



CARRIAGE AND REMOVAL REQUIREMENTS FOR INTERNET PLATFORMS:  
WHAT *TAAMNEH* TELLS US

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The Supreme Court’s 2023 *Twitter v. Taamneh* ruling arrived at a moment of potentially great change in the laws governing Internet platforms. The ruling, including Justice Thomas’s factually dubious descriptions of platforms as passive and agnostic toward user content, will have major influence in two categories of future cases.

- Most obviously, *Taamneh* will affect cases in which plaintiffs seek to hold platforms liable for unlawful material posted by users.
- Less obviously, *Taamneh* is sure to affect “must-carry” claims or mandates for platforms to carry content against their will—including major cases on the Supreme Court’s 2023–24 docket about laws in Texas and Florida.

This piece explains how *Taamneh* may be invoked in both kinds of cases, and explores the strengths and limitations of parties’ likely arguments—in particular, arguments based on platforms’ putative passivity. It also examines important intersections between must-carry claims and claims seeking to hold platforms liable for unlawful user content. It argues that ignoring those connections may cause cases in one area of law to distort outcomes in the other. *Taamneh* itself may already have done just that.

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## INTRODUCTION

Efforts to regulate platforms in the U.S. are often stymied by a fundamental disagreement. Some voters and leaders—mostly Democratic—want platforms to remove *more* content, including “lawful but awful” material like medical misinformation or hate speech. Some—mostly Republicans—want platforms to remove *less* content. These same competing impulses appear in litigation. Some plaintiffs sue to prevent platforms from removing content, and others to hold them liable for failing to do so. Courts, unlike Congress, may soon be forced to resolve the tensions between these competing imperatives. Their decisions will almost certainly be shaped by a 2023 Supreme Court ruling, *Twitter v. Taamneh*.<sup>1</sup>

*Taamneh* was one of two closely-linked cases about platforms’ responsibility for user content. In it, the Court unanimously held that Twitter, Facebook, and YouTube were not liable for harms from ISIS attacks. In the second case, *Gonzalez*

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<sup>1</sup> 143 S. Ct. 1206 (2023).

*v. Google*,<sup>2</sup> the Court declined to decide whether the platforms were also immunized under the law known as Section 230.<sup>3</sup> Litigation on other claims that would effectively hold platforms liable for failing to remove user speech—which I will call “must-remove” cases—continues in lower courts.

Questions about the opposite legal pressure, under so-called must-carry laws that prevent platforms from removing certain user speech, will be considered by the Court this Term in *NetChoice v. Paxton* and *Moody v. NetChoice*. Those cases challenge must-carry laws in Texas and Florida. Platforms argue that the laws violate their First Amendment rights, by stripping them of editorial discretion to set speech policies and remove harmful content.

Must-carry and must-remove claims generally come up in separate cases and are treated as unrelated by courts. But they are deeply intertwined. *Taamneh*, as the Court’s first major holding on platforms and speech since the 1990s, will matter to both. This piece examines the connections between must-remove and must-carry claims through the lens of the tort law questions examined in *Taamneh*. It argues that *Taamneh*’s emphasis on platform “passivity,” which permeates the opinion, may have troubling ramifications. Indeed, Texas relied heavily on *Taamneh* in a brief supporting its must-carry law, arguing that platforms’ passivity demonstrates that platforms have no First Amendment interest in setting editorial policies.<sup>4</sup>

Legal disputes like the one in *Taamneh*, about whether plaintiffs have any cause of action against platforms in the first place, are relatively common in litigation. But academic and public policy discussion tends not to focus on these issues about the merits of plaintiffs’ underlying claims. Instead, academics and policymakers often focus on the other two major sources of law governing platforms and speech: immunity statutes and the Constitution. Statutory immunities under laws like Section 230 have been the subject of noisy debates for a number of years, while constitutional questions rose to prominence more recently. It is clear that the First Amendment sets real limits on the laws that govern platforms. But it is less clear exactly what those limits are.

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<sup>2</sup> 598 U.S. 617 (2023).

<sup>3</sup> 47 U.S.C. § 230.

<sup>4</sup> Supplemental Brief for Respondent, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) [hereinafter *Texas August 2023 Brief*], [https://www.supremecourt.gov/DocketPDF/22/22-555/278306/20230828160856772\\_No.%2022-555\\_Brief.pdf](https://www.supremecourt.gov/DocketPDF/22/22-555/278306/20230828160856772_No.%2022-555_Brief.pdf).

Basic liability standards, immunity standards, and First Amendment standards all combine to shape platform regulation. Together, they profoundly influence platforms' content moderation and users' ability to share information online. The tort law questions explored in this article are closely tied to the First Amendment questions I discussed in a previous article, *Who Do You Sue?*<sup>5</sup> Like this article, it explored links between must-carry and must-remove claims. It reviewed the Supreme Court precedent and competing speech rights claims that are now at issue in the Texas and Florida cases, as well as in "jawboning" cases about informal state pressure on platforms.<sup>6</sup> Most relevantly for this article, it also described First Amendment limits on actual laws—including the laws invoked by plaintiffs in cases like *Taamneh*—that hold platforms liable for failing to remove content.

A predictable consequence of laws that hold platforms liable or potentially liable for user speech is that platforms will, out of caution, remove both unlawful and lawful material in order to protect themselves. As the Supreme Court has noted in cases about movie theaters<sup>7</sup> and video distributors,<sup>8</sup> speech intermediaries can be chilled more easily than ordinary speakers and publishers. Platforms generally have less motivation to defend users' speech than users themselves do, and less ability to ascertain legally relevant facts. As recognized in a midcentury Supreme Court case

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<sup>5</sup> Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech*, HOOVER WORKING GRP. ON NAT'L SEC., TECH. & L., Aegis Series Paper No. 1902 (Jan. 29, 2019), <https://www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech>.

<sup>6</sup> Keller, *supra* note 5, at 5–7; see also Daphne Keller, *Six Things About Jawboning*, KNIGHT FIRST AMEND. INST. (Oct. 10, 2023), <https://knightcolumbia.org/blog/six-things-about-jawboning>; Genevieve Lakier, *Informal Government Coercion and The Problem of "Jawboning"*, LAWFARE BLOG (July 26, 2021), <https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning>.

<sup>7</sup> *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (noting that, "[p]articularly in the case of motion pictures, it may take very little to deter exhibition in a given locality" considering "the exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation").

<sup>8</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994) (interpreting child sexual abuse material statute to impose different levels of scienter on video producers and distributors in order to avoid "imput[ing] to Congress an intent to pass legislation that is inconsistent with the Constitution," given distributors' relatively limited ability to ascertain the ages of commercial performers).

about bookstores, *Smith v. California*,<sup>9</sup> this can be a problem of constitutional dimension. *Smith* struck down a law that held bookstores strictly liable for obscene books, noting that such unbounded liability would foreseeably lead booksellers to err on the side of caution and “restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly.”<sup>10</sup> The resulting “censorship affecting the whole public” would be attributable to state action, and “hardly less virulent for being privately administered.”<sup>11</sup>

In *Taamneh*, the Court steered well clear of examining these First Amendment issues by rejecting plaintiffs’ claims under basic tort law. That doesn’t always work, though—as at least one amicus brief pointed out, and as I will discuss here.<sup>12</sup> Courts’ resolutions of claims like the one in *Taamneh* can shape both platforms’ editorial policies and users’ opportunities to speak. As a result, free expression considerations can in turn play a structuring role when courts interpret the elements of such tort claims.

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*Taamneh* is largely a victory for platforms. The opinion, authored by Justice Thomas, powerfully rejects the idea that basic platform functions, including algorithmic ranking of user content, aid and abet users’ harmful acts. Because its analysis turns on general tort law, *Taamneh* will influence cases far beyond the anti-terrorism context. The ruling is most obviously relevant for must-remove claims that are not immunized under Section 230, like copyright or federal criminal claims. But as I will discuss below, it could also influence courts’ reasoning about Section 230 itself.

Despite its overall pro-platform holding, though, *Taamneh* may have unexpected consequences. The ruling turns on platforms’ lack of assistance to ISIS, but

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<sup>9</sup> 361 U.S. 147 (1959).

<sup>10</sup> *Id.* at 154.

<sup>11</sup> *Id.*

<sup>12</sup> Brief of Ctr. Democracy & Tech. et al. as Amici Curiae in Support of Petitioner at 15–18, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

it repeatedly states or implies that platforms are more broadly “passive,” “agnostic,” and “indifferent” toward the content of users’ speech.<sup>13</sup> As I’ve detailed before,<sup>14</sup> the ruling’s descriptions of platform operations also have some very odd omissions (like not mentioning that platforms enforce their own speech rules), understatements (like saying that platforms only “perhaps” removed or “attempted” to remove ISIS posts and accounts<sup>15</sup>), and inaccuracies (like saying that platforms performed “little to no front-end screening” of uploaded content<sup>16</sup>).

The result is a depiction of platform operations that largely elides the content moderation and editorial policymaking that are at issue in *NetChoice*. The *Taamneh* ruling’s omissions are particularly striking in light of the many briefs the Court received from parties and amici detailing platforms’ actual content moderation practices. The Supreme Court clerks who read those briefs are gone, though, and both their successors and lower courts may consider *Taamneh* a reliable primer on platforms’ operations despite its shortcomings.

For must-carry cases, *Taamneh* makes it sound as if platforms are already more or less what Texas and Florida want them to be: common carriers, with no rules or preferences for user speech. It should come as no surprise that Texas seized on these parts of the opinion as justifications for the state’s must-carry law. *Taamneh* does not prejudge anything about the Texas and Florida cases, of course. But the facts about platforms’ current content moderation will likely matter. Texas and Florida argue that platforms’ hands-off behavior demonstrates their lack of expressive interest in curating or editing user speech, and that platforms have sacrificed any First Amendment objections to must-carry laws by holding themselves out as open to all

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<sup>13</sup> *Taamneh*, 143 S. Ct. at 1227 (noting that, as presented by the plaintiffs, “the algorithms appear agnostic as to the nature of the content,” while “defendants’ relationship with ISIS and its supporters appears to have been the same as their relationship with their billion-plus other users: arm’s length, passive, and largely indifferent”).

<sup>14</sup> Daphne Keller, *What the Supreme Court Says Platforms Do*, LAWFARE (Sept. 14, 2023), <https://www.lawfaremedia.org/article/what-the-supreme-court-says-platforms-do>.

<sup>15</sup> *Taamneh*, 143 S. Ct. at 1226 (stating there was not “reason to think that defendants selected or took any action at all with respect to ISIS’ content (except, perhaps, blocking some of it)”; see also *id.* at 1226 n.13 (noting that “[p]laintiffs concede that defendants attempted to remove at least some ISIS-sponsored accounts and content after they were brought to their attention”).

<sup>16</sup> *Id.* at 1226.

comers. Justice Thomas, as well as Justices Alito and Gorsuch, have signaled receptivity to this line of argument.<sup>17</sup>

*Taamneh*'s emphasis on passivity will also come up in future must-remove cases. Plaintiffs are sure to quote from it in arguing that the *Taamneh* platforms won *because* they were passive. Platforms exercising more editorial discretion—which is to say, every major platform—might, by that logic, assume more legal responsibility for users' unlawful posts. To be clear, I don't think *Taamneh* actually supports this argument, because the ruling turns on platforms' behavior toward ISIS and not on the degree of passivity toward users in their overall operations. But its broad statements about platform passivity will give future litigants a lot of jurisprudential spaghetti to throw at the wall. Some of it could stick. If it does—if plaintiffs win some of those cases—platforms will be further deterred from moderating “lawful but awful” speech.

*Taamneh* illustrates how easily tort law standards can give rise to the so-called “moderator's dilemma,” in which platforms want to moderate content but are deterred by fear of future liability.<sup>18</sup> As I will discuss below, the basic elements of many tort claims allow plaintiffs to argue that content moderation gives platforms culpable knowledge about, or overall responsibility for, users' speech. Even if platforms ultimately win such suits, the expense and nuisance of litigating remains a major consideration, particularly for smaller platforms.<sup>19</sup> Section 230 was intended to eliminate the resulting disincentives to moderate content. But the moderator's dilemma has always been alive and well for claims that are not immunized by that law, including copyright claims. If courts or lawmakers pared back Section 230's protections, these issues would spread to other areas of law. *Taamneh* gives us a glimpse of how that might play out.

For advocates who want platforms to more actively moderate and remove user content, *Taamneh* may prove to be a double setback. It directly rejects plaintiffs'

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<sup>17</sup> *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting).

<sup>18</sup> Matt Schruers, *Debate over Online Content Embodies “Moderator's Dilemma,”* DISRUPTIVE COMPETITION PROJECT (Sept. 4, 2019), <https://www.project-disco.org/innovation/090419-debate-over-online-content-embodies-moderators-dilemma/>.

<sup>19</sup> See Engine, *Startups, Content Moderation, & Section 230* (Dec. 9, 2021), available at <https://www.engine.is/news/category/startups-content-moderation-and-section-230>.

claims that platforms *must* moderate more in order to avoid tort liability—an argument for which, in the Section 230 context, Justice Jackson voiced sympathy.<sup>20</sup> And it indirectly nudges platforms to avoid even voluntary content moderation. That nudge will become a lot more direct if plaintiffs succeed in persuading courts that moderation creates culpable knowledge and liability for platforms. The Court could have spoken to this in *Taamneh*, sending a clear message that platforms don't assume legal risk under tort law by taking down terrorist content, hate speech, harassment, and other illegal or harmful online content. Instead, the ruling is at best silent on this question.

*Taamneh* is a timely reminder of the problems with applying tort standards to speech platforms, and the work that Section 230 does in avoiding both the moderator's dilemma and potential constitutional problems. That statute has earned its bipartisan opposition by thwarting the goals of lawmakers on both sides of the aisle. It lets platforms that want to avoid “censorship” leave content up. It lets platforms that want to enforce their own “house rules” take content down.

Critically, Section 230 also keeps governments out of the business of telling platforms how to moderate user speech. It tries, instead, to create a diversity of forums offering distinct and competing rules for online speech. Must-remove laws and must-carry laws do the opposite: They expand the state's role in shaping online speech. Must-remove laws make it harder for users to see and share content online. Must-carry laws restrict platforms' editorial choices, and effectively force users to view unwanted speech as the cost of seeing the speech they are actually interested in. The Texas and Florida laws have other troubling implications for users' speech rights, as I will discuss below and have argued elsewhere.<sup>21</sup> Whatever its other strengths or weaknesses, Section 230 at least largely avoids the constitutional questions that arise when such control over speech sits in state hands.

