

No. 21-1333

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IN THE

**Supreme Court of the United States**

REYNALDO GONZALEZ, et al.,  
*Petitioners,*

*v.*

GOOGLE, LLC,  
*Respondent.*

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

**BRIEF OF AMICI CURIAE FORMER  
NATIONAL SECURITY OFFICIALS IN  
SUPPORT OF NEITHER PARTY**

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| <i>Boim v. Holy Land Found. for Relief &amp; Dev.</i> ,<br>549 F.3d 685 (7th Cir. 2008)..... | 29            |
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| <i>D.C. v. Heller</i> ,<br>554 U.S. 570 (2008).....  | 29            |
| <i>EC Term of Years Tr. v. United States</i> ,<br>550 U.S. 429 (2007).....                   | 31            |
| <i>Fields v. Twitter, Inc.</i> ,<br>881 F.3d 739 (9th Cir. 2018).....                        | 35            |
| <i>Force v. Facebook, Inc.</i> ,<br>934 F.3d 53 (2d Cir. 2019).....                          | 20, 23        |
| <i>FTC v. Accusearch</i> ,<br>570 F.3d 1187 (10th Cir. 2009).....                            | 23            |
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| <i>Halberstam v. Welch</i> ,<br>705 F.2d 472 (D.C. Cir. 1983) .....                          | 30            |

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| <i>In re Chiquita Brands Int’l, Inc. Alien Tort Statute<br/>&amp; S’holder Derivative Litig.</i> ,<br>690 F. Supp. 2d 1296 (S.D. Fla. 2010) ..... | 32     |
| <i>In re Terrorist Attacks on Sept. 11, 2001</i> ,<br>298 F. Supp. 3d 631 (S.D.N.Y. 2018) .....   | 32     |
| <i>Joplin Mercantile Co. v. United States</i> ,<br>236 U.S. 531 (1915) .....  | 32     |
| <i>Kaplan v. Lebanese Canadian Bank, SAL</i> ,<br>999 F.3d 842 (2d Cir. 2021).....  | 32     |
| <i>Kingdomware Techs., Inc. v. United States</i> ,<br>136 S. Ct. 1969 (2016).....   | 29     |
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| <i>Morton v. Mancari</i> ,<br>417 U.S. 535 (1974).....  | 28     |
| <i>Posadas v. Nat’l City Bank of New York</i> ,<br>296 U.S. 497 (1936).....   | 28     |
| <i>Reno v. Am. C.L. Union</i> ,<br>521 U.S. 844 (1997).....   | 21     |
| <i>Retana v. Twitter, Inc.</i> ,<br>1 F.4th 378 (5th Cir. 2021).....  | 35     |
| <i>Rodriguez v. United States</i> ,<br>480 U.S. 522 (1987).....   | 28     |
| <i>Rothstein v. UBS AG</i> ,<br>708 F.3d 82 (2d Cir. 2013).....   | 29     |

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| <i>Silver v. New York Stock Exch.</i> ,<br>373 U.S. 341 (1963) .....  | 34 |
| <i>Stratton Oakmont, Inc. v. Prodigy Servs. Co.</i> ,<br>No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May<br>24, 1995) ..... | 19 |
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| <i>United States v. Will</i> ,<br>449 U.S. 200 (1980) .....   | 31 |
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| <i>Zeran v. Am. Online, Inc.</i> ,<br>129 F.3d 327 (4th Cir. 1997) .....  | 21 |

## STATUTES

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| Anti-Terrorism and Effective Death Penalty Act of<br>1996, Pub. L. No. 104-132 (Apr. 24, 1996) ..... | 25            |
| Justice Against Sponsors of Terrorism Act (JASTA),<br>Pub. L. No. 114-222 (Sept. 28, 2016) .....     | <i>passim</i> |

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| Telecommunications Act of 1996, Pub. L. No. 104-104 (Feb. 8, 1996) ..... | 25 |
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## LEGISLATIVE MATERIALS

|  |          |
|--|----------|
| 162 Cong Rec. S2845 (May 17, 2016).....  | 33       |
| 162 Cong. Rec. H5239-44 (Sept. 9, 2016) .....  | 33       |
| <i>A Country in Crisis: How Disinformation Online is Dividing the Nation: J. Hearing Before the Subcomm. on Commc'ns &amp; Tech. &amp; the Subcomm. on Consumer Prot. &amp; Com. of the H. Comm. on Energy &amp; Com., 116th Cong. (June 24, 2020) .....</i> | 15, 16   |
| <i>Counterterrorism, Counterintelligence, and the Challenges of "Going Dark": Hearing Before the S. Select Comm. on Intel., 114th Cong. (2015) .....</i>   | 5        |
| <i>ISIS Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media: Hearing Before the Perm. Subcomm. on Investigations of the S. Comm. on Homeland Sec. &amp; Governmental Affairs, 114th Cong. (2016) .....</i>          | 5, 7, 33 |
| <i>Radicalization: Soc. Media &amp; the Rise of Terrorism: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight &amp; Gov't Reform, 114th Cong. (Oct. 28, 2015).....</i>   | 33       |
| S. 2040, 114th Cong. (as passed by House and Senate, Sept. 28, 2016) .....   | 33       |

|   |       |
|---|-------|
| <i>Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11: Hearing Before the S. Comm. on Homeland Sec. &amp; Governmental Affs.</i> , 117th Cong. (Sept. 21, 2021)..... | 9, 10 |
| Victoria L. Killion, Cong. Rsch Serv., R46484, <i>Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations</i> (May 19, 2022) .....                    | 30    |

## EXECUTIVE MATERIALS

|  |    |
|--|----|
| Veto Message from the President—S. 2040, The White House, Office of the Press Secretary (Sept. 23, 2016),<br><a href="https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040..">https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040..</a> | 33 |
|--|----|

## OTHER AUTHORITIES

|  |    |
|--|----|
| Alexander Meleagrou-Hitchens et al., <i>Homegrown: ISIS In America</i> (2020).....   | 10 |
| Alliance to Counter Crime Online, <i>How Social Media Fuels Extremism</i> ,<br><a href="https://www.counterincrimingcrime.org/how-social-media-fuels-extremism">https://www.counterincrimingcrime.org/how-social-media-fuels-extremism</a> .....   | 27 |
| Andrew Tarantola, <i>How Social Media Recommendation Algorithms Help Spread Hate</i> , Yahoo! News (May 3, 2021),<br><a href="https://news.yahoo.com/how-social-media-recommendation-algorithms-help-spread-online-hate-180032029.html">https://news.yahoo.com/how-social-media-recommendation-algorithms-help-spread-online-hate-180032029.html</a> ..... | 27 |



- Anna Gronewald, *Buffalo Shooter ‘Radicalized’ Through Fringe Online Platforms, Report Finds*, Politico (Oct. 18, 2022), <https://www.politico.com/news/2022/10/18/hochul-james-release-report-on-buffalo-shooter-online-radicalization-00062344> ..... 14
- Annie Y. Chen et al., *Exposure to Alternative & Extremist Content on YouTube*, Anti-Defamation League (May 3, 2022), <https://www.adl.org/resources/reports/exposure-to-alternative-extremist-content-on-youtube> ..... 17
- Antonia Ward, *ISIS’s Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, Geo. Sec. Stud. Rev. (Dec. 10, 2018), <https://georgetownsecuritystudiesreview.org/2018/12/10/isiss-use-of-social-media-still-poses-a-threat-to-stability-in-the-middle-east-and-africa/> ..... 5
- Bipartisan Pol’y Ctr., *Countering Online Radicalization in America* (December 2012), <https://perma.cc/FP5J-L9GQ> ..... 8
- Brandy Zadrozny, *‘Carol’s Journey’: What Facebook Knew About How it Radicalized Users*, NBC News (Oct. 22, 2021), <https://www.nbcnews.com/tech/tech-news/facebook-knew-radicalized-users-rcna3581> 17
- 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/> ..... 6

