

In The
Supreme Court of the United States

TWITTER, INC.,
Petitioner,

v.

MEHIER TAAMNEH, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF ON BEHALF OF THE AMERICAN
ASSOCIATION OF JEWISH LAWYERS AND
JURISTS, THE SIMON WIESENTHAL
CENTER, AND THE ZACHOR LEGAL
INSTITUTE, AS *AMICI CURIAE*,
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

The American Association of Jewish Lawyers and Jurists (“AAJLJ”) is an affiliate of the International Association of Jewish Lawyers and Jurists and is open to all members of the profession regardless of religion. The AAJLJ’s mission includes representing the human rights interests of the American Jewish community, which benefit all people irrespective of religion. The AAJLJ seeks legal remedies to achieve justice for victims of terrorism through its participation in legal cases in the United States and abroad. The AAJLJ’s mission statement, “Justice, Justice Shall You Pursue” (Deuteronomy 16:20), compels support for Respondents in this case, who deserve an opportunity to seek justice under American law.

The Simon Wiesenthal Center (“SWC”) is a leading international Jewish human rights organization with 400,000 member families. SWC’s mission includes confronting anti-Semitism, hate, and terrorism in order to defend the safety of Jews worldwide. SWC uses its influence to enact change through its robust social action agenda and to teach the lessons of the Holocaust. SWC’s work includes the Museum of Tolerance in Los Angeles, California, with a second museum set to open in Jerusalem, and over a dozen documentaries, two of which have won Academy Awards and are streaming on every major

¹ No party or their counsel either: (a) authored this brief in whole or in part; or (b) made a monetary contribution intended to fund the preparation or submission of this brief. *See* SUP. CT. R. 37.6. All parties consented to the filing of this brief.

platform. SWC is a trailblazer in interfaith and multifaith work and is committed to holding terrorists, and those that assist them, accountable under the law.

The Zachor Legal Institute (“ZLI”) is a 501(c)(3) non-profit legal advocacy organization focusing on eliminating discrimination. Among ZLI’s areas of focus is confronting discriminatory boycotts promoted by the Boycott, Divestment and Sanction (“BDS”) movement. BDS has deep and extensive ties to designated foreign terrorist organizations and has infiltrated a number of organizations to spread a discriminatory agenda aimed at Jews and companies that do business with and in Israel. ZLI is interested in ending all forms of support to foreign terrorist organizations and holding their supporters accountable under the law.

AAJLJ, SWC, and ZLI (collectively, “Amici”) are interested in efforts to confront and dismantle terrorist organizations such as the Islamic State of Iraq and Syria (“ISIS”), whose use of video, online publications, and other social media has expanded ISIS’s reach beyond the Middle East at troubling rates and with violent and often fatal consequences. As a result, Amici have an interest in ensuring appropriate moderation of content meant to incite violence posted on social media. With the rise of anti-Semitism in America and around the world, anti-Semitic social media users have promoted their agendas on Twitter, Facebook, and YouTube with impunity. Should the courts find social media companies immune from liability for knowingly allowing such content to incite violence, Amici’s missions will suffer.

Accordingly, Amici have a strong interest in stopping international terrorism by, among other means, ensuring that all victims of such terrorism are compensated to the fullest extent. This compensation includes the broad application of the secondary liability provision of the Justice Against Sponsors of Terrorism Act (“JASTA”), Pub. L. No. 114-222, 130 Stat. 852 (2016). In their ongoing effort to minimize the devastating effects of global terrorism, Amici believe that those who aid and abet terrorist organizations like ISIS should be held responsible pursuant to JASTA. ISIS’s sophisticated, calculated use of social media platforms such as Twitter, Facebook, and YouTube has facilitated it garnering support for its terrorist activities against Americans and others, recruiting followers, and striking fear in ordinary citizens. Twitter, Facebook and YouTube’s algorithms provide wider, focused audiences for ISIS supporters, their targeted advertisements offer monetary support for the group, and, as a whole, social media has been integral to the spread of the terrorist organization throughout the world. Amici strongly support holding terrorist organizations – including those who aid and abet them through social media platforms – responsible for their violations of human rights through application of JASTA.

