

U.S. Supreme Court Rejects Anti-Terrorism Act Claims Against Social Media Platforms Used By ISIS

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On May 18, 2023, the Supreme Court issued a decision in *Twitter, Inc. v. Taamneh, et al.*,¹ unanimously rejecting claims against Twitter, Facebook and Google (as the owner of YouTube) for allegedly aiding and abetting ISIS in its commission of terrorist attacks. Plaintiffs, who were injured in an ISIS-sponsored terrorist attack on the Reina nightclub in Istanbul in 2017, alleged that Twitter, Facebook and Google were liable under the Anti-Terrorism Act (“ATA”), 18 U.S.C. § 2333(a), as amended by the Justice Against Sponsors of Terrorism Act (“JASTA”), 18 U.S.C. § 2333(d)(2), because they allegedly knowingly allowed ISIS to use their social media platforms and “recommendation” algorithm tools, profited from advertising revenue on ISIS content, and failed to take sufficient steps to remove ISIS-affiliated accounts. The Supreme Court held that these allegations were insufficient to establish aiding and abetting liability under JASTA, in a decision that substantially clarifies the circumstances under which companies in the U.S. who offer widely-available and generalized services may be liable for complicity in terrorist attacks.

¹ No. 21-1496 (U.S. May 18, 2023).
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Statutory Background

The ATA provides U.S. citizens “injured . . . by reason of an act of international terrorism”² with a civil damages claim for treble damages, as well as costs and attorney’s fees. In its initial form, the ATA solely provided for primary liability, until in 2016 it was amended by JASTA.³ JASTA imposes secondary civil liability in certain circumstances on anyone who “who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.”⁴

As relevant here, for aiding and abetting liability under JASTA, a plaintiff must show that:

- The plaintiff was injured in an “act of international terrorism,” *i.e.*, an act that (i) involved violence or was dangerous to human life, and (ii) appeared to be intended to intimidate a civilian population or influence a government;⁵
- The terrorist attack was “committed, planned or authorized” by a foreign terrorist organization (“FTO”) so designated at the time of the attack;⁶ and
- The defendant aided and abetted the FTO. A defendant aids and abets when it is generally aware that it was assuming a role in furthering the FTO’s terrorist attack and that it knowingly and substantially assisted the attacks.

When it enacted JASTA, Congress specified that courts should apply “the legal framework” from *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), when construing the statute’s conspiracy and aiding and abetting provisions.⁷ *Halberstam* is a decades-old

opinion involving a very different context: there, the longtime live-in companion and bookkeeper for a nighttime burglar was found liable for aiding and abetting a murder committed in the course of one such burglary. The court reached that conclusion after finding the defendant to be a “willing partner in [the defendant’s] criminal activities,”⁸ describing a three part test: (1) the primary violator must perform a wrongful act causing injury, (2) the defendant must be “generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance,” and (3) the defendant must “knowingly and substantially assist the principal violation.”⁹

As the Supreme Court recognized, *Taamneh* presented a very different pattern of facts from those at issue in *Halberstam*, and provided the Court with its first opportunity to interpret JASTA’s legal framework.

Factual and Procedural History

The claims in *Twitter v. Taamneh* arose from the January 7, 2017 attack on the Reina nightclub in Istanbul, which was perpetrated by an ISIS-affiliated terrorist. Plaintiffs, relatives of a victim of the Reina nightclub attack, filed suit in the Northern District of California against three social media companies: Twitter, Facebook, and Google (as the owner of YouTube). They asserted both primary liability (ATA) claims and secondary liability (JASTA) claims against the defendants, alleging that “ISIS uses Defendants’ social media platforms to promote and carry out its terrorist activities,” including by recruiting new terrorist operatives, raising funds, spreading propaganda, and planning terrorist attacks.¹⁰

Plaintiffs made no specific allegations tying defendants’ social media platforms to the planning or

² 18 U.S.C. § 2333(a).

³ See *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 278 (D.C. Cir. 2018); *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013).

⁴ 18 U.S.C. § 2333(d)(2). JASTA was originally enacted for the benefit of 9/11 victims seeking to bring claims against Saudi Arabia, but has been invoked much more widely in the years since its enactment.

⁵ See 18 U.S.C. §§ 2333(a), 2331(1); *Linde v. Arab Bank, PLC*, 882 F.3d 314, 325-26 (2d Cir. 2018).

⁶ 18 U.S.C. § 2333(d)(2).

⁷ JASTA, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016).

⁸ *Halberstam*, 705 F.2d at 486.

