

Comment

Laying the Foundation for Social Media Prosecutions Under 18 U.S.C. § 2339B

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American lawmakers and law enforcement officials face a situation with no precedent, no standard operating procedure, and no end in sight: international terrorism. International terrorism has threatened the American way of life for hundreds of years, but the proliferation of terrorist recruitment through social media platforms has heightened the risk and sheer destruction that global terror attacks create. America must take a role in eliminating this new wave of recruitment and the overall war on terrorism; but the lack of accountability of social media companies hinders America's ability to fight back. This Article explains and argues that holding social media companies criminally and civilly liable for providing social media platforms to known terrorists and terror groups is the most direct and effective method to stifle global terror attacks, and save countless American lives. This Article proposes to explicitly include the provision of a social media platform in 18 U.S.C. § 2339A's definition of "material support" because the current material support statutes do not adequately prevent terrorists from using social media platforms to further their terroristic aims.

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INTRODUCTION

Between January 2015 and July 2016, a siege of terrorist attacks took the lives of 28,689 people.¹ The world can no longer view terror attacks as isolated and remote threats due to the proliferation of foreign terror organizations (“FTOs”) in the post-9/11 era.² The American government, along with other international entities and governments, enacted policies and measures to prevent and combat the upsurge in global terror.³ While some policies and measures successfully deter both

1. Lazaro Gamio & Tim Meko, *How Terrorism in the West Compares to Terrorism Everywhere Else*, WASH. POST (July 16, 2016), <https://www.washingtonpost.com/graphics/world/the-scale-of-terrorist-attacks-around-the-world/>.

2. See also Brigitte Gabriel, *Committed to Denial Since 9/11 Some 28,000 Terrorist Attacks Worldwide*, BREITBART (Sept. 23, 2016), <http://www.breitbart.com/big-government/2016/06/14/committed-denial-since-911-28000-terrorist-attacks-worldwide> (explaining that Islamic extremist terror groups have committed 28,135 terror attacks worldwide since 9/11 and highlighting the territorial strength ISIS has assumed).

3. See *9-11 Commission, Homeland Security, and Intelligence Reform*, U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFF., <https://www.hsgac.senate.gov/issues/9-11-commission> (last visited May 5, 2017), (highlighting legislation authored by Senators Lieberman and McCain that created the 9/11 commission to investigate why America’s defenses failed leading up to the 9/11 attacks and how to prevent another attack from occurring); see also *The USA PATRIOT Act: Preserving Life and Liberty*, U.S. DEP’T JUST., <https://www.justice.gov/archive/ll/highlights.htm> (last visited Apr. 29, 2017) (noting that the Patriot Act expanded and increased the available penalties that the government can assess not only against individuals who *commit* acts of terror, but also on those whom *support* terrorist operations).

terror activity and attacks, it is clear that FTOs evade these protections due in large part to the increased accessibility to, and lack of accountability for their actions on, American social media platforms.⁴ The accessibility of social media—Facebook and Twitter, in particular—gives FTOs an incredible tool to directly contact and radicalize potential recruits across the globe.⁵ This type of direct outreach is the most dangerous threat posed to Western nations.⁶ Even though FTOs cannot persuade every person they recruit to join their fight, their social media campaigns drum up a significant amount of terror sympathizers who voice their support, and even incite violence, in the social media sphere.⁷ Some FTOs, like Hamas for example, take their social media use to a level beyond outreach, and use social media platforms to announce demonstrations and direct calls for violence.⁸

Despite the perpetual threat FTOs pose, this Article recognizes that America must balance FTOs' threats against the constitutional liberties—particularly the First Amendment—afforded to American citizens and businesses.⁹ The safeguarding of fundamental rights, especially free speech, is imperative to America's democratic structure and way of life,

4. See *Remarks by the President in Closing of the Summit on Countering Violent Extremism*, WHITE HOUSE—OFF. PRESS SECRETARY (Sept. 23, 2016), <https://www.whitehouse.gov/the-press-office/2015/02/18/remarks-president-closing-summit-countering-violent-extremism> (quoting President Obama) (“The high-quality videos, the online magazines, the use of social media, terrorist Twitter accounts—it’s all designed to target today’s young people online, in cyberspace.”); see generally *How ISIS Recruits Through Social Media*, FORDHAM POL. REV. (Sept. 23, 2016), <http://fordhampoliticalreview.org/how-isis-recruits-through-social-media/> [hereinafter *How ISIS Recruits*] (explaining how foreign terror organizations (“FTOs”) had a harder time reaching out to westerners, particularly young westerners, before the social media age, but now an estimated 3,000 westerners joined in fighting alongside ISIS in Syria and Iraq).

5. *How ISIS Recruits*, *supra* note 4.

6. See *id.* (statement by the former senior adviser at the United States State Department, Shahed Amanullah) (“These types of fighters are the biggest threats to Western countries because they can travel more freely and blend in easier.”).

7. See J.M. Berger & Jonathon Morgan, *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter*, BROOKINGS INST., <https://www.brookings.edu/research/the-isis-twitter-census-defining-and-describing-the-population-of-isis-supporters-on-twitter/> (estimating that from September through December, 2014, at least 46,000 Twitter accounts were used by ISIS supporters, and the ISIS-supporting accounts had an average of 1,000 followers each—which is “considerably higher than an ordinary Twitter user”).

8. See Gwen Ackerman, *Facebook Accused in \$1 Billion Suit of Being Hamas Tool*, BLOOMBERG TECH. (Sept. 10, 2016, 7:43 AM), <http://www.bloomberg.com/news/articles/2016-07-11/facebook-sued-for-1b-for-alleged-hamas-use-of-medium-for-terror> (noting that Facebook took down a page promoting a new Palestinian uprising against Israel that made direct calls for violence).

9. “Congress shall make no laws abridging . . . the freedom of speech, or of the press.” U.S. CONST. amend. I.

but one must draw the line when the very utterance of speech causes injury or is likely to incite an immediate breach of peace.¹⁰

This Article does not purport to infringe on the constitutional liberties of American citizens by limiting what they may post on social media and does not seek to hold *individuals* responsible for their social media posts. Rather, this Article posits that the most efficient way to curb global terror is to prosecute *social media companies* under the material support statutes for knowingly providing a social media platform to a FTO. Prior to 9/11, Congress recognized the threat that FTOs posed and enacted the material support statutes—18 U.S.C. § 2339A (“section 2339A”) and 18 U.S.C. § 2339B (“section 2339B”)—as a way to prohibit United States citizens from providing material support to designated terror groups.¹¹ Individuals who violate the statutes are subject to a monetary fine, imprisonment, or both.¹²

To alleviate the burden prosecutors face particularly in section 2339B prosecutions against social media companies, this Article urges Congress to amend section 2339A’s definition of “material support” to explicitly include the provision of a social media platform. Including the provision of a social media platform in section 2339A’s definition is essential because section 2339B (i.e., the specific statute that the government uses to prosecute individuals who *support* FTOs) imposes criminal liability on companies and individuals who knowingly provide terrorists the specific types of material support delineated in section 2339A.

Part I provides a brief overview of the two material support statutes—section 2339A and section 2339B—but primarily focuses on section 2339B. This Part also provides an overview of civil cases brought under 18 U.S.C. § 2333 (“section 2333”), which originally targeted banks and financial institutions. Finally, Part I examines the Communications Decency Act (“CDA”) and how it serves as the primary hurdle for plaintiffs attempting to obtain civil relief under section 2333.

Part II discusses the status of the law regarding criminal prosecutions under section 2339B. Specifically, Part II introduces the “coordination test” from *Holder v. Humanitarian Law Project*, which is used to determine whether there is a sufficient link between a defendant and a

10. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”).

11. *See* 18 U.S.C. § 2339A (2009) (forbidding United States citizens from providing material support to terrorist groups); *see also* 18 U.S.C. § 2339B (2015) (imposing penalties for violating section 2339A and supporting terrorist groups).

12. *See* 18 U.S.C. § 2339B (imposing a monetary fine and imprisonment of not more than twenty years, unless the death of any person results, for whoever knowingly provides material support or resources to a FTO).

FTO for criminal liability. This Part also discusses the ambiguity of *Holder's* coordination test, and discusses courts' varying broad and narrow interpretations of the test.

Part III analyzes how the CDA and proximate cause requirements stifle and restrict civil remedies under section 2333. Specifically, this Part analyzes the different approaches used by the Seventh and Second Circuits to find proximate cause. This Part also introduces *Fields v. Twitter* and asserts that the district court improperly immunized Twitter from civil liability when it applied the CDA to the facts of the case.

Part IV of this Article argues that the CDA should not immunize social media companies from civil liability in section 2333 lawsuits because these lawsuits are predicated upon a violation of federal law. This Part also introduces *Force v. Facebook* and argues this case should lay the foundation for social media prosecutions under section 2339B. This Part asserts that social media companies *currently* possess the requisite mens rea under section 2339B, and thus violate section 2339B, as knowingly providing a platform to FTOs meets the existing definition of material support and satisfies *Holder's* coordination test. Part IV, however, ultimately urges Congress to amend section 2339A's definition of "material support" to explicitly include the provision of a social media platform. Part IV also urges Congress to retain section 2339B's current mens rea of knowledge because social media companies are now capable of monitoring and removing terror-related content. Finally, this Part does not argue that individuals should lose constitutional protection and subsequently incur criminal liability for posting sympathetic, or even pro-terrorism, content to social media. Rather, this Part argues that Congress must ease the burden of proof necessary to criminally prosecute social media companies to combat the war on terror.

I. BACKGROUND

A. *The Material Support Statutes: Section 2339A and Section 2339B*

In 1996, Congress enacted the material support statutes in response to the 1993 World Trade Center bombing; the 1995 bombing of a United States military building in Riyadh, Saudi Arabia; and the 1995 Oklahoma City bombing.¹³ Section 2339A prohibits one from providing "material

13. Holly Chapin, *Clarifying Material Support to Terrorists: The Humanitarian Project Litigation and the U.S. Tamil Diaspora*, J. INT'L SERV., 69, 69 (Fall 2011) (noting that section 2339B was part of the 1996 Antiterrorism and Effective Death Penalty Act and that section 2339B criminalizes support regardless of whether the assistance is for peaceful activities); see Charles Doyle, *Terrorist Material Support: A Sketch of 18 U.S.C. § 2339A and § 2339B*, CONG. RES. SERV.

support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out,” a violation of certain offenses.¹⁴ The statute defines “material support or resources” as

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe-houses, 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.¹⁵

Section 2339A only outlaws activities that relate to one or more of the federal crimes enumerated in 18 U.S.C. § 2332b(g)(5)(B); the enumerated offenses are ones that are most likely to be committed in a terrorist context.¹⁶ The individual also must know or intend the support to assist in the commission of a terrorist crime.¹⁷ Section 2339A also imposes criminal penalties, such as fines or fifteen years of imprisonment, on individuals who knowingly or intentionally provide material support to be used to violate one of the enumerated federal crimes within the statute.¹⁸ This layer includes the mens rea of specific intent, where the defendant must have provided support with the knowledge or intent that the resources be used to commit certain specific violent crimes.¹⁹

Section 2339A prohibits the provision of material support when the individual knows or intends the support will be used for the commission of certain offenses, but section 2339B prohibits individuals from knowingly providing material support—as defined in section 2339A—to designated terrorist organizations or groups the individual knows engages in terrorism.²⁰ Section 2339B is favored for these types of prosecutions because it does not include a specific intent element like section 2339A requires and assesses liability for providing material support to FTOs the individual knows to be engaged in terrorism, generally.²¹ In other words,

(July 19, 2010), <https://fas.org/sgp/crs/natsec/R41334.pdf> (explaining that sections 2339A and 2339B are at the core of the United States Justice Department’s terrorist prosecution efforts).

14. Charles Doyle, *Terrorist Material Support: An Overview of 18 U.S.C. § 2339A and § 2339B*, CONG. RES. SERV. (Dec. 8, 2016), <https://fas.org/sgp/crs/natsec/R41334.pdf>.

15. 18 U.S.C. § 2339A.

16. *See id.* § 2332(a) (identifying the prohibited offenses).

17. *Id.* § 2339A.

18. *Id.*

19. *United States v. Stewart*, 590 F.3d 93, 113 (2d Cir. 2009).

