# TWITTER, INC. V. TAAMNEH

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## INTRODUCTION

As a counter-terrorism measure, Congress enacted the Antiterrorism Act (ATA) of 1990 for U.S. nationals or their "estate, survivors, or heirs" to bring a civil suit under 18 U.S.C.A. § 2333 when "injured in his person, property, or business by reason of act of international terrorism."[1] The act defined the term "international terrorism" to mean activities that are violent, criminal, intended to intimidate or coerce civilians or a government, and occur either primarily outside the U.S. or transcending national boundaries.[2] However, while the act opened the courthouse doors for plaintiffs who were injured by an act of international terrorism, it did not provide an explicit form of secondary liability on anyone who only helped or conspired with terrorists.

The Antiterrorism Act soon became inadequate to patrol the proliferation of the internet and social media platforms. Thus, in 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA) to amend Section 2333 and provide a form of secondary civil liability.[3] Under this new act, U.S. nationals who have been injured by reason of an act of international terrorism may directly sue the

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1. Antiterrorism Act of 1990, 18 U.S.C. § 2333.

2. 18 U.S.C. § 2331(1)(A)–(C).

3. Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333 (2016).

terrorists,[4] or anyone who "aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."[5] For a secondary liability claim, the JASTA also imposes an additional condition.[6] The act of international terrorism must have been "committed, planned, or authorized by an organization that had been designated as a Foreign Terrorist Organization under Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) as of the date on which such act of international terrorism was committed, planned, or authorized."[7] Significantly, the Islamic State of Iraq and Syria (ISIS) was designated a foreign terrorist organization in December 2004.[8]

In 2017, Abdulkadir Masharipov "entered [an Istanbul] nightclub in the early hours of January 1, 2017, and fired over 120 rounds into a crowd of 700 people"[9] on behalf of ISIS. The terrorist killed Nawras Alassaf along with thirty-eight others and injured sixty-nine.[10] ISIS released a statement the next day claiming responsibility for the attack.[11]

Alassaf's family brought suit under the JASTA.[12] Instead of directly suing ISIS under Section (a) of the act,[13] Alassaf's family invoked Section (d)[14] to sue Facebook, Twitter, and Google (the owner of YouTube) for aiding and abetting ISIS by failing to prevent the terrorist organization from using their services,[15] even though the platforms did not actively participate in the specific act of terrorism that injured Alassaf.

## I. ISSUE: SOCIAL MEDIA COMPANIES SECONDARY LIABILITY FOR FAILURE TO PREVENT TERRORIST ORGANIZATIONS' USE OF THEIR SERVICES

The central issue in *Twitter, Inc. v. Taamneh* is whether social media companies–Twitter, Facebook, and Google–can be held

4. *Id.* § 2333(a).
5. *Id.* § 2333(d)(2).
6. *Id.*
7. *Id.*; 8 U.S.C. § 1189 (1996).
8. Bureau of Counterterrorism, *Foreign Terrorist Organizations, Designated Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ (last visited Jan. 1, 2024).
9. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1215 (2023).
10. *Id.*
11. *Id.*
12. *Id.*
13. 18 U.S.C. § 2333(a).
14. *Id.* § 2333 (d)(2).
15. *Twitter*, 143 S. Ct. at 1210.

secondarily liable under the JASTA[16] as aiders and abettors of a terrorist attack carried out by a Foreign Terrorist Organization.[17]

To answer this question, the Court must first determine what it means for the defendants to aid and abet. Specifically, the Court must decide whether Twitter, Facebook, and Google are immunized when their "recommendation algorithms" suggest unconscionable ISIS content to their users. The Court noted that Section 2333 does not define any of its critical terms.[18] In its decision, the Supreme Court examined the plausibility of the plaintiff's claim under Section 2333(d)(2) by addressing whether the social media platforms' conduct "knowingly provided substantial assistance" to the fulfillment of the specific ISIS terrorist attack on the Reina Nightclub.[19]

## II. DEVELOPMENT OF INTERNET PLATFORM CIVIL LIABILITY

Although the internet has developed at an unparalleled rate, the law has been interpreted and applied broadly to protect internet platforms from the content of its users. That is, the "legal system generally does not impose [tort] liability for mere omissions, inactions, or nonfeasance; although inaction can be culpable in the face of some independent duty to act, the law does not impose a generalized duty to rescue."[20] Typically, only "wrongful conduct" is sanctioned in both criminal and tort law.[21]

Nevertheless, many are concerned that this broad liability shield was never intended to allow such inaction. Given that, some internet platforms, such as YouTube, have taken substantial steps to screen and remove harmful content from its platform.[22] Yet, while internet platforms are encouraged to moderate and remove content that violates their terms of service, some continue to fall short.

