

In November 2015, Nohemi Gonzalez, a twenty-three-year-old college student studying abroad in Paris, was among the 130 killed in a coordinated series of ISIS terrorist attacks.¹ Ms. Gonzalez’s father subsequently brought an action against YouTube, a subsidiary of Google, for their “uniquely essential role” in the promotion, expansion, and success of ISIS by algorithmically recommending their videos to certain YouTube users.² In doing so, Gonzalez aimed to pierce Section 230 of the Communications Decency Act of 1996, the legal shield that, since its enactment, lower courts interpreting the statute have, with limited exceptions, granted internet platforms sweeping immunity.³

As relevant here, Section 230(c) prohibits courts from treating internet platforms as the “publisher or speaker” of third-party content.⁴ However, Section 230 does not protect platforms from liability for the content they create or provide.⁵ Proponents of Section 230 largely credit the statute for developing the modern internet.⁶ In contrast, Section 230’s critics believe it gives internet platforms too much power, as it immunizes them from responsibility for the negative consequences of their action (or inaction) online.⁷

On February 21, 2023, the Supreme Court heard *Gonzalez v. Google LLC*, on appeal from the United States Court of Appeals for the Ninth Circuit.⁸ Interpreting Section 230(c) for the first time, the Court needed to determine whether the statute protects internet platforms when their algorithms recommend third-party content to specific users.⁹ In doing so, the parties expect the Court to determine how a “pre-algorithm statute applies in a post-algorithm world.”¹⁰

Key Arguments of Gonzalez

Arguing for Mr. Gonzalez, Eric Schnapper claimed that YouTube cannot receive Section 230’s protections because the *platform*, not a third party, created and published the thumbnails and “Up

¹ See *Gonzalez v. Google LLC*, 2 F.4th 871, 880-81 (9th Cir. 2021); 2015 Paris Terror Attacks Fast Facts, CNN, <https://www.cnn.com/2015/12/08/europe/2015-paris-terror-attacks-fast-facts/index.html> (last updated Nov. 8, 2022).

² Brief of Petitioners, *Gonzalez v. Google*, No. 21-1333, at 10; Supreme Court Takes Up Challenge to Social Media Platforms’ Shield. <https://www.nytimes.com/2022/10/03/us/supreme-court-social-media-section-230.html>

³ For example, courts have expanded the definition of “publisher” to email listservs, *Batzel v. Smith*, 333 F.3d 1018, 1030-31 (9th Cir. 2003), dating websites, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003), social networking sites, *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849-50 (W.D. Tex. 2007), *aff’d*, 528 F.3d 413 (5th Cir. 2008), and gossip sites, *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998).

⁴ 47 U.S.C. § 230(c).

⁵ *Id.*; David McCabe, *Supreme Court Poised to Reconsider Key Tenets of Online Speech*, N.Y. Times (Jan. 19, 2023), <https://www.nytimes.com/2023/01/19/technology/supreme-court-online-free-speech-social-media.html>.

⁶ *Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020) (statement of Mark Zuckerberg, CEO, Facebook, Inc.) (arguing that Section 230 “made it possible for every major internet service to be built and ensured important values like free expression and openness were part of how platforms operate.”); *id.* at 1 (statement of Jack Dorsey, CEO, Twitter, Inc.) (arguing that “Section 230 is the internet’s most important law for free speech and safety”); *Section 230*, Electronic Frontier Foundation, <https://www.eff.org/issues/cda230>.

⁷ *The Daily: A Ruling That Could End the Internet as We Know It*, N.Y. Times (Feb. 23, 2023), <https://www.nytimes.com/2023/02/23/podcasts/the-daily/supreme-court-youtube-google.html>.

⁸ Supreme Court of the United States Docket for 21-1333, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1333.html>.

⁹ Brief of Petitioners, *Gonzalez v. Google*, No. 21-1333, at 18; Supreme Court of the United States Docket for 21-1333, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1333.html>.

