CASE NO. 18-1110

IN THE

United States Court of Appeals for the Ames Circuit

MARGARET BOND,

Plaintiff-Appellant,

v.

ANON, INC.

Defendant-Appellee.

On Appeal From
The United States District Court for the District of Ames
No. CV17-1020

BRIEF FOR PLAINTIFF-APPELLANT

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March 12, 2019, 6:15 PM
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Oral Argument

QUESTIONS PRESENTED

1. Whether Margaret Bond has sufficiently pleaded under the Anti-Terrorism Act that Anon, Inc. proximately caused her injuries by providing support to a terrorist organization.

2. Whether Anon, Inc. can invoke immunity under § 230 of the Communications Decency Act for providing support to a terrorist organization.

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The unreported memorandum opinion of the United States District Court for the District of Ames regarding the Defendant-Appellee's motion to dismiss is reproduced at page 2 of the Joint Appendix. The court's original order is reproduced at page 19 of the Joint Appendix.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this action under 28 U.S.C. § 1331 (2018) and 18 U.S.C. § 2333 (2018). The District Court entered final judgment on December 28, 2018, J.A. 7, and Appellant filed a timely notice of appeal on January 7, 2019, J.A. 20.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 18 U.S.C. §§ 2331, 2333, 2339A, 2339B (2018), and 47 U.S.C. § 230 (2018). All relevant provisions are reproduced in the Appendix.

STANDARD OF REVIEW

Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) are reviewed *de novo* on appeal. *See Lewis v. Pension Benefit Guar. Corp.*, 912 F.3d 605, 609 (D.C. Cir. 2018). All "well-pleaded factual allegations" are assumed to be true and must "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Appellant's complaint must be construed "liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in [Appellant's] favor." *Rothstein v. UBS AG*, 708 F.3d 82, 90 (2d Cir. 2013) (internal quotation marks omitted). Questions of statutory interpretation are also reviewed *de novo*. *Doe v. Internet Brands Inc.*, 824 F.3d 846, 850 (9th Cir. 2016).

STATEMENT OF THE CASE

Anon, Inc. ("Anon") provided a terrorist organization, Haprusa First Forever ("HFF"), with financial support and a platform for incendiary, nationalist rhetoric. HFF used these resources to commit a terrorist attack that killed Margaret Bond's husband and twelve others. Bond now brings two claims under the Anti-Terrorism Act ("ATA") against Anon for providing material resources to this terrorist organization. J.A. 16–17.

The District Court for the District of Ames granted Anon's motion to dismiss for failure to state a claim upon which relief can be granted. J.A. 7. The court held that (1) the complaint did not sufficiently plead that Anon's support proximately caused Bond's injuries, and (2) Anon is immune under § 230 of the Communications Decency Act ("CDA"). J.A. 5–7. This timely appeal follows. J.A. 20.

A Platform for Extremists

Anon is a privately-held media company. J.A. 9. In 2010, Anon launched Hardest Right, an international social media platform catering to right-wing extremist groups, including "fringe groups that have been banned from mainstream social media platforms." J.A. 8–9. In its mission statement, Hardest Right identifies as a "forum [for] those who see the emerging threats of globalism and socialism" to share

nationalist content. J.A. 9. In a few short years, Hardest Right has amassed more than half a million users. J.A. 10.

Anon profits from this extremist environment by placing advertising on Hardest Right user pages. J.A. 11. Anon receives revenue each time a website visitor clicks on an advertisement on a user's page. *Id.* Every month, Anon directly shares a portion of the advertising revenue generated from a page with that page's owner via cryptocurrency payments. *Id.* The more advertising revenue a user's page generates, the larger the revenue share that user receives. *Id.* Specifically, Anon shares 2% of the first $500 generated from a user's page with that user, and increases the user's share by 1% for each additional $500 earned, up to 5% of all revenues earned above $1,500. *Id.*

On Hardest Right, the most extreme posts on users' pages receive the most engagement. For example, a video showing the "violent beating of a liberal rabbi" received twice the number of comments as a routine post demeaning refugees. J.A. 10, 12. A post claiming responsibility for a terrorist attack received four times as many comments. J.A. 15.

A Nationalist Terrorist Organization

HFF is a right-wing terrorist organization operating in the foreign state of Haprusa. J.A. 12. The group has evolved from a "criminal street gang" with only fifty members into a nationalist, anti-immigrant

terrorist organization with over two thousand members today. *Id.* HFF joined Hardest Right during the platform's first year of operation and has been on the site ever since. *Id.* Since joining, the terrorist group has nearly tripled its membership. J.A. 12, 14.

HFF uses Hardest Right to recruit, fundraise, incite violence, and "spread its anti-immigrant message." J.A. 12–13. HFF also receives advertising revenue from Hardest Right to fund its operations. J.A. 14, 16. The group has grown increasingly violent over time, urging members "to arm themselves," to "prepare to fight against the government and immigrants," and to "defend themselves by any means necessary." J.A. 13–14. HFF's Hardest Right page also provides information to members about weapons, and instructs them to go to "rallies, marches, [and] protests . . . armed, if possible, to start trouble." J.A. 13.

HFF is not limited to online activity, as the group has evolved to commit real-world violence. These acts have included committing "violence against immigrant and refugee families in Haprusa," "violently intimidating voters in Haprusa's elections," and sponsoring a rally that "turned into a full-blown riot where three people were killed, and dozens more injured." J.A. 13–14. HFF boasted about the deadly riot on all of its social media platforms, proclaiming that "more blood would be spilled" unless Haprusa was "restored to its rightful citizenry." J.A. 14.

The response to the riot and its aftermath was swift. Complaints were made to Hardest Right and other social media sites about HFF's terrorist activities. *Id.* While HFF's official accounts were terminated on mainstream social media platforms, Anon declined to terminate HFF's Hardest Right account. *Id.* To the extent that Anon "actively moderates" the site, it removes accounts "that it deem[s] to be fraudulent," but not accounts that post objectionable content. J.A. 11. After Hardest Right became HFF's only platform, the terrorist group embraced the platform as "the only social media site with 'the will necessary to allow true patriots to speak.'" J.A. 14.

The Avoidable Tragedy

In late 2014, the Haprusan government announced that the country would accept additional refugees to help mitigate "various humanitarian crises around the world." J.A. 14. In response, HFF attacked the Oblinsk Hotel in the Haprusan capital on January 3, 2015 (the "Oblinsk Attack"). J.A. 15. Three HFF members used automatic weapons to kill thirteen people. *Id.* Derek Bond, an American visiting Haprusa, was among the victims. *Id.*

A subsequent forensic examination of the gunmen's homes and devices revealed that all three were HFF members who had adopted HFF's views on refugees and immigration and had viewed HFF's page on Hardest Right before perpetrating the attack. *Id.* After the attack,

HFF posted on Hardest Right, claiming responsibility and threatening further violence. *Id.* This post yielded high engagement on the platform, receiving more than two thousand comments. *Id.*

Since the Oblinsk Attack, HFF has perpetrated two other deadly attacks in Haprusa. J.A. 16. Even now, HFF continues posting on Anon's site, and Anon continues making payments to HFF. *Id.*

The Present Proceedings

Margaret Bond, Derek Bond's widow, filed suit in the United States District Court for the District of Ames. J.A. 16–17. She brought two claims against Anon for providing material support to a terrorist group under § 2333(a) of the ATA. *Id.* First, she alleged that Anon provided HFF with a communications infrastructure, the Hardest Right platform, which "allowed HFF to recruit, fundraise, spread its terrorist message, and perpetrate other terrorist activities." J.A. 16. Second, she alleged that Anon provided direct monetary support to HFF. J.A. 17.

In response, Anon filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) on two grounds: first, that the complaint failed to plead causation under the ATA; and second, that § 230 of the CDA bars both claims. J.A. 2. The lower court granted Anon's motion to dismiss both claims. J.A. 7. This appeal follows. J.A. 20.

SUMMARY OF THE ARGUMENT

I. Margaret Bond ("Appellant") has sufficiently pleaded that Anon, Inc. ("Appellee") proximately caused her injuries under the Anti-Terrorism Act ("ATA").

The ATA requires pleading that an injury to a U.S. national occurred "by reason of an act of international terrorism." 18 U.S.C. § 2333 (2018). A proximate cause requirement is derived from the language, "by reason of." *See, e.g.*, *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013). A broad proximate causation standard best reflects the ATA's purpose to "impose[] 'liability at any point along the causal chain of terrorism.'" *Weiss v. Westminster Nat'l Bank* (*Weiss I*), 453 F. Supp. 2d 609, 631 (E.D.N.Y. 2006) (quoting S. REP. NO. 102-342, at 22 (1992)); *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690–91, 697–98 (7th Cir. 2008) (en banc).