⁹ *Id.* at 477.

¹⁰ *Taamneh, et. al v. Twitter, Inc.*, 343 F. Supp. 3d 904, 906-07 (N.D. Cal. 2018) (internal quotation omitted).

preparation for the Reina nightclub attack.¹¹ Rather, plaintiffs' claims rested on the allegation that defendants' social media platforms provided the infrastructure that allowed ISIS operatives to recruit, raise funds, and communicate with each other, thus providing material support to, or aiding and abetting, ISIS in its terrorist activities generally.¹²

The district court granted defendants' motion to dismiss plaintiffs' complaint for failure to state a claim for either ATA primary liability or JASTA secondary liability. Rejecting plaintiffs' JASTA claims, the district court noted: "The Court . . . has concerns about Plaintiffs' JASTA claims because Plaintiffs seem to take the position that, in the instant case, ISIS's 'act of international terrorism' encompasses all of ISIS's terrorist operations, and not the Reina attack specifically. . . . [But] Congress chose to refer to aiding/abetting or conspiring with a person who committed 'an act of international terrorism,' not aiding and abetting or conspiring with a foreign terrorist organization."¹³ The district court ultimately ruled that plaintiffs' generalized allegations failed to establish secondary liability.¹⁴

Plaintiffs appealed the dismissal only of their JASTA claim. In a consolidated opinion addressing three similarly-situated ATA/JASTA cases attempting to impose liability for ISIS-sponsored attacks on Twitter, Facebook, and/or Google, the Ninth Circuit reversed the district court's holding.¹⁵ It held that plaintiffs had adequately alleged that defendants "were generally aware that ISIS used defendants' platforms to recruit, raise funds, and spread propaganda in support of their terrorist activities," but "refus[ed] to actively identify ISIS's Twitter, Facebook, and YouTube accounts."¹⁶ This failure to act "substantially

assisted" ISIS because "defendants provided services that were central to ISIS's growth and expansion . . . over many years."¹⁷ While claiming to "recognize the need for caution in imputing aiding-and-abetting liability in the context of an arms-length transactional relationship of the sort defendants have with users of their platforms," the Ninth Circuit nonetheless held that plaintiffs had adequately stated a claim for aiding and abetting liability under JASTA.¹⁸

Defendants appealed the Ninth Circuit's ruling, and the Supreme Court granted certiorari.

Supreme Court Decision

On May 18, 2023, the Supreme Court unanimously reversed the Ninth Circuit's decision.¹⁹ The Supreme Court reviewed the *Halberstam v. Welch* framework and explained that "aiding and abetting is inherently a rule of secondary liability for specific wrongful acts."²⁰ Rejecting plaintiffs' contention that it is sufficient "that a defendant have given substantial assistance to a transcendent 'enterprise' separate from and floating above all the actionable wrongs that constitute it," the court emphasized that "a defendant must have aided and abetted (by knowingly providing substantial assistance) another person *in the commission of the actionable wrong*—here, an act of international terrorism."²¹ An aiding and abetting defendant must thus "consciously and culpably participate[]" in the commission of the act of international terrorism that injured the plaintiff in such a way as to help make it succeed,²² typically by "encouraging, soliciting, or advising the commission of the [] attack."²³ While there need not always be a strict nexus between the alleged assistance and the terrorist act, simply helping the FTO behind the act is

¹¹ *Id.* at 907–08.

¹² *See id.* at 908.

¹³ *Id.* at 915–16 (citing *Linde*, 882 F.3d at 329).

¹⁴ *See id.* at 916–17.

¹⁵ *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021). The Ninth Circuit's consolidated ruling also resolved a different group of plaintiffs' claims against Google. That portion of the Ninth Circuit's ruling was separately appealed to the Supreme Court. *See Gonzalez, et al. v. Google LLC*, No. 21-1333 (U.S. May 18, 2023) (per curiam).

¹⁶ *Gonzalez*, 2 F.4th at 908.

¹⁷ *Id.* at 910.

¹⁸ *Id.*

¹⁹ *Twitter v. Taamneh*, No. 21-1496 (U.S. May 18, 2023), slip op. at 30–31.

²⁰ *Id.* at 18.

²¹ *Id.* at 18–19 (emphasis added).

²² *Id.* at 17 (internal quotation omitted).

