CRIMINAL LAW – PARTIES TO OFFENSES: EXPLORING THE BOUNDARIES OF ONLINE PLATFORM ACCOUNTABILITY

Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023).

ABSTRACT

In the landmark case of *Twitter, Inc. v. Taamneh*, the United States Supreme Court addressed whether Facebook, Google, and Twitter were liable for allegedly allowing ISIS to use their social media platforms for content sharing, fundraising, and recruitment. Additionally, the companies were accused of being aware of ISIS content on their platforms, failing to remove it, and even sharing it with other users through recommendation algorithms.

The central question before the Court was whether these actions amounted to aiding and abetting a terrorist attack at the Reina nightclub in Istanbul, Turkey, under the Justice Against Sponsors of Terrorism Act. This statute created a civil cause of action for aiding and abetting against individuals or entities who knowingly provide substantial assistance to an act of international terrorism. In *Taamneh,* the Supreme Court *held* that while ISIS used the social media platforms, the recommendation algorithms agnostically matched content to users without providing preferential treatment to ISIS-related material. The companies did not have an affirmative duty to remove such content from their platforms. Thus, the Court held that the companies did not provide substantial assistance and dismissed the case for failure to state a claim. The Court analogized the treatment of social media platforms with that of internet, cell service, and communications providers, emphasizing that imposing liability in those circumstances would also be unreasonable. As such, *Twitter, Inc. v. Taamneh* clarified social media companies' liability for their users' actions.

This evolving legal landscape has significant implications for practitioners and lawmakers in North Dakota. States, including North Dakota, are considering new legislation regarding social media companies' immunity and censorship. Additionally, practitioners are increasingly likely to have cases that involve social media posts and communications, potentially creating causes of actions against social media companies.

I. FACTS

On New Year's Day in 2017, Abdulkadir Masharipov, an Islamic State of Iraq and Syria ("ISIS") affiliate, carried out a terrorist attack on the Reina nightclub in Istanbul, Turkey ("Reina attack").[1] During the New Year celebrations, Masharipov entered the nightclub and fired over one hundred twenty rounds into the crowd, injuring sixty-nine people and killing thirty-nine.[2] Among the casualties was Nawras Alassaf, whose family ("Plaintiffs") brought an action against three major social media companies: Twitter, Facebook, and Google ("Defendants").[3] Plaintiffs accused these companies of civilly aiding and abetting ISIS under the Justice Against Sponsors of Terrorism Act ("JASTA").[4] Plaintiffs alleged that Masharipov became radicalized due to ISIS's exploitation of Defendants' platforms.[5] Furthermore, Plaintiffs contended that Defendants were not only aware of ISIS's exploitation of their platforms, they promoted ISIS-related content to specific users through recommendation algorithms.[6]

This action began in the United States District Court for the Northern District of California.[7] The district court granted Defendants' motion to dismiss for failure to state a claim.[8] The district court held that Plaintiffs' allegations—suggesting ISIS's presence on Defendants' platforms caused the Reina attack—were conclusory,[9] under the U.S. Supreme Court's holding in *Ashcroft v. Iqbal*.[10]

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1. Twitter, Inc. v. Taamneh, 598 U.S. 471, 478-79 (2023).

2. *Id.*; *Istanbul Nightclub Targeted in New Year Attack Demolished*, REUTERS, May 22, 2017, https://www reuters.com/article/us-turkey-security-nightclub/istanbul-nightclub-targeted-in-new-year-attack-demolished-idUSKBN18I1G1 [https://perma.cc/9ANU-MVSD] ("The attacker opened fire with an automatic rifle, throwing stun grenades to allow himself to reload and shooting the wounded on the ground.").

3. *Taamneh*, 598 U.S. at 479.

4. *Id.* at 478.

5. *See id.* at 481-82.

6. *Id.*

7. Taamneh v. Twitter, Inc., 343 F. Supp. 3d 904, 913 (N.D. Cal. 2018), *rev'd and remanded by* Gonzalez v. Google LLC, 2 F.4th 871, 880 (9th Cir. 2021), *rev'd by Taamneh*, 598 U.S. 471.

8. *Id.*

9. *Id.* at 919 ("Plaintiffs allege that Mr. Masharipov was radicalized through Defendants' social media networks, that allegation is entirely conclusory in nature . . . .").

10. Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) (holding that conclusory allegations do not enjoy the presumption of truth).

Plaintiffs appealed to the Ninth Circuit, and the case was consolidated with two other cases arising from other acts of terrorism.[11] The court applied the analysis framework for civil aiding and abetting claims outlined in *Halberstam v. Welch*[12] and reversed the lower court, holding that Plaintiffs adequately stated a claim.[13] Subsequently, Defendants filed a writ of certiorari which was granted by the U.S. Supreme Court.[14]

II. LEGAL BACKGROUND

The legal background of *Taamneh* traces the Antiterrorism Act's ("ATA") progression toward recognizing secondary liability and carries significant implications for Section 230 of the Communications Decency Act. This background explores the ATA's historical progression, secondary liability framework, and the broader debate surrounding Section 230.

