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Brief for Respondents, Twitter, Inc. v. Taamneh, 143 S.Ct. 1206 (2023) (No. 21.1496)

Eric Schnapper
University of Washington School of Law

Keith L. Altman

Robert J. Tolchin

No. 21-1496

In The Supreme Court of the United States

TWITTER, INC.,

Petitioner,

v.

MEHIER TAAMNEH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

KEITH L. ALTMAN
THE LAW OFFICE OF KEITH ALTMAN
33228 West 12 Mile Rd.
Suite 375
Farmington Hills, MI 48334
(516) 456-5885
keithaltman@kaltmanlaw.com

ROBERT J. TOLCHIN
THE BERKMAN LAW OFFICE, LLC
829 East 15th St.
Brooklyn, NY 11230
(718) 855-3627
rtolchin@berkmanlaw.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT

The Complaint

This case arises from a terrorist attack on the Reina nightclub in Istanbul, Turkey, by Abdulkadir Masharipov, an individual affiliated with ISIS. On January 1, 2017, Masharipov carried out a shooting massacre, firing 120 rounds into the crowd of 700 people, killing 39 and injuring 69 others. On the day of the attack, ISIS issued a statement claiming responsibility for the killings.

This action was commenced by the relatives of Nawras Alassaf, a Jordanian citizen who was killed during the attack. The plaintiffs, all United States citizens, brought this action against three major social media companies, Twitter, Facebook and Google (which owns YouTube). The complaint alleged, *inter alia*, that the defendants had aided and abetted ISIS, and that their actions were a cause of Alassaf's death. The plaintiffs asserted that the defendants were liable under the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016). JASTA amended the Anti-Terrorism Act (ATA), to impose liability for aiding and abetting certain terrorist acts. 18 U.S.C. §2333(d)(2).

Masharipov, a native of Uzbekistan, first became affiliated with ISIS sometime prior to the attack, when he was outside of Turkey. The complaint alleged that Masharipov had been radicalized by ISIS's use of social media.[1] About a year before the Reina attack, Masharipov was directed by a high-ranking ISIS official, Abu Shuhada (then in Raqqa, Syria), to go to Istanbul and remain as a "sleeper operative" and "await further orders."[2] Upon his arrival in Istanbul, Masharipov "was provided [by ISIS] with an AK-47 assault rifle, six loaded magazines, and three stun grenades."[3]

In late 2016, Shuhada contacted Masharipov, and directed him to launch a terror attack on New Year's Eve in Istanbul.[4] "ISIS leadership" initially selected as the target Taksim Square, a large public gathering place.[5] When Masharipov arrived at Taksim Square, however, he aborted the planned attack because of intense security measures there.[6] Masharipov reported that problem to Shuhada, who instructed Masharipov to instead target the Reina nightclub.[7] "ISIS leaders sent Masharipov footage from inside the nightclub" (J.A. 128, ¶371), which those leaders had earlier obtained in some fashion. At around 1:15 a.m.,

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[1] J.A. 157, ¶493.

[2] J.A. 119, ¶339; J.A. 118, ¶337.

[3] J.A. 119, ¶344.

[4] J.A. 118, ¶343.

[5] J.A. 126-27, ¶367.

[6] J.A. 127, ¶369.

[7] J.A. 128, ¶370.

Masharipov killed a police officer at the entrance to the club, entered the building and fired upwards of 120 rounds into the crowd, killing 39 people and injuring 69 others. ISIS promptly issued a statement claiming responsibility for the Reina attack, and lauding Masharipov as a "hero solider of the caliphate."[8] Masharipov "[f]or over two weeks ... evaded arrest, utilizing ISIS connections and safe houses."[9] At the ISIS safe house at which Masharipov was finally arrested, Turkish authorities found firearms, ammunition, two drones, and $200,000 in cash.[10]

The complaint alleged that the defendants had long known that their websites were assisting ISIS's terrorist activities. The complaint described a series of public statements by government officials and reports in numerous media sources detailing the manner in which the defendants were doing so.

There had been public statements by high-ranking government officials pointing out that one or more of the defendants was through its social media operations assisting ISIS or other terrorist organizations. That included statements by the Chair of the House Foreign Affairs Subcommittee on Terrorism,[11] the Under Secretary of Treasury for Terrorism and Financial Intelligence,[12] the multi-lateral Financial Action

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[8] J.A. 129, ¶¶379, 380.

[9] J.A. 130, ¶383.

[10] J.A. 130, ¶384.

[11] J.A. 90, ¶209.

[12] J.A. 79, ¶154.

Task Force[13] and the Home Affairs Committee of the House of Commons.[14] In January 2016, there were high-level discussions between senior officials of the United States and the large social media companies. The United States conducted those discussions in order to "encourage [those companies] 'to do more to block terrorists from using their services."[15]

The complaint asserted that descriptions of the manner in which the defendants were assisting these terrorist activities were published in the New York Times,[16] the Wall Street Journal,[17] the Washington Post,[18] the Washington Times,[19] Time magazine,[20] the Huffington Post,[21] Agence France-Presse,[22] and other publications.[23] There were broadcast accounts of the problem on CBS,[24] NBC,[25] CNN,[26]and the BBC.[27] *See* J.A. 88, ¶197 ("[f]or years the media has reported on

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[13] J.A. 80, ¶155.

[14] J.A. 135-36, ¶¶408-09.

[15] J.A. 91, ¶211.

[16] J.A. 86, ¶188; J.A. 88, ¶198.

[17] J.A. 89, ¶204.

[18] J.A. 93, ¶221.

[19] J.A. 93, ¶222.

[20] J.A. 90, ¶205.

[21] J.A. 105, ¶274.

[22] J.A. 89, ¶202.

[23] J.A. 88, ¶199; J.A. 89, ¶200; J.A. 95, ¶228.

[24] J.A. 92, ¶220.

[25] J.A. 137, ¶418.

[26] J.A. 89, ¶203.

[27] J.A. 89, ¶201.

the ISIS's use of Defendants' social media sites"). Reports or statements about the use of defendants' websites by terrorist organizations were issued by a number of credible organizations, including the Brookings Institution[28] and the Anti-Defamation League.[29] The recitation of that avalanche of public information plausibly alleged that the defendants were well aware of the assistance which they were providing to ISIS and other terrorist organizations.

The complaint also alleged that there were circumstances in which the defendants would have reviewed particular terrorist videos that were on their websites. Google shares revenues from advertisements placed with a video if the user who posted the video created an appropriate account.[30] Google represents that before permitting such revenue-shared advertisements to be placed with a video, the video in question must be "reviewed and approved by Google."[31] The complaint alleged that Google indeed "reviewed and approved ISIS videos, including videos posted by ISIS-affiliated users."[32] In addition, the complaint alleged that when the defendants reviewed ISIS videos, the defendants sometimes permitted the video to remain (and be recommended),[33] removed only part of the

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[28] J.A. 49, ¶13; J.A. 78, ¶143.

[29] J.A. 93, ¶223.

[30] J.A. 139, ¶¶427, 428.

[31] J.A. 139, ¶429.

[32] JA. 139, ¶431; *see* J.A. 141, ¶¶436, 437.

[33] J.A. 134-35, ¶403.

video, or merely limited access (and recommendations) to viewers at least 18 years old.[34]

Plaintiffs alleged that defendants not only disseminated ISIS materials from their websites, but affirmatively recommended ISIS materials to targeted users.

> Defendants use computer algorithms to match content, videos, and accounts with similarities, so that similar Twitter, Facebook, or YouTube content, videos and accounts are suggested to a user or viewer when viewing a Twitter, Facebook, or YouTube account....

J.A. 147, ¶459. These "sophisticated algorithms ... facilitate ISIS's ability to reach and engage audiences it could not otherwise reach as effectively."[35] As Judge Gould explained in his dissenting opinion in *Gonzalez*, these practices "affirmatively ... amplify and direct ISIS content, repeatedly putting it in the eyes and ears of persons who were susceptible to acting upon it." Pet. App. 88a. In addition, the complaint asserted that Google, through YouTube, shared advertising revenue with ISIS when advertisements were posted with an ISIS-created video.[36]

The complaint explained that the dissemination and recommendation of these materials assisted ISIS

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[34] J.A. 137, ¶415.

[35] J.A. 147, ¶461.

[36] J.A. 53-54, ¶31; J.A. 81, ¶158; J.A. 140, ¶¶432, 435 ("[b]y providing financial support to ISIS, Google contributed to the Reina attack").

in several distinct ways. Their content was designed to recruit new terrorists, to raise funds, and to terrorize members of the public. It would have been obvious that these terrorist materials were from or posted on behalf of ISIS. ISIS maintained official accounts, in its own name, with each of the defendants. The infamous ISIS videos graphically depicting the horrible executions staged by ISIS were generally initially disseminated by ISIS through YouTube, a phenomenon of which YouTube officials were surely aware.