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|--|------------|
| Brief of Appellee (Redacted), <i>United States v. Bahnasawy</i> , No. 18-3805 (2d Cir. Feb. 21, 2020) .  | 13         |
| BroadbandNow Team, <i>Internet Usage in the U.S. - Statistics &amp; Facts Updated, 2021</i> , BroadbandNow (Apr. 26, 2021), <a href="https://broadbandnow.com/internet/usage-stats-america">https://broadbandnow.com/internet/usage-stats-america</a> .....  | 25         |
| Charlie Winter, et al., <i>Online Extremism: Research Trends in Internet Activism, Radicalization, and Counter-Strategies</i> , 14(2) Int'l J. Conflict & Violence (2020) .....  | 5          |
| Christina Pineda, <i>What Does ISIS Post on YouTube?</i> , Homeland Security Digital Library (July 26, 2018), <a href="https://www.hsdl.org/c/what-does-isis-post-on-youtube/">https://www.hsdl.org/c/what-does-isis-post-on-youtube/</a> .....  | 6          |
| Christopher Cox, <i>The Origins and Original Intent of the Section 230 of the Communications Decency Act</i> , Rich. J. L. & Tech. Blog (Aug. 27. 2020), <a href="https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/">https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/</a> ..... | 20, 21, 24 |
| Counter Extremism Project, <i>Anwar al-Awlaki's Ties to Extremists</i> , <a href="https://www.counterextremism.com/anwar-al-awlaki">https://www.counterextremism.com/anwar-al-awlaki</a> .....   | 10         |
| Criminal Complaint, <i>United States v. Conley</i> , 14-mj-01045-KLM (D. Colo. Apr. 9, 2014) (ECF 1) .....   | 12         |

|   |        |
|---|--------|
| Dana Kerr, <i>ISIS spread its reach through Twitter with 46,000 accounts</i> , CNET (Mar. 8, 2015), <a href="https://www.cnet.com/tech/services-and-software/isis-spread-its-reach-through-twitter-with-46000-accounts/">https://www.cnet.com/tech/services-and-software/isis-spread-its-reach-through-twitter-with-46000-accounts/</a> .....   | 5      |
| David Lauer, <i>Facebook's Ethical Failures are Not Accidental; They are Part of the Business Model</i> , 1 AI & Ethics 395 (2021), <a href="https://perma.cc/P564-2GKM">https://perma.cc/P564-2GKM</a> .....   | 18     |
| Dep't of Homeland Sec., <i>Strategic Framework for Countering Terrorism and Targeted Violence</i> (Sept. 2019), <a href="https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf">https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf</a> ..... | 9      |
| Eli Pariser, <i>The Filter Bubble: How the New Personalized Web is Changing What We Read and How We Think</i> (2011) .....  | 16     |
| Erin Alworth et al., <i>Lost in Life, El Paso Suspect Found A Dark World Online</i> , Wall St. J. (Aug. 8, 2019, 8:09 pm), <a href="https://www.wsj.com/articles/lost-in-life-el-paso-suspect-found-a-dark-world-online-11565308783">https://www.wsj.com/articles/lost-in-life-el-paso-suspect-found-a-dark-world-online-11565308783</a> .....  | 14     |
| Farhad Manjoo, <i>Jurassic Web</i> , Slate (Feb. 24, 2009, 5:33 PM), <a href="https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html">https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html</a> .....  | 24, 25 |
| GCF Global, <i>How Filter Bubbles Isolate You</i> , <a href="https://edu.gcfglobal.org/en/digital-media-literacy/how-filter-bubbles-isolate-you/1/">https://edu.gcfglobal.org/en/digital-media-literacy/how-filter-bubbles-isolate-you/1/</a> .....   | 26     |

|   |    |
|---|----|
| Government’s Sentencing Memorandum, <i>United States v. Rahimi</i> , No. 16-CR-00760-RMB (S.D.N.Y. June 22, 2017) (ECF 188).....  | 13 |
| Ines von Behr et al., <i>Radicalisation in the Digital Era: The Use of the Internet in 15 Cases of Terrorism &amp; Extremism</i> , Rand Europe (2013), <a href="https://perma.cc/TCJ2-LZQE">https://perma.cc/TCJ2-LZQE</a> .....  | 12 |
| J.M. Berger & Jonathon Morgan, Brookings Inst., <i>The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter</i> (2015), <a href="https://perma.cc/9Z9L-EU6V">https://perma.cc/9Z9L-EU6V</a> .....  | 5  |
| Jeff Horwitz & Deepa Seetharaman, <i>Facebook Executives Shut Down Efforts to Make the Site Less Divisive</i> , Wall St. J. (May 26, 2020), <a href="https://www.congress.gov/117/meeting/house/111407/documents/HHRG-117-IF16-20210325-SD033.pdf">https://www.congress.gov/117/meeting/house/111407/documents/HHRG-117-IF16-20210325-SD033.pdf</a> .....                                   | 15 |
| Jens F. Binder & Jonathan Kenyon, <i>Terrorism and the Internet: How Dangerous is Online Radicalization?</i> , <i>Frontiers in Psych.</i> , Oct. 2022 <a href="https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9606324/">https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9606324/</a> .....   | 7  |
| Joe Whitaker et al., <i>Recommender Systems and the Amplification of Extremist Content</i> , <i>Internet Pol’y Rev.: J. on Internet Regul.</i> , June 30, 2021, <a href="https://policyreview.info/articles/analysis/recommender-systems-and-amplification-extremist-content">https://policyreview.info/articles/analysis/recommender-systems-and-amplification-extremist-content</a> ..... | 15 |

- Joe Whitaker, *The Online Behaviors of Islamic State Terrorists in the United States*, 20 *Criminology & Pub. Pol'y* 177 (2021) ..... 7
- Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, *NOVA* (Mar. 28, 2019), <https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms/>..... 14, 15
- Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, *Wall St. J.* (Sept. 15, 2021), [www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215](http://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215)..... 16
- Larry Greenemeier, *Social Media's Stepped-Up Crackdown on Terrorists Still Falls Short*, *Scientific American* (July 24, 2018), <https://www.scientificamerican.com/article/social-medias-stepped-up-crackdown-on-terrorists-still-falls-short/> ..... 10
- Laura K. Donohue, *Social Media: The Canary in the Coal Mine*, *Geo. L. Ctr. on Nat'l Sec.* (Nov. 2022), <https://www.law.georgetown.edu/national-security-center/wp-content/uploads/sites/6/2022/11/Social-Media-Report-Final.pdf>..... 24
- Lee Ferran, *Frankfurt Terror Suspect Mistakenly Inspired by Hollywood*, *ABC News* (Aug. 31, 2011, 8:49 AM), <https://abcnews.go.com/Blotter/frankfurt-terror-suspect-mistakenly-inspired-hollywood/story?id=14419192>..... 12

- Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, Prog. on Extremism, Geo. Wash. Univ. (Dec. 2015),  
<https://perma.cc/BB3X-K6Y5>..... 6
- Mark Berman, *Prosecutors Say Dylann Roof ‘Self-Radicalized’ Online, Wrote Another Manifesto in Jail*, Wash. Post (Aug. 22, 2016),  
<https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-charleston-church-gunman-self-radicalized-online/> ..... 13
- Matthias Bartsch et al., *The Radical Islamist Roots of the Frankfurt Attack*, Der Spiegel (Mar. 3, 2011, 5:43 PM),  
<https://www.spiegel.de/international/germany/facebook-jihad-the-radical-islamist-roots-of-the-frankfurt-attack-a-748910.html> ..... 11
- Michael Lavi, *Do Platforms Kill?*, 43 Harv. J. L. & Pub. Pol’y. 477 (2020) ..... 26
- Nat’l Consortium for the Study of Terrorism & Responses to Terrorism, *The Use of Social Media by United States Extremists* (2018),  
<https://perma.cc/7X3D-N4VL>..... 5
- Noah Pflueger-Peters, *Do YouTube Recommendations Foster Political Radicalization?* Univ. Cal. Davis Comput. Sci. (Aug. 25. 2022),  
<https://cs.ucdavis.edu/news/do-youtube-recommendations-foster-political-radicalization..> 16

|   |      |
|---|------|
| Paul M. Barrett et al., <i>Fueling the Fire: How Social Media Intensifies U.S. Political Polarization – And What Can Be Done About It</i> , N.Y.U. Stern Ctr. for Bus. & Hum. Rts. (2021), <a href="https://perma.cc/U7J2-9A6B">https://perma.cc/U7J2-9A6B</a> .....  | 18   |
| <i>Profiles of Individual Radicalization in the United States (PIRUS)</i> ,<br><a href="https://www.start.umd.edu/data-tools/profiles-individual-radicalization-united-states-pirus">https://www.start.umd.edu/data-tools/profiles-individual-radicalization-united-states-pirus</a> .....  | 6    |
| Restatement (Second) of Torts § 876 (1979) .....  | 31   |
| Robert Cannon, <i>The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway</i> , 49 Fed. Commc’ns L.J. 51 (Nov. 1996).....   | 24   |
| Ryan Hunter & Daniel Heinke, <i>Perspective: Radicalization of Islamist Terrorists in the Western World</i> , FBI Law Enforcement Bulletin (Sept. 1, 2011),<br><a href="https://leb.fbi.gov/articles/perspective/perspective-radicalization-of-islamist-terrorists-in-the-western-world">https://leb.fbi.gov/articles/perspective/perspective-radicalization-of-islamist-terrorists-in-the-western-world</a> .....          | 8, 9 |
| Ryan Mac et al., <i>Growth At Any Cost: Top Facebook Executive Defended Data Collection In 2016 Memo—And Warned That Facebook Could Get People Killed</i> , BuzzFeed News (Mar. 29, 2018),<br><a href="https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data">https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data</a> ..... | 17   |

