No. 21-1496

IN THE
Supreme Court of the United States

TWITTER, INC.,
Petitioner,
v.
MEHIER TAAMNEH; LAWRENCE TAAMNEH; SARA TAAMNEH; DIMANA TAAMNEH,
Respondents.

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

BRIEF OF CENTER FOR DEMOCRACY & TECHNOLOGY, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, ELECTRONIC FRONTIER FOUNDATION, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, R STREET INSTITUTE, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are organizations that support and advocate for Internet users' free expression and other human rights. *Amici* have a strong interest in ensuring that individuals are able to access and participate in all forms of constitutionally protected speech online, as the First Amendment guarantees.

The **Center for Democracy & Technology** ("CDT") is a non-profit public interest organization. For more than 25 years, CDT has represented the public's interest in an open, decentralized Internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates before legislatures, regulatory agencies, and courts in support of First Amendment rights on the Internet and other protections for online speech, including limits on intermediary liability for user-generated content.

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Federal Constitution and our nation's civil rights laws. The **ACLU of Northern California** is the Northern California affiliate of the ACLU. Since its founding in 1920, the ACLU has frequently appeared before this Court, the lower federal courts, and state courts in cases defending Americans' free speech and

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation and submission. All parties have provided blanket consent to this filing.

freedom of association, including their exercise of those rights online.

The **Electronic Frontier Foundation** ("EFF") is a member-supported, nonprofit civil liberties organization that has worked for more than thirty years to protect innovation, free expression, and civil liberties in the digital world. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues, including users' rights to transmit and receive information online.

The **Knight First Amendment Institute at Columbia University** is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Knight Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. Protecting the integrity and vitality of online platforms as forums for public discourse is of special concern to the Knight Institute.

The **R Street Institute** is a nonprofit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The **Reporters Committee for Freedom of the Press** ("RCFP") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced

an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, RCFP provides pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that the First Amendment forbids not just direct regulation of protected speech, but also state action likely to result in self-censorship and the curtailment of lawful speech. The Ninth Circuit held that under the Anti-Terrorism Act ("ATA"), an online platform with only generalized awareness that a terrorist organization—among literally hundreds of millions of other speakers—may have used its service has "knowingly provided substantial assistance" to an act of terrorism. That interpretation threatens to substantially narrow the speech that platforms host, raising serious First Amendment concerns. But those concerns are easily avoided by rejecting the Ninth Circuit's erroneous reading of the statute, and by requiring that a defendant possess actual knowledge that a specific piece of user-generated content on its platform provides substantial assistance to a terrorist act before imposing aiding-and-abetting liability on the basis of its function as a speech intermediary.

The multi-factor *Halberstam v. Welch* test that Congress specified for determining aiding-and-abetting liability under the ATA can and should be interpreted to account for the First Amendment implications of imposing liability on speech "intermediaries"—third parties who publish or distribute the speech of others—like Petitioner

Twitter, Inc. and Respondents Facebook, Inc. and Google LLC.[2] These platforms and other intermediaries provide essential fora for speech and have become a primary source of news, information, and discussions across the nation and around the world. Indeed, "[t]he numbers suggest that companies like Google and Twitter have at least as great an impact on free expression as do traditional newspapers." Marvin Ammori, *The "New" York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 Harv. L. Rev. 2259, 2266 (2014). The *Halberstam* inquiry requires that "(1) the party 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." *Halberstam v. Welch*, 705 F.2d 472, 487–88 (D.C. Cir. 1983).[3] The Ninth Circuit interpreted the third of these prongs to allow liability for a platform based only on "general awareness" that a handful of users might be using the platform in ways that support offline terrorist conduct. If that is a sufficient basis for liability, intermediaries will no longer be able to

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[2] This brief uses the term "intermediary" to refer to both distributors and publishers of speech, as those two roles are functionally the same in the context of online speech.

[3] In the Justice Against Sponsors of Terrorism Act, which amended the ATA in 2016, Congress instructed that *Halberstam* provides the "'proper legal framework for how [aiding-and-abetting] liability should function'" under the ATA. App. 175a; *see* 18 U.S.C. § 2333 Statutory Note (Findings and Purpose § 5) (quoting Pub. L. No. 114–222, § 2, 130 Stat. 852 (2016)).

function as fora for others' speech, and free expression will be the loser.