The volume of ISIS materials was quite considerable. There were a large number of Twitter accounts, with many thousands of followers.[37] On one day in 2015, the hacking group Anonymous took down "several thousand ISIS twitter accounts."[38] A single ISIS terrorist video on YouTube was viewed 56,998 times in a single day.[39] ISIS released at least 830 videos between 2013 and 2015. [40]

The complaint alleged that the assistance provided by the defendants has been essential to the growth of ISIS and to its ability to carry out terrorist activities. "Without Defendants Twitter, Facebook, and

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[37] J.A. 50 (20,000 followers); J.A. 50, ¶16 (8,954 followers); J.A. 51, ¶17 (90 tweets a minute); J.A. 85, ¶184 (14,000 tweets threatening Americans); J.A. 85-86, ¶186 (40,000 tweets the day ISIS captured Mosul); J.A. 86, ¶487 (thousands of ISIS supporters coordinated "Tweet storm"); J.A. 93, ¶222 (Facebook ISIS fan page with 6,000 members).

[38] J.A. 155, ¶486.

[39] J.A. 103, ¶261.

[40] J.A. 115, ¶319.

Google (YouTube), the explosive growth of ISIS over the last few years into the most feared terrorist group in the world would not have been possible."[41] That assistance, plaintiff alleged, was the primary reason that ISIS was able to recruit tens of thousands of foreign volunteers to come to Syria or Iraq and join ISIS.[42] The Home Affairs Committee of the House of Commons concluded that "[n]etworks like Facebook, Twitter and YouTube are the vehicles of choice in spreading [terrorist] propaganda and they have become the recruiting platforms for terrorism."[43] A New York Times correspondent covering terrorism reported that " 'Twitter is the main engine' in ISIS communication, messaging and recruiting."[44] The Middle East Media Research Institute concluded that YouTube has emerged as "one of the leading websites for online jihad."[45]

The complaint repeatedly asserted that each of the defendants would only consider removing material posted by ISIS if it received a complaint specifically identifying a particular video or post. Absent such a specific complaint, the plaintiffs alleged, the defendants would take no effort to use their computer algorithms to identify possible ISIS, or other terrorist, materials in their own computers.[46] A Google official specifically testified that the company's policy was only

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[41] J.A. 49, ¶13; *see* J.A. 48-49, ¶11; J.A. 49, ¶12.

[42] J.A. 79, ¶152; J.A. 104, ¶271.

[43] J.A. 156, ¶489.

[44] J.A. 88, ¶199.

[45] J.A. 135, ¶407.

[46] J.A. 134, ¶402; J.A. 52-53, ¶26.

to act on a specific complaint, and to make no effort of its own to identify terrorist materials in the company's computers.

> The Google representative admitted that ... Google did not actively guard against terrorists' use of the YouTube platform and services.... Rather, the Google representatives testified that Google only reviews a video posted on YouTube if it receives a complaint from a YouTube user....

J.A. 136, ¶¶408-09; *see* J.A. 52, ¶26 ("[f]or years, ISIS ... openly maintained and used official Twitter, Facebook and YouTube accounts with little or no interference)."

Finally, the complaint alleged that the actions of the defendants were connected to the death of Nawras Alassaf. The assistance that ISIS received from defendants, the complaint asserted, was "among its most important tools to facilitate and carry out its terrorist activities, including the terrorist attacks in which ISIS murdered Nawras Alassaf."[47] "But for ISIS's posting using Defendants' social media platforms, Abdulkadir Masharipov would not have engaged in the[] attack on the Reina nightclub."[48] Thus, the complaint insisted, "Defendants knowingly provided substantial assistance and encouragement to ISIS, and thus aided and

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[47] J.A. 53, ¶28; *see* J.A. 140, ¶435 ("By providing financial support to ISIS, Google contributed to the Reina attack.").

[48] J.A. 158, ¶497; *see* J.A. 164, ¶535 ("[t]he conduct of each Defendant was a direct, foreseeable and proximate cause of the death[] of ... Plaintiff's Decedent[]...."); J.A. 49, ¶12.

abetted ISIS in committing, planning, or authorizing acts of international terrorism, including the acts of international terrorism that injured Plaintiffs."[49]

Proceedings Below

The district court dismissed the complaint for failure to state a claim. It reasoned, first, that §2333(d)(2) requires that a defendant in some specific way have aided and abetted the particular terrorist attack at issue; the complaint was deficient, the district court concluded, because it only alleged that the defendants had aided and abetted ISIS as an organization. Pet. App. 173a-75a. Second, the district court concluded that the complaint failed to allege that the defendants had the requisite knowledge. Even if the defendants knew that they were assisting ISIS to recruit terrorists, raise funds, or spread propaganda, that was not enough. The complaint was deficient because it did not allege that the defendants knew that ISIS was using their platforms "to communicate specific plans to carry out terrorist attacks." Pet. App. 176a-77a.

The court of appeals reversed. Relying on the decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), it held that §2333(d)(2) does not require that the defendants have provided specific assistance for the

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[49] J.A. 160, ¶506; *see* J.A. 160, ¶507 ("By aiding and abetting ISIS in committing, planning, or authorizing acts of international terrorism, including acts that caused each of the Plaintiffs to be injured in his or her person and property, Defendants are liable pursuant to 18 U.S.C. §2333(a) and (d)....").

Reina attack. "[T]he act encouraged is ISIS's terrorism campaign, and the [complaint] alleges that this enterprise was heavily dependent on social media platforms to recruit members, to raise funds, and to disseminate propaganda." Pet. App. 63a. The court of appeals also concluded that the complaint adequately alleged that the defendants knew that they were assisting ISIS's terrorist activities, and that such knowledge was sufficient under §2333(d)(2). The opinion pointed to allegations that the government, media reports, and private organizations had for years expressly and repeatedly warned the defendants that they were assisting ISIS and other foreign terrorist organizations.

> The Taamneh Plaintiffs' complaint alleges that ISIS and its affiliated entities have used YouTube, Twitter, and Facebook for many years with "little or no interference." "Despite extensive media coverage, complaints, legal warnings, petitions, congressional hearings, and other attention for providing [their] online social media platforms and communications services to ISIS, ... Defendants continued to provide these resources and services to ISIS and its affiliates."

Pet. App. 10a-11a; *see* Pet. App. 61a-62a.

SUMMARY OF ARGUMENT

I. JASTA contains two specific textual directives regarding the manner in which §2333(d)(2) is to be interpreted. Section 2(a)(5) provides that the decision in

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), establishes "the proper legal framework" for how aiding-and-abetting liability should function. Section 2(b) states that the purpose of JASTA is to provide civil litigants with "the broadest possible basis" for seeking relief against defendants who provided support for organizations that engage in terrorist activities against the United States. Those instructions are dispositive here.

Halberstam arose out of a series of burglaries, the last of which resulted in a murder. The defendant sued for aiding and abetting had never assisted in the commission of any burglary, or of the murder, and had not necessarily even known that burglaries were occurring. The defendant's activity was limited to helping after the fact with the sale of the stolen property. *Halberstam* nonetheless concluded that the defendant's activity constituted actionable aiding and abetting because the defendant had substantially assisted the overall "wrongful enterprise" involved.

Similarly here, the complaint alleged that the defendants provided substantial assistance to the wrongful terrorist enterprise of ISIS, the foreign terrorist organization which committed the attack that injured the plaintiffs. The complaint asserted that the defendants recommended and disseminated a large volume of written and video terrorist material created by ISIS, and described the nature of that material and the manner in which the defendants thus assisted ISIS's efforts to recruit terrorists, raise money, and terrorize the public. The terrorist attack which injured the

plaintiffs was part of ISIS's overall terrorist campaign and allegedly was caused by the defendants' substantial assistance to that terrorist enterprise. In that manner, the complaint alleged, the defendants aided and abetted the commission of the attack that injured the plaintiffs. Those factual allegations, which on a motion to dismiss are assumed to be true, are all that the text of §2333(d)(2) and the *Halberstam* standard require.

The plain language of §2333(d)(2) encompasses liability for assisting a terrorist enterprise. Section 2333(d)(2) provides that "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance," whoever "committed ... an act of international terrorism" that injured the plaintiff. The text of the statute applies to a defendant which provides substantial assistance to the terrorist enterprise of an international terrorist organization that committed such an attack. Nothing in the text limits the covered assistance to action that has a particular direct connection to the attack itself.

