Court of Appeals Case No. 16-17165

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAMARA FIELDS, et al.,

Plaintiffs-Appellants,

v.

TWITTER, INC.,

Defendant-Appellee.

Appeal from the United States District Court
Northern District of California
District Court No. 3:16-cv-00213-WHO
The Honorable William H. Orrick

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1)

Plaintiffs-Appellants have no corporate interests or affiliations to disclose.

Dated: March 31, 2017

Respectfully submitted,

BURSOR & FISHER, P.A.

s/ L. Timothy Fisher
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Plaintiffs-Appellants Tamara Fields, on behalf of herself and as a representative of the Estate of Lloyd Fields, Jr., Heather Creach, on behalf of herself and as a representative of the Estate of James Damon Creach, J.C. (1), a minor, and J.C. (2), a minor ("Plaintiffs-Appellants" or "Appellants") appeal from the Judgment of the United States District Court for the Northern District of California (Hon. William H. Orrick) entered on November 18, 2016, and reflected in an Order of that same day, in which the District Court granted with prejudice the Motion To Dismiss of Defendant-Appellee Twitter, Inc. ("Twitter" or "Defendant-Appellee"). *See* Appellants' Excerpts of Record ("AER") at 7-26. Because the District Court erred in granting the Motion To Dismiss, this Court should reverse the District Court's Order and Judgment.

INTRODUCTION

Plaintiffs-Appellants are the surviving family members of Lloyd "Carl" Fields, Jr. and James Damon Creach, two United States citizens killed by an ISIS[1] operative in Amman, Jordan on November 9, 2015. They seek to hold Twitter responsible for knowingly providing material support to ISIS in violation of the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.* ("ATA").

That Twitter violated the ATA is essentially beyond dispute; it is a matter of

[1] The Islamic State of Iraq and Syria ("ISIS") is also known as the Islamic State of Iraq and the Levant ("ISIL"), the Islamic State ("IS"), ad-Dawlah al-Islāmiyah fīl-ʿIrāq wash-Shām ("DAESH") and al-Qaeda in Iraq ("AQI").

public record that Defendant-Appellee provided ISIS with material support in the form of Twitter accounts and did so knowingly and/or recklessly. Nevertheless, the District Court held that Plaintiffs-Appellants' claims are barred pursuant to the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA") because they seek to treat Twitter liable as a publisher. This decision was made in error. Plaintiffs-Appellants' claims are not premised on the dissemination of offensive user-generated content, but rather the provision of Twitter accounts to ISIS in the first place. Indeed, Plaintiffs-Appellants' allegations do not rely on user-generated content at all except for purposes of demonstrating causation, and that is not sufficient to invoke the protections of the CDA. Nor can the provision of Twitter accounts itself be deemed publishing activity given that such activity is content-neutral. The CDA also does not bar Plaintiffs-Appellants' claims insofar as they are based on private communications that were not published.

The District Court also dismissed Plaintiffs-Appellants' claims for failing to adequately allege proximate causation. This too was in error. The District Court focused on the lack of an alleged direct connection between the provision of Twitter accounts to ISIS and the November 9, 2015 attack, but proximate causation under the ATA has no "directness" requirement. This is because material support to terrorists is fungible: any type of support can help a terrorist organization carry out additional attacks. Accordingly, Plaintiffs-Appellants adequately alleged

proximate causation because they claimed that (1) Twitter provided material support to ISIS, and (2) ISIS shortly thereafter carried out a terrorist attack in which one of its operatives killed Mr. Fields and Mr. Creach. Courts interpreting the ATA have not required anything more.

STATEMENT OF JURISDICTION
(Fed. R. App. P. 28; Ninth Circuit Rule 28-2.2)

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 2333(a) as a civil action brought by a citizen of the United States injured by reason of an act of international terrorism and the estate, survivor, or heir of a United States citizen injured by reason of an act of international terrorism. AER at 28.

The Court of Appeals has jurisdiction over this matter because Plaintiffs-Appellants are appealing a final decision of the District Court. 28 U.S.C. § 1291.

Plaintiffs-Appellants timely appealed on November 23, 2016 from the District Court's final Order and Judgment of November 18, 2016, which disposed of all of their claims. AER at 7-26.

ISSUES PRESENTED AND STANDARD OF REVIEW
(Fed. R. App. P. 28; Ninth Circuit Rule 28-2.5)

(1) **Issue:** Whether a theory of liability based on the provision of Twitter accounts to a designated terrorist organization seeks to treat the defendant as

a "publisher" for purposes of the Communications Decency Act, 47 U.S.C. § 230(c).

Standard Of Review: "[The Ninth Circuit] review[s] de novo the district court's grant of a motion to dismiss, construing all facts in the light most favorable to the non-moving party." *Zinni v. Jackson White, PC*, 2014 WL 1101222, at *1 (9th Cir. 2014).

(2) **Issue:** Whether a theory of liability based on the provision of private messaging tools to a designated terrorist organization seeks to treat the defendant as a "publisher" for purposes of the Communications Decency Act, 47 U.S.C. § 230(c).

Standard Of Review: "[The Ninth Circuit] review[s] de novo the district court's grant of a motion to dismiss, construing all facts in the light most favorable to the non-moving party." *Zinni v. Jackson White, PC*, 2014 WL 1101222, at *1 (9th Cir. 2014).

(3) **Issue:** Whether the lower court erred in holding that Plaintiffs-Appellants failed to adequately allege proximate causation.

Standard Of Review: "[The Ninth Circuit] review[s] de novo the district court's grant of a motion to dismiss, construing all facts in the light most favorable to the non-moving party." *Zinni v. Jackson White, PC*, 2014 WL 1101222, at *1 (9th Cir. 2014).