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<sup>20</sup> Caitlin Vogus & Emma Llansó, *What's Speech Got to Do With It? Supreme Court Justices Say Little About Users' Free Speech in Internet Speech Cases Gonzalez and Taamneh*, CTR. FOR DEMOCRACY & TECH. (Mar. 6, 2023), <https://cdt.org/insights/whats-speech-got-to-do-with-it-supreme-court-justices-say-little-about-users-free-speech-in-internet-speech-cases-gonzalez-and-taamneh/>.

<sup>21</sup> Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. ONLINE (June 28, 2022), <https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/>.



Following this Introduction, Section I of this essay will discuss the overall landscape of must-remove and must-carry claims. It will describe the role that liability standards like *Taamneh*'s already play, despite Section 230, in shaping platform behavior. It will also discuss legal, policy, and practical issues with must-carry laws like the ones in Texas and Florida. Section II will describe the *Taamneh* ruling in more detail, and sketch out ways it might shape future must-remove and must-carry claims. It will also examine a scenario that courts and advocates would do well to consider now: What if the Court upholds the Texas and Florida laws, leaving platforms subject to simultaneous must-carry and must-remove obligations?

A few caveats are in order. My analysis is informed by my own experience, which includes serving as an associate general counsel to Google until 2015 and consulting for smaller platforms. This article is about platforms that allow users to host and share content, like the defendants in *Taamneh*—and not about more complex intermediaries like Wikipedia or CloudFlare. I will use some other common terms as if they had stable meanings, when they actually do not. “Unlawful content,” in particular, is rarely a clearcut category. Most speech is lawful in at least some circumstances, like news reporting or parody. The word “remove” is also an oversimplification, since platforms may also demonetize, de-index, demote, or take other adverse actions against user content. I’ve argued that those distinctions make little difference for constitutional<sup>22</sup> purposes or Section 230<sup>23</sup> purposes. But they could matter for tort claims.

This essay largely sets aside those variables to focus on *Taamneh* and the connections between must-carry and must-remove mandates. For both policy and doctrinal purposes, must-carry and must-remove claims are two parts of the same puzzle. Courts should be wary of considering either in isolation.

## I. THE MODERATOR’S DILEMMA AND THE LURE OF COMMON CARRIAGE

Cases about platforms’ liability for user speech tell them, as a practical matter, when they must remove that speech in order to avoid liability. A single must-remove case may have sweeping consequences, shaping numerous platforms’ future

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<sup>22</sup> Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, KNIGHT FIRST AMEND. INST. (June 8, 2021), <https://knightcolumbia.org/content/amplification-and-its-discontents>.

<sup>23</sup> Brief of ACLU et al. as Amici Curiae Supporting Respondent, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

approaches to content moderation. *Taamneh* re-raises longstanding questions about whether platforms can avoid liability by refusing to moderate user speech. A standard like that could lead platforms to opt for the very passivity that, according to Texas and Florida, supports must-carry mandates. This section lays out the overall state of play in disputes about these interlinked questions.

### A. *Must-Remove Claims and the Moderator's Dilemma*

In the U.S., must-remove cases—cases that effectively seek to hold platforms liable for failing to remove users' speech—come in many forms. Some common claims, including defamation, fail because of platforms' statutory immunities. But claims not immunized by Section 230, including federal criminal law, intellectual property, and trafficking or prostitution claims, can all potentially impose liability if platforms do not remove content.

Platforms' incentives vary significantly depending on the details of must-remove liability standards, as James Grimmelman and Pengfei Zhang recently illustrated through rigorous economic modeling.<sup>24</sup> Laws imposing liability for unlawful content that a platform “knows” about can create moderator's-dilemma incentives, and lead platforms to avoid any possible knowledge by not reviewing or attempting to moderate user content. Knowledge-based liability can also drive platforms to the opposite extreme—that is, removing any content that comes to employees' attention and is even slightly suspicious.

Laws that immunize platforms until they know about or receive “notice” of illegal content can combine these two incentives. Platforms operating under laws like the Digital Millennium Copyright Act (DMCA) are sometimes reluctant to moderate content or allow employees to review it until they receive a notice alleging that content is illegal.<sup>25</sup> At that point, many err strongly on the side of simply removing any content identified in the notice.<sup>26</sup> This can be a real problem for users' free expression interests, because “notice-and-takedown” regimes under laws like the

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<sup>24</sup> James Grimmelman & Pengfei Zhang, *An Economic Model of Intermediary Liability*, BERKELEY TECH. L. J. (forthcoming 2023), <https://ssrn.com/abstract=4422819>.

<sup>25</sup> 17 U.S.C § 512; Daphne Keller, *The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33 BERKELEY TECH. L. J. 287 (2018) (explaining legal bases for right to be forgotten in European law).

<sup>26</sup> See Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* at 41 (UC Berkeley Public Law Research Paper No. 2755628, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628) (documenting some platforms' disclosure to researchers that they “opt to take down

DMCA in the U.S. and the Right to Be Forgotten in the EU attract an enormous number of false allegations.<sup>27</sup> In some notorious examples, politicians have used DMCA notices to try to remove material about corruption charges,<sup>28</sup> and the Ecuadorian government has used them to suppress critical journalism.<sup>29</sup>

Platform immunity legislation like Section 230, the DMCA, or the EU's new Digital Services Act (DSA)<sup>30</sup> often aims to better align platforms' incentives with societal goals. At the simplest, the goal might be to make platforms remove unlawful content, while avoiding incentives to remove lawful speech. The DMCA tries to do this, for example, by penalizing bad faith notices and creating appeals possibilities for accused speakers.

Section 230 is in some ways a blunter legal instrument, because its immunity is simple and unconditional. But in conjunction with other federal laws, it also creates a relatively nuanced regime with tiers of legal responsibility for different kinds of harms. It does not, for example, immunize platforms from claims about content so harmful that it violates federal criminal law. A platform that distributes child sexual abuse material faces the same federal criminal law standards as anyone else. Section 230 is also in some ways more ambitious than laws like the DMCA, because of its engagement with competition and technical innovation. It avoids over-specifying the design of immunized technologies, expressly articulates pro-competitive goals, and immunizes providers of user-empowerment tools that increase individuals' control over the content they see.

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content even when they are uncertain about the strength of the underlying claim” in order to avoid exposure to liability).

<sup>27</sup> For a list of studies in the copyright context, see Daphne Keller, *Empirical Evidence of Over-removal by Internet Companies Under Intermediary Liability Laws: An Updated List*, CTR. FOR INTERNET & SOC'Y (Feb. 8, 2021). For Google's data about Right to Be Forgotten requests, see Google, *Transparency Report: Requests to Delist Content Under European Privacy Law*, <https://transparencyreport.google.com/eu-privacy/overview?hl=en>.

<sup>28</sup> Andrea Fuller, *Google Hides News, Tricked by Fake Claims*, WALL ST. J. (May 15, 2020).

<sup>29</sup> José Miguel Vivanco, *Censorship in Ecuador Has Made It to the Internet*, HUM. RTS. WATCH (Dec. 15, 2014), <https://www.hrw.org/news/2014/12/15/censorship-ecuador-has-made-it-internet>.

<sup>30</sup> Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC, O.J. (L 277) 1-102, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065>.

*Taamneh* provides a valuable look at how cases play out without immunities like those in Section 230. The Supreme Court reviewed the merits of plaintiffs' claims under the Justice Against Sponsors of Terrorism Act (JASTA)<sup>31</sup> in isolation from Section 230 immunities because only the former had been resolved by lower courts. The resulting analysis is in many ways typical of platform liability cases, because it turns on two legal elements that have close analogs in other areas of law.

One is what the platforms *did* (an element known in criminal law as *actus reus*). The culpable act that plaintiffs needed to establish in *Taamneh* was "substantial assistance." Similar culpable acts for platforms include "material contribution" (in copyright cases) and "facilitation" (in trafficking and prostitution cases).

The second element is what the platforms *knew*. Under the statute applied in *Taamneh*, the culpable mental state (sometimes called *mens rea* or *scienter*) was "knowingly." Other laws might hold platforms liable for things they "should have known" or for mental states like "intent" or "reckless disregard."

Both of these two very standard legal elements—the culpable act and mental state—contribute to the moderator's dilemma for platforms. Platforms that hire moderators to enforce speech rules and remove objectionable content may find those actions characterized as "assistance" for whatever content *doesn't* get removed. Or plaintiffs may argue that a platform's entire business "assists" or "facilitates" users' actions—a claim that is almost by definition true of most platforms, at least given the ordinary meaning of those terms.

If courts accept that reasoning, then the only element that matters in litigation, and the only thing platforms can try to control ahead of time, is their knowledge or other relevant mental state. Moderating user content makes that much harder. Once platform moderators have looked at user posts in order to enforce rules against things like nudity or harassment, plaintiffs can argue that they "knew" or "should have known" about illegality, even on unrelated legal grounds. In *Taamneh*, plaintiffs made precisely this argument about YouTube's knowledge, because employees reviewed videos for monetization.<sup>32</sup>

These concerns matter to U.S. platforms, because Section 230 is not the only source of law shaping their choices about content moderation. For one thing, major platforms operate internationally. Outside the U.S., tort standards like the ones in

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<sup>31</sup> 18 U.S.C § 2333(d)(2).

<sup>32</sup> *Taamneh*, 143 S. Ct. at 1230.

*Taamneh* are commonplace, and lead to claims that platforms “contributed to” and “knew” or “should have known about” users’ illegal conduct. Immunity standards can work the same way. In the EU, for example, courts and lawmakers struggled for years to encourage content moderation under an imprecise law that exposed platforms to liability if they had “knowledge” or “control over” online content.<sup>33</sup>

The moderator’s dilemma persists in U.S. law, too. It influences platform practices to a degree often underappreciated in discussions about Section 230. The biggest source of pressure generally comes from copyright law. Copyright claims against platforms often involve well-funded, highly motivated claimants, and statutory damages<sup>34</sup> that could bankrupt most Internet companies. Platforms are generally immunized under the DMCA, but lose that statutory immunity if they disregard notices provided under the statute. They can also lose immunity under a separate, hotly litigated “knowledge” exception in the DMCA. At that point, they can face claims like common law contributory liability, which turns on “knowledge” and “material contribution” to infringement.

Copyright law provides one of the richest sources of information, other than *Taamneh*, about what U.S. litigation and platform behavior might look like in a world without Section 230. One lesson is the consistent tendency, discussed above, to remove lawful speech. Another lesson, particularly compelling to investors and platform operators, is that platforms can prevail in must-remove cases but still join what *Wired* called the “long list of promising startups driven into bankruptcy” by litigation.<sup>35</sup> One such platform, Veoh, litigated a copyright case<sup>36</sup> almost identical to YouTube’s dispute with Viacom.<sup>37</sup> Like YouTube, Veoh won its case. But only YouTube—backed by Google’s deep litigation coffers—avoided bankruptcy and remains in business today.

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<sup>33</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, O.J. (L 178) 1, 6, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031#>.

<sup>34</sup> Copyright Alliance, *Copyright Statutory Damages*, <https://copyrightalliance.org/education/copyright-law-explained/copyright-infringement/copyright-statutory-damages/>.

<sup>35</sup> Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending off Infringement Charges*, WIRED (Feb. 12, 2010).

<sup>36</sup> *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

<sup>37</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

Other lessons are more granular. The 2016 *Capitol Records v. Vimeo* case, for example, illustrates the moderator’s dilemma in action.<sup>38</sup> Vimeo employed moderators to evaluate whether videos violated their Terms of Service. Plaintiffs argued that when these platform employees saw videos that included entire popular songs, they could be assumed to “know” the use was infringing.

The Second Circuit rejected this theory.<sup>39</sup> It pointed out that people might recognize different music based on their age or musical taste.<sup>40</sup> It also noted that moderators who reviewed videos might have focused on other issues, like “obscenity or bigotry,” rather than copyright.<sup>41</sup>

The fact that employees were doing the very content moderation encouraged by Section 230 did not protect Vimeo from liability, though. The Second Circuit said that plaintiffs could seek discovery, asking individual employees about what videos they looked at and what they “knew” about them.<sup>42</sup> By undertaking to moderate content, the platform exposed itself to litigation and discovery costs, at minimum—and perhaps to extremely steep statutory damages.

A platform in Vimeo’s position—particularly a smaller platform—might rationally decide it is better off not trying to enforce content rules at all, even under current U.S. law. Some American platforms have always avoided certain content moderation efforts on this basis. That some *do* build expensive moderation tools<sup>43</sup> and hire armies of content moderators is partly a testament to the power of norms and markets in shaping company behavior. It also reflects platforms’ strong immunities under Section 230 and relatively clear conditional immunities under the DMCA—as well as courts’ general reluctance to puncture DMCA immunity absent very clear “red flag knowledge.”<sup>44</sup>

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<sup>38</sup> 826 F.3d 78 (2d Cir. 2016).

<sup>39</sup> *Id.* at 96.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 97.

<sup>43</sup> See, e.g., Paul Sawers, *YouTube: We’ve Invested \$100 Million in Content ID and Paid over \$3 Billion to Rightsholders*, VENTUREBEAT (Nov. 7, 2018), <https://venturebeat.com/mobile/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/>.

<sup>44</sup> See, e.g., *UMG Recordings*, 718 F.3d 1006; *Capitol Recs.*, 826 F.3d 78.