This Court has long taken seriously the impact of imposing overly broad indirect liability on speech intermediaries. In a line of cases dating back to *Smith v. California*, 361 U.S. 147 (1959), the Court has made clear that laws that incentivize intermediaries' self-censorship through an insufficiently stringent scienter requirement undermine the public's ability to engage in constitutionally protected speech and accordingly violate the First Amendment. *Smith* and its progeny concerned state laws that—by threatening liability for facilitating others' speech—prompted intermediaries such as bookstores and newspapers to curtail their distribution of protected speech. As this Court emphasized, intermediaries' rational caution in the face of potential liability deprives the public of robust access to all kinds of speech—exactly what the First Amendment is designed to protect. Applying similar principles here, the Court should require an intermediary's actual knowledge that a specific piece of user-generated content on its platform provides substantial assistance to a terrorist act before imposing aiding-and-abetting liability.

If, instead, the Ninth Circuit's startlingly broad construction of the ATA stands, online intermediaries will be forced to suppress protected speech, just like the publishers and content distributors at issue in *Smith* and its progeny. By allowing for indirect liability based on mere "generalized knowledge" that alleged terrorists or their affiliates use such intermediaries' services, this construction would effectively require platforms to sharply limit the content they allow users to post, lest courts find they failed to take sufficiently "meaningful steps" against

speech later deemed beneficial to an organization labeled "terrorist."

Indeed, given the vast amounts of speech that online intermediaries handle every day, were the Ninth Circuit's approach the law, intermediaries would be likely to use necessarily blunt content moderation tools to over-restrict speech or to impose blanket bans on certain topics, speakers, or specific types of content. Even today, online intermediaries frequently take down content mistakenly identified as offensive or forbidden—for instance, by confusing a post about a landmark mosque with one about a terrorist group.

Faced with potential ATA liability, all manner of speech intermediaries—not only online platforms—will grow more risk-averse and more susceptible to overly cautious moderation, thus suppressing large amounts of protected speech. And such a reading would open the door to future federal or state legislation imposing liability on online intermediaries for inadvertently hosting other kinds of content, thereby chilling platforms and inhibiting the public's access to speech on other topics. This problem is exactly what the Court cautioned against in *Smith* and its progeny.

This Court should accord proper respect to the key First Amendment principles at stake and reverse the Ninth Circuit's erroneous interpretation of the ATA.

ARGUMENT

I. Interpretation of the Anti-Terrorism Act Must Account for the Statute's Effects on Speech

The First Amendment guards against the possibility that the government will directly or indirectly cause an intermediary of speech—whether a bookstore or a social media platform—to suppress otherwise protected speech of its users, including speech about controversial topics like terrorism, for fear of liability. This Court has long recognized that stringent scienter requirements help avoid this outcome and best serve First Amendment interests. Consistent with this constitutional principle, the scienter element of the multifactor *Halberstam* test—the test that Congress directed should govern the present inquiry—can and should be interpreted to avoid the chilling effects that imposing overly expansive indirect liability would have on the First Amendment rights of intermediaries and their users. In interpreting the ATA, this Court should avoid the grave First Amendment harms that would result if intermediaries were forced to engage in the sweeping self-censorship and suppression of users' lawful speech that the Ninth Circuit's extraordinarily expansive reading of "knowing" assistance will require.

A. The First Amendment Requires Robust Protection for Intermediaries of Speech

Throughout its First Amendment jurisprudence, this Court has consistently sought to avoid chilling protected speech, including by imposing stringent scienter requirements on statutes creating liability for speech. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam) (requiring intent to incite

or produce imminent lawless action for challenges to inflammatory statements); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–82 (1964) (requiring "actual malice" for defamation claims by public officials). That is particularly true where, as here, laws potentially impose liability on intermediaries of speech. Imposing liability on a speech intermediary with an insufficiently stringent scienter requirement, the Court has repeatedly warned, has a chilling effect that limits both the intermediaries' and the public's speech rights.