The internet has advanced to allow platforms to operate across one another. For example, links to content on one platform can be posted on another, such as a YouTube video link posted on Twitter. This cross-platform feature has created unprecedented internet operability, making screening and moderation onerous. While internet platforms eventually remove both content and user accounts

16. § 2333.
17. *Twitter*, 143 S. Ct. at 1218.
18. *Id.*
19. *Id.*
20. *Id.* at 1220–21.
21. *Id.* at 1221.
22. The YouTube Team, *The Four Rs of Responsibility, Part 1: Removing harmful Content*, YOUTUBE OFF. BLOG (Sept. 3, 2019), https://blog.youtube/inside-youtube/the-four-rs-of-responsibility-remove/.

that violate their terms of service,[23] significant damage may have already been done before it can be removed. For example, on December 19, 2020, President Donald Trump tweeted, "Big Protest in D.C. on January 6th, be there, will be wild!" referring to a "Stop the Steal" rally outside the Capitol Building on the day President-Elect Joe Biden's electoral college victory was set to be certified.[24] This content was cross-posted on Facebook referencing President Trump's tweets,[25] drawing tens of thousands of angry protestors to D.C. to participate in a riot against democracy.[26]

President Trump tweeted 25 times that day, fueling the riot,[27] and eventually leading to an attack on the Capitol Building with an estimated $2.73 million worth of damage.[28] Three of the twenty-five tweets were removed shortly after publication.[29] By 9:00 PM on January 6th, both Facebook and Twitter temporarily suspended the President's accounts.[30] Subsequently, the President's Facebook account was indefinitely suspended on January 7th and his Twitter account was permanently suspended on January 8th as a result of the attack.[31] Although President Trump called for peaceful protests and no violence,[32] a bipartisan Senate report determined that seven deaths were connected to the riot and approximately 150 police

23. Brian Fung, *Twitter Bans President Trump Permanently*, CNN BUS., (Jan. 9, 2021, 9:19 AM), https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html.

24. Tom Dreisbach, *How Trump's 'will be wild!' Tweet Drew Rioters to the Capitol on Jan. 6*, NPR (July 13, 2022, 3:42 PM), https://www.npr.org/2022/07/13/1111341161/how-trumps-will-be-wild-tweet-drew-rioters-to-the-capitol-on-jan-6.

25. *Id.*

26. *Id.*

27. The American Presidency Project, *Tweets of January 6, 2021*, UC SANTA BARBA, https://www.presidency.ucsb.edu/documents/tweets-january-6-2021 (last visited Jan. 1, 2024).

28. Zachary Snowdon Smith, *Capitol Riot Costs Go Up: Estimates $2.73 Million in Property Damage*, FORBES (Apr. 11, 2022, 5:07 PM), https://www.forbes.com/sites/zacharysmith/2022/04/08/capitol-riot-costs-go-up-government-estimates-273-million-in-property-damage/.

29. The American Presidency Project, *supra* note 27.

30. Jenni Fink, *Jan. 6 Capitol Riot Timeline: From Trump's First Tweet, Speech to Biden's Certification,* NEWSWEEK (Jan. 6, 2022, 1:00 AM), https://www.newsweek.com/jan-6-capitol-riot-timeline-trumps-first-tweet-speech-bidens-certification-1665436

31. Meline Delkic, *Trump's banishment from Facebook and Twitter: A timeline*, N.Y. TIMES (May 10, 2022), https://www.nytimes.com/2022/05/10/technology/trump-social-media-ban-timeline.html.

32. The American Presidency Project, *supra* note 27.

officers were injured as a result.[33] The attack has since been deemed a terrorist attack by many, including Democrat Representative of New York, Alexandria Ocasio-Cortez.[34]

While some internet platforms, like YouTube, actively condemn terrorism and claim to take actions to remove terrorists and other potentially harmful conduct,[35] other platforms' failure to proactively screen and moderate certain content has been openly scrutinized. As the internet has adapted, social media platforms now use algorithms to recommend specific content a user may be interested in based on their prior internet activity. Yet, the Ninth Circuit has held that such recommendation algorithms are immune from liability based on the premise that the algorithms did not "create" the content.[36] Still, civilians are unsatisfied with these outcomes and continue challenging this broad liability shield.