SUMMARY OF THE ARGUMENT

On January 1, 2017, an ISIS member acting on instructions from a cell leader entered a nightclub in Istanbul, Turkey and killed thirty-nine people and wounded seventy-nine others. Prior to this atrocious attack, Twitter, Facebook, and YouTube had notice that ISIS was using their platforms to spread propaganda, recruit members, raise money, and

create fear. Indeed, countless articles as well as hearings before United States House of Representatives Committees on Homeland Security and Oversight and Government Reform detailed terrorist organizations' pervasive use of social media. Each of these companies had content moderation policies that prohibited such use; yet each failed to appropriately or effectively enforce those policies, thereby assisting ISIS in its despicable mission. And, Twitter, Facebook, and YouTube's algorithms contributed to the spread of ISIS, allowing it to gain supporters in the Western world and the United States. These algorithms promoted content based upon a social media user's specific usage trends, which – in turn – led to confirmation bias and the radicalization of more individuals. Twitter, Facebook, and YouTube knew these facts years before the deadly 2017 New Year's attack.

In 2016, with the enactment of JASTA, Congress provided a broader remedy against those who aid and abet terrorists. The express purpose of JASTA is to allow litigants the “broadest possible basis... to seek relief against persons... that have provided material support, directly or indirectly” to groups like ISIS. Pub. L. No. 114-222, § 2(b). Such aiding and abetting liability is analyzed under *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). *Id.* § 2(a)(5). *Halberstam* unequivocally found liability for generalized support of an illegal enterprise even where the defendant did not know about, directly participate in, or outwardly sanction the principal violation at issue – there, a murder. Where, as here, Twitter, Facebook, and YouTube knew about ISIS's extensive use of their platforms before the 2017

attack at issue and failed to moderate such content pursuant to their own policies, a claim for liability under JASTA should survive a motion to dismiss. The Ninth Circuit, therefore, correctly reversed the District Court's dismissal of Respondents' First Amended Complaint against Twitter, Facebook, and YouTube. Because the complaint adequately alleged that Twitter, Facebook, and YouTube knowingly provided substantial assistance to ISIS prior to the 2017 attack, this Court should affirm the Ninth Circuit's decision allowing the case to proceed.

ARGUMENT

For years, ISIS has used social media providers, such as Twitter, Facebook, and YouTube, to recruit members, raise funds, and instill fear in civilians across the world. For example, in 2014, an estimated 46,000-90,000 ISIS-supporting social media accounts were active on Twitter.² Shaun Wright, *Resurgent Insurgents: Quantitative Research Into Jihadists Who Get Suspended but Return on Twitter*, 7 J. OF TERRORISM RES. 2, 2 (2016). As stated in 2016, ISIS "is as much a media conglomerate as a fighting force" whose social media propaganda was

² Although this case focuses on ISIS's use of social media, other terrorist organizations also use social media to incite violence and instill fear. *See, e.g.*, Simon Handler, *The Cyber Strategy & Operations of Hamas: Green Flags & Green Hats*, ATLANTIC COUNCIL (Nov. 7, 2022), <https://www.atlanticcouncil.org/in-depth-research-reports/report/the-cyber-strategy-and-operations-of-hamas-green-flags-and-green-hats/#overview> ("A robust online presence is essential for modern terrorist organizations. They rely on the internet to recruit members, fund operations, indoctrinate target audiences, and garner attention on a global scale....").

“crafted not just to stir the hearts of potential recruits but also to boost the organization’s ghastly brand – to reinforce Westerners’ perception of the Islamic State and its devotees as ruthless beyond comprehension.” Brendan I. Koerner, *Why ISIS is Winning the Social Media War*, WIRED, <https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat/> (last visited Jan. 3, 2023). Prior to YouTube, however, ISIS was limited to releasing low-quality videos with limited reach. YouTube gave ISIS a platform to produce and disseminate professional quality feature films devoted to supporting its terrorist mission to a broad audience. See Ariel V. Lieberman, Note, *Terrorism, the Internet, & Propaganda: A Deadly Combination*, 9 J. OF NAT’L SEC. L. & POL’Y 95, 104 (2017). ISIS has been described as having an extremely sophisticated propaganda machine, which relies on social media platforms to distribute “slick videos that resemble trailers for Hollywood action movies.” Holly Yan, *How is ISIS Luring Westerners*, CNN, (Mar. 23, 2015, 11:14 AM), <https://www.cnn.com/2015/03/23/world/isis-luring-westerners/index.html>. In the period of 2010-2017, ISIS used its heavy social media presence as an “essential tool to promote ‘brand awareness.’” Asma Shakir, *Media Strategy of ISIS: An Analysis*, 36 J. OF STRATEGIC STUD. 104, 112 (2016).