STATEMENT OF THE CASE
(Fed. R. App. P. 28)

For years, Twitter knowingly and/or recklessly provided ISIS with accounts on its social network. AER at 28. Through this provision of material support, Twitter enabled ISIS to acquire the resources needed to carry out numerous terrorist attacks. *Id.* One of these terrorist attacks took place on November 9, 2015 when an ISIS operative in Amman, Jordan shot and killed Lloyd "Carl" Fields, Jr. and James Damon Creach. *Id.*

I. TWITTER PROVIDED ACCOUNTS TO ISIS

ISIS was designated as a Foreign Terrorist Organization ("FTO") under Section 219 of the Immigration and Nationality Act, as amended, on December 17, 2004. *Id.* at 30. Since its emergence in Iraq in the early 2000s, when it was known as AQI, ISIS has wielded increasing territorial power, applying brutal, terrifying violence to attain its military and political goals, including summary executions, mass beheadings, amputations, shootings and crucifixions. *Id.* at 29-30. Originally affiliated with al Qaeda, ISIS's stated goal is the establishment of a transnational Islamic caliphate, i.e. an Islamic state run under strict Sharia law. *Id.* at 29. By February 2014, however, ISIS's tactics had become too extreme for even al Qaeda and the two organizations separated. *Id.*

Despite all this, Twitter has provided ISIS with dozens of accounts on its social network since 2010. *Id.* at 29-30. For years, Twitter permitted ISIS to

maintain its official accounts unfettered and, until recently, the number of ISIS accounts on Twitter grew at an astonishing rate. *Id* at 29. These official accounts included media outlets, regional hubs and well-known ISIS members, some with tens of thousands of followers. *Id.* For example, Twitter permitted Al-Furqan, ISIS's official media arm, to maintain an account with 19,000 followers. *Id.* Likewise, Al-Hayat Media Center, ISIS's official public relations group, maintained at least a half dozen accounts. *Id.* As of June 2014, Al-Hayat had nearly 20,000 followers. Another Twitter account, @ISIS_Media_Hub, had 8,954 followers as of September 2014. *Id.* As of December 2014, ISIS had an estimated 70,000 Twitter accounts, at least 79 of which were "official." *Id.*

II. TWITTER PROVIDED DIRECT MESSAGING CAPABILITIES TO ISIS

Twitter also provided material support to ISIS in the form of direct messaging capabilities, which ISIS often used to attract recruits from Western countries. *Id.* at 33-34. As described by Defendant-Appellee, "Direct Messages are the private side of Twitter. . . . Communicate quickly and privately with one person or many. Direct Messages support text, photos, links, emoji and Tweets, so you can make your point however you please. . . . Have a private conversation with anyone on Twitter, even a friend of a friend. Direct messages can only be seen between the people included." *Id.*

These Direct Messages are "extensively monitored by [ISIS's] emirs and supervisors of the recruiting unit." *Id.* at 34. According to FBI Director James Comey, "[o]ne of the challenges in facing this hydra-headed monster is that if (ISIS) finds someone online, someone who might be willing to travel or kill . . . they will begin a [T]witter direct messaging contact." *Id.* Indeed, according to the Brookings Institution, some ISIS members "use Twitter purely for private messaging or covert signaling." *Id.* ISIS has also been known to use Twitter's Direct Messaging capabilities for fundraising and operational purposes. *Id.*

Twitter's Direct Messaging capabilities also permit ISIS operatives to receive private communications without ever issuing a single tweet. *Id.* Through its Direct Messaging tool, Twitter enables ISIS members to receive private Direct Messages from potential recruits, terrorist financiers and other terrorists with operational and intelligence information. *Id.* Giving ISIS the capability to send and receive Direct Messages in this manner is no different than handing it a satellite phone, walkie-talkies or the use of a mail drop, all of which terrorists use for private communications in order to further their extremist agendas. *Id.*

III. TWITTER ACTED KNOWINGLY AND RECKLESSLY

For years, the media has reported on the use of Twitter by ISIS and other terrorist groups:

- In December 2011, the New York Times reported that the terrorist

group al-Shabaab, "best known for chopping off hands and starving their own people, just opened a Twitter account." *Id.* at 30.

- That same month, terrorism experts cautioned that "Twitter terrorism" was part of "an emerging trend" and that several branches of al Qaeda were using Twitter. *Id.*

- On August 18, 2013, USA Today reported on "the Twitter feed of pro-Islamic State of Iraq and the Levant (ISIS)." *Id.*

- On October 14, 2013, the BBC issued a report on "The Sympatic," "one of the most important spokesmen of the Islamic State of Iraq and the Levant on the social contact website Twitter." *Id.*

- On October 31, 2013, Agence France-Presse reported on ISIS accounts on Twitter. *Id.*

- On June 19, 2014, CNN reported on ISIS's use of Twitter. The next day, Seth Jones, Associate Director at International Security and Defense Policy Center, stated in an interview on CNN that Twitter was widely used by terrorist groups like ISIS. *Id.*

- In September 2014, Time Magazine quoted terrorism expert Rita Katz, who observed that, "[f]or several years, ISIS followers have been hijacking Twitter . . . with very little to no interference at all. . . . Twitter's lack of action has resulted in a strong, and massive pro-ISIS presence on their social media platform." *Id.* at 30-31.

Throughout this period, both the U.S. government and the public at large have urged Twitter to stop providing its services to terrorists.

- In December 2011, an Israeli law group threatened to file suit against Twitter for allowing terrorist groups like Hezbollah to use its social network in violation of U.S. anti-terrorism laws. *Id.* at 31.

- In December 2012, several members of Congress wrote to FBI Director Robert Mueller asking the Bureau to demand that the Twitter block the accounts of various terrorist groups. *Id.*

- In a committee hearing held on August 2, 2012, Rep. Ted Poe, chair

of the House Foreign Affairs Subcommittee on Terrorism, lamented that "when it comes to a terrorist using Twitter, Twitter has not shut down or suspended a single account." "Terrorists are using Twitter," Rep. Poe added, and "[i]t seems like it's a violation of the law." In 2015, Rep. Poe again reported that Twitter had consistently failed to respond sufficiently to pleas to shut down clear incitements to violence by terrorists. *Id.*

- Former Secretary of State Hillary Clinton has urged Twitter to become more aggressive in preventing ISIS from using its network. "Resolve means depriving jihadists of virtual territory, just as we work to deprive them of actual territory," she told one audience. *Id.*

- On January 7, 2016, White House officials announced that they would hold high-level discussions with Twitter and other social media companies to encourage them "to do more to block terrorists" from using their services. "The primary purpose is for government officials to press the biggest Internet firms to take a more proactive approach to countering terrorist messages and recruitment online. . . . That issue has long vexed U.S. counterterrorism officials . . . [b]ut the companies have resisted some requests by law-enforcement leaders to take action . . . ." *Id.*

Twitter responded to these public appeals by acknowledging that ISIS was using its social network, but it nevertheless refused to act. *Id.* at 31-32.