¹⁰ Oral Argument Transcript, *Gonzalez v. Google LLC*, No. 21-1333 (Feb. 21, 2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1333_p8k0.pdf.

Next” recommendation lists, which direct users to endless content.¹¹ However, in arguing such, Schnapper conceded that YouTube’s algorithm applies neutrally across third-party content, regardless of the content’s subject matter. This concession concerned some of the justices.¹²

Specifically, Chief Justice Roberts noted that without a focused algorithm, Schnapper would be less likely to successfully argue that there is a “selection” or “recommendation” of content for which YouTube could be liable.¹³ Justice Thomas even suggested that platforms cannot be liable for their recommendations if their algorithms “neutrally” promote third-party content.¹⁴

Among some of the other justices, Justice Kagan agreed that a platform’s decision to recommend specific content to a user is likely the platform’s speech.¹⁵ However, when she began testing the limits of Schnapper’s theory, Schnapper seemed unable to draw a line differentiating between the content of a third party and that of a platform.¹⁶ Many justices grew confused and frustrated, finding it hard to identify a demarcation point consistent with the statute that minimizes unintended consequences for the internet.¹⁷

Key Arguments of Google

Lisa Blatt, arguing for Google, claimed that exposing internet platforms to liability for implicitly recommending third-party content defies the text of Section 230 and “threatens the basic organizational decisions of the modern internet.”¹⁸ However, after questions by Justice Alito, Blatt admitted that she did not think Google would collapse if the Court narrowed Section 230.¹⁹

Justices across the political spectrum questioned Blatt’s interpretation of Section 230.²⁰ Justice Jackson—recognizing that the language of Section 230 allows platforms to block or remove “offensive” materials—questioned how it is “conceptually consistent with what Congress intended” for platforms to use the same provision as a shield for promoting such offensive materials.²¹ The Justice noted that, in her view, Blatt’s theory of Section 230’s protections “bear[s] no relationship ... to the text of the actual statute.”²²

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Daniel Lyons, *Supreme Court Seems Skeptical in YouTube Algorithm Case*, American Enterprise Institute (Feb. 23, 2023), <https://www.aei.org/technology-and-innovation/supreme-court-seems-skeptical-in-youtube-algorithm-case/>; Emily Birnbaum, *Justices ‘Confused’ by Lawyer’s Argument on Online Legal Shield*, Bloomberg Law (Feb. 21, 2023), <https://news.bloomberglaw.com/us-law-week/justices-confused-by-lawyers-argument-on-online-legal-shield>.

¹⁸ Oral Argument Transcript, *Gonzalez v. Google LLC*, No. 21-1333 (Feb. 21, 2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1333_p8k0.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

The Chief Justice found Blatt’s interpretation problematic, reasoning that as “the videos just don’t appear out of thin air” to users, YouTube’s algorithmic recommendations are YouTube’s content and, as such, Section 230 immunity “is just not directly applicable.”²³

What Will Happen Next?

Many have anticipated the Court’s interpretation of Section 230 since the statute’s enactment.²⁴ However, Justice Barrett—noting that the following day, the Court would hear *Twitter v. Taamneh*,²⁵ a similar case centering on whether social media companies, when hosting and profiting on ISIS content, violate the Anti-Terrorism Act—raised the prospect that the Court could find in favor of Twitter and avoid answering *Gonzalez*’s questions on Section 230’s scope.²⁶ The Court is scheduled to decide both cases by late June.

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²³ *Id.*

²⁴ Clare Morell, *The Supreme Court Should Review Section 230’s Interpretation*, Newsweek (Nov. 4, 2021), <https://www.newsweek.com/supreme-court-should-review-section-230s-interpretation-opinion-1645193>.

²⁵ Supreme Court of the United States Docket for 21-1496, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1496.html>.

²⁶ Greg Stohr & Emily Birnbaum, *Supreme Court Holds Option to Sidestep Social Media Issue*, Bloomberg Law (Feb. 21, 2023), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XECECMBK000000?bna_news_filter=us-law-week#jcite.