Defendants urge the Court to hold that §2333(d)(2) only applies to assistance to a terrorist enterprise when that assistance has a specific direct connection to the attack at issue; a plaintiff must show that the perpetrator of the attack utilized a defendant's services in the very commission of the attack. Except in that narrow circumstance, individuals and organizations which knowingly provide substantial assistance to terrorist enterprises would be immune from any liability under JASTA. The statute thus construed

would generally apply only in circumstances that would be meaningless, such as to a fellow terrorist who handed a killer a firearm, and could not as a practical matter be applied to the types of outside assistance that most matters to terrorist organizations, such as contributions, banking services, and social media recommendations. The United States suggests a complex multi-part standard, which would be difficult for the courts to administer, but not hard for sophisticated actors to circumvent.

The complaint plausibly alleged that the defendants knew that they were providing substantial assistance to ISIS's terrorist enterprise. Whether the defendants had the requisite knowledge is a question of fact. At this stage in the proceedings, in determining whether a complaint states a claim on which relief can be granted, a court's role is limited to deciding whether such a factual allegation is plausible.

II. The complaint sets out a series of detailed factual assertions supporting an inference of knowledge. The complaint details a large number of very public reports regarding the manner in which the defendants were assisting terrorist organizations such as ISIS, including statements by American and British officials, and reports in many of the nation's major newspapers and television networks. The complaint also asserts that there were circumstances in which employees of the defendants had actually seen the ISIS terrorist material, and thus were familiar with its contents. The complaint alleged that there were thousands of ISIS accounts on the defendants' websites, including in

ISIS's own name, and that the horrific execution videos recorded by ISIS had been made public through YouTube.

The defendants argue that the complaint does not also include other possible types of evidence of knowledge, such as a showing that ISIS was purchasing non-routine services. But to state a claim on which relief can be granted, a complaint need only plausibly allege the relevant facts; it need not include any particular type of supportive detail.

The defendants also suggest that there was no more that they could have done to avoid assisting ISIS, because they did not know which of the posts and videos in their computers contained terrorist material. But the complaint alleges that the defendants had the technical ability to identify that material, and simply chose not to do so. Such a deliberate failure would demonstrate a culpable state of mind that would be relevant under the *Halberstam* standards. This important allegation is apparently denied; but that factual dispute cannot be resolved in this Court or at this stage of the proceedings.

ARGUMENT

In 2016, after years of consideration, Congress enacted the Justice Against Sponsors of Terrorism Act. The legislation passed with virtually unanimous support, and was adopted over the veto of President Obama. The avowed purposes of the law were to deter

those who might aid and abet persons who commit terrorist acts, and to provide meaningful redress for those injured by such attacks. To make clear the intended breadth of the legislation, Congress took the extraordinary step of including in the statute a statement that the purpose of the Act was "to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief [for such aiding and abetting]." P.L.114-222, §2(b).

Twitter and Facebook advance a variety of contentions in support of an exceptionally narrow interpretation of the statute. What they do not contend, however, is that the statute as so construed would be the least meaningful. They ask the Court to limit the aiding-and-abetting provision to circumstances that will virtually never arise, and to require a type of knowledge which almost no one but a terrorist would usually possess. So construed, §2333(d)(2) in the instant case would probably apply only to the then-ISIS "emir" Abu Shuhada, ISIS's then-leader Abu Bakr al Baghdadi, and perhaps one or two ISIS sleeper operatives then in Turkey. None of those ISIS officials would have been the least deterred by the possibility of being named as a defendant in a lawsuit in American courts, or by the possibility of a civil judgment against them.

This Court should decline to nullify in this manner a statute to which Congress manifestly attached exceptional importance, and should instead give to the text of the law the sensible and meaningful interpretation that it warrants.

I. AIDING-AND-ABETTING LIABILITY UNDER §2333(d)(2) IS NOT LIMITED TO INSTANCES IN WHICH A PARTICULAR ACT OF ASSISTANCE IS CLOSELY CONNECTED TO THE PARTICULAR ACT OF INTERNATIONAL TERRORISM THAT INJURED THE PLAINTIFF

A. Introduction

(1) Title 18 U.S.C. §2333(d)(2) authorizes aiding-and-abetting liability when a national of the United States has been injured by an act of international terrorism committed by a designated foreign terrorist organization. It provides that "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance," the organization which "committed such an act of international terrorism." §2333(d)(2). The court of appeals held that §2333(d)(2) can be satisfied by a showing that a defendant knowingly provided substantial assistance to a foreign terrorist organization's overall campaign of terror, of which the act injuring the plaintiff was a part. Twitter contends that §2333(d)(2) is far narrower, and applies only when a specific act of assistance has a specific "connection" to the particular act of terrorism.

The complaint alleges that the defendants assisted ISIS in committing, planning and authorizing acts of terrorism. The campaign of terrorism thus assisted, the complaint asserts, included the act of international terrorism that killed Nawras Alassaf. And the defendants' assistance is alleged to have been so substantial that without it the Reina nightclub attack, and

the murder of Alassaf, would not have occurred. The complaint alleges that by providing broad assistance to ISIS's overall campaign of terrorism, the defendants aided and abetted the Reina attack. In resolving a motion to dismiss, the court assumes each of these factual assertions is true. But, Twitter argues, these allegations are not sufficient to state a claim on which relief can be granted. According to Twitter, §2333(d)(2) requires far more; there must be an allegation, and proof at trial, that the individuals directly involved in the Reina attack relied in an identifiable specific way on a particular act of assistance provided by one of the defendants, in some manner using its services to plan or commit that specific attack.

The three courts of appeals to consider this issue have all unanimously rejected this narrow interpretation of §2333(d)(2). The Ninth Circuit in this case held the complaint was sufficient because it alleged the defendants had assisted the overall ISIS campaign of terror, of which the Reina attack was a particular instance. (Pet. App. 63). The District of Columbia Circuit rejected this interpretation in *Atchley v. AstraZeneca UK Limited*, 22 F.4th 204, 220, 222 (D.C. Cir. 2022). The Second Circuit rejected this construction of the statute in *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 497 (2d Cir. 2021) and *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 860 (2d Cir. 2021).[50] Those courts

[50] The petition stated that "recently, the Second and D.C. Circuits relied on *Halberstam* to conclude incorrectly (as did the Ninth Circuit below) that a plaintiff need allege only that the defendant assisted some illegal 'enterprise', *Atchley*, 22 F.4th at 222,

all correctly recognize that requiring plaintiffs to trace assistance through a terrorist organization to the ultimate act of violence that injured the plaintiff would effectively eviscerate JASTA.

Twitter's proposed interpretation of JASTA would implausibly segregate a particular terrorist act from the overall campaign of terror of which it was an integral part, requiring courts to ignore the often long chain of events which enabled a foreign terrorist organization to mount such an attack. And it would limit aiding-and-abetting liability to the point at which outside assistance is least important and least likely, the attack itself. But as federal officials have repeatedly explained,

> [w]hile any single terrorist attack may be relatively inexpensive to carry out, terrorist groups continue to need real money. They depend on a regular cash flow to pay operatives and their families, arrange for travel, train new members, forge documents, pay bribes, acquire weapons and stage attacks.

Testimony of Stuart A. Levey, Undersecretary of Terrorism and Financial Intelligence, Before the House Financial Services Committee on Oversight and Investigations, July 11, 2006.

Last year, in *Weiss v. National Westminster Bank*, 142 S.Ct. 2866 (2022), the government advanced the interpretation of §2333(d)(2) adopted by the Second,

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not the specific "injury-causing act," *Honickman*, 6 F.4th at 499." Pet. 25.

Ninth, and District of Columbia Circuits. In that case, the United States explained that §2333(d)(2) imposes liability on a defendant which, *inter alia*, "provides ... support [and] is generally aware that it is playing a role in unlawful activity from which acts of international terrorism are a foreseeable risk...." (U.S. Amicus Br., 20). In *Boim v. Holy Land Found for Relief & Dev*., 549 F.3d 685 (7th Cir. 2008), cert. denied, 558 U.S. (2009), the government urged the court of appeals to construe §2333(a), prior to the enactment of JASTA, to impose liability for aiding and abetting, and to utilize the *Halberstam* standard in delineating the nature of that liability. (U.S. C.A. Amicus Br. at 21-22 (No. 05-1815) (available at 2008 WL 3993242)). The government advised the court of appeals that under that *Halberstam* standard "liability can be imposed ... on a defendant who knowingly provides substantial assistance to an organization engaged in terrorist activities, the operatives of which then carry out a reasonably foreseeable act of international terrorism." *Id*. at 31. In its amicus brief in this case, however, the government now advances essentially the opposite interpretation of §2333(d)(2) and of *Halberstam*. (U.S. Br. 31-34).