A. THE HISTORICAL PROGRESSION OF THE ATA TOWARDS SECONDARY LIABILITY

The development of the ATA toward recognizing secondary liability has followed a multifaceted trajectory.[15] Enacted in 1990, the ATA gives U.S. nationals injured by acts of international terrorism standing to seek civil damages in federal court.[16] This legislation followed Congress's 1986 expansion of criminal jurisdiction beyond national borders for terrorist offenses.[17] The ATA's primary goal is to offer a complementary mechanism for civil redress to individuals affected by terrorism.[18] Initially, the ATA did not expressly address secondary liability for aiding terrorists.[19] However, in 1996, Congress introduced Section 2339B, which prohibits knowingly providing material support to foreign terrorist organizations.[20] Although the scope of material support has evolved through congressional amendments, Section 2339A(b)(1) provides a list of recognized culpable actions.[21]

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11. *See Gonzalez*, 2 F.4th at 879.
12. 705 F.2d 472, 477 (D.C. Cir. 1983).
13. *Gonzalez*, 2 F.4th at 910.
14. *See* Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023).
15. Brief of Anti-Terrorism Act Scholars as *Amici Curiae* in Support of Respondents at 5-13, *Taamneh*, 598 U.S. 471 (2023) (No. 21-1496) [hereinafter ATA Scholars].
16. *Taamneh*, 598 U.S. at 482-83; *see also* 18 U.S.C. § 2333(a).
17. ATA Scholars, *supra* note 15, at 6.
18. *Id.*
19. *Taamneh*, 598 U.S. at 483; *see also* 18 U.S.C. § 2333.
20. 18 U.S.C. § 2339B(a)(1); *see also* Holder v. Humanitarian L. Project, 561 U.S. 1, 7 (2010).
21. 18 U.S.C. § 2339A(b)(1) ("[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives,

Knowledge of an organization's connection to terrorism is a required element, but specific intent to advance the organization's terrorist activities is not required to establish material support.[22]

Section 2339B enables private actions against direct perpetrators who materially supported terrorist organizations; however, whether the ATA recognized secondary liability was uncertain from the statute's language.[23] The Seventh Circuit, in *Boim v. Holy Land Foundation for Relief and Development*, addressed this issue and held the ATA's silence on secondary liability implied its nonexistence.[24] However, *Boim* recognized that secondary liability can be imposed for aiding and abetting.[25] This interpretation judicially bridged the gap between Congress's intent and the ATA's original text until JASTA's enactment.[26]

B. ENACTMENT OF JASTA AND CLARIFICATION OF SECONDARY LIABILITY

In 2016, despite President Obama's veto, Congress enacted JASTA with broad bipartisan support.[27] The primary purpose of JASTA is to provide September Eleventh victims' families standing to seek remedies against Saudi Arabia within U.S. courts.[28] This legislation caused considerable controversy primarily because it altered the Foreign Sovereign Immunities Act.[29] Additionally, JASTA amended the ATA to provide clearer guidelines for pursuing legal action against non-governmental individuals and entities under theories of secondary liability, including aiding and abetting.[30] This amendment effectively resolved prior confusion over the ATA's stance on secondary liability.[31]

1. Secondary Liability Under JASTA

Victims of international terrorism have two routes for legal recourse under the ATA.[32] They can sue responsible terrorist organizations directly

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personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.").

22. *Holder*, 561 U.S. at 16-17.

23. ATA Scholars, *supra* note 15, at 7-8.

24. 549 F.3d 685, 689 (7th Cir. 2008).

25. *Id.* at 691 ("Primary liability in the form of material support to terrorism has the character of secondary liability.").

26. ATA Scholars, *supra* note 15, at 10.

27. *Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act*, 111 AM. J. INT'L L. 156, 156 (2017).

28. *Id.*

29. ATA Scholars, *supra* note 15, at 10.

30. Twitter, Inc. v. Taamneh, 598 U.S. 471, 485 (2023).

31. *Congress Overrides*, *supra* note 27, at 157.

32. *Taamneh*, 598 U.S. at 483.

through Section 2333(a) or they can bring an action under Section 2333(d)(2) against secondary actors who "aid[] and abet[] . . . or who conspire[] with the person who committed such an act of international terrorism."[33] To succeed in the latter, a plaintiff must establish that the defendant's conduct constitutes "aid[ing] and abet[ting], by knowingly providing substantial assistance" to an "act of international terrorism" that was "committed, planned, or authorized by an organization designated as a terrorist organization under [8 U.S.C. § 1189] as of the date" the conduct occurred.[34]

To qualify as international terrorism, an attack must first involve violent or life-threatening acts that breach federal or state criminal laws.[35] Second, the conduct "must appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination, or kidnapping."[36] Lastly, a majority of these acts must occur beyond U.S. territorial jurisdiction or "transcend national boundaries" through the methods employed, the individuals targeted for intimidation or coercion, or the locations where the perpetrators operate or seek asylum.[37]

2. *Congress's Intent and the* Halberstam *Framework*

During discussions, Congress affirmed its intent that JASTA "provide[s] civil litigants with the broadest possible basis to seek relief."[38] Congress comprehensively outlined the scope and elements of secondary liability under JASTA and directed further clarification from the pivotal D.C. Circuit ruling in *Halberstam v. Welch*,[39] which is "widely recognized as the leading case regarding Federal civil aiding and abetting."[40]

In *Halberstam*, Linda Hamilton ("Hamilton") was sued for allegedly aiding and abetting and conspiring with her partner, Bernard C. Welch, Jr. ("Welch"), in a robbery that resulted in the death of Michael Halberstam, the plaintiff's late husband.[41] Although Hamilton was not physically present during the murder, the court held that her substantial involvement displayed an apparent willingness to participate in Welch's criminal pursuits.[42] Her involvement included managing Welch's bookkeeping, facilitating the sale

33. *Id.* (quoting 18 U.S.C. § 2333(d)(2)).
34. *Id.* at 483-84 (fourth alteration in original) (quoting 18 U.S.C. § 2333(d)(2)).
35. ATA Scholars, *supra* note 15, at 7 (quoting 18 U.S.C. § 2331(1)(A)).
36. *Id.* (citing 18 U.S.C. § 2331(1)(B)).
37. *Id.* (citing 18 U.S.C. § 2331(1)(C)).
38. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016) (codified as amended at 18 U.S.C. § 2333).
39. 705 F.2d 472 (D.C. Cir. 1983).
40. Justice Against Sponsors of Terrorism Act § 2(a)(5).
41. *Halberstam*, 705 F.2d at 484.
42. *Id.* at 474, 487-88.