20. Doyle, *supra* note 14, at 1.

21. *See* 18 U.S.C. § 2339A (requiring proof of specific intent that the provided support will be used in the commission of an attack); *see also* 18 U.S.C. § 2339B (requiring a mens rea element of

section 2339B does not require proof that the individual knew or intended the FTO would use that material support to commit a certain offense.

Prosecutions under section 2339B use the definition of “material support” that section 2339A contains. Although both sections use the same definition of “material support,” prosecution under section 2339B is more applicable to most fact scenarios because, as mentioned above, section 2339A requires knowledge or intent that the support be used in an attack, while section 2339B only requires that the individual knowingly provides support to a FTO.²² To prosecute a social media company under section 2339B, the government must first show that the initial provision of a social media platform fits within section 2339A’s definition of material support and then prove the social media company knew it provided the material support to an organization it knew was a FTO.²³

Some consider section 2339B a novel way to approach terrorism because it seeks to *prevent* acts of terror, rather than punishing individuals after the fact.²⁴ Despite the popularity of prosecuting individuals under section 2339B for providing material support to known FTOs on social media, government officials have yet to prosecute a social media company for permitting FTOs to utilize its social media platform.²⁵

B. Civil Cases

1. Civil Standing Pursuant to Section 2333

Neither section 2339A nor section 2339B create a private civil cause

knowingly).

22. 18 U.S.C. § 2339B(a)(1).

23. See Kathleen Ann Ruanne, *The Advocacy of Terrorism on the Internet: Freedom of Speech Issues and the Material Support Statutes*, CONG. RES. SERV., 1, 17–19 (2016), <http://www.fas.org/sgp/crs/terror/R44626.pdf> (outlining the applicability of social media prosecutions under section 2339B).

24. Andrew Peterson, *Addressing Tomorrow’s Terrorists*, J. NAT’L SECURITY L. & POL’Y, 297, 300 (2008); see also Chapin, *supra* note 13 (noting that previous terrorism laws were rooted in the more traditional sense of criminalization by punishing individuals *after* the act was committed).

25. Emily Goldberg Knox, *Social Media Companies and Material Support*, JUST SECURITY (Oct. 31, 2014, 1:18 PM), <https://www.justsecurity.org/16961/social-media-companies-material-support/> (noting the public execution of journalist James Foley on social media sparked government officials and entities to urge social media companies to shut down accounts associated with FTOs). Seven House Republicans implored the FBI to force Twitter to take down Hamas’ official Twitter account. Julian Pecquet, *Gaza Violence Leads Lawmakers to Call for Shuttering Terror Groups on Twitter*, HILL (Nov. 23, 2012, 11:00 AM), <http://thehill.com/policy/international/269141-gaza-violence-leads-lawmakers-to-call-for-twitter-shuttering>. In response, Twitter eventually suspended Hamas’ account in January 2014. *Id.* As a result, requests were also made to shut down the Twitter accounts of al-Shabaab and the Taliban. *Id.*

of action, but section 2333 provides standing for United States nationals whose person or property was injured by an act of international terrorism (i.e., a violent act that is dangerous to human life) and authorizes suits for treble damages.²⁶ Congress enacted section 2333 with sections 2339A and 2339B as a deterrence mechanism but, unlike sections 2339A and 2339B, section 2333 does not require proof of a specific mens rea.²⁷

Since its enactment, section 2333 has primarily targeted financial institutions, banks, and charitable organizations that provide material support in the form of fundraising to FTOs.²⁸ Despite private citizens' efforts, only one bank has ever been held liable under section 2333.²⁹ Some believe this is due to the fact that Congress intended to limit the ability to recover civil damages against individuals who provide support to the actual terrorist organizations that effectuated the violent attack, and not secondary actors (i.e., financial institutions, banks, and charitable organizations) that merely provided support to the actual terrorist organizations that effectuated the crime.³⁰ Courts relied on the plain language of section 2333 and concluded that commercial banking activity itself did not constitute "violent acts or acts dangerous to human life" and therefore did not constitute the "international terrorism" from which the private actor suffered.³¹ But the court in *Boim v. Holy Land Foundation for Relief and Development* analogized a charitable organization's conduct of donating money to Hamas as giving a loaded gun to a child.³² The court found the charity's act was dangerous to human life and in violation of section 2339B's prohibition on *knowingly* providing material

26. See 18 U.S.C. § 2333 ("[A]ny national of the United States injured in his 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."). The statute also provides for treble damages plus attorney's fees. *Id.*

27. See Jimmy Gurule, *Holding Banks Liable Under the Anti-Terrorism Act for Providing Financial Services to Terrorists: An Ineffective Legal Remedy in Need of Reform*, 41 J. LEGIS. 184, 186 (2015) (noting the mens rea requirement in section 2339B is incorporated into section 2333).

28. *Id.* at 184.

29. *Id.* The only bank ever held liable under section 2333 was Arab Bank, PLC. The bank provided funding to Hamas and Hamas then used the money to perpetuate a series of terror attacks between 2000 and 2004 during the Second Intifada. Discovery also revealed that the bank funded several other FTOs in addition to Hamas. *Linde v. Arab Bank PLC*, No. 04-CV-02799 (E.D.N.Y. Sept. 22, 2014) (jury verdict form).

30. See Lanier Sapersten & Geoffrey Sant, *The Anti-Terrorism Act: Bad Acts Make Bad Law*, 248 N.Y. L.J. (Nov. 5, 2012), http://files.dorsey.com/files/upload/NYLJ_saperstein_sant_anti_terrorism.pdf (explaining Congress' intent when it codified section 2333).

31. *Id.*

32. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 693–94 (7th Cir. 2008).

support.³³ Although the court found that the charitable organization violated section 2339B, the *Boim* court noted that section 2333 does not impose strict liability, so the plaintiff must demonstrate that the defendant provided material support with a mens rea listed in section 2339A or 2339B.³⁴ Section 2333 also requires plaintiffs to demonstrate how the defendant's provision of material support to a FTO was the proximate cause of the plaintiff's injuries, creating yet another hurdle in the private plaintiff's path toward recovering civil damages.³⁵

After the increased amount of terrorist attacks in 2015–16, the United States court system faced an unprecedented number of civil lawsuits attempting to hold social media companies civilly liable under section 2333 for sections 2339A and 2339B violations for knowingly providing material support or resources to FTOs which resulted in the death of an American citizen or national.³⁶ But even if a plaintiff surpassed the above-mentioned hurdles of proving the requisite statutory elements, the applicable mens rea, and proximate cause, plaintiffs still have to overcome the CDA.

2. The CDA: The Hurdle Before Civil Damages

Congress had two goals in mind when it enacted the CDA: to control the exposure of minors to indecent material and to simultaneously encourage the growth of web-based interactive services while promoting free speech.³⁷ Yet, Congress also sought to arm the United States

33. *Id.*

34. *Id.* at 691; *see also* Saperstein & Sant, *supra* note 30 (noting that Congress did not intend section 2333 to impose strict liability).

35. *Boim*, 549 F.3d at 725.

36. The plaintiffs in *Force v. Facebook* brought suit after a viscous rampage of Palestinian terror attacks against Israeli citizens between 2014 and 2016. Complaint, *Force v. Facebook, Inc.*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016). The plaintiffs allege that Facebook knowingly provided support and resources to Hamas by allowing Hamas, and its members, to use the Facebook platform to carry out terror activities, plan attacks, and purposely incite violence against Israelis. *Id.* at 2–3. Specifically, the plaintiffs allege that Hamas used Facebook as a “gateway to other extremist sites and online radical content,” as a means of intelligence gathering, as a method of dispersing operational and tactical information with other Hamas members and followers, to spread propaganda in the form of graphic photos and videos calculated to “inflame Palestinian emotions and incite violence against Israelis and Jews,” to glorify martyrs, and to fundraise and general material support. *Id.* at 20–21. In *Fields v. Twitter*, Fields' wife sued Twitter under section 2333 alleging that Twitter provided material support to ISIS by allowing it to use the Twitter service, which was the proximate cause of her husband's death in a November 2015 terror attack in Jordan. Second Amended Complaint at ¶¶ 40–52, *Fields v. Twitter*, No. 16-cv-00213-WHO (N.D. Cal. Aug. 30, 2016).

37. 47 U.S.C. § 230(b)(2); *see* Jeffrey Neuburger, *Liability Under CDA Section 230? Recent Lawsuit Tries to Flip the Script Against Social Media Service*, NEW MEDIA & TECH. L. BLOG (Sept. 8, 2016), <http://newmedialaw.proskauer.com/2016/09/08/liability-under-cda-section-230-recent->

government with a powerful tool when it enacted and amended the material support statutes.³⁸

Despite Congress' intentions to curb terrorism with the material support statutes, the CDA's statutory language provides one reason why civil suits based on sections 2339A and 2339B have proved unsuccessful. Due to the CDA's broad-sweeping language, defendants in civil actions assert that section 230 of the CDA bars civil claims based on sections 2339A and 2339B because the CDA does not treat the service (or social media) provider as the "publisher" of posts or "activities" that may violate the anti-terror laws.³⁹ In effect, the nation's courts and legislature seem to give social media companies great latitude to monitor the content on their platforms because courts do not seem to assess liability on these companies based on posts that a third party may generate. Congress desired to give online service providers freedom in regulating content to preserve the delicate balance between ensuring free speech under the First Amendment and simultaneously protecting individuals, especially children and minors, from obscene content.⁴⁰ Yet, this balancing act proved difficult to preserve. So, as a result, fierce litigation ensued challenging the constitutionality of the CDA.

Critics disclaimed the CDA and opined that the CDA unconstitutionally infringed First Amendment rights.⁴¹ One of the biggest critiques of the CDA was that its definition of "unacceptable

lawsuit-tries-to-flip-the-script-against-social-media-service/ (noting Congress' goals when it enacted the Communications Decency Act ("CDA")); *see also* Ruanne, *supra* note 23 (explaining that the CDA seeks to protect against defamation and liable).

38. *See* Doyle, *supra* note 14, at 1 (explaining that Congress broadened the material support statutes' scope over time to include more precise definitions of material support and noting that individuals who violate the material support statutes may be imprisoned for up to fifteen years).

39. *See* Jimmy Hoover, *Facebook Says CDA Shields It from Palestinian Terror Liability*, LAW360 (Jan. 17, 2017, 1:37 PM), <https://www.law360.com/articles/881240/facebook-says-cda-shields-it-from-palestinian-terror-liability> (explaining how the CDA bars Facebook from being treated as a publisher of the posts that incited violence against Israelis and inevitably immunizes Facebook from civil liability). Because the CDA does not treat service providers as "publishers," providers are able to escape liability because they are not deemed to have created the offending post. The provider merely allows the content or the post to be uploaded to their service, which Congress wanted given its goal to encourage the free-flow of ideas and speech on the Internet. *CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Apr. 30, 2017) [hereinafter *CDA 230*].

40. Communications Decency Act of 1996, Pub. L. No. 104-106, 110 Stat. 137; *see CDA 230, supra* note 39 (explaining that with the CDA, Congress sought to reconcile inconsistent decisions within the New York court system and to ensure the Internet could flourish without imposing restrictions on what content users may post).

41. *See generally* *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (holding that some of the provisions of the CDA were too vague and violated the First Amendment).

online speech” was too vague and overly broad.⁴² Because the CDA was a broad “content-based restriction on speech,” critics contended that the CDA could not survive strict scrutiny because it was not narrowly tailored to effectuate a compelling government interest.⁴³

In June 1997, in *Reno v. American Civil Liberties Union*, the Supreme Court affirmed the lower court’s rulings that the CDA unconstitutionally restricted free speech.⁴⁴ Writing for the majority, Justice Stevens stated that “the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”⁴⁵ The Court specifically conceded the fact that the government had a valid interest in protecting minors from potentially damaging and harmful content online.⁴⁶ The problem, however, was that the government’s means censored online content that adults have a constitutional right to see, send, and receive.⁴⁷ Moreover, the Court took issue with the fact that the government failed to effectuate any alternatives that were less restrictive than the all-encompassing censorship regulations.⁴⁸

Only section 230 of the CDA survived after the Supreme Court in *Reno* struck down the CDA.⁴⁹ Section 230 survived the *Reno* ruling in large part because, unlike the rest of the CDA, this section actually promoted free speech instead of restricting it.⁵⁰ Section 230 expressly states that “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.”⁵¹ This provision essentially mandates courts to treat online service and content providers differently than traditional print publications (i.e., online service and content providers may not be liable for the content on their websites).⁵²

42. *CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Nov. 1, 2016).