Judges are poorly equipped to resolve moderator’s dilemma problems. As Justice Kagan said, the Supreme Court justices themselves are “not the nine greatest experts on the Internet.”<sup>45</sup> Beyond the question of expertise, though, judges of any sort simply have a very limited toolkit for shaping platforms’ behavior or incentives. They can’t create notice-and-takedown systems to balance the rights of online speakers and victims of harms, like the ones legislators created in the DMCA and DSA or like those recommended in international human rights literature.<sup>46</sup>

Even if judges could somehow craft such a system, litigation would not provide all the information relevant for the system’s design. That is because adversarial proceedings generally just surface the concerns of two parties—the plaintiff and defendant—while platforms’ content moderation practices may be highly consequential for third parties with a wide array of competing interests. In ordinary must-remove cases, lower courts typically hear only from plaintiffs who say they were injured by online content and from platforms. Other Internet users are not represented, and no one fully advocates for their speech and information rights. By contrast, in must-carry cases, courts hear about the rights of speakers and platforms, but victims of harm are absent. This “three-body problem” with litigation<sup>47</sup> is one of many reasons why, as Justices Kagan and Kavanaugh both suggested in oral arguments, Congress is the better venue for complex changes to Internet policy.<sup>48</sup>

Courts in must-remove cases do sometimes look beyond merits issues, though, and consider the constitutional backdrop. That’s what the Supreme Court did in *Smith*, rejecting overly stringent liability for booksellers.<sup>49</sup> In *X-Citement Video*, similarly, it managed to read a single statutory passage as establishing strict liability for creators of pornographic videos, but knowledge-based liability for distributors,

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<sup>45</sup> Transcript of Oral Argument at 45, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

<sup>46</sup> David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UNITED NATIONS HUM. RTS. COUNCIL (May 11, 2016), <https://perma.cc/4RMF-U8EJ>.

<sup>47</sup> Daphne Keller, *The Three-Body Problem: Platform Litigation and Absent Parties*, LAWFARE (May 4, 2023), <https://www.lawfaremedia.org/article/the-three-body-problem-platform-litigation-and-absent-parties>.

<sup>48</sup> Transcript of Oral Argument at 46, 53–54, 82, *Gonzalez*, 598 U.S. 617).

<sup>49</sup> *Smith v. California*, 361 U.S. 147 (1959).

in order to avoid “imput[ing] to Congress an intent to pass legislation that is inconsistent with the Constitution.”<sup>50</sup> This method for reconciling tort and constitutional law, using mental state liability standards to protect speech, is also familiar from the seminal *New York Times v. Sullivan* case.<sup>51</sup> The Court there adopted the stringent “actual malice” mental state standard for defamation claims by public figures in order to protect First Amendment rights.<sup>52</sup>

Rulings in other countries, drawing in part on U.S. First Amendment precedent, do the same thing for platform liability. Supreme Courts in both Argentina<sup>53</sup> and India,<sup>54</sup> for example, ruled that platforms cannot be deemed to “know” which online content is unlawful until a court or competent authority has ruled on the speech in question. A Mexican court held that speakers must be given notice and an opportunity to contest allegations about their speech.<sup>55</sup> Even under Europe’s softer free expression rules, courts have cited users’ speech rights as a basis for limiting when platforms can be said to “know” about unlawful content.<sup>56</sup> Reinterpreting the mental state element of tort claims is often the most direct way that courts can align tort law with free expression protections.

The Court in *Taamneh* did not address this constitutional backdrop, nor did it attempt to wrangle with the moderator’s dilemma. By limiting its analysis to tort

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<sup>50</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994).

<sup>51</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>52</sup> *Id.* at 279–80.

<sup>53</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Rodríguez, María Belén c. Google Inc. / daños y perjuicios (Arg. Oct. 28, 2014), <https://perma.cc/6876-2G3P>.

<sup>54</sup> *Singhal v. Union of India*, (2015) 12 SCC 73, ¶¶ 100, 117 (India) (holding that, based on free expression considerations, a notice and takedown statute must be construed to mandate removal only based on court or other government order).

<sup>55</sup> Ctr. for Internet & Soc’y at Stanford L. Sch., *La Fortuna v. INAI*, WILMAP (Aug. 7, 2016), <https://wilmap.stanford.edu/entries/la-fortuna-v-inai>; *La Fortuna v. Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales*, Séptimo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, <https://perma.cc/5WQC-JJMV>.

<sup>56</sup> *Joined Cases C-682/18 and C-683/18, Peterson v. Google and Elsevier v. Cyando*, ECLI:EU:C:2021:503, ¶¶ 115–16 (June 22, 2023) (holding that a notice to a platform cannot create “knowledge” sufficient to remove statutory immunity unless the notice contains sufficient information to establish, “without a detailed legal examination, that that communication is illegal and that removing that content is compatible with freedom of expression”).



doctrine, it avoided fraught and complex questions—perhaps wisely, since the issues had not been extensively briefed or teed up for review. But the result is a standard that arguably encourages platforms to remain passive and avoid moderating content in order to avoid must-remove liability.

### ***B. Must-Carry Claims and Common Carriage***

Must-remove cases like *Taamneh* are relatively familiar legal territory. U.S. courts have reviewed hundreds and perhaps thousands of must-remove cases.<sup>57</sup> But must-carry cases, in which claimants assert a right to make platforms host and transmit content against their will, are relative *terra incognita*. The total number of must-carry cases is likely in the dozens.<sup>58</sup> As I discussed in *Who Do You Sue?*, platforms have historically won such cases—a run of victories that ended with the Fifth Circuit’s ruling upholding Texas’s must-carry law. Previous claims often failed simply because plaintiffs could not make out the merits of their legal claims; or platforms won based on Section 230 immunities or First Amendment rights to make editorial decisions.

While must-carry claims are not new, the motivation for them has largely shifted. Early plaintiffs often sued because of their commercial interests in reaching customers through particular platforms. Recent cases are often political, with plaintiffs asserting rights against platform “censorship”—and alleging platform bias against politically conservative viewpoints. Critics have increasingly expressed concern about platform moderation that, as Justice Thomas put it, “stifle[s]” or “smother[s]” lawful speech.<sup>59</sup> Thomas and others have suggested that platforms should instead be required to carry users’ speech regardless of its content or viewpoint. This idea has a lot of legal and practical problems. But it stems from very valid concerns about platforms’ concentrated, private power over public discourse.

Accusations of platform “censorship” in the U.S. currently come more from the political right. The Court will hear another major case that fits this mold in the

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<sup>57</sup> Elizabeth Banker, *A Review of Section 230’s Meaning & Application Based on More Than 500 Cases*, INTERNET ASS’N, [https://web.archive.org/web/20211217114027/https://internetassociation.org/wp-content/uploads/2020/07/IA\\_Review-Of-Section-230.pdf](https://web.archive.org/web/20211217114027/https://internetassociation.org/wp-content/uploads/2020/07/IA_Review-Of-Section-230.pdf) (reviewing Section 230 cases). The number of cases under the DMCA and FOSTA is likely comparable.

<sup>58</sup> Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

<sup>59</sup> *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222–27 (2021) (Thomas, J., concurring).

2023–24 term: In *Murthy v. Missouri*, plaintiffs, including prominent Covid vaccine skeptics, argue that members of the Biden administration violated the First Amendment by pressuring platforms to remove their speech.<sup>60</sup> But the underlying concerns are not innately partisan. The most important international ruling on jawboning to date, for example, involves more traditionally liberal concerns. In it, the Israeli Supreme Court rejected Palestinians’ arguments that the Israeli government violated their rights by requesting, through private extra-judicial channels, that platforms remove their posts as “terrorist” content.<sup>61</sup>

Platforms may have been controlled by comparatively liberal Californians for the past few years. But as Elon Musk’s Twitter takeover illustrates, regime change happens. Platforms’ speech rules can change overnight. In general, we should expect corporate decisions about online speech to be shaped by economic motives, not political conviction. Speech rules may be influenced by advertisers’ preferences,<sup>62</sup> broader business interests,<sup>63</sup> political expediency,<sup>64</sup> and desire for access to markets outside the U.S.<sup>65</sup> In the long term, those pressures seem likeliest to harm speech and speakers that are unpopular, marginalized, and politically or economically powerless.

Policymakers’ and judges’ political alignment on must-carry questions have shifted over time. The GOP platform long included opposition<sup>66</sup> to the “fairness

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<sup>60</sup> 601 U.S. \_\_\_, 2023 WL 6935337 (2023) (Alito, J., dissenting from grant of stay).

<sup>61</sup> Daphne Keller, *When Platforms Do the State’s Bidding, Who Is Accountable? Not the Government, Says Israel’s Supreme Court*, LAWFARE (Feb. 7, 2022), <https://www.lawfaremedia.org/article/when-platforms-do-states-bidding-who-accountable-not-government-says-israels-supreme-court> (discussing the Israeli Supreme Court case *Adalah v. Cyber Unit*).

<sup>62</sup> Rachel Griffin, *From Brand Safety to Suitability: Advertisers in Platform Governance*, 12 INTERNET POL’Y REV. 1 (July 11, 2023), <https://doi.org/10.14763/2023.3.1716>.

<sup>63</sup> E.g., Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753 (2022).

<sup>64</sup> See, e.g., Keach Hagey & Jeff Horwitz, *Facebook’s Internal Chat Boards Show Politics Often at Center of Decision Making*, WALL ST. J. (Oct. 24, 2021).

<sup>65</sup> E.g., David Ingram, *Elon Musk’s Twitter Faces Censorship Allegations in India Free Speech Battle*, NBC NEWS (Jan. 25, 2023), <https://www.nbcnews.com/tech/social-media/modi-twitter-bbc-musk-elon-documentary-watch-video-rcna67497>.

<sup>66</sup> *Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms: Hearing Before the House Committee on the Judiciary*, 115th Cong. (2018) (statement of Berin Szóka, President, TechFreedom).

doctrine”<sup>67</sup> for television stations. Republican-appointed FCC Commissioners deemed that carriage mandate unconstitutional, and President Reagan vetoed a bill that would have reinstated it. As recently as the 1996 *Denver Area* case, Justices Thomas and Scalia and Chief Justice Rehnquist expressed reservations about carriage mandates for cable companies, comparing them to the “government forc[ing] the editor of a collection of essays to print other essays.”<sup>68</sup> Justices Ginsburg and Kennedy, by contrast, endorsed the dedication of cable channels for public use, invoking common-carriage or public-forum doctrines.<sup>69</sup>

The political and legal landscape shifted significantly during President Trump’s time in office. Throughout the Trump administration, Republicans increasingly called for must-carry mandates for Internet platforms. In 2021, Justice Thomas took the unusual step of writing about the idea in an opinion, framed as a concurrence to an otherwise pro forma order vacating the Second Circuit’s *Knight Institute v. Trump* case.<sup>70</sup> (That case, about state actors’ social media accounts, became moot when President Trump left office.) He suggested that lawmakers might constitutionally compel platforms to carry speech against their will.<sup>71</sup>

Within a few months thereafter, Texas and Florida enacted their must-carry laws. Texas’s law prohibits platforms from moderating most speech based on its “viewpoint.”<sup>72</sup> Florida’s requires platforms to carry almost any speech by “journalistic enterprises” and restricts moderation of speech by or about political candidates—seemingly even if those users post defamation, copyright infringement, or

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<sup>67</sup> Kathleen Ann Ruane, *Fairness Doctrine: History and Constitutional Issues*, CONG. RSCH. SERV. (July 13, 2011), <https://sgp.fas.org/crs/misc/R40009.pdf>.

<sup>68</sup> *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in part and dissenting in part). *Denver Area* did not require the Court to resolve questions about cable operators’ First Amendment rights. Thomas’s opinion offered no conclusion on this point, and suggested a relatively nuanced position by citing a previous dissent he had joined, which stated that “Congress might also conceivably obligate cable operators to act as common carriers for some of their channels.” *Id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O’Connor, J., concurring in part and dissenting in part)).

<sup>69</sup> *Id.* at 797–803 (Kennedy, J., concurring in part and dissenting in part).

<sup>70</sup> *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

<sup>71</sup> *Id.*

<sup>72</sup> HB 20, 87th Leg., 2d Sess. (Tex. 2021), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=872&Bill=HB20>.

offers to sell illegal drugs.<sup>73</sup> Platforms challenged<sup>74</sup> both laws, leading to a circuit split on a First Amendment question: whether the laws violate platforms' own rights to set and enforce editorial policies. The Court will review those cases, *NetChoice v. Paxton* and *Moody v. NetChoice* ("the *NetChoice* cases") in the coming term.

Thomas's *Knight* concurrence compared platforms to common carriers, public accommodations, and designated public forums—all entities with special obligations under law. He noted that under common carriage precedent, states could potentially impose obligations on any platform that already "holds itself out as open to the public."<sup>75</sup> Texas<sup>76</sup> and Florida<sup>77</sup> advance the same theory in the *NetChoice* cases. Texas argues that platforms are "twenty-first century descendants of telegraph and telephone companies," with only limited First Amendment protections because they are "open to the general public."<sup>78</sup> In a brief earlier foray to the Supreme Court—an emergency petition that kept Texas's law from coming into effect—Justices Alito, Thomas, and Gorsuch dissented. They signaled openness to Texas's argument, saying that platforms likely forfeited their constitutional objections to must-carry laws by "hold[ing] themselves out as 'open to the public'" and as "neutral forums for the speech of others."<sup>79</sup>

The *Taamneh* opinion, authored by Justice Thomas, uses quite similar language in describing platforms. It characterizes them as passive entities that are "generally available to the internet-using public," and as functional substitutes for

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<sup>73</sup> SB 7072, 2021 Leg. (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/7072/?Tab=BillHistory>.

<sup>74</sup> Daphne Keller, *NetChoice Legal Arguments and Options* (last updated Aug. 31, 2023), <https://docs.google.com/document/d/1U8Ed-FfOz7JgS7y00KsHGo7gu3ky5ZYs/edit>.

<sup>75</sup> *Knight First Amend. Inst.*, 141 S. Ct. 1220 at 1223.

<sup>76</sup> Respondent's Opposition to Application to Vacate Stay of Preliminary Injunction, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

<sup>77</sup> Opening Brief of Appellants, *NetChoice, LLC v. Atty. Gen., Florida*, 34 F.4th 1196 (11th Cir. 2022).

<sup>78</sup> See Respondent's Opposition to Application to Vacate Stay of Preliminary Injunction at 2–3, 41, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022).