(2) The question presented concerns the meaning of the last 31 words of §2333(d)(2): "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." In addition to the usual principles of statutory interpretation, Congress in JASTA took the unusual step of enacting two specific

directives regarding how §2333(d)(2) should be interpreted. Those textual instructions regarding the interpretation of §2333(d)(2) are central to its proper construction.

First, §2(a)(5) of JASTA provides that the decision in *Halberstam*, "the leading case regarding Federal civil aiding and abetting ... liability ..., provides the proper legal framework for how such liability should function [under §2333(d)(2)]." Thus to the extent that *Halberstam* provides the answer to a question of statutory interpretation, §2(a)(5) directs the courts to so construe §2333(d)(2), unless it would be clearly contrary to the unequivocal text of §2333(d)(2) itself.

Second, §2(b) of JASTA states that "The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries ... that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." Thus where the language of §2333(d)(2) is reasonably capable of more than one interpretation, §2(b) directs the courts to select the interpretation that provides the broader basis for such relief, provided that interpretation would be constitutional.

In this case §2(a)(5), §2(b), and the traditional tools of statutory interpretation all lead to the same conclusion: §2333(d)(2) encompasses aiding-and-abetting liability for providing substantial assistance to the

terrorist enterprise of a designated foreign terrorist organization.

B. The *Halberstam* Standard Encompasses Aiding and Abetting By Assisting A Wrongful Enterprise

Section 2(a)(5) of JASTA states that "[t]he decision ... in *Halberstam* ... provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code[,]" which includes §2333. That statutory directive is largely dispositive of the issue in this case. *Halberstam* makes clear that a defendant can be held liable for substantially assisting a wrongful enterprise, of which the plaintiff's injury was a foreseeable result, even though the defendant did not directly assist the particular tort which injured the plaintiff, or assist any tort at all.

(1) A central issue in *Halberstam*, and the aspect of that decision critical to the issue before this Court, was how (or, indeed, whether) to apply aiding-and-abetting liability where the defendant had not assisted either the act that injured the plaintiff or the wrongful conduct of which that injurious act was a foreseeable consequence. The circumstances from which *Halberstam* arose are important to understanding the holding in that case.

For a number of years prior to 1981, Bernard Welch had committed a series of burglaries in the Washington, D.C. area, stealing antiques, gold, and silver. Welch sold the stolen goods to third parties and

made millions of dollars doing so. Linda Hamilton was Welch's live-in companion. She did not take part in or assist the burglaries themselves. Although she understood that Welch was involved in some sort of property crime, she did not necessarily know that he was a burglar. 705 F.2d at 488. Hamilton played a limited role in the disposition of the loot that Welch brought to their shared home.

> Hamilton typed transmittal letters for these sales. She also kept inventories of antiques sold, and in general did the secretarial work for Welch's "business." The buyers of Welch's goods made their checks payable to her, and she deposited them in her own bank accounts. She kept the records on these asymmetrical transactions—which included payments coming in from buyers, but no money going out to the sellers from whom Welch had supposedly bought the goods.

705 F.2d at 475.

Welch's crime spree came to a tragic end on May 19, 1981, when he killed Dr. Michael Halberstam during a burglary of Halberstam's home. Welch was apprehended near the scene of the crime and convicted of murder. Dr. Halberstam's widow sued Hamilton, alleging Hamilton had aided and abetted Welch. After a bench trial, the district judge found Hamilton liable, and the District of Columbia Circuit affirmed, in a unanimous decision by Judges Wald, Bork and Scalia.

Halberstam concluded that Hamilton's conduct constituted actionable aiding and abetting. Critical to

the decision, and to the legal standard which it announced, was *what* the court of appeals held Hamilton had assisted. *Halberstam* did not assert that Hamilton had asserted the burglaries; clearly she had not done so. The burglaries were all completed before she played any relevant role. What Hamilton had assisted, *Halberstam* repeatedly explained, was Welch's overall wrongful enterprise:

> Hamilton "knowingly and willingly assisted in Welch's burglary enterprise."
>
> Hamilton's invaluable service to the enterprise as banker, bookkeeper, recordkeeper, and secretary....
>
> Hamilton knew about and acted to support Welch's illicit enterprise....
>
> Applying the Restatement's five factors, we look first at *the nature of the act assisted*, here a long-running burglary enterprise....
>
> Hamilton's ... acts ... must be evaluated in the context of the enterprise they aided, i.e., a five-year-long burglary campaign against private homes.
>
> On the scope of her liability, we agree with the district court that Hamilton's assistance to Welch's illegal enterprise should make her liable for Welch's killing of Halberstam.

705 F.2d at 486-88 (quotation from district court, emphasis in original). The court explained that "[i]t was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, ... it was

enough that she knew he was involved in some type of personal property crime at night ... because violence and killing is a foreseeable risk in any of these enterprises." 705 F.2d at 488.

In the instant case, the Ninth Circuit correctly understood *Halberstam* to have imposed aiding-and-abetting liability on Hamilton because she had assisted "Welch's illegal burglary enterprise." Pet. App. 54a (citing *Halberstam*, 705 F.2d at 488); *see* Pet. App. 66a ("[Hamilton liable for having assisted] an ongoing illicit enterprise") (quoting 705 F.2d at 488). The Second Circuit, and the District of Columbia Circuit itself, have consistently interpreted *Halberstam* to impose liability for assisting an illicit enterprise, even where the defendant did not assist the particular wrongful conduct causing the injury in question. *Atchley v. AstraZeneca UK Limited*, 22 F.4th 204, 220, 222 (D.C. Cir. 2022); *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 497 (2d Cir. 2021); *Kaplan v. Lebanese Canadian Bank*, 999 F.3d 842, 860 (2d Cir. 2021).

The Ninth Circuit, applying that holding in *Halberstam*, held defendants could be liable for having assisted ISIS's "terrorist enterprise." (Pet. App. 56a, 62a; *see* Pet. App. 54a (ISIS's "campaign of terrorism"), 56a (ISIS's "terrorist campaign," "terrorism campaign")). The Second and District of Columbia Circuits applied *Halberstam* similarly. *Atchley*, 22 F.4th 291-20, 223 (assisting "Jaysh-al Mahdi's violent terrorizing, maiming, and killing of U.S. nationals"); *Kaplan*, 999 F.3d at 865 (aiding "H[e]zbollah's policy and practice of engaging in terrorist raids").

(2) Neither the defendants nor the United States comes to grips with *Halberstam*'s holding that aiding-and-abetting liability can be based on assisting an illicit enterprise, even in the absence of assistance to any of the specific wrongful acts. Their accounts of *Halberstam* are at times inconsistent with the actual holding and facts of that case.

Twitter attempts to explain away *Halberstam* by describing it as a case in which Hamilton had actually assisted in the commission of the burglaries. Twitter characterizes *Halberstam* as involving a situation in which "a secondary actor [Hamilton] substantially assist[ed] a tort (the burglaries Welch committed)." Pet. Br. 31. But Hamilton did not assist in the commission of even a single one of Welch's burglaries. Assisting the commission of a burglary would have involved conduct such as driving Welch to the scene of the crime, prying open a window, helping to carry out the loot, assisting in selecting the house to be burglarized, purchasing burglary tools, or at least handing Welch his burglary tools as he headed out for another crime. But Hamilton did not do any of those things. As the court of appeals made clear, Hamilton did not necessarily even know that Welch was a burglar; at most she understood he was involved (without her assistance) in some sort of property crime. 705 F.2d at 488.

Twitter states that "*Halberstam*'s conclusion was based on the fact that the defendant was a full and willing participant in, and logically and practically aided, each of her live-in partner's burglaries...." (Pet. Br. 25). But that simply is not what happened. Hamilton was not a "participant in" any of—let alone "each of"—the burglaries. And Hamilton did not even assist with the disposing of loot related to the Halberstam burglary itself. Welch was arrested near the Halberstam home shortly after the shooting; there is no indication that Welch succeeded in taking anything from that home, and once in police custody Welch would not have been able to pass on to Hamilton anything he had stolen.[51] Twitter asserts that "Hamilton was liable for aiding and abetting *a* burglary." (Pet. Br. 29) (emphasis added). That simply ignores altogether the central holding of *Halberstam*, that Hamilton was held liable for assisting an overall illicit enterprise even though she never assisted the commission of a single burglary, let alone the commission of murder.