- Scott Shane, *In ‘Watershed Moment,’ YouTube Blocks Extremist Cleric’s Message*, N.Y. Times (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/us/politics/youtube-terrorism-anwar-al-awlaki.html> ..... 10, 11
- Second Superseding Indictment, *United States v. Kareem*, CR-15-0707-PHX-SRB (D. Ariz. Dec. 22, 2015) (ECF 158)..... 11
- Sheera Frenkel & Nellie Bowles, *Facebook Employees in an Uproar over Executive’s Leaked Memo*, N.Y. Times (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/technology/facebook-leaked-memo.html>..... 17
- The Cases*, Prog. on Extremism, Geo. Wash. Univ., <https://extremism.gwu.edu/cases> ..... 12
- Tristana Moore, *Was the Frankfurt Airport Shooter a “Lone-Wolf” Jihadist*, Time (Mar. 3, 2011), <http://content.time.com/time/world/article/0,8599,2057164,00.html>..... 12
- U.S. Dep’t of Just., Cmty. Oriented Policing Servs., *Awareness Brief: Online Radicalization to Violent Extremism* (2014), <https://cops.usdoj.gov/RIC/Publications/cops-w0739-pub.pdf> ..... 7, 8



U.S. Dep't of Justice, Off. Pub. Affs., *Colorado  
Woman Sentenced for Conspiracy to Provide  
Material Support to a Designated Foreign Terrorist  
Organization* (Jan. 23, 2015),  
[https://www.justice.gov/opa/pr/colorado-woman-  
sentenced-conspiracy-provide-material-support-  
designated-foreign-terrorist](https://www.justice.gov/opa/pr/colorado-woman-sentenced-conspiracy-provide-material-support-designated-foreign-terrorist)..... 12

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States v. Kareem*, CR-15-0707-PHX-SRB (D. Ariz.  
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Amici are former federal officials who have significant counterterrorism experience in Republican and Democratic administrations. Amici represent a broad cross section of the national security community, including former career and politically appointed officials from the National Security Council staff, Office of the Director of National Intelligence, Central Intelligence Agency, Department of Homeland Security, Department of Justice, Federal Bureau of Investigation (FBI), Department of Defense, and Department of State.

As experienced national security officials, prosecutors, and law enforcement officials, amici have seen firsthand the threat that online radicalization poses to the United States. In amici's experience, the use of internet platforms to radicalize, recruit, plot, and plan terrorist attacks is ubiquitous among foreign terrorist organizations like ISIS. Algorithmic amplification of terrorist content by internet platforms—extending the reach of extremist messaging and the rapidity with which it is spread and consumed—has made the task of preventing terrorist attacks in the United States and abroad significantly more challenging. Amici believe that Congress did not and

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission. All parties have filed blanket consents to the filing of amicus briefs in these proceedings.

could not have intended, when enacting the Communications Decency Act in 1996, to wholly bar those providers from facing civil liability for injuries caused by algorithmic amplification. Accordingly, although amici take no position on the merits of petitioners' claims, they strongly believe that, as victims of terrorism, petitioners are entitled under federal law to their day in court.

### **SUMMARY OF ARGUMENT**

The Internet has fundamentally changed human experience in ways that previous generations could not have fathomed. It connects us with family and friends; provides endless entertainment and immediate access to news and information; engages our imaginations; allows us to shop, make travel arrangements, and pay bills at the click of a button; and exposes us to a multiplicity of ideas, beliefs, and cultures.

But the Internet has a dark side. Terrorist groups use the Internet to spread propaganda; connect like-minded individuals; recruit sympathizers; plan terrorist operations; livestream terrorist attacks and executions; and incite more violence. Terrorist content is amplified and promoted by algorithms developed and used by internet platforms. These algorithms recommend content to users based on sophisticated analysis of their interests and are designed to drive user engagement and maximize the time users spend on platforms by serving more and more extreme content, thus increasing advertisement views and generating greater revenue.

Petitioners, whose family member was murdered in a terrorist attack, seek to assert liability against the respondent internet platform for its design and use of algorithmic recommendations to amplify terrorist content. Petitioners allege that, by doing so, the platform acted to “aid[] and abet[], by knowingly providing substantial assistance, or [] conspire[] with the person who committed such an act of international terrorism.” 18 U.S.C. § 2333(d)(2). The Court of Appeals held that petitioners’ claims failed because 47 U.S.C. § 230(c)(1) barred suit. *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), *cert. granted*, 2022 WL 4651229 (Oct. 3, 2022).

Whatever the merits of petitioners’ claims, amici believe that the Court of Appeals was wrong to invoke Section 230(c)(1) to deny them their day in court. Section 230(c)(1) protects internet platforms only from claims seeking to hold them liable as publishers or speakers of *someone else’s* content. But petitioners’ claims are not based on respondent’s publication of terrorist content; they are based on respondent’s *own* affirmative amplification of that content for targeted users whom the platform’s algorithms identify as likely to view it. Because the decision below extends Section 230 beyond the scope of its language and well past what Congress intended, this Court should reverse. Alternatively, this Court should reverse because the 2016 Justice Against Sponsors of Terrorism Act (JASTA) impliedly repealed Section 230 to the extent that it shields respondent from liability for petitioners’ claims based on the algorithmic amplification of terrorist content.

## ARGUMENT

### I. ALGORITHMIC AMPLIFICATION OF TERRORIST CONTENT BY INTERNET PLATFORMS POSES A GRAVE RISK TO NATIONAL SECURITY.

#### A. Online Radicalization From Viewing Terrorist Content on Internet Platforms is Widespread and Leads Directly to Violence.

For more than a decade, foreign terrorist organizations have used the Internet as a tool for radicalizing, recruiting, plotting, and planning. This phenomenon has been tracked across terrorist groups, from al-Qaeda in the Arabic Peninsula's launch of a digital magazine in 2010, to ISIS's strategic use of social media to mobilize an estimated 40,000 foreign fighters from 110 countries.<sup>2</sup> Terrorist organizations use internet platforms to disseminate terrorist propaganda, target U.S. personnel, and identify potential recruits.<sup>3</sup> As then-FBI Director James Comey testified to Congress in 2015, "[s]ocial media has allowed groups, such as ISI[S], to use the internet to spot and assess potential recruits.... The foreign terrorist now has direct access into the United States like never before."<sup>4</sup>

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<sup>2</sup> Antonia Ward, *ISIS's Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, Geo. Sec. Stud. Rev. (cont'd)

At one point in 2014, Twitter accounts of ISIS supporters numbered more than 46,000, to say nothing of accounts supporting Hamas or al Qaeda, or accounts on other platforms.<sup>5</sup> In 2016, “social media played a primary or secondary role in the radicalization of 93.18% of Islamist extremists” in the United

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(Dec. 10, 2018), <https://georgetownsecuritystudiesreview.org/2018/12/10/isiss-use-of-social-media-still-poses-a-threat-to-stability-in-the-middle-east-and-africa/>.

<sup>3</sup> *ISIS Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media: Hearing Before the Perm. Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 52 (2016) (statement of Michael Steinbach, Exec. Assistant Dir., Fed. Bureau of Investigation), <https://www.govinfo.gov/content/pkg/CHRG-114shrg22476/pdf/CHRG-114shrg22476.pdf>; see also Charlie Winter, et al., *Online Extremism: Research Trends in Internet Activism, Radicalization, and Counter-Strategies*, 14(2) *Int'l J. Conflict & Violence* 7-9 (2020) (cataloging how extremist organizations use the Internet, including propaganda, recruitment, logistics, and fundraising).

<sup>4</sup> *Counterterrorism, Counterintelligence, and the Challenges of “Going Dark”*: Hearing Before the S. Select Comm. on Intel., 114th Cong. 65 (2015) (statement of James B. Comey, Dir., Fed. Bureau of Investigation), <https://www.govinfo.gov/content/pkg/CHRG-114shrg27896/pdf/CHRG-114shrg27896.pdf>.

<sup>5</sup> Dana Kerr, *ISIS spread its reach through Twitter with 46,000 accounts*, CNET (Mar. 8, 2015), <https://www.cnet.com/tech/services-and-software/isis-spread-its-reach-through-twitter-with-46000-accounts/> (citing J.M. Berger & Jonathon Morgan, Brookings Inst., *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter* 7 (2015), <https://perma.cc/9Z9L-EU6V>).

States.<sup>6</sup> In just a three-month period in 2018, 1,348 ISIS videos were uploaded to YouTube, at an average rate of nearly 15 videos per day.<sup>7</sup>

George Washington University's Program on Extremism concluded in 2015 that "[s]ocial media plays a crucial role in the radicalization and, at times, mobilization of U.S.-based ISIS sympathizers," identifying "some 300 American and/or U.S.-based ISIS sympathizers active on social media, spreading propaganda, and interacting with like-minded individuals. Some members of this online echo chamber eventually make the leap from keyboard warriors to actual militancy."<sup>8</sup>

Other researchers agree. More than three-quarters of American militants studied by the New America Foundation were "active in online jihadist circles,

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<sup>6</sup> Nat'l Consortium for the Study of Terrorism & Responses to Terrorism, *The Use of Social Media by United States Extremists* 3 (2018), <https://perma.cc/7X3D-N4VL> (last visited Nov. 14, 2022) (citing *Profiles of Individual Radicalization in the United States (PIRUS)*, <https://www.start.umd.edu/data-tools/profiles-individual-radicalization-united-states-pirus>).