<sup>79</sup> *NetChoice*, 142 S. Ct. at 1717 (Alito, J., dissenting).

traditional common carriers.<sup>80</sup> Most users, it asserts, “use the platforms for interactions that once took place via mail, on the phone, or in public areas.”<sup>81</sup> The opinion’s descriptions of platform operations also include a number of notable omissions and departures from the information provided in party and amicus briefs. I detailed those in a separate piece, *What the Supreme Court Says Platforms Do*.<sup>82</sup>

A reader who learned about platforms only from *Taamneh* might reach some doubtful or simply incorrect conclusions. Perhaps the strangest omission in *Taamneh* is that it gives no indication that platforms set and enforce their own private, discretionary rules against “lawful but awful” material like disinformation and hate speech. That’s not something the Court needed to mention in resolving the terrorism claims in *Taamneh*, of course. But it’s an odd thing to leave out, given the public prominence of questions about platform power over speech—and given that Justice Thomas previously issued an entire opinion on platforms’ enforcement of privately established speech rules in another case that, like *Taamneh*, did not raise that issue as legal matter.<sup>83</sup>

Our hypothetical reader would also learn from *Taamneh* that platforms only “perhaps” ever removed users’ content or “attempted” to deplatform speakers. (All parties in *Taamneh* agreed that platforms did both things, and Twitter described removing hundreds of thousands of ISIS accounts.<sup>84</sup>) Such a reader would also learn, incorrectly, that platforms rarely or never pre-screened users’ posts.<sup>85</sup> (In fact, all three *Taamneh* defendants screened for child sexual abuse material at the time, and at least two screened for copyright infringement. Duplicate-detection tools of the sort that they used are typically designed to screen every upload.<sup>86</sup>)

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<sup>80</sup> *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1226 (2023).

<sup>81</sup> *Id.* at 1228.

<sup>82</sup> Keller, *supra* note 14.

<sup>83</sup> *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222–27 (2021) (Thomas, J., concurring).

<sup>84</sup> Brief for Petitioner, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

<sup>85</sup> *Taamneh*, 143 S. Ct. at 1226 (stating that “there is not even reason to think that defendants carefully screened any content before allowing users to upload it onto their platforms. If anything, the opposite is true: By plaintiffs’ own allegations, these platforms appear to transmit most content without inspecting it.”).

<sup>86</sup> See Keller, *supra* note 14.

*Taamneh* is also oddly inconsistent on the question of whether platforms make content-based decisions when they algorithmically rank content. Some passages say that ranking algorithms are “agnostic” as to content of users’ posts;<sup>87</sup> others say that algorithms do consider “information about . . . the content.”<sup>88</sup> The question whether algorithms themselves can assess “content” or only machine-readable information “about content” is interesting as a philosophical matter, and of course some algorithms really do take into account only non-content information, such as user behavioral patterns.<sup>89</sup> But even those algorithms are often designed, assessed, and refined based on the quality and meaning of the content they surface. Some may be fine-tuned based on whether they prioritize information that human raters consider to be hate speech or otherwise harmful, for example.<sup>90</sup> Other algorithms (or component parts of overall algorithmic ranking systems) detect specific content such as nudity or images of weapons,<sup>91</sup> or identify and demote “borderline” content that comes close to violating platforms’ content-based speech rules.<sup>92</sup>

To be clear, *Taamneh* does not purport to offer the truth about any of these topics. The Court’s job, given the procedural posture, was to consider facts alleged

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<sup>87</sup> *Taamneh*, 143 S. Ct. at 1212.

<sup>88</sup> *Id.* at 1216.

<sup>89</sup> For more detailed discussion of algorithms, see the briefs of Ctr. for Democracy & Tech. and 6 Technologists as Amici Curiae Supporting Respondent; Integrity Inst. and AlgoTransparency as Amici Curiae Supporting Neither Party; and Info. Science Scholars as Amici Curiae Supporting Respondent, all in *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

<sup>90</sup> Google, *General Guidelines* at 32–35 (Nov. 16, 2023), <https://static.googleusercontent.com/media/guidelines.raterhub.com/en//searchqualityevaluatorguidelines.pdf> (providing guidelines on classes of harmful content for search quality evaluators hired by Google); Danny Sullivan, *An Overview of Our Rater Guidelines for Search*, THE KEYWORD (OCT. 19, 2021), <https://blog.google/products/search/overview-our-rater-guidelines-search/> (explaining that evaluator feedback is used by engineers to vet potential improvements to ranking algorithms).

<sup>91</sup> See Nafia Chowdhury, *Automated Content Moderation: A Primer*, STANFORD CYBER POL’Y CTR. PROGRAM ON PLATFORM REG. (Mar. 19, 2022), <https://cyber.fsi.stanford.edu/news/automated-content-moderation-primer>.

<sup>92</sup> Meta, *Types of Content We Demote*, TRANSPARENCY CTR. (updated Oct. 16, 2023), <https://transparency.fb.com/features/approach-to-ranking/types-of-content-we-demote>. Eugene Volokh and Donald Falk have argued that algorithmic ranking, in the form of search engine results, is constitutionally protected speech. *First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883 (2012) (white paper commissioned by Google).

by plaintiffs. Within the four corners of the question presented in the case, platforms' content moderation and ranking were relevant only to the extent that they affected the Court's analysis of platforms' relationship with ISIS. But because the broader facts about platforms' overall operations matter to so many other cases, we should expect any apparently-helpful passages from *Taamneh* to be used liberally by future litigants. As I will discuss below, both must-remove and must-carry proponents will likely see value in the passages about platform passivity.

*Taamneh* was not the Justices' last chance to preview theories, forge alliances, or lay the foundation for future positions about must-carry rules. Those opportunities will arise in other cases the Court already agreed to hear this term. Perhaps most relevantly, *Murthy* asks about First Amendment limits on the Biden administration's communications with platforms.<sup>93</sup> Two cases that the Court heard earlier in the term, *Lindke v. Freed*<sup>94</sup> and *Garnier v. O'Connor-Ratcliff*, also involve state actors and platforms<sup>95</sup> Both present claims against government officials who operated social media accounts and blocked the plaintiffs, who argue that this violated the First Amendment. In principle, the Court could easily resolve any of these cases about government officials without discussing *platforms'* rights to block users or content. But they also offer ample room for Justices to strategically expound on must-carry and other high-profile questions about the relationship between state actors and platforms in setting rules for online speech.<sup>96</sup>

Must-carry rules for platforms create a daunting array of constitutional, doctrinal, and practical problems. Very few users would want to spend time on YouTube or Facebook if it meant seeing the hate speech, extreme pornography, and

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<sup>93</sup> *Murthy*, 601 U.S. \_\_\_, 2023 WL 6935337.

<sup>94</sup> 37 F.4th 1199 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (2023).

<sup>95</sup> 41 F.4th 1158 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (2023).

<sup>96</sup> *E.g.*, Lakier, *supra* note 6.

scams that major platforms currently exclude.<sup>97</sup> Users who do want to see that material can find it now on barely-moderated sites like 4chan or 8chan<sup>98</sup>—but most choose not to. If the same material became common on mainstream platforms, many users would almost certainly leave. So would advertisers. Platforms would lose value for their operators, but also for many users, both as listeners and as speakers. Content creators ranging from emerging hip hop artists<sup>99</sup> to providers of makeup tutorials<sup>100</sup> would lose both audiences and revenue streams if sites like YouTube and Facebook turned into free speech mosh pits and drove away key audiences.

Americans may be deeply divided about what speech rules platforms should apply, as a legal or moral matter. But very few people actually want to waste their own time on the illegal or lawful-but-awful content that common carriage laws would unleash.<sup>101</sup> And while requiring carriage just for *some* lawful speech may

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<sup>97</sup> Must-carry laws could be designed to require platforms to *host* content without making them *show* unwanted material to users by surfacing it in ranked features like feeds or YouTube recommendations. Eugene Volokh has described this more limited model and argued that it could be constitutional. *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021). The Texas and Florida laws do not work this way, because they regulate ranking as well as hosting. Under Texas’s law, but probably not Florida’s, platforms arguably could avoid showing users unwanted content by displaying only posts from accounts that users follow. That, too, would be constitutionally significant step back from the more diverse feeds that users see on major social media platforms today. See Stuart Dredge, *Yes, Twitter Is Putting Tweets in Your Timeline from People You Don’t Follow*, GUARDIAN (Oct. 17, 2014) (reporting Twitter’s 2014 change to add posts from non-followed accounts to users’ algorithmically ranked feeds). As Volokh and a co-author explained in an earlier piece about search engines, automated ranking benefits users by providing accelerated access to the speech they want to see, and thus provides First Amendment value stemming from “the value of the speech to listeners or readers.” Volokh & Falk, *supra* note 92, at 10–11.

<sup>98</sup> Samuel Greengard, *4chan and 8chan (8kun)*, BRITANNICA, <https://www.britannica.com/topic/4chan>.

<sup>99</sup> See, e.g., Lauryn Bayley, *How Marketing Genius Lil Nas X Creatively Uses Social Media, Controversy to Build His Career*, DAILY TARGUM (Sept. 23, 2021), <https://dailytargum.com/article/2021/09/how-marketing-genius-lil-nas-x-creatively-uses-social-media-controversy-to>.

<sup>100</sup> See, e.g., Amanda Krause, *Inside the YouTube Beauty Community That’s Turning Makeup Artists into Millionaires*, INSIDER (May 21, 2020), <https://www.insider.com/youtube-beauty-everything-you-need-to-know-jeffree-james-nikkietutorials-2020-3>.

<sup>101</sup> See Keller, *supra* note 21 (describing how the lawful-but-awful category “includes material that is almost universally condemned, on moral or normative grounds, when it appears on social media,” such as “horrific footage from the racist massacres in Christchurch and Buffalo”).



sound appealing, devising legal rules to this effect would be a practical, political, and constitutional nightmare. (The idea is not entirely without supporters, though. FCC Commissioner Brendan Carr appears to favor it.<sup>102</sup>)

On the constitutional front, platforms' First Amendment arguments against must-carry rules are just the start. There are also Dormant Commerce Clause questions about subjecting shared national communications services to competing obligations in different states. Platforms raised those issues in *NetChoice*, but they are parked back in the district courts. Carriage obligations that destroyed much of platforms' commercial value could also raise Takings Clause questions. And there are many as-yet-underexplored questions about *users'* First Amendment rights when government regulation of platforms determines what information they see online, and what opportunities they have to speak and reach a desired audience.

Individual speakers' rights would be dramatically affected, for example, if platforms opted to comply with Texas's viewpoint-neutrality rule or Florida's requirement for "consistent" content moderation by simply banning *all* speech about topics like race or abortion. Platforms might readily conclude that, as both a commercial and moral matter, suppressing all of that speech is preferable to carrying the most outrageous, harmful, or hateful things that users have to say on those topics. In *NetChoice*, the platforms challenge the laws as "must-carry" mandates and speech compulsions. But that framing should not obscure the fact that Texas and Florida's laws could just as easily lead to removal and suppression of online speech.

If platforms did choose to act more like common carriers, allowing previously prohibited content to appear, existing users might have other First Amendment concerns. Online speakers would surely object if state interference drowned their speech in a sea of noise, leaving them unable to reach existing audiences. Internet users' First Amendment rights as listeners are equally relevant: Must-carry laws effectively force them to hear unwanted speech, as the state-imposed cost of hearing the speech they are actually interested in.

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<sup>102</sup> Stanford Law School, *Fifth Circuit's Social Media Ruling: Conversation w/ FCC Commissioner Brendan Carr & Daphne Keller*, YOUTUBE (Oct. 24, 2022), <https://www.youtube.com/watch?v=cVaDK6Iuw1c> (at 31:00) (discussing viability of "pro-speech guardrails" to protect political speech but not terrorist content or profanity).

The doctrinal questions are also tricky. As Blake Reid has written, “there is no coherent, widely-agreed-upon understanding” of which companies qualify as common carriers, or what legal obligations they assume as a result.<sup>103</sup> The Court could change that, of course. But *NetChoice* would be a strange case in which to do so. For one thing, the Texas and Florida statutes use the language of common carriage, but their actual rules impose or permit a complicated assortment of speaker, content, and even viewpoint-based distinctions between users’ posts. Florida’s law uses state power to favor certain speakers and topics. Texas’s law, as I read it, disfavors some lawful-but-awful speech, giving platforms free rein to remove speech on a few, state-selected topics.<sup>104</sup> Courts applying the laws would also be put in the technically and constitutionally difficult position of deciding what the “correct” ranking of content in search results or news feeds would be, in order to determine whether platforms’ actual ranking violates the law. All of this makes the *NetChoice* laws odd versions of “common carriage” to review. There is, in any case, no circuit split on the common carriage issue. Only one judge below—Judge Oldham in the Fifth Circuit—endorsed the states’ arguments.

Public accommodations arguments, which were not part of the rulings below in *NetChoice*, but which appear in Texas’s briefs to the Supreme Court<sup>105</sup> and which Thomas has discussed elsewhere,<sup>106</sup> may be doctrinally even thornier. For one thing, the Court’s conservative majority recently held that Colorado’s public accommodations law could not require a web developer to build websites for same-sex weddings, because of the developer’s First Amendment rights.<sup>107</sup> Interpreting public accommodations laws to nonetheless strip platforms of First Amendment rights, and compelling them to carry hate speech as a consequence, would be both

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<sup>103</sup> Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4181948](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181948).

<sup>104</sup> See Keller, *supra* note 21 (discussing Texas’s oddly worded carveouts from viewpoint neutrality requirements and arguing that they are content-based rules disfavoring lawful speech).

<sup>105</sup> See Respondent’s Opposition to Application to Vacate Stay of Preliminary Injunction, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022); Respondent’s Opposition to Application to Vacate Stay of Preliminary Injunction, *NetChoice, LLC v. Paxton*, 49 F.4th 439, 2022 WL 2376283 (5th Cir. 2022).

<sup>106</sup> See *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222–27 (2021) (Thomas, J., concurring).

<sup>107</sup> 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

doctrinally awkward and extremely troubling as a public policy matter. Public accommodations laws are intended to promote equality goals and protect people from discrimination based on *identity* attributes like race, religion, or disability. Reinterpreting those laws to prevent discrimination based on people's *speech* is a significant shift.<sup>108</sup> It would use anti-discrimination laws to make platforms disseminate racist, homophobic, antisemitic, and otherwise discriminatory messages.

The Internet was quite literally designed to avoid problems of this sort—to reap the benefits of common carriage while also allowing content moderation. Following “end-to-end” technical design principles,<sup>109</sup> the “dumb pipes”<sup>110</sup> that transmit information, like undersea cables or telecommunications carriers, were expected to be neutral—to play no role in approving or disapproving of the speech they carry.