43. Brief for Appellees at 22, 28, *Reno*, 521 U.S. 844 (No. 96-511) [hereinafter Brief for Appellees in *Reno*].

44. *Reno*, 521 U.S. at 845.

45. *Id.* at 885.

46. *Id.* at 846.

47. *Id.*

48. *See id.* (emphasizing the district court’s finding of other methods, like software that prevents children from viewing material their parents deem inappropriate).

49. *See* Ambika Doran & Tom Wyrich, *Section 230 of the Communications Decency Act Turns 20*, LAW360 BLOG (Sept. 7, 2016, 12:27 PM), <https://www.law360.com/articles/836281/Section-230-of-the-communications-decency-act-turns-20> (explaining how only section 230 of the CDA survived *Reno*).

50. *CDA 230, supra* note 39.

51. 47 U.S.C. § 230(c)(1) (1998).

52. 47 U.S.C. § 230, *a Provision of the Communication Decency Act*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> (last visited Nov. 1, 2016) (noting that online providers

Defendants in civil litigation could take advantage of the CDA's broad-sweeping immunizing language CDA as a shield against liability pursuant to violations of sections 2339A and 2339B.⁵³ Defendants urge that third-party-generated content triggers liability, but because the CDA explicitly states that online providers are not the publishers of the content, they cannot be held liable for something they did not produce.

II. DISCUSSING THE COORDINATION TEST

Holder is the seminal case on when independent advocacy loses constitutional protection and veers into the murky waters of what is considered providing material support to a FTO.⁵⁴ The Supreme Court in *Holder* went so far as to conclude that the government may block free speech and other forms of advocacy supporting FTOs even if the aim is to promote nonterroristic ends of the FTO.⁵⁵ The Court clarified, however, that the government may only prohibit this type of advocacy and speech if the FTO coordinates or controls the activity; this analysis is known as the coordination test.⁵⁶ The Court held that Congress intended the material support statutes to only reach activities "directed to, coordinated with, or controlled by foreign terrorist groups."⁵⁷ Because section 2339B only prohibits material support *provided to* a FTO, *Holder's* coordination test serves to determine whether the (material) support provided was "directed to, coordinated with, or controlled by" a FTO.⁵⁸ Criminal liability under section 2339B may be appropriate if the

may not be liable for the content on their websites because of the impracticality of interactive service providers constantly monitoring user-generated content for objectionable content).

53. Benjamin Wittes & Zoe Bedell, *Did Congress Immunize Twitter Against Lawsuits for Supporting ISIS?*, LAWFARE BLOG (Jan. 22, 2016, 9:14 AM), <https://www.lawfareblog.com/did-congress-immunize-twitter-against-lawsuits-supporting-isis>.

54. *See generally* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (explaining that the Humanitarian Law Project ("HLP") sought pre-enforcement review to ensure it could provide humanitarian aid and political advocacy on behalf of minority groups represented by the Partiya Karkeran Kurdistan ("PKK") and Liberation Tigers of Tamil Eelam ("LTTE"), both of which are designated as FTOs).

55. *Id.* at 33; *see also* Lyle Denniston, *Analysis: Partial U.S. Victory on Terrorism*, SCOTUSBLOG (June 21, 2010, 11:49 AM), <http://www.scotusblog.com/2010/06/analysis-partial-u-s-victory-on-terrorism/> (noting that the government may block otherwise constitutionally protected speech when that speech is directed toward supporting the violent or nonviolent aims of a FTO).

56. *Holder*, 561 U.S. at 5.

57. *Id.*

58. *See* 18 U.S.C. § 2339B(a)(1) (holding that "whoever knowingly provides material support or resources to a foreign terrorist organization" is in violation of the statute); *see also Holder*, 561 U.S. at 31 (explaining that the statute only prohibits otherwise constitutionally protected speech when that speech is coordinated with or under the direction of a FTO, whereas independent advocacy is constitutionally protected).

government can demonstrate that a defendant's activities or speech were "directed to, controlled by, or coordinated with" a FTO. But failing to establish coordination between the defendant and FTO merely suggests the defendant engaged in constitutionally protected independent or political advocacy. Even though the *Holder* Court enumerated a specific test to navigate the delineation between providing material support to a FTO and independent advocacy, the Court refused to elaborate on what may suffice as coordination and limited its holding to the facts and circumstances present in the *Holder* case.⁵⁹

But mere coordination is enough, according to the Supreme Court: "It is not difficult to conclude as Congress did that the "tain[t]" of such violent activities is so great that working in coordination with or at the command of [FTOs] serves to legitimize and further their terrorist means."⁶⁰ *Webster's Third New International Dictionary* defines "to coordinate" as "to bring into a common action, movement, or condition."⁶¹ But comparing *Webster's* definition of coordination to the language in section 2339B adds a layer of ambiguity and complexity because they appear to be at odds with each other. Section 2339B prohibits individuals from knowingly providing material support directly to a FTO, regardless of whether it is used in, or furthers, a terror attack. The dictionary definition of coordination, however, implies that coordination may only be satisfied if the defendant provided support as part of some larger common plan, which may, or may not, be aimed to further the FTO's terror intentions. Without more Supreme Court guidance, lower courts are split as to what coordination truly requires and entails.⁶²

The Humanitarian Law Project ("HLP") aspired to provide tangible aid and support, by way of legal training and political advocacy, to two FTOs: the humanitarian and political branches of the Kurdistan Workers Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE").⁶³ HLP sought pre-enforcement review to confirm it could provide resources to both groups and teach them how to apply for humanitarian

59. See Denniston, *supra* note 55 (articulating how Chief Justice Roberts sought to emphasize the narrow ruling in *Holder v. Humanitarian Law Project*).

60. *Holder*, 561 U.S. at 30.

61. *Coordinate*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 501 (1993) [hereinafter WEBSTER'S DICTIONARY].

62. See Ruanne, *supra* note 23, at 15–17 (illustrating the ambiguity of coordination).

63. See *Holder*, 561 U.S. at 9 (explaining that the Secretary of State has the authority to designate an entity as a FTO upon finding that it is foreign and engages in terrorist activity or terrorism and thereby threatens the security of United States nationals or the national security of the United States).

aid and advocate for the minority groups represented by both organizations, without violating the material support statutes.⁶⁴ In an effort to seek an injunction on applying section 2339B to HLP's activity, HLP asserted that section 2339B's prohibitions were unconstitutional because: (1) the statute violated its First Amendment right to free speech and association because it criminalized HLP's provision of material support without requiring the government to prove a specific intent to further the FTO's terroristic objectives; and (2) the statute violated the Due Process Clause of the Fifth Amendment because it was impermissibly vague applied to the case's specific facts.⁶⁵

First, the *Holder* Court held that section 2339B's prohibition on content-based regulation of speech, as applied to the particular activities HLP wished to engage in, was permissible and did not violate HLP's freedoms of speech and association.⁶⁶ The First Amendment of the Constitution guarantees the fundamental right to free speech.⁶⁷ The Constitution even protects speech and actions that are entirely offensive and insensitive, but these protections are not absolute—speech can sometimes lose its constitutional protection.⁶⁸ Though section 2339B's restriction on content-based speech required the rigorous strict scrutiny test to survive,⁶⁹ the Court found that Congress' desire to combat global terrorism and protect national security was of the upmost importance and

64. HLP also wanted to provide legal advice to assist in the negotiation of peace treaties. *Id.* at 10.

65. *Id.* at 10–11, 14 (noting the HLP's argument that its provision of humanitarian aid only advanced the legitimate activities of the FTOs, not their terrorism).

66. *See id.* at 20–21 (explaining that section 2339B was not unconstitutionally vague because it did not prohibit conduct evaluated by subjective judgments without statutory definitions); *see also id.* at 32 (noting that the government can prohibit what the plaintiffs wanted to do because the government was not restricting pure political speech, it was prohibiting the provision of material support that, in this case, took the form of speech); *see also id.* at 39–40 (articulating that freedom of association was not violated because the statute does not prohibit associating with a FTO or even joining a FTO, but rather the statute “prohibits the act of providing material support”).

67. U.S. CONST. amend. I.

68. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding the defendant's act of burning the American flag during a protest rally was expressive conduct within the protection of the First Amendment); *see also Watts v. United States*, 394 U.S. 705, 708 (1969) (holding Watts' remark about killing the president during a political debate at a public gathering was constitutionally protected because it was considered a hyperbole); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem.”); Ruanne, *supra* note 23, at 3 (explaining some speech like fighting words, incitements to innocent violence, child pornography, and obscenity can be restricted by the government without constitutional concern).

69. *See Holder*, 561 U.S. at 27–28 (rejecting the government's contention that intermediate scrutiny should be applied in favor of a more rigorous standard of scrutiny because the government's regulation of conduct, in this case, took the form of speech).

a compelling state interest.⁷⁰ The Court then found that Congress narrowly tailored section 2339B's language to achieve the compelling interest of combatting global terror and protecting national security.⁷¹

Second, the *Holder* Court held that section 2339B, as applied, did not violate the Fifth Amendment's Due Process Clause for being impermissibly vague because of the knowledge requirement.⁷² The question presented for this Fifth Amendment vagueness challenge was whether the statute "provides a person of ordinary intelligence fair notice of what is prohibited."⁷³ When applying that test, the Court found that section 2339B's knowledge requirement adhered to the Supreme Court's vagueness precedent⁷⁴ because a reasonable person would understand that teaching the PKK and LTTE how to petition for humanitarian relief to the United Nations stems from "specialized knowledge."⁷⁵

Third, the Court relied heavily on legislative findings that indicated even the provision of support intended as humanitarian aid, or even support insulated from furthering terroristic objectives, nonetheless

70. *See id.* at 29–30 (noting Congress' specific findings regarding the serious threat posed by global terrorism and mentioning the various deadly attacks carried out in the 1990s by both the PKK and the LTTE); *see also* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 301(a), 110 Stat. 1214, 1247 (1996) (confirming that the prohibition of plaintiffs' proposed conduct furthers a compelling state interest because "[f]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct*" (emphasis added)); *Holder*, 561 U.S. at 29 (citing section 323 of the AEDPA and noting that Congress removed an exception contained in section 2339A of the material support statutes for the material support in the form of "humanitarian assistance to persons not directly involved in terrorist activity").

71. *See Holder*, 561 U.S. at 25–26 (reasoning because the statute covered speech coordinated with FTOs and not independent advocacy that happened to support those groups, the language of the statute made it easier for the government to illustrate how the restriction was narrowly tailored to advance the government's interest in combatting global terrorism); *see also* 18 U.S.C. § 2339A(b)(1) (excluding the provision of medicine and religious materials from the definition of material support). These limited exceptions demonstrate how Congress carefully balanced the interests at hand when crafting section 2339B and illustrate Congress' superior judgment when it comes to weighing competing interests. *Holder*, 561 U.S. at 36.

72. The Court rejected the Ninth Circuit Court of Appeals' analysis because it believed the Ninth Circuit erroneously merged the vagueness challenge with the First Amendment challenge, assuming it applied to protected speech—regardless of whether those applications were clear. The Court also rejected the Ninth Circuit's analysis of a hypothetical scenario when it should have applied the law to the facts at hand. *Id.* at 19–20.

73. *Id.* at 18 (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

74. *See id.* at 21 (confirming the constitutionality of the knowledge requirement "as we have held with respect to other statutes containing a similar requirement").