In the early stages of the *Twitter* complaint, the United States District Court for the Northern District of California dismissed the complaint for failure to state a claim. Specifically, the court held that the plaintiffs inadequately alleged that social media defendants provided substantial assistance to the terrorist organization because their inaction did not amount to playing a role in any specific terrorist act.[37] On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court, holding that the aiding and abetting allegations under Section 2333 adequately survived the motion to dismiss.[38] Twitter appealed, and the Supreme Court granted certiorari to determine the adequacy of the claims.

*Twitter v. Taamneh* came before the Court with a companion case, *Gonzalez v. Google LLC*.[39] The cases were consolidated at the United States Court of Appeals Ninth Circuit.[40] Notably, although these cases are based on the same premise, they invoke different authorities. *Gonzalez* concerned 47 U.S.C. § 230(c)(1) and the Communications Decency Act, whereas *Twitter* concerned 18 U.S.C. §

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33. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html.

34. *Id.*

35. The YouTube Team, *supra* note 22.

36. Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1096 (9th Cir. 2019); Gonzalez v. Google LLC, 2 F.4th 871, 892 (9th Cir. 2021) ("The Gonzalez Plaintiffs are correct that § 230 immunity only applies to the extent interactive computer service providers do not also provide the challenged information content.").

37. Taamneh v. Twitter, Inc., 343 F. Supp.3d 904, 918 (N.D. Cal. 2018).

38. *Gonzalez*, 2 F.4th at 913.

39. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023).

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

2333 and JASTA.The Supreme Court had yet to examine the issue of internet secondary liability for the content of its users until *Twitter* and *Gonzalez* reached the bench.

The key question in *Gonzalez* was whether the broad liability shield of Section 230 still applies when the platform uses recommendation algorithms to suggest terrorist content to its users.[41] Section 230(c)(1) of the Communications Decency Act provides 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] *Twitter* and *Gonzalez* are similar because both cases were brought by family members of a victim of an ISIS attack.[43] Moreover, each case seeks to determine whether social media platforms are immunized from secondary liability resulting from the content promoted by their recommendation algorithms and their inaction to adequately remove terrorist content.[44]

The Supreme Court first addressed *Twitter* to examine the issue under Section 2333 of JASTA before addressing *Gonzalez* to examine the issue under Section 230 of the Communications Decency Act. Considering the *Twitter* decision, the Supreme Court remanded *Gonzalez* to the Ninth Circuit for reconsideration,[45] declining to address the scope of Section 230 to the platforms' recommendation algorithms and noting that the complaint is "materially identical" to *Twitter*.[46] Therefore, the scope of Section 230 to recommendation algorithms is currently unresolved.

Because *Twitter* was not brought on Section 230 grounds, the Ninth Circuit did not apply Section 230 to its facts.[47] Instead, *Halberstam v. Welch* applied, which is the leading case regarding federal civil aiding and abetting liability.[48] *Halberstam* recognizes that the terms aiding and abetting are familiar to the common law, and holds that aiders and abettors are secondarily liable for the wrongful acts of others.[49] The legal framework in *Halberstam* confirms that "aids and abets" in Section 2333(d)(2) "refers to a conscious, voluntary, and culpable participation in another's wrongdoing."[50] In *Twitter*, the Court noted that *Halberstam* is the

41. Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023).

42. Communications Decency Act of 1996, 47 U.S.C. 47 U.S.C. § 230(c)(1).

43. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); *Gonzalez*, 143 S. Ct. at 1191.

44. *Twitter*, 143 S. Ct. at 1218; *Gonzalez*,143 S. Ct. at 1191.

45. *Gonzalez*, 143 S. Ct. at 1192.

46. *Id.*

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

48. *Id.* (citing Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983).

49. *Halberstam*, 705 F.2d at 472 (D.C. Cir. 1983); Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994).

50. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1223 (2023).

proper legal framework for how such aiding and abetting liability should be imposed under JASTA.[51]

## III. ANALYSIS OF TWITTER, INC. V. TAAMNEH

Billions of users around the world utilize social media platforms, like Twitter, and upload vast amounts of content each day. Significantly, minimal or no screening is performed at the point of the content's upload.[52] Defendants then profit from that content using "recommendation" algorithms[53] whereby advertisements on or near the content match it with users based on information about the content being viewed.[54] The content is matched with any user who is more likely to view it.[55] The content "can then [be] view[ed], respond[ed] to, and share[d]."[56]

Plaintiffs assert that aiding and abetting under JASTA refers to "'the person' while defendants insist reference to 'the act of international terrorism.'"[57] The Court reasoned that this dispute is immaterial "because aiding and abetting is . . . a rule of secondary liability for specific wrongful acts." Under tort context, liability is imposed only when someone commits an actual tort.[58]