Gravely concerned about ISIS’s pervasive use of social media and the ramifications thereof, on October 28, 2015, the Subcommittee on National Security, organized under the United States House of Representatives Committee on Oversight and Government Reform, met to discuss social media and

the rise of terrorism. In his opening remarks, Chairman of the Subcommittee Ronald D. DeSantis stated:

While foreign fighters travel overseas for training and to make other terrorist connections, it's becoming apparent that Islamic recruits in the United States and other parts of the world who are unable to travel to these battlegrounds do not necessarily need to do so in order to receive training and inspiration. They can engage real time with jihadists on Twitter, watch ISIS's murderous propaganda on YouTube, [and] view jihadi selfies on Instagram. . . .

Radicalization: Social Media and the Rise of Terrorism, Hearing Before the Subcomm. on Nat'l Sec. of the H.R. Comm. on Oversight & Gov't Reform, 114th Cong. (2016) (statement of Subcommittee Chairman Ronald D. DeSantis); see also Jihadist Use of Social Media—How to Prevent Terrorism and Preserve Innovation, Hearing Before the Subcomm. on Counterterrorism & Intel., H.R. Comm. on Homeland Sec., 112th Cong. (2012) (detailing terrorists' use of social media).

In this case, the operative complaint provided further details on the extensive use of social media platforms by ISIS to “promote and carry out its terrorist activities.” (JA48-49.) ISIS's use of social media was and continues to be out in the open. Perhaps surprising to an ordinary user of social media (but not to extremists and terrorists), Twitter permitted ISIS's official media wing to maintain an

official Twitter page where it posted messages from ISIS leaders and videos and images of violent, brutal executions to its 19,000 followers. (JA50.) According to the First Amended Complaint, ISIS posted “at least 90 tweets *every minute*.” (JA51 (emphasis added).) And, ISIS has used YouTube to post “videos and images of numerous beheadings and other brutal killings, including setting captives on fire, blowing them up with explosives, [and] slowly lowering them in a cage underwater to drown.” (JA52.) The complaint asserts that through its use of Twitter, Facebook, and YouTube, “ISIS has recruited more than 30,000 foreign recruits since 2013, including some 4,500 Westerners and 250 Americans.” (JA79.)

This backdrop of ISIS’s social media usage directly preceded the January 1, 2017 attack on the Reina nightclub in Istanbul, Turkey that murdered Respondent Mehier Taamneh’s brother, Nawras Alassaf (the “Reina Attack”). (JA46; JA54.) Contrary to Twitter, Facebook, and YouTube’s assertions in their briefs to this Court, the complaint details ISIS’s use of social media specific to the attack in Turkey – using Twitter, Facebook, and YouTube to warn Turkish residents that Turkey would be attacked for participating in a “coalition of nations against ISIS” and to promote the operational leader of the Reina Attack as a celebrity. (JA52.) More specifically, the complaint alleged that the shooter in the Reina Attack “was radicalized by ISIS’s use of social media.” (JA157.) Given these allegations, the Ninth Circuit properly reversed dismissal of the complaint, finding it pled plausible claims against Twitter, Facebook, and YouTube for violation of the Anti-Terrorism Act and, specifically, the 2016 amendment to that Act,

which expressly recognized aiding and abetting civil liability.

The Anti-Terrorism Act (“ATA”) provides a civil remedy for a “national of the United States injured in his person, property, or business by reason of an act of international terrorism, or [to] his or her estate, survivors, or heirs.” 18 U.S.C. § 2333(a). JASTA, which amended the ATA in 2016, expands the reach of that Act, providing:

In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization³... as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

Id. § 2333(d)(2).

JASTA’s express purpose is to “provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries,

³ ISIS has been designated as a foreign terrorist organization. See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Jan. 10, 2023).

wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.” Pub. L. No. 114-222, § 2(b); *Atchley v. AstraZeneca UK Limited*, 22 F.4th 204, 215 (D.C. Cir. 2022); *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 855 (2d Cir. 2021).