75. *Id.* at 22 (citing 18 U.S.C. § 2339A(b)(3) and noting the proposed conduct fits within the statute's definition of material support and even points to the fact that the plaintiffs used the terms "training" and "expert advice" to describe their proposed conduct throughout the course of litigation).

untied other resources to support terror activities.⁷⁶ The Court explained that the lack of firewalls between branches of FTOs meant that any resource given to a FTO was “fungible,” and would thus untangle other resources to be used in terror attacks. Essentially, giving money to the humanitarian sector of a FTO allows the FTO to redirect money in other places, perpetuating attacks. The Court noted that HLP’s support could legitimize the groups, which in turn would make it easier for them to exist, recruit members, and raise funds, all of which perpetuate more attacks.⁷⁷ Therefore, the Court concluded that HLP’s conduct and speech were not protected by the First Amendment because they fit within section 2339A’s definition of material support, HLP knew it was dealing with FTOs, and there was evidence of an established coordination between HLP and the FTOs.⁷⁸

A. *The First Circuit’s Broad Interpretation of Coordination*

In December 2011, a jury convicted Tarek Mehanna, a United States citizen, for attempting to provide material support to al Qaeda.⁷⁹ The First Circuit Court of Appeals affirmed the government’s and district court’s broad constructions of coordination to sustain Mehanna’s conviction based on what the First Circuit described as two “clusters” of activity.⁸⁰ One cluster involved Mehanna translating a pro-jihadi propaganda text from Arabic to English called *39 Ways to Serve and Participate in Jihad*, which called on Muslims to support jihad and incite others to engage in jihad.⁸¹ Mehanna then posted the translated materials to at-Tibyan, an online forum sympathetic to al Qaeda.⁸² The court ultimately concluded that the translated propaganda fit within section 2339A’s definition of material support, as a “service,” because evidence revealed that Mehanna desired his translation to “make an impact.”⁸³ Using the framework in *Holder*, the court concluded that the translations

76. *Id.* at 30–32 (demonstrating that the PKK and the LTTE do not delineate between humanitarian aid and violent activities and explaining that the provision of material support to FTOs inevitably frees up other resources within the organization that may be put to violent ends, known as fungibility).

77. *Id.* at 32.

78. *Id.*

79. *United States v. Mehanna*, 735 F.3d 32, 41 (1st Cir. 2013).

80. *Id.* at 40–41; *see also* Nikolas Abel, *United States v. Mehanna, the First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711, 733 (2013) (noting the jury instructions included the “plain-and-ordinary-meaning” of “coordination”).

81. *Mehanna*, 735 F.3d at 41.

82. *Id.*

83. *Id.* at 49; *see* Abel, *supra* note 80, at 732 (outlining all the evidence used to demonstrate Mehanna’s intent).

were a coordinated service due to Mehanna's conversations online with an individual who told Mehanna at-Tibyan was "al Qaeda's English Wing."⁸⁴ The First Circuit also highlighted that the materials Mehanna translated were generally supportive of al Qaeda and al Qaeda even created some of the translated materials that Mehanna posted.⁸⁵ The court also concluded that Mehanna's translations satisfied the material support statutes' scienter requirements because evidence revealed Mehanna supported the aims of al Qaeda; therefore, Mehanna knew his material support was provided to al Qaeda with the intent to further its terroristic endeavors.⁸⁶

The second cluster, which the court placed greater weight on, centered on a 2004 trip to Yemen where Mehanna allegedly sought out terrorist training camps.⁸⁷ The *Mehanna* court rejected Mehanna's assertion that his 2004 trip to Yemen was solely to pursue Islamic studies and determined that on this 2004 trip to Yemen, Mehanna attempted to offer himself and friends as recruits (i.e., material support) to al Qaeda.⁸⁸ The Court placed great emphasis on the testimonies of Mehanna's coconspirators, who testified that Mehanna once declared that "America was at war with Islam" and saw "American soldiers as valid targets."⁸⁹ Most notably, one of Mehanna's coconspirators obtained a contact person who could get them into a terror camp upon their arrival in Yemen.⁹⁰ Unlike *Holder*—which only determined the HLP *knew* it was dealing with FTOs—the *Mehanna* Court found that the government could prove

84. *Mehanna*, 735 F.3d at 48; *see also* Abel, *supra* note 80, at 732 (explaining that coordination was established due to the fact Mehanna knew he was translating the material to "al Qaeda's English Wing" and hoped that the translation would make an impact).

85. *See id.* at 41 (clarifying that Mehanna's use of the word "jihad" was referencing violent acts).

86. *Id.*; *see also* Abel, *supra* note 80, at 732 (noting how Mehanna's own statements contributed to the finding he intended to further the goals of al Qaeda).

87. *Mehanna*, 735 F.3d at 45 (rejecting Mehanna's claims that he travelled to Yemen in 2004 in the pursuit of Islamic scholarly studies based on all the evidence, and even statements made by Mehanna regarding his trip). For example, Mehanna attempted to locate a terrorist training camp in Yemen and even stayed there for an extra week in search of a camp before returning home. Mehanna's conversations, dating back to 2001, with his coconspirators showed how the trip was in search of terrorist camps as the group discussed different ways they could get into Iraq, and "wished to engage in jihad if he 'ever had the chance.'" *Id.*

88. 18 U.S.C. § 2339A (defining "material support," in part, as "personnel (1 or more individuals who may be or include oneself)"); *Mehanna*, 735 F.3d at 43–44.

89. *See Mehanna*, 735 F.3d at 44 (highlighting that coconspirators testified that Mehanna persistently stated his belief that engaging in jihad was "a duty upon a Muslim if he's capable of performing it" and that this duty included violence). Mehanna also told an associate in 2006, Ali Aboubakr, about how he had traveled to Yemen to engage in jihad, and even invited Aboubakr to join him if he traveled abroad in search of jihad again. *Id.*

90. *See id.* at 45 (explaining that Mehanna had a plan of action after arriving in Yemen).

that Mehanna possessed the requisite mens rea of *specific intent* to convict him under section 2339A.⁹¹ In *Holder*, the HLP intended to provide material support to the nonviolent ends of the FTOs, which is why liability solely under section 2339A was not available in *Holder*.⁹² But here, Mehanna possessed the specific intent to provide material support to al Qaeda, knowing or intending that a FTO would use this support in a conspiracy to kill persons abroad.⁹³

But Mehanna further argued that his actions constituted “independent advocacy” protected under the First Amendment and that they did not meet the requisite coordination test because his translations of al Qaeda materials were neither provided to, nor in coordination with, al Qaeda.⁹⁴ The First Circuit in *Mehanna* explicitly rejected Mehanna’s contention that the government needed to show a direct and solid connection to satisfy *Holder*’s coordination test to sustain the conviction.⁹⁵ The court found that even if the evidence did not establish a direct link, Mehanna’s translations were specifically coordinated with al Qaeda.⁹⁶ Mehanna’s

91. 18 U.S.C. § 2339A; *Mehanna*, 735 F.3d at 46 (“[T]he evidence we have summarized sufficed to ground a finding, beyond a reasonable doubt, that the defendant traveled to Yemen with the specific intent of providing material support to al-Qa’ida, knowing or intending that this support would be used in a conspiracy to kill persons abroad.”); see generally *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (noting that the HLP intended to provide material support to the nonviolent ends of the FTOs, which is why liability solely under section 2339A was not available).

92. *Holder*, 561 U.S. at 5. A section 2339A prosecution was not available because section 2339A requires that the provision be made with the intent or knowledge that the support given will be used in an attack. 18 U.S.C. § 2339A.

93. *Mehanna*, 735 F.3d at 35.

94. Brief of Defendant-Appellant at 40–47, *Mehanna*, 735 F.3d 32 (No. 12-1461); see also Benjamin Wittes et al., *An Exchange on Tarek Mehanna*, LAWFARE BLOG (Apr. 22, 2012, 3:45 PM), <https://www.lawfareblog.com/david-cole-and-peter-margulies-exchange-tarek-mehanna> (arguing that speaking to al Qaeda is not criminal and the evidence does not show that Mehanna used the website as an intermediary); but see Brief of Plaintiff-Appellee at 23, *Mehanna*, 735 F.3d 32 (No. 12-1461) [hereinafter Brief of Plaintiff, *Mehanna*] (explaining Mehanna’s translation of 39 *Ways to Jihad* established “coordination” because the contents of the translated material served as an instructional guide for those who wished to engage in jihad); accord Abel, *supra* note 80, at 732–39 (noting Mehanna’s translated material calls upon Muslims to support jihad and to incite other Muslims to engage in violence); but see also Second Superseding Indictment at 6–14, *United States v. Mehanna*, 669 F. Supp. 2d (D. Mass. 2011) (No. 09-CR-10017-GAO) (using Mehanna’s statement that he hoped the translated materials “made an impact” to further establish coordination).

95. See *Mehanna*, 735 F.3d at 49 (noting that the *Holder* Court explained coordination in terms of service as “concerted activity, not independent advocacy”). The government pushed for an even broader interpretation of coordination, where it opined that independent advocacy should be interpreted narrowly in material support convictions. Even if a direct link was required, the government asserted it was established because Mehanna responded directly to al Qaeda’s public calls for support and believed his translations would further al Qaeda’s goals. Government’s Opp’n to Def.’s Motion to Dismiss Portions of Counts One Through Three of the Second Superseding Indictment at 23, *Mehanna*, 669 F. Supp. 2d (No. 09-CR-10017-GAO).

96. See Brief of Plaintiff, *Mehanna*, 735 F.3d at 66–67 (arguing Mehanna’s activities were

translation activities seem to fit within the common understanding of “coordinate” because the court found that his translations were designed to bring a common action, one of jihad and violence, against the United States.⁹⁷ The court found that the translations constituted concerted activity because Mehanna knew that al Qaeda directly requested at-Tibyan to translate its propaganda materials.⁹⁸

The First Circuit also followed *Holder* and the statutory language of section 2339B and found that the First Amendment did not protect any provision of material support through speech to a FTO.⁹⁹ The court sentenced Mehanna to seventeen-and-a-half years in prison, despite arguably no concrete evidence establishing direct contact with members of al Qaeda or the imposition of an imminent threat of violence.¹⁰⁰

B. A Narrow Interpretation of Coordination

Some argue that a broad interpretation of “coordination” destroys the protection afforded by the First Amendment and allows the government to criminalize speech that it disagrees with under the guise of combatting terrorism.¹⁰¹ David Cole, who served as counsel to HLP, is a leading proponent of interpreting coordination narrowly, and stresses that a broad approach enables the government to unfairly imprison citizens without sufficient evidence.¹⁰² Critics like Cole (e.g., Justice Stephen Breyer),

specifically directed to al Qaeda because Mehanna answered public calls for support and considered it an honor to be associated with al Qaeda); *see also id.* at 67 (noting coordination extends to services rendered to a FTO at the organization’s own behest).

97. *See supra* note 94 (discussing the content and message of Mehanna’s translated materials); *see generally* Brief of Plaintiff, *Mehanna*, 735 F.3d (highlighting Mehanna’s personal statements of his desire to engage in jihad).

98. *See* Brief of Plaintiff, *Mehanna*, 735 F.3d at 68 (citing *United States v. Maryea*, 704 F.3d 55, 73 (1st Cir. 2013)) (noting the translations were coordinated because Mehanna participated in the conspiracy to aid al Qaeda knowingly and voluntarily and did so in direct response to al Qaeda’s requests).

99. 18 U.S.C. § 2339B(h) (2015) (“Individuals who act entirely independently of the [FTO] to advance its goals or objectives shall not be considered to be working under the [FTO’s] direction and control.”); *see Mehanna*, 735 F.3d at 49 (explaining the government characterized the translations as “service,” which is a form of material support, where service as material support refers to “concerted activity, not independent advocacy”); *but see* Abel, *supra* note 80, at 735 (noting that Mehanna’s speech would have received greater constitutional protection had the court and government characterized the translations as a call for violence under a *Brandenburg* incitement analysis).

100. *See Mehanna*, 735 F.3d at 50 (explaining that neither the statute nor the Supreme Court’s decision in *Holder* required a “direct link” between a defendant and a FTO for a violation to occur).

101. *See* David Cole, *The Roberts Court vs. Free Speech*, 57 N.Y. REV. BOOKS 80, 81 (Aug. 19, 2010) (comparing the modern terrorism era to the McCarthy era, where unfounded fears and disapproval of a speaker’s viewpoint “eroded” protections afforded by the First Amendment).

102. *See id.* (arguing that the *Holder* Court based its decision on “justifications that were unsupported by evidence”); *see also* Wittes et al., *supra* note 94 (arguing that the government failed

believe that coordination should require more than mere contact with a FTO to avoid an unconstitutional intrusion into free speech.¹⁰³ Additionally, Cole rejects the *Holder* court's notion that human rights advocacy is fungible, and that the HLP's assistance to the FTOs could free up other money and resources for the groups to further their terror objectives.¹⁰⁴ But whether future courts will broadly or narrowly interpret *Holder*'s coordination test remains unanswered.