Elsewhere in its merits brief, Twitter suggests that the court of appeals itself held that Hamilton had actually assisted each of the burglaries, particularly including the last one, and that Hamilton was liable because Dr. Halberstam's death was a foreseeable consequence of Hamilton's assistance of the burglary of his house.

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[51] Although the circumstances of Welch's arrest are not mentioned in the appellate opinion, the details of his crime and arrest were widely reported at the time in the national and local press. *See*, *e.g.*, New York Times, April 11, 1981, §1, p. 10.

> The court held that the extent of liability included "Welch's killing of Halberstam" because murder is "a natural and foreseeable consequence of the activity Hamilton helped Welch to undertake"—i.e., a series of burglaries, *specifically including the one in question*.

(Pet. Br. 31) (emphasis added). But the quoted passage in *Halberstam* ends with the word "undertake": the words following after "undertake" in this block quote, characterizing the assisted "activity" as a series of distinct burglaries (including the last one) are Twitter's. And that characterization is incorrect. In the immediately preceding two sentences, the *Halberstam* court made clear that the "activity" Hamilton assisted was not the Halberstam burglary ("the one in question"), but Welch's "illegal enterprise" and "the illicit burglary enterprise." 705 F.2d at 488. As the government correctly pointed out, "there was no suggestion in *Halberstam* that Hamilton provided her post-burglary service to the particular crime that resulted in the murder." (U.S. Br. 33).

When Twitter does mention the use of the term "enterprise" in *Halberstam*, it suggests that the court of appeals used the word to refer to a series of discrete crimes, each of which had received particularized assistance from Hamilton. "*Halberstam* held that Hamilton had aided and abetted Welch's burglaries over five years, a 'long-running burglary enterprise.' " (Pet. Br. 30) (quoting 705 F.2d at 488). But in the passage from which the quotation is excerpted, *Halberstam* did not refer to Hamilton aiding and abetting *burglaries*.

Rather, the court there explained in the sentence in question that "the nature of the act assisted [was] a long-running burglary *enterprise*." 705 F.2d at 488. (Emphasis added).

The government does acknowledge that *Halberstam* held that liability could be imposed on Hamilton for assisting an illicit enterprise (U.S. Br. 17), and concedes that there was no indication Hamilton had in any way assisted the burglary of the Halberstam house. (U.S. Br. 33). And the government's brief recognizes that the Ninth Circuit relied on *Halberstam*'s enterprise-based aiding-and-abetting analysis in deciding the instant case. (U.S. Br. 9). But the United States simply has nothing to say about whether the Ninth Circuit correctly interpreted *Halberstam*, or whether the court of appeals below erred in applying *Halberstam* to JASTA claims. One sentence in the government's brief suggests that Hamilton had some role in the commission of Welch's crimes:

> For aiding-and-abetting liability, it was sufficient that Hamilton provided her substantial aid to a series of crimes committed by Welch with the knowledge that "he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference."

U.S.Br. 33 (quoting 705 F.2d at 488). But Hamilton did not provide any aid to the commission of the "property crime[s]" that Welch committed.

The defendants and the government each sets out its own view of the necessary elements of civil aiding-and-abetting liability. Although those proposed standards are phrased somewhat differently, they all lead to one key common conclusion. If this Court were to apply any of those proposed standards to the facts of *Halberstam*, it would have to overturn the finding of liability in that case. Twitter insists that the law requires a showing that "the defendant has substantially assisted the primary tort that injured the plaintiff...." Pet. Br. 19.[52] But "the primary tort that injured the plaintiff" in *Halberstam* was the murder; Hamilton clearly had not assisted that. Facebook insists that "[i]n both ordinary and legal usage, ... one can aid and abet someone only in committing some particular wrong." (Facebook Br. 23). Hamilton did not assist Welch in committing the particular wrong of robbing the Halberstam house, or any other house, or of murdering Dr. Halberstam. The United States argues that there is only aiding-and-abetting liability if the defendant assisted the commission of the wrong (U.S. Br. 34), or if there is a "substantial causal nexus" between the defendant's assistance and the wrong that led to the plaintiff's injuries. But Hamilton neither assisted nor caused (substantially or otherwise) the commission of the burglaries or the murder. The defendants and the government argue at length for those narrow interpretations of the common law of civil aiding and abetting. If any

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[52] *See* Pet. 26-27 ("helps another to *complete its commission*" (quoting *Rosemond v. United States*, 572 U.S. 65, 70 (2014) (emphasis in petitioner's brief))).

of them are correct, then perhaps *Halberstam* was incorrectly decided, but regardless of whether *Halberstam* was rightly or wrongly decided, and even if *Halberstam* were to one day be reversed, the statute at issue in the instant case provides that *Halberstam* sets out "the proper legal framework" which Congress directed the courts to apply in JASTA cases.

Twitter and Facebook point out that *Halberstam* held that an aider and abettor must have assisted "the principal violation." (Pet. Br. 3, 20, 22; Facebook Br. 28, 35). According to Twitter, the "principal violation" in *Halberstam* was the burglary of the Halberstam home, of which the murder was a foreseeable consequence. (Pet. Br. 31). That is incorrect. *Halberstam* explained that the principal violation in that case was Welch's five-year criminal enterprise. After articulating the requirement that a defendant must "assist the principal violation," 705 F.2d at 488, *Halberstam* set out a six-paragraph analysis of how the plaintiff had satisfied that standard, 705 F.2d at 288-29. That analysis repeatedly described how Hamilton assisted Welch's "enterprise," and never suggested that Hamilton had assisted the murder of Dr. Halberstam or the burglary of his home. *Halberstam* held, to the contrary, that "the nature of the act assisted [ ] here [was] a long-running burglary enterprise"—not the murder of Dr. Halberstam. If the D.C. Circuit had given "principal violation" the narrow meaning urged by petitioner or Facebook, the court would have overturned the decision in favor of the plaintiff. Hamilton had not assisted

either the burglary of the Halberstam home or the murder of Dr. Halberstam.

Twitter correctly notes that "*Halberstam* did not hold that a secondary actor can be liable for generalized assistance to an actor that subsequently commits an actionable tort...." (Pet. Br. 31). *Halberstam* indeed distinguished assistance to Welch's illicit criminal scheme from "normal spousal support activities" such as "performing household chores," 705 F.2d at 488. But the Ninth Circuit in the instant case held not that aiding-and-abetting liability can be based on "generalized assistance," but that it can be based on assistance to an organization's terrorist *enterprise*. Pet. App. 62, 63, 66. Assisting ISIS to commit bloodthirsty terrorist attacks all across the Middle East and Europe, and to disseminate videos of grisly executions, is not like helping Welch wash the dinner dishes.

Putting aside the actual holding of *Halberstam* itself, Twitter repeatedly invokes the legal standards in other authorities "discussed in *Halberstam*" (Pet. Br. 27), "cited in *Halberstam*" (Pet. Br. 29), or "on which *Halberstam* relied." (Pet. Br. 29); *see* (U.S. Br. 19-20 ("*Halberstam* relied on"), 20 (*Halberstam* cited")). Facebook offers accounts of authorities whose articulation of aiding-and-abetting standards, it argues, are "reflect[ed]" in *Halberstam*. (Facebook Br. 28). These are not standards for which those authorities are actually cited in *Halberstam*, but language that *Halberstam*, for whatever reason, did not endorse. According to the defendants, those other authorities demonstrate that civil aiding-and-abetting liability is

limited to individuals who assist the very act that injured the plaintiff, or at least the specific tort of which that injury was a foreseeable result. But Congress designated *Halberstam*—not cases preceding *Halberstam* or discussed in *Halberstam*—as providing "the proper legal framework" governing JASTA cases for the very purpose of avoiding this sort of litigation about the scope of "common law principles" or "black letter law." (Pet. Br. 26). The court of appeals in *Halberstam* quoted or cited 41 different opinions and other authorities. Given the complexity of this area of the law, and the understandable variations in the ways in which judges might phrase an opinion, it would be possible to cherry pick from among the many passages in those authorities some language supporting any number of legal standards not found in, or even inconsistent with, *Halberstam* itself. But in JASTA Congress directed the courts to utilize the "legal framework" in "[t]he decision ... in *Halberstam*" itself, not whatever legal framework could be gleaned from some passage in an entirely different decision that happened to be "cited, "discussed," or "relied [on]" in *Halberstam*.

C. The Text of §2333(d)(2) Applies To Assistance To A Terrorist Enterprise

The operative aiding-and-abetting provision of §2333(d)(2) is the last thirty-one words of the section: "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who

committed such an act of international terrorism." This language has three key aspects.