of stolen goods, falsifying tax returns, and maintaining incoming payment records.[43] Absent precedent, the *Halberstam* court had to determine which activities by an indirect defendant constituted aiding and abetting.[44] The court undertook an extensive survey amalgamating the common law on secondary liability and formulated three fundamental elements:

> (1) [T]he 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; [and] (3) the defendant must knowingly and substantially assist the principal violation.[45]

Elements two and three require not only awareness of the wrongful act's existence but also recognition of one's involvement in an improper undertaking.[46] Furthermore, a secondary actor who provides substantial assistance may be liable "for other reasonably foreseeable acts done in connection" with the principle tort.[47] The *Halberstam* court established six factors to determine whether a defendant's assistance is substantial: "(1) 'the nature of the act assisted,' (2) the 'amount of assistance' provided, (3) whether the defendant was 'present at the time' of the principal tort, (4) the defendant's 'relation to the tortious actor,' (5) the defendant's state of mind,' and (6) the 'duration of the assistance' given."[48]

Finally, the *Halberstam* court emphasized that this framework should "adapt[] as new cases test their usefulness in evaluating vicarious liability" and is not a set of fixed elements.[49] This sentiment is also echoed in JASTA, where *Halberstam* is referred only as a "proper legal framework" for analyzing secondary liability.[50]

C. SECTION 230: SAFEGUARDING ONLINE FREEDOM AND TECHNOLOGY COMPANY PROTECTIONS

Implicit in *Taamneh* is the safeguard afforded to interactive computer service providers through Section 230 of the Communications Decency Act ("Section 230").[51] Colloquially known as *The Twenty-Six Words That*

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43. *Id.* at 474-76.
44. *Id.* at 477.
45. *Id.*
46. Brief of Petitioner at 10, *Taamneh*, 598 U.S. 471 (No. 21-1496) (quoting *Halberstam*, 705 F.2d at 478 n.8).
47. *Halberstam*, 705 F.2d at 484.
48. *Taamneh*, 598 U.S. at 486 (quoting *Halberstam*, 705 F.2d at 488).
49. *Halberstam*, 705 F.2d at 489.
50. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016) (codified as amended at 18 U.S.C. § 2333).
51. *See* Zhang v. Twitter Inc., No. 23-cv-00980-JSC, 2023 WL 5493823, at *3 (N.D. Cal. Aug. 23, 2023).

Created the Internet,[52] Section 230 is a cornerstone of the digital age's freedom of expression,[53] protecting Americans' online freedom and shielding social media corporations from liabilities arising from user-generated content.[54]

When Congress initially enacted Section 230, its primary objective was to promote the development of the internet, maintain a competitive free market, empower users to control the information they receive, and encourage self-regulation of content.[55] Section 230 allows online service providers to moderate third-party content, exercise editorial discretion, facilitate publication, and censor materials.[56] However, with the evolution of online platforms from simple digital bulletin boards to influential social media corporations, Section 230 has become a source of controversy.[57]

Section 230 is often credited for the free and open nature of today's digital landscape.[58] Nonetheless, critics contend that it has provided unfettered protection to technology giants, shielding them from the repercussions of misinformation, discrimination, and violent content often found throughout their platforms.[59]

1. Balancing Cyberlibertarian Ideals and Technology Company Protections

Proponents of Section 230 often emphasize its alignment with the values of *cyberlibertarianism*—an ideology that the internet should be a realm of individual liberty and autonomy.[60] Cyberlibertarians believe that digital liberty is rooted in self-governance,[61] a tenet undoubtedly reflected within

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52. Tom Wheeler, *The Supreme Court Takes Up Section 230*, BROOKINGS (Jan. 31, 2023), https://www.brookings.edu/articles/the-supreme-court-takes-up-section-230 [https://perma.cc/2PDA-974W]; *see also* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

53. *See* Jack M. Balkin, *Freedom of the Press: Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2313 (2014).

54. *See* 47 U.S.C. § 230(b).

55. *Id.*

56. *Zhang*, 2023 WL 5493823, at *3 (quoting Barnes v. Yahoo, 570 F.3d 1096, 1102 (9th Cir. 2009)).

57. Wheeler, *supra* note 52.

58. *Section 230*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/4PLP-T49U] (last visited Sep. 10, 2023).

59. Adam Liptak, *Supreme Court Won't Hold Tech Companies Liable for User Posts*, N.Y. TIMES (May 18, 2023), https://www nytimes.com/2023/05/18/us/politics/supreme-court-google-twitter-230 html [https://perma.cc/UMH5-ADTF].

60. Rachel Reed, *Supreme Court Considers How Far Section 230 Should Go in Shielding Google, Twitter and Other Tech Companies*, HARV. L. TODAY (Feb. 13, 2023), https://hls harvard.edu/today/supreme-court-considers-how-far-section-230-should-go-in-shielding-google-twitter-and-other-tech-companies/ [https://perma.cc/HS76-CEU4].

61. Lincoln Dahlberg, *Cyberlibertarianism*, OXFORD UNIV. PRESS (Oct. 26, 2017), https://oxfordre.com/communication/ [https://perma.cc/R9S8-JAM5].