The proper test to determine proximate causation, therefore, is the substantial factor test. *See Rothstein*, 708 F.3d at 91. Under this test, proximate causation is established if (1) conduct was a "material and substantial factor" in bringing about an injury, and (2) the injury was a "reasonably foreseeable consequence" of this conduct. *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1317–18 (S.D. Fla. 2018). Here, Appellant has satisfied both requirements.

Appellee's provision of support to HFF was material. If support has "more than a remote or trivial impact" in bringing about an injury, it is material. *Id.* at 1311. Factors that are relevant to materiality include directness of support to the terrorist group, *see Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 97 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018), and temporal proximity of support to the attack, *see Weiss I*, 453 F. Supp. 2d at 618. Factors that are not significant to materiality include the absolute amount of money contributed, *see Chiquita*, 284 F. Supp. 3d at 1317, and whether specific dollars are traceable from funding source to injury, *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 433 (E.D.N.Y. 2013). Here, both relevant factors point to materiality: Appellant directly supported a terrorist group, and this support occurred in close proximity to the terrorist attack. J.A. 11, 14.

It was also foreseeable to Appellee that providing support to a terrorist group would result in a terrorist attack. Several factors are key to this analysis. *See Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 50, 53 (D.D.C. 2010) (notice); *Chiquita*, 284 F. Supp. 3d at 1318 (public awareness); *id.* (lack of non-violent operations). Here, the attack was foreseeable: Appellee was on notice that it was providing support to a terrorist group; public awareness existed surrounding HFF's past attacks; and HFF only had terroristic operations. J.A. 12–15.

The Ninth Circuit's causation standard is inapplicable here. This standard contravenes the purpose of the ATA, as it requires plaintiffs to plead a "direct relationship," *Fields v. Twitter, Inc.*, 881 F.3d 739, 748 (9th Cir. 2018). But even under this standard, Appellee directly caused Appellant's injuries. Appellee directly contributed money to HFF. *See* J.A. 14. Moreover, HFF members' electronic history directly links Appellee with the January 3, 2015 Oblinsk Hotel attack (the "Oblinsk Attack"). *See* J.A. 15. Further, Appellee purposefully operates outside the norms of its industry by catering specifically to extremists, *see* J.A. 8; it may not now claim the protections granted by the Ninth Circuit to conventional companies.

II. The Communications Decency Act ("CDA") does not immunize Appellee for two reasons. First, Appellee does not meet two of the statutory requirements for § 230 immunity. Second, an application of the CDA to the events in this case would be impermissibly extraterritorial.

Section 230 of the CDA grants immunity to: "(1) a provider or user of an interactive computer service (2) whom the plaintiff seeks to treat as a publisher or speaker . . . (3) of information provided by another information content provider [("ICP")]." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). Here, Appellee fails to satisfy the second and third prongs.

Appellee fails the second prong because Appellant does not seek to treat Appellee as a publisher for the revenue-sharing claim. Section 230 does not confer immunity unless the plaintiff's claims implicate the defendant's exercise of "traditional editorial functions." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Appellant has claimed that Appellee made financial payments to HFF. J.A. 17. Making payments to a terrorist organization is not a traditional editorial function.

Appellee also fails the third prong. Appellee is an ICP because it is "responsible, in whole or in part, for the creation or development" of internet content, 47 U.S.C. § 230(f)(3) (2018). There are two tests used to interpret this ICP definition. *See FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc). But the choice of tests does not control the outcome here—Appellee is an ICP under either standard. Appellee's business model and toxic environment make Appellee responsible for the development of content.

But this Court need not consider the statutory requirements under § 230. Fundamentally, an application of the CDA in this case would be impermissibly extraterritorial. A statute applies extraterritorially only if Congress has included a "clear, affirmative indication" that it does so. *RJR Nabisco, Inc. v. European Cmty.*, 136 S.

Ct. 2090, 2101 (2016). The CDA contains no such indication. *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 159 (E.D.N.Y. 2017).

In the absence of a clear indication, courts evaluate the "focus" of the statute. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267 (2010). If the events or conduct "relevant to the statute's focus" occurred abroad, the statute cannot be applied. *RJR Nabisco*, 136 S. Ct. at 2101. The events relevant to the focus of the statute occurred in Haprusa. Further, an application of the CDA abroad would undermine the statutory regime of both the ATA and the CDA as enacted by Congress. Immunizing Appellee here would be an impermissible extraterritorial application of the CDA.

This Court should reverse.

ARGUMENT

I. Appellant has sufficiently pleaded that Appellee's actions were the proximate cause of her injuries.

To bring an action under the Anti-Terrorism Act ("ATA"), a claimant must properly plead that an injury to a United States national occurred "by reason of an act of international terrorism." 18 U.S.C. § 2333 (2018). Courts have distilled the ATA's language into three requirements for a proper pleading: (1) injury to a U.S. national, (2) an act of international terrorism, and (3) a causal link between the act of terrorism and the injury. *Owens v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 90 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018). The first requirement is undisputed in the instant case. Appellant is a citizen of the United States. J.A. 9. The loss of her spouse in the HFF-perpetrated January 3, 2015 Oblinsk Hotel attack (the "Oblinsk Attack") is a legally cognizable injury under the ATA. *See Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 182 (D.D.C. 2004). The second requirement is also undisputed here. Appellee has conceded that its provision of communication services to Haprusa First Forever ("HFF"), a terrorist organization, can be an act of international terrorism as defined in 18 U.S.C. § 2331 (2018). J.A. 4, 16.

Only the third requirement, causation, is at issue here. Both Appellant and Appellee agree that proximate causation is required to

adequately plead an ATA claim. J.A. 5. Courts have read the ATA's "by reason of" language to require only proximate causation; but-for causation is not required. *See, e.g.*, *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584–85 (E.D.N.Y. 2005). The correct standard to determine proximate causation is the Second Circuit's substantial factor test. *See, e.g.*, *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013). This standard is most appropriate because it rests firmly on the purpose of the ATA. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc). Under the substantial factor test, plaintiffs must sufficiently plead that defendant's conduct was a "material and substantial factor in bringing about [plaintiffs'] injuries . . . and that [the injuries] in question were a reasonably foreseeable consequence of that conduct." *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1317 (S.D. Fla. 2018) (internal quotation marks omitted). Appellant has sufficiently pleaded both materiality and foreseeability. The Ninth Circuit has formulated an alternative test, *see Fields v. Twitter, Inc.*, 881 F.3d 739, 744 (9th Cir. 2018), but this test is inapplicable here because it contravenes the ATA's purpose. However, under either test, Appellant has sufficiently pleaded proximate causation.

A. HFF carried out the Oblinsk Attack that resulted in Appellant's injuries.

In evaluating proximate causation under the ATA, courts first consider whether the attack giving rise to the plaintiff's injuries can be

attributed to the terrorist organization the defendant supported. *See Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 567 (E.D.N.Y. 2012). Here, Appellant has pleaded sufficient facts to establish that HFF is responsible for the Oblinsk Attack because the three gunmen that murdered Appellant's husband were members of HFF and viewed HFF's page on Hardest Right prior to the attack, *see* J.A. 15. The shooters "accepted HFF's views on immigration and refugees" and committed the attack shortly after the Haprusan government announced it would accept additional refugees. *Id.* Unlike less centralized, global terrorist networks, HFF is a small terrorist organization that operates within Haprusa, where the attack occurred, *see* J.A. 12, 15. As a result, Appellant has sufficiently pleaded that HFF committed this attack.

B. This Court should construe the ATA's proximate causation standard broadly in order to reflect Congress' intent to impose liability on a large class of culpable defendants.

The legislative history of the ATA demonstrates that Congress enacted the statute to impose liability on a broad class of actors who support terrorism, with the ultimate goal of striking terrorists "where it hurts them most: at their lifeline, their funds." 136 CONG. REC. S14279-01 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley). Accordingly, in creating a civil cause of action under the ATA, Congress intended to "open[] the courthouse door to victims of international terrorism," S. REP. NO. 102-342, at 45 (1992), by allowing for "the imposition of liability

at any point along the causal chain," *id.* at 22 (emphasis added); *see also* 18 U.S.C. §§ 2339A–2339B (defining provision of material support to terrorist organization as act of terrorism itself); *Antiterrorism Act of 1990: Hearing before the Subcomm. on Courts & Admin. Practice*, 101st Cong. 136 (1990) (statement of Joseph A. Morris, General Counsel, U.S. Information Agency) ("[T]he bill as drafted is powerfully broad, and its intention, as I read it, is to bring focus on the problem of terrorism and, reaching behind the terrorist actors to those who fund and guide and harbor them.").