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<sup>108</sup> Laws in some jurisdictions prohibit discrimination against patrons based on their political affiliation or activities; a few of the laws specifically extend to political messages displayed while patronizing the business. The degree to which these laws cover speech that is disruptive or offensive to employees or other patrons is little-explored in the case law. See Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J.L. & LIBERTY 709, 709 (2022) (describing laws in “several major cities and counties, in some territories, perhaps in the whole states of California and Montana, and to a small extent in Minnesota”). A decision applying Washington, D.C.’s law upheld a private club’s right to expel a member based in part on his “repeated use of offensive racial and ethnic slurs while on Club premises,” “his use of the Club’s facilities to conduct business with persons who publicly expound racist and anti-Semitic views,” and his connections with a white supremacist group. Expelling him based on his connections with the white supremacist group did not constitute prohibited discrimination based on political affiliation, it held, because the D.C. ordinance—unlike some broader ones in other jurisdictions—only banned discrimination based on a person’s “belonging to or endorsing any political party.” *Blodgett v. University Club*, 930 A.2d 210, 221–22 (D.C. 2007) (cleaned up).

<sup>109</sup> See Simson Garfinkel, *The End of End-to-End?*, MIT TECH. REV. (July 1, 2003), <https://www.technologyreview.com/2003/07/01/234174/the-end-of-end-to-end/>; Devopedia, *End-to-End Principle*, <https://devopedia.org/end-to-end-principle> (explaining that the “end-to-end argument or principle states that it’s proper to implement the function in the end systems” rather than “within the communication subsystem that interconnects all the end systems”); Marjory S. Blumenthal & David D. Clark, *Rethinking the Design of the Internet: The End-to-End Arguments vs. the Brave New World*, 1 ACM TRANSACTIONS ON INTERNET TECH. 70 (2001), <http://nms.lcs.mit.edu/6829-papers/bravenewworld.pdf>.

<sup>110</sup> This term refers to a simple network with sufficient bandwidth between a customer’s device and the Internet that there isn’t a need for the Internet Service Provider to prioritize content, instead allowing neutral delivery of services and applications. Academic Accelerator, *Dumb Pipe: Encyclopedia, Science News & Research Reviews*, <https://academic-accelerator.com/encyclopedia/dumb-pipe>.

Power to discriminate based on content was reserved for applications or software at the edge of the network, under the control of end users. Users might, for example, decide what content to retrieve using the File Transfer Protocol or web browsers; or configure email clients to block profanity; or use services like NetNanny to restrict pornography websites. This distributed control, under diverse standards, was to be layered on top of carriage mandates at the infrastructure level.

End-to-end design aimed to keep decisions about speech out of the hands of any centralized authority, be it government or a company. Policymakers in the 1990s, too, tried to keep individual users in control of decisions about speech. Congress in Section 230 lauded and immunized the providers of technologies for end user control over content.<sup>111</sup> And the Supreme Court in *Reno v. ACLU* discussed parental control technologies in the household as tools superior to, and more narrowly tailored than, top-down state regulation of online speech.<sup>112</sup>

Demands for common carriage on platforms like Facebook or YouTube are not entirely out of keeping with end-to-end network design. Proponents want to treat major platforms as unavoidable and essential public utilities and relegate them to the status of—to use Justice Thomas’s word in *Taamneh*—“infrastructure.”<sup>113</sup> But that only works if some *new* technology emerges to take on the “end” function, giving users the ability to choose their preferred rules for online speech. Otherwise, common carriage just takes away all controls and subjects users to a barrage of online garbage.

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<sup>111</sup> 47 U.S.C. § 230(c)(2)(B) (providing immunity for “any action taken to enable or make available to information content providers or others the technical means to restrict access” to objectionable material). This relatively neglected provision of Section 230 serves Congress’s goal of, in Adam Candeub’s words, offering users “*more* freedom to choose among content moderation policies, essentially encouraging differentiated products that a competitive market would provide.” Brief of Institute for Free Speech and Professor Adam Candeub as Amici Curiae in Support of Neither Party, at 15, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

<sup>112</sup> 521 U.S. 844, 854–55 (1997).

<sup>113</sup> *Taamneh*, 143 S. Ct. at 1212.

Technical models that treat major platforms more like infrastructure, and layer new end-user controls and competition on top, do exist.<sup>114</sup> Functioning commercial versions are in their infancy,<sup>115</sup> though, and can be blocked<sup>116</sup> or sued<sup>117</sup> by platforms. They also face challenges relating to privacy, technical feasibility, costs, and revenue models.<sup>118</sup> Lawmakers could help with that. Texas’s law makes a gesture in this direction, in a brief section that seemingly allows platforms themselves to offer end-user control mechanisms that let users block posts.<sup>119</sup> But lawmakers could do much more to foster the development of tools from diverse, antagonistic, and competitive sources—not just incumbent platforms. At the very minimum, they could remove legal impediments to platform competitors that wish to build such tools.<sup>120</sup>

The Supreme Court has identified individual control over content as a less restrictive alternative in striking down past speech regulations. Those older cases involved speech restrictions, but principles for speech compulsion should be no different—and in any case, as discussed above, the Texas and Florida laws do effectively restrict speech by both platforms and users.

In *United States v. Playboy Enterprises Group*, for example, the Court struck down a broad requirement for cable companies to block or scramble pornographic content, saying that a less restrictive option would be to let individual subscribers

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<sup>114</sup> See Cory Doctorow, *Adversarial Interoperability*, ELEC. FRONTIER FOUND. (Oct. 2, 2019), <https://www.eff.org/deeplinks/2019/10/adversarial-interoperability>.

<sup>115</sup> See Daphne Keller, *The Future of Platform Power: Making Middleware Work*, 32 J. DEMOCRACY 168 (July 2021), <https://www.journalofdemocracy.org/articles/the-future-of-platform-power-making-middleware-work/#f1>.

<sup>116</sup> E.g., Jess Weatherbed, *Anti-Harassment Service Block Party Leaves Twitter amid API Changes*, VERGE (May 31, 2023), <https://www.theverge.com/2023/5/31/23743538/block-party-hiatus-twitter-app-anti-harassment-service-api>.

<sup>117</sup> E.g., *Facebook, Inc. v. Power Ventures, Inc.*, 844 F. Supp. 2d 1025 (N.D. Cal. 2012).

<sup>118</sup> See Keller, *supra* note 115.

<sup>119</sup> TEX. CIV. PRAC. & REM. CODE § 143A.006(a)(3) (“This chapter may not be construed to prohibit or restrict a social media platform from authorizing or facilitating a user’s ability to censor specific expression on the user’s platform or page at the request of that user”). This provision appears to allow users to block individual posts, but not accounts.

<sup>120</sup> Bennett Cyphers & Cory Doctorow, *A Legislative Path to an Interoperable Internet*, ELEC. FRONTIER FOUND. (July 28, 2020), <https://www.eff.org/deeplinks/2020/07/legislative-path-interoperable-internet>.

decide what channels to block.<sup>121</sup> “[T]argeted blocking is less restrictive than banning,” it wrote, and “the Government cannot ban speech if targeted blocking is a feasible and effective means” of furthering state interests.<sup>122</sup> “Technology expands the capacity to choose,” the Court continued.<sup>123</sup> Where individual choice is feasible, lawmakers should not “assume the Government is best positioned to make these choices for us.”<sup>124</sup> Technologies expanding capacity to choose are eminently feasible on the Internet, and relevant under *Reno v. ACLU*. As the *Playboy* Court noted, the “mere possibility that user-based Internet screening software would ‘soon be widely available’” contributed to *Reno*’s rejection of the Internet speech regulation.<sup>125</sup>

## II. *TAAMNEH*

Literal must-carry mandates are not the only ways the law can push platforms toward common carriage, of course. Liability standards in must-remove cases like *Taamneh* can do the same thing, by telling platforms that being content-neutral is the way to avoid liability. That’s not an outcome that any party to *Taamneh* wanted or asked for. Plaintiffs, like many advocates and legal scholars, wanted platforms to face liability unless they do *more* to combat unlawful user content. Defendant platforms wanted to avoid liability while remaining free to moderate. No party wanted an outcome suggesting that platforms should do *less* moderation.

*Taamneh* does not directly tell platforms to do less moderation, of course. Nor does it discuss how platforms’ overall content moderation efforts might affect liability. But future plaintiffs in must-remove cases will almost certainly rely on *Taamneh* in ways that starkly surface the moderator’s dilemma, pointing to content moderation activity as evidence supporting their claims. Whether or not those claims succeed, platforms may try to avoid litigation by moderating less. If those plaintiffs do prevail in arguing that platforms assume more liability by moderating content, platforms will be more reluctant to engage in voluntary moderation going forward. That would leave far fewer tools against “lawful but awful” online con-

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<sup>121</sup> 529 U.S. 803 (2000).

<sup>122</sup> *Id.* at 815.

<sup>123</sup> *Id.* at 818.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 814.

tent—material like Holocaust denial or pro-suicide videos that cannot constitutionally be regulated, but that threatens platforms’ bottom line and violates most Americans’ personal moral beliefs or social norms.

This section will explain the *Taamneh* ruling in broader strokes and discuss how it might play into this dynamic. It will offer predictions and conjectures about the decision’s impact on future must-remove cases, future must-carry cases, and future rulings that attempt to reconcile must-carry and must-remove obligations.

### A. Case Overview

*Taamneh* and *Gonzalez* both arose from horrific events. Plaintiffs lost family members in ISIS attacks, in *Taamneh*’s case the 2017 attack at the Reina nightclub in Istanbul. The *Taamneh* plaintiffs argued that three platform defendants—YouTube, Facebook, and Twitter—were liable under JASTA because of their role in spreading ISIS’s message online. They did not claim that terrorists used the platforms to plan or execute the attacks; the Reina attacker appears not to have used Twitter at all. It was undisputed that all of the defendants had policies against ISIS content, and systems in place to remove ISIS content they became aware of. Plaintiffs did not identify any specific ISIS posts or accounts as the basis for their claims.

Plaintiffs’ argument was that the measures platforms took against ISIS, which allegedly only involved removing specific accounts after being notified, were insufficient.<sup>126</sup> Platforms knew that additional ISIS content remained on the platform and was boosted by ranking algorithms, plaintiffs argued, because reliable sources including law enforcement and news media told them so. But beyond removing accounts or material specifically identified to them, the platforms opted to “avoid reviewing their files for terrorist materials,”<sup>127</sup> and took “no steps of their own” to detect additional material.<sup>128</sup>

The Ninth Circuit, which reviewed the two cases together, upheld the JASTA claim in *Taamneh*, but said platforms were immune under Section 230 in *Gonzalez*.<sup>129</sup> Plaintiffs’ allegations, it held, met JASTA’s statutory prohibition on “aid[ing]

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<sup>126</sup> Brief for Respondents, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

<sup>127</sup> *Id.* at 73.

<sup>128</sup> *Id.* at 80.

<sup>129</sup> *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), *rev’d sub nom.* *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

and abet[ting], by knowingly providing substantial assistance.”<sup>130</sup> Twitter successfully petitioned for Supreme Court review. This made Twitter the only platform to appear at oral argument, though Google and Meta filed briefs as parties to *Taamneh*.

Before the Supreme Court, plaintiffs’ claims focused on platforms’ algorithmically ranked newsfeeds and recommendations. Plaintiffs argued that these newsfeeds and recommendations were the source of liability, because the algorithms amplified ISIS content and helped the group recruit new members. But the Court held that plaintiffs had not established a sufficient nexus between the platforms’ actions and ISIS’s attack.<sup>131</sup> Providing “generally available virtual platforms” and “fail[ing] to stop ISIS despite knowing it was using those platforms” did not, the Court said, violate JASTA.<sup>132</sup>

The Court considered three possible culpable acts that might support liability for platforms—allowing ISIS to “upload content,” ranking the content, and taking “insufficient steps to . . . remove” content—and rejected all three.<sup>133</sup> Its analysis drew extensively on common law aiding and abetting precedent, which the Court said did not support extending liability to a platform “merely for knowing that the wrongdoers were using its services and failing to stop them.”<sup>134</sup> Instead, aiding and abetting liability required more active involvement, such as “encouraging, soliciting, or advising the commission” of harmful acts—none of which had been alleged in *Taamneh*.<sup>135</sup>

The statute’s two key elements—that defendants must have acted *knowingly* and that they must have *provided substantial assistance*—worked “in tandem” under common law principles, the Court said.<sup>136</sup> A “lesser showing of one” would mean plaintiffs could prevail only with “a greater showing of the other.”<sup>137</sup> If a defendant’s assistance is not very substantial, for example, a plaintiff would have to

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<sup>130</sup> *Id.* at 910; *see also* 18 U.S.C. § 2333(d)(2).

<sup>131</sup> *Taamneh*, 143 S. Ct. at 1230.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1226.

<sup>134</sup> *Id.* at 1229.

<sup>135</sup> *Id.* at 1221.

<sup>136</sup> *Id.* at 1222.

<sup>137</sup> *Id.*



make a stronger showing of culpable knowledge. Aiding and abetting claims also, the Court noted, generally depend on a defendant’s *intent*.<sup>138</sup> To prevail, the *Taamneh* plaintiffs would have had to establish that platforms “intentionally” assisted in ISIS’s attacks.<sup>139</sup>

The Court reinforced this emphasis on intent in another 2023 case, *United States v. Hansen*.<sup>140</sup> That ruling rejected a First Amendment challenge to a statute that prohibited “encourag[ing] or induc[ing]” unlawful immigration, “knowing or in reckless disregard of” the immigration being in violation of law.<sup>141</sup> The statute, it held, merely established familiar and constitutionally permissible “aiding and abetting” liability. That meant that prosecutors must establish “provision of assistance to a wrongdoer with the intent to further” a “particular unlawful act.”<sup>142</sup>

This reasoning about culpable mental states has already had an impact on platform law. The D.C. Circuit followed it, citing *Hansen* in rejecting a First Amendment challenge to the Fight Online Sex Trafficking Act (FOSTA)—a 2018 law that removed Section 230 immunity for platforms that “knowingly” facilitated prostitution or sex trafficking.<sup>143</sup> (I was one of the plaintiffs’ counsel in that case.)

These stringent readings of statutes that on their face mention only knowledge stand in sharp contrast to the interpretation of “knowingly” advanced by plaintiffs in *Taamneh* and many other must-remove cases. Plaintiffs’ theory was that platforms should be liable even if they removed each *specific* unlawful post or account they knew of, because they still *generally* knew that other prohibited content remained on the platform. That reading would effectively have turned JASTA’s “knowingly” standard into something more like a “constructive knowledge” standard, meaning that platforms would face liability for specific items of ISIS content that they did not actually know about, but *should* have known about. Under that standard, the way for platforms to avoid liability would be to proactively monitor

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<sup>138</sup> *Id.* at 1221.