III. ANALYZING HOW PROXIMATE CAUSE AND THE CDA IMPACT AND RESTRICT REMEDIES IN CIVIL LAWSUITS

The material support statutes aim to deter and punish parties responsible for deadly and horrible terror attacks, but the statutory language creates many hurdles for prosecutors and plaintiffs alike. Civil lawsuits are vital to the war on terrorism as they can stifle the flow of money to FTOs, and thus cripple their operations.¹⁰⁵ But before prevailing on any civil claim pursuant to section 2333, plaintiffs have additional challenges to hurdle that are unique to civil lawsuits. Plaintiffs must satisfy *Holder*'s coordination test; but they also must establish proximate causation and defeat the social media company's anticipated CDA immunity defense.

A. Proximate Cause

To recover pursuant to the material support statutes for either civil or criminal damages, a prosecutor or a private plaintiff must prove that a

to provide evidence to show that Mehanna knew he translated materials for al Qaeda). For a discussion on whether American society has become tolerant of infringement on First Amendment rights, see generally Nicholas A. Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313 (2014).

103. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 43–44 (Breyer, J., dissenting) (noting there is no traditional First Amendment “categorical exception” for coordinating with a group that is engaged in unlawful activity); Cole, *supra* note 101 (arguing that when “material support” consists of speaking with or to a group, the First Amendment protects the rights of assembly and association).

104. David Cole, *What Counts as Abetting Terrorists?*, N.Y. TIMES BLOG (June 21, 2010, 3:21 PM), <https://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/> (declaring that the First Amendment is all about human rights advocacy and cannot be turned into bullets or guns); see generally *Holder*, 561 U.S. at 47 (Breyer, J., dissenting) (rejecting the idea that human rights advocacy is fungible on the basis that the government offered no empirical information or evidence in support of this assertion, and the majority gave too much weight to congressional concern “about the ‘fungible’ nature in general of resources, predominately money and material goods”).

105. See Stephen J. DiGregoria, Note, *If We Don't Bring Them to Court, the Terrorists Will Have Won: Reinvigorating the Anti-Terrorist Act and General Jurisdiction in a Post-Daimler Era*, 82 BROOK. L. REV. 357, 376 (2016) (noting how civil lawsuits contribute to the war on terror because they have the ability to disturb the inflow of money to FTOs).

defendant knowingly provided material support to a known FTO.¹⁰⁶ But to recover civil damages, some causal connection between the conduct alleged and the injury asserted is required under the material support statutes. And each circuit has different standards for establishing that proximate cause.¹⁰⁷

The Seventh Circuit, for example, has a more relaxed standard to establish proximate cause. In *Boim*, the Seventh Circuit found a Hamas donor liable because the donor participated in the wrongful activity “as a whole,” despite no proven causal connection between the donor’s actions and the injury.¹⁰⁸

But the Second Circuit, on the other hand, refused to adopt a lower standard of proximate cause.¹⁰⁹ In *Rothstein v. UBS AG*, the Second Circuit held that a plaintiff does not establish proximate cause by merely proving the defendant per se violated the federal statute, because Congress did not intend to impose strict liability into section 2333.¹¹⁰ In the Second Circuit, proximate cause hinges on the substantial factor test (i.e., “whether the defendant’s conduct is a substantial factor in bringing about the plaintiff’s injuries”).¹¹¹

In *Fields*, the Northern District of California followed the Second Circuit’s approach to define proximate cause and dismissed Fields’ civil lawsuit against Twitter because the complaint failed to establish how Twitter’s provision of accounts to ISIS proximately caused her husband’s death.¹¹² In *Fields*, Fields’ wife sued Twitter under section 2333 and alleged that Twitter provided material support to ISIS by allowing it to

106. *Holder*, 561 U.S. at 17–18.

107. See Benjamin Wittes & Zoe Bedell, *Facebook, Hamas, and Why a New Material Support Suit May Have Legs*, LAWFARE BLOG (July 12, 2016, 1:23 PM), <https://www.lawfareblog.com/facebook-hamas-and-why-new-material-support-suit-may-have-legs> (explaining how the Second Circuit uses the traditional proximate causation approach that uses the substantial factor test, where the Seventh Circuit has a much lower standard).

108. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 697 (7th Cir. 2008); see also Wittes & Bedell, *supra* note 107 (contrasting the Seventh Circuit’s lower standard for proximate cause with the Second Circuit’s higher standard).

109. *Rothstein v. UBS*, 708 F.3d 82, 96 (2d Cir. 2013).

110. See *id.* (articulating that proximate cause must be established separate from the alleged violation occurring as Congress did not intend to impose strict liability within the statute); accord Wittes & Bedell, *supra* note 107 (noting that congressional intent does not support strict liability).

111. *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 130 (2d Cir. 2013) (describing the “substantial factor” test for establishing proximate causation); see also Wittes & Bedell, *supra* note 107 (reiterating that the Second Circuit requires a finding that the defendant’s conduct must be a substantial factor in bringing about the plaintiff’s injury to establish proximate cause).

112. *Fields v. Twitter*, No. 16-cv-00213-WHO, 2016 WL 6822065, at *9–10 (N.D. Cal. Nov. 18, 2016) (dismissing the case because even under “a substantial factor test,” the plaintiffs failed to demonstrate how Twitter’s provision of accounts to ISIS proximately caused the injuries).

use the Twitter service, which proximately caused her husband's death in a November 2015 terror attack in Jordan.¹¹³ The court found that the complaint sufficiently alleged Twitter's provision of material support to ISIS and noted that ISIS used Twitter to fundraise for terrorist activities, postinstructional guidelines and promotional videos, reach recruits across the globe, disseminate propaganda, and incite fear.¹¹⁴ But the court found that the complaint ultimately failed to establish how providing this material support proximately caused Fields' death, despite ISIS' claim of responsibility.¹¹⁵

Though Fields contended that ISIS' use of Twitter proximately caused her husband's death because ISIS utilizes Twitter "as a tool for spreading extremist propaganda, raising funds and attracting new recruits," and that "this material support has been instrumental to the rise of ISIS and has enabled it to carry out numerous terrorist attacks,"¹¹⁶ the court found that the complaint did not allege that ISIS used Twitter to directly communicate with, or recruit, Abu Zaid—the attacker—and also failed to establish that Abu Zaid ever used Twitter to finance, plan, or carry out his attack.¹¹⁷ Rather, the complaint alleged only a thin, tenuous connection between ISIS' Twitter use and Abu Zaid; it claimed that ISIS' execution of a kidnapped Jordanian pilot inspired Abu Zaid, but it failed to connect Twitter in any way to the specific attacks.¹¹⁸ The *Fields* court therefore dismissed the plaintiff's complaint and held that ISIS' use of Twitter was not the proximate cause of the terror attack because the fact 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" does not "plausibly suggest the necessary causal connection."¹¹⁹ The plaintiff in *Fields* asserted that ISIS' presence on social media may have influenced the attacker, but the plaintiff failed to allege that ISIS used Twitter as a mechanism to carry out or plan deadly attacks.¹²⁰

113. *Id.* at *1–2.

114. *Id.*

115. *Id.* at *10 n.3. In claims based on the material support statutes, courts have "rejected alleged causal connections that are too speculative or attenuated to raise to a plausible inference of proximate causation." *Id.*

116. Complaint ¶ 2, *Fields*, No. 16-cv-00213-WHO (N.D. Cal. Aug. 30, 2016).

117. *Fields*, 2016 WL 6822065, at *1 (illustrating the complaint's deficiency in alleging proximate cause for failing to show that the attacker even had a Twitter account to begin with).

118. *Id.* at *9.

119. *Id.* at *10.

120. See Wittes & Bedell, *supra* note 107 (reiterating that Twitter has a strong defense to lawsuits alleging they provided material support to terrorist groups because most complaints cannot specifically link the attack with anything that happened on Twitter).

B. CDA Immunization

But even if a plaintiff satisfies the proximate cause element, the plaintiff must still hurdle the CDA immunity defense. Under the CDA, defendants may qualify for immunization if the plaintiff's lawsuit is: (1) against an interactive computer service provider or user; (2) based upon information provided by another content provider; and (3) attempting to hold the defendant liable as a publisher or speaker of that content.¹²¹

The *Fields* court is the only court that ruled regarding the application of the CDA to a civil lawsuit where the material support statutes are implicated.¹²² Even though the *Fields* court found that the plaintiff did not establish proximate cause, the court proceeded to discuss whether the CDA immunized Twitter and ultimately granted Twitter's motion to dismiss on the grounds that Twitter was immunized from liability under the CDA because it was a mere passive service provider.¹²³ In granting the motion to dismiss for the Second Amended Complaint, the *Fields* court did not consider whether the initial provision of Twitter accounts to ISIS violated the material support statutes, but instead concluded that providing accounts was "publishing activity," protected by the CDA.¹²⁴ Instead, the court framed the issue as: whether *Fields* attempted to hold Twitter liable as a publisher of content that a third party generated.¹²⁵

The plaintiffs in *Fields* provided two justifications to bolster their argument that the lawsuit was not attempting to hold Twitter liable as a publisher. First, they argued that the lawsuit was based on Twitter's provision of Twitter accounts to ISIS, and not solely based upon the content of the posts that Twitter and ISIS disseminated.¹²⁶

121. Ruanne, *supra* note 23, at 21–22; *see also* Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (listing the three-prong test for CDA protection). Section 230 defines an interactive computer service as "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 or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (1998); *see also* Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 406–07 (6th Cir. 2014) (noting how courts broadly construe this definition to encompass websites like Facebook).

122. Ruanne, *supra* note 23, at 22.

123. *See Fields*, 2016 WL 6822065, at *5–6 (concluding that providing accounts to ISIS is "publishing activity," which section 230(c) protects because it is a decision about what content will be posted); *but see* Wittes & Bedell, *supra* note 53 (questioning whether the CDA may immunize a content provider when the underlying offense is an alleged violation of federal law).

124. *Fields*, 2016 WL 6822065, at *11–12; *see* Wittes & Bedell, *supra* note 53 (questioning whether the CDA should have immunized Twitter when the complaint alleged Twitter violated federal law).

125. *Fields*, 2016 WL 6822065, at *7.

126. *Id.* at *8.

The court rejected the plaintiffs' first theory by relying on previous cases that broadly defined publishing activities, which included any decision about what third-party-generated content might be posted online.¹²⁷ The *Fields* court adopted this broad view of publishing activity even though the cases it relied on generally applied that reasoning to specific offensive content posted on a specific platform, and not to the mere provision of a platform in general.¹²⁸ Rather than analyzing whether the initial provision of Twitter accounts to ISIS constituted material support, the *Fields* court reasoned that providing ISIS with Twitter accounts was essentially the same thing as permitting content to be posted, or declining to remove content.¹²⁹ In the court's view, the provision of Twitter accounts to ISIS reflects "choices about what third party content can appear on Twitter and in what form."¹³⁰ It appears that the plaintiff's failure to allege how Twitter specifically contributed to ISIS' mission—other than merely providing a forum for ISIS to post content—influenced the court's decision to apply the CDA as broadly as it did.¹³¹

Next, the plaintiffs argued that the CDA did not apply because ISIS accomplished its recruiting and other objectives through Twitter's *private* direct messaging features. The plaintiffs argued that the court should define "publisher" under the CDA as "one who disseminates information to the public."¹³² And because private direct messages are not "disseminated public information," but rather private messages, the

127. *Id.* at *5 (citing *Klayman v. Zuckerberg*, 735 F.3d 1354, 1357 (D.C. Cir. 2014)) (explaining that Twitter was immunized because the plaintiff's claims were based on what third-party-generated content Twitter allowed to be posted on its service); see *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (explaining that determining whether to prevent the posting of third-party material online is precisely the kind of activity that the CDA covers); *Ruanne, supra* note 23, at 23 (discussing the court's rejection of the plaintiff's provision-of-accounts theory of liability).

128. *Ruanne, supra* note 23, at 23; see *Fields*, 2016 WL 6822065, at *6 (noting that Twitter was not liable because this case had nothing to do with information that Twitter should have posted online).