Because the ATA is silent regarding proximate causation, courts have applied a broad proximate causation standard to effectuate the statute's purpose. *See, e.g.*, *Boim*, 549 F.3d at 697–98 (applying "relaxed" proximate causation standard to ATA claims); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) (noting that the imposition of stringent proximate causation standard is "incompatible with the legislative history of the ATA"). This Court should do the same—failing to do so would undermine Congressional goals and bolster terrorists' ability to fundraise.

This approach was embraced by the Seventh Circuit in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685, 697–698 (7th Cir. 2008) (en banc). In *Boim*, victims of a Hamas terrorist attack sued groups that had made financial contributions to the terrorist

organization. *See id.* Writing for the full Seventh Circuit, Judge Richard Posner held that defendants' provision of any financial support to Hamas was sufficient to establish causation under the ATA. *See id.* The holding was explicitly broad, as the court recognized that construing proximate causation narrowly would invite actors to knowingly support terrorist activity with no consequences, thereby rendering the ATA "a dead letter." *Id.* at 702. Construing proximate causation narrowly would thus undermine the purpose of the ATA. Therefore, this Court should use *Boim*'s approach, construing proximate causation broadly, as a guidepost in its analysis.

C. The Second Circuit has distilled this broad standard into a practical two-part test, under which Appellant has sufficiently pleaded proximate causation.

This Court should adopt the Second Circuit's substantial factor test. *See Rothstein v. UBS AG*, 708 F.3d at 91. This test builds on *Boim* by incorporating the purpose of the ATA, while also providing a justiciable test. *See* Maryam Jamshidi, *How the War on Terror is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 596–97 (2018) (noting that courts in Second Circuit apply modified versions of *Boim* approach); Peter Budoff, *How Far Is Too Far?: The Proper Framework for Civil Remedies Against Facilitators of Terrorism*, 80 BROOK. L. REV. 1057, 1082 (2015) (noting that substantial factor test is "proper approach").

Courts have noted that this "substantial factor" analysis is "only a slight refinement to *Boim*," *Chiquita*, 284 F. Supp. 3d at 1314, and "not . . . the application of an entirely different legal standard," *Owens*, 235 F. Supp. 3d at 97; *see also Abecassis v. Wyatt*, 7 F. Supp. 3d 668, 675 (S.D. Tex. 2014). Even the Seventh Circuit has recognized that the substantial factor test is the practical implementation of the principles underlying *Boim*. *See Kemper v. Deutsche Bank, AG*, 911 F.3d 383, 391 (7th Cir. 2018).

To sufficiently plead proximate causation under this substantial factor test, plaintiffs must allege that: (1) "defendant's conduct was a material and substantial factor in bringing about [plaintiffs'] injuries," and (2) plaintiffs' injuries "were a reasonably foreseeable consequence" of defendant's actions. *Chiquita*, 284 F. Supp. 3d at 1317 (internal quotation marks omitted). Since Appellant has sufficiently pleaded facts that establish materiality and foreseeability, she has adequately pleaded proximate causation under the ATA.

1. *Appellant has adequately pleaded that Appellee's actions were a material factor in causing her injuries.*

Courts applying the substantial factor test first consider whether the support provided by defendants was "a material and substantial factor in enhancing [a terrorist group's] terror capabilities and enabling it to commit more terror." *Chiquita*, 284 F. Supp. 3d at 1317. Courts have deemed a defendant's conduct material if it has had "more than a

remote or trivial impact on the circumstances leading" to the plaintiff's injury. *Id.* at 1311. Within this fact-specific analysis, courts assess the extent to which a defendant's provision of institutional or financial support to the terrorist organization increased the likelihood of a terrorist attack. *See id.* at 1318; *Weiss v. Nat'l Westminster Bank* (*Weiss II*), 278 F. Supp. 3d 636, 641 (E.D.N.Y. 2017). Because Appellee's provision of communications infrastructure and direct financial support to HFF increased the likelihood of a terrorist attack, Appellant has sufficiently pleaded that Appellee's actions were a material factor in bringing about her injuries.

a. Appellee's continuous provision of support to HFF before the Oblinsk Attack was a material factor in bringing about Appellant's injuries.

Courts have held that contributions to terrorist groups are a material factor in causing injuries inflicted by those groups. Terrorist organizations are "so tainted by their criminal conduct that *any contribution* to such an organization facilitates that conduct." *Weiss II*, 278 F. Supp. 3d at 642 (emphasis added) (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–32, § 301(a)(7), 110 Stat. 1214, 1247 (1996)). These contributions include both operational and monetary support. *See Goldberg*, 660 F. Supp. 2d at 429–30.

With respect to operational support, in *Goldberg v. UBS AG*, the court held that defendant bank's provision of services to terrorist groups

was a material factor in causing injuries inflicted by those groups because the provision of services enhanced the likelihood of injuries. *See* 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009). The provision of communications services in the present case, like the provision of financial services in *Goldberg*, is a form of key operational support. Here, by supplying HFF with an online platform, Appellee provided HFF access to its network when no other social media company would, J.A. 14. This vital service enhanced HFF's ability to recruit, fundraise, and organize, resulting in HFF tripling its membership. J.A. 12–13. This increased the likelihood of a terrorist attack.

With respect to monetary support, the court in *In re Chiquita Brands International, Inc.*, held that defendant banana company's provision of regular monetary payments to FARC, a terrorist organization, "was a material and substantial factor in bringing about deaths of Plaintiff's decedents." 284 F. Supp. 3d 1284, 1318 (S.D. Fla. 2018). This monetary support made the terrorist attacks more likely to occur because it gave HFF a regular income stream. *See id.* at 1317. Like the defendant in *Chiquita*, Appellee made regular payments to a terrorist organization, paying HFF monthly shares of advertising revenue. J.A. 11. Here, this monetary support to HFF also made a terrorist attack more likely to occur.

Not only did Appellee provide operational and financial support to HFF, but it did so *directly*. The more direct the provision of support from a defendant to a terrorist organization, the more likely that support is material. *See Owens*, 235 F. Supp. 3d at 97. In *Chiquita*, the money provided by defendant banana company was given directly to FARC, with no intermediaries. *See* 284 F. Supp. 3d at 1295–97. The court held that this direct support was a material factor in causing plaintiffs' injuries. *See id.* at 1317. Here, just as the defendant in *Chiquita* made direct transfers of money to FARC, Appellee made direct monthly payments to HFF without any intermediary front groups, states, or charities. *See* J.A. 11, 16. Moreover, Appellee used a blockchain to make its cryptocurrency payments to HFF, J.A. 11, a form of payment specifically designed to operate without any intermediary banks or payment processors, *see* Vinay Gupta, *The Promise of Blockchain Is a World Without Middlemen*, HARV. BUS. REV. (Mar. 6, 2017), https://hbr.org/2017/03/the-promise-of-blockchain-is-a-world-without-middlemen. As a result, because the money went directly to HFF, Appellee's direct provision of monetary support was a material factor in Appellant's injuries.

In light of how other courts have evaluated directness of defendants' support, Appellee's support to HFF is sufficiently direct to be material. In *Weiss v. National Westminster Bank* (*Weiss II*), a bank

provided services to a Hamas front group, which in turn supported Hamas in its terrorist activities, which in turn injured plaintiffs. 278 F. Supp. 3d 636, 643 (E.D.N.Y. 2017). Despite the existence of an intermediary, the court held that plaintiffs had sufficiently pleaded proximate causation because the bank contributed services "directly to Hamas front-groups." *Id.* at 642; *cf. Owens*, 235 F. Supp. 3d at 97 (holding that bank did not proximately cause injury because it provided support through multiple intermediaries). Here, Appellee's provision of services was even more direct than that of the defendant's in *Weiss II*. While the *Weiss II* court found directness even with the presence of a front group, here there was no front group—Appellee provided services and payment to HFF directly.