Section 230, granting online service providers immunity for user-generated content while holding users liable for their own content.[62] Notably, Section 230(a)(4) states that the internet thrives within an environment of "minimum government regulation."[63] Section 230(b)(4) describes its goal to promote technology development that gives users greater control.[64] Finally, the statute underscores that the internet provides a platform for "diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[65] Hence, Section 230 closely aligns closely with cyberlibertarian ideals.[66]

Section 230 supports large technology companies' growth and development because they are not required to undertake the unfeasible task of reviewing each piece of user-generated content.[67] Devoid of these safeguards, social media platforms would likely resort to either heavy censorship of user speech or abstention from hosting user-generated content to evade potential liability.[68]

2. Challenges to Section 230's Extensive Protections

Critics argue that social media's pervasiveness and influence on contemporary society has promoted "social devastation."[69]

> To what degree should Facebook be held accountable for the Capitol riots, much of the planning for which occurred on its platform? To what degree should Twitter be held accountable [for] enabling terrorist recruiting? How much responsibility should Backpage and Pornhub bear for facilitating the sexual exploitation of children?[70]

The dual protective mechanisms of Section 230, shielding both users and providers, function effectively when considered independently but can create conflicts when they intersect.[71] Technology companies' complete immunity

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62. *See Section 230*, *supra* note 58.

63. 47 U.S.C. § 230(a)(4).

64. *Id.* § 230(b)(4).

65. *Id.* § 230(a)(3).

66. *See* Kevin Werbach, *The Song that Remains the Same: What Cyberlaw Might Teach the Next Internet Economy*, 69 FLA. L. REV. 887, 904 (2018) (Cyberlibertarians argue "that even if states and private litigants" have the capacity to regulate online activities, they should exercise restraint, as cyberspace should maintain the autonomy to self-govern. This aligns with Section 230's focus on the self-regulation of the internet.).

67. *See Section 230*, *supra* note 58.

68. *Id.*

69. Michael D. Smith & Marshall Van Alystyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230 [https://perma.cc/C54C-SCTT].

70. *Id.*

71. *Id.*

from users' content disincentivizes them from actively removing content that causes social harm.[72]

Others acknowledge Section 230's pivotal role during the renaissance of internet growth but argue that the 'free ride' is over.[73] Supporters of this belief state that in today's digital era, these technology companies have garnered an extensive user base and substantial wealth.[74] Thus, these companies no longer need the same level of liability protection as during Section 230's adoption in the 1990s.[75] These proponents argue that digital content providers should no longer have immunity protections that their physical counterparts do not share.[76]

III. ANALYSIS

The U.S. Supreme Court unanimously reversed the Ninth Circuit's decision in *Taamneh*, holding that Plaintiffs failed to state a viable claim under Section 2333(d)(2).[77] The key issue before the Court was whether Defendants' conduct amounted to aiding and abetting in the Reina attack.[78] The Court reached its decision by applying the *Halberstam* framework.[79]

A. OVERVIEW OF DEFENDANTS' ARGUMENT

Defendants argued that common law principles, exemplified in *Halberstam,* indicate that aiding and abetting requires an individual to substantially assist the specific "act of international terrorism" giving rise to the cause of action.[80] Relying on the Restatement (Second) of Torts, Defendants contended that a secondary actor must significantly contribute to the tortious conduct leading to the plaintiff's injury.[81] Similarly in cases of aiding and abetting, secondary actors may only be held responsible for a crime committed by another if they provide material support.[82] Defendants argued that courts have consistently recognized this principle in other

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72. *Id.*

73. *See* Reed, *supra* note 60.

74. *Id.*

75. *Id.*

76. *Id.* ("For instance, when the law was passed, someone could place the exact same ad in a physical newspaper and an online platform—say, an ad for sex trafficking—and the newspaper would be liable for it, while the online service would not be liable for it.").

77. Twitter, Inc. v. Taamneh, 598 U.S. 471, 506-07 (2023). *See* Ryan Tarinelli, *Supreme Court Sides With Social Media Giants on Liability Laws*, ROLL CALL (May 18, 2023, 1:43 PM), https://rollcall.com/2023/05/18/supreme-court-sides-with-social-media-giants-on-liability-laws [https://perma.cc/KB9K-FZLU].

78. *Taamneh*, 598 U.S. 471 at 484.

79. *Id.* at 487-88.

80. Brief of Petitioner, *supra* note 46, at 21-22 (quoting 18 U.S.C. § 2333(d)(2)).

81. *Id.* at 26 (quoting RESTATEMENT (SECOND) OF TORTS §876(b) (1979)).

82. *Id.* at 26-27 (quoting Rosemond v. United States, 572 U.S. 65, 70 (2014)).

contexts as well, including securities law, where acts must substantially contribute to the principal violation forming the basis of the claim.[83]

Defendants cited *Halberstam*, which they interpreted as requiring an individual to give direct aid to the specific act of terrorism.[84] However, Defendants emphasized that this precedent did not extend to secondary actors liable for generalized assistance.[85] Therefore, they argued that Facebook, Google, and Twitter's liability hinged solely on whether they directly aided and abetted the Reina attack—the act of international terrorism giving rise to Plaintiffs' claim.[86] Since Plaintiffs did not allege such direct involvement, Defendants contended the claim was meritless and should be dismissed.[87]

B. OVERVIEW OF PLAINTIFFS' ARGUMENT

Plaintiffs argued that Defendants' interpretation of aiding and abetting was unduly narrow and contrary to the broader scope of liability intended by the statute.[88] In their view, substantial assistance is not confined solely to the immediate act giving rise to the claim; rather, it should extend to aiding and abetting the overarching terrorist organization involved in planning and authorizing the acts.[89] They interpreted the language of Section 2333(d)(2), "aids and abets" and "conspires with," as referring to individuals involved in an international terrorist act.[90] Notably, they argued that the absence of the word "to" in the provision expands its reach to both direct and indirect support.[91] While Defendants narrowed the definitions of "aids" and "abets" to a specific "act of international terrorism," Plaintiffs contended that this view overlooked Congress's deliberate omission of qualifying language.[92]