In *Smith v. California*, 361 U.S. 147 (1959), for example, this Court invalidated a Los Angeles ordinance imposing strict criminal liability on a bookstore that sold obscene books. The Court explained that imposing strict liability would lead booksellers to sell the limited number of books they could actually inspect:

> By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.

Id. at 153. In that scenario, "[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop," and "[i]t

would be altogether unreasonable to demand so near an approach to omniscience." *Id.* (quotation marks omitted). As a result, fewer books would be available to the public: "If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed." *Id.* This "self-censorship," compelled by the ordinance's strict liability standard, would "affect[] the whole public . . . . Through it, the distribution of all books, both obscene and not obscene, would be impeded." *Id.* at 154. Notably, the Court deemed the statute invalid because it lacked a sufficient scienter requirement. *See id.*

The Court reaffirmed these principles in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), where a plurality held that magazine publishers could not be liable under the Comstock Act for distributing advertisements by independent photographers offering nudist photographs for sale without proof that the publisher "*knew* that at least some of his advertisers were offering to sell obscene material." *Id.* at 492 (plurality op.) (emphasis added). The Court explained:

> Since publishers cannot practicably be expected to investigate each of their advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such

> materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public.

Id. at 493. Liability without proof of *specific knowledge* of the character of the advertisements included in the magazine "would as effectively 'impose a severe limitation on the public's access to constitutionally protected matter,' . . . as would a state obscenity statute which makes criminal the possession of obscene material without proof of scienter." *Id.* at 492–93 (quoting *Smith*, 361 U.S. at 153).

Similarly, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that a Rhode Island commission violated the First Amendment by threatening book distributors with liability for selling, distributing, or displaying books to youth under the age of 18 that the commission had deemed "objectionable." *Id.* at 61, 63–64. While the First Amendment challenge in *Bantam Books* was brought by book publishers, this Court explained that the commission violated the Constitution by threatening book *distributors*. *See id.* at 61. The Court held that the Constitution requires "that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Id.* at 66. And although the state commission in *Bantam Books* had not seized or banned any books, the commission's "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" resulted in the suppression of

constitutionally protected speech by making book distributors unwilling to distribute the books. *Id.* at 67.[4] As a result, both minors and adults were "deprived of the opportunity to publish publications in the State" that were not actually obscene. As the Court explained:

> [A]lthough the Commission's supposed concern is limited to youthful readers, the 'cooperation' it seeks from distributors invariably entails the complete suppression of the listed publications; adult readers are equally deprived of the opportunity to purchase the publications in the State.

Id. at 69 n.9.

In the years following these decisions, the Court continued to recognize the importance of a heightened scienter requirement before speech intermediaries may be subjected to liability. *See, e.g.*, *Hamling v. United States*, 418 U.S. 87, 123 (1974) (holding that obscenity prosecution against brochure distributors was not unlawful because statute applied only to "knowing" conduct); *Ginsberg v. New York*, 390 U.S. 629, 644 (1968) (upholding New York obscenity statute and explaining that its scienter requirement "rests on the necessity to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the

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[4] The notices in *Bantam Books* caused book distributors "(a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers." *Bantam Books*, 372 U.S. at 64.

definition of obscenity" (internal quotation omitted)); *see also* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 83 (2006) (collecting cases and concluding that "[i]n the last half century, *Smith* has regularly served as the basis for decisions rejecting the imposition of liability without fault on intermediaries who facilitate the transmission of erotic materials from speaker to listener").[5]

Since the advent of the Internet, relatively few cases have addressed these First Amendment principles in the context of online speech, largely