²³ *Id.* at 24.

not enough, unless the assistance is so intentional, systemic and pervasive (like that of the girlfriend in *Halberstam* to her burglar companion)²⁴ that the defendant could be said to have actually aided and abetted every single attack by that FTO.²⁵

The Supreme Court further explained that the imposition of aiding and abetting liability under the common law has often depended on a sliding scale balancing between the defendant’s knowledge of its participation and the substantiality of the assistance given. “In other words, less substantial assistance required more scienter before a court could infer conscious and culpable assistance. And, vice versa, if the assistance were direct and extraordinary, then a court might more readily infer conscious participation in the underlying tort.”²⁶ While it was “possib[le] that some set of allegations involving aid to a known terrorist group would justify holding a secondary defendant liable for all of the group’s actions,” the *Taamneh* plaintiffs’ allegations were “a far cry from the type of pervasive, systemic, and culpable assistance to a series of terrorist activities that could be described as aiding and abetting each terrorist act.”²⁷

The Supreme Court criticized the Ninth Circuit’s mechanical application of the elements of aiding and abetting, noting that it “erred in focusing (as it did) primarily on the value of defendants’ platforms to *ISIS*, rather than whether defendants culpably associated themselves with *ISIS*’ actions.”²⁸ “Taken as a whole, the Ninth Circuit’s analytic approach thus elided the fundamental question of aiding-and-abetting liability: Did defendants consciously, voluntarily, and culpably participate in or support the relevant wrongdoing?”²⁹

Lastly, on the same day that the Supreme Court issued its decision in *Taamneh*, the court also resolved the parallel appeal in *Gonzalez, et al. v. Google, LLC*.³⁰ *Gonzalez* was appealed on the separate issue of whether Section 230 of the Communications Decency

Act barred plaintiffs’ claims against Google. Rather than address the Section 230 issue, the Supreme Court vacated the Ninth Circuit’s holding and remanded the case, noting, “In light of . . . our disposition of *Twitter*, on which we also granted certiorari and in which we today reverse the Ninth Circuit’s judgment, it has become clear that plaintiffs’ complaint—independent of §230—states little if any claim for relief.”³¹ Accordingly, the extent of the protections available under Section 230 remains to be resolved by the Supreme Court in another case.

Takeaways

The Supreme Court’s ruling in *Taamneh* clarifies the law for service providers, including financial institutions, technology companies, and others that provide platforms or services that may be used by or indirectly involve organizations that are also engaged in or support international terrorism.

It establishes the requirement that there be either an intent to commit terrorism or a direct nexus between the defendant’s acts and the wrongs committed by terrorists: the more attenuated the causal chain, the more substantial and intentional the defendant’s assistance must be in order to justify the imposition of secondary liability.

Historically, ATA and JASTA secondary liability cases were primarily brought against large banks for providing financial services to entities with alleged terrorist links. Typically in such cases, victims of a terrorist attack and/or their family members allege that the bank supported the attack by processing U.S. dollar denominated transactions to an entity with links to terrorism (often through a chain of intermediaries). In recent years, the range of entities against which ATA and JASTA claims have been brought has increasingly expanded to include other sectors, such as claims

²⁴ *Id.* at 19.

²⁵ *Id.* at 30.

²⁶ *Id.* at 15 (internal citation omitted).

²⁷ *Id.* at 26.

²⁸ *Id.* at 28 (emphasis in original).

²⁹ *Id.* at 29.

³⁰ No. 21-1333 (U.S. May 18, 2023) (per curiam).

³¹ *Id.*, slip op. at 2. The district court in *Taamneh* did not reach the section 230 issue, so the Ninth Circuit did not address the issue as to the *Taamneh* plaintiffs’ claims. *Gonzalez*, 2 F.4th at 907–08.

against pharmaceutical companies,³² government contractors,³³ and (as is the case here) social media platforms.

The Supreme Court’s decision in *Taamneh* limits the scope of liability for aiding and abetting under JASTA and accordingly cabins the risk that service providers may be held to be liable for terrorism-related activities. Given the nature of the issues involved, however, we expect that victims of terrorism and others may continue to look for creative legal avenues to establish liability for those whose services are improperly used by terrorists.

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³² See, e.g., *Atchley v. AstraZeneca UK Limited*, 22 F.4th 204 (D.C. Cir. 2022) (upholding JASTA secondary liability claims against several pharmaceutical and medical equipment companies in relation to their sale of products to Iraq’s Ministry of Health).

³³ See, e.g., *Cabrera v. Black & Veatch Special Projects Corp.*, No. 19–03833 (D.D.C. Dec. 27, 2019), ECF No. 1 (ATA suit against government contractors and a telecommunications company operating in Afghanistan in relation to alleged “protection payments” to the Taliban).