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That Was Close! The Supreme Court Declines Opportunity to Address CDA Immunity in Social Media

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Back in October 2022, the Supreme Court granted certiorari in *Gonzalez v. Google*, an appeal that challenged whether YouTube's targeted algorithmic recommendations qualify as "traditional editorial functions" protected by the CDA — or, rather, whether such recommendations are not the actions of a "publisher" and thus fall outside of CDA immunity. At the time, some commentators cautioned that an adverse ruling for YouTube would "break the internet" and subject a host of modern platforms to crippling liability for automated moderation or recommendation of third party content. At the very least, as we proffered in our prior post on the *Gonzalez* case, an adverse ruling would have created a major carve-out of the CDA, with online providers potentially losing immunity in instances where automated tools were used to organize, repackage, or recommend third party content. On May 18, 2023, in what turned out to be a close shave for online platforms and Section 230, the Court declined to take up the CDA issues in the *Gonzalez* appeal.

The Supreme Court issued two decisions on May 18th: one in the *Gonzalez* case, and a second decision in *Twitter v. Taamneh*, a related case against Twitter and other platforms. This second case undertook an analysis of aiding and abetting liability under the federal Anti-Terrorism Act (ATA) (18 U.S.C. § 2333) and whether certain social media platforms could be held liable under the ATA for, among other things, algorithmic recommendation of third party terrorist content to other users. (See *Gonzalez v. Google LLC*, No. 21-1333, 598 U. S. ____ (May 18, 2023) (per curiam); *Twitter, Inc. v. Taamneh*, No. 21-1496, 598 U. S. ____ (May 18, 2023)).

Both cases involved allegations under the ATA that the social media defendants provided "material support" to ISIS terrorists through their use of the platforms. However, the *Twitter* case focused on whether the social media company defendants could be considered to have aided and abetted ISIS in a 2017 terrorist attack at a Turkish nightclub. On the other hand, the *Gonzalez* case focused more on the availability of CDA 230 immunity for similar claims against YouTube. Despite the principal issues being different, the cases were linked, and a ruling in *Twitter* would inevitably impact the outcome of the *Gonzalez* case. Given the interrelationship of the two cases, an adverse ruling in *Twitter*, which focused on the merits of plaintiffs' ATA claims, would doom the plaintiffs' chances in *Gonzalez* (as the underlying ATA claims involved relatively similar conduct on the part of the social media defendants in that case), and also would give the Court an off-ramp to avoid having to take up the CDA 230 issues at all in the *Gonzalez* appeal. And that is exactly what happened.

A full overview of the Court's analysis of aiding and abetting liability under the ATA is beyond the scope of this post. However, in brief, the Court in the *Twitter* case dismissed the ATA claims against the social media defendants on the merits and seemed wary to validate a theory that could subject online platforms to vast liability merely for providing what amounts to a communication service. The Court stated:

> "The fact that some bad actors took advantage of these platforms is insufficient to state a claim [under the ATA] that defendants knowingly gave substantial assistance and thereby aided and abetted those wrongdoers' acts. And that is particularly true because a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings."

Armed with the decision in the *Twitter* case, the Court, in a *per* curiam opinion, noted that the holding similarly applied to the claims against YouTube in the *Gonzalez* case and remanded the case, noting that it need not delve into the social media defendants' defenses under the CDA and that ultimately the claims in *Gonzalez* were likely insufficient on the merits as well:

> "[W]e think it sufficient to acknowledge that much (if not all) of plaintiffs' complaint seems to fail under…our decision in *Twitter*…. We therefore decline to address the application of §230 to a complaint that appears to state little, if any, plausible claim for relief. Instead, we vacate the judgment below and remand the case for the Ninth Circuit to consider plaintiffs' complaint in light of our decision in *Twitter*."

With the Supreme Court declining the opportunity to effect CDA reform on its own, the breadth of Section 230 remains unchanged and providers can continue to operate without the uncertainty that had hung over this appeal. Moving forward, the industry will be closely watching the petition for certiorari challenging a Texas social media regulation (HB20) on First Amendment grounds currently being considered by the Supreme Court. According to the Petitioners, HB20 presents "burdensome operational and disclosure requirements" and would chill editorial choices. Back in Congress, there is still a lot of political chatter around Washington about "reigning in Big Tech" from both sides of the aisle, but no consensus in how to achieve that through CDA reform without affecting the vibrant internet. The urgency to enact CDA reform appears to be tempered by the focus on the technology issue du jour, artificial intelligence (AI). In fact, following OpenAI CEO Sam Altman's appearance before the Senate Judiciary Privacy, Technology, & the Law Subcommittee this past week, there appears to be some bipartisan appetite to regulate this emerging area. Will the CDA get swept into a broader AI-focused legislative effort? Or, will it be left aside, an orphaned legal issue, overshadowed by this new technology. We will have to wait and see how this all unwinds. But in the meantime, the CDA still survives!

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