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[5] The Court has likewise emphasized avoiding First Amendment concerns when applying statutes of general applicability that, like the ATA, might implicate speech. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) (invalidating "breach of the peace" ordinance applied to forbid wearing a "Fuck the Draft" jacket in a municipal courthouse, as an asserted interest in avoiding public disturbances would "also run[] a substantial risk of suppressing ideas in the process"); *City of Houston v. Hill*, 482 U.S. 451, 453, 466 (1987) (holding that an ordinance "that makes it unlawful to interrupt a police officer in the performance of his or her duties" was unconstitutional, as it "criminalizes a substantial amount of constitutionally protected speech"); *McCullen v. Coakley*, 573 U.S. 464, 469, 476, 496–97 (2014) (invalidating on First Amendment grounds a Massachusetts statute that made it a crime to knowingly stand on a "public way or sidewalk" near certain abortion clinics, "even though the Act says nothing about speech on its face," because it impermissibly limited petitioners' ability "to converse with their fellow citizens about an important subject on the public streets and sidewalks"); *see also Scales v. United States*, 367 U.S. 203, 222 (1961) (construing statute to limit liability for membership in Communist Party to only "'active' members" in part "because of the close constitutional questions" that would arise from imposing liability on "mere passive members").

because Section 230 of the Communications Decency Act, 47 U.S.C. § 230, has provided significant protection from suits challenging platforms' publication and dissemination of user-generated content. But courts that have considered these principles in the online context readily recognized that the First Amendment precedents governing speech intermediaries offer crucial guidance in determining whether electronic services are liable for material their users provided. In *Cubby v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991), for example, a plaintiff sued the distributor of an electronic newsletter called Rumorville for libel after the newsletter published articles criticizing the plaintiff. *See id.* at 137–38. The court first noted that "[t]he requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment," citing *Smith* and its progeny. *Id.* at 139–40. And while recognizing that the online context was new, the court held that "it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so." *Id.* at 140. The court thus applied the *Smith* rationale to CompuServe, explaining that "[a] computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor . . . than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information." *Id.*

Similarly, in *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012), a district

court held that a Washington statute prohibiting the "knowing" dissemination of advertisements for commercial sex with a minor likely violated the First Amendment under *Smith*. The court explained that the statute, like the ordinance in *Smith*, "would compel those publishers and distributors who did not abstain from publishing large categories of speech altogether to review every book, magazine, video, or online post containing a 'depiction' and a possible 'implicit' ad for sex to ensure that none ran afoul of the law"—*i.e.*, to over-moderate and chill speech. *McKenna*, 881 F. Supp. 2d at 1278 (quoting *Smith*, 361 U.S. at 153–54). Such a "pre-screening mechanism" would "limit the amount of content available on some publishers' websites to the amount of content that such publishers had the time and money to screen." *Id.* For example, "[s]ome individuals would be reticent to provide government identification in connection with borderline content, such as racy personal ads, thus further diminishing the universe of protected speech available online." *Id.* As *McKenna* explained, the "Constitution does not permit such collateral burdens on protected speech." *Id.*; *cf. Universal Comm'cn Sys., Inc. v. Lycos*, 478 F.3d 413, 423 (1st Cir. 2007) (holding that "because of the serious First Amendment issues that would be raised by allowing" a state-law trademark claim against a message board relating to comments posted by users, "the claim would not survive, even in the absence of Section 230").

In passing Section 230 in 1996, Congress sought to provide a statutory shield for online intermediaries involved in publication and dissemination of user speech. But the core principles this Court articulated decades earlier regarding the activities of traditional

publishers and distributors of speech—bookstores or newspapers—apply with equal force to online intermediaries today. As discussed below, holding the platforms sued here liable under the ATA their users' speech—without a robust scienter requirement—would necessarily restrict the speech of its hundreds of millions of users in violation of the First Amendment principles enshrined in this Court's jurisprudence.

B. Where Aiding-and-Abetting Liability Under the Anti-Terrorism Act Is Premised on Speech, the Act Should Be Interpreted to Avoid Chilling the Protected Speech of Online Platforms and Their Users

Consistent with longstanding First Amendment principles, the best reading of the ATA is to apply the *Halberstam* framework to require more than "generalized awareness" in cases like this one, where liability is predicated on a defendant's function as a speech intermediary. In such cases, the best reading of the ATA requires a showing that the intermediary had actual knowledge that a specific piece of user-generated content substantially assists an act of terrorism. Congress directed courts to apply the ATA using the *Halberstam* framework, which makes clear that the scienter required in a particular case turns critically on the "assistance" a defendant allegedly provides. *See Halberstam*, 705 F.2d at 487–88.