129. *Fields*, 2016 WL 6822065, at *6; see generally *Fair Hous. Council*, 521 F.3d at 1175 (discussing when CDA immunization is available).

130. *Fields*, 2016 WL 6822065, at *6 (citing *Doe v. Backpage.com*, 817 F.3d 12 (1st Cir. 2016)).

131. *Fields*, 2016 WL 6822065, at *10 ("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."); see *Ruanne, supra* note 23, at 23 (noting deficiencies in the plaintiff's complaint as it focused too much on content posted to Twitter by third-parties); but see Second Amended Complaint ¶¶ 84–90, *Fields*, No. 3:16-cv-00213-WHO 9 (N.D. Cal. Aug. 30, 2016) (outlining the ways in which Twitter's provision of accounts violates the material support statutes).

132. *Fields*, 2016 WL 6822065, at *10.

plaintiff argued that the court should not apply the CDA to the facts of the case.¹³³

But the court found that the CDA's enactment is rooted in defamation law.¹³⁴ In defamation law, a court defines "publication" as "communication [of the defamatory matter] intentionally or by a negligent act to one other than the person defamed."¹³⁵ As a result, the *Fields* court held that because it treated Twitter as a publisher, and because defamation law does not distinguish between private and public communication, even private direct messages fell within the scope of the CDA's immunization.¹³⁶

Fields established that the CDA shields social media companies from liability under the material support statutes when they are treated as publishers.¹³⁷ But the *Fields* decision likely cannot firmly establish that providing a FTO a social media platform is always a publishing decision akin to making choices about what content can appear on the website and in what form.¹³⁸ The *Fields* court most likely arrived at its conclusion as a result of the plaintiff's failure to specifically allege that Twitter contributed to the unlawful conduct (i.e., the terror attacks) by providing the social media accounts to ISIS.¹³⁹ But such evidence in future cases might change the court's opinion.

Proving a social media company violated federal law might provide plaintiffs another way to evade the CDA's application to a case brought under the material support statutes. Section 230(e)(1) of the CDA does not impair the enforcement of any federal criminal statute.¹⁴⁰ The federal circuit courts are split, however, on whether service providers, like Twitter, lose their civil immunity if they aided and abetted, or violated federal law.¹⁴¹ The First Circuit, for example, recently held that the CDA

133. *Id.* at *10.

134. *Id.*

135. *Id.* at *14–15 (internal citations omitted).

136. *Id.* at *11 (citing several decisions in which the courts had no issues applying the CDA to claims predicated upon transmission of nonpublic messages).

137. *Id.*; see Wittes & Bedell, *supra* note 53 (explaining CDA immunization). *But see* Ruanne, *supra* note 23, at 21 n.200 (stating that the statute did not "create a lawless no-man's land on the [I]nternet" (quoting *Fair Hous. Council v. Roommates.com LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008))).

138. See *Fields*, 2016 WL 6822065, at *10–11 (noting that Twitter was considered a publisher because the focus of the complaint was based on offending content).

139. See *infra* Part IV (articulating this Article's proposal); see also *Fields*, 2016 WL 6822065, at *9 (noting the failure to allege elements of proximate cause).

140. 47 U.S.C. § 230(e)(1) (1998); Wittes & Bedell, *supra* note 53.

141. See Wittes & Bedell, *supra* note 53 (explaining how some federal courts in Texas and Mississippi determined that Section 230 still immunizes service providers from civil liability for

may also bar recovery where the service provider is treated as a publisher even when the civil lawsuit is predicated upon a violation of a federal crime.¹⁴² But the Seventh Circuit, in *Doe v. GTE Corp.*, entertained, but did not affirmatively reject, the idea that a provider could lose its civil immunity for aiding and abetting a violation of federal law.¹⁴³ Therefore, demonstrating that a social media company violated federal law potentially presents another potential avenue for plaintiffs to defeat a CDA immunity defense.

IV. PROPOSAL

Social media companies know terrorists actively manipulate their platforms and even former President Obama urged social media companies to do more to combat extremism online.¹⁴⁴ Given the recognized connection between social media and terrorist activity, this Article urges Congress and courts to collaboratively act to use the material support statutes to deter and punish actors that give material support to FTOs.

A recently filed case claiming violations of the material support statutes, *Force*, has the potential to fundamentally change America's approach to combat terrorism by eliminating terrorists' greatest weapon: social media.¹⁴⁵ This Article argues that the *Force* complaint should survive a motion to dismiss and should lay the foundation for future prosecutions against social media companies to help combat global

alleged violations of federal law, while the Seventh Circuit has considered the alternative, where an Internet service provider would lose civil immunity for an alleged violation of federal law).

142. *Doe v. Backpage.com*, 817 F.3d 12, 22 (1st Cir. 2016) (noting the plain language of section 230(e) compelled the court's conclusion that the exception from the liability shield for federal criminal cases did not apply to civil liability even where the civil action was based on a violation of federal criminal law).

143. See *Doe v. GTE Corp.*, 347 F.3d 655, 662 (7th Cir. 2003) (declining to answer the question of whether aiding and abetting a violation of federal law would forfeit civil immunity for providers, while dismissing the case on other grounds).

144. See Peter Nicholas, *Clinton Urges Social-Media Intelligence Sharing in Terror Fight*, WALL ST. J. (Dec. 6, 2015, 5:20 PM), <https://www.wsj.com/articles/clinton-urges-social-media-intelligence-sharing-in-terror-fight-1449438763> (illustrating how social media companies know terrorists actively manipulate their platforms); see Berger & Morgan, *supra* note 7 (detailing the pervasiveness and prevalence of ISIS activity on Twitter); see also Barack Obama, President of the United States of America, Remarks by the President in Closing of the Summit on Countering Violent Extremism (Feb. 18, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/remarks-president-closing-summit-countering-violent-extremism> (urging social media companies to do more to combat extremism online).

145. See Lisa Blaker, *The Islamic State's Use of Online Social Media*, 4 MIL. CYBER AFF. 1, 3–4 (2015) (explaining how ISIS' "masterful" use of social media successfully attracts new recruits and sympathizers, especially millennials); see generally Berger & Morgan, *supra* note 7 (illustrating social media's value to terrorists).

terrorism.¹⁴⁶ But this Article recognizes that not all cases will contain the strong facts that the *Force* case comprises. Therefore, to ensure national security and easier prosecutions against those who knowingly support terrorist organizations, this Article proposes that Congress amend the definition for “material support” in section 2339A to include “social medial platforms,” which would also remove the CDA hurdle in civil liability as a violation of a federal statute (e.g., the material support statute) would occur the instance a social media company knowingly provides a platform to a FTO.

A. *Force v. Facebook: The Future Foundation for Social Media Company Prosecutions Under Section 2339B*

In July 2016, the estates of five victims of terrorist attacks filed a complaint claiming that Facebook “knowingly provided material support and resources to Hamas, a notorious terrorist organization that has engaged in and continues to commit terror attacks.”¹⁴⁷ The *Force* case has yet to go to trial, but Facebook has filed a motion to dismiss contending the CDA immunizes Facebook from any civil liability.

Even though section 2333 does not include any mens rea element, the plaintiffs still must satisfy section 2339B’s mens rea requirement because it is incorporated into section 2333(a). Therefore, the complaint alleges that Facebook possessed the requisite mens rea of “knowingly” to impose criminal liability under section 2339B because individual members of Hamas managed Facebook accounts in their own names which they used to carry out Hamas activities and the plaintiffs allege that a company as technologically advanced as Facebook should know that these designated terrorists actively use its services.¹⁴⁸

146. See Complaint at 54, *Force v. Facebook, Inc.*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (detailing all the required elements to prosecute a social media company under 18 U.S.C. § 2339B); see also Benjamin Wittes & Zoe Bedell, *Tweeting Terrorists, Part II: Does It Violate the Law for Twitter to Let Terrorist Groups Have Accounts?*, LAWFARE BLOG (Feb. 14, 2016, 6:35 PM), <https://www.lawfareblog.com/tweeting-terrorists-part-ii-does-it-violate-law-twitter-let-terrorist-groups-have-accounts> (identifying how companies may have provided material support to FTOs and noting the potential impact the Facebook lawsuit may have).

147. Complaint at 2, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016).

148. *Id.* at 44 (discussing how knowledge of Hamas’ Facebook and social media use is in the public domain and well known); see *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 208 (2d Cir. 2014) (holding that a defendant has actual knowledge that an organization engages in terroristic activity if the defendant demonstrated deliberate indifference as to whether the organization engages in such terrorist activity); Adam Rasgon, *Facebook Closes Hamas Leader’s Account*, JERUSALEM POST (July 13, 2016, 11:06 AM), <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Facebook-closes-Hamas-leaders-account-460246> (reporting that Facebook shut down Hamas’ leader’s account seven times). Ironically, the leader condemned Facebook’s decision over Twitter. *Id.*; see Becca Noy, *Facebook Refuses to Take Down Video of Hamas Terrorists Training*

Facebook's "community standards" policy reveals that it does not actively monitor pages and posts, but only responds to complaints it receives from other users.¹⁴⁹ Therefore, the plaintiffs use Facebook's own policy to demonstrate that Facebook reviews complaints about pages and consciously decides whether to remove or suspend a page or post, satisfying section 2339B's knowledge requirement.¹⁵⁰ The *Washington Examiner* levied a complaint to Facebook in 2014 regarding anti-Israel propaganda featured on the site.¹⁵¹ Facebook responded by saying that the page fit into an "approved category" under its community standards policy and did not remove it.¹⁵² The plaintiffs could further use this example to illustrate how Facebook's reluctance to remove the material satisfies section 2339B's knowledge requirement.

As mentioned in Part I, section 2339B uses the definition of "material support" contained in section 2339A. In the *Force* complaint, the plaintiffs allege that the very provision of a Facebook account to Hamas is "material support" because FTOs use social media to recruit, which section 2339A includes within the definition of "material support."¹⁵³ By providing Facebook accounts to Hamas, the plaintiffs argue that

in Gaza, JERUSALEM ONLINE (July 3, 2016, 12:30 PM), <http://www.jerusalemonline.com/news/in-israel/local/facebook-refuses-to-remove-video-of-hamas-terrorists-training-drill-22090> (reporting Facebook's refusal to take down Shahab News Agency's posts featuring live videos of Hamas' military drills even after the Israeli Public Security Minister reported the post and requested that it be removed).

149. Complaint at 45, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016); see *What Happens When I Report Something to Facebook? Does the Person I Report Get Notified?*, FACEBOOK BUS., <https://www.facebook.com/business/help/103796063044734> (last visited Nov. 3, 2016) (confirming Facebook reviews complaints and decides whether to remove the content); but see *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards#> (last visited Nov. 2, 2016) (banning organizations engaged in terrorist or criminal activity from using Facebook).

150. Complaint at 45, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (providing examples of Facebook's application of its policies that arguably demonstrate knowledge of terrorist activity); see 18 U.S.C. § 2339B (2015) (providing for a knowledge requirement for liability to attach); Lahav Harkov, *Bill Fining Facebook, Twitter for Not Removing Incitement to Terror Gets Ministers' Approval*, JERUSALEM POST (July 17, 2016, 9:51 PM), <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Bill-fining-Facebook-Twitter-for-not-removing-incitement-to-terror-gets-ministers-approval-460672> (noting Israel's legislation to fine Facebook and Twitter for failing to remove posts that incite terror).

151. Complaint at 45–46, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016); see Philip Klein, *Facebook Says Page Calling for Death to Jews Doesn't Violate "Community Standards,"* WASH. EXAMINER (July 28, 2014, 11:45 AM), <http://www.washingtonexaminer.com/article/2551348> (reporting Facebook's response to the complaint).

152. Complaint at 46, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016).

153. See generally *id.* (arguing that Facebook allows Hamas to spread violent propaganda to encourage and incite violence, fundraise, organize demonstrations, send covert messages, and connect like-minded individuals with a propensity to engage in acts of terrorism).