For purposes of analyzing an aiding and abetting claim under JASTA, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), provides the appropriate legal framework. Pub. L. No. 114-222, § 2(a)(5). The D.C. Circuit set forth the elements for aiding and abetting liability in *Halberstam* as:

- (1) the party whom the defendant aids must perform a wrongful act that causes an injury;
- (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;
- (3) the defendant must knowingly and substantially assist the principal violation.

Halberstam, 705 F.2d at 477-78. “The ‘general awareness’ element requires the defendant to be ‘generally aware’ of its role in ‘an overall illegal or tortious activity at the time that [it] provides the assistance.’” *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 496 (2d Cir. 2021). The defendant need not be aware of its role in the “specific act” that causes the plaintiff’s injury – it is enough to be “generally aware” of its role in “an overall illegal activity from which the

act that caused the plaintiff's injury was *foreseeable*.” *Id.* (emphasis in original).

Based on these principles, the Ninth Circuit correctly held that Respondents plausibly stated a claim for recovery under JASTA. Finding that Respondents' complaint alleged that “social media platforms were essential to ISIS's growth and expansion” and that Twitter, Facebook, and YouTube allowed ISIS accounts to remain public even after receiving complaints, that court found that Respondents met the elements for aiding and abetting liability set out in *Halberstam* – and that the complaint was sufficient to survive a motion to dismiss. *Gonzalez v. Google*, 2 F.4th 871, 910 (9th Cir. 2021).

In this Court, the first two elements – that ISIS caused Respondents' injuries or that Twitter, Facebook, and YouTube were “generally aware” of ISIS's use of their social media platforms – are not at issue. Only the third element, whether the defendant “knowingly and substantially” assisted the principal violation, is before this Court. To determine whether assistance is substantial enough to constitute aiding and abetting, *Halberstam* established the following factors: “the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind.” 705 F.2d at 478. The duration of the defendant's assistance is also considered. *Honickman*, 6 F.4th at 500. No one factor is dispositive. *Id.*

Considering the procedural posture of this case and the standards set forth in Federal Rule of Civil

Procedure 12(b)(6), the complaint sufficiently alleged that Twitter, Facebook, and YouTube's assistance to ISIS was knowing and substantial. This Court should therefore affirm.

I. The Ninth Circuit Correctly Found that the Complaint Adequately Alleged that Twitter, Facebook, and YouTube's Support of ISIS was Knowing and Substantial.

A. Twitter, Facebook, and YouTube's Assistance was Not Accidental or Innocent; It was Knowing.

First, the "knowledge component ... requires that the defendant 'know' that it is providing assistance[;]" *i.e.*, "accidental or innocent" assistance is insufficient. *Atchley*, 22 F.4th at 222. Put differently, when assistance is provided knowingly, the defendant is not required to know anything more about the principal's unlawful activities than what it knew for the general awareness element." *Honickman*, 6 F.4th at 500. As the Ninth Circuit properly found, the complaint adequately and persuasively established that Twitter, Facebook, and YouTube *knew* of ISIS's use of their platforms. Allowing ISIS's use of their social media sites was not "accidental or innocent":

The Taamneh Plaintiffs adequately allege that defendants knowingly assisted ISIS. Specifically, the [complaint] alleges that ISIS depends on Twitter, Facebook, and YouTube to

recruit individuals to join ISIS, to promote its terrorist agenda, to solicit donations, to threaten and intimidate civilian populations, and to inspire violence and other terrorist activities. The Taamneh Plaintiffs' complaint alleges that each defendant has been aware of ISIS's use of their respective social media platforms for many years—through media reports, statements from U.S. government officials, and threatened lawsuits—but have refused to take meaningful steps to prevent that use.

Gonzalez, 2 F.4th at 909.

Indeed, the complaint alleged that numerous articles were posted in the years leading up to the Reina Attack detailing ISIS's use of social media to recruit followers and instill terror. (JA88-90; JA92-96; JA138.) And, articles detailed advertisements being placed on ISIS propaganda videos – articles of which these social media companies were aware before the Reina Attack. (JA137-38.) In 2015, the United States House of Representatives Subcommittee on National Security met to discuss these issues and Twitter, Facebook, and YouTube's lack of response thereto. In 2016 – again, before the Reina Attack – government officials met with Twitter, Facebook, and YouTube to “press” them to “take a more proactive approach to countering terrorist messages and recruitment online.” (JA91); *see also* Dustin Volz, *White House, Silicon Valley to Hold Summit on Militants' Social Media Use*, REUTERS (Jan. 7, 2016), <https://www.reuters.com/article/us-usa-security->

tech/white-house-silicon-valley-to-hold-summit-on-militants-social-media-use-idUSKBN0UL2H320160107. Despite this knowledge, prior to the Reina Attack, Twitter, Facebook, and YouTube permitted ISIS-related accounts to remain on their platforms, finding such accounts not to be in violation of their terms of service. (JA134-36.)