Furthermore, Plaintiffs challenged Defendants' interpretation of *Halberstam*.[93] They emphasized that despite Hamilton's indirect role in the burglaries, her contribution to the overall criminal enterprise was significant.[94] The *Halberstam* court noted that Hamilton served as a banker, bookkeeper, and secretary—roles that significantly contributed to Welch's murder—though she was not directly involved in the particular robbery

83. *Id.* at 28 (quoting 15 U.S.C. § 78t(e)).
84. *Id.* at 26.
85. *Id.* at 31.
86. *See id.* at 33.
87. *Id.* at 36.
88. Brief of Respondents at 16-22, Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023) (No. 21-1496).
89. *See id.* at 17-19.
90. *Id.* at 36-38.
91. *Id.* at 34-35.
92. *Id.* at 40-41.
93. *Id.* at 26-27.
94. *Id.* at 23-25.

leading to his death.[95] Thus, the court's ruling was premised on Hamilton's awareness of Halberstam's criminal pursuits and the foreseeable risk of violence.[96] Plaintiffs argued that Defendants' aid to ISIS's broader terrorist activities was comparable, claiming that without the social media companies allowing and sharing ISIS content on their platforms, the Reina nightclub attack would not have occurred.[97]

C. COURT'S DECISION AND RATIONALE

1. *The Meaning of "Aiding and Abetting" Under JASTA and* Halberstam

In analyzing the meaning of "aids and abets, by knowingly providing substantial assistance," the Supreme Court drew upon established common law principles and the framework offered by JASTA.[98] The Court stated that "aids and abets" has a well-defined meanings in common law precedent.[99] Consistent with Section 2(a)(5) of JASTA, the Court began by considering facts and framework of *Halberstam*.[100] The Court recognized the potential limitations of directly applying *Halberstam*'s three-element and six-factor test but deemed it necessary to distill *Halberstam*'s core concepts.[101]

The Court explained that aiding and abetting is an "ancient criminal law doctrine" and has exerted significant influence over its tort counterpart.[102] In criminal law, an individual may be convicted of aiding and abetting by actively assisting another in committing a crime despite not directly perpetrating such crime.[103] However, the Court noted that the "concept of 'helping' in the commission of a crime—or a tort—has never been boundless."[104] To prevent an overly broad application, the Court held that tortious aiding and abetting hinges on an affirmative "conscious, voluntary,

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95. *Id*.

96. *Id.*

97. *Id.* at 17-18 ("[B]y providing broad assistance to ISIS's overall campaign of terrorism, the defendants aided and abetted the Reina attack.").

98. Twitter, Inc. v. Taamneh, 598 U.S. 471, 483 (2023) (quoting 18 U.S.C. § 2333(d)(2)).

99. *Id.* at 484-85 ("We generally presume that such common-law terms 'brin[g] the old soil' with them." (quoting Sekhar v. United States, 570 U.S. 729, 733 (2013))).

100. *Id.* at 485.

101. *Id.* at 488 (The factor test was originally formulated in the context of a burglary.).

102. *Id.* (quoting Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994)).

103. *Id.*

104. *Id.* at 488. The Supreme Court acknowledged that the term "helping" should not be interpreted broadly to encompass all types of assistance. *Id.* at 488. The term specifically excludes indirect or tangential forms of aid. *Id.* at 489. To illustrate the significance of this limitation to culpable aid, the Court offered an analogy: suppose someone passively observes a bank robbery without contacting the police. *Id.* at 488-89. In this scenario, that person is not considered to have aided and abetted in the robbery. *Id.* at 489.

and culpable participation in another's wrongdoing."[105] This sentiment of providing "knowing and substantial assistance to the primary tortfeasor" was also reflected within the *Halberstam* framework.[106]

2. *What Precisely Must the Defendant "Aid and Abet"?*

Next, the Supreme Court determined what an individual's involvement must be to be considered aiding and abetting.[107] The key determination the Court had to address was whether "aids and abets" refers to the individual terrorist organization or the specific act of international terrorism.[108] Despite both parties' rigorous argument over the statute's syntax, the Court emphasized that aiding and abetting fundamentally concerns secondary liability for particular wrongful acts.[109] As asserted in *Halberstam*, this principle places liability on those who actively contribute to the completion of "a tortious act."[110] Therefore, the Court held that the question of whether "aids and abets" refers to the person committing the terrorist act or the act itself is secondary to whether they facilitated a specific wrongful act.[111]

Tort law served as guiding precedent to the Court, illustrating that liability arises from the actual commission of a tort rather than mere association or suggestion.[112] The Court underscored that aiding and abetting must be linked to the actionable wrong itself, exemplified by the fact that the ATA grants remedies only to those injured by an "act of international terrorism."[113] Individuals cannot pursue a claim under the ATA for mere association or support to a larger terrorist organization.[114]

Therefore, the Court held that "aid and abets, by knowingly providing substantial assistance," refers to carrying out a wrongful act consistent with the key elements encapsulated by the *Halberstam* framework.[115] Accordingly, the Court held that to receive relief under Section 2333 of the ATA, Plaintiffs must allege that Defendants aided and abetted ISIS in carrying out the Reina attack.[116]

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105. *Id.* at 493. *See also* Nye & Nissen v. United States, 336 U.S. 613, 620 (1949); Rosemond v. United States, 572 U.S. 65, 70 (2014).

106. *Taamneh*, 598 U.S. at 491 ("[G]iving verbal encouragement . . . could be substantial assistance, but . . . passively watching an assault . . . would not be." (internal citations omitted)).

107. *Id.* at 493-94.

108. *Id.* at 494.

109. *Id*.

110. *Id.* (quoting Halberstam v. Welch, 705 F.2d 472, 484 (D.C. Cir. 1983)).

111. *Id.*

112. *Id.* at 494-95.

113. *Id.* (quoting 18 U.S.C. § 2333(a)).