The Court begins its analysis with a determination that *Halberstam* is the proper legal framework to harmonize aiding and abetting and secondary liability under JASTA.[59] The *Halberstam* court determined three elements that must be analyzed with respect to aiding and abetting:

> (1) there must be a wrongful act causing an injury performed by the person whom the defendant aided; (2) at the time assistance was provided, the defendant must have been "generally aware of his role as part of an overall illegal or tortious activity;" and (3) the defendant must have "knowingly and substantially assist[ed] the principal violation.[60]

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51. *Id.* at 1210.
52. *Id.*
53. *Id.*
54. *Twitter*, 143 S. Ct. at 1210.
55. *Id.*
56. *Id.* at 1216.
57. *Id.* at 1211–12.
58. *Id.* at 1212.
59. *Id.* at 1223.
60. *Id.* at 1211 (alteration in original).

In addition, six factors were identified regarding satisfaction of substantial assistance: (1) "the nature of the act" encouraged; (2) the "amount of assistance" given by defendant; (3) defendant's presence or absence at the time of the tort; (4) defendant's relation to the principal; (5) "defendant's state of mind;" and (6) the period of defendant's assistance.[61]

Although the Plaintiffs in *Twitter* satisfied *Halberstam's* first two elements by alleging that ISIS committed a wrong (and that defendants knew they were playing a role in that wrong), the allegations do not show a satisfaction of the third element–that defendants gave such "knowing and substantial assistance" to ISIS that they culpably participated in the Reina attack.[62] The Court notes that because the facts of *Twitter* are very distinguishable from *Halberstam*, they must look to the common law to determine the basic thrust of aiding and abetting.[63] The Court reasoned that there is not a general duty to rescue, and that criminal and tort law only sanction wrongful and culpable conduct.[64] Therefore, although the Court recognizes that those "who aid and abet a tort can be held liable for other torts that were 'a foreseeable risk' of the intended tort,"[65] Twitter's inaction was too attenuated to constitute aiding and abetting.[66]

Justice Clarence Thomas wrote for the unanimous Court to explain that social media platforms are not culpable even if "bad actors like ISIS are able to use" those platforms for "illegal–and sometimes terrible–ends."[67] Thomas reasoned that the platform's "relationship with ISIS and its supporters appears to have been the same as their relationship with their billion–plus other users: arm's length, passive, and largely indifferent."[68] The Court then goes on to identify three mistakes in the Ninth Circuit's reasoning: (1) the issue is not framed according to defendants' assistance to ISIS activities in general, but rather defendant's substantial assistance to ISIS with the Reina attack; (2) there was a misapplication of the "'knowing' half of 'knowing and substantial assistance'"; and (3) it erred in analyzing the substantiality factors as unrelated considerations, rather than the

61. Halberstam v. Welch, 705 F. 2d 472, 483–84 (D.C. Cir. 1983); *Twitter*, 143 S. Ct. at 1219.

62. *See Twitter*, 143 S. Ct. at 1219.

63. *Id.* at 1211.

64. *Id.* at 1221.

65. *Id.* at 1225; *Halberstam*, 705 F. 2d at 488.

66. *Twitter*, 143 S. Ct. at 1213.

67. *Id.* at 1226.

68. *Id.* at 1227.

essence of aiding and abetting.[69] Ultimately, the Court concluded that the defendant's conduct did not amount to consciously, voluntarily, and culpably participating in or supporting the relevant wrongdoing and the plaintiff's failed to state a claim under 18 U.S.C. § 2333(d)(2).[70]

## IV. IMPLICATIONS

Algorithms are the nucleus of the internet's functionality. In effect, the internet would spiral into upheaval if the Court found that objectionable content should be restricted because companies would be overwhelmed with modification responsibilities. Yet, dismissing the issue at the social media platform's preference still leaves significant uncertainties. In effect, the plain language of the statute will have courts consistently revisiting and quarreling with the issue. Here, while the Court determined *Halberstam* to be the proper legal framework,[71] that framework has failed to protect civilians from the unconscionable conduct of broadcasting acts of terrorism. In fact, companies like Twitter have knowingly allowed terrorist organizations, like ISIS, and its followers to use their platforms and algorithms as tools for recruitment and propaganda.[72]

Although Justice Ketanji Brown Jackson suggests that other cases presenting different allegations and different records may lead to different conclusions,[73] internet technology is still rapidly advancing, and these cases will not produce a solution. The issue is not limited in scope to the facts of cases like *Twitter* and *Gonzalez*. While these cases are comprehensive, they are not exhaustive and their application does not put the issue of internet platform liability to rest. Relying on these cases is misplaced because instances to come will be factually distinguishable. In fact, the *Halberstam* court warned that "its formulations should not be accepted as immutable components" but should be "adapted as new cases test their usefulness in evaluating vicarious liability."[74]