<sup>7</sup> Christina Pineda, *What Does ISIS Post on YouTube?*, Homeland Security Digital Library (July 26, 2018), <https://www.hsdl.org/c/what-does-isis-post-on-youtube/>; see generally 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 Nov. 30, 2022) (describing ISIS's social media strategy).

<sup>8</sup> Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, Prog. on Extremism, Geo. Wash. Univ. ix (Dec. 2015), <https://perma.cc/BB3X-K6Y5>.

posting jihadist messages on Twitter or Facebook, or were in direct contact with ISIS recruiters over social media.”<sup>9</sup> In another study focused on U.S.-based ISIS terrorism, “[s]ome online activity was ... present in 92% of all cases; more than 80% interacted online with co-ideologues, 80% used social media platforms for at least some of their activities, [and] 36% percent had disseminated propaganda online.”<sup>10</sup>

The U.S. Department of Justice defines “online radicalization” as the process by which “an individual is introduced to an ideological message and belief system that encourages movement from mainstream beliefs toward extreme views, primarily through the use of online media, including social networks such as Facebook, Twitter, and YouTube.”<sup>11</sup> Online radicalization occurs when, “as individuals immerse themselves in online extremist content, they begin to develop a skewed sense of reality in which their views no longer seem radical. Online interactions with like-minded individuals can substitute for an individual’s

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<sup>9</sup> *ISIS Online*, *supra* note 3, at 69 (statement of Peter Bergen, Vice President, New Am. Found.).

<sup>10</sup> See Jens F. Binder & Jonathan Kenyon, *Terrorism and the Internet: How Dangerous is Online Radicalization?*, *Frontiers in Psych.*, Oct. 2022, at 5, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9606324/> (citing Joe Whitaker, *The Online Behaviors of Islamic State Terrorists in the United States*, 20 *Criminology & Pub. Pol’y* 177 (2021)).

<sup>11</sup> U.S. Dep’t of Just., Cmty. Oriented Policing Servs., *Awareness Brief: Online Radicalization to Violent Extremism* 1 (2014), <https://cops.usdoj.gov/RIC/Publications/cops-w0739-pub.pdf>.



physical community.”<sup>12</sup> In this online social environment, “deviant behavior and violence are the norm. Consumers of online extremist content can also develop or increase feelings of superiority, moral outrage, desensitization to violence, and willingness to commit acts of violence in furtherance of a particular cause.”<sup>13</sup>

According to the FBI, online radicalization generally involves three components: grievance, ideology/narrative, and mobilization.<sup>14</sup> Grievance can stem from a real-world personal event (e.g., job loss, divorce, financial strain) or be rooted in more general discontent, disaffection, or alienation. Ideological or narrative framing assembles grievances and points them in a specific direction, for example, toward an us-versus-them mentality, providing followers with a “sense of belonging to a transnational community.”<sup>15</sup> Mobilization is the point at which grievance and ideology come together to spur action.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also Bipartisan Pol’y Ctr., *Countering Online Radicalization in America* 17-22 (December 2012), <https://perma.cc/FP5J-L9GQ> (describing the process of online radicalization).

<sup>14</sup> Ryan Hunter & Daniel Heinke, *Perspective: Radicalization of Islamist Terrorists in the Western World*, FBI Law Enforcement Bulletin (Sept. 1, 2011), <https://leb.fbi.gov/articles/perspective/perspective-radicalization-of-islamist-terrorists-in-the-western-world>.

<sup>15</sup> *Id.*

In amici’s experience, terrorist content has been critical to each component of online radicalization, posing a significant challenge to counterterrorism officials. Not only does the Internet “allow[] rapid and widespread dissemination of information about events that may fuel grievance,”<sup>16</sup> its platforms create a sense of belonging and community, pulling individuals deeper into extremist ideologies.<sup>17</sup> As FBI Director Christopher Wray recently testified before Congress, homegrown violent extremists, i.e., those “inspired primarily by global jihad,” are inspired to commit violence through terrorist propaganda available online: “ISIS advocates for lone offender attacks . . . via videos and other English language propaganda . . . against civilians, the military, law enforcement, and other government personnel.”<sup>18</sup> Director

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<sup>16</sup> *Id.*

<sup>17</sup> See Dep’t of Homeland Sec., *Strategic Framework for Countering Terrorism and Targeted Violence* 8 (Sept. 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0920\\_plcy\\_strategic-framework-countering-terrorism-targeted-violence.pdf](https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf) (online interactions “help people see themselves as part of communities and causes that transcend national borders, provide users with a sense of intimacy with people and groups half a world away, and embolden the adoption of identities or causes that may once have been obscure, marginalized, or otherwise unknown”).

<sup>18</sup> *Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. (Sept. 21, 2021) (statement of Christopher Wray, Dir., Fed. Bureau of Investigation), <https://www.fbi.gov/news/testimony/threats-to-the-homeland-evaluating-the-landscape-20-years-after-911-wray-092121>.

Wray noted that terrorist sympathizers who are radicalized online create significant concerns for law enforcement: their “lack of a direct connection to [a foreign terrorist organization], their ability to rapidly mobilize without detection, and their use of encrypted communications pose significant challenges to our ability to proactively identify and disrupt them.”<sup>19</sup>

Terrorist video content, in particular, plays a significant role in online radicalization.<sup>20</sup> Perhaps the best examples are the videos of Anwar al-Awlaki, the American-born al-Qaeda leader whose jihadist propaganda “helped shape a generation of American terrorists, including the Fort Hood gunman, the Boston Marathon bombers and the perpetrators of massacres in San Bernardino, Calif., and Orlando, Fla.”<sup>21</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> See Larry Greenemeier, *Social Media’s Stepped-Up Crackdown on Terrorists Still Falls Short*, *Scientific American* (July 24, 2018), <https://www.scientificamerican.com/article/social-medias-stepped-up-crackdown-on-terrorists-still-falls-short/>.

<sup>21</sup> Scott Shane, *In ‘Watershed Moment,’ YouTube Blocks Extremist Cleric’s Message*, *N.Y. Times* (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/us/politics/youtube-terrorism-anwar-al-awlaki.html>; see also Counter Extremism Project, *Anwar al-Awlaki’s Ties to Extremists*, <https://www.counterextremism.com/anwar-al-awlaki> (last visited Nov. 22, 2022) (documenting al-Awlaki’s influence on 99 extremists, 56 in the United States and 43 in Europe); Alexander Meleagrou-Hitchens et al., *Homegrown: ISIS In America* 119 (2020) (describing court documents showing that at least 31 percent of U.S. jihadist-related offenses between 2009 and 2016 were inspired by or linked to al-Awlaki).

Videos related to al-Awlaki, including his terrorist screeds calling for the murder of Americans, numbered, at one point, more than 70,000 on YouTube alone.<sup>22</sup>

The use of social media by terrorists to fuel grievances, spread ideological propaganda, form communities of disaffection, and provide logistical and operational instructions have real world consequences. In 2015, Abdul Kareem and his friends spent hours watching ISIS-related videos and other terrorist content and declared their support for jihad; on May 3, Kareem's co-conspirators drove to a "Draw Muhammad" contest in Garland, Texas, with over 1,500 rounds of ammunition and opened fire with assault rifles, injuring a security guard before they were shot dead.<sup>23</sup> In 2011, 21-year-old Arid Uka killed two U.S. airmen at the Frankfurt airport; Uka was triggered by a YouTube video purportedly showing Muslim women being raped by American soldiers that had been lifted from a fictional anti-war movie and posted for jihadi propaganda purposes.<sup>24</sup>

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<sup>22</sup> Shane, *supra* note 21.

<sup>23</sup> Second Superseding Indictment, *United States v. Kareem*, CR-15-0707-PHX-SRB (D. Ariz. Dec. 22, 2015) (ECF 158); United States' Sentencing Memorandum, *United States v. Kareem*, CR-15-0707-PHX-SRB (D. Ariz. Sept. 22, 2016) (ECF 421).