<sup>139</sup> *Id.* at 1231.

<sup>140</sup> *United States v. Hansen*, 143 S. Ct. 1932 (2023).

<sup>141</sup> 8 U.S.C. § 1324(a)(1)(A)(iv).

<sup>142</sup> *Hansen*, 143 S. Ct. at 1940.

<sup>143</sup> *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1298–99 (D.C. Cir. 2023).

or police users' online speech in search of prohibited content. In rejecting it, *Taamneh* improved platforms' position for the next time this issue is litigated in copyright, under FOSTA, or in other cases that turn on "knowledge."

The Court's analysis in *Taamneh* turns on platforms' actions or passivity toward ISIS. "The key question" the Court says, is "whether defendants gave such knowing and substantial assistance to ISIS that they culpably participated in the Reina attack."<sup>144</sup> Given the motion-to-dismiss posture, the answer to this central question depended on facts alleged by the plaintiffs.<sup>145</sup> Their claims failed because plaintiffs did not allege that the platforms did anything special to help ISIS. Instead, they alleged that platforms allowed ISIS to use the same services that platforms provided to billions of other users.

The relevant question in *Taamneh*, in other words, was *not* about the service-wide content moderation that platforms engaged in, or about platforms' overall role in selecting, excluding, ranking, or making editorial decisions regarding user content overall. The Court was clearly aware of platforms' content moderation, given the torrent of party and amicus briefs describing it and its role in parties' arguments in both *Taamneh* and *Gonzalez*. Justices also discussed platforms' content moderation in oral arguments.<sup>146</sup> For purposes of *Taamneh*'s legal test, however, platforms' content moderation and ranking mattered only to the extent that they indicated "knowing and substantial assistance to ISIS."<sup>147</sup>

Despite this doctrinal focus on aid to ISIS, the *Taamneh* opinion is littered with passages that appear to describe platforms' entire services as passive. As described

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<sup>144</sup> *Taamneh*, 143 S. Ct. at 1226. The Court found it unnecessary to resolve whether the defendants' actions must have aided and abetted the terrorist act itself, as opposed to ISIS as a group or any individuals or subgroups involved in the attack. *Id.* at 1223–24, 1225 n. 12.

<sup>145</sup> Justice Jackson concurred largely to emphasize that "the Court's view of the facts—including its characterizations of the social-media platforms and algorithms at issue—properly rests on the particular allegations" in plaintiffs' complaints. *Id.* at 1231.

<sup>146</sup> Transcript of Oral Argument at 135:10–16, *Gonzalez v. Google LLC*, 598 U.S. 617; Transcript of Oral Argument at 35:3, *Taamneh*, 143 S. Ct. 1206.

<sup>147</sup> *Taamneh*, 143 S. Ct. at 1226. The Court held open the possibility that content moderation might matter for JASTA liability given different facts. Using a hypothetical that will be familiar to teachers and students of intermediary liability law, it noted that if "a platform consciously and selectively chose to promote content provided by a particular terrorist group, perhaps it could be said to have culpably assisted the terrorist group." *Id.* at 1228. In that scenario, of course, plaintiffs could also more readily establish knowledge or intent to aid ISIS.

above, *Taamneh* also omits or understates standard platform practices including removing content, deplatforming users' accounts, enforcing discretionary content rules, proactively searching for prohibited content, and algorithmically ranking posts based on their content.<sup>148</sup> Those omissions generally do not matter to *Taamneh*'s ruling, since the case turned on platforms' alleged assistance to ISIS in particular. But between the opinion's failure to discuss platforms' ordinary content moderation and its repeated references to platforms' "distant inaction" and "passive," "agnostic," or "indifferent" attitude toward online content, a hasty reader might lose sight of *Taamneh*'s core inquiry into platforms' relationship with ISIS.<sup>149</sup> They might wrongly conclude that platform-wide passivity and lack of editorial role were established in *Taamneh*, and were legally relevant to the case's outcome.

Texas's August 2023 brief to the Supreme Court supporting its must-carry law illustrates the mischief to which *Taamneh* may be put. It presents facts that were at most alleged by the plaintiffs as legally relevant determinations to which "this Court unanimously agreed."<sup>150</sup> *Taamneh*'s determination that the defendants had not culpably "'associate[d themselves] with' the *Reina* attack" becomes, in Texas's telling, a conclusion that platforms did not meaningfully "'associate[] themselves with' underlying user content" overall.<sup>151</sup> Similarly, a passage from *Taamneh* stating that the "relationship between defendants and the *Reina* attack is highly attenuated" is quoted to characterize platforms' relationship to any "user and his activities" as highly attenuated.<sup>152</sup> Perhaps more consequentially, Texas suggests that the

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<sup>148</sup> See *supra* text accompanying notes 83–92; Keller, *supra* note 14.

<sup>149</sup> *Taamneh*, 143 S. Ct. at 1227–28.

<sup>150</sup> Texas August 2023 Brief, *supra* note 4, at 4 (citing *Taamneh*, 143 S. Ct. at 1226) ("Just last Term this Court unanimously agreed that—unlike the newspapermen and parade organizers from which the United States insists the Platforms are indistinguishable 'there is not even reason to think that [Platforms] carefully screen[] any content before allowing users to upload it onto their platform.'").

<sup>151</sup> *Id.* at 4 (citing *Taamneh*, 143 S. Ct. at 1226 (emphases added)).

<sup>152</sup> *Id.* at 5 (citing *Taamneh*, 143 S. Ct. at 1227). Texas argues that platforms' algorithmic selection, curation, and arrangement of user posts cannot be an expressive editorial choice, given that platforms "have a 'passive' and 'highly attenuated' relationship to the user and his activities. *Id.* at 1227."

*Taamneh* defendants prevailed *because* of their “inaction[] or nonfeasance” toward user content overall.<sup>153</sup>

### B. Future Cases

Platforms and the lawyers who sue them will, in future cases, surely continue to do what Texas did in *NetChoice*: They will reshape arguments based on *Taamneh*, including by selectively quoting the ruling’s language about platform passivity. In the must-remove context, rightsholders in a major copyright case against Twitter, filed a few weeks after *Taamneh* came out, did just that.<sup>154</sup> Echoing the Court’s emphasis on passivity, their complaint described Twitter as *not* “content neutral”—implying that a content-neutral defendant might face less risk of liability.<sup>155</sup> The platform’s infringement, it further argues, is “not merely the result of automated activity that occurs as a result of how Twitter designed its platform.”<sup>156</sup>

This section offers some predictions and speculations about how claims building on *Taamneh* will play out, beginning with comparatively straightforward must-remove claims and continuing to the relatively uncertain landscape of must-carry claims. It will also discuss the very difficult and consequential issues—both legal and practical—that would arise if the Court upheld some form of must-carry obligations in the *NetChoice* cases, leaving lower courts to determine the ruling’s consequences for must-remove cases.

#### 1. Must-remove claims

The most obvious place for parties to cite *Taamneh* will be in future claims about platforms’ liability for content posted by users. That will surely happen for cases not immunized by Section 230, like copyright or prostitution claims. As I will explain below, though, it may also shape future cases involving Section 230.

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<sup>153</sup> *Id.* at 4 (citing *Taamneh*, 143 S. Ct. at 1220–21) (“Nor do the Platforms meaningfully ‘associate[] themselves with’ underlying user content. *Id.* This ‘inaction[] or nonfeasance’ is why the Platforms do not share the same exposure to liability as newspapermen or parade organizers who promote expression that leads to harm. *See id.* at 1220–21; *see also* 47 U.S.C. § 230(c)(1).”).

<sup>154</sup> Complaint, *Concord Music Group, Inc. v. X Corp.*, No. 3:23-cv-00606, 2023 WL 4003714 (M.D. Tenn. June 14, 2023).

<sup>155</sup> *Id.* at ¶ 116.

<sup>156</sup> *Id.* at ¶ 115.

**a. How *Taamneh* could come up**

In one sense, *Taamneh* is a ruling from an alternate legal universe—one in which platforms cannot assert Section 230 immunity, and instead must litigate must-remove claims on the merits. But that world is not hypothetical. The Court never resolved whether the claims in *Taamneh* were immunized, for one thing. And powerful lawmakers of all political stripes have called for the abolition of Section 230. If that happens, *Taamneh* will be a guide to a very real future.

*Taamneh* is a good guide to future must-remove cases, because its “aiding and abetting” standard and its specific “knowledge” and “substantial assistance” elements have close analogs in other claims that are litigated against platforms. That includes the list of civil claims that fall outside of Section 230—including prostitution or trafficking claims under FOSTA, federal intellectual property claims like copyright, and state intellectual property claims like right of publicity in some parts of the country. And platforms have never been immune from federal criminal prosecution. Criminal laws commonly spell out aiding and abetting offenses or can be charged as aiding and abetting under 18 U.S.C. § 2. Some, including anti-terrorism laws<sup>157</sup> beyond JASTA and laws governing child sexual abuse material,<sup>158</sup> also predicate liability on “knowledge.” *Taamneh* will matter, for example, if the Justice Department follows through on not-so-veiled threats to prosecute social media companies in relation to the fentanyl crisis.<sup>159</sup>

*Taamneh* could matter even for must-remove claims that are currently understood to be immunized under Section 230. For one thing, courts in those cases often assess the merits of plaintiffs’ claims in addition to or in lieu of ruling on statutory immunities. An analysis of over 500 Section 230 cases found courts did so 28% of

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<sup>157</sup> *E.g.*, 18 U.S.C. § 2339B (barring the provision of “material support or resources to designated foreign terrorist organizations”).

<sup>158</sup> 18 U.S.C. § 2252 (prohibiting “[c]ertain activities relating to material involving the sexual exploitation of minors”).

<sup>159</sup> Lisa O. Monaco, Deputy Att’y Gen., U.S. Dep’t of Justice, *Remarks on Charges Against China-Based Chemical Manufacturing Companies and Arrests of Executives in Fentanyl Manufacturing* (June 23, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-charges-against-china-based> (noting that the “precursor sellers” of fentanyl “brazenly advertised” on social media platforms, and that the DOJ has “encouraged” companies to remove drug advertising content).

the time.<sup>160</sup> Defendants and judges may both prefer resolving meritless claims under familiar liability principles, rather than an Internet-specific and politically unpopular immunity statute.

*Taamneh* could also matter for cases interpreting Section 230 itself. As Eric Goldman points out, if Justice Thomas is “playing 4D chess,” *Taamneh* might “lay the foundation for a future SCOTUS evisceration of Section 230, on the basis that the Internet services shouldn’t be too upset because they will have other common law defenses.”<sup>161</sup> That evisceration could come about through new judicial reasoning about Section 230, drawing on *Taamneh*’s discussion of platforms’ culpable mental state or actions.

Platforms’ knowledge or mental state has long been considered irrelevant to Section 230 immunity. The statute does not mention a mental state, and courts have noted that the point of Section 230 immunity would be largely defeated if claimants could remove immunity simply by alleging that speech is illegal.<sup>162</sup> But a number of thinkers—including many *Taamneh* amici<sup>163</sup> and Justice Thomas<sup>164</sup>—have questioned whether this is correct. Their argument, which builds on common law distinctions between “publisher” and “distributor” liability for defamation, suggests that platforms lose immunity once they “know” about unlawful content. That analysis has doctrinal and policy problems that are unpacked in the seminal *Zeran* case,<sup>165</sup> and its common law basis is debatable.<sup>166</sup> If courts prove more open to it in

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<sup>160</sup> Banker, *supra* note 103.

<sup>161</sup> Eric Goldman, *The Internet Survives SCOTUS Review (This Time)—Twitter v. Taamneh and Gonzalez v. Google*, TECH. & MARKETING L. BLOG (May 18, 2023), <https://blog.ericgoldman.org/archives/2023/05/the-internet-survives-scotus-review-this-time-twitter-v-taamneh-and-gonzalez-v-google.htm>.

<sup>162</sup> See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (describing how “liability upon notice has a chilling effect on the freedom of Internet speech” by incentivizing removal of speech upon notification regardless of whether the speech was defamatory or not).

<sup>163</sup> Brief of Amici Curiae The Cyber Civil Rights Initiative and Legal Scholars in Support of Petitioners, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

<sup>164</sup> *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting the denial of certiorari).

<sup>165</sup> *Zeran*, 129 F.3d 327.

<sup>166</sup> Brief of Internet Law Scholars as Amici Curiae in Support of Respondent, *Gonzalez*, 598 U.S. 617.

the future, though, they might look to *Taamneh*'s analysis of platform "knowledge" in defining the scope of immunity.

Platforms' actions, unlike their mental states, can clearly be relevant to Section 230 immunity today. Indeed, some concept of which actions are and are not immunized is innate to platform immunity laws—otherwise we wouldn't know which defendants can claim protection. Under Section 230, platforms are not immunized if they are "responsible, in whole or in part, for the creation or development" of actionable content.<sup>167</sup> In other words, there is something like a culpable act or *actus reus* standard baked into Section 230. Courts have referred to this, rather imprecisely, as a "material contribution" standard.<sup>168</sup> A primary theory left unaddressed in *Gonzalez* was that plaintiffs' claims involved platforms' own "creation or development" of ranking algorithms, for which platforms should have no immunity.

We will surely see variations on the *Gonzalez* theory litigated again, whether they are based on algorithms or on currently-fashionable arguments about platforms' "design" or "systems." When that happens, courts may look to *Taamneh*'s analysis of "substantial assistance" as an interpretive aid, especially if they focus on the judicially-created "material contribution" standard, rather than the facts of important cases applying it or Section 230's wording about responsibility for the "creation or development" of information.<sup>169</sup> *Taamneh*'s emphasis on passivity may leave such plaintiffs with an uphill battle, though. It is harder to argue that ordinary ranking algorithms make platforms responsible for particular content if the algorithms are also, in *Taamneh*'s characterization, "merely part of [the] infrastructure" for platforms' services, providing seemingly equivalent assistance to all posts and assisting ISIS too little to support plaintiffs' tort claims. But ample room remains for litigation about the relationship between standards for immunity and liability, and how *Taamneh* fits in.

#### **b. How *Taamneh* could affect later must-remove cases**

On its face, *Taamneh* is a very defense-friendly ruling. In cases where courts reach merits questions about liability, it will largely favor platform defendants. It

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<sup>167</sup> 47 U.S.C. § 230(f)(3).