Determining whether a defendant "knowingly and substantially" assists in wrongful activity—*Halberstam*'s third factor—requires consideration of "the amount and kind of assistance." *Halberstam*, 705 F.2d at 483 (cleaned up). Critical to this consideration is the fact that Twitter, Facebook, and Google are

speech intermediaries. Here, their alleged "assistance" consists of operating mostly open fora for large numbers of private speakers—including disseminating and suggesting content to users based on algorithms that seek to match users' interests. But just as a physical bookstore or newsstand does not provide "substantial assistance" to an act of terrorism, neither does operating a broadly accessible technology platform without actual knowledge that third-party speech is providing substantial assistance to an act of terrorism. Thus, where, as here, indirect ATA liability is predicated on speech carried by an intermediary, the Court should—consistent with the ATA's plain text—read the *Halberstam* factor requiring "knowing and substantial assistance" to mandate actual knowledge that a particular post provides substantial assistance to an act of terrorism. Otherwise, all sorts of protected speech by all sorts of speakers *could* conceivably subject an online intermediary to liability, and intermediaries will have to restrict a great deal of speech in order to mitigate the risk of litigation and massive damages awards. This chilling effect, in turn, will deprive the public of access to large swaths of speech. These outcomes are precisely what the First Amendment forbids under this Court's precedents. *See supra* Section I.A.

For example, under the Ninth Circuit's interpretation, a user's post criticizing Israel's actions in the West Bank could subject an online intermediary to liability, provided that the intermediary is generally aware that the user is affiliated with a group that has engaged in terrorist activities. By the same token, a platform could be liable for failing to take down user-generated content criticizing detention policies at Guantanamo Bay, again on the ground that

those users (or the groups they belong to) are generally known to engage in terrorist activities. The same could be said of declining to moderate posts shared by certain European militant organizations that support specific candidates for office in the United States. These types of speech fall squarely within the First Amendment's protections, yet an online intermediary could face potentially crippling liability by failing to delete them.

To avoid these chilling effects on the First Amendment rights of intermediaries and their users in accordance with this Court's precedents, the Court should read the ATA to require more than a showing that an online platform had "general knowledge" that some users associated with a terrorist organization were among the hundreds of millions using its platform. Instead, when ATA liability is predicated on serving as an intermediary for another's speech, the Court should require actual knowledge that a specific piece of user-generated content provided substantial assistance to an act of terrorism.[6]

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[6] In other contexts, such as news reporting, courts have recognized that an even more demanding scienter requirement may be appropriate. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266 (4th Cir. 1997) ("News reporting, we can assume, no matter how explicit it is in its description or depiction of criminal activity, could never serve as a basis for aiding and abetting liability consistent with the First Amendment.").

II. The Ninth Circuit's Overly Broad Interpretation of ATA Liability as Applied to Speech Will Result in the Suppression of Lawful Speech

If the Court accepts the Ninth Circuit's interpretation of the ATA, intermediaries—and especially online intermediaries—will be compelled to take extreme and speech-chilling steps to insulate themselves from potential liability. Given the Internet's enormity and the pervasiveness of content associated with entities that might be labeled as terrorists or associated with others who are, virtually all online intermediaries could be said to possess the "generalized knowledge" of such content that the Ninth Circuit deemed sufficient to establish scienter under the ATA. Under this interpretation, even traditional publishers arguably have generalized knowledge that coverage of the newsworthy activities of terrorists, like coverage of any other newsworthy activity, publicizes that activity. *See, e.g.*, *Interview with Osama Bin Laden*, PBS Frontline (May 1998), https://perma.cc/9V9Y-UY9T; *Provisional I.R.A. Continues Truce*, N.Y. Times, Jan. 3, 1975, https://tinyurl.com/vkat5zsb (reporting on activities of Provisional Irish Republican Army and quoting extensively from a Provisional I.R.A. statement). Indeed, and perversely, many Internet platforms may obtain this knowledge by participating in initiatives like the Global Internet Forum to Counter Terrorism, an organization "committed to cross-industry efforts to counter the spread of terrorist and violent extremist content online." *About*, Global Internet Forum to Counter Terrorism, https://gifct.org/about/ (last visited Dec. 3, 2022).