To put the question to rest, Congress must act by amending the statute to clarify the scope of immunity and explicitly define its crucial terms–or, create an immunity exception for the broadcast and recommendation of terrorism content. This is not an irregular proposition. Statutes often include codified exceptions. In fact,

69. *Id.* at 1229.
70. *Id.* at 1230.
71. *Twitter*, 143 S. Ct. at 1210.
72. Fields v. Twitter, Inc., 881 F3d. 739, 742 (9th Cir. 2018).
73. *Twitter*, 143 S. Ct. at 1231. (Jackson, J., concurring).
74. Halberstam v. Welch, 705 F. 2d 472, 489; *Twitter*, 143 S. Ct. at 1219–20.

Congress amended the Mann Act to enact an immunity exemption for computer services that promote prostitution via algorithms.[75] Furthermore, Justice Elena Kagan exhibited hesitancy in *Gonzalez*, and noted that it may be "something for Congress to do, not the Court."[76] Similarly, other judges have explicitly stated their preference that this immunity issue be addressed by an act of Congress.[77] In support, one Judge contended that social media platforms do more than just publish the content because they are collecting information about its users to communicate its own message that a user may be interested in specific content.[78] Moreover, Justice Kagan described a scenario where a well-known terrorist, Osama Bin Laden, opens a bank account and uses that account and the bank's services to aid his terrorist activities. Justice Kagan confirmed with the deputy solicitor general, who argued on behalf of the Biden administration, that the bank could be sued under the Antiterrorism Act. Justice Kagan then questioned why *Twitter* was different if social media platforms provide important services to terrorists as well.[79] Therefore, many judges support Congress creating an immunity exemption for internet services that use recommendation algorithms to promote egregious content like terrorism.

Reluctance to hold internet platforms liable for such unconscionable conduct is an effort to preserve First Amendment rights. Yet, as of 2014 that effort has allowed ISIS to create, at minimum, an estimated 46,000 Twitter accounts to promote the organization's jihadist killings.[80] Today, the problem is likely worse as the number of ISIS accounts has increased. These competing

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75. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

76. Transcript of Oral Argument at 46, Gonzalez v. Google LLC 143 S. Ct. 1191 (2023) (No. 21-1333).

77. *See* Force v. Facebook, Inc., 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, J., dissenting) ("Congress may wish to revisit the CDA to better calibrate the circumstances where such immunization is appropriate and inappropriate in light of congressional purposes.").

78. Gonzalez v. Google LLC, 2 F.4th 871, 920 (9th Cir. 2021) (Gould, J., dissenting.).

79. Amy Howe, *In Lawsuit Against Tech Companies, Justices Debate What It Means to "Aid and Abet" Terrorism*, SCOTUSBLOG (Feb. 22, 2023, 4:23 PM), https://www.scotusblog.com/2023/02/in-lawsuit-against-tech-companies-justices-debate-what-it-means-to-aid-and-abet-terrorism/.

80. J.M. Berger & Jonathan Morgan, *The ISIS Twitter Census*, THE BROOKINGS PROJECT ON U.S. RELS. WITH THE ISLAMIC WORLD (Mar. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/isis_twitter_census_berger_morgan.pdf. (citing data from 2014).

interests between content moderation and free speech have come to a head, as illustrated by First Amendment torchbearer Elon Musk purchasing the majority of Twitter shares in 2022 in an effort to restore free speech.[81] Nevertheless, questions concerning the future of the platform's liability for failing to remove terrorist content and users still loom. At what point does Twitter's inaction cross the line? Perhaps it will take a terrorist act against the United States rather than a foreign country to prompt statutory amendment and establish the platform's liability.

## CONCLUSION

The importance of social media platform liability to the modern internet environment must not continue to be overlooked. As illustrated by *Twitter* and *Gonzalez*, the issue is an urgent and trending topic. Thus, Congress must act to harmonize the balance between free speech and internet platform liability. Only an act of Congress can refine the intent of internet platform immunity with respect to the Communications Decency Act and JASTA. While such an enactment will implicate free speech and the future use of the internet, a change is necessary to protect internet users from terrorist organization recruitment and propaganda, the worst kind of misconduct.

81. Jon Miltimore, *Did Elon Musk Just Save Free Speech?*, FEE STORIES (Apr. 4, 2022), https://fee.org/articles/did-elon-musk-just-save-free-speech/.