IV. TWITTER PROXIMATELY CAUSED PLAINTIFFS-APPELLANTS' INJURIES

Without Twitter, the explosive growth of ISIS over the last few years into the most-feared terrorist group in the world would not have been possible. *Id.* at 120. Twitter has played a key role in enabling ISIS to recruit new members, fundraise millions of dollars and spread its propaganda. *Id.* at 33-38. Through Twitter, ISIS was able to amass considerable resources that it used to carry out

countless terrorist attacks. One of those attacks was the shooting of Lloyd "Carl" Fields, Jr. and James Damon Creach.

Mr. Fields and Mr. Creach were former police officers who were training law enforcement personnel at the International Police Training Center ("IPTC") in the Muwaqqar district of southeast Amman, Jordan. *Id.* at 39. On November 15, 2015, Anwar Abu Zaid, one of the men studying at the IPTC, entered the facility smuggling a Kalashnikov assault rifle with 120 bullets and two handguns. *Id.* at 40-41. After the noontime prayer, Abu Zaid shot a truck that was moving through the facility, killing Damon Creach. *Id.* at 41. Abu Zaid then entered the facility's cafeteria where he killed an additional four people eating lunch, including Carl Fields. *Id.* ISIS claimed responsibility for the attack in two separate statements. *Id.* Israeli military intelligence later released a report stating that Abu Zaid was part of a clandestine ISIS terror cell that was also responsible for a suicide attack near Mosul, Iraq in 2015 and a shooting at the Sarona Market in Tel Aviv. *Id.*

V. STATUTORY FRAMEWORK

A. The Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.*

The ATA prohibits intentionally, knowingly or recklessly providing any type of "material support or resources" to terrorists, including "any property, tangible or intangible, or service" such as "communications equipment." 18 U.S.C. §§ 2339A(b)(1); 2339B(g)(4). Congress purposefully defined "material

support or resources" in a broad fashion because providing any assistance to terrorists frees up resources that they can use for their criminal and violent activities. Even the provision of seemingly benign services (like social network accounts) bolsters a terrorist organization's efficacy and strength in a community, thus undermining this nation's efforts to delegitimize and weaken these groups.

Anyone who violates the ATA's criminal material support provisions may be held liable under the statute's private right of action, which provides the following:

> 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.

18 U.S.C. § 2333(a). The legislative history of the ATA's civil remedy indicates that it "was to be construed broadly," and, in the words of Senator Grassley, the bill's co-sponsor, "it empowers victims with **all** the weapons available in civil litigation." *Estates of Ungar ex rel. Strachman v. Palestinian Authority*, 304 F. Supp. 2d 232, 265 (D.R.I. 2004) (original emphasis).

B. The Communications Decency Act Of 1996, 47 U.S.C. § 230

Section 230(c)(1) of the CDA provides the following:

> **(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.

Separated into its elements, subsection (c)(1) precludes liability for "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a . . . cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009) (footnote omitted). "Thus, section 230(c)(1) precludes liability that treats a website as the publisher or speaker of information users provide on the website. In general, this section protects websites from liability for material posted on the website by someone else." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016).

While the CDA bars claims that seek to treat defendants as a publisher or speaker, it does not declare "a general immunity from liability deriving from third-party content." *Barnes*, 570 F.3d at 1100. Nor was it "meant to create a lawless no-man's-land on the Internet." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008). And "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user

content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Internet Brands*, 824 F.3d at 853.

VI. PROCEDURAL HISTORY

Plaintiff-Appellant Tamara Fields originally filed suit on January 13, 2016 and then filed a First Amended Complaint ("FAC") on March 24, 2016 to add the Creach family as additional plaintiffs. AER at 47. Defendant-Appellee moved to dismiss the FAC on April 6, 2016 and that motion was granted on August 10, 2016 with leave to amend. *Id.* at 49, 51. Plaintiffs-Appellants filed a Second Amended Complaint ("SAC") on August 30, 2016, and Defendant-Appellee moved to dismiss the SAC on September 13, 2016. *Id.* at 27, 51. Oral argument on that motion was heard on November 9, 2016. *Id.* at 35. On November 18, 2016, the District Court granted Defendant-Appellee's motion to dismiss the SAC, dismissed the case and a final judgment was entered. *Id.* at 7-26. Plaintiffs-Appellants filed a Notice Of Appeal on November 23, 2016. *Id.* at 1.

SUMMARY OF THE ARGUMENT
(Fed. R. App. P. 28)

The District Court erred in dismissing Plaintiffs-Appellants' claims. First, claims based on the provision of Twitter accounts to ISIS do not implicate the protections of the CDA because they do not seek to hold Twitter liable as a publisher or speaker of content. Plaintiffs-Appellants' claims arise from Twitter's provision of social media accounts to ISIS, not editorial decisions about specific

tweets. Plaintiffs-Appellants allege that Twitter knew that ISIS was using its social network not through the content of tweets, but from entirely external sources. Indeed, the contents of ISIS's tweets are only referenced in the SAC for purposes of alleging causation and thus do not implicate the CDA.

Second, Plaintiffs-Appellants' private messaging theory of liability does not implicate the CDA because it involves only private messages that were never published. The CDA itself does not define the term "publisher," and so its ordinary meaning must be used: "one who disseminates information to the public." Because private messages are not published, the CDA does not apply to claims that arise out of such messages. While the CDA may have been passed with defamation law in mind—where information can be "published" to just one person—the CDA itself does not contain any such definition.

Finally, the District Court incorrectly applied the standard for proximate causation. Courts throughout the country have held that there is no "directness" requirement for proximate causation under the ATA. Any provision of material support to a terrorist organization facilitates its terrorist activities. Here, the provision of Twitter accounts enabled ISIS to raise funds and recruit new operatives which it used to carry out numerous terrorist attacks. One of those attacks was the November 9, 2015 shooting in Amman, Jordan in which Mr. Fields and Mr. Creach were killed. This is enough for proximate causation under the

ATA.