Similarly, the temporal proximity of Appellee's direct support to the Oblinsk Attack renders this support material. Courts have held that "temporal proximity" between the provision of support and a terrorist attack strengthens a claim that the recent support was a material factor in causing plaintiff's injury because such support makes "it more likely that the terrorist act would occur." *In re Terrorists Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 517 (S.D.N.Y. 2010), *aff'd*, 714 F.3d 118 (2d Cir. 2013). For instance, in *Weiss v. National Westminster Bank* (*Weiss I*), the transaction facilitated by a defendant bank to a Hamas front group occurred two years before the terrorist attack that injured

plaintiffs. 453 F. Supp. 2d 609, 618 (E.D.N.Y. 2006). While acknowledging that, in some instances, "the lapse of time may factor into the proximate cause inquiry," the court held that the chain of causation was not severed by the two-year span. *Id.* at 632; *compare id. with In re Terrorists Attacks*, 740 F. Supp. 2d at 521 (finding that decade-long gap between actions of defendant and injuries of plaintiff was "too remote . . . to establish the requisite causal connection").

Here, the chain of causation is less attenuated than in *Weiss I*; Appellee's contributions to HFF were closer in time to the attacks than the *Weiss I* defendant's single, two-year-old transaction. Appellee continuously provided advertising revenue contributions to HFF every month in the five years leading up to the attack. *See* J.A. 11–12. Moreover, Appellee provided online communications infrastructure to HFF that, given the nature of the Internet, was accessible any day or time, including in the minutes and seconds leading up to the attack. Appellee's temporally proximate, ongoing support to HFF made the terrorist attack more likely to occur because it provided HFF with a constant network and regular payments. Therefore, Appellee's support was a material factor in causing Appellant's injuries.

b. Appellee cannot escape liability by downplaying its role in facilitating terrorism.

Appellant has sufficiently pleaded that Appellee's contributions were a material factor in causing the attack and need not plead that

Appellee's financial contributions exceeded an arbitrary, minimum threshold. Courts have held that, even if financial contributions to a terrorist group are a "relatively small contribution to [the group's] coffers," this monetary support can still be a substantial factor in causing injury. *Chiquita*, 284 F. Supp. 3d at 1317; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) ("[A]ll contributions to foreign terrorist organizations further their terrorism."); *Boim*, 549 F.3d at 691 ("[T]he fact of contributing to a terrorist organization rather than the amount of the contribution is the keystone of liability.").

For example, in *Chiquita*, the court held that, even though Chiquita's contributions constituted only a small part of FARC's total revenue, the funds were still a material factor in causing the violence committed by the terrorist group. *See* 284 F. Supp. 3d at 1317–18. Just as the relatively small contributions to FARC in *Chiquita* were a material factor in causing violent terrorist attacks, the monthly payments Appellee made to HFF were a material factor in causing Appellant's injuries, regardless of the relative amount. Further, Appellee has chosen to pay terrorists through anonymous cryptocurrency of untraceable value—Appellee cannot then "gain the advantage of the lack of proof inherent in the . . . situation which [it] ha[s] created." *Haft v. Lone Palm Hotel*, 478 P.2d 465, 475 (Cal. 1970); J.A. 11. Appellant has sufficiently pleaded that Appellee's payments to

HFF were a material factor in causing her injuries, and any lack of detail about the amount of these payments does not undermine the sufficiency of this pleading.

Further, it is not necessary for Appellant to plead that the money Appellee gave to HFF was ultimately used to carry out the Oblinsk Attack. Plaintiffs are not required to "trace specific dollars to specific attacks to satisfy the proximate cause standard." *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 433 (E.D.N.Y. 2013). Such a requirement "would be impossible [to meet] and would make the ATA practically dead letter," *id.*, because "money is fungible," *Holder*, 561 U.S. at 31; *see also Gill*, 893 F. Supp. 2d at 555–56 ("[T]he money alleged to have changed hands need not be shown to have been used to purchase the bullet that struck the plaintiff." (internal quotation marks omitted)). In *Strauss v. Credit Lyonnais, S.A.*, victims of a Hamas terrorist attack sued a bank that had provided money to the terrorist organization. *See* 925 F. Supp. 2d 414, 432–33 (E.D.N.Y. 2013). The court held that, in pleading proximate causation, plaintiffs were not required to allege that the contributions provided by the bank were the actual dollars used to commit the terrorist attack that injured plaintiffs. *See id.* at 433. Likewise, Appellant is not required to plead that funds provided by Appellee to HFF were used in the Oblinsk Attack. A holding otherwise would impute a but-for causation requirement into a cause of action that

has been consistently held not to have one. *See Chiquita*, 284 F. Supp. 3d at 1310, n.23.

Thus, Appellant has sufficiently pleaded that Appellee's support was a material factor in bringing about her injuries.

2. Appellant has sufficiently pleaded that an HFF terrorist attack was reasonably foreseeable to Appellee, fulfilling the second requirement of the substantial factor test.

To satisfy the foreseeability requirement, plaintiffs must allege that defendants could have reasonably anticipated that their actions would support terrorist activity. *See, e.g.*, *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 647 (S.D. Tex. 2011), *on reconsideration in part*, 7 F. Supp. 3d 668 (S.D. Tex. 2014); *Chiquita*, 284 F. Supp. 3d at 1318. In determining foreseeability, courts have looked to several factors, including: whether a party was on notice that it was providing support to a terrorist group, *see Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 50, 53 (D.D.C. 2010); whether there was public awareness surrounding past attacks committed by the group, *Chiquita*, 284 F. Supp. 3d at 1318; and whether the group lacked other legitimate operations, *see id*. Considering these factors, Appellant has pleaded sufficient facts to establish foreseeability.

Appellee was on notice that it was providing support to a terrorist organization. If a party has received such notice, then terrorist activity subsequently committed by that group is foreseeable, even if the notice

was ignored. *See Wultz*, 755 F. Supp. 2d at 51, 53; *In re Terrorists Attacks*, 740 F. Supp. 2d at 517 ("It is . . . wholly foreseeable that a terrorist organization could use any material support provided to it as part of a broader strategy to promote terrorism."). For example, in *Wultz v. Islamic Republic of Iran*, victims of a terrorist attack in Israel sued the Bank of China ("BOC") under the ATA, alleging that BOC had caused the attack by transferring money to the terrorist group. 755 F. Supp. 2d 1, 18 (D.D.C. 2010). The court held that plaintiffs had sufficiently pleaded facts to establish that the attack was foreseeable to BOC because BOC had received and ignored notice from Israeli officials that it was transferring money to a terrorist group. *See id.* at 50.

Likewise, Appellee received notice that HFF was a terrorist organization in the form of numerous complaints about HFF's deadly riot months prior to the Oblinsk Attack. *See* J.A. 14. Despite these complaints, and despite the fact that HFF accounts were terminated on mainstream platforms after the riot, Appellee declined to deactivate HFF's Hardest Right account. J.A. 14. Because Appellee "actively moderates" its site, it was on notice that HFF was a violent, extremist group that was using its services and its money to perpetuate violence. J.A. 11. As a result, Appellee could have reasonably foreseen that its provision of support to HFF would lead to Appellant's injuries.

Moreover, public awareness surrounding HFF's past violent activities made subsequent HFF terrorist attacks reasonably foreseeable to Appellee. Courts have held that public awareness surrounding a terrorist organization's past violence is sufficient to establish foreseeability. *See Chiquita*, 284 F. Supp. 3d at 1318. For instance, in *Chiquita*, even though FARC had not been officially designated as a terrorist organization by the U.S. government, the court was persuaded that "common experience, given the widely reported news," about FARC's past violence made further terrorist activity foreseeable to Chiquita. *Id.* The court therefore held that plaintiffs had sufficiently pleaded that their injuries "were a reasonably foreseeable consequence of [Chiquita's] alleged material support." *Id.* Just as Chiquita was on notice due to FARC's well-known terrorist activities, here, Appellee was on notice due to HFF's well-known history of violent acts. Acts including "violence against immigrant and refugee families in Haprusa," "violently intimidating voters in Haprusa's elections," and sponsoring a rally that "turned into a full-blown riot where three people were killed, and dozens more injured," J.A. 13–14, all support the inference that HFF's tendencies were publicly known and that Appellee could have reasonably foreseen a terrorist attack.