114. *Id.* at 494 ("'Enterprises' or 'conspiracies' alone are therefore not tortious . . . .").

115. *Id.* at 497.

116. *Id*.

3. Reasonable Foreseeability: Establishing a Nexus Between Auxiliary Torts

Central in *Halberstam's* holding is that aiding and abetting a tort can extend liability to include other reasonably foreseeable torts that arise during its commission.[117] A direct link between the wrongful act and the assistance provided is not always required.[118] The Court held that aiding and abetting does not require a defendant to have complete knowledge of the primary actor's plan; it can apply in scenarios where assistance indirectly contributes to the wrongful act.[119] However, in some instances, a defendant's involvement within a tortious organization may be so substantial that it effectively aids, abets, and enables every wrongful act within that organization, like in *Halberstam*.[120]

Ultimately, a strong causal link between a defendant's actions and the primary wrongdoing establishes an actionable case of aiding and abetting.[121] However, aiding and abetting may still be established even when the connection is more remote.[122]

4. Passive Nonfeasance and Lack of Culpable Participation

Applying the aforementioned principles, the Supreme Court scrutinized Plaintiffs' claim, which alleged that Defendants (1) hosted ISIS content on their social media platforms, (2) operated recommendation algorithms that matched ISIS-related content to specific users, and (3) were aware of such content being uploaded and did not sufficiently remove it.[123] The Court analyzed whether these actions constituted a form of conscious, voluntary, and culpable participation in the Reina attack, reaching the level of knowing and substantial assistance.[124] Ultimately, the Court held that Defendants' conduct did not meet this threshold.[125]

The Court explained that culpable participation in a wrongful act requires the defendant to, in some way, wish to bring about its occurrence.[126]

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117. *Id*.; Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983). In *Halberstam*, the defendant's multifaceted substantial involvement beyond the actual robbery extended liability to reasonably foreseeable wrongdoings. 705 F.2d at 489. Murder, in the context of burglary, was considered a foreseeable risk. *Id.*

118. *Taamneh*, 589 U.S. at 497.

119. *Id*. at 495-96 ("[A] defendant might be held liable for aiding and abetting the burning of a building if he intentionally helped others break into the building at night and then, unknown to him, the others lit torches to guide them through the dark and accidentally started a fire.").

120. *Id*. at 496.

121. *Id*.

122. *Id*.

123. *Id*. at 498.

124. *Id.* at 497-98.

125. *Id*.

126. *Id*. (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)).

Apart from allegedly creating their platforms with autonomous recommendation algorithms, the allegations against Defendants did not establish any discernible active association, participation, or culpable intent to facilitate the Reina attack.[127] Instead, the Court reasoned that Defendants' conduct aligned closely with passive nonfeasance, an action long deemed insufficient for both tort and criminal aiding and abetting.[128] Accordingly, Plaintiffs needed to identify an independent tort duty that explicitly required Defendants to take action.[129]

The Supreme Court analogized Defendants' social media platforms with passive internet, email, or cell service providers.[130] Defendants service billions of individuals globally.[131] Defendants' support of ISIS seemed unremarkable when viewed in the context of the billions individuals they service.[132] Given that standard service "providers [are not] . . . described as aiding and abetting . . . illegal drug deals brokered over cell phones," it was unreasonable to extend such liability to Defendants in the present case.[133] The Supreme Court limited the implications of its decision by stressing the potential for a specific set of allegations that could warrant the imposition of secondary liability on a defendant for a group's terrorist actions.[134]

IV. IMPACT

North Dakota may not typically be in the spotlight for high-profile lawsuits involving technology giants; however, the digital age has effectively blurred geographical boundaries. Social media use and other online activity have grown exponentially since the enactment of Section 230 and show no sign of slowing down. In June 2022, YouTube saw an astounding 500 hours of content uploaded every minute.[135] Likewise, during a live broadcast of *Castle in the Sky*, Twitter recorded 143,199 tweets per second.[136] This surge

127. *Id*.
128. *Id*. at 500.
129. *Id*.
130. *Id*. at 499.
131. *Id*. at 500.
132. *Id.*
133. *Id*. at 499.
134. *Id*. at 502 ("[F]or example, situations where the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable terror attack.").
135. YouTube Official Blog, *YouTube for Press*, YOUTUBE (last visited Nov. 19, 2023), https://blog.youtube/press/ [https://perma.cc/BH8K-PNX5]. *See also* L. Ceci, *Hours of Video Uploaded to YouTube Every Minute 2007-2022*, STATISTA (June 22, 2022), https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/ [https://perma.cc/5Y7P-4E9B].
136. Jonathan Reichhold et al., *New Tweets per second record, and how!*, TWITTER (Aug. 16, 2013), https://blog.twitter.com/engineering/en_us/a/2013/new-tweets-per-second-record-and-how [https://perma.cc/VTP2-HM4D]. *See also* Statista Research Department, *Most Popular Global*

in internet usage correlates with a notable rise in legal actions against major technology corporations.[137]

Hence, *Taamneh* is increasingly significant for lawyers in North Dakota. The case is not merely an academic exercise but rather affects how practitioners should advise their clients, what claims they can pursue in cases involving the internet, and what considerations practitioners should have regarding future legislation in the digital realm.

A. SECTION 230'S UNALTERED STATUS FUELS ONGOING UNCERTAINTY

The Supreme Court's decision in *Taamneh* left Section 230 unreformed, preserving social media companies' immunity as publishers.[138] However, growing pressure from lawmakers and interest groups is casting a shadow of uncertainty over the future of Section 230.[139]

1. Congressional Action

The Supreme Court's hesitancy to address Section 230 may compel Congress to reform the statute directly. Since *Taamneh*, bipartisan support to reform Section 230 has been mounting in Congress, suggesting that reform may be imminent.[140] In June 2023, Senators Josh Hawley (R-Mo.) and Richard Blumenthal (D-Conn.) introduced the No Section 230 Immunity for AI Act.[141]

Events on Twitter as Measured in Tweets Per Second From 2011 to 2012, STATISTA (July 1, 2012), https://www.statista.com/statistics/277394/worldwide-events-with-the-most-tweets-per-second/ [https://perma.cc/C7HU-4PMD].