ARGUMENT
(Fed. R. App. P. 28)

I. ISSUE 1: A THEORY OF LIABILITY BASED ON THE PROVISION OF TWITTER ACCOUNTS TO A DESIGNATED TERRORIST ORGANIZATION DOES NOT SEEK TO TREAT THE DEFENDANT AS A "PUBLISHER" FOR PURPOSES OF THE COMMUNICATIONS DECENCY ACT, 47 U.S.C. § 230(c)

In its November 18, 2016 Order, the District Court held that Plaintiffs-Appellants' claims were barred by the CDA because: (1) "providing accounts to ISIS is publishing activity, just like monitoring, reviewing and editing content," and (2) the allegations "at their core . . . are still that Twitter knowingly failed to prevent ISIS from disseminating content through the Twitter platform, not its mere provision of accounts to ISIS." AER at 15, 17-18. Respectfully, these conclusions are both erroneous. The decision to provide ISIS with a Twitter account is wholly distinct from policing the content of ISIS's tweets. Indeed, the account creation process is antecedent to the issuing of tweets and entirely content-neutral. All references to user-generated content in the SAC are limited to the issue of causation and thus do not implicate the CDA.

A. The Provision Of Social Media Accounts Is Not Publishing Activity

For purposes of the CDA, "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content."

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009); *id.* (A publisher is one who "reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it."); *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) ("Jane Doe's failure to warn claim has nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user generated content.").

Providing ISIS with Twitter accounts is not publishing activity under these definitions because it does not involve reviewing, editing or deciding whether to issue or withdraw tweets. Deciding whether someone can sign up for a Twitter account is not the same thing as deciding what content can be published; handing someone a tool is not the same thing as supervising the use of that tool. The CDA bars claims based on the latter, but the theory of liability in this case is based solely on the former. Twitter's knowing provision of accounts to ISIS is itself a violation of the ATA regardless of what content is issued from those accounts or whether they are used to tweet at all. Social media account creation and content creation are two distinct activities.

Nevertheless, the District Court reasoned that the provision of social media accounts is akin to traditional publishing activities:

> A policy that selectively prohibits ISIS members from opening accounts would necessarily be content based as Twitter could not possibly identify ISIS members without

> analyzing some speech, idea or content expressed by the would-be account holder: i.e. "I am associated with ISIS." The decision to furnish accounts would be content-neutral if Twitter made no attempt to distinguish between users based on content – for example if they prohibited everyone from obtaining an account, or they prohibited every fifth person from obtaining an account. But plaintiffs do not assert that Twitter should shut down its entire site or impose an arbitrary, content-neutral policy. Instead, they ask Twitter to specifically prohibit ISIS members and affiliates from acquiring accounts – a policy that necessarily targets the content, ideas, and affiliations of particular account holders. There is nothing content-neutral about such a policy.

AER at 16; *id.* (a decision based on a public user name is likewise a publishing decision based on content). Respectfully, this analysis is flawed on several counts. First, it does not accept as true the facts alleged in the SAC. Plaintiffs-Appellants do not contend that Twitter's knowledge was based on its review of tweets, or usernames, or any other user-generated content found on its social media platform. Rather, they allege that Twitter knew through numerous media reports and communications from government officials that ISIS was using its social network. *Id.* at 29-33.

Second, Plaintiffs-Appellants *are* asserting a content-neutral policy: Twitter should not provide anyone with an account if it knows from external sources that that person appears on the U.S. Treasury Department's list of Specially Designated Nationals And Blocked Persons. This distinction is status-

based, not content-based. Indeed, this policy does not depend on the content of tweets at all; it is a violation of the ATA to provide a Twitter account to a member of a designated terrorist organization whether they use that account to spread propaganda or to post knitting lessons. The District Court conflated content- and status-based policies when it considered decisions based on "affiliations" as akin to those based on the expression of "ideas." But a status-based distinction has nothing whatsoever to do with the content of tweets when knowledge is based on external sources.

The District Court also held that, based on the decision in *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), "decisions about the structure and operation of a website are content-based decisions." AER at 17. But *Backpage* is distinguishable. There, the plaintiff alleged that Backpage.com was aiding human trafficking in the way that it constructed its website. The First Circuit found that despite being framed as a claim about the structure and operation of the site, the claim was really about what specific content would be published, including whether phone numbers would be displayed, whether email addresses would anonymized and whether photographs should have been stripped of their metadata. *Backpage.com*, 817 F.3d at 20. Accordingly, the focus of the claims was really about what user-generated content could "appear on the website and in what form." *Id.* at 21; *id.* at 20 ("[S]ome of the challenged practices—most

obviously, the choice of what words or phrases can be displayed on the site—are traditional publisher functions under any coherent definition of the term.").

Here, on the other hand, Plaintiffs-Appellants' claims are not tied to user-generated content in the same fashion. Indeed, apart from the causal chain, they are not dependent on content at all. Whereas the claims in *Backpage.com* were directly related to what user-generated content would appear and in what form, as well as word choices and phrases, Plaintiffs-Appellants' claims in this action are not similarly tied to content. Creating an account on Twitter does not involve any of these content-based decisions. Nor are Plaintiffs-Appellants' claims based on the structure and operation of Twitter.com; they do not claim that Twitter should have built it website differently, but that it should not have knowingly provided ISIS with access to accounts on the site at all. That was not the issue *Backpage.com*.

B. Plaintiffs-Appellants' Allegations Are Not Content-Based

The District Court also held that Plaintiffs-Appellants' provision of accounts theory is barred by the CDA because "at their core, plaintiff's allegations are still that Twitter knowingly failed to prevent ISIS from disseminating content through the Twitter platform, not its mere provision of accounts to ISIS." AER at 17-18. Respectfully, this decision was made in error. To the extent that user-generated content is referenced at all in the SAC, it is solely for purposes of demonstrating

causation. Under the precedent of this Court, references to content used solely for purposes of alleging causation are not sufficient to invoke the protections of the CDA.