Twitter contends that the knowledge component requires it to have “known both of specific accounts that substantially assisted the Reina attack and that not blocking those accounts would substantially assist such an attack.” (Pet. Br. at 37.) Facebook and YouTube argue similarly: “the complaint does not allege that either company had any knowledge of the attack, of any ISIS leader or member’s plans to perpetrate it, of any of the individuals who planned it or carried it out, or of any alleged (but as-yet-unidentified) content having anything to do with it.” (Facebook Br. at 8.) These arguments are focused on a false standard. “A specific intent, or ‘one in spirit,’ requirement is contrary to *Halberstam* as incorporated into the JASTA.” *Atchley*, 22 F.4th at 224; *see also Kaplan*, 999 F.3d at 859-60; *Lelchok v. Islamic Republic of Iran*, 393 F. Supp. 3d 261, 267 (E.D.N.Y. 2019) (“To establish [defendant’s] ‘awareness’ of its role, Plaintiffs need not establish the specific intent required for criminal aiding and abetting or prove that [defendant] knew of a specific terrorist attack.”). The complaint’s allegations – which must be taken as true – establish the requisite knowledge.

B. Twitter, Facebook, and YouTube's Assistance was Substantial – Indeed, Indispensable.

The Ninth Circuit carefully considered each of the factors set forth in *Halberstam* and determined that Twitter, Facebook, and YouTube's assistance was knowing and substantial. *Gonzalez*, 2 F.4th at 908-10. To repeat, *Halberstam* established the following factors relevant to this inquiry: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind." 705 F.2d at 478. The duration of the defendant's assistance is also considered. *Honickman*, 6 F.4th at 500.

This brief will not belabor the various factors that support a finding that the complaint adequately alleged substantial assistance. To the extent not set forth herein, Amici adopt the arguments made in the Taamneh Respondents' Brief. However, the fifth factor bears further consideration.

In reviewing that factor, which considers the defendants' state of mind, the Ninth Circuit improperly discounted Twitter, Facebook, and YouTube's culpability. As an initial matter, the length of time Twitter, Facebook, and YouTube ignored the problem despite repeated public reminders that their sites were being used to facilitate terrorism demonstrates a culpable state of mind. *See Kaplan*, 999 F.3d at 857 ("[T]he length of time an alleged aider-abettor has been involved with the tortfeasor... may afford evidence of the defendant's state of

mind.”). Twitter, Facebook, and YouTube’s long-standing inaction in the face of multiple requests for help speaks volumes.

Though Twitter, Facebook, and YouTube claim to “regularly” enforce their policies against terrorist accounts using their services (*see, e.g.*, Pet. Br. at 13), both the complaint and countless reports on the issue at the relevant time are to the contrary. During the United States House of Representatives Subcommittee on National Security’s October 28, 2015 meeting, Mark Wallace, founder and CEO of United Against Nuclear Iran, stated:

We wrote three letters to Twitter. But the response we have gotten is dismissive to the point of dereliction. Twitter’s attitude can be best summarized in a quote provided to Mother Jones magazine by a Twitter official. They said “one man’s terrorist is another man’s freedom fighter.” I want to repeat that. “One man’s terrorist is another man’s freedom fighter.”

See also Jenna McLaughlin, *Twitter is Not at War with ISIS: Here’s Why*, MOTHER JONES, (Nov. 18, 2014), <https://www.motherjones.com/politics/2014/11/twitter-is-isis-war-ban-speech/>; David Ibsen, *Big Tech is Running Out of Excuses for Inaction*, MORNING CONSULT, (Jan. 27, 2021, 5:00 AM) <https://morningconsult.com/opinions/big-tech-running-is-out-of-excuses-for-inaction/>. An example of Facebook’s intransigence to deviate from its lack of

moderation is detailed in *Terrorist Speech on Social Media*:

To give some idea of the incendiary content, Facebook has refused requests from various watchdog organizations to follow its written community decency standards to “remove graphic images when they are shared... to celebrate or glorify violence.” In the past, despite repeated external requests, Facebook has refused to take down a community page called, “Stab Israelis.” It depicted a Palestinian flag in the background and an image of a man menacingly holding a large knife in his hand. On a different Facebook page, a graphically depicted young man walks down the street with a long butcher knife in one hand toward two Jews in Chasidic clothes, who are standing at a bus stop. Another Facebook page contained a victim’s photograph with a knife blade almost completely imbedded in his head and the following message: “Stabbing operation. The free men of Al-Aqsa. The Intifada has started. The [West] Bank is carrying out resistance. There is nothing greater than a knife penetrating the heads of Jews.” This came during a period of terrorist stabbings in Israel. At the same time Twitter hosted a slew of messages with hashtags rejoicing and supporting the attacks.

Alexander Tsesis, Essay, *Terrorist Speech on Social Media*, 70 VANDERBILT L. REV. 651, 656 (2017) (footnotes omitted and alterations in original).

When any moderation was undertaken, the so-called “regular” enforcement of anti-terrorism policies was reactive, not proactive – Twitter, Facebook and YouTube waited for another user to make a report of the improper material before taking any action. *Mother Jones*, *supra* (“Twitter only investigates possible user misconduct when another user notifies the company of a potential violation.”); *Big Tech*, *supra* (“It is typical yet unsurprising that Facebook and Twitter decided to act only *after* the riot at the Capitol broke out. Such reactive policies are the norm.”); (JA136) (“Google reiterated that it would only review a video after a complaint is received.”); (JA148) (“Twitter spokesperson Nu Wexler reiterated Twitter’s hands-off approach, telling the press, “Twitter users around the world send approximately 500 million tweets each day, and we do not monitor them proactively.”).

Turning a blind eye and ignoring ISIS is not an excuse to avoid liability. Rather, because all reasonable inferences must be construed in a plaintiff’s favor, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), this factor supports the Ninth Circuit’s decision reversing dismissal of the complaint. *See also Kaplan*, 999 F.3d at 865 (stating that a complaint is allowed to contain general allegations about a defendant’s state of mind).

The factors set forth in *Halberstam* support the Ninth Circuit’s finding that the complaint adequately

alleged Twitter, Facebook, and YouTube’s assistance was substantial. This Court should affirm.

C. Affirmance Will Not Bring About Unfettered Liability Under JASTA.

The underlying theme of Twitter, Facebook, and YouTube’s briefs is that holding them liable under JASTA would have devastating and far-reaching effects such that any provider of general goods and services could be similarly held liable.⁴ But, nothing in JASTA suggests that if a party legitimately offers goods and services to the public, it is free to also *knowingly* allow terrorists to use those goods and services to facilitate their operations. ISIS’s use of social media is both pervasive and unique. Put simply, ISIS used social media to recruit members and wage psychological warfare – and these companies failed to respond. These facts are materially different than the taxi company that unknowingly brings a member of ISIS to the scene of the crime or a hospital providing humanitarian aid in

⁴ *Amici* in support of Twitter, Facebook, and YouTube also make these arguments. The Chamber of Commerce and related *amici* contend that secondary liability lawsuits under the ATA are essentially a tactic for “plaintiffs’ lawyers” to file suit against “legitimate companies” to exact “unjustified settlements.” (Chamber Br. at 7-8.) This argument, aside from disparaging victims of terrorism and their counsel, disregards the monumental role social media has played in the expansion of ISIS and the lack of response by social media providers. If Twitter, Facebook, and YouTube did not want the “reputational damage” that comes with potential liability under the ATA, perhaps they should have taken a more proactive approach to preventing ISIS’s use of their platforms.

war-torn countries. Nothing about this case implies liability for “everyday businesses providing widely available goods or services and humanitarian organizations” (Pet. Br. at 47) unless they, too, knowingly provide such services to terrorists.

And, Twitter, Facebook, and YouTube are not simply “passive” services. When a user views content on Twitter, Facebook, or YouTube, these companies use sophisticated algorithms to transform that information and create tailored content targeted at that particular user. These same algorithms push curated content similar to a user’s interests. This feature allows ISIS to recruit more members. (JA147.) For example, YouTube can recommend ISIS videos to viewers based upon what YouTube knows about a particular user, as shown here:



The entire right side of the above screenshot contains videos curated and recommended by YouTube based upon the viewed content. (JA144.)