Facebook provides an intangible service under the statute's definition, because Facebook's data-usage-policy algorithm connects Hamas members with sympathizers and other terrorists.¹⁵⁴ Essentially, the plaintiffs seem to identify Facebook as Hamas' cost-free matchmaker by providing countless potential recruits and jihadists.¹⁵⁵

As it is currently set up, Facebook's algorithm alerts and leads a Facebook user who actively posts content supporting or sympathetic to Hamas to similar content and posts, allowing Hamas to disseminate its terroristic message to users across the globe (an objective Hamas may not have been able to achieve on its own without the Facebook platform).¹⁵⁶ Additionally, Facebook's algorithm considers a user's location and can notify users at certain locations of Hamas' upcoming demonstrations, rallies, and even other terrorist activity.¹⁵⁷

In this case, the court should align these activities pursuant to the *Holder* court's idea of fungibility.¹⁵⁸ FTOs, like Hamas, can rely on Facebook's cost-free, advanced algorithms to disseminate propaganda to potential recruits. This enables FTOs to allocate resources originally intended for recruitment to further its terroristic intentions because now, FTOs can accomplish recruitment objectives—without spending any funds—through Facebook's platform.¹⁵⁹ Fungibility is a key principle rooted in the material support statutes because courts interpret the statutes to find that providing supplies, funds, goods, or services to a FTO helps defray the group's legitimate costs which, in turn, frees up other monies and resources that can be used to pursue unlawful, terroristic ends.¹⁶⁰ By

154. *Id.* at 49; see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) (intimating that social media services enable FTOs to perpetuate more terror attacks).

155. Complaint at 50–52, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016); see Hughes & Vidino, *supra* note 153 (providing a more complete dissection of social media's role in recruiting potential jihadists).

156. Complaint at 20, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016); see Emily Goldberg Knox, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295, 301 (noting how terrorists manipulate social media to find potential recruits that are sympathetic to their cause).

157. Complaint at 20, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016).

158. See *Holder*, 561 U.S. at 30 (defining material support as a “valuable resource” that, when acquired, enables the organization to utilize other existing resources to be put to violent ends); see also H.R. REP. NO. 104-383, at 81 (1995) (recognizing even lawful, peaceful support provided to FTOs can defray the costs associated with engaging in violence and terrorism).

159. See Doyle, *supra* note 13, at 1–2 (explaining the fungibility of material support); see generally Complaint at 45–46, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (articulating the fungibility of a Facebook account as a service).

160. See H.R. REP. NO. 104-383, 81 (1995) (explaining that section 2339B reflects a recognition of the fungibility of financial resources and other types of material support).

Allowing an individual to supply funds, goods, or services to an organization, or to any

characterizing Twitter as a “publisher,” it appears that the *Fields* court may have overlooked the fact that FTOs, like ISIS, have significantly more resources at their disposal to plan and purchase arms for attacks because Twitter essentially recruits and disseminates propaganda for them.¹⁶¹ Therefore, when characterizing Facebook’s actions in *Force*, this Article urges the court to apply the concept of fungibility when determining material support.

This Article also asserts that a court should follow the First Circuit’s broad interpretation of “coordination.” Under a broad interpretation of the coordination test, this Article urges the court to find the requisite coordination because of Facebook’s conscious decision to not remove or suspend content that FTOs post.¹⁶² Facebook’s terms of service clearly state that it will remove or suspend accounts run by terrorists, or accounts that post terrorist content.¹⁶³ The coordination element is established due to Facebook’s conscious disregard to enforce its own policies, which Facebook knows allows terrorists and FTOs to flourish on social media to pursue their terroristic ends.¹⁶⁴

of its subgroups, that draw significant funding from the main organization’s treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can be spent on terrorist activities.

H.R. REP. NO. 104-383, 81 (1995); *see also Holder*, 561 U.S. at 32 (considering money as fungible when terror groups have dual structures to raise funds because monies donated for humanitarian aims have ultimately been used to purchase arms and explosives).

161. Instead of spending time, money, and resources on recruitment and propaganda, FTOs can rely on services like Twitter or Facebook to spread violent messages with the single click of a button, which enables them to focus on planning attacks and purchasing weapons; *see John Hall, ISIS Controls as Many as 90,000 Twitter Accounts Which It Uses to Spread Sick Propaganda and Radicalise Westerners, Terror Experts Reveal*, DAILY MAIL (March 6, 2015, 10:33 PM), <http://www.dailymail.co.uk/news/article-2982673/ISIS-controls-90-000-Twitter-accounts-uses-spread-sick-propaganda-radicalise-Westerners-terror-experts-reveal.html> (quantifying just how many Twitter accounts ISIS uses to demonstrate how quickly and efficiently ISIS can spread its message); *see also* Complaint at 4–5, *Fields*, No. 16-cv-00213-WHO (Aug. 10, 2016) (illustrating how Twitter essentially does ISIS’ job for it by providing ISIS with a Twitter account).

162. *See Knox*, *supra* note 156, at 316 (intimating that the benefit of increased user traffic to social media sites could establish coordination because both the FTO and the social media company mutually benefit from the FTOs using the platform); *see also* Complaint at 52, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (demonstrating Facebook’s ability, but refusal, to monitor and remove terrorist content).

163. *Community Standards*, *supra* note 149.

164. *See* WEBSTER’S DICTIONARY, *supra* note 61 (defining coordination); *see also Knox*, *supra* note 156, at 316–17 (explaining coordination in the context of social media companies’ failure to suspend accounts); Keith Wagstaff, *Facebook and Instagram Crack Down on Illegal Online Gun Sales*, NBC NEWS (Mar. 5, 2015, 1:59 PM), <http://www.nbcnews.com/tech/social-media/facebook-instagram-crack-down-illegal-online-gun-sales-n45316> (noting that Facebook’s ability to monitor and police content coupled with its ignorance to some content violates its own community standards and terms of service).

But even if the court analyzes *Force* pursuant to a narrow reading of coordination, this Article contends that the *Force* complaint shows how Facebook's provision of accounts to Hamas is consistent with the *Holder* court's narrow interpretation of the coordination test.¹⁶⁵ Facebook's provision of accounts to Hamas and other FTOs establishes a direct link because any user who signs up for Facebook must agree to abide by Facebook's terms of service.¹⁶⁶ This Article argues that the acceptance of the terms of services establishes a direct link because both Facebook and the FTO user have "communicated" with each other that each party agrees to provide the other with something.¹⁶⁷

And finally, the court in *Force* is in a prime position to remove the CDA hurdle that has historically obstructed plaintiffs' path to civil liability pursuant to the material support statutes. Congress enacted the CDA to protect individuals from indecent material. Therefore, this Article argues that using the CDA as a shield for social media companies that permit FTOs to post graphic videos and images of executions and tortures is illogical.¹⁶⁸ Section 230(e)(1) of the CDA specifically states a court should not construe the CDA to impair the enforcement of any federal criminal statute (e.g., the material support statutes).¹⁶⁹ Therefore, despite preceding case law, the court in *Force* should not even consider the CDA as an applicable defense to the material support statutes given

165. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24 (2010) (defining coordination broadly where a connection between the service and the FTO is required); see *id.* at 26 (describing a more narrow version of coordination that involves under the direction of, or in coordination with, a FTO); see also Knox, *supra* note 156, at 315–18 (exploring how providing a social media platform satisfies the variations of *Holder's* coordination test); Wittes & Bedell, *supra* note 146 (satisfying an even narrower definition of coordination to require formal elements, like a contract).

166. See Wittes & Bedell, *supra* note 146 (establishing a direct link by virtue of a contract, where the FTO agrees to abide by the social media company's terms of service in order to use the service).

167. Essentially, Facebook agrees to provide material support in the form of a social media platform, to be used for recruiting, fundraising, and disseminating propaganda. *Id.* The FTO agrees to abide by the terms of service, which brings increased traffic to the site and possibly creates more ad revenue for the social media company. Knox, *supra* note 156, at 316.

168. See *Fair Hous. Council v. Roommates.com LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) ("In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."). For examples of the types of gruesome and violent posts FTOs put on social media, see *supra* Part II.C. See *supra* Part II.B for a discussion on section 230 of the CDA. See Wittes & Bedell, *supra* note 123 (questioning whether the CDA immunizes Twitter from liability); see also Ruanne, *supra* note 23, at 22 (noting section 230 does not operate as a bar to liability if the underlying content is illegal); see generally Berger & Morgan, *supra* note 7 (analyzing and describing how ISIS uses Twitter and what types of content it posts).

169. 47 U.S.C. 230(e)(1); see Wittes & Bedell, *supra* note 53 (describing why the CDA should not immunize social media companies from civil liability for providing platforms to FTOs).

the CDA's statutory language and because liability under section 2333 is a predicated federal law violation.

Courts should find that social media companies lose their immunity the instant they knowingly provide FTOs with social media platforms in violation of section 2339B; and therefore, courts should not allow the CDA immunity defense to survive.¹⁷⁰ This Article argues that removing this hurdle and alleviating the burden on plaintiffs in civil lawsuits could help combat global terror because an increase in lawsuits could stifle the flow of money to FTOs.¹⁷¹

B. Amending Section 2339A's Definition of Material Support

Regardless of the future outcome of *Force*, this Article recognizes that the most direct and efficient way to prevent FTOs from accessing and manipulating social media platforms to perpetuate terrorism is for Congress to amend section 2339A's definition of material support to explicitly include the provision of a social media platform.¹⁷² Section 2339A currently defines "material support or resources" as "any property, tangible or intangible, or service."¹⁷³ As discussed, *Holder* found that "service" refers to concerted activity that is "directed to, or coordinated with," a FTO.¹⁷⁴ Therefore, to prove a social media company, specifically, provided "material support" to a FTO, in violation of the material support statutes, a prosecutor or plaintiff must apply *Holder*'s coordination test to prove that the social media company knowingly provided services directly to or in coordination with a FTO.¹⁷⁵ But this is a difficult task.

170. See Wittes & Bedell, *supra* note 53 (differentiating the material support statutes' operation from the CDA on the basis that the material support statutes have nothing to do with offending content where criminal liability is incurred the instant an individual or entity knowingly provides material support to a FTO); see also 18 U.S.C. § 2339B (defining a material support statute violation); see generally *John Doe & Other Members of the Football Team at Ill. State Univ. v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (indicating a service provider may lose civil liability immunity under CDA if the provider aided a crime); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (same); but see *Hinton v. Amazon.com, LLC*, 72 F. Supp. 3d 685, 691 (S.D. Miss. 2014) (indicating that aiding a crime may not create a civil liability exception); *Doe v. Bates*, No. 5:05-cv-91-DF-CMC, 2006 WL 3813758, at *6 (E.D. Tex. Dec. 27, 2006) (same).

171. See DiGregoria, *supra* note 105 (illustrating the stifling effect civil lawsuits have on FTOs' cash flow).

172. Leaving this up to judicial interpretation will inevitably create a circuit split, considering the already ambiguous definition of coordination. Aaron Tuley, *Holder v. Humanitarian Law Project: Redefining Free Speech Protection in the War on Terror*, 49 IND. L.J. 579, 600-01 (2016).

173. 18 U.S.C. § 2339A (2009).

174. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24 (2010).

175. *Id.*

Including social media platforms within section 2339A's definition of material support would alleviate prosecutors' and plaintiffs' burdens to establish the material support statutes' requisite "coordination test." If Congress were to include "social media platform" into the definition of "material support," a prosecutor or plaintiff would have to prove that a social media company knowingly provided a social media platform (i.e., material support) to a FTO to allege a violation of section 2339B. Therefore, by merely knowingly providing a social medial platform, a social medial company would violate section 2339B's plain language. In other words, courts would no longer analyze whether social media platforms are "intangible services directed to, coordinated with, or controlled by" FTOs,¹⁷⁶ but would rather focus on whether the social media company *knowingly* provided its platform to a FTO.

But *Holder* found that some forms of support cannot be given without coordination.¹⁷⁷ Therefore, some form of coordination is likely required, but this Article urges courts to find coordination to exist when a social media company provides or fails to remove a suspect social media account that a FTO used to further terror objectives.¹⁷⁸ Providing a social media platform creates "harmonious action" between FTOs and social media companies because both parties benefit.¹⁷⁹ FTOs receive a platform to spread terrorist propaganda, recruit, and fundraise and the social media company benefits because it increases traffic to its service that may not otherwise exist, and can profit off that increased traffic via advertisements.¹⁸⁰ Moreover, courts should construe the deliberate failure of social media companies to remove terrorist-run accounts as coordination because by failing to remove these accounts, social media companies are no longer passively providing data and content services, but are engaging in harmonious action allowing FTOs to pursue their terroristic objectives.¹⁸¹

Congress, however, should retain the current mens rea elements of

176. 18 U.S.C. § 2339B; *Holder*, 561 U.S. at 36.