All of the content-based allegations in the SAC are strictly limited to Section III, titled "TWITTER PROXIMATELY CAUSED PLAINTIFFS' INJURIES." AER at 33-38. Because this Court has repeatedly held that the CDA does not bar claims simply because publishing activity is part of the causal analysis, these references to ISIS's tweets do not implicate Section 230.

In *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), the plaintiff brought a negligent failure to warn claim based on her allegation that defendant knew rapists were using its website to lure victims. The Ninth Circuit ruled that the CDA did not apply despite the fact that Internet Brands' publishing activity "could be described as a 'but-for' cause of [plaintiff's] injuries." *Id.* at 853.

> Publishing activity is a but-for cause of just about everything Model Mayhem is involved in. It is an internet publishing business. Without publishing user content, it would not exist. As noted above, however, we held in *Barnes* that the CDA does not provide a general immunity against all claims derived from third-party content.

Id. Because the failure to warn claim did not depend on user-generated content outside of the causal analysis, the CDA was not a bar to relief.

The Ninth Circuit reached a similar conclusion in *Barnes v. Yahoo!, Inc.*,

570 F.3d 1096, 1102 (9th Cir. 2009). In that case, the plaintiff filed a promissory estoppel claim against defendant Yahoo because she had relied on Yahoo's promise that it would remove private information and photographs that her ex-boyfriend had posted. *Id.* at 1098-99. Yahoo's failure to remove the offensive profile was a but-for cause of plaintiff's injury "because without that posting the plaintiff would not have suffered any injury. But that did not mean that the CDA immunized the proprietor of the website from all potential liability." *Internet Brands*, 824 F.3d at 853. Even though the causal chain required reference to published content, the CDA did not apply because the theory of liability was otherwise not based on Yahoo's publishing functions.

These cases stand for the proposition that where a theory of liability relies on user-generated content purely for purposes of alleging causation, but otherwise does not depend on content as a critical element, the CDA does not apply. Here, Sections I and II of the SAC, which explain that Defendant-Appellee violated the ATA because it knowingly and/or recklessly provided ISIS with Twitter accounts, do not rely on or refer to user-generated content. AER at 29-33. Rather, all references to content in the SAC are limited to allegations of causation. *Id.* at 33-38. Under the law as stated in *Internet Brands* and *Barnes*, such references no not give rise to immunity under the CDA.

The District Court distinguished *Internet Brands* and *Barnes* on the basis

that those cases "involve[d] substantially different facts," and, "[u]nlike those cases," Plaintiffs-Appellants' "theory of liability is inherently tied to content." AER at 20. But the District Court's attempt to differentiate the role of user-generated content in this case from its use in *Internet Brands* and *Barnes* does not hold up. Here, just like in *Internet Brands* and *Barnes*, content is referenced solely for purposes of demonstrating causation and not for any other element of the violations alleged. For instance, in *Barnes*, while Yahoo's failure to remove the offensive content caused the plaintiff's injury, the cause of action arose not from that content but from some other action—in that case, the creation of a contract. Similarly, here, while ISIS was able to amass resources through tweets and direct messages, the cause of action arises from the provision of the accounts in the first place in violation of the ATA. Neither case is premised on user-generated content in the way that a defamation case would be. Accordingly, Plaintiffs-Appellants' theory of liability here is not "inherently tied to content" any more than it was in *Internet Brands* and *Barnes*. While this case may not involve promissory estoppel or a failure to warn, the underlying principle of *Internet Brands* and *Barnes*—that references to content for purposes of causation alone do not implicate the CDA—applies with equal force.

C. Barring Plaintiffs-Appellants' Claims Would Not Further The Goals Of The CDA

Barring Plaintiffs-Appellants' claims in this case would not further the purported goals of the CDA. First, in passing the CDA, "Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *id.* at 1033 (Congress was "concern[ed] with assuring a free market in ideas and information on the Internet."). But Congress surely did not intend to promote speech that aids designated terrorist organizations. To the contrary, it expressly prohibited such speech through the ATA's material support provisions. 18 U.S.C. §§ 2339A-B (defining "material support or resources" to include "training, expert advice" and "communications equipment"). Numerous courts have held that that violations of the ATA's material support statutes do not implicate free speech concerns. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (the ATA's prohibition on providing material support to terrorists in the form of legal and political advocacy training is constitutional because such a ban is necessary to further the "[g]overnment's interest in combating terrorism," which "is an urgent objective of the highest order"); *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1194 (9th Cir. 2014) ("There are, of course, certain types of speech that do not fall within the protection of the First Amendment, such as . . . speech that materially

assists a foreign terrorist organization."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003) (holding "as other courts have," that "there is no First Amendment right nor any other constitutional right to support terrorists"). Accordingly, nothing about the allegations in this lawsuit infringe upon Congress's goal of promoting free speech on the Internet. To the contrary, barring Plaintiffs' claims in this case would directly contradict the express language of the ATA and expand the reach of the CDA far beyond its intended purpose.

Nor would allowing this case to go forward have a "chilling effect" on Internet free speech simply because it might "make operating an internet business marginally more expensive." *Internet Brands*, 824 F.3d at 852. "Congress has not provided an all purpose get out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Id.* at 824. Here, at most, liability would deter interactive computer services from *knowingly* providing material support to terrorists.

The District Court believed that Twitter's core business would be crushed absent the protections of the CDA in this case.

> A policy holding Twitter liable for allowing ISIS to use its services would require it to institute new procedures and policies for screening and vetting accounts before

> they are opened; identify and suspend the accounts of users posting pro-ISIS content; and even identify and suspend the accounts of users promoting terrorism through the direct messaging feature. These are not minor obligations, as they would require Twitter to fundamentally change certain aspects of its services and overturn its hands-off content-neutral approach.

AER at 25. This is not true for the simple reason that the ATA has a scienter requirement. If Twitter does not know or have reason to know that a terrorist group is using its social network, it cannot be held liable. It is only in the unique and limited scenario where an interactive computer service *knowingly* provides material support to a designated terrorist group that liability would attach. Accordingly, the view that liability in this case would destroy or fundamentally change Twitter and other social networks is overblown.

