisers, which the plaintiff claimed caused measurable damages by actively and directly enabling other parties to use their trademark in an unauthorized manner.⁶³ However, the court

⁵⁷ Id. at 1164-1170

⁵⁸ *Goddard v. Google*, 640 F. Supp 2d at 3

⁵⁹ Id. at 1

⁶⁰ Id. at 4-5

⁶¹ Id.

⁶² Id. at 8

⁶³ *Jurin v. Goddard*, 695 F. Supp. 2d at 1

held that “suggesting keywords to competing advertisers... merely helps third parties to refine their content,” and that “this is tantamount to the editorial process protected by the CDA.”⁶⁴

Because of the ruling in *Roommates*, courts have developed an understanding that being a content creator in the context of unlawful content requires “materially contributing to its alleged unlawfulness.”⁶⁵ When viewing *Gonzalez* through these lenses regarding algorithmically recommended content, one cannot draw a perfectly direct comparison. It is plain that Google’s algorithm in recommending ISIS produced content, does not materially contribute to its alleged unlawfulness. The algorithm is purely neutral. It recommends content to users based on their expressed interests and browsing history, with no bias towards content related to terrorism.⁶⁶ As such, Google should not be viewed as a content provider for the purposes of exception from Section 230.

However, it is important to note that Google’s algorithm and the potential promotion of terrorism-related content are not the only issues at hand. When this case was heard in the District Court of California, it was held that the claims pertaining to Google’s liability for hosting and promoting such content were mostly baseless. The court granted the plaintiffs the opportunity to make an amended complaint prior to their appeal focused on their claim that Google’s targeted ad revenue sharing with ISIS violated Section 2339B of the Anti-Terrorism Act.⁶⁷ Similarly, the plaintiffs claim a violation of Section 2339C(c), which prohibits disguising “the nature, location, source, ownership, or control of any material support or resources” to a terrorist group.⁶⁸ These claims have much more potential to be acted upon, as Section 230’s shield of immunity mostly applies to content posted on the platform, whereas the act of revenue sharing is not one which has historically seen such sweeping protection. It is important to note that the District Court dismissed all claims - including those pertaining to revenue sharing - due to a lack of “proximate causation.”⁶⁹ If the plaintiffs were to amend their claims to specifically focus on the revenue sharing and demonstrate proximate causation, it is possible it might not be seen as “futile,” as the

⁶⁴ *Id.* at 1123

⁶⁵ *Roommates* at 1167-1168

⁶⁶ *Gonzalez* at 881-882

⁶⁷ *Gonzalez v. Google*, 335 F. Supp 3d at 1163

⁶⁸ 18 U.S.C. Section 2339C(c)

⁶⁹ *Gonzalez v. Google*, 335 F. Supp 3d at 1179

court held in their conclusion.⁷⁰ As the claims come inherently tied to the idea that Google was intentionally promoting terrorism on their platform, something of which Google is almost guaranteed to be found not guilty of due to Section 230 protections, these revenue sharing claims will most likely be viewed by the Supreme Court as “simply [an] attempt to repackage this theory” - exactly as the District Court did - of Google’s permissive dissemination of a terrorist message, and thus struck down in service of maintaining Section 230’s broad protections.⁷¹

We feel Google will win this fight, retaining Section 230 protections.

⁷⁰ Id.

⁷¹ Id.

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Team members

Achat Poojitha, Bhavesh Jain, Edward Baroncini, Hritesh Sonawane, Julia Tittler, Keerthana Thangavelu, Ronnie Sekamwa, Vanessa Kibaja