

Gonzalez v. Google, LLC

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2 F.4TH 871 (9TH CIR. 2021)

In *Gonzalez v. Google*, the Ninth Circuit addressed two major claims asserted against Google for the alleged role of its subsidiary, YouTube, in facilitating an ISIS terrorist attack on November 13, 2015 in Paris, France.¹ The court ultimately affirmed the district court’s granting of Google’s motion to dismiss, holding that 47 U.S.C. § 230 of the Communications Decency Act (“CDA”) effectively immunized Google from the majority of the Plaintiffs’ (collectively, Gonzalez) claims.² For the remaining claims, Gonzalez had failed to state a right of action under the Anti-Terrorism Act (“ATA”), 18 U.S.C. § 2333.³ This case was argued before the United States Supreme Court on February 21, 2023 and is awaiting final disposition.⁴

I. BACKGROUND

The decedent, Nohemi Gonzalez, was a United States citizen studying in Paris, France in the fall of 2015.⁵ On the evening of November 13, 2015, she was killed in a shooting at a local café by ISIS terrorists as part of a series of attacks that occurred in the city.⁶ The following day, ISIS claimed responsibility for the attacks by issuing a written statement and posting a video on YouTube.⁷

The case was brought primarily by Reynaldo Gonzalez, Nohemi’s father, although other family members were added as plaintiffs in the Second Amended Complaint (“SAC”).⁸ In the SAC, Reynaldo and family claimed that Google violated the ATA by aiding and abetting “international terrorism and provid[ing] material support to international terrorism by allowing ISIS to use YouTube.”⁹ Two of these claims were based on a revenue-sharing theory, whereby ISIS received payment from Google for its monetized videos.¹⁰ Certain other claims were predicated on the broadened scope of the ATA in 2016 through the Justice Against Sponsors of Terrorism Act

1. *Gonzalez v. Google LLC*, 2 F.4th 871, 880-81 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 80 (Oct. 3, 2022) (No. 21-1333).

2. *Id.* at 880.

3. *Id.*

4. *Gonzalez v. Google LLC*, No. 21-1333 (U.S. argued Feb. 21, 2023).

5. *Gonzalez*, 2 F.4th at 880.

6. *Id.* at 880-81.

7. *Id.* at 881.

8. *Id.* at 882.

9. *Id.*; 18 U.S.C. § 2333(a), (d).

10. *See Gonzalez*, 2 F.4th at 882.

("JASTA").¹¹ Google filed a motion to dismiss all claims for direct and secondary liability, arguing that Section 230 of the CDA bars such claims.¹² The district court agreed but granted Gonzalez leave to amend the complaint.¹³

Gonzalez then filed the Third Amended Complaint ("TAC"), which is at issue in this case.¹⁴ In addition to the previous claims, Gonzalez alleged that Google has direct liability under Section 2333(a) of the ATA for "providing material support and resources to ISIS."¹⁵ Google submitted a motion to dismiss the entire TAC, claiming immunity under Section 230 of the CDA, and argued in the alternative for dismissal of the Section 2333(a) direct liability claims because Gonzalez had failed to state a claim that Google had proximately caused the decedent's injuries.¹⁶

The district court granted the motion to dismiss on the grounds of Google's Section 230 immunity and Gonzalez's failure to plausibly allege proximate cause.¹⁷ Gonzalez appealed.¹⁸

II. ANALYSIS

On appeal, the court affirmed the district court's dismissal, rejecting Gonzalez's arguments that Google does not enjoy Section 230 immunity and that Google bears direct liability under the ATA due to its revenue-sharing with ISIS.¹⁹ The court began by framing the history and purpose of the CDA as creating immunity for "providers of interactive computer services against liability arising from content created by third parties."²⁰ The congressional intent at the time of the Act's passage in 1996 was to promote the free exchange of ideas in the new age of the Internet.²¹ The operative provision, Section 230(c)(1), immunizes providers like Google from liability for content posted by third parties.²²

With this framing, the court turned to Gonzalez's three arguments regarding why Google should not be given Section 230 immunity for the non-revenue-sharing claims.²³

11. *See id.* at 889.

12. *Id.* at 882.

13. *Id.*

14. *Id.*

15. *Id.* (discussing 18 U.S.C. § 2333(a)).

16. *Gonzalez*, 2 F.4th at 882.

17. *Id.*

18. *Id.* at 883.

19. *Id.* at 880.

20. *Id.* at 886.

21. *Id.*

22. *Gonzalez*, 2 F.4th at 886.

23. *See id.*

A. Google's Immunity Under Section 230 of the CDA

1. Presumption Against Extraterritoriality

The first claim Gonzalez asserted on appeal was that the presumption against extraterritorial application precluded Section 230 from applying to their claims, as the killing of the decedent took place in France.²⁴ The court analyzed this claim in accordance with the Supreme Court's two-part test in *RJR Nabisco, Inc. v. European Community*.²⁵ The first step, "whether the presumption against extraterritoriality has been rebutted," was not at issue.²⁶ The court then moved to the second step: identifying the statute's focus and "whether the conduct relevant to that focus occurred in United States territory."²⁷ The court concluded the purpose of Section 230(c)(1) is to limit liability of interactive computer services providers (such as Google) in order to encourage them to monitor their respective websites.²⁸ Section 230 does this through immunizing the providers against liability for content created by third parties.²⁹ Given Section 230's focus on limiting liability, the relevant conduct for the extraterritorial analysis is that which incurs immunity, which in this case took place in the United States.³⁰ The court sided with Google, concluding that the claim involved a domestic application of Section 230 and raised no issue of extraterritorial application.³¹

2. 2016 Amending of the ATA

The second claim Gonzalez made on appeal was that when Congress amended the ATA in 2016 by enacting JASTA, it implicitly repealed Section 230.³² The court was not so persuaded.³³ The Supreme Court held in *Branch v. Smith* that, "absent a clearly expressed congressional intention, repeals by implication are not favored."³⁴ Such an implied repeal as argued by Gonzalez will only be found "where provisions in two statutes are in 'irreconcilable conflict.'"³⁵ In considering the statutory language of JASTA, the court found no substantive provision that conflicts with Section 230.³⁶ Section 230 protects a narrow class of defendants from liability, protecting interactive computer services from being treated as publishers or speakers of the content

24. *See id.* at 887.