With "generalized knowledge" so easy to allege, online intermediaries would be forced to conduct overly aggressive content moderation to defend against claims that they have "knowingly and substantially assisted" a terrorist act by "refus[ing] to take meaningful steps to prevent" their platforms' use by alleged terrorists. *Gonzalez v. Google LLC*, 2 F.4th 871, 908–09 (9th Cir. 2021). And because of the scale of speech that many online platforms carry, content moderation can be done only with necessarily blunt instruments. The result would be widespread suppression of constitutionally protected speech on some of the most important fora for public debate, dialogue, and information today.

A. The Ninth Circuit's Construction Incentivizes Intermediaries to Over-Moderate Content, Causing Dramatic Suppression of Protected Speech

As in *Smith*, an online intermediary may "tend to restrict the [content] he [hosts] to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected" content. *Smith*, 361 U.S. at 153. But the Internet's vast scale compounds the risk that the Ninth Circuit's overly expansive interpretation of ATA liability will suppress lawful speech far beyond anything this Court envisioned when it decided *Smith*. Internet users create enormous amounts of content, much of it posted through online intermediaries like Twitter, Facebook, or Google. To give just one

snapshot: there are reportedly 500 million posts on Twitter every day.[7]

Platforms threatened with liability based on mere "generalized awareness" may well be forced to restrict user-generated content to only the tiny fraction that humans can review, excluding large swaths of constitutionally protected content from their services. Or intermediaries may prohibit certain speakers altogether—on the ground that some might argue their content provides assistance to terrorism—and privilege others. For instance, an intermediary might afford more latitude to favored or "trusted" speakers like government officials or certain news organizations. This too would chill the public's access to individual voices and diverse perspectives.

Or, as a third and perhaps the most likely alternative, intermediaries may configure their content moderation algorithms to restrict users' speech that potentially falls within necessarily overbroad definitions of objectionable content. Given their scale, online intermediaries already rely extensively on automated tools to promote compliance with their content-moderation policies. *See* Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int'l L.J. 41, 42, 48 (2020). But the Ninth Circuit's interpretation of the ATA will encourage intermediaries to rely on automated content moderation tools in a manner that will over-restrict speech.

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[7] Jack Shepherd, *22 Essential Twitter Statistics You Need to Know in 2022*, Social Shepherd (Nov. 5, 2022), https://tinyurl.com/5bjy4jw7.

These automated content moderation technologies have inherent limits, which will necessarily lead platforms to restrict more speech than necessary in order to avoid the expansive liability the Ninth Circuit rule would impose. To take one example, platforms calibrate machine-learning tools to filter content based on "confidence intervals," a measurement of the software's confidence that it has correctly identified forbidden content. *See Automation in Moderation*, *supra*, at 42, 48; Spandana Singh, *Everything in Moderation: An Analysis of How Internet Platforms Are Using Artificial Intelligence to Moderate User Generated Content*, New America 5, 7 (July 15, 2019), *available at* https://tinyurl.com/23zhxmaa; *see also, e.g.*, Nafia Chowdhury, *Automated Content Moderation: A Primer*, Stanford Freeman Spogli Institute, 5 (March 19, 2022), https://tinyurl.com/3txpeufd (discussing platforms' use of confidence intervals). Moderation tools set to a high confidence interval will block content or flag it for human review only when there is a high likelihood that it has correctly identified that content, while setting such tools to a lower confidence interval means that they will block or flag content even when comparatively less sure that the content is prohibited. A platform confronted with the Ninth Circuit's reading of the ATA might well set its moderation system to reject users' posts with only a low confidence level that the material is associated with or might be construed to assist alleged terrorist organizations. And that will have the effect of suppressing a vast amount of protected speech.