<sup>168</sup> *E.g.*, *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110 (4th Cir. 2022); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

<sup>169</sup> *Id.* The term "material contribution" can be confusing because the same words may have broader meanings in other areas of law, such as copyright.

emphasizes “intent” as a requirement for liability under a statute that mentions only “knowledge,” and has strong language about platforms’ lack of responsibility for users’ actions. That said, in arriving at its conclusions, the Court repeatedly characterizes platforms as more passive than they actually were in 2017, and far more passive than they are today. Plaintiffs may point to this in alleging that platforms’ now-ordinary content moderation makes them ineligible for protection under *Taamneh*.

In principle, those arguments should not work. *Taamneh*’s statements about platform-wide passivity generally appear in the case as descriptive passages untied to legal conclusions, or else to support the conclusion that platforms offered no special additional assistance to ISIS. Platforms should be on strong ground arguing that platform-wide moderation practices are not themselves a basis for liability or increased legal exposure under *Taamneh*. But they likely will have to mount those defenses, as plaintiffs test what opportunities the ruling might have created for must-remove claims.

*Taamneh* also leaves open other avenues of attack for plaintiffs simply because, as must-remove cases go, *Taamneh* presented an unusually weak claim. The causal chain from defendants’ actions to plaintiffs’ harms from ISIS attacks was, as the ruling put it, “highly attenuated.”<sup>170</sup> Multiple lower courts had rejected JASTA claims against platforms for this very reason.<sup>171</sup> Establishing causation and harm from platforms’ actions is much simpler, however, for many common claims against platforms. The mere act of copying or displaying content can be the basis for copyright liability, for example, or might violate state laws about non-consensual sexual images. In defamation law, similarly, the harm comes from “publishing” content. Plaintiffs need not establish subsequent offline consequences.

If plaintiffs in these more traditional must-remove cases can get around platforms’ statutory immunities, they will presumably point to *Taamneh*’s statement that culpable knowledge and substantial assistance work “in tandem, with a lesser showing of one demanding a greater showing of the other.”<sup>172</sup> Given platforms’

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<sup>170</sup> *Taamneh*, 143 S. Ct. at 1227.

<sup>171</sup> See Eric Goldman, *Eleventh Circuit Rejects “Material Support for Terrorists” Case—Colon v. Twitter*, TECH. & MARKETING L. BLOG (Oct. 12, 2021), <https://blog.ericgoldman.org/archives/2021/10/eleventh-circuit-rejects-material-support-for-terrorists-case-colon-v-twitter.htm>.

<sup>172</sup> *Taamneh*, 143 S. Ct. at 1222.



very direct role in displaying or publishing content, they may argue, plaintiffs need not make the more significant mental state showing discussed in *Taamneh*.

Plaintiffs may also argue that *Taamneh*—despite its examination of commonly used terms like JASTA’s “substantial assistance” and knowledge elements—applies only to aiding and abetting claims. But other recent cases tell us, for better or for worse, that statutes can create aiding and abetting standards without using those words. The Court’s 2023 *Hansen* ruling and cases applying it have identified aiding and abetting standard in laws that prohibited only “facilitating,” “encourag[ing] or induc[ing]” unlawful acts.<sup>173</sup> Following *Hansen*’s reasoning, aiding and abetting standards could be relevant for the many other civil claims against platforms that use similar words.

Plaintiffs could also bring claims under the burgeoning list of state laws<sup>174</sup> that “impose duties” on platforms to protect children.<sup>175</sup> California’s Age Appropriate Design Code, for example, says platforms must not take actions “materially detrimental to the . . . well-being of a child.”<sup>176</sup> Claims under such laws, plaintiffs may argue, are not immunized by Section 230, because they regulate the platforms’ own conduct—and they create the “independent duty to act” that the Court said was missing in *Taamneh*.<sup>177</sup> Such a duty, the Court suggested, could open the door to liability for mere “inaction” by platforms.<sup>178</sup>

That said, the Court also stated that on the facts of *Taamneh*, including plaintiffs’ allegations about ranking algorithms, even a duty would “not transform defendants’ distant inaction into knowing and substantial assistance.”<sup>179</sup> Following that logic, even plaintiffs who can identify a statutory duty of care would have trouble prevailing on claims that have similar elements to *Taamneh*, and that arise from platform behavior like that alleged in *Taamneh*.

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<sup>173</sup> See *supra* notes 132–135 and accompanying text.

<sup>174</sup> See Tim Bernard, *144 State Bills Aim to Secure Child Online Safety as Congress Flounders*, TECH POLICY PRESS (May 22, 2023), <https://techpolicy.press/144-state-bills-aim-to-secure-child-online-safety-as-congress-flounders/>.

<sup>175</sup> See, e.g., S.B. 66, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

<sup>176</sup> CAL. CIV. CODE §§ 1798.99.28–.40 (enacted 2022).

<sup>177</sup> *Taamneh*, 143 S. Ct. at 1221.

<sup>178</sup> *Id.* at 1228.

<sup>179</sup> *Id.*

## 2. Must-carry claims

*Taamneh*'s relevance for future must-carry claims, including the Texas and Florida cases the Court will hear this term, is harder to forecast. In theory, the Court's analysis in those cases could be entirely unrelated. The legal questions in *Taamneh* about platforms' responsibilities for harms caused by users should, in principle, have no direct bearing on the questions in *NetChoice* about when platforms can be forced to carry content against their will.

But Texas's brief shows how *Taamneh*'s odd characterizations can be put to use.<sup>180</sup> As discussed above, it implies that platforms prevailed in *Taamneh* because of their overall "inaction[] or nonfeasance," and argues that the same passivity shows that platforms lack any First Amendment expressive interest in setting editorial policies. Justices Thomas, Alito, and Gorsuch have also expressed their openness to arguments that carriage obligations may be imposed on a platform that already "holds itself out as open to the public."<sup>181</sup> To the extent that future clerks or Justices see *Taamneh*'s description of platform behavior as a source of truth, it will lend support to this argument.

Of course, if platforms actually *did* offer their services to all comers, Texas and Florida would not have passed their laws—which explicitly responded to perceived political bias in platforms' content moderation and account terminations. Platforms' extensive content moderation is, outside of the *Taamneh* ruling, no secret. Politicians and pundits talk about it daily. Platforms proclaim it in their Terms of Services, Community Guidelines, and blog posts—not to mention endless hours of testimony,<sup>182</sup> TED talks,<sup>183</sup> and other public statements going back for over a decade. Given this backdrop, reasoning that they *already* accept all speakers, and thus have no cognizable First Amendment rights to set editorial rules, seems perverse. Justice Kavanaugh, who as a Circuit Court judge called similarly circular reasoning

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<sup>180</sup> Supplemental Brief for Respondent, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

<sup>181</sup> *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting).

<sup>182</sup> *Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Juniper Downs, Director, Public Policy and Government Relations, Google), <https://docs.house.gov/meetings/JU/JU00/20180717/108546/HHRG-115-JU00-Wstate-DownsJ-20180717.pdf>.

<sup>183</sup> Del Harvey, *Protecting Twitter Users (Sometimes from Themselves)*, TED (Mar. 2014), [https://www.ted.com/talks/del\\_harvey\\_protecting\\_twitter\\_users\\_sometimes\\_from\\_themselves](https://www.ted.com/talks/del_harvey_protecting_twitter_users_sometimes_from_themselves).

in a net neutrality case “mystifying,” may be particularly impatient with this line of argument.<sup>184</sup>

Thomas’s characterization of platforms and analysis in *Taamneh* may also allow him to voice an oft-repeated critique of platforms’ alleged inconsistency in must-remove and must-carry cases. “Platforms reaped the benefits of their passivity to avoid liability in *Taamneh*,” this critique might say, “but now they want to have it both ways, and simultaneously be treated as active editors whose First Amendment rights preclude common carriage obligations.”<sup>185</sup>

I don’t think this charge bears much scrutiny as a legal matter. It conflates *users’* speech in the form of posts with *platforms’* speech in the form of editorial decisions. Those are two distinct things for liability purposes, and also two distinct things for First Amendment purposes. Platforms are unambiguously immunized for user speech under Section 230. The separate question about platforms’ immunity for editorial choices in the form of algorithmic ranking was left unresolved in *Gonzalez*, but lower courts have consistently held that such decisions are immunized. (Section 230’s authors filed a brief saying the statute had to immunize platforms’ editorial decisions, or else its pro-content-moderation purpose would be defeated.<sup>186</sup> I made similar points in a brief with the ACLU.<sup>187</sup>)

The same distinction between two kinds of protected expression exists in First Amendment law, which clearly distinguishes between users’ speech in posts and platforms’ or other editors’ protected editorial decisions. The Court has recognized First Amendment rights for the editorial decisions made by aggregators of third party speech, including parade organizers whose only relevant “editorial” decision

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<sup>184</sup> United States Telecom Ass’n v. FCC, 855 F.3d 381, 429 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

<sup>185</sup> As Texas’s brief puts it, “[p]latforms do not share the same exposure to liability as newspapermen or parade organizers who promote expression. . . . The Platforms cannot simultaneously demand First Amendment protection for this same conduct.” Texas August 2023 Brief, *supra* note 4, at 4.

<sup>186</sup> Brief of Senator Ron Wyden and Former Representative Christopher Cox as Amici Curiae in Support of Respondent, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

<sup>187</sup> Brief of ACLU, ACLU N. Cal., and Daphne Keller as Amici Curiae in Support of Respondent, *Gonzalez*, 598 U.S. 617).

was to exclude plaintiffs from a parade.<sup>188</sup> There is no reason that the existence of First Amendment rights for platforms' editorial decisions legally must affect—or be affected by—the existence of immunity for content moderation choices, much less for speech posted by users.

The defendant platforms also did not claim to be passive in *Taamneh* or *Gonzalez*. It is the *Taamneh* ruling, and not the platforms' arguments, that goes to such lengths to characterize platforms as passive—although, as discussed above, the case's key legal analysis concerned passivity toward ISIS, not toward all speech on the platform. Briefs from the parties and amici in *Gonzalez* detailed at length the rules and methods that many platforms use to exclude users and content, including hate speech, disinformation, and other often-lawful speech. Their overall argument across the cases is that ranking and moderation are editorial choices, and *also* immunized by Section 230. In *Taamneh*, Meta and Google's brief described "extensive efforts to prevent" ISIS activity on the platform,<sup>189</sup> and Twitter described removing hundreds of thousands of ISIS accounts under its policies.<sup>190</sup> Even the plaintiffs' allegations credit platforms with more agency and active opposition to ISIS than the ruling does, recognizing platforms' notice-and-takedown systems for ISIS content and accounts.<sup>191</sup>

The deeper force of the argument that platforms must be passive in order to be immune comes from a widely held intuition that platforms *should* have to choose between being responsible editors and being passive carriers. Those are categories

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<sup>188</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). A separate body of law, copyright, recognizes the same distinction—and also does so based on the "expressiveness" of a creator's actions. U.S. law grants separate copyrights protecting the expression of an author of stories on one hand, and the expression of a publisher who selects and arranges stories in a compilation on the other. 17 U.S.C. § 103.

<sup>189</sup> Brief for Respondents Facebook, Inc. and Google LLC Supporting Petitioner at 3, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

<sup>190</sup> Brief for Petitioner at 7, *Taamneh*, 143 S. Ct. 1206 (stating that "Twitter has terminated over 1.7 million accounts for violating those rules [against terrorism-related content] since August 2015, including over 630,000 accounts between August 2015 and December 31, 2016").

<sup>191</sup> Brief for Respondents at 73, *Taamneh*, 143 S. Ct. 1206 (describing how "the complaint alleges that the policy of the defendants was to avoid reviewing their files for terrorist materials, and only to remove those particular terrorist postings or videos that were the subject of an outside complaint").

familiar from pre-Internet law and communications technology. But forcing Internet platforms to behave like these older entities would forfeit much of the value that users get from the Internet in the first place, and divide Internet speakers into haves and have-nots. Speakers that platforms deem worthy of costly legal review could reach large but passive audiences via privileged spaces for online speech. Everyone else would be left to fend for themselves in forums that permit every kind of barely-legal harassment and invective. Nothing in *Taamneh* requires that outcome.

### 3. Simultaneous must-carry and must-remove obligations

If courts recognized simultaneous must-carry and must-remove obligations for platforms, the intersection would be unpredictable and chaotic. Major rulings in either area should, explicitly or implicitly, take account of the other.

Making communications channels carry some speech and *also* suppress other speech is not unheard of. Obligations of both kinds exist in U.S. law for broadcast and cable. Occasionally they even appear in the same case—though the last time that happened, in *Denver Area*, the Court issued six separate and very fractured rulings.<sup>192</sup> Those cable and broadcast rules are administered by an expert federal agency under detailed regulation, though. They are constitutionally justified by attributes unique to those media. Building similar mandates for the Internet, using an ad hoc mix of federal and state liability laws and hastily drafted must-carry statutes like the ones in *NetChoice*, would be profoundly different.

#### a. Competing obligations and real world options for platforms

The tension between must-remove and must-carry mandates is worth exploring as the Court considers *NetChoice*. It would almost certainly have come up in *NetChoice* itself if *Gonzalez* or *Taamneh* had expanded platforms' obligations to remove content in order to avoid liability. Platforms would then, in *NetChoice*, have pointed out the difficulty of complying with laws like JASTA while carrying the content required in Texas and Florida. They would likely have noted that Texas lawmakers rejected an amendment that would at least have solved the JASTA problem, by allowing platforms to remove terrorist content.<sup>193</sup>

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<sup>192</sup> *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

<sup>193</sup> Mike Masnick, *Texas Legislature Says You Can't Teach About Racism in Schools, But Social Media Sites Must Host Holocaust Denialism*, TECHDIRT (Aug. 30, 2021), <https://www.techdirt.com/2021/08/30/texas-legislature-says-you-cant-teach-about-racism-schools-social-media-sites-must-host-holocaust-denialism/>.

As things stand, the moment when courts grapple with tensions between must-carry and must-remove rules could in principle be deferred. The Supreme Court could uphold the Texas or Florida laws without mentioning removal obligations at all, though that seems unlikely to me, given tensions with laws like the DMCA and FOSTA. If the Court did evade the issue, it would kick these difficult questions down the road to lower courts in future must-carry cases or in run-of-the-mill must-remove cases. Those courts would have to decide whether or how the Texas and Florida laws might tie their hands in cases about anything from copyright to federal criminal law.