<sup>24</sup> See Matthias Bartsch et al., *The Radical Islamist Roots of the Frankfurt Attack*, Der Spiegel (Mar. 3, 2011, 5:43 PM), [https://www.spiegel.de/international/germany/facebook-jihad-the-radical-islamist-roots-of-the-frankfurt-attack-a-](https://www.spiegel.de/international/germany/facebook-jihad-the-radical-islamist-roots-of-the-frankfurt-attack-a)

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Similar examples are legion.<sup>25</sup> They include:

- Shannon Maureen Conley, the 19-year-old Colorado woman who pleaded guilty to attempting to provide material support to ISIS in 2014 after planning to travel to Syria, marry an ISIS fighter she met online, and, with him, wage violent jihad; a search of Conley's residence yielded numerous al-Awlaki videos.<sup>26</sup>
- Abdulrahman El Bahnasawy, the 21-year-old Canadian who pleaded guilty to plotting an attack on Times Square and the New York City

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748910.html; Lee Ferran, *Frankfurt Terror Suspect Mistakenly Inspired by Hollywood*, ABC News (Aug. 31, 2011, 8:49 AM), <https://abcnews.go.com/Blotter/frankfurt-terror-suspect-mistakenly-inspired-hollywood/story?id=14419192>; Tristana Moore, *Was the Frankfurt Airport Shooter a "Lone-Wolf" Jihadist*, Time (Mar. 3, 2011), <http://content.time.com/time/world/article/0,8599,2057164,00.html>.

<sup>25</sup> See *The Cases*, Prog. on Extremism, Geo. Wash. Univ., <https://extremism.gwu.edu/cases> (last visited Nov. 30, 2022) (collecting court documents relating to 238 individuals charged with ISIS-related activities in the United States); Ines von Behr et al., *Radicalisation in the Digital Era: The Use of the Internet in 15 Cases of Terrorism & Extremism*, Rand Europe (2013), <https://perma.cc/TCJ2-LZQE>.

<sup>26</sup> Criminal Complaint, *United States v. Conley*, 14-mj-01045-KLM (D. Colo. Apr. 9, 2014) (ECF 1) (filed unsealed in *United States v. Conley*, 14-cr-00163-RM (D. Colo. June 26, 2014) (ECF 28)); see also U.S. Dep't of Justice, Off. Pub. Affs., *Colorado Woman Sentenced for Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization* (Jan. 23, 2015), <https://www.justice.gov/opa/pr/colorado-woman-sentenced-conspiracy-provide-material-support-designated-foreign-terrorist>.

Subway in 2016 after consuming ISIS propaganda online and using his online ISIS identities to recruit other supporters and facilitate connections among attack planners.<sup>27</sup>

- Ahmad Khan Rahimi, the New Jersey man convicted for a bombing that injured more than 30 people in New York in 2016, who radicalized online after viewing materials relating to terrorism, violent jihad, and war against the United States, including downloading every issue of al-Qaeda's online magazine, *Inspire*.<sup>28</sup>

As amici are aware, online radicalization also plays a significant role in violent attacks conducted by domestic extremists with no ties to foreign terrorist organizations. The massacre of nine Black worshipers at a Charleston, South Carolina, church in 2015; the killing of 23 people at an El Paso, Texas, Walmart in 2019; and the murder of ten at a Buffalo, New York, supermarket in 2022 have all been linked to online radicalization through social media platforms.<sup>29</sup>

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<sup>27</sup> Brief of Appellee (Redacted), *United States v. Bahnasawy*, No. 18-3805 (2d Cir. Feb. 21, 2020).

<sup>28</sup> Government's Sentencing Memorandum, *United States v. Rahimi*, No. 16-CR-00760-RMB (S.D.N.Y. June 22, 2017) (ECF 188).

<sup>29</sup> See, e.g., Mark Berman, *Prosecutors Say Dylann Roof 'Self-Radicalized' Online, Wrote Another Manifesto in Jail*, Wash. Post (Aug. 22, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-charleston-church-gunman-self-radicalized-online/>;

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### **B. Algorithmic Amplification of Terrorist Content by Internet Platforms Appreciably Increases the Risk for Radicalization and Terrorist Violence.**

To maximize advertising profits, internet platforms like respondent have developed and deployed algorithms that are purposefully designed to steer users toward more and more extreme content. Facebook ads, YouTube recommendations, suggested hyperlinks, and other targeted content are delivered to users by algorithms that are programmed to increase user engagement and thereby increase revenue for the internet platforms. “If the platform doesn’t show you things you’re interested in, you won’t come back. So they build their algorithms to learn what your preferences are.”<sup>30</sup>

As users explore the Internet, algorithms collect data about, for example, the user’s search history and click-throughs, where they spend their time, and the kinds of content they like, share, or comment on. The

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Erin Alworth et al., *Lost in Life, El Paso Suspect Found A Dark World Online*, Wall St. J. (Aug. 8, 2019, 8:09 pm), <https://www.wsj.com/articles/lost-in-life-el-paso-suspect-found-a-dark-world-online-11565308783>; Anna Gronewald, *Buffalo Shooter ‘Radicalized’ Through Fringe Online Platforms, Report Finds*, Politico (Oct. 18, 2022), <https://www.politico.com/news/2022/10/18/hochul-james-release-report-on-buffalo-shooter-online-radicalization-00062344>.

<sup>30</sup> Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, NOVA (Mar. 28, 2019), <https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms/> (quoting Elisa Celis, data scientist, Yale Univ.).

algorithms learn user preferences and suggest content that matches them.<sup>31</sup> Indeed, “the vast majority of delivered content” online today “is actively promoted by content providers based on their algorithms that are designed in large part to maximize engagement and revenue.”<sup>32</sup> On YouTube, as much as 70 percent of content viewed is derived from recommendations made by the platform as opposed to users’ own searches.<sup>33</sup> Facebook’s internal data shows that “64% of all extremist group joins are due to our recommendation tools.”<sup>34</sup>

Targeted recommendation of extremist content increases user engagement: “[t]hese algorithms have learned that divisive, hateful, and conspiratorial con-

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<sup>31</sup> See generally *id.*

<sup>32</sup> *A Country in Crisis: How Disinformation Online is Dividing the Nation: J. Hearing Before the Subcomm. on Commc’ns & Tech. & the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 116th Cong. (June 24, 2020) (testimony of Dr. Hany Farid, Professor, Univ. Cal. Berkeley), <https://www.congress.gov/116/meeting/house/110832/witnesses/HHRG-116-IF17-Wstate-FaridH-20200624.pdf>.

<sup>33</sup> Joe Whitaker et al., *Recommender Systems and the Amplification of Extremist Content*, *Internet Pol’y Rev.: J. on Internet Regul.*, June 30, 2021, at 3 <https://policyreview.info/articles/analysis/recommender-systems-and-amplification-extremist-content>.

<sup>34</sup> Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, *Wall St. J.* (May 26, 2020), <https://www.congress.gov/117/meeting/house/111407/documents/HHRG-117-IF16-20210325-SD033.pdf>.



tent engages users and so this type of content is prioritized, leading to rampant misinformation and conspiracies and, in turn, increased anger, hate, and intolerance, both online and offline.”<sup>35</sup> As users get inured to mainstream content and interested in more extreme views, more radical information is served to them and, before they know it, they have fallen down the rabbit hole, each piece of extremist content validating their evolving world view, creating an echo chamber or “filter bubble,” which mainstream content can no longer penetrate.<sup>36</sup> University of California at Davis researchers describe this as a “loop effect”: “[i]f the algorithm sees that a user is watching a lot of biased political videos, it can trap them in . . . a ‘loop effect’ where the system will continue recommending similarly biased and potentially more extreme content . . . . Left unchecked, this can lead to polarization and radicalization. . . .”<sup>37</sup>

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<sup>35</sup> *Country in Crisis* (testimony of Farid), *supra* note 32; see also Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, Wall St. J. (Sept. 15, 2021), [www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215](http://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215).

<sup>36</sup> The term “filter bubble” was coined by Eli Pariser, *The Filter Bubble: How the New Personalized Web is Changing What We Read and How We Think* (2011).

<sup>37</sup> Noah Pflueger-Peters, *Do YouTube Recommendations Foster Political Radicalization?* Univ. Cal. Davis Comput. Sci. (Aug. 25, 2022), <https://cs.ucdavis.edu/news/do-youtube-recommendations-foster-political-radicalization>.

Social media platforms know their algorithms have this effect. A researcher hired by Facebook, for example, “consistently found Facebook pushed some users into ‘rabbit holes,’ increasingly narrow echo chambers where violent conspiracy theories thrived.”<sup>38</sup> A senior Facebook executive explained: “We connect people. ... That can be bad if they make it negative. Maybe it costs a life by exposing someone to bullies. Maybe someone dies in a terrorist attack coordinated on our tools. And still we connect people. The ugly truth is that we believe in connecting people so deeply that anything that allows us to connect more people more often is a \*de facto\* good.”<sup>39</sup>

This is a business choice made by the internet platforms. Engaged users spend more time online and therefore view more advertisements, translating into

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<sup>38</sup> Brandy Zadrozny, ‘Carol’s Journey’: What Facebook Knew About How it Radicalized Users, NBC News (Oct. 22, 2021), <https://www.nbcnews.com/tech/tech-news/facebook-knew-radicalized-users-rcna3581>.