Second, Congress enacted the CDA in order "to encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material. . . ." *Batzel*, 333 F.3d at 1028. The CDA was enacted in large part in reaction to the decision in *Stratton Oakmont*, where the court held that Prodigy could be held responsible for libelous statements posted on one of its bulletin boards because it had proactively monitored that forum for offensive content. 1995 WL 323710, at *1-4. But this is not a case that has anything to do with Twitter's efforts, or lack thereof, to edit or remove user generated content. Nothing about this case would discourage "Good Samaritan"

filtering of third party content. Indeed, it defies credulity that a section entitled "Protection For 'Good Samaritan' Blocking And Screening Of Offensive Material" would create immunity for the knowing provision of material support to a terrorist organization. Such an interpretation of the CDA would expand that law far beyond its narrow language and purpose. *Internet Brands*, 824 F.3d at 852 ("[L]iability would not discourage the core policy of section 230(c), 'Good Samaritan' filtering of third party content.").

II. ISSUE 2: A THEORY OF LIABILITY BASED ON THE PROVISION OF PRIVATE MESSAGING TOOLS TO A DESIGNATED TERRORIST ORGANIZATION DOES NOT SEEK TO TREAT THE DEFENDANT AS A "PUBLISHER" FOR PURPOSES OF THE COMMUNICATIONS DECENCY ACT, 47 U.S.C. § 230(c)

In its November 18, 2016 Order, the District Court held that "[p]ublishing activity under section 230(c)(1) extends to Twitter's Direct Messaging capabilities." AER at 23. But Plaintiffs-Appellants' theory of liability based on Twitter's provision of Direct Messaging capabilities to ISIS is not barred by the CDA because Direct Messages are entirely private and not published. The District Court's interpretation of "publisher" conflicts with the ordinary meaning of that word and was thus improper.

The CDA 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). The statute,

however, does not define the term "publisher" and so that word must be given its ordinary meaning. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) ("As in any statutory construction case, '[w]e start, of course, with the statutory text,' and proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'") (quoting *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)); *Cheffins v. Stewart*, 825 F.3d 588, 594 (9th Cir. 2016) ("We adopt the 'common practice of consulting dictionary definitions' to clarify the 'ordinary meaning' of terms used in a statute but not defined therein.") (citing *Johnson v. Aljian*, 490 F.3d 778, 780 (9th Cir. 2007)); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 927 (9th Cir. 2015) ("Because this language is not defined in the statute, we apply its ordinary meaning.") (quotation omitted); *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) ("We apply the fundamental precept of statutory construction that, unless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning.'") (quoting *Perrin*).

The ordinary meaning of "publisher" is one who disseminates information **to**

the public. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("Although the [CDA] does not define 'publisher,' its ordinary meaning is 'one that makes public,' and 'the reproducer of a work intended for public consumption.'") (quoting Webster's Third New International Dictionary 1837 (1981)); *Publish Definition*, merriam-webster.com, http://www.merriam-webster.com/dictionary/publish (last visited Mar. 31, 2017) ("to disseminate to the public"); *Publish Definition*, Dictionary.com, http://www.dictionary.com/browse/publish (last visited Mar. 31, 2017) ("to issue . . . for sale or distribution to the public"; "to issue publicly the work of"; "to make publicly or generally known"); *Publish Definition*, Black's Law Dictionary (2d Pocket Ed.) ("To distribute copies (of a work) to the public."). Accordingly, the CDA does not apply to claims based on purely private communications, including claims based on ISIS's use of Twitter's direct messages.

Despite all this, the District Court applied the definition of "publish" used in defamation law—communication of defamatory matter to one other than the person defamed—because "Congress enacted section 230(c)(1) in part to respond to a New York state court decision finding that an internet service provider could be held liable for defamation based on third-party content posted on its messages boards." AER at 23. But the legislative history behind the CDA is irrelevant in interpreting the term "publisher" because there is no ambiguity in the plain

language of the statute. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (In determining the plain meaning of statutory language, the court must "assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'") (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

While courts have noted that the CDA was enacted in reaction to the decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where an internet service provider could be liable for defamation, Congress did not define "publisher" according to its use in defamation law. Had Congress wanted to incorporate such a definition into the CDA, it surely knew how to do so. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Bauer v. MRAG Americas, Inc.*, 624 F.3d 1210, 1212 (9th Cir. 2010) (same).[2] As the Ninth Circuit has repeatedly warned about the CDA in particular, "we must be careful not exceed the scope of the immunity provided by Congress. Congress could have written the statute more broadly, but it did not." *Internet Brands*, 824 F.3d at 853

[2] Indeed, the CDA itself contains a definition section. 47 U.S.C. § 230(f).

(quoting *Fair Housing Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008)).

In support of its reliance on the CDA's legislative history, the District Court pointed to language from *Barnes*:

> While plaintiffs insist that reference to the legislative history is improper and that "publisher" must be given its normal, ordinary meaning, - "to make public" - the Ninth Circuit has already indicated that section 230(c)(1) extends at least as far as prohibiting internet service providers from being treated as publishers for the purposes of defamation liability. *Barnes*, 570 F.3d at 1101 (the language of the statute *does not limit its application to defamation cases*) (emphasis added). In response to this, plaintiffs assert that "even if Congress had intended that the defamation definition of 'publisher' be applied in defamation cases, it makes no sense to apply that definition outside of the context of defamation claims." Oppo. at 8. But this is contradicted by the Ninth Circuit's statement that "sections 230(c)(1) precludes courts from treating internet service providers as publishers not just for the purposes of defamation law . . . but in general." *Id.*

AER at 23 (original emphasis). Respectfully, the District Court misreads the holding of *Barnes*. *Barnes* indeed states that the application of the CDA is not limited to defamation cases; Plaintiffs-Appellants make no contention to the contrary. But *Barnes* says nothing about how to define "publisher" for purposes of the CDA. The District Court's reading of *Barnes* does not find support in the text of that decision. While the CDA applies outside of the defamation context, it does

not follow that the definition of "publish" used in defamation cases should apply to the CDA.