First, the defendant must have aided and abetted the person who committed the terrorist act. The object of the verbs "aids and abets" is "person who committed such an act of international terrorism." The phrase "such an act of international terrorism" is the object of the verb "committed." That reading is strongly supported by §2(a)(6) and §2(b) of JASTA, which refer to providing "support ... to persons or organizations,"[53] not to support for acts.

Second the manner in which the aiding and abetting must occur is "by knowingly providing substantial assistance", but this language does not specify or limit to whom that assistance might be provided. Specifically, it does not include a requirement that the assistance be to the person who committed the terrorist act. If Congress had mandated that that person be assisted, it would have included the word "to" after "substantial assistance," so that the sentence would read "substantial assistance to ... the person who

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[53] Section 2(a)(6) provides that those who "contribute material support or resources, directly or indirectly, *to persons or organizations* that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security" can expect to be sued in United States courts. P.L. 114-222, §2(a)(6) (emphasis added). Section 3 states that the purpose of the Act is to provide broad relief for those who provide "material support or resources, directly or indirectly, *to foreign organizations or persons* that engage in terrorist activities against the United States." P.L. 114-222, §2(b) (emphasis added).

committed such an act...." But Congress deliberately did not do so. The absence of that term, and the consequent broader meaning of this provision, is consistent with §2(a)(6) and §2(b) of JASTA, both of which indicate the intent of Congress that the statute apply to "indirect" as well as direct support for persons who engage in terrorism. For example, the language of the statute would apply to a defendant who, by providing substantial assistance to the foreign terrorist organization that planned or authorized a terrorist act, aided and abetted the person who committed that act.

Third, the statute contains no limitation on the form of the "substantial assistance," other than that it be the means by which a defendant has aided and abetted the person who committed the terrorist act. The statute is not limited to situations in which that assistance has directly assisted the terrorist act itself, just as it is not limited to assistance provided directly to the person committing that act.

Facebook and the government read this language very differently. They insist that the object of the verbs "aids" and "abets" in §2333(d)(2) is "an act of international terrorism." (Facebook Br. 24; U.S. Br. 31-32). That interpretation, they insist, dramatically narrows the meaning of the statute. But even if the object of those verbs were indeed "an act of international terrorism," that would not be determinative of the meaning of the provision, it would simply reframe the issue. The parties would still disagree about whether the "substantial assistance" that aided and abetted that act could include all assistance to the ISIS

terrorist enterprise. The underlying facts would remain the same: in the absence of that terrorist enterprise, Masharipov would have awoken on December 31, 2016, somewhere in central Asia, with no automatic weapon or hand grenades, no animus towards Turkey, and no terrorist supervisor to tell him to go on a killing spree, and thus the January 1, 2017 attack would not have occurred. But, as the Ninth Circuit recognized, the task of statutory interpretation in this case is simpler if the object of the verbs in question is indeed "person who committed such an attack...."

The passage at issue has three verbs: "liability may be asserted as to any person who *aids* and *abets* ... or who *conspires* with the person who committed such an act of international terrorism." (Emphasis added). The government and Facebook concede that the object of the verb "conspires" has to be "person who committed the act," not "act." (U.S. Br. 32; Facebook Br. 24). One cannot conspire with an "act," one can only conspire with another person. So, on their view, although the object of the first two verbs ("aids and abets") is the last four words of the sentence, the object of the verb "conspires [with]" would have to be the last nine words of the sentence. That would be a very strange way to construct or interpret a sentence. Normally parallel verbs of this sort would have the same object.

Facebook argues that if "person" rather than "act" were the object of the verbs aids and abets, "one would have expected" a comma after the phrase "conspires with." (Facebook Br. 24). The failure to use a single

comma is an exceedingly thin reed on which to base an interpretation of §2333(d)(2) that would render the law virtually meaningless. One could argue with equal justification that if Congress had wanted to codify Twitter's interpretation, it would have added a comma after "committed," so that the statute would have read: "aids and abets, by knowingly providing substantial assistance, or conspires with the person who committed[,] such an act of international terrorism." Moreover, even if Congress had included such a comma after "conspires with," making it clearer that "person" is the object of all the verbs in §2333(d)(2) (not just the object of "conspires"), Facebook and Twitter would still contend that the statute as so modified required assistance specific to the act that injured the plaintiff. All the defendants insist that "aids and abets" inherently means aiding and abetting the act that caused that injury, or at least the particular tort of which that injury was a foreseeable result. Facebook argued, immediately after highlighting the absence of the comma, that "whether the direct object of 'aids and abets' is the 'person' or the 'act,' the result is the same. The defendant must have aided and abetted 'the person who committed [the] act of international terrorism' *in the commission* of that act." (Pet. Br. 24-25) (emphasis in original). So as far as Facebook is concerned, neither the inclusion nor the omission of the comma would establish the plain meaning of the text.

The government contends that "[t]he couplet 'aid and abet' is generally defined in terms of *specific acts*,

not people...." (U.S. Br. 32) (emphasis in original). But the government itself earlier in that same brief used the couplet to refer to aiding "someone," rather than to some act.[54] And the Solicitor General used that couplet to refer to aiding a "party" in its recent amicus brief in *Weiss v. National Westminster Bank, PLC*, 142 S.Ct. 2866 (2022).[55] The couplet is also used to refer to assisting a person (rather than an act) by the court of appeals in *Halberstam*,[56] the district court below,[57] and

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[54] U.S. Br. 16 ("'abet': 'to aid, encourage, or assist (someone).'") (quoting *Black's Law Dictionary* 4 (10th ed. 2014)); *see* (U.S. Br. 16) ("a person is secondarily liable if he 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement *to the other* so to conduct himself'") (quoting *Halberstam*, 705 F.2d at 477) and *Restatement (Second) of Torts* §876(b) (1979) (emphasis added)).

[55] U.S. *Weiss* Br. 14 ("The court identified three elements of a civil aiding-and-abetting claim: First, 'the *party* whom the defendant aids must perform a wrongful act that causes an injury.'") (quoting *Halberstam*; emphasis added).

[56] 705 F.2d at 477 ("Aiding-abetting includes the following elements: (1) the *party* whom the defendant aids must perform a wrongful act that causes an injury"); 478 ("Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' *to someone*"), 478 ("We have summarized its elements as follows: (1) the *party* the defendant aids must perform a wrongful act that causes an injury") (emphasis added).

[57] Pet. App. 174a (the language of §2333(d) "indicates that ... the secondary tortfeasor assisted the principal tortfeasor").

both Twitter[58] and Facebook[59] in their respective briefs. For more than one hundred and thirty years, this Court has at times used the phrase "aiding and abetting" to refer to assisting people.[60]

A literal reading of "aids ... an act of international terrorism" would not quite make sense. Acts (at least of that sort) are not, like photosynthesis or volcanic eruptions, events that just happen without any involvement by a sentient being. "Aid an act" is shorthand for "aid [someone to commit] an act." Similarly, an act of international terrorism would have to be committed by someone; "aid an act of international

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[58] (Pet. Br. 24) ("the secondary actor must assist 'the principal tortfeasor....' " (quoting Pet. App. 174a, district court opinion)), 26 (" 'gives substantial assistance or encouragement' to the principal") (quoting *Restatement (Second) of Torts* §876(b)), 27 ("aided or abetted him") (quoting *Duke v. Feldman*, 226 A.2d 345, 347-48 (Md. 1967)), 28 ("substantial assistance to another person") (quoting 15 U.S.C. §78t(e)).

[59] (Facebook Br. 23) ("aid and abet someone"; "abet the thief"; "incite ... a person").

[60] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) ("aiding and abetting a wrongdoer"); *Standefer v. U.S.*, 447 U.S. 10, 11 (1980) ("aiding and abetting a revenue officer"); *Shuttlesworth v. City of Birmingham, Ala.*, 373 U.S. 262, 265 (1963) ("aiding and abetting someone"); *U.S. v. Williams*, 341 U.S. 58, 64 (1991) ("[a]iding and abetting means to assist the perpetrator"); *Nye & Nisssen v. U.S.*, 336 U.S. 613, 619 (1949) ("aid and abet another"); *Bozza v. U.S.*, 330 U.S. 160, 164 (1947) ("aids and abets another"); *Coffin v. U.S.*, 162 U.S. 664, 666 (1896) ("aided and abetted said Haughey"); *Evans v. U.S.*, 153 U.S. 584, 586 (1894) ("aiding and abetting the president of the bank"); *Hicks v. U.S.*, 150 U.S. 442, 446 (1893) ("aiding and abetting Rowe").

terrorism" is shorthand for "aid [someone to commit] an act of international terrorism."