137. *See* Kara Arundel, *'Wave' of Litigation Expected as Schools Fight Social Media Companies*, K-12 DIVE (June 1, 2023), https://www k12dive.com/news/wave-of-social-media-litigation-expected/651224/ [https://perma.cc/9EY6-JT56]; Kevin T. Merriman et al., *Social Media Liability Exposures*, NAT'L ASS'N OF INS. COMM'RS 9 https://content naic.org/sites/default/files/jir-za-38-08-el-social-media-liability.pdf [https://perma.cc/UD42-WNZN] (last visited Nov. 19, 2023). *See also Removal Requests*, TWITTER, https://transparency.twitter.com/en/reports/removal-requests html#2021-jul-dec [https://perma.cc/RA7Z-TWZ3] ("Increase [of 10%] in global legal demands compared to the last reporting period.").

138. *Supra* Section III.

139. *The Future of Section 230 Reform*, BROOKINGS (Mar. 14, 2022), https://www.brookings.edu/events/the-future-of-section-230-reform.

140. Press Release, Richard Blumenthal, Senator, U.S. Senate, Blumenthal on Big Tech's Legal Immunities: "Reform is Coming" (Mar. 9, 2023), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-on-big-techs-legal-immunities-reform-is-coming [https://perma.cc/2K2E-NRD8] ("So here's a message to Big Tech: reform is coming. Can't predict it'll be in the next couple weeks, or the next couple months, but if you listen, you will hear a mounting consensus and a demand from the American public that we need to act in a bipartisan way.").

141. *See* S. 1993, 118th Cong. (2023), https://www hawley.senate.gov/sites/default/files/2023-06/Hawley-No-Section-230-Immunity-for-AI-Act.pdf [https://perma.cc/6QW5-WX7R].

This legislation represents Congress's first attempt to regulate artificial intelligence ("AI") by removing Section 230 immunity for claims related to generative AI.[142] The bill carves out an exception to Section 230 immunity, allowing legal actions against interactive computer service providers when generative AI is at the core of the claim.[143] This legislation demonstrates the need to modernize Section 230 to keep pace with technological advancements.[144]

2. State Legislators Advocating for Social Media Accountability

In 2021, the North Dakota House of Representatives introduced House Bill 1144 ("HB 1144"), which gained nationwide attention[145] for attempting to safeguard free speech from censorship by social media platforms or interactive computer services for racial, religious, or political reasons.[146] Targeting platforms with specific user criteria, this legislation sought to provide civil recourse, including the possibility of treble damages up to fifty thousand dollars, to individuals who experienced discrimination.[147] The bill received overwhelming support in the State House of Representatives,[148] but it faced constitutional concerns causing it to be ultimately rejected by the Senate.[149] State Senator Kreun underscored the significance of the issue:

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142. Press Release, Josh Hawley, Senator, U.S. Senate, Blumenthal Introduce Bipartisan Legislation to Protect Consumers and Deny AI Companies Section 230 Immunity (June 14, 2023), https://www hawley.senate.gov/hawley-blumenthal-introduce-bipartisan-legislation-protect-consumers-and-deny-ai-companies-section [https://perma.cc/3EAX-XK35].

143. S. 1993*, supra* note 141.

144. *See* News Release, Jason S. Miyares, Attorney General, Virginia, Attorney General Miyares Joins Bipartisan Multistate Coalition in U.S. Supreme Court to Hold Big Tech Accountable (Dec. 7, 2022), https://www.oag.state.va.us/media-center/news-releases/2506-december-7th-2022-attorney-general-miyares-joins-bipartisan-multistate-coalition-in-u-s-supreme-court-to-hold-big-tech-accountable [https://perma.cc/QG24-Z87M] ("Over the past twenty years, information technology has rapidly advanced, making the internet a dramatically different place than it was when Section 230 was originally enacted. In order for our technology laws to be effective and ensure consumers are protected, these laws must modernize as technology does to ensure that social media companies claiming Section 230 immunity are not exploiting users.").

145. Jerry Lambe, *North Dakota's Attempt to Legislate Around Section 230 Allows "Nazis to Sue You if You Report Their Content to Twitter,"* L. & CRIME (Feb. 18, 2021, 11:52 AM), https://lawandcrime.com/high-profile/north-dakotas-attempt-to-legislate-around-section-230-allows-nazis-to-sue-you-if-you-report-their-content-to-twitter/ [https://perma.cc/NVC8-LSF8]; Tom Ramanoff, *Implications for Changing Section 230*, BIPARTISAN POL'Y CTR. (Mar. 29, 2022), https://bipartisanpolicy.org/blog/implications-for-changing-section-230/ [https://perma.cc/2WQY-S5GG]; Caleb Parke, *Censored by Twitter or Facebook? This State's Bill Would Let You Sue*, FOX NEWS (Jan. 16, 2021, 10:32 AM), https://www.foxnews.com/politics/twitter-facebook-censorship-state-bill-sue [https://perma.cc/9YYG-MQG5].

