

A Look At Section 230 After High Court's Refusal To Clarify

By **Neusha Etemad and Anne Marie Ellis** (June 30, 2023)

Section 230 of the Communications Decency Act was enacted in 1996 to provide websites with immunity from liability arising from posting third-party content.

For a service provider to be immune, however, the information at issue must be provided by another information content provider. This begs the question of whether website operators provide the content on their platforms or act solely as intermediaries for third-party content.

Determining who is an information content provider is a complex question as more websites are verifying users and suggesting content, blurring the line between passive third-party content and content that a website provides itself.

Historically, the majority of federal circuits have applied broad federal immunity to content providers that publish third-party content. Courts are now cracking down and limiting the safe harbor that content providers previously relied on to avoid liability.

Supreme Court Decisions: Gonzalez v. Google and Twitter v. Taamneh

In June 2021, the U.S. Court of Appeals for the Ninth Circuit **decided** a group of three actions against Google LLC, Twitter Inc. and Facebook Inc. under the Anti-Terrorism Act: Gonzalez v. Google, Taamneh v. Twitter et al. and Clayborn v. Twitter et al.

The plaintiffs in these actions alleged that social media platforms gave ISIS a platform to promote terrorism. The three-judge Ninth Circuit panel generated three separate opinions, disagreeing on the scope of Section 230 immunity for content providers.

The majority requested an en banc panel, and U.S. Circuit Judge Ronald M. Gould pled for the U.S. Supreme Court to address the scope of Section 230. In October 2022, the U.S. Supreme Court granted Twitter's petition for a writ of certiorari.

Government agencies, scholars and terrorist attack victims filed over 20 amicus curiae briefs before the Supreme Court **issued** opinions in the Gonzalez and Taamneh cases on May 18.

It was expected that the results would be telling for any platform that allows public expression and publication. However, the Supreme Court declined to address the question of Section 230 immunity under the CDA.

In Gonzalez, the court issued a per curiam opinion stating that they "decline[d] to address the application of §230 to a complaint that appears to state little, if any, plausible claim for relief." [1]

The Taamneh decision is silent on Section 230. In a 9-0 reversal, however, the court ruled



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that Twitter was not liable for aiding and abetting terrorist attacks by providing a platform to display content and suggesting such content to its users.

Prior Case Background: Roland v. Letgo

Prior to the Gonzalez and Taamneh rulings, two users of an online marketplace called Letgo Inc., now merged with OfferUp Inc., were murdered by an alleged verified user of the platform.

To be verified on Letgo, a user inputs a phone number, and the platform sends the phone number a text message to confirm it truly exists. The verified designation is noted on the users' profiles.

Despite being verified, Kyree Brown was allegedly selling a stolen car through a fictitious name on his profile. He allegedly murdered Joseph and Jossline Roland when they met to obtain the car title.

In *Roland v. Letgo*, the plaintiffs asserted seven claims against defendants who argued that all claims should be dismissed under Section 230 of the CDA.

In 2022, a Colorado magistrate judge found that the plaintiffs' allegations were sufficient to survive a motion to dismiss, and defendants Letgo and OfferUp were not granted immunity under Section 230 of the CDA.[2]

To fall under CDA immunity, a website must passively display content that is created entirely by a third party.

In *Roland*, U.S. Magistrate Judge Michael E. Hegarty found that the plaintiffs sufficiently pled that the defendants contributed in part to Kyree Brown's representation as a verified user.

Judge Hegarty noted that his decision applied only to the pleading stage and did not affect whether defendants could assert CDA immunity at summary judgment. The ruling shows that internet service providers' involvement in vetting users and their content could lead to greater potential exposure.

The Ninth Circuit and U.S. Court of Appeals for the Tenth Circuit have also weighed in on the issue. These courts have routinely differentiated between content that a website itself creates versus the passive display of content.

In *Fair Housing Council of San Fernando Valley v. Roommates.com LLC* in 2008, the Ninth Circuit found that requiring subscribers to select their roommate preferences through prepopulated answers prevented CDA immunity because the website materially contributed to the content's unlawfulness.[3]

Similarly, in *FTC v. Accusearch Inc.*, the Tenth Circuit found that a website's participation in disclosing confidential telephone records through a third party classified it as a developer of information.[4]

At odds with *Accusearch*, the Ninth Circuit ruled in *Kimzey v. Yelp! Inc.* that Yelp had immunity when transforming negative reviews to conform to its star-rating system because the system is a neutral tool that did not amount to content creation or development.[5]

Key Takeaways

The Supreme Court has never addressed whether Section 230 immunity will remain broad in its protections or be narrowed. The question remains open for the lower courts, and there is inconsistency among circuits regarding the immunity that content providers are granted.

To avoid greater exposure, internet service providers should carefully consider any activities involving vetting and attesting to information on their platforms and suggesting content.

The Supreme Court declining to address Section 230 in the Gonzalez decision only heightens the importance of understanding which laws apply in the jurisdictions companies operate in.

Best practices for attorneys representing content providers include erring on the side of caution when engaging with or verifying users' content because CDA immunity is not guaranteed.

Counsel should ensure that content providers' websites and applications are designed to remain neutral when publishing, suggesting or verifying content.

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[1] 598 U. S. ____, at *3 (2023).

[2] *Roland v. Letgo, Inc.*, No. 22-cv-00899 (D. Colo. April 14, 2022).

[3] See *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008).

[4] See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200-01 (10th Cir. 2009).

[5] 836 F.3d 1263, 1269-70 (9th Cir. 2016).