The defendants at times spell out what they are saying. Twitter asserts that §2333(d)(2) is stating a common law rule that "the secondary actor must assist 'the principal tortfeasor in *committing* such an act of international terrorism.'" (Pet. Br. 24 (quoting Pet. App. 174a) (emphasis added)); *see* (Facebook Br. 23) ("In both ordinary and legal usage, ... one can aid and abet someone only *in committing* some particular wrong.") (emphasis added). Or, as Facebook articulates the proposed meaning of this portion of §2333(d)(2), "[t]he defendant must have aided and abetted 'the person who committed [the] act of international terrorism' *in the commission* of that act." (Facebook Br. 25) (emphasis in original). But the words "in committing" and "the commission of" simply are not in §2333(d)(2). The omission is telling, because Congress regularly utilizes just such language in *other* statutes. Numerous other laws refer expressly to aiding and abetting "the commission of"[61] an act or

[61] 7 U.S.C. §25(a)(1) ("aids [or] abets ... the commission of a violation"); 7 U.S.C. §2009cc-14(a) ("aids or abets in the commission of any acts"); 8 U.S.C. §1324(a)(1)(A)(v)(II) ("aids or abets the commission of any of the preceding acts"); 15 U.S.C. §687f(a) ("aids or abets in the commission of any acts"); 15 U.S.C. §689(a) ("aids or abets in the commission of any acts"); 18 U.S.C. §201(b)(1)(B) ("aiding in committing ... any fraud"); 18 U.S.C. §201(b)(2)(B) ("aiding in committing ... any fraud"); 18 U.S.C. §226(a)(1)(A) ("aid in committing ... the commission of any fraud"); 18 U.S.C. §1992(c)(2) ("in aid of the commission of the offense"); 22 U.S.C. §6723(b)(3)(A)(i) ("aided or abetted in the commission of ... any terrorist act"); 22 U.S.C. §7708(b)(4) ("aiding or

violation, or aiding and abetting a person "in committing"[62] an offense. Defendant's proposed interpretation would add to §2333(d)(2) qualifying language which Congress deliberately chose not to put in the statute itself.

D. The Statutory Context Supports Interpreting §2333(d)(2) To Apply To Assisting A Terrorist Enterprise

The enacted provisions of JASTA are not limited to the text of §2333(d)(2) alone. The plain text of §2(b) of JASTA makes clear that the statute is to be given the broadest constitutionally permissible interpretation.

> Purpose.—The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the

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abetting in the commission of an act"); 50 U.S.C. §1705(c) ("aids or abets in the commission of ... an unlawful act"); 50 U.S.C. §4819(b) ("aids and abets in the commission of ... an unlawful act"); 50 U.S.C. §4843(a) ("aids or abets in the commission of ... an unlawful act").

[62] 5 U.S.C. §7313(a)(3) ("aiding or abetting any person in committing any offense"); 18 U.S.C. §175c(b)(5) ("aids or abets any person ... in committing"); 18 U.S.C. §2101(a)(1) ("aid or abet any person in ... committing any act"); 42 U.S.C. §2122(b)(4) ("aids or abets any person ... in committing an offense"); 18 U.S.C. §2339B(d)(1)(F) ("an offender who aids or abets any person in committing an offense"); 18 U.S.C. §2339D(b)(6) ("aids or abets any person ... in committing an offense"); 18 U.S.C. §2332g(h)(b)(5) ("aids or abets any person ... in committing"); 18 U.S.C. §2332h(b)(5) ("aids or abets any person ... in committing an offense").

> United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly to foreign organizations or persons that engage in terrorist activities against the United States.

P.L. 114-222, §2(b). The text of §2(b) applies here: ISIS is a "foreign organization[ ] ... that engage[s] in terrorist activities against the United States," and the plaintiffs allege that the defendants provided support to that organization.[63]

The larger statutory context provides further support for interpreting §2333(d)(2) to apply to providing assistance to a terrorist enterprise. The text of the aiding-and-abetting provision in §2333(d)(2) specifically incorporates other provisions of federal law, each of which expressly focuses on circumstances in which a foreign terrorist organization is likely to engage in a campaign of terrorism.

First, §2333(d)(2) itself only authorizes aiding-and-abetting liability where an attack involves a foreign terrorist organization, which must have either "committed, planned, or authorized" the attack. In that regard, §2333(d)(2) is deliberately narrower than §2333(a), which authorizes suit for injury by any act of international terrorism. Section 2333(a) applies to an

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[63] *See* 162 Cong. Rec. 6092 (2016) (remarks of Sen. Cornyn) ("we will combat terrorism with every tool we have available"). The language of §2(b) is fatal to Facebook's suggestion that §2333(d)(2) be construed narrowly. Facebook Br. 47-50.

attack by a single, lone wolf terrorist with no connection to any other terrorists or terrorist organizations, but §2333(d)(2) is limited to attacks involving a foreign terrorist organization. Aiding-and-abetting claims are doubtless limited in that way because such organizations pose a far greater risk than individuals, since they typically engage in campaigns of terrorism, and any assistance can enhance the ability of the organization to commit multiple attacks. A lone wolf terrorist is likely to die or be captured shortly after a single attack, but an organization typically has other operatives who can commit additional acts of terrorism.

Second, §2333(d)(2) expressly refers to 8 U.S.C. §1189, which authorizes the Secretary of State to designate certain organizations as foreign terrorist organizations. Section 1189 contemplates designation of organizations behind multiple terrorist attacks; it refers to an organization that "engages in terrorist activity" (in the present tense), not an organization that only committed a terrorist act in the past. As a practical matter, organizations have been designated by the Secretary under §1189 based on an extensive history of terrorist activity.[64] And an organization with a history of terrorist activity will only be designated as a

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[64] *See*, *e.g.*, *People's Mojahedin Org. of Iran v. U.S. Dept. of State*, 182 F.3d 17, 24 (D.C. Cir. 1999) (history of terrorist activity of the People's Mojahedin Organization of Iran and the Liberation Tigers of Tamil Eelam); Declaration of Kenneth R. McKune, J.A. 134-36, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (history of terrorist activity of the Liberation Tigers of Tamil Eelam and the Kurdistan Worker's Party).

foreign terrorist organization if it continues to present a serious risk of additional such attacks in the future, and therefore "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." §1189(a)(1)(C).

Third, the definition of "international terrorism" applicable to §2333(d)(2) (and governing the meaning of "act of international terrorism") concerns conduct which is likely to motivate a foreign terrorist organization to commit multiple terrorist acts. The activities encompassed by that definition must appear to be intended

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

18 U.S.C. §2331(1).

In sum, because three other elements of this statutory scheme are specifically concerned with the problem of multiple terrorist attacks by a foreign terrorist organization, it makes no sense to exclude assistance to such terrorist enterprises from the assistance covered by the general language of §2333(d)(2).

The phrase "aids and abets" must also be interpreted in light of the text of the statute which specifies

the type of injury-causing conduct that must be involved—"international terrorism"—and the type of entity which must have planned, authorized, or committed that act—"a foreign terrorist organization." What a foreign terrorist organization needs most to launch terror attacks is money and people to maintain its overall operations, as it uses up the financial and human resources it has. To grow and expand its ability to launch terror attacks, a foreign terrorist organization needs more of both. That type of assistance, which defendants dismiss as "generalized support," is what permitted ISIS to expand from a handful of former Al Qaeda supporters in Raqqa in June 2014 into a vast operation, with tens of thousands of fighters, capable in 2016 of organizing and supporting a large sleeper terrorist scheme over 1,400 miles away in Istanbul. It would make little sense to define "aids and abets" in a manner that excludes the very type of assistance that Congress well understood was most important in determining whether a foreign terrorist organization can plan, authorize or commit acts of international terrorism.

Nor would it make sense to require, as does the defendants' proposed interpretation, that a particular act of international terrorism be traced to a particular act of support. Congress well knew that terrorists do not handle funds in a manner that would make that possible. Terrorist organizations are unlikely to maintain financial records, do not erect firewalls between various sources of funds, and certainly do not allocate specific contributions to distinct accounts dedicated to

particular planned attacks—such as an "Attack Reina Nightclub Fund."[65]

This Court and the United States pointed out in *Holder* that support received by a foreign terrorist organization is fungible, in the sense for example that money provided for a possibly benign activity frees up money for criminal activity. Support for terrorist activities is fungible in the same way, and more so. A donation of baby food might in some situations free up resources that could be used for illicit purposes, but a bullet is always a bullet, equally usable against any victim. The availability of resources or people for one aspect of ISIS's terrorist activity would free up resources and people to engage in other terrorist acts. It is unlikely that we will ever know whether Masharipov was persuaded to join ISIS by terrorist materials recommended to him by Facebook, Twitter, or YouTube. But if, as the complaint alleges, the assistance provided by the defendants enabled ISIS to radicalize and recruit many thousands of other foreigners, the ability of ISIS in 2016 to deploy a sufficient number of fighters

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[65] The United States explained in *Holder* the difficulty of tracing such funds:

> The means by which terrorist organizations transfer funds abroad are varied and obfuscatory: wire transfers; check cashing services; couriers carrying cash; and complex real estate transactions and bogus commercial transactions. Once funds are transferred to foreign institutions, the ability of the U.S. government to identify the end-recipients and beneficiaries of such funds is dramatically diminished.