<sup>39</sup> Ryan Mac et al., *Growth At Any Cost: Top Facebook Executive Defended Data Collection In 2016 Memo—And Warned That Facebook Could Get People Killed*, BuzzFeed News (Mar. 29, 2018), <https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data> (quoting memo by Andrew Bosworth, Vice President, Facebook); see also Sheera Frenkel & Nellie Bowles, *Facebook Employees in an Uproar over Executive’s Leaked Memo*, N.Y. Times (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/technology/facebook-leaked-memo.html>.

more profit for the platforms.<sup>40</sup> In 2020, advertising provided 98 percent of Facebook’s \$86 billion in revenue; Google, which owns YouTube, reported \$182 billion in revenue, 81 percent from advertising.<sup>41</sup> Internet platforms like “Facebook . . . profit[] chiefly from engagement and virality. . . . Facebook knows that the most efficient way to maximize profitability is to build algorithms that create filter bubbles and spread viral misinformation.”<sup>42</sup>

## II. SECTION 230(c)(1)’S IMMUNITY DOES NOT EXTEND TO ALGORITHMIC AMPLIFICATION OF TERRORIST CONTENT BY INTERNET PLATFORMS.

Section 230(c)(1), the provision of law at issue in this case, states: “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.” 47 U.S.C.

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<sup>40</sup> See generally Annie Y. Chen et al., *Exposure to Alternative & Extremist Content on YouTube*, Anti-Defamation League (May 3, 2022), <https://www.adl.org/resources/reports/exposure-to-alternative-extremist-content-on-youtube>; David Lauer, *Facebook’s Ethical Failures are Not Accidental; They are Part of the Business Model*, 1 AI & Ethics 395 (2021), <https://perma.cc/P564-2GKM>.

<sup>41</sup> Paul M. Barrett et al., *Fueling the Fire: How Social Media Intensifies U.S. Political Polarization – And What Can Be Done About It*, N.Y.U. Stern Ctr. for Bus. & Hum. Rts. 8 (2021), <https://perma.cc/U7J2-9A6B>.

<sup>42</sup> Lauer, *supra* note 40, at 396.

§ 230(c)(1). Although respondent may be an “interactive computer service,” that is the only part of Section 230’s text applicable to the allegations at issue.

Petitioners seek neither to “treat[]” the platform “as [a] publisher or speaker,” nor do their claims of liability arise as a result of “any information provided by another information content provider.” Petitioners seek to hold respondent liable based on its own conduct—the design and implementation of algorithms that amplify and recommend terrorist content. Petitioners may or may not ultimately be able to prove their claims on the merits, but there is no indication in Section 230 that Congress intended to shut them out of the courthouse altogether.

**A. Section 230(c)(1) Does Not Apply Because Petitioners Seek Neither to Treat the Internet Platform as a Publisher or Speaker nor to Hold it Liable for Someone Else’s Content.**

Congress enacted Section 230 in response to a state court decision holding that an internet platform had become a “publisher”—and was thereby liable for defamatory content on its platform—when it deleted selected content posted by third parties while allowing other content to be posted unedited. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished); *see generally Gonzalez*, 2 F.4th at 886-87 (describing purpose and intent of Section 230). Congress’s goals for Section 230 were modest: to ensure that (1) internet platforms would not face secondary liability for content posted by others when they acted

only as intermediaries, and (2) platforms would not expose themselves to liability by engaging in responsible content moderation.<sup>43</sup>

Section 230(c)(1) accordingly provides that “[n]o 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,” while Section 230(c)(2) provides that interactive computer services shall not “be held liable on account of” any action taken in good faith to remove offensive content, or for any action taken to provide content providers or others with the tools to remove or restrict access to such content themselves. The two provisions operate in tandem; (c)(1) provides protection when content goes up, and (c)(2) provides protection when platforms responsibly take content down.

Despite the narrowness of Section 230’s text and purposes, courts have relied on it to immunize a wide swath of activity, much of which goes far beyond the protections provided by the text. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14-16 (2020) (Thomas, J., statement respecting denial of cert.) (cataloging cases where courts viewed Section 230 expansively). Courts have rationalized this expansive view by noting that “Section 230(c)(1) should be construed broadly in favor of immunity.” *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019)

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<sup>43</sup> See generally Christopher Cox, *The Origins and Original Intent of the Section 230 of the Communications Decency Act*, Rich. J. L. & Tech. Blog (Aug. 27, 2020), <https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/>.

(collecting cases). That principle, in turn, assumes that Congress intended to protect internet companies at the dawn of the Internet from ruinous regulation. *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

This is a misconception of Congress’s intent for several reasons. First, the Communications Decency Act of 1996, of which Section 230 was but one part, enacted sweeping regulation of the Internet in an attempt to keep “indecent” content away from minors; so sweeping, in fact, that this Court eventually struck down all but Section 230 as unconstitutional. *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997). Second, Section 230 itself notes that it does not impact the continued enforcement of numerous other laws that affect the Internet, including federal criminal law, intellectual property law, state laws not inconsistent with Section 230, and communications privacy law. 47 U.S.C. § 230(e). Preventing the regulation of the Internet was plainly not Congress’s aim. And third, as former Representative Christopher Cox, the co-author of the bill that became Section 230, has noted, the “creation myth” that “Section 230 was conceived as a way to protect an infant industry” is “entirely fictitious . . . . [O]ur legislative aim was to recognize the sheer implausibility of requiring each website to monitor all user-created content that crossed its portal each day.”<sup>44</sup> The goal of Section 230 was to protect against secondary liability for content posted by others, when it was “implausible” for platforms to monitor all of it, and to encourage platforms to do some responsible

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<sup>44</sup> Cox, *supra* note 43, ¶ 61.

monitoring, even if they could not moderate everything.

Section 230's protection should not expand to cover the internet platforms' knowing deployment of algorithmic amplification of terrorist content. The nature of petitioners' claims demonstrate why they do not fall within Section 230's liability shield. "[A]id[ing] and abet[ting], by knowingly providing substantial assistance" to a person who commits an act of international terrorism, 18 U.S.C. § 2333(d)(2), does not depend on the substance of the content the terrorist disseminates. So, if ISIS used the platform to do nothing but disseminate innocuous puppy videos as a fundraising pitch, the platform could still face potential liability for aiding and abetting ISIS, assuming the appropriate legal standards were met. This is because it is the nature of the entity being aided—a terrorist organization—and not the nature of the content disseminated—whether terrorist recruitment videos or puppy videos—that gives rise to potential liability under 18 U.S.C. § 2333.<sup>45</sup>

The aid alleged to have been provided here is not the unwitting use of respondent's platform for terror-

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<sup>45</sup> Cf. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 30 (2010) (under 18 U.S.C. § 2339B, which prohibits knowingly providing material support to a foreign terrorist organization, even innocuous material support "frees up other resources within the [terrorist] organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups . . . that makes it easier for those groups to persist, to recruit members, and to raise funds").

ist content, but the knowing development and deployment of algorithms that research and analyze the preferences of its users, connect like-minded users, and make targeted recommendations of terrorist content to those users. Section 230, by its plain terms, does not protect these activities; claims challenging algorithmic amplification do not attempt to “treat[]” the platform as the “publisher or speaker of [] information provided by another information content provider.” Petitioners seek to hold respondent liable for its *own* conduct, regardless of the content to which the conduct applies. *See Force*, 934 F.3d at 84 (Katzmann, J., dissenting in part) (claims premise liability “not on publishing *qua* publishing, but rather on Facebook’s provision of services and personnel to Hamas”); *FTC v. Accusearch*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J., concurring) (section 230 should not apply when suit concerns defendant’s “*conduct* rather than . . . the *content* of the information”) (emphasis in original).

Limiting Section 230(c)(1) to its terms would not create an avalanche of liability for internet platforms. Liability would lie only where there is both a recognized cause of action reaching the conduct of intermediaries—here, 18 U.S.C. § 2333, which creates a cause of action for aiding and abetting a designated terrorist organization—*and* where plaintiffs are able prove their case under the applicable legal standard. *See Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., statement respecting denial of cert.) (“Paring back the sweeping immunity courts have read into § 230 . . . simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove



the merits of their cases, and some claims will undoubtedly fail.”).

**B. Congress Did Not Intend Section 230 to Protect Internet Platforms Against Liability for Harms Caused by Their Amplification of Terrorist Content.**

In 1996, when Section 230 was enacted, “the idea of social media as a major national security threat was almost unthinkable.”<sup>46</sup> Congress’s lack of sophistication with the Internet at that time demonstrates the limitations of the provision. In 1995, as Congress was considering the Communications Decency Act, 52 percent of Senators had no Internet connection; only 26 percent of House members had email addresses.<sup>47</sup> The two most prominent interactive computer services were Prodigy and CompuServe, which operated fee-for-service models providing gateways to the World Wide Web, then mostly a collection of messaging boards and chatrooms. Americans with internet access spent just 30 minutes a month surfing the

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<sup>46</sup> Laura K. Donohue, *Social Media: The Canary in the Coal Mine*, Geo. L. Ctr. on Nat’l Sec. (Nov. 2022), <https://www.law.georgetown.edu/national-security-center/wp-content/uploads/sites/6/2022/11/Social-Media-Report-Final.pdf>.