25. *See id.* (citing *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337 (2016)).

26. *RJR Nabisco*, 579 U.S. at 337.

27. *Gonzalez*, 2 F.4th at 887 (quoting *RJR Nabisco*, 579 U.S. at 337).

28. *Id.* at 888.

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.* at 888-89.

33. *Gonzalez*, 2 F.4th at 889.

34. *Id.* (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

35. *Id.* (quoting *Branch*, 538 U.S. at 273).

36. *Id.*

at issue.³⁷ JASTA included no provision to the contrary, merely expanding the scope of liability under the ATA for acts of international terrorism.³⁸ Therefore, the court rejected Gonzalez's claims that JASTA repealed Section 230.³⁹

3. Application to ATA Claims

Gonzalez's third claim was that the ATA's right of private civil enforcement that otherwise gives rise to criminal liability cannot be immunized by Section 230.⁴⁰ Gonzalez supported this claim with the text of Section 230(e)(1), which states, "[n]othing in this section shall be construed to impair the enforcement of . . . any . . . [f]ederal criminal statute."⁴¹ The court rejected this claim and sided with Google, concluding that Section 230(e)(1) applies only to criminal prosecution, not cases like this which are only for civil damages.⁴² The court found support for this conclusion in First and Second Circuit rulings, which similarly found that Section 230(e)(1) is limited only to criminal prosecutions and, therefore, would not preclude Section 230 immunity for Google in this case.⁴³

4. Application to the TAC

Concluding that Gonzalez's claims were not categorically excluded from Section 230 immunity, the court then addressed whether Google, rather than a third party, created the content addressed in the TAC and, therefore, is not afforded Section 230 immunity.⁴⁴ The court found that Google did not create or develop the ISIS content posted to YouTube, but instead merely republished it.⁴⁵ The court concluded that Google was not acting as an information content provider and was, therefore, eligible for Section 230 immunity.⁴⁶

5. Application to the Revenue-Sharing Theory

Gonzalez's final claim regarding Section 230 immunity arose under the revenue-sharing theory: because Google shared advertising revenue with ISIS, it "should be held directly liable for providing material support to ISIS pursuant to Section 2333(a) and secondarily liable for providing substantial

37. *Id.* at 889; 47 U.S.C. § 230(c)(1).

38. *See Gonzalez*, 2 F.4th at 889.

39. *Id.* at 890.

40. *Id.*

41. *Id.*; 47 U.S.C. § 230(e)(1).

42. *Gonzalez*, 2 F.4th at 890.

43. *Id.*

44. *Id.*

45. *Id.* at 892.

46. *Id.*

assistance to ISIS pursuant to Section 2333(d).⁴⁷ The court distinguished this claim because here, Google would be providing ISIS with material support through monetary payments, rather than simply publishing ISIS's content.⁴⁸ The court concluded that Section 230 does not necessarily preclude Gonzalez's claim based on a theory of revenue-sharing with ISIS.⁴⁹

B. Direct and Secondary Liability Under the ATA

Given the court's finding that Section 230 does not immunize Google from liability under the theory of revenue-sharing, the court then considered whether Gonzalez sufficiently alleged claims for direct and secondary liability under the ATA.⁵⁰ The court rejected Gonzalez's theory of direct liability under Section 2333(a), concluding that the TAC offered no evidence that "Google's provision of material support appeared to be intended to intimidate or coerce a civilian population, or to influence or affect a government as required by the ATA."⁵¹

The court also rejected Gonzalez's theory of secondary liability, agreeing with Google that Gonzalez failed to state a claim for such a finding.⁵² The operative required showing for secondary liability for aiding and abetting acts of terrorism under Section 2333(d) is that Google knowingly and substantially assisted the act of terrorism that injured the decedent.⁵³ While the court concluded that Gonzalez sufficiently alleged Google's "knowing" assistance through revenue-sharing, it ultimately concluded Gonzalez did not sufficiently allege Google's "substantial" assistance.⁵⁴

III. CONCLUSION

For the foregoing reasons, the Ninth Circuit affirmed the district court's dismissal of the case, holding that for the non-revenue-sharing claims Google is eligible for Section 230 immunity and that while Google is not eligible for Section 230 immunity for the revenue-sharing claim, Gonzalez did not sufficiently allege Google's direct nor secondary liability under the ATA.⁵⁵ Gonzalez petitioned the Supreme Court of the United States for a writ of certiorari, which was granted in October 2022.⁵⁶ The Supreme Court heard the case on February 21, 2023.⁵⁷

47. *Id.* at 897-98.

48. *Gonzalez*, 2 F.4th at 897-98.

49. *Id.* at 899.

50. *Id.*

51. *Id.* at 901.

52. *Id.*

53. *Id.* at 905.

54. *Gonzalez*, 2 F.4th at 907.

55. *Id.*

56. *Gonzalez v. Google LLC*, 143 S. Ct. 80 (Oct. 3, 2022) (No. 21-1333) (granting cert.).

57. *Gonzalez v. Google LLC*, No. 21-1333 (U.S. argued Feb. 21, 2023).