These concerns are not hypothetical. Machine-learning technology's limitations, along with its difficulty in discerning linguistic, cultural, or

historical context, already leads it to misidentify benign content as harmful. *See* Carey Shenkman et al., *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Center for Democracy & Technology 27–29 (May 2021), https://tinyurl.com/yzw2hmah. One such "enforcement error," for example, led Instagram to remove a series of user-generated posts about the Al-Aqsa Mosque—one of Islam's holiest sites—because the term "al-Aqsa" also appears in the name of a designated terrorist organization. Jon Porter, *Instagram blames "enforcement error' for removal of posts about Al-Aqsa Mosque*, The Verge (May 13, 2021), https://tinyurl.com/yn8kujej. Similarly, YouTube removed videos posted by independent journalists showing the January 6, 2021 attack on the U.S. Capitol after its content moderation system determined the videos violated YouTube's policies against scams, deception, and spam. Mikael Thalen, *YouTube is cracking down on independent journalists who covered the Capitol riot*, Daily Dot (Feb. 3, 2021), https://tinyurl.com/3kdwbuhx. And Facebook reportedly suspended dozens of Middle Eastern journalists after potentially "miscategorizing their accounts as having links to terrorism." Olivia Solon, *"Facebook doesn't care": Activists say accounts removed despite Zuckerberg's free-speech stance*, NBC News (June 15, 2020), https://tinyurl.com/4ve5nypm.

Constitutionally protected speech like that discussed above already is threatened by imperfect automated content moderation, and the Ninth Circuit's reading of the ATA will vastly exacerbate the problem.

B. The Ninth Circuit's Construction Incentivizes Intermediaries to Impose Blanket Bans on Controversial Topics Like Terrorism, Barring Speech Regardless of Its Constitutional Protection

Online intermediaries may well be driven to impose categorical limits on the kind of content they host in response to the Ninth Circuit's overly broad interpretation of the ATA. For example, intermediaries may impose across-the-board restrictions on content with links to particular topics or regions—including art, news reports, or even anti-indoctrination materials—leaving speakers "deprived of the opportunity" to publish constitutionally protected content. *Bantam Books*, 372 U.S. at 71. This outcome is especially likely for smaller platforms without the resources to spend on sophisticated automated moderation tools or armies of human reviewers.

Again, experience teaches that these kinds of categorical bans may be an attractive option to intermediaries. Faced with potential legal exposure under the Allow States and Victims to Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA"), many platforms responded by removing or limiting the availability of constitutionally protected content far outside FOSTA's ambit. For instance, Instagram began removing content posted by authors writing about sex work and even content related to sex education. Abigail Moss, *"Such a Backwards Step": Instagram Is Now Censoring Sex Education Accounts*, Vice (Jan. 8, 2021), https://tinyurl.com/5a4mezp9. Tumblr took a similar step, announcing that "any explicit posts will be flagged and deleted by

algorithms." Shannon Liao, *Tumblr will ban all adult content on December 17th*, The Verge (Dec. 3, 2018), https://bit.ly/2SmoC5A.

With the Ninth Circuit's rule, one could easily imagine similar bans on all content even conceivably related to terrorism. Such a prohibition might reach, for example, a religious leader's teachings against violent extremism, a human rights organization's work documenting abuses perpetrated by terrorists, or any number of other forms of protected speech. *See, e.g.*, Pope Francis (@pontifex), Twitter (Sept. 15, 2022), https://tinyurl.com/3ycm2hwd ("Extremism, radicalism, terrorism and all other incentives to hatred, hostility, violence and war have nothing to do with the authentic spirit of religion and must be rejected in the most decisive terms possible."); Human Rights Watch (@hrw), Twitter (Nov. 26, 2022), https://tinyurl.com/ywa977cf (reporting that "[m]any children repatriated from detention camps for ISIS suspects and their families are successfully reintegrating in their home countries").

* * *

No matter how platforms respond under the Ninth Circuit's erroneous reading of the ATA—limiting content by human review, requiring "preclearance" of trusted speakers, relying on imperfect and overinclusive automated moderation tools, or imposing categorical bans on speech—free speech will be the loser. The Ninth Circuit's misinterpretation will lead intermediaries to take steps that impede the distribution of all user-generated content, including constitutionally protected and socially beneficial speech by persons with no tie to anyone who could be deemed a terrorist.

A proper interpretation of the ATA—where, as here, liability is predicated on acts of speech—avoids these significant First Amendment problems. This Court should reject the Ninth Circuit's view and its implications for protected online speech of all kinds.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision below.

Respectfully submitted,

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