Further, an HFF terrorist attack was foreseeable to Appellee because HFF did not have any legitimate operations, and had no

purposes beyond spreading hateful rhetoric and inciting violence. It is reasonably foreseeable that providing support to a terrorist group with "no function other than the perpetration of violence" will lead to a violent attack. *Chiquita*, 284 F. Supp. 3d at 1315. While courts have held that this foreseeability link is more tenuous in cases in which the terrorist group had legitimate operations, *see Owens*, 235 F. Supp. 3d at 97, the instant case is distinguishable. For example, in *Owens v. BNP Paribas S.A.*, victims of Al Qaeda terrorist attacks brought suit against a bank that provided banking services to the Sudanese government, which had ties to Al Qaeda. *See* 235 F. Supp. 3d 85, 89 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018). The district court held that plaintiffs had not adequately pleaded foreseeability because the bank was supporting a government with "many legitimate agencies, operations, and programs to fund." *Id.* at 97 (internal quotation marks omitted).

Unlike the Sudanese government, which provides a broad array of services, HFF does not have any legitimate functions; its only purposes are to "spread its anti-immigrant message" and "incite[] violence." J.A. 12–13. HFF publicly urged young men to "arm themselves and prepare to fight against the government and immigrants" and "provide[d] information about weapons" along with information about "rallies, marches, protests, etc., where it wants its members to go—armed, if possible, to start trouble." J.A. 13. As a result, it was

foreseeable to Appellee that its support to a terrorist organization without legitimate services could lead to terrorism.

D. Appellant has sufficiently pleaded proximate causation even under the Ninth Circuit's inapposite standard.

The District Court erred in holding that the Ninth Circuit's proximate causation standard should govern in this case. The Ninth Circuit has read the "by reason of" language in the ATA to require a "direct relationship" between the defendant's actions and the plaintiff's injuries. *See Fields*, 881 F.3d at 744. In inferring a direct relationship requirement, the Ninth Circuit relied on *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in which the Supreme Court interpreted "by reason of" in the Racketeer Influenced and Corrupt Organizations Act ("RICO") to require a direct relationship. *See* 503 U.S. at 268. In *Holmes*, the Court adopted this more stringent proximate causation test for RICO claims out of concerns that a broad interpretation of proximate causation would swell the class of plaintiffs beyond the purpose of the statute. *See id.* at 279–80.

However, this same concern does not apply to ATA claims because the class of possible plaintiffs is inherently limited by the small number of Americans that are killed in terrorist attacks per year. *See National Consortium for the Study of Terrorism and Responses to Terrorism: Annex of Statistical Information*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/rls/crt/2017/282853.htm (finding that 7 U.S.

citizens were killed abroad in 2017 as a result of terrorist attacks). Moreover, expanding the class of potential *defendants* is exactly what Congress desired when it enacted the ATA to impose liability "at any point along the causal chain." S. REP. NO. 102-342, at 22 (1992). Because Congress has explicitly spoken to its desire to make the pool of potential defendants under the ATA as large as possible, applying the Ninth Circuit's rigid directness test contravenes the ATA's purpose. *Cf. Paroline v. United States*, 134 S. Ct. 1710, 1724 (2014) ("[A]lternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes."). Therefore, the more flexible substantial factor test should be applied instead.

Though the Ninth Circuit's directness test is inapplicable because it contravenes the purpose of the ATA, Appellant has still made a sufficient pleading of proximate causation under this standard. Unlike the substantial factor test, which considers directness as a component of the analysis, the Ninth Circuit's test requires directness to the exclusion of other factors. *See Fields*, 881 F.3d at 748; *supra* Part I.C.i.a. Courts have applied the standard to both monetary support, *see Brill v. Chevron Corp.*, Case No. 15-cv-04916-JD, 2018 WL 3861659 (N.D. Cal. Aug. 14, 2018), and communications infrastructure, *see Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 915 (N.D. Cal. 2018), *appeal filed*, No. 18-17192 (9th Cir. Nov. 13, 2018).

Here, Appellant has sufficiently pleaded that Appellee contributed funds directly to HFF, distinguishing the present case from those involving more attenuated chains. In *Brill v. Chevron Corp.*, for instance, Chevron made illegal payments to the Iraqi government, which Iraq then funneled to terrorist groups, which then committed an attack that injured plaintiffs. *See* Case No. 15-cv-04916-JD, 2018 WL 3861659, at *1 (N.D. Cal. Aug. 14, 2018). The court held that Chevron's payments were not a direct cause of the injuries because the payments had to go through a "financial labyrinth" of "businesses, banks, [and] government institutions" before reaching the terrorists. *Id.* at *2. But here, unlike Chevron's payments in *Brill*, Appellee's funds went directly to HFF, *see* J.A. 11, 16, without passing through a "serpentine" set of actors, *Brill*, 2018 WL 3861659, at *2. As a result, Appellant has sufficiently pleaded that Appellee's monetary payments were a direct cause of Appellant's injuries.

Moreover, there is a direct relationship between Appellee's communications infrastructure and Appellant's injuries. Courts consider the extent to which the terrorist attack was "in *any way* impacted, helped by, or the result of [the terrorist organization's] presence on the social network." *Fields*, 881 F.3d at 750 (citation omitted). The instant case is distinguishable from those in which there was no clear connection between the terrorist attack and the defendant

social media platform. In *Taamneh v. Twitter, Inc.*, for example, victims of an ISIS terrorist attack brought ATA claims against Twitter for providing communications services to ISIS. 343 F. Supp. 3d 904, 907 (N.D. Cal. 2018), *appeal filed*, No. 18-17192 (9th Cir. Nov. 13, 2018). The district court held that plaintiffs had failed to sufficiently plead proximate causation because they had not pleaded that the attacker had viewed ISIS content on social media. *See id.* at 915; *see also Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888 (N.D. Cal. 2017) (considering whether terrorist group "instructed or encouraged groups . . . to foment the sort of attack that [the attacker] committed").

By contrast, Appellant has pleaded that that the HFF attackers who carried out the Oblinsk Attack "had viewed HFF's page on Hardest Right." J.A. 15. The posts on this page instructed members to "defend themselves by any means necessary," to "arm themselves and prepare to fight," and to go to different events "armed, if possible, to start trouble." J.A. 13–14. HFF members then did go, "armed . . . to start trouble," to the Oblinsk Hotel where they shot and killed Appellant's husband. J.A. 15. Appellant has thus sufficiently pleaded a direct link between Appellee's provision of communications infrastructure and Appellant's injuries.

This case is further distinguishable from cases involving social media companies under the Ninth Circuit's standard because Hardest

Right operates outside the norms of the social media industry by catering specifically to extremists. Courts consider whether a defendant's actions in providing support to a terrorist organization were within the ordinary scope of defendant's industry. *See In re Terrorists Attacks*, 740 F. Supp. 2d at 518; *see also Taamneh*, 343 F. Supp. 3d at 918. Unlike other social media platforms that market themselves to all users, Hardest Right capitalizes on "fringe groups that have been banned from mainstream social media platforms." J.A. 8.

Moreover, Hardest Right's mission statement, in which it identifies as a forum for those "who see the emerging threats of globalism and socialism," J.A. 9, includes shibboleths of violence. Anti-"globalism" is accepted terminology that indicates, to a particular community of internet users, a violent, nationalist, anti-Semitic worldview. *See, e.g.*, Ben Zimmer, *The Origins of the 'Globalist' Slur*, THE ATLANTIC, (Mar. 14, 2018), https://www.theatlantic.com/politics/archive/2018/03/the-origins-of-the-globalist-slur/555479/. This niche, extremist viewpoint makes inapposite any comparison to general social networks like Facebook, Twitter, or YouTube, which seek to connect people of different beliefs from all of the world. *See What is Twitter's mission statement?*, TWITTER, INC. INVESTOR RELATIONS, https://investor.twitterinc.com/contact/faq/ ("[T]o give everyone the power to create and share ideas and information instantly without

barriers . . . a free and global conversation."); *What is Facebook's mission statement?*, FACEBOOK INVESTOR RELATIONS, https://investor.fb.com/resources/default.aspx ("[T]o give people the power to build community and bring the world closer together."); *About YouTube*, YOUTUBE, https://www.youtube.com/yt/about/ ("[T]o give everyone a voice and show them the world.").