These social media companies are promoting ISIS through their use of algorithms to recommend

similar content to users. Indeed, YouTube recommends extreme content after a user interacts with “far-right materials.” Joe Whittaker, *Recommender Systems and the Amplification of Extremist Content*, 10 INTERNET POL’Y REV. (2021). These “filter bubbles,” which began with Google’s personalization of search results in 2009, “may act as ‘autopropaganda’ by invisibly controlling what web users do and do not see, promoting ideas that users are already in agreement with and, in doing so, dramatically amplifying confirmation bias.” *Id.*

Nor is this a case of attempting to hold a company liable for “doing its best.” Whether these companies did their best is a question of fact, but the complaint sufficiently sets forth a variety of simple methods Twitter, Facebook, and YouTube could have undertaken to limit ISIS’s access to their services. (JA148-56.)

Finally, Twitter, Facebook, and YouTube do not explain why effectuating JASTA’s purpose to provide “the broadest possible” *civil* remedies to victims of terrorism would have any impact on the incentives of companies that may already face serious *criminal* penalties for providing even “benign support” to a foreign terrorist organization. See generally *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). For instance, LaFarge S.A. recently agreed to a fine of more than \$700 million for providing generalized material support to ISIS. While LaFarge’s support was not “benign,” the Department of Justice’s press release does not show that its assistance was directed towards a particular terrorist attack. See *LaFarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist*

Organizations, U.S. DEP'T OF JUSTICE, Oct. 18, 2022, <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations>.

II. Respondents Need Not Allege that Twitter, Facebook, and YouTube Aided and Abetted the Reina Attack Itself.

As a threshold matter, this Court should broadly construe JASTA, as intended by Congress, to effectuate its express purpose of disincentivizing the provision of aid to terrorist organizations. In an effort to frustrate JASTA's purpose, Twitter, Facebook, and YouTube contend that they can only be held liable under JASTA and the ATA for knowingly providing substantial assistance to the Reina Attack itself. In other words, because the complaint does not allege that Twitter, Facebook, and YouTube had any direct connection with the perpetrators or assisted in the Reina Attack, these companies cannot be liable. This reading of the statute contradicts its plain language, JASTA's express purpose, *Halberstam*, and case law interpreting JASTA's reach.

First, JASTA subjects to liability anyone who "aids and abets" by "knowingly providing substantial assistance" to the commitment, planning, or authorization of an act of international terrorism. 18 U.S.C. § 2333(d). Secondary liability of this sort "reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do." *Atchley*, 22 F.4th at 215 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994)).

Twitter, Facebook, and YouTube’s reading of JASTA is artificially narrow and contrary to its purpose. The terror that ISIS’s use of social media instills is part of the attack itself; in other words, ISIS uses Twitter, Facebook, and YouTube as a psychological weapon. As alleged in the complaint, these messages “are essential components of generating the physical, emotional, and psychological impact ISIS desire[s] to achieve via the terrorist attack.” (JA82.) The same is true for the Reina Attack itself, where “a major component” of that attack “was the messaging disseminated by ISIS prior to, during, and after the events, in which ISIS stated its reasons for committing the terrorist attack against these countries’ civilians.” (JA117.) So, while the parties may agree that the discrete attack in which Mr. Alassaf, and thereby Respondents, was injured was the shooting of the Reina nightclub, JASTA provides civil liability for material support in the planning and authorization of that attack. Put another way, the Reina Attack cannot be viewed in isolation – only beginning the moment the perpetrator stepped through the doors to accomplish his heinous acts and ending with his exit from the nightclub – but rather must be considered as a whole, consistent with the language of JASTA, to include the planning and authorization of the attack. In the case before this Court, that planning stage is alleged to have preceded the actual violence by a year – a year during which ISIS continued to use Twitter, Facebook, and YouTube to further its agenda. (JA119.) And, importantly, the attack includes the use of social media after-the-fact to instill fear in civilians – *i.e.*, the psychological warfare that works hand-in-hand with the physical warfare.