<sup>47</sup> Cox, *supra* note 43 at ¶¶ 12, 19 (citing Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Commc’ns L.J. 51, 71-72 & n.103 (Nov. 1996)).

Web.<sup>48</sup> Search engines employed human beings to manually review websites and catalog them so that, when a user made a request, sites previously tagged as relevant by a human would be returned.<sup>49</sup> Google, YouTube, Facebook, and Twitter did not exist.

Congress could not have anticipated the complex algorithms that the internet platforms use today to drive engagement on their sites and increase their own revenue. Nor could it have foreseen the exponential increase in Internet use by the American public.<sup>50</sup> The narrow language of Section 230 does not indicate any intent on Congress's part to immunize activity it could not have imagined from legal liability beyond the two activities that it identified: putting content up and (selectively) taking content down.

Terrorism, on the other hand, was topmost in Congress's mind at the time of Section 230's enactment. Just two months after Section 230 became law, Pub. L. No. 104-104 (Feb. 8, 1996), Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (Apr. 24, 1996) (AEDPA). AEDPA contained numerous provisions aimed at combatting the increasing threat from international

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<sup>48</sup> Farhad Manjoo, *Jurassic Web*, Slate (Feb. 24, 2009, 5:33 PM), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html>.

<sup>49</sup> *Id.*

<sup>50</sup> See generally BroadbandNow Team, *Internet Usage in the U.S. - Statistics & Facts Updated, 2021*, BroadbandNow (Apr. 26, 2021), <https://broadbandnow.com/internet/usage-stats-america>.

terrorism, including creating federal jurisdiction for civil lawsuits against terrorist states, sec. 221; providing financial assistance to victims of terrorism, sec. 233; creating the modern system for designating international terrorist organizations and prohibiting financing of and material support to them, Tit. III; providing for the removal of terrorist aliens under U.S. immigration law, sec. 401; and making multiple modifications to existing criminal laws and procedures to make them more effective at countering terrorism, Tit. VII. Congress would have been shocked to see Section 230 read so broadly as to protect conduct that aided the very terrorists it was trying so comprehensively to combat.

Indeed, the “filter bubble” effect that algorithms are designed to produce is exactly the opposite of what Congress intended when it enacted Section 230. Congress explicitly found that interactive computer services provided “users a great degree of control over the information they receive” and that there was “the potential for even greater control in the future as technology develops.” 47 U.S.C. § 230(a)(2). Thus, Congress declared, “[i]t is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.” *Id.* § 230(b)(3).

Algorithms affirmatively take control away from users. “You may not even realize you’re in a filter bubble because these algorithms don’t ask for your permission, tell you when they’re active, or say what

they’re keeping from you.”<sup>51</sup> The proprietary algorithms are a black box, shrouded in secrecy and claims of trade secrets.<sup>52</sup> Thus, one of Congress’s stated goals in enacting Section 230 is affirmatively undermined by the algorithmic amplification of terrorist content.

A narrow interpretation of Section 230(c)(1) consistent with its text and congressional intent would not affect responsible content moderation efforts by social media platforms.<sup>53</sup> Section 230(c)(2)—not at issue in this case—continues to shield platforms from civil liability where they voluntarily restrict access to or availability of terrorist content or when they provide content providers or users with tools enabling them to do the same. The Court’s endorsement of the

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<sup>51</sup> GCF Global, *How Filter Bubbles Isolate You*, <https://edu.gcfglobal.org/en/digital-media-literacy/how-filter-bubbles-isolate-you/1/> (last visited Nov. 22, 2022); see also Michael Lavi, *Do Platforms Kill?*, 43 Harv. J. L. & Pub. Pol’y. 477, 502 (2020) (“The intermediaries determine what recommendations, content, and advertisement will be available to whom.”).

<sup>52</sup> See Andrew Tarantola, *How Social Media Recommendation Algorithms Help Spread Hate*, Yahoo! News (May 3, 2021), <https://news.yahoo.com/how-social-media-recommendation-algorithms-help-spread-online-hate-180032029.html>.

<sup>53</sup> The extent of effective content moderation is debatable. See Alliance to Counter Crime Online, *How Social Media Fuels Extremism*, <https://www.counterincrimine.org/how-social-media-fuels-extremism> (last visited Nov. 22, 2022) (“Facebook claims its AI systems identify 99 percent of terrorist content that is taken down before appearing on its platform” but “studies . . . indicate that terror content from groups like ISIS and al-Qaeda is flagged and removed only about 38% of the time.”).

original, literal meaning of Section 230(c)(1) would not alter or detract from the protection afforded by Section 230(c)(2).

**III. IN THE ALTERNATIVE, JASTA IMPLIEDLY REPEALED SECTION 230'S PROTECTION FOR ALGORITHMIC AMPLIFICATION OF TERRORIST CONTENT BY INTERNET PLATFORMS.**

Even if this Court were to disagree with the argument above, it should still conclude that petitioners' claims fall outside of section 230(c)(1) because the 2016 Justice Against Sponsors of Terrorism Act impliedly repealed any application that section might have to the algorithmic amplification of terrorist content. "Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). Because implied repeals are disfavored, Congress's intent to repeal must be "clear and manifest," but "may be inferred," *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (citation omitted), where there is a "positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy." *United States v. Borden*, 308 U.S. 188, 198-99 (1939) (citation omitted); *see also Morton v. Mancari*, 417 U.S. 535, 550 (1974) (absent positive showing of intent to repeal, repeal by implication is justified only "when the earlier and later statutes are irreconcilable") (citation omitted).

The irreconcilable conflict test is met here. Section 4 of JASTA, Pub. L. No. 114-222 (Sept. 28, 2016), amended the Anti-Terrorism Act, 18 U.S.C. § 2333, to clarify that, in actions alleging injury from an act of international terrorism, “*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.” 18 U.S.C. § 2333(d)(2) (emphasis added). The purpose of this amendment was to provide “civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons ... 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).<sup>54</sup>

The Court of Appeals’ dismissal of Congress’s statement of purpose as prefatory, *Gonzalez*, 2 F.4th at 889, was incorrect. Although a “clause announc[ing] an objective” cannot “change the plain meaning of the operative clause,” *id.* (citing *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016)), the operative language here, “liability may be asserted,” is not changed by the statement of purpose. Instead, such statements help discern the meaning of

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<sup>54</sup> Congress amended 18 U.S.C. § 2333 in response to rulings that the civil liability provisions of the 1992 Anti-Terrorism Act did not create secondary liability. *See, e.g., Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc); *Rothstein v. UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013).

the operative language by confirming the intent behind it. Statutory text setting forth the purpose of an Act is a clear indication of congressional intent. *See, e.g., D.C. v. Heller*, 554 U.S. 570, 578 (2008) (prefatory clause is an important tool to “ensure that our reading of the operative clause is consistent with the announced purpose”); *see also* Victoria L. Killion, Cong. Rsch Serv., R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations* 33 (May 19, 2022) (courts “view findings in the bill text itself as more authoritative than those that appear in the legislative history, because both houses of Congress passed them.”).

JASTA’s effort to open the courthouse door to victims of terrorism and allow them the broadest possible opportunity to seek relief in federal court is wholly irreconcilable with Section 230. The protection from liability that federal courts have read into Section 230 cuts these claims off at their knees, completely undermining Congress’s intent to provide terrorist victims “with full access to the court system in order to pursue civil claims.” Pub. L. No. 114-222, § 2(a)(7). There is no possible way to reconcile the operative language of JASTA that “liability may be asserted” with the lower court’s interpretation of Section 230 to “preclude[] liability.” *Gonzalez*, 2 F.4th at 891. These two provisions are repugnant to one another and cannot co-exist. JASTA, passed more than 20 years after Section 230, should control the assessment of liability for conduct falling within its scope. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) (“the more recent of two irreconcilably conflicting statutes governs”).

This conclusion is buttressed by Congress’s identification of the appropriate standard to apply when assessing aiding and abetting liability under Section 2333(d)(2). Congress instructed that *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)—the “leading case regarding Federal civil aiding and abetting and conspiracy liability”—provided the “proper legal framework for how . . . liability should function” under Section 2333. Pub. L. No. 114-222 § 2(a)(5). *Halberstam* establishes a multi-part test: “the nature of the act encouraged; the amount [and kind] of assistance given; the defendant’s absence or presence at the time of the tort; his relation to the tortious actor; and the defendant’s state of mind.” 705 F.2d at 483-84 (citing Restatement (Second) of Torts § 876 (1979)) (alteration in original). Application of the *Halberstam* test requires the assessment of facts, but such facts cannot be developed if Section 230 halts the case at the start. Following Congress’s direction in JASTA that *Halberstam* provides the proper legal framework is impossible if Section 230 is read to bar suit.