The simplest potential conflicts between must-carry and must-remove obligations involve content that platforms are compelled to host under must-carry laws, but for which they simultaneously face liability under must-remove laws. A platform that removed child abuse material, or even pirated Hollywood movies identified in DMCA notices, might well violate Florida's law, for example. It requires that platforms carry "journalistic" speech (except obscenity) and greatly restricts moderation of speech "by or about" political candidates (seemingly including obscenity).<sup>194</sup>

As a legislative drafting problem, that hard conflict between must-carry and must-remove mandates could be fixed. Florida's legislators could revise the law to let platforms remove illegal content—much as they already revised it to remove a carve-out initially granted to Disney, but withdrawn after that company publicly

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<sup>194</sup> A 1959 case about live radio broadcasts, *Farmers Educ. & Co-op. Union v. WDAY, Inc.*, 360 U.S. 525 (1959), resolved a similar tension in favor of carriage mandates. Station operators could face no liability for defamation, the Court held, when providing legally mandated air-time to candidates for public office under a law requiring operators to "afford equal opportunities" to all such candidates and exercise "no power of censorship." As Justice Thomas has noted, a 1940 First Circuit case went further, identifying an implicit duty for telegraph carriers to carry defamatory messages. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 & n.3 (2021) (Thomas, J., concurring) (citing *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 542 (1st Cir. 1940)). As Blake Reid notes, however, subsequent cases about telegraph and telephone companies offer mixed precedent on the relationship between carriage mandates and liability for users' unlawful speech. Reid, *Uncommon Carriage*, *supra* note 103, at 34–36.

supported LGBTQ+ rights.<sup>195</sup> That wouldn't solve the law's deeper problem, which involves speech that is merely potentially unlawful.

Simultaneously complying with must-remove and must-carry laws like the ones in Texas and Florida is a practical impossibility. Platforms can't just take down all the illegal content and leave up all the legal content, because the Internet is awash in speech that *might* violate laws. Content that is regulated by federal criminal law in one context (like an ISIS recruitment video) might be lawful and important in another (like academic work or news reporting). Content that is lawful in one state might be unlawful in another, because of varying standards for claims like defamation or intentional infliction of emotional distress. Legality can depend on doctrinal determinations platforms are poorly equipped to make, like whether a local business leader or ex-politician counts as a public figure. It can depend on facts that platforms are even less able to assess, like the truthfulness of sexual harassment allegations.

Platforms receive an enormous number of notices alleging that online speech is illegal.<sup>196</sup> Many demand removal of clearly legal speech, many more target speech that might be legal. Platforms encounter still more legally ambiguous content through content moderation. If they are subject to must-remove claims for that material, then they must decide—rapidly and at scale—which user speech breaks the law. Perfect enforcement of complex speech laws is not an option. Instead, platforms' systems will inevitably err on the side of over- or under-removal. A platform that calibrates its systems to protect lawful speech will leave some illegal content online, and risk liability in must-remove cases. A platform that protects itself from liability by erring on the side of removing too much content will risk violating must-carry laws. Such a system essentially requires platforms to transform their workers into proxies for judges, guessing at how future courts might rule.

It's tempting to imagine that new technological advances might allow platforms to increase accuracy in moderation and so thread this needle. But technology, including artificial intelligence, won't fix this. Accepting certain rates of false positives or false negatives is intrinsic to automated content moderation using machine

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<sup>195</sup> Jennifer Kay, *Florida Lawmakers Move to Include Disney Under Tech Limits*, BLOOMBERG LAW (Apr. 20, 2022), <https://news.bloomberglaw.com/tech-and-telecom-law/florida-lawmakers-move-to-include-disney-in-tech-restrictions>.

<sup>196</sup> See, e.g., Google, *Transparency Report: Requests to Delist Content Under European Privacy Law*, <https://transparencyreport.google.com/eu-privacy/overview?hl=en>.

learning.<sup>197</sup> The kinds of duplicate-detection systems that the *Taamneh* plaintiffs urged platforms to adopt for terrorism<sup>198</sup> (and that they later did adopt<sup>199</sup>) push toward over-removal, because the software can't distinguish contexts like news reporting. Human moderators make foreseeable errors, too. People have biases, and are prone to rubber stamp machines' conclusions.<sup>200</sup> And platforms can't possibly train a huge, distributed workforce to perfectly apply every law to every piece of content.

Whatever platforms do will, inevitably, skew toward over-removal, under-removal, or a combination. Platforms may take down too much potentially pornographic content, for example, but not enough potentially harassing content. These problems compound rapidly. If Facebook achieved an astonishing 99.9% accuracy rate in reviewing the over 350 million photos uploaded daily, that would still lead to hundreds of thousands of errors every day.<sup>201</sup> Each might support must-remove or must-carry claims.

Platforms' over-removal errors will not be neutral as to the viewpoint or content of posts. They will systematically penalize posts that resemble unlawful speech or that correlate to liability risks. Platforms seeking to avoid liability under laws like FOSTA, for example, have reason to remove ambiguously legal speech that is pro-prostitution but not anti-prostitution. Platforms trying to avoid liability under JASTA or criminal anti-terrorism laws have reason to restrict content ranging from praise for Osama bin Laden to criticism of U.S. and Israeli military actions. These big-picture patterns and individual choices burden speech with one viewpoint more than speech on the other side. Platforms—and before long, courts—would

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<sup>197</sup> See Chowdhury, *supra* note 91.

<sup>198</sup> Brief for Respondents, *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

<sup>199</sup> Letter from Civil Soc'y Organizations to European Parliament on EU's Proposed Regulation on Preventing the Dissemination of Terrorist Content Online (Feb. 8, 2019), <https://cdt.org/wp-content/uploads/2019/02/Civil-Society-Letter-to-European-Parliament-on-Terrorism-Database.pdf>.

<sup>200</sup> See Ben Wagner, *Liable, but Not in Control? Ensuring Meaningful Human Agency in Automated Decision-Making Systems*, 11 POL'Y & INTERNET 104 (Mar. 2019), <https://doi.org/10.1002/poi3.198>.

<sup>201</sup> Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation at Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), <https://www.techdirt.com/2019/11/20/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well/>.



have to decide how that fits with rules like Texas’s prohibition on viewpoint discrimination, or Florida’s restrictions on moderation of speech by journalists or candidates.

These decisions get even messier if platforms must remove or restrict content that is not illegal on its face, but could contribute to future harms. Under California’s child safety law, for example, a platform risks liability when it “knows, or has reason to know” that its actions may prove “materially detrimental to the physical health, mental health, or well-being of a child.”<sup>202</sup> Standards like that can also implicate politically fraught culture war issues. An Attorney General in Arkansas may think platforms should protect children from speech supporting transgender rights, but not speech supporting gun ownership.<sup>203</sup> A California official might think the opposite. In either case, courts would wind up deciding who is right.

*Taamneh* points to a seemingly simple way out of this overall legal bind: A platform that enforced few or no speech rules would satisfy must-carry laws and—under *Taamneh*’s logic—fend off must-remove claims. But this “solution” would essentially give Florida and Texas lawmakers what they want. It would forfeit platforms’ own editorial rights and the content moderation measures sought by many other people—including the plaintiffs and their aligned amici in *Taamneh*.

#### **b. Other problems**

Two other points of tension between claims like those in *Taamneh* and laws like the ones in Texas and Florida warrant discussion. Neither is as profound as the competing carriage and removal obligations described so far. But both are important—and warrant more attention than this abbreviated treatment can provide.

The first issue involves identifying which platform features will be subject to new obligations: the content *ranking* function or the content *hosting* function. The must-remove claims in *Taamneh* and *Gonzalez* focused on platforms’ algorithmic ranking systems. Under plaintiffs’ theory, platforms would have needed to restrict content in ranked features like YouTube recommendations or Twitter feeds in order to avoid liability—but the legal status quo would have remained intact for hosted features like Twitter users’ profile pages. Must-carry obligations might con-

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<sup>202</sup> CAL. CIV. CODE § 1798.99.31.

<sup>203</sup> See @daphnehk, TWITTER (July 26, 2023, 11:22 AM), <https://twitter.com/daphnehk/status/1684268089494638592>.

stitutionally do just the opposite, following an argument from Eugene Volokh commonly referenced in *NetChoice* briefs.<sup>204</sup> Following that model, the legal status quo would remain in place for ranked features, in order to protect platforms' rights under the First Amendment. But states could require platforms to host content in the first place. (To be clear, this argument would not justify the Texas and Florida laws, which restrict platforms' freedom to both host and rank content.) If courts were to adopt both Volokh's theory and the *Gonzalez* plaintiffs' theory, no major, public-facing aspect of platforms would remain untouched. Platforms would have to tightly curate newsfeeds to avoid liability, but be prevented from curating hosted content at all.

The other area of intersection involves Section 230. Arguments about that law were left unresolved in *Gonzalez*, and are formally not part of the questions presented in *NetChoice*. Nonetheless, the Court could wind up interpreting Section 230 in that case. Both the Texas and Florida laws exempt platforms from obligations inconsistent with federal law; the latter specifies that this includes Section 230. The states have argued that their laws cannot be interpreted without parsing these provisions and determining the scope of platforms' immunity from must-carry mandates under Section 230.<sup>205</sup> If the Court elected to focus on this issue in *NetChoice*, the case would bring Section 230 back to the Court much sooner than expected.

In this scenario, the Court could be presented with a number of statutory interpretation questions about Section 230.<sup>206</sup> One in particular relates to the connections between must-carry and must-remove requirements discussed in this piece. Texas and Florida have argued that the only relevant part of Section 230 for must-

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<sup>204</sup> Volokh, *supra* note 97.

<sup>205</sup> Petition for Writ of Certiorari at 27, *Moody v. NetChoice, LLC*, \_\_ U.S. \_\_, No. 22-277 (citing FLA. STAT. § 501.2041(9)); Respondent's Opposition to Application to Vacate Stay of Preliminary Injunction at 12, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022). Texas's law does not expressly reference Section 230, but the bill's primary drafter said that this provision referred to § 230(c)(2). @BriscoeCain, TWITTER (May 16, 2022, 11:05 AM), <https://twitter.com/BriscoeCain/status/1526262461049065474?s=20&t=9-RvEuDH5owXcubI-2z0Xw>; see also Mike Masnick, *Author of Texas' Social Media Law Admits That He Meant the Law To Exempt Any Moderation Decisions Protected by Section 230 (That's Everything)*, TECHDIRT (May 17, 2022), <https://www.techdirt.com/2022/05/17/author-of-texas-social-media-law-admits-that-he-meant-the-law-to-exempt-any-moderation-decisions-protected-by-section-230-thats-everything/>.

<sup>206</sup> Blake Reid, *Section 230's Debts*, FIRST AM. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4624865](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4624865).

carry obligations is subsection (c)(2)—and not subsection (c)(1), which was at issue in *Gonzalez* and other must-remove cases.<sup>207</sup> Determining which part of the statute applies to carriage mandates would itself be a very fraught decision, with consequences far outside of Texas and Florida.

This statutory dispute is complex, and has been years in the making. The states' interpretation of Section 230 is one long pursued by conservatives but generally rejected by courts.<sup>208</sup> It says that platforms have no immunity from must-carry claims under the statute's broadly worded subsection 230(c)(1), but instead only under the narrower language of subsection 230(c)(2). As a result, immunity applies only when platforms remove speech in the categories that 230(c)(2) lists: "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing."<sup>209</sup> By extension, the Texas and Florida laws—by exempting the moderation decisions immunized by 230(c)(2) from carriage mandates—would permit platforms to freely moderate speech in the listed categories. If the Court accepted that statutory interpretation in *NetChoice*, that portion of the ruling would have consequences well outside of Texas and Florida. It would limit platforms' defenses from must-carry claims in any state, including claims based on common theories like unfair competition or breach of contract. It would also seemingly eliminate the related defense, under subsection 230(c)(2)(B), for vendors of spam filters or other user-operated content-blocking software, to the extent that they block content on grounds other than those listed in the statute.<sup>210</sup>

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<sup>207</sup> Defendant's Response to Motion for Preliminary Injunction (Dkt. 12), *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092 (W.D. Tex. 2021), *vacated and remanded*, 49 F.4th 439 (5th Cir. 2022); Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction at 5–8, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021).

<sup>208</sup> See *Goldman & Miers*, *supra* note 58.

<sup>209</sup> Critics of the states' interpretation argue that it ignores the statute's reference to "otherwise objectionable" content; defenders respond that the meaning of "objectionable" is limited by the *ejusdem generis* canon of interpretation.

<sup>210</sup> Section 230(c)(2)(B) references "material described in paragraph (1)" rather than in paragraph (A). This is widely assumed to be a typographical error. See, e.g., *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009).

The states' interpretation of Section 230 has a number of problems, which have been addressed in other publications.<sup>211</sup> Importantly for First Amendment purposes, however, this interpretation would turn Section 230, and the states' own laws, into content-based rules—putting the state's thumb on the scales to shape platforms' moderation of online speech. Platforms could freely remove sexual or violent content, but not disinformation or non-harassing hate speech. The politely expressed racial superiority claims that got white nationalist Jared Taylor kicked off of Twitter,<sup>212</sup> for example, could seemingly not be taken down in Texas. (Or at least, not unless Twitter also removed other viewpoints about racism.) The states' interpretation, in other words, would raise a whole new round of First Amendment questions about state-backed preferences for online speech in both their own laws and Section 230.

#### CONCLUSION

The legal landscape for platform moderation of user content, outside the protected world of Section 230, is vast and thorny. The streamlined and defense-favorable tort rules announced in *Taamneh* will help in simplifying future litigation for non-immunized claims. But *Taamneh*, by over-emphasizing platforms' putative passivity, may also have unintended consequences for both must-remove and must-carry claims. *Taamneh*'s ripple effects in those areas illustrate how interconnected they are, and always have been. Advocates and courts should consider these intersections in future must-remove cases like *Taamneh*, and in must-carry cases like the *NetChoice* cases.

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<sup>211</sup> See Goldman & Miers, *supra* note 58; Reid, *supra* note 206.

<sup>212</sup> Abrar Al-Heeti, *White Nationalist Jared Taylor Sues Twitter over Account Ban*, CNET (Feb. 22, 2018), <https://www.cnet.com/culture/white-nationalist-jared-taylor-american-renaissance-sues-twitter-for-account-suspension/>.