The District Court also relied on the fact that "a number of courts have applied the CDA to bar claims predicated on a defendant's transmission of nonpublic messages, and have done so without questioning whether the CDA applies in such circumstances." AER at 24. But as the District Court notes, none of these cases actually addressed whether the CDA applies to non-published private communications. That these courts failed to address the issue is not indicative of how they would have decided it, only that the argument was not presented.

In any event, even if Congress intended that defamation definition of "publisher" apply in defamation cases, it makes little sense to use that definition in other contexts. Here, Plaintiffs-Appellants are not seeking to hold Defendant-Appellee liable for the dissemination defamatory material. The ATA has nothing to do with defamation and there is no reason that a definition strictly confined to that area of law should apply to a statute like the ATA designed to prevent the provision of material support to terrorists. Moreover, the threat of the decision in the *Stratton Oakmont* case was that it potentially opened up interactive computer services to tremendous liability due to their outsized readership. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Interactive computer services

have millions of users. . . . The specter of tort liability in an area of such prolific speech would have an obvious chilling effect."). Liability for private communications present no such threat.

III. ISSUE 3: THE LOWER COURT ERRED IN HOLDING THAT PLAINTIFFS-APPELLANTS FAILED TO ADEQUATELY ALLEGE PROXIMATE CAUSATION

In its November 18, 2016 Order, the District Court held that "the allegations in the SAC do not support a plausible inference of proximate causation between Twitter's provision of accounts to ISIS and the death of Fields and Creach" because Plaintiffs-Appellants did not allege that the "attack was in any way impacted, helped by, or the results of ISIS's presence on the social network." AER at 21. Respectfully, the District Court is wrong on the law and misstates Plaintiffs-Appellants' allegations.

Proximate causation is established under the ATA when a defendant's "acts were a substantial factor in the sequence of responsible causation," and the injury at issue "was reasonably foreseeable or anticipated as a natural consequence."[3] *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003)); *Linde v. Arab Bank, PLC*, 97 F.

[3] Notably, the ATA does not require but-for causation. *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 323 (E.D.N.Y. 2015) ("As the only cases to directly address the issue have held, requiring 'but for' causation would effectively annul the civil liability provisions of the ATA. That cannot have been the intent of Congress in

Supp. 3d 287, 328 (E.D.N.Y. 2015) ("The causation charge the Court gave focused solely on whether defendant's acts were a substantial factor in causing plaintiffs' injuries, and whether such injuries were a foreseeable result of those acts."). "A proximate cause determination does not require a jury to identify the liable party as the sole cause of harm; it only asks that the identified cause be a substantial factor in bringing about the injury." *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 508 (E.D.N.Y. 2012) ("*Gill I*") (quoting *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 15 (2d Cir. 2000)).

Importantly, there is no "directness" requirement for proximate causation under the ATA. *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 328 (E.D.N.Y. 2015) ("[P]roposed language [for the jury instructions] concerning the 'directness' of the relation between plaintiffs' injury and defendant's acts was inappropriate in the ATA context."). In cases involving the provision of financial support to terrorist organizations, courts have refused to impose a "directness" requirement for proximate causation under the ATA because money is fungible. *See, e.g.*, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690-91 (7th Cir. 2008) ("*Boim III*") ("Because money is fungible, the combination of the link to Hamas and the receipt of an amount that would have been sufficient to finance the

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enacting them."); *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012) ("'But for' cause cannot be required in the section 2333(a) context.").

shooting at the Beit El bus stop would be enough to show that the 'material assistance' of giving money caused the terrorist act that took David Boim's life.") (Posner, J.); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 433-34 (E.D.N.Y. 2013) ("[P]laintiffs who bring an ATA action are not required to trace specific dollars to specific attacks to satisfy the proximate cause standard. Such a task would be impossible and would make the ATA practically dead letter because '[m]oney is fungible.'") (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010)); *Gill I*, 893 F. Supp. 2d at 507 ("The money used need not be shown to have been used to purchase the bullet that struck the plaintiff. A contribution, if not used directly, arguably would be used indirectly by substituting it for money in [ISIS's] treasury. . . .").

But fungibility is not limited to financial support. As the Supreme Court has noted, non-financial forms of material support to terrorists are just as fungible. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), plaintiffs sought a preliminary injunction because they wished to provide legal and political advocacy training to designated terrorist organizations, but feared that they would be prosecuted under 18 U.S.C. § 2339B for providing material support to FTOs. *Id.* at 10. The Supreme Court considered "whether the Government may prohibit" the provision of "material support to [terrorists] in the form of speech," and focused on whether a ban on the kind of material support at issue was necessary to further the

Government's interest in combatting terrorism. *Id.* at 28. The Supreme Court, following the lead of Congress, determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." *Id.* at 29 (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose)) (original emphasis). The court likewise deferred to the expertise of the State Department which found that "all contributions to foreign terrorist organizations further their terrorism," and that "it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities." *Id.* at 33.

"Material support," the court reasoned, "is a valuable resource by definition." *Id.* at 30.

> Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks. . . . Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations.

Id. at 30-31 (quotation marks omitted). It is thus unsurprising that the ATA's material support statutes prohibit not only providing money to terrorist groups, but also "any property, tangible or intangible, or service," including "communications equipment." 18 U.S.C. § 2339A(b)(1). "The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur." *Humanitarian Law Project*, 561 U.S. at 35.

Here, the District Court's analysis ran afoul of this established case law. First, the District Court improperly sought to impose a directness requirement even though courts have uniformly found that there is no such requirement under the ATA:

> Plaintiffs have not alleged any facts linking Twitter's provision of accounts to ISIS to Abu Zaid's attack. Instead they assert that they have demonstrated proximate cause by alleging that Twitter provided ISIS with material support in the form of a powerful communication tool and that ISIS has claimed responsibility for Abu Zaid's actions. These allegations do not plausibly suggest the necessary causal connection between Twitter's provision of accounts and the attack that killed Lloyd Fields, Jr. and James Damon Creach.

AER at 22. As many courts have found, proximate causation under the ATA is satisfied where a defendant provides material support to a terrorist organization and that organization soon thereafter carries out a terrorist act. *Linde*, 97 F. Supp.