146. H.B. 1144, 67th Legis. Assemb., Reg. Sess. (N.D. 2021).

147. *Id.*

148. H.B. 1144, 67th Legis. Assemb., Reg. Sess. (N.D. 2021).

149. *Final Passage House Measures: Hearing on H.B. 1144 Before the Senate*, 67th Legis. Assemb., Reg. Sess. (N.D. 2021) (statement of Curtis Kreun, Member, S.), https://video ndlegis.gov/ [https://perma.cc/W47R-ZBSE] ("Let's start with the First Amendment to the U.S. Constitution. . . . For over two centuries, that language has prohibited our government

> The notion that these big tech platforms can censor our citizens' political speech is a real problem that we all are facing. It's something that we need to address. It's a conversation that we need to have. But upon review, and a lot of contemplation and analysis of [HB 1144], it's actually a bad move for North Dakota.[150]

Although HB 1144 did not pass, it offers valuable insights into North Dakota's stance on online freedom of expression and foreshadows potential future legislative actions concerning technology companies' liability. The U.S. Supreme Court's decision in *Taamneh* carries implications for both in North Dakota and other states that are currently considering legislation to address the power and immunity of big technology companies.[151]

B. REFERENCE POINT FOR AIDING AND ABETTING CASES

Taamneh provides practitioners with insights to U.S. Supreme Court's current view of aiding and abetting generally and offers a nuanced look to the Court's perspective regarding criminal activities on online platforms. Notably, this case established a higher standard for aiding and abetting liability.[152] The holding emphasizes that merely hosting illegal activities on a platform does not necessarily indicate substantial assistance; rather, it is more akin to passive nonfeasance, suggesting a lack of active involvement in the criminal activities.[153] This distinction is crucial in the digital age where online platforms serve as conduits for various activities.

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from compelling people or newspapers to carry speech they don't want to carry. The First Amendment is designed to protect us from lawmakers passing laws that force us to either say or not say something. So, neither Congress nor our State may force a progressive newspaper to carry our op-ed, say favoring the end of COVID restrictions. Nor may the government force a person or business say something they really don't want to say. But this also means that the government can't force private online businesses like Facebook, Twitter, and YouTube to carry speech that violates their preferred content guidelines. It was just last week; Utah Governor Spencer Cox vetoed the State's anti-censorship bill, that was the first in the nation to pass this year, saying it raises significant constitutional concerns, and I think we should agree. . . . So rest assured that [H.B.] 1144 likely will be enjoined and overturned and then what?").

150. *Id.*

151. In 2021, Florida's Governor Ron DeSantis signed Senate Bill 7072 into law. *See* FLA. STAT. ANN. § 501.2041 (West 2022). This legislation, among other provisions, bars social media platforms from de-platforming political candidates or journalistic organizations. *Id.* Likewise, states such as California, Texas, Virginia, Utah, Colorado, and nearly two dozen others have joined the movement by introducing bills aimed at holding technology conglomerates accountable. David McCabe & Cecilia Kang, *As Congress Dithers, States Step in to Set Rules for the Internet*, The Denver Post (May 22, 2021), https://www.denverpost.com/2021/05/22/state-bills-internet-privacy/ [https://perma.cc/8GLC-S29X]. As this trend gains momentum across states, it raises concerns regarding uniformity given the internet's capacity to transcend geographical limitations. *Id.* Consequently, it may prompt the need for congressional reforms to Section 230 to effectively address these shared concerns.

152. *Supra* Sections III.C.1-2.

153. Twitter, Inc. v. Taamneh, 598 U.S. 471, 499 (2023).

Moreover, the language used in the *Taamneh* decision equips technology companies with effective arguments against future lawsuits, including for algorithms that agnostically match content to users who have shown previous interest.[154] Equally significant to the Court's decision is its analogizing social media platforms with other service providers such as email or cell phones.[155]

C. TAAMNEH'S RELEVANCE TO NORTH DAKOTAN PRACTITIONERS

Taamneh unravels the complex legal dynamics surrounding internet communications, serving as a valuable framework for practitioners with cases involving crimes or tortious conduct linked with social media activity. Consider a hypothetical scenario involving a local company facing a media crisis due to a former employee's damaging Facebook post. The company may contemplate legal action against the former employee for defamation and also against Facebook for hosting the content. In this context, practitioners will find themselves assessing Facebook's liability for harboring this content.

Taamneh is a vital reference point for understanding technology companies' liability concerning user-generated content. It highlights the potential legal implications of their typical hands-off approach to content moderation, removal, and sharing regarding civil liability. Practitioners armed with this insight will recognize the need for extraordinary aid by these companies to establish liability. This understanding influences the guidance practitioners should offer their clients, shaping their approach to legal action and crisis management in the digital age. Additionally, the intersection of this case with North Dakota's legislative attempt HB 1144 underscores the State's evolving position on technology company liability and its commitment to addressing these issues within the legal sphere.

V. CONCLUSION

In *Taamneh,* the U.S. Supreme Court clarified the liability of social media companies under the ATA for allegedly aiding and abetting international terrorism. The Court's ruling, guided by the landmark case of *Halberstam*, established that social media and similar platforms cannot be held liable for "aiding and abetting" a terrorist attack, except when their involvement includes the provision of extraordinary services.[156] Beyond its fact-specific holding, *Taamneh* raises questions about the scope and implications of Section 230, a cornerstone of digital age legal protection. Referenced as "the most consequential Supreme Court cases related to the

154. *Id.* at 498-99.
155. *Id.*
156. *Id.* at 478.

internet,"[157] *Taamneh* serves as both a judicial precedent and a timely reflection on the intricate relationship between innovation, accountability, and the protection of individual rights in the digital age.

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157. Reed, *supra* note 60.

∗ 2025 J.D. Candidate at the University of North Dakota School of Law. I extend my heartfelt appreciation to the NORTH DAKOTA LAW REVIEW for their dedicated efforts in preparing and publishing this case comment. A special thank you is also owed to my parents Kevin and Suzie Banash, my brother Dylan Banash, friends, and mentors for their unwavering support throughout my law school career.