177. *Holder*, 561 U.S. at 24.

178. Knox, *supra* note 156, at 316.

179. *Id.* at 315–18; *see Holder*, 561 U.S. at 43–44 (defining coordination).

180. *See Hughes & Vidino, supra* note 153 (discussing social media's recruitment benefits); *see generally* Complaint at 45–46, *Force v. Facebook, Inc.*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (alleging the benefits Hamas derives from using Facebook); THE CAMSTOLL GRP., USE OF SOCIAL MEDIA BY TERRORIST FUNDRAISERS & FINANCIERS (Apr. 2016), <https://www.camstoll.com/wp-content/uploads/2016/04/Social-Media-Report-4.22.16.pdf> (reporting the fundraising benefits social media companies provide to FTOs).

181. *See Blake, supra* note 145 (discussing social media companies' conscious failure to remove accounts); *see also* Knox, *supra* note 156, at 316 (explaining social media companies' failure to remove accounts they know are run by terrorists as "coordination").

both sections 2339A and 2339B.¹⁸² But a plaintiff or prosecutor could easily satisfy section 2339B's current mens rea requirement by merely citing to the widespread notoriety of FTOs using social media to propagate terror attacks.¹⁸³

Finally, this Article's proposed amended definition would also simplify civil lawsuits under section 2333, because it would restrict a social media company's ability to shield itself under the CDA because the initial provision of the platform would violate section 2339B.¹⁸⁴ As a result, most section 2333 civil lawsuits would turn on whether the provision of an account proximately caused the plaintiff's injuries, which the *Force* complaint appears to accomplish by alleging Hamas used Facebook to actively call upon its supporters to engage in jihad and terrorism against American-Jews and Israelis.

Clearing the barriers to civil lawsuits could add another weapon in the court's arsenal against the war on terrorism,¹⁸⁵ but this Article's proposal inherently raises the question of whether it is feasible for social media companies to know whether a FTO uses their services.¹⁸⁶ This Article proposes that a court should prohibit the use of CDA immunity and assess liability when a social media company knowingly provides an individual or FTO a social media platform used to establish an online, terroristic presence. Companies could still escape liability, however, if the social media company neither knew nor had reason to know a FTO, or an affiliated individual, signed up for the service. The plain language of Facebook's and Twitter's terms of service clearly outlaw any activity that

182. See *Holder*, 561 U.S. at 21 (holding the knowledge requirement reduces the potential for vagueness challenges); see also *Knox*, *supra* note 156, at 319 (noting when knowledge is not overt, defendants typically satisfy a more stringent level of mens rea in material support prosecutions); but see *Knox*, *supra* note 156, at 322 (urging Congress to amend the law to require a specific intent to further the FTOs' goals, similar to the mens rea in section 2339A).

183. See *Knox*, *supra* note 156, at 319–21 (articulating how social media companies may have the requisite means rea for section 2339B prosecutions); see also *Blake*, *supra* note 145 (reporting the vast and widespread public knowledge of terrorists exploiting social media); see generally *Complaint, Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (demonstrating Facebook's actual knowledge that FTOs exploit the platform to perpetuate terrorism and terror attacks).

184. See 47 U.S.C. § 230(e)(1) (“[N]othing in this section shall be construed to impair the enforcement of . . . any other federal criminal statute.”).

185. See *DiGregoria*, *supra* note 105 (noting civil lawsuits potentially stifle cash flow to FTOs).

186. See *Ashlee Vance, Facebook: The Making of 1 Billion Users*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2012, 6:06 PM), <http://www.bloomberg.com/news/articles/2012-10-04/facebook-the-making-of-1-billion-users> (noting that over one billion people use Facebook); see also *Knox*, *supra* note 156, at 319 (noting how over 200 million users, in twenty-one languages, use Twitter each day); *Localization & Translation*, FACEBOOK, <https://developers.facebook.com/docs/internationalization> (last visited May 5, 2017) (noting Facebook is used in over seventy languages).

promotes and incites violence and terrorism and both companies can monitor the content of users' posts.¹⁸⁷ Amending section 2339A would effectively compel social media companies to enforce their own policies, with less bias.¹⁸⁸ Facebook, when responding to third-party complaints, would be more inclined to suspend or shut down terrorist-run accounts if the failure to do so could result in sizeable monetary fines, civil liability, and or imprisonment.¹⁸⁹

Companies like Facebook and Twitter are just that: companies, not people. As such, it might be difficult to determine whether a company possesses the requisite scienter. To overcome this hurdle, prosecutors and plaintiffs will likely find the collective knowledge theory as the most appropriate way to evaluate whether a social media company knowingly provided material support to FTOs.¹⁹⁰ Under the collective knowledge theory in a section 2339B prosecution, the government would only need to provide evidence that showed an employee, acting within the scope of his or her employment, knew that a given FTO used the social media service.¹⁹¹ In October 2013, Twitter suspended twelve accounts of known jihadists, but reinstated those same accounts just a few days later.¹⁹² This example should prove that at least one Twitter employee

187. See *Community Standards*, *supra* note 149 (banning FTOs from using Facebook); see also Knox, *supra* note 156, at 317 (discussing YouTube's "Content ID System" that allows YouTube to identify and manage content online); see *id.* (noting an information gathering system developed by the Department of Homeland Security that could operate similarly to YouTube's "Content ID System").

188. See Phillip Klein, *Facebook Says Page Calling for Death to Jews Doesn't Violate "Community Standards,"* WASH. EXAMINER (July 28, 2014, 11:45 AM), <http://www.washingtonexaminer.com/article/2551348> (highlighting Facebook's bias and inconsistency when responding to third-party complaints to show Facebook knows terror groups use the service but preserves terror groups' posts); see also Rasgon, *supra* note 148 (reporting that Facebook shut down a Hamas leader's account several times, yet he was able to keep his Twitter account); see generally Complaint at 45–46, *Force*, No. 1:16-cv-05490 (S.D.N.Y. July 10, 2016) (alleging Facebook's deliberate failure to remove known posts, pages, and accounts of Hamas).

189. See 18 U.S.C. § 2339B(a) (identifying a twenty-year maximum prison sentence for a violation); see also Blake, *supra* note 145 (noting Twitter does not currently report suspicious accounts to law enforcement); Doyle, *supra* note 13, at 20 (confirming a maximum \$500,000 fine for organizational defendants); Knox, *supra* note 156, at 317 (outlining how social media companies could work with law enforcement to identify potential terroristic activity on their websites).

190. See Knox, *supra* note 156, at 320 (defining the collective knowledge theory and its application).

191. See *U.S. v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (explaining the collective knowledge theory and how it applies to corporate defendants); accord Knox, *supra* note 156, at 320–21 (explaining how social media companies likely satisfy the knowledge requirement under the collective knowledge theory).

192. J.M. Berger (@intelwire), TWITTER (Oct. 7, 2013, 11:17 AM), <https://twitter.com/intelwire/status/387280656616538112>; see also Knox, *supra* note 156, at 320

knew the accounts were run by jihadists, but more importantly, that another employee reviewed the case and nonetheless subsequently reinstated the accounts.

Not every case, however, will contain those conclusive facts. Therefore, in addition to the collective knowledge theory, prosecutors and plaintiffs should use the notoriety theory to establish knowledge.¹⁹³ Social media companies, specifically Facebook, have the ability to track and monitor their users' data.¹⁹⁴ This internal monitoring system allows social media companies to identify individuals who become radicalized over time.

C. Criticisms

Some may argue that this Article's proposal would unduly broaden the material support statutes and effectively burden First Amendment rights. The proposed broad regulations and the expected threat to a social media company will undoubtedly result in social media companies mistakenly shutting down accounts belonging to individuals who are not associated with FTOs, but merely sympathize with them. But this Article does not find that its proposals would unduly burden the First Amendment rights of individuals, even if a social media company erroneously suspended or deactivated a social media account.

It should be noted that FTOs and individuals linked to FTOs abroad, do not have First Amendment rights.¹⁹⁵ Additionally, the Supreme Court has recognized that the government may restrict certain categories of speech, like fighting words, incitements to imminent violence, child pornography, and obscenity.¹⁹⁶ Courts will likely consider the

(discussing the suspension of known jihadists' twitter accounts).

193. See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 NAT'L SECURITY L. & POL'Y 5, 28 (2005) (explaining how the widespread notoriety of an organization that engages in terrorist activities can easily persuade a jury of the defendant's knowledge).

194. See Knox, *supra* note 156, at 317 (discussing programs that allow social media companies to track and monitor user activity); Michael Roppolo, *Personalized Ads Coming to Facebook*, CBS NEWS (June 12, 2014, 2:43 PM), <http://www.cbsnews.com/news/facebook-rolls-out-ad-preferences-but-gets-more-user-data/> (noting how Facebook customizes advertisements based on user activity); Ruanne, *supra* note 23, at 17–18 (outlining the widespread use and public knowledge of terror groups using social media).

195. Groups and individuals that are not United States citizens do not have these rights, as the United States Constitution only applies United States citizens. U.S. CONST. amend. I.

196. See *United States v. Stevens*, 559 U.S. 460, 468 (2010) (listing traditionally recognized categories of speech that may be prohibited); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that free speech does not protect an individual who falsely shouts "fire" in a crowded theatre and causes a panic); see also 18 U.S.C. § 2552 (outlawing the dissemination of child pornography); see generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (outlawing speech that

prohibition of the provision of social media platforms as a content-based restriction; therefore, the restriction must pass the strict scrutiny test to alleviate constitutional concerns.¹⁹⁷ The prohibition will undoubtedly surpass this rigorous test because it is fully documented and accepted that combatting terrorism, especially preventing “home-grown extremists,” is a compelling state interest and outlawing companies from giving certain individuals and entities social media accounts is narrowly tailored to further that interest.¹⁹⁸ This Article asserts that the proposed amended statute would likely satisfy the narrowly tailored prong because it would only prohibit a social media company from knowingly providing a social media platform to a FTO or an individual who is known to be associated with a FTO.¹⁹⁹ This Article also asserts that the institution of an appeals process could solve the above-mentioned concerns. By instituting an appeals process where an individual can petition social media companies to re-activate accounts by sufficiently demonstrating they are not associated with a FTO could constitute as a low restriction on speech.

CONCLUSION

America is at war. Albeit, an unfamiliar cyber war with FTOs that exploit social media services to recruit, fundraise, and disseminate propaganda to perpetuate terror attacks across the globe. Allowing FTOs to flourish on social media places the lives of thousands of American civilians and service members at risk. Social media companies have consistently demonstrated an unwillingness to stay ahead of the curve when it comes to combatting terrorism. America is a step behind the rest of the world in recognizing the very real threat that social media use by FTOs poses.²⁰⁰ The *Force* litigation will lay the foundation for social

incites violence).

197. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (sustaining regulations that burden speech where the government interest in enacting legislation is unrelated to the suppression of speech); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (“Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).

198. See generally *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (expressing the government’s significant and compelling interest in combatting global terrorism). The narrowly tailored element is satisfied because the prohibition would only cover the narrow category of knowingly providing social media platforms to FTOs. *Id.* at 26.

199. See *id.* at 24 (differentiating between independent advocacy for a cause an individual agrees with from providing a service to a group to further that cause).

200. See *Blake*, *supra* note 145 (reporting the United Kingdom’s dismay with America’s reluctance to stop social media companies from providing their services to FTOs); see also *Conclusions and Recommendations*, UNITED KINGDOM PARLIAMENTARY PUBLICATIONS

media prosecutions because it articulates how valuable of a resource social media is to FTOs and also highlights how social media companies know FTOs use their platforms. Additionally, the *Force* complaint demonstrates why the CDA should not immunize social companies from civil liability because the initial provision of a platform is a criminal violation. Ultimately, this Article urges Congress to act swiftly and definitively to not only prevent future attacks, but to prevent FTOs from radicalizing Americans through social media. Including the “provision of a social media platform” into section 2339A’s definition of material support will give the government the tool it needs to fight against, and deter future, terrorism.