Further, Appellee pays its extremist users in untraceable, anonymous cryptocurrency, J.A. 11, a practice in which no other major social media site engages. *See Setting up your form of payment*, YOUTUBE, https://support.google.com/youtube/answer/1714397?hl=en (offering the following payment options: "Checks, Electronic Funds Transfer (EFT), EFT via Single Euro Payments Area (SEPA), Wire Transfer and Western Union Quick Cash"). Cryptocurrency has been identified as an effective tool for terrorist organizations. *See, e.g.*, Steven Salinsky, *The cryptocurrency-terrorism connection is too big to ignore*, WASH. POST (Dec. 17, 2018), https://wapo.st/2EqqkiB. The House of Representatives recently passed a bill unanimously to establish an independent task force to combat the use of cryptocurrency by terrorists. *See* Financial Technology Protection Act, H.R. 5036, 115th Cong. (2018). Appellee profited for years by specifically operating its violent, extremist social media site outside the norms set by the mainstream sites and the

norms of common decency; it cannot now claim that it is similar to those mainstream sites in order to escape liability.

For the foregoing reasons, this Court should hold that Appellant has adequately pleaded proximate causation.

II. Appellee is not immunized by the Communications Decency Act.

Appellee cannot rely on § 230 of the Communications Decency Act ("CDA") as a shield from ATA liability for the Oblinsk Attack. Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2018). The CDA is not a blanket grant of immunity; it only immunizes parties that fulfill *each part* of § 230. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc) ("The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."). Here, Appellee fails to fulfill the requirements of this statute. Moreover, Appellee's attempt to use the CDA fails for an even more fundamental reason: it would constitute an impermissible extraterritorial application of the statute, *cf. Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255, 267 (2010). Therefore, the CDA does not immunize Appellee from liability.

A. Appellee does not meet all requirements under § 230 and is therefore not immune.

Courts have translated the text of § 230 into a three-prong test, granting immunity to: "(1) a provider or user of an interactive computer service (2) whom the plaintiff seeks to treat as a publisher or speaker . . . (3) of information provided by another information content provider [("ICP")]." *See Barnes*, 570 F.3d at 1100–01. If a party fails to meet even a single requirement, then the party is not immune under § 230. *See id.* It is uncontested that Appellee is an interactive computer service provider under the first prong. However, Appellant does not seek to treat Appellee as a publisher or speaker in her claim that Appellee shared advertising revenue with HFF, thereby failing to satisfy the second prong.

Under the third prong, while it is uncontested that HFF is an ICP of content on Hardest Right, Appellee is also an ICP of that content and therefore not immune. Section 230 shields a party from liability for content provided exclusively by *another* ICP, but it does not shield a party from liability for content it *itself* was partially responsible for developing as an ICP. *See Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). Because Appellee created a financial structure that incentivized Hardest Right members to post increasingly outrageous content, and because Appellee shaped the toxic culture on Hardest Right that facilitated extremist content, Appellee is an ICP of

the content at issue, thereby failing the third prong. The language of § 230 therefore does not shield Appellee from liability.

1. Appellee is not immune under the CDA because Appellant does not seek to treat Appellee as a publisher for the revenue-sharing claim.

In considering the publisher requirement of § 230, courts analyze whether the "cause of action inherently requires the court to treat [defendant] as a publisher or speaker" of the posted content. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016) (internal quotation marks omitted). If the underlying cause of action does not require the defendant to have exercised "traditional editorial functions," then the defendant is not being treated as a publisher and § 230 does not apply. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). "[T]raditional editorial functions" include "deciding whether to publish, withdraw, postpone or alter content." *Id.*

In *Gonzalez v. Google, Inc.* (*Gonzalez II*), 335 F. Supp. 3d 1156 (N.D. Cal. 2018), *appeal filed*, No. 18-16700 (9th Cir. Sept. 10, 2018), victims of ISIS terrorist attacks in Paris brought several claims against Google, including that Google-owned YouTube directly shared advertising revenue with ISIS. *See* 335 F. Supp. at 1163–64. While the court fully analyzed the other claims under the CDA, *id.* at 1171–74, the court specifically excluded the revenue-sharing claims from its CDA analysis, *id.* at 1176. These revenue-sharing claims were based on Google's provision of revenue to a terrorist organization, rather than

Google's exercise of traditional publishing functions. Appellant's underlying claim, like the plaintiffs' underlying claim in *Gonzalez II*, seeks to hold accountable a social media company for sharing advertising revenue with a terrorist organization. This provision of advertising revenue to terrorists is not a traditional editorial function. Because Appellant's revenue-sharing claim does not require treating Appellee as a publisher, Appellee therefore fails to satisfy the second prong of the CDA immunity analysis.

Moreover, Appellee's liability under the revenue-sharing claim is unrelated to content posted on Hardest Right, and therefore is not based on Appellee's status as a publisher. A claim does not treat a defendant as a publisher if it is based on the defendant's own tortious conduct, rather than published content. *See McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 538 (D. Md. 2016). In *McDonald v. LG Electronics USA, Inc.*, a consumer purchased a defective battery from a third-party seller on Amazon and sued the company after the battery exploded in his pocket. *See* 219 F. Supp. 3d 533, 535 (D. Md. 2016). The court held that the CDA did not bar plaintiff's claims that Amazon negligently sold the battery because the claim implicated only Amazon's tortious conduct, and did not concern the actual content on Amazon's website. *See id.* at 538. Just as the negligence claim in *McDonald* did not involve the content on the website, here the advertising revenue claim does not

involve HFF content on Hardest Right. Regardless of the content HFF posted on Hardest Right, Appellee's tortious conduct, providing revenue to a terrorist group, gives rise to liability. Because the revenue-sharing claim does not seek to treat Appellee as a publisher, it is not barred by the CDA.

Appellee could have avoided liability by ceasing payments to HFF. Ceasing payments does not involve any traditional editorial functions. If a party may avoid liability without infringing upon the party's traditional editorial functions, then that party is not being treated as a publisher and is not immune under the CDA. *Cf. Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123–24 (N.D. Cal. 2016) (requiring "a blanket ban on pro-ISIS content . . . would constitute publishing activity"), *aff'd*, 881 F.3d 739 (9th Cir. 2018). The CDA only protects publishers, not funders. In order to avoid liability, Appellee must only change its payment structure, not its CDA-protected editorial decisions. Because Appellee's only means of avoiding liability for this claim are financial, not editorial, the claim does not treat Appellee as a publisher. Appellee is not immune under the CDA.

2. Appellee is an information content provider under the CDA, and is therefore not immunized for the communications infrastructure claim.

The CDA defines the term "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation

or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (2018). Courts have recognized that this is "a broad definition, covering even those who are responsible for the development of content only 'in part.'" *Lycos*, 478 F.3d at 419; *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009) (noting that "there may be several information content providers with respect to a single item of information"). When interpreting this definition, the Tenth Circuit has held that a party is an ICP if it "in some way specifically encourages development of what is offensive about the content." *Accusearch*, 570 F.3d at 1199. The Ninth Circuit takes a similar approach, holding that a party is an ICP if it "materially contribute[s]" to the content's alleged unlawfulness. *Roommates*, 521 F.3d at 1168. Here, the Tenth Circuit's approach is more appropriate because it employs the ordinary meaning of the words of the statute and is therefore closest to Congress' direction. However, under either standard, Appellee qualifies as an ICP and therefore, Appellant's communications infrastructure claim is not barred by the CDA.

The Tenth Circuit's standard is faithful to the text of the CDA as enacted by Congress. The two operative words in the CDA's definition of ICP—"develop" and "responsible"—are not defined in the statute. *See Accusearch*, 570 F.3d at 1197–98. When words are not defined in a

statute, it is a "fundamental canon of statutory construction" to interpret those words with their "ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). The Tenth Circuit has concluded that the dictionary definition of "develop" is the "act of drawing something out, making it 'visible,' 'active,' or 'usable.'" *Accusearch*, 570 F.3d at 1198 (quoting Webster's Third New International Dictionary 618 (2002)). Next, the court found that the word "responsible" has been defined as being "[m]orally accountable for one's actions," and includes synonyms such as "*blame, fault, guilt,* and *culpability*." *Id.* (quoting The Oxford English Dictionary 742 (2d ed. 1998)). From these definitions, the Tenth Circuit formulated a rule whereby a party is responsible for the development of content, and therefore an ICP, if it "specifically encourages development of what is offensive about the content." *Id.* at 1199.

Under this rule, Appellee is an ICP because it specifically encouraged the development of HFF's offensive content. In *FTC v. Accusearch Inc.*, a website paid third-party researchers for each illegally-obtained phone record the researchers provided to the site. 570 F.3d 1187, 1191 (10th Cir. 2009). Even though the phone records were provided by third-party researchers, the court found that the website was responsible for the development of the phone records, and therefore an ICP, because its actions "were intended to generate [offensive]

content." *Id.* at 1201; *see also Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016) (noting that encouraging the most defamation-prone commenters could forfeit CDA immunity). The payment model in *Accusearch* incentivized researchers to seek out more illegal phone records because the more numbers researchers provided, the more they were paid. *See* 570 F.3d at 1191.