Second, JASTA's express purpose is to provide civil litigants with the "broadest possible basis" for relief. This liberal interpretation of the statute extends to the terms "planned" and "authorized." *See, e.g., Atchley*, 22 F.4th at 216-17; *Wildman v. Deutsche Bank Aktiengesellschaft*, No. 21-cv-04400, 2022 WL 17993076, *9 (E.D.N.Y. Dec. 29, 2022). On the other hand, Twitter, Facebook, and YouTube's reading of JASTA ignores its congressional purpose entirely.

Third, the interpretation of JASTA urged by Twitter, Facebook, and YouTube contradicts Congress's findings in enacting JASTA because it does not follow *Halberstam's* "framework for how [aiding and abetting] liability should function." Pub. L. 114-222, § 2(a)(5). In *Halberstam*, Linda Hamilton was held liable for aiding and abetting her boyfriend in the murder of Dr. Halberstam. 705 F.2d 472. Bernard Welch, Hamilton's boyfriend, engaged in a years-long burglary scheme in which he stole gold and silver, melted it into bars, and sold it. Hamilton knew that Welch would leave their shared home every evening for several hours, was aware of a smelting furnace installed in the couple's garage, and kept detailed records of Welch's financial transactions which included payments coming in but no payments going out. *Id.* at 475. She also benefitted from his income – living in a house valued at \$1,000,000, driving a new Mercedes-Benz, and hiring a housekeeper. *Id.* During a burglary at which Hamilton was not present, Welch murdered Dr. Halberstam. Dr. Halberstam's widow sought to hold Hamilton liable for the wrongful death of her husband based upon a theory of aiding and abetting. *Halberstam* did not require that Hamilton specifically

intended to commit the ultimate criminal act – *i.e.*, murder – or even that she knew Welch was going to murder Dr. Halberstam. She was civilly liable because she contributed to and benefited from what she was generally aware was illegal activity, and under the circumstances murder was a foreseeable risk of that activity. *Id.* at 488. The same is undoubtedly true here.

The Ninth Circuit correctly analyzed *Halberstam* in finding that the support Twitter, Facebook, and YouTube gave to ISIS’s “broader campaign of terrorism” meant that the specific acts of violence – the Paris attack at issue in *Gonzalez* and the Reina Attack at issue in this case – were foreseeable results of ISIS’s terrorist activities. *Gonzalez*, 2 F.4th at 904-05. Twitter, Facebook, and YouTube’s attempts to parse the Reina Attack from ISIS’s reign of terror is illogical, artificial, and inconsistent with *Halberstam*. Of course, under Twitter, Facebook, and YouTube’s argument, Hamilton could not have been held liable for the murder of Dr. Halberstam because there was no evidence she provided any assistance – or even knew about beforehand – that killing. But, nonetheless, she was found to be an aider and abettor and so, too, should Twitter, Facebook, and YouTube.

Finally, the D.C. and Second Circuits have similarly found a complaint to state a claim for aiding and abetting liability under JASTA even where the “aiding and abetting” was not of the actual terrorist attack itself. *See, e.g., Atchley*, 22 F.4th at 221 (“[A] ‘defendant need not be generally aware of its role in the specific act that caused the plaintiff’s injury; instead, it must be generally aware of its role in an

overall illegal activity from which the act that caused the plaintiff's injury was foreseeable.”); *Kaplan*, 999 F.3d at 866 (“[T]he district court’s initial rationale does not properly reflect the *Halberstam* third element, which concerns not whether [defendant] ‘intentionally supported Hizbollah^{5]} in perpetrating the rocket attacks,’ or acted ‘pursuant to [Hizbollah’s] agenda,’ but rather concerns whether [defendant] aided and abetted Hizbollah by knowingly providing assistance—whether directly to Hizbollah or indirectly—and whether that assistance was substantial.”).

For these reasons, Twitter, Facebook, and YouTube’s reading of JASTA to require allegations that they specifically aided and abetted the Reina Attack itself is incorrect. Like Dr. Halberstam’s murder in *Halberstam*, the Reina Attack was a foreseeable result of ISIS’s conduct as a known terrorist organization using each social media platform to further its terrorist agenda with murderous consequences.

CONCLUSION

For the above reasons, this Court should affirm the judgment of the Ninth Circuit, reversing the Northern District of California’s decision dismissing the First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

⁵ The complaint in *Kaplan* spelled Hezbollah as “Hizbollah,” which is how the Second Circuit then referenced the terrorist organization at issue in that case. *Kaplan*, 999 F.3d at 845.

Respectfully submitted,

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