3d at 328; *Boim III*, 549 F.3d at 690-91; *Strauss*, 925 F. Supp. 2d at 433-34. Whether the support comes in the form of cash or equipment or services does not matter; such support is fungible and permits the terrorist organization to carry out further attacks.

In this case, Plaintiffs-Appellants adequately pled proximate causation because they alleged that: (1) Twitter provided material support to ISIS, and (2) ISIS soon thereafter carried out the attack in which Lloyd Fields, Jr. and James Damon Creach were killed. AER at 33-42. The importance of the accounts that Twitter provided to ISIS cannot be overstated. ISIS used Twitter to recruit numerous operatives across the globe, to raise millions of dollars for carrying out its terrorist operations and for spreading its propaganda. *Id.* at 33-38. Indeed, "[w]ithout Twitter, the explosive growth of ISIS over the last few years into the most-feared terrorist group in the world would not have been possible." *Id.* at 33. According to the District Court, this is not enough because Plaintiffs-Appellants did not tie Twitter's provision of accounts to ISIS directly to the attack at issue. But this is precisely the kind of directness requirement that courts have rejected.

The District Court's decision is also based in part on the belief that, under a fungibility conception of material support, "any plaintiff could hold Twitter liable for any ISIS-related injury without alleging any connection between a particular terrorist act and Twitter's provision of accounts." AER at 29. This is not so. As

Judge Posner has noted, "[t]errorism campaigns often last for many decades" and "[s]eed money for terrorism can sprout acts of violence long after the investment." *Boim v. Holy Land Found. for Relief & Dev.* ("*Boim III*"), 549 F.3d 685, 701 (7th Cir. 2008). But this does not mean that Twitter would be liable for every terrorist act that ISIS carries out. Rather, liability under the ATA is inherently limited by the importance of the material support provided and its temporal proximity to the attack(s) at issue:

> Thus, a major recent contribution with a malign state of mind would—and should—be enough . . .[b]ut a small contribution made long before the event—even if recklessly made—would not be. The concept of proximate cause is central in imposing a balance. . . . Temporal and factual issues will often be crucial, in particular cases, in proximate cause inquiries pursuant to section 2333(a).

Gill I, 893 F. Supp. 2d at 507 (Weinstein, J.). Here, as noted above, the provision of Twitter accounts to ISIS had a major impact on the recruiting and fundraising of that terrorist organization and allowed it to carry out a shockingly large number of terrorist attacks. And Twitter's provision of accounts to ISIS coincides precisely with the rise of that organization and the attack that killed Mr. Fields and Mr. Creach.

In support of its interpretation of the proximate causation standard under the ATA, the District Court relied on two Second Circuit cases. First, the District

Court cited to *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 118, 124 (2d Cir. 2013) for the proposition that "routine banking services" cannot establish proximate causation. But the application of that rule to this case is mistaken. The Second Circuit's ruling in *In re Terrorist Attacks* is based on the view that terrorist attacks are not reasonably foreseeable results of "routine banking services" because there is no reason to know that such services would be misused.[4] Here, however, Plaintiffs-Appellants alleged that Twitter *knowingly* provided material support to ISIS. There is nothing routine about the knowing provision of material support to terrorists and it is entirely foreseeable that such conduct would likely result in future terrorist attacks. This case is thus on similar footing to *Arab Bank*:

> Nothing in the amended complaints suggests that Arab Bank is a mere unknowing conduit for the unlawful acts of others, about whose aims the Bank is ignorant. Given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing "routine" about the services the Bank is alleged to have provided. Thus, plaintiffs' allegations with respect to Arab Bank's knowledge and conduct are sufficient under their first factual theory.

Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007). Likewise, in *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1 (D.D.C. 2010), the court

[4] Indeed, the Second Circuit's reference to "routine banking services" appears to originate from *Licci v. Am. Exp. Bank Ltd.*, 704 F. Supp. 2d 403, 410-11 (S.D.N.Y. 2010), in which the court held that it was not "reasonably foreseeable that the routine banking services performed by Amex Bank would result in the death and bodily injuries suffered by plaintiffs in rocket attacks launched at Israel."

acknowledged that the knowing provision of services to a designated terrorist organization is not routine:

> Plaintiffs have alleged that BOC provided financial services to a terrorist organization despite knowing those services would facilitate the PIJ's acts of terrorism against Israeli and American citizens. . . . The banking services allegedly provided by BOC to the PIJ are, therefore, by no means the *routine* sort of services provided by the correspondent bank to the Lebanese bank.

Id. at 66. Because Plaintiffs-Appellants have alleged that Twitter *knowingly* provided ISIS with accounts, *In re Terrorist Attacks* does not apply.

Second, the District Court cited *Rothstein v. UBS AG*, 708 F.3d 82, 96 (2d Cir. 2013) for the proposition that proximate causation under the ATA cannot be established without a direct causal link because such a standard "would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state." AER at 22. But the *Rothstein* court was specifically addressing whether UBS's violation of federal law created *per se* liability. In that case, while UBS had illegally furnished U.S. currency to Iran, there was no allegation that UBS had provided funds directly to Hizbollah, the terrorist group that injured the plaintiffs. The allegations here are not similarly attenuated. Plaintiffs-Appellants allege that Twitter provided material support directly to ISIS, not through an

intermediary. They are not arguing that Twitter's violation of the ATA's criminal provisions creates *per se* liability, but rather that the tools that Twitter provided were so valuable to ISIS that it enabled ISIS to carry out numerous terrorist attacks, including the attack that killed Mr. Fields and Mr. Creach. In addition, Plaintiffs-Appellants are not seeking to impose "strict liability"; they allege that Twitter acted knowingly and/or recklessly.

CONCLUSION
(Fed. R. App. P. 28)

For the reasons stated above, this Court should reverse the District Court's Order and Judgment granting Twitter's motion to dismiss.

Dated: March 31, 2017

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STATEMENT OF RELATED CASES
(Ninth Circuit Rule 28-2.6)

Plaintiffs-Appellants are not aware of any related cases pending in this Court.

Dated: March 31, 2017

Respectfully submitted,

BURSOR & FISHER, P.A.

s/ L. Timothy Fisher
L. Timothy Fisher

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When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Mar 31, 2017 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ L. Timothy Fisher

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)