Likewise, the payment structure in the present case incentivized Hardest Right users to develop increasingly dangerous content. Appellee pays a percentage of advertising revenue generated from each page to the page owner, with payments increasing for increasingly high-engagement content. *See* J.A. 11–13. On Hardest Right, more extreme posts attract more user engagement. This structure incentivizes users to create dangerous content. The more extremist the content HFF produced on Hardest Right, the more engagement the terrorist group received, and therefore, the more money the terrorist group would receive. For example, HFF's post claiming responsibility for the deadly Oblinsk Attack garnered four times as many comments, and thus generated more financial compensation, than a routine post by HFF demeaning refugees. J.A. 12–13. Because Appellee incentivizes users to generate increasingly offensive content with its revenue-sharing model, it is responsible for the development of the content.

Even if this court declines to apply the test derived from the dictionary definitions of these terms, Appellee is still an ICP under the Ninth Circuit's standard. The Ninth Circuit has held that an interactive computer service provider who "materially contribut[es] to [the content's] alleged unlawfulness" is an ICP for the purposes of the CDA. *Roommates*, 521 F.3d at 1167–68; *see also Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014). In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, a roommate-matching website required users to provide discriminatory biographical information and preferences, including sex, sexual orientation, and parental status, in violation of the Fair Housing Act. *See* 521 F.3d 1157, 1161-62 (9th Cir. 2008) (en banc). The website then filtered search results based on this impermissible information, *id.* at 1167, thereby creating a discriminatory environment. The court held that the website materially contributed to unlawful behavior when it intentionally solicited this information and displayed the filtered results, thereby rendering the website an ICP. *See id.* at 1169–70.

Just as the *Roommates* website required a sign-up process which filtered potential users in order to create a discriminatory environment, Appellee *de facto* required extremist views on its websites which filtered potential users by their subscription to such views. On a website that is populated with content that is racist and nationalistic, potential users

with more mainstream beliefs are excluded from the dialogue. By effectively excluding those without an extremist viewpoint, Appellee materially contributes to the illegal activity that arises from the conversations on Hardest Right and can thus be considered an ICP of any shared content.

B. Applying the CDA to events that occurred abroad would be impermissibly extraterritorial under the *Morrison* two-step test.

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The Supreme Court, in *Morrison v. National Australia Bank Ltd.*, reinforced this canon against extraterritoriality by creating a two-step test to determine whether an application of a statute is impermissibly extraterritorial. *See* 561 U.S. 247, 255, 267 (2010). First, courts determine whether the statute contains a "clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255.

If the statute does not contain a clear extraterritorial application, then courts proceed to the second step in which they evaluate the "focus"

of the statute. *Id.* at 266–67. To determine the "focus" of the statute, courts generally consider the "objects of the statute's solicitude," what the statute "seeks to regulate," and the "parties or prospective parties . . . that the statute seeks to protect." *Id.* at 267. If the events or conduct "relevant to the statute's focus" occurred abroad, the application of the statute is impermissibly extraterritorial. *RJR Nabisco*, 136 S. Ct. at 2101.

Here, the CDA contains no clear indication that it applies extraterritorially. Further, the conduct relevant to the focus of the CDA occurred in Haprusa. Therefore, immunizing Appellee would constitute an impermissibly extraterritorial application of the CDA.

1. *Under the first step, the CDA does not apply extraterritorially because Congress has not clearly indicated that it applies extraterritorially.*

To rebut the presumption against extraterritoriality, a statute must "evince a clear indication of extraterritoriality." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 118 (2013) (internal quotation marks omitted). In *Morrison*, the Supreme Court assessed the extraterritorial application of § 10(b) of the Securities Act of 1933, and after consulting its text, purposes, and adjacent legislation, found it "contains nothing to suggest it applies abroad." 561 U.S. at 262.

So too here. Multiple courts have concluded that there is nothing in the text, purposes, or adjacencies that suggests that the CDA applies

abroad. *See Gonzalez v. Google, Inc.* (*Gonzalez I*), 282 F. Supp. 3d 1150, 1161 (N.D. Cal. 2017); *see also Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 159 (E.D.N.Y. 2017) (recognizing that neither CDA nor § 230 indicates foreign application). Therefore, any extraterritorial application of the CDA is impermissible.

2. Under the second step, the events relevant to the focus of the CDA occurred abroad.

Because Congress did not clearly indicate that the CDA applies extraterritorially, the analysis proceeds to the second step of the *Morrison* test. In this step, courts must assess whether the events relevant to the focus of the statute occurred abroad. *Morrison*, 561 U.S. at 266–67. To determine the focus of a statute, courts consider "the object of [the statute's] solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (internal quotation marks and alterations omitted). In making this determination, courts employ the "familiar tools of statutory interpretation," such as analyzing the text of the statute, its framework, and the legislative history. *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 217 (2d Cir. 2016), *vacated on other grounds*, 138 S. Ct. 1186 (2018).

While lower courts have evaluated the focus of § 230(c) in isolation, *see, e.g.*, *Cohen*, 252 F. Supp. 3d at 159–60, the Supreme Court has held that the focus of statutory provisions should not be assessed "in a vacuum," *WesternGeco*, 138 S. Ct. at 2137, suggesting that this Court should look to the focus of the CDA as a whole, *cf*. *Morrison*, 561 U.S. at 266–70 (analyzing text and statutory context to determine entire Exchange Act's focus). After determining the focus, courts consider where the events "relevant to the statute's focus" occurred. *RJR Nabisco*, 136 S. Ct. at 2101. If those events occurred abroad, the application of the statute is impermissibly extraterritorial. *Morrison*, 561 U.S. at 268. ("[I]t is the foreign location of the [event] that establishes (or reflects the presumption of) the Act's inapplicability . . . ."). Here, whether this Court considers the focus of § 230(c) or the CDA as a whole, the events relevant to the focus of the statute occurred abroad. Therefore, the application of CDA immunity to Appellant's claims is impermissibly extraterritorial.

a. The events underlying the focus of the entire CDA occurred in Haprusa, rendering an application of the CDA impermissibly extraterritorial.

Applying the tools of statutory interpretation, the focus of the full CDA is preventing vulnerable populations from being exposed to explicit content on the Internet. *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016); *see also* David S. Ardia, *Free Speech Savior or*

Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act, 43 LOY. L.A. L. REV. 373, 409 (2010) (noting that goal of CDA was to protect vulnerable populations from "harmful material on the Internet"). The text of the CDA indicates that Congress enacted the statute to regulate "Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities." *See* Communications Decency Act of 1996, Pub. L. No. 104-104, Title V, Subtitle A, 110 Stat. 56 (1996). Furthermore, the legislative history underlying the CDA demonstrates that Congress purposefully designed the statute to "increase the penalties" for the communication of obscene content. S. REP. NO. 104-23, at 9 (1996); *see also* H.R. REP. NO. 104-458, at 81–91 (1996); S. REP. NO. 104-230, at 187–96 (1996); 141 CONG. REC. S1953 (daily ed. Feb. 1, 1996) ("[T]he information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.") (statement of Sen. Exon).

In light of the text and legislative history of the CDA, this Court should consider the events relevant to the focus of the CDA to be the viewing of objectionable or dangerous content on the Internet. The viewing of HFF's page is the relevant event in this case. This event occurred abroad, in Haprusa, because HFF's page contained content

that, by its violently nationalist nature, was uniquely objectionable and dangerous *in Haprusa*. HFF's rhetoric and violence exclusively targeted refugees and immigrants *in Haprusa*. *See* J.A. 13–15. Since the event relevant to the focus of the CDA occurred abroad, the application of the CDA to Appellant's claims would be impermissibly extraterritorial.

b. Even if this Court confines its analysis to § 230(c), an application of § 230(c) to these events would also be impermissibly extraterritorial.

Courts have held that the focus of § 230(c) is limiting civil liability for Internet companies. *See Cohen*, 252 F. Supp. 3d at 159–60. However, when a statute does not itself create a cause of action, courts look to the underlying claim in order to determine the events relevant to the focus. *See Mastafa v. Chevron Corp.*, 770 F.3d 170, 184 (2d Cir. 2014); *cf. Smith v. United States*, 507 U.S. 197, 204 (1993) (holding that application of Federal Tort Claims Act waiver of immunity to underlying tort claim that occurred in Antarctica would be impermissible extraterritorial application of statute). Because § 230(c) itself does not provide a cause of action, 47 U.S.C. § 230, this Court must look to the underlying claims—here, the claims arising under the ATA.