This Court’s precedents on implied repeal are in accord. See *EC Term of Years Tr. v. United States*, 550 U.S. 429, 435-36 (2007) (later statutory provision creating nine-month limitations period for certain wrongful levy claims impliedly repealed earlier enacted, more general, four-year limitations period); *United States v. Will*, 449 U.S. 200, 222-24 (1980) (series of statutes that stopped or reduced previously authorized salary increases for federal officials constituted implied repeal, even without express language, where congressional intent was evident from contemporaneous House and Senate Reports and



floor debates); *United States v. Fisher*, 109 U.S. 143, 144, 146 (1883) (implied repeal where earlier statute established a \$3,000 annual salary for certain government employees, but later act appropriated only \$2,600 and stated it would be “in full compensation for the service” that year). So too, here, it is impossible for Congress’s creation of a cause of action on which “liability may be asserted” to be reconciled against Section 230’s protection as to that same liability. The later act, JASTA, “must therefore prevail.” *Fisher*, 109 U.S. at 146.

The purpose and intent of the later statute as a whole, *see Joplin Mercantile Co. v. United States*, 236 U.S. 531, 545-46 (1915), also supports a finding of implied repeal. JASTA is an immunity-limiting statute. Section 3 amended the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1601 *et seq.*, to limit the sovereign immunity of foreign states that aid and abet international terrorism. In also amending the civil cause of action in 18 U.S.C. § 2333 and opening the courthouse doors to claims against a wide variety of entities,<sup>55</sup> Congress could not have intended that a small group of favored entities would be exempted

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<sup>55</sup> These include international charities, *e.g.*, *Boim v. Am. Muslims for Palestine*, 9 F.4th 545 (7th Cir. 2021); banks, *e.g.*, *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021); pharmaceutical companies, *e.g.*, *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022); food conglomerates, *e.g.*, *In re Chiquita Brands Int’l, Inc. Alien Tort Statute & S’holder Derivative Litig.*, 690 F. Supp. 2d 1296 (S.D. Fla. 2010); energy producers, *e.g.*, *Brill v. Chevron Corp.*, 804 Fed App’x 630 (9th Cir. 2020); and foreign sovereigns, *e.g.*, *In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d 631 (S.D.N.Y. 2018).

from liability because of some pre-existing statutory bar.

This conclusion comports with JASTA’s legislative history. When Congress enacted JASTA, it was wholly cognizant of the threat of online radicalization by foreign terrorist groups. Indeed, it held hearings in both chambers on the subject.<sup>56</sup> Congressmembers strongly expressed their intent that JASTA’s cause of action would allow terrorism victims to assert their claims in federal court.<sup>57</sup> The bipartisan bill passed both the House and Senate by voice vote<sup>58</sup> before being vetoed by the President because of the amendment to the FSIA not at issue here.<sup>59</sup> Both Houses of

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<sup>56</sup> *ISIS Online, supra* note 3; *Radicalization: Soc. Media & the Rise of Terrorism: Hearing Before the Subcomm. on Nat’l Sec. of the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (Oct. 28, 2015).

<sup>57</sup> *See* 162 Cong. Rec. H5239-44 (Sept. 9, 2016) (statements from representatives about the goal of giving terrorist victims their day in court).

<sup>58</sup> *See also* 162 Cong. Rec. H5240 (statement of Rep. Goodlatte) (noting that JASTA had “been introduced over several successive Congresses and has twice passed the Senate”); 162 Cong. Rec. S2845 (May 17, 2016) (statement of Sen. Conyers) (noting that “similar legislation passed the Senate unanimously last Congress. I believe that kind of unanimous support sends a clear message: that we will combat terrorism with every tool we have available and that the victims of terrorist attacks in our country should have every means at their disposal to seek justice”).

<sup>59</sup> Veto Message from the President—S. 2040, The White House, Office of the Press Secretary (Sept. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040>.

Congress then acted to override the President’s veto, the House voting 348 to 77 (with one member voting present), and the Senate voting 97-1.<sup>60</sup>

In overwhelmingly passing JASTA twice, Congress clearly demonstrated its strong intent to secure for terrorism victims their day in court. Section 230’s liability bar is squarely contrary to the language, purpose, and intent of JASTA, and it would be appropriate to hold in this case that Section 230 is impliedly repealed to the extent that it prevents the assertion of liability against internet platforms for their algorithmic amplification of terrorist content. *See Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963) (“Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.”).

As discussed *supra* at 23, such a holding would not guarantee judgments against internet platforms for their algorithmic amplification of terrorist content. Section 2333 provides that “[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States....” 18 U.S.C. § 2333(a). To be successful on such a claim, plaintiffs must prove that the defendant is one who “aids and abets, by knowingly providing substantial assistance, or who conspires with” the person committing the terrorist attack. 18

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<sup>60</sup> S. 2040, 114th Cong. (as passed by House and Senate, Sept. 28, 2016).

U.S.C. § 2333(d)(2). They must demonstrate that the defendant meets the multi-pronged, fact-based *Halberstam* test. Pub. L. No. 114-222, § 2(a)(5). And they must show that defendant’s action caused their injury. These are no easy tasks.<sup>61</sup>

But none of these assertions of liability could be tested by plaintiffs in federal courts—as Congress clearly intended they should be—if Section 230 stops these claims dead in their tracks. There is no way to reconcile these conflicting statutory commands. JASTA must be given precedence over the earlier statute.

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<sup>61</sup> See, e.g., *Retana v. Twitter, Inc.*, 1 F.4th 378, 384 (5th Cir. 2021); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 624-26 (6th Cir. 2019); *Fields v. Twitter, Inc.*, 881 F.3d 739, 741 (9th Cir. 2018) (all dismissing claims because of a failure to adequately allege that defendants’ conduct proximately caused plaintiffs’ injuries).

## CONCLUSION

For the foregoing reasons, this Court should reverse the United States Court of Appeals for the Ninth Circuit and hold that Section 230 does not protect respondents from liability for their conduct in the circumstances of this case.<sup>62</sup>

Respectfully submitted,

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<sup>62</sup> To the extent the Court determines that the parties' briefing in the litigation thus far forecloses the Court from reaching the arguments amici raise here, amici urge the Court to vacate the decision below and remand so that the lower courts may consider these arguments in the first instance.

**APPENDIX: LIST OF AMICI CURIAE**

**Javed Ali**, former Senior Director for Counterterrorism, National Security Council.

**Jason M. Blazakis**, former Director of the Office of Terrorist Designations and Finance, Counterterrorism Bureau, U.S. Department of State.

**William Braniff**, former Director of Practitioner Education, Combating Terrorism Center, West Point.

**John O. Brennan**, former Director, Central Intelligence Agency; former Assistant to the President for Homeland Security and Counterterrorism; former (Interim) Director, National Counterterrorism Center; former Director, Terrorist Threat Integration Center.

**Graham Brookie**, former Advisor for Strategic Communications, National Security Council; former Advisor to the White House Homeland Security Advisor.

**Rosa Brooks**, former Counselor to the Under Secretary for Policy, U.S. Department of Defense; former Senior Advisor to the Assistant Secretary for Democracy, Human Rights and Labor, U.S. Department of State.

**Christopher P. Costa**, former Special Assistant to the President and Senior Director for Counterterrorism, National Security Council.

**Jason Crow**, Member of Congress.

**Mary DeRosa**, former Deputy Assistant and Deputy Counsel to the President; former Legal Advisor, National Security Council; former Chief Counsel for National Security, Senate Judiciary Committee.

**Gary Hart**, former United States Senator; former member of the Armed Services Committee, Intelligence Oversight Committee, and Church Committee, United States Senate; former Vice Chair, Homeland Security Advisory Council; former national security appellate attorney, U.S. Department of Justice.

**David Hickton**, former U.S. Attorney for the Western District of Pennsylvania.

**Deborah K. Jones**, former U.S. Ambassador to Kuwait; former U.S. Ambassador to Libya.

**Tom Malinowski**, Member of Congress; Vice Chair, House Committee on Foreign Affairs; former Assistant Secretary of State for Democracy, Human Rights, and Labor, U.S. Department of State.

**Andrew G. McCabe**, former Acting Director and Deputy Director, Federal Bureau of Investigation.

**Mary B. McCord**, former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General, National Security Division, U.S. Department of Justice; former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney's Office for the District of Columbia.

**Barbara L. McQuade**, former U.S. Attorney for the Eastern District of Michigan; former Co-Chair, Terrorism and National Security Subcommittee, Attorney General's Advisory Committee of United States Attorneys, U.S. Department of Justice.

**Mark Medish**, former Senior Director, National Security Council; former Deputy Assistant Secretary, U.S. Department of the Treasury.

**Elizabeth Neumann**, former Assistant Secretary for Counterterrorism and Threat Prevention, U.S. Department of Homeland Security.

**Anne Patterson**, former Assistant Secretary of State for Near Eastern and North African Affairs, U.S. Department of State; former Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, U.S. Department of State; former U.S. Ambassador to Egypt; former U.S. Ambassador to Pakistan; former U.S. Ambassador to Colombia; former U.S. Ambassador to El Salvador.

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