Other courts have considered similar issues in the context of the Alien Torts Statute ("ATS"), a jurisdictional statute that likewise provides no cause of action. *See Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 192 (5th Cir. 2017); *Mastafa*, 770 F.3d at 184. As a result

of this statutory structure, courts have instead relied on the statute's underlying claims that arise under the law of nations. *See Adhikari*, 845 F.3d at 195. In *Adhikari v. Kellogg Brown & Root, Inc.*, Nepalese citizens sued military contractors, alleging that a scheme to traffic and subject plaintiffs to forced labor in Nepal, Jordan, and Iraq violated the law of nations. *See* 845 F.3d 184, 195 (5th Cir. 2017). In determining whether the application of the ATS was impermissibly extraterritorial, the court looked to the location of events underlying the claim, the violation of the law of nations. *See id.*

Like the ATS, § 230(c) does not provide a cause of action, and therefore, this court should examine the underlying claim, a violation of the ATA, to determine the events relevant to liability. Under the text of the ATA, liability attaches when an American national is "injured . . . by reason of an act of international terrorism." 18 U.S.C. § 2333 (2018). Therefore, the event relevant to the focus of § 230 is the act of terrorism that generates liability under the ATA. Here, the act of terrorism, the Oblinsk Attack, occurred in a foreign country, Haprusa. *See* J.A. at 15. Because the relevant event occurred outside the United States, applying the CDA in this case would be impermissibly extraterritorial.

Applying this logic, this Court should reject the *Cohen v. Facebook, Inc.* court's conclusion that the event relevant to the focus of § 230(c) is the filing of litigation, 252 F. Supp. 3d 140, 160 (E.D.N.Y.

2017), because this interpretation contravenes the presumption against extraterritoriality. In *Cohen*, the district court reasoned that the location of the relevant events "must be where redress is sought and immunity is needed." *Id.* However, this reasoning is misguided because it would lead to the application of § 230(c) immunity in all cases. Defendants would receive immunity, even in cases in which there was no domestic tortious conduct, solely because the case was filed in the United States. This would be an absurd result: the filing of a lawsuit cannot be a sufficient event to overcome the presumption against extraterritoriality. *Cf. Morrison*, 561 U.S. at 266 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."). As a result, this court should reject the *Cohen* court's erroneous conclusion. The events underlying the focus of § 230(c) occurred abroad, and therefore immunity cannot be invoked.

3. It would contravene Congressional intent to extend CDA immunity extraterritorially.

Given the presumption against extraterritoriality, courts generally exercise restraint in applying domestic laws outside the United States. *See Morrison*, 561 U.S. at 261. This restraint is grounded in the principle of separation of powers, as courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542

U.S. 692, 727 (2004). Congress is fully capable of indicating its intentions for statutes to apply abroad. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."). In the context of the statutes at issue, Congress was clear that it wanted the ATA to apply to events that occurred abroad, 18 U.S.C. § 2339B (2018), while it was equally clear that it did not want the CDA to apply to events that occurred abroad, *Cohen*, 252 F. Supp. 3d at 159. The application of the ATA abroad and the CDA domestically was intentional.

Further, granting CDA immunity in this case would limit the ATA's extraterritorial application, thereby virtually eliminating liability for parties like Appellee for terrorist attacks that occurred abroad. This is precisely what Congress did not intend. If Congress had wanted to limit liability in cases like the present case, it could have and should have done so while drafting or amending either statute. As a result, this court should find that the CDA does not shield terrorism supporters from liability under the ATA.

Therefore, this Court should hold that the CDA does not bar Appellant's claims.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court.

February 11, 2019

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APPENDICES

Statutory Provisions

18 U.S.C. § 2331. Definitions.

As used in this chapter--

(1) the term "international terrorism" means activities that--

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;

(3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property;

(4) the term "act of war" means any act occurring in the course of--

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin;

(5) the term "domestic terrorism" means activities that--

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended--

(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States; and

(6) the term "military force" does not include any person that--

(A) has been designated as a--

(i) foreign terrorist organization by the Secretary of State under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189); or
(ii) specially designated global terrorist (as such term is defined in section 594.310 of title 31, Code of Federal Regulations) by the Secretary of State or the Secretary of the Treasury; or

(B) has been determined by the court to not be a "military force".

18 U.S.C. § 2333. Civil remedies.

(a) Action and jurisdiction.--Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

(b) Estoppel under United States law.--A final judgment or decree rendered in favor of the United States in any criminal proceeding under section 1116, 1201, 1203, or 2332 of this title or section 46314, 46502, 46505, or 46506 of title 49 shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(c) Estoppel under foreign law.--A final judgment or decree rendered in favor of any foreign state in any criminal proceeding shall, to the extent that such judgment or decree may be accorded full faith and credit under the law of the United States, estop the defendant from

denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(d) Liability.--

> (1) Definition.--In this subsection, the term "person" has the meaning given the term in section 1 of title 1.
>
> (2) Liability.--In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

(e) Use of blocked assets to satisfy judgments of U.S. nationals.--For purposes of section 201 of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note), in any action in which a national of the United States has obtained a judgment against a terrorist party pursuant to this section, the term "blocked asset" shall include any asset of that terrorist party (including the blocked assets of any agency or instrumentality of that party) seized or frozen by the United States under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b)).

18 U.S.C. 2339A. Providing material support to terrorists.

(a) Offense.--Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section

46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) Definitions.--As used in this section--

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

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

18 U.S.C. § 2339B. Providing material support or resources to designated foreign terrorist organizations.

(a) Prohibited activities.--

(1) Unlawful conduct.--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have

knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(2) Financial institutions.--Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall--

(A) retain possession of, or maintain control over, such funds; and

(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) Civil penalty.--Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of--

(A) $50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

(c) Injunction.--Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

(d) Extraterritorial jurisdiction.--

(1) In general.--There is jurisdiction over an offense under subsection (a) if--

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) Extraterritorial jurisdiction.--There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Investigations.--

(1) In general.--The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

(2) Coordination with the Department of the Treasury.--The Attorney General shall work in coordination with the Secretary in investigations relating to--

(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

(B) civil penalty proceedings authorized under subsection (b).

(3) Referral.--Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

(f) Classified information in civil proceedings brought by the United States.--

(1) Discovery of classified information by defendants.--

(A) Request by United States.--In any civil proceeding under this section, upon request made ex parte and in

writing by the United States, a court, upon a sufficient showing, may authorize the United States to--

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Order granting request.--If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(C) Denial of request.--If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

(2) Introduction of classified information; precautions by court.--

(A) Exhibits.--To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

(B) Determination by court.--The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

(3) Taking of trial testimony.--

(A) Objection.--During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) Action by court.--In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including--

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

(C) Obligation of defendant.--In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

(4) Appeal.--If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

(5) Interlocutory appeal.--

(A) Subject of appeal.--An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court--

(i) authorizing the disclosure of classified information;

(ii) imposing sanctions for nondisclosure of classified information; or

(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.

(B) Expedited consideration.--

(i) In general.--An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

(ii) Appeals prior to trial.--If an appeal is of an order made prior to trial, an appeal shall be taken not later than 14 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

(iii) Appeals during trial.--If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--

(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial, excluding intermediate weekends and holidays;

(II) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(III) shall render its decision not later than 4 days after argument on appeal, excluding intermediate weekends and holidays; and

(IV) may dispense with the issuance of a written opinion in rendering its decision.

(C) Effect of ruling.--An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

(6) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

(g) Definitions.--As used in this section--

(1) the term “classified information” has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);
(2) the term “financial institution” has the same meaning as in section 5312(a)(2) of title 31, United States Code;
(3) the term “funds” includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;
(4) the term “material support or resources” has the same meaning given that term in section 2339A (including the definitions of “training” and “expert advice or assistance” in that section);
(5) the term “Secretary” means the Secretary of the Treasury; and
(6) the term “terrorist organization” means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

(h) Provision of personnel.--No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

(i) Rule of construction.--Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

(j) Exception.--No person may be prosecuted under this section in connection with the term “personnel”, “training”, or “expert advice or assistance” if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be

used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

47 U.S.C. § 230. Protection for private blocking and screening of offensive material.

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals,

families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer

with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a

violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4)Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.