(Declaration of Kenneth R. McKune, *Holder* J.A. 137).

for combat and terrorist activities in Syria and Iraq made it feasible for ISIS to *also* send sleeper operatives to Turkey and throughout Europe.

E. The Other Arguments of Defendants and The United States Are Not Persuasive

Twitter contends that "[b]y using the singular 'an act,' throughout §2333, Congress intended that aiding-and-abetting liability attaches only when the defendant assists a specific crime...." (Pet. 23; *see* Facebook Br. 22). A careful reading of the statute demonstrates why that is not so. The first usage of the words "an act" in §2333(d)(2) refers to a claim seeking relief for "an injury arising from an act of international terrorism...." This passage indicates what the cause of the injury must have been. In using the singular "an act" here, Congress assumed the injury would arise from a single such terrorist act. In a second passage, §2333(d)(2) provides that the foreign terrorist organization involved in committing, planning or authorizing the act which harmed the plaintiff must have been designated as a foreign terrorist organization "as of the date on which *such act* of international terrorism was committed, planned or authorized...." (Emphasis added). "Such act" is singular because this passage is referring to the singular act that injured the plaintiff in the earlier passage. And in the aiding and abetting portion of the statute, "such an act" is again singular simply because it is referring to that earlier passage denoting the act

that injured the plaintiff. In any event, 1 U.S.C. §1 provides that ordinarily the singular includes the plural.

Twitter argues that if Congress had intended aiding and abetting to include assisting the terrorist activities of a foreign terrorist organization, it would simply have borrowed the language of §2339B. "[H]ad Congress intended to impose secondary liability for aiding and abetting 'a foreign terrorist organization generally,' it could easily have used language similar to §2339B." (Pet. Br. 25; *see* Pet. 23; Facebook Br. 25; U.S. Br. 32). Section 2339B makes it a crime to "provide material support or resources to a foreign terrorist organization." 18 U.S.C. §2339B(a)(1). But it is clear why Congress did not simply create a cause of action for violations of §2339B. As the United States has repeatedly pointed out, the requirements for aiding-and-abetting liability in §2333(d)(2) are in important respects decidedly narrower than the prohibitions in §2339B. A cause of action for injuries caused by "provid[ing] material support or resources to a foreign terrorist organization" would have borne little relationship to an aiding-and-abetting claim applying the *Halberstam* standards. (1) As the government noted in its brief in *Weiss*, an aiding-and-abetting claim requires proof that a defendant was generally aware of its role in the wrongful conduct at issue; §2339B has no such requirement.[66] *See Halberstam*, 705 F.2d at

[66] "[T]he facts establishing a jury question on §2339B liability will not always establish a jury question for a JASTA aiding-and-abetting claim.... [N]ot every JASTA defendant who proves such support [within the meaning of §2339B] is generally aware

477. (2) As the government pointed out elsewhere, an aiding-and-abetting claim requires proof that the assistance was "substantial"; §2339B applies to any support, no matter how small.[67] *See id.*, 705 F.2d at 477-78, 481-82. (3) Under *Halberstam*, aiding-and-abetting liability is limited to injuries that were a foreseeable consequence of the assistance at issue; a cause of action for injuries caused by a violation of the §2339B prohibition would not be so limited. *See id.*, 705 F.2d at 483, 484, 487.

Conversely, aiding and abetting under *Halberstam* is in some respects broader than material support under §2339B. In an aiding-and-abetting case, the assistance can be mere verbal encouragement, which would fall outside the scope of §2339B. *See Halberstam*, 705 F.2d at 478 ("[a]dvice or encouragement ... moral support"; (quoting *Restatement (Second) of Torts*, §876 comment on clause (b) (1979)), 489 ("encouragement")). Under *Halberstam*, a defendant who incited potential terrorists by assuring them their families would receive martyr pensions would be aiding and abetting the terrorist activities of the terrorist organization, although that promise would not constitute material support within the meaning of §2339B. Similarly, urging extremists to join or give money to ISIS could

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that it is playing a role in [the unlawful activity]...." (U.S. Weiss Br. 20); *see Weiss v. National Westminster Bank, PLC*, 993 F.2d 144, 165-66 (2d Cir. 2021).

[67] "[N]ot every JASTA [plaintiff will be able to establish] ... the multi-factor substantial-assistance standard [in JASTA]." (U.S. *Weiss* Br. 20).

constitute aiding and abetting, but it would not constitute providing material support to that organization.

F. Neither The Defendants Nor The United States Propose A Plausible Standard for Determining Which Types of Assistance To A Terrorist Enterprise Would And Would Not Be Covered by §2333(d)(2)

Under the interpretation of §2333(d)(2) adopted by the Second, Ninth, and District of Columbia Circuits, assisting the terrorist enterprise of a foreign terrorist organization can be actionable. Under the interpretation advanced by the defendants and the United States, on the other hand, only assistance to a narrow category of terrorist activities (the act which injured the plaintiff) would be relevant under JASTA. Administration of such a standard would require the courts to fashion and apply some standard for deciding which aspects of terrorist operations are sufficiently connected to a particular attack, and which aspects of those operations can under JASTA be assisted with impunity. The defendants and the United States propose different standards.

The Proposed Twitter/Facebook Standard

Twitter asserts that §2333(d)(2) applies only insofar as the assistance of a defendant was "used in connection with the specific 'act of international terrorism' that injured the plaintiff." (Pet. i). The meaning of that

standard depends in part on the identity of the person who must be shown to have "used" that assistance, and in part on what constitutes a "connection."

If the person who must have used the service is the individual who planned and committed the attack, that might be just Masharipov. The person whose assistance Masharipov used was that of Shuhada, who provided him with a video of the inside of the Reina nightclub. At one point Twitter suggests it might be sufficient if a defendant's services were used by someone "directly involved with the Reina attack." (Pet. Br. 30). Shuhada could be said to have been directly involved, and he was assisted by whoever created and provided that video. No one else seems to have been directly involved, so liability for aiding and abetting might be limited to Shuhada and the source of the video, both presumably ISIS operatives. The scope of the law could be slightly larger if one regards ISIS, rather than only the individuals, as having committed the attack. ISIS used the services of whoever provided Masharipov with the gun, magazine, and grenades (probably also an ISIS operative), but that was apparently a year before the attack, so it might not be assistance "in connection with the attack." (Pet. i). But that would be the extent of JASTA liability, which would be limited to ISIS operatives, all assuredly judgment proof, even if they are alive and could be located. The possibility of a civil suit in American courts could not possibly deter ISIS operatives from providing such assistance to a terrorist attack; they are individuals

already committed to risking their lives to aid ISIS, and in some instances looking forward to martyrdom.

This crabbed interpretation would exclude from the scope of §2333(d)(2) virtually all the aiding and abetting that would be of any practical importance. The most common form of outside assistance on which foreign terrorist organizations rely is money. "Many of the terrorist organizations designated by the Secretary [of State under §1189] derive a significant portion of their overall financing from fundraising conducted outside of their area of operations...." Declaration of Kenneth R. McKune, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), J.A. 134. The ability of existing foreign terrorist organizations to engage in acts of terrorism often depends on such outside funding. Terrorist organizations do not keep contributions in separate accounts earmarked for particular attacks. Income from a variety of sources would undoubtedly be pooled, and there would be no financial records that could be used to connect any particular contribution to a specific attack.

> Terrorist groups operate in clandestine fashion to impede their apprehension by law enforcement authorities. Foreign terrorist organizations can and do take advantage of the fact that money is fungible and that there exist myriad ways to disguise its origin and transfer. It is uniquely in the interests of foreign terrorist organizations *not* to maintain accurate records, *not* to reveal sources of funding for arms, explosives and logistical infrastructure....

McKune Declaration, *Holder v. Humanitarian Law Project*, J.A. 135 (emphasis in original). Under Twitter's proposed interpretation of §2333(d)(2), a supporter who gave millions of dollars to a terrorist organization could not be held liable because a plaintiff would never be able to show that the supporter's donation had been "used to plan or commit ... the attack [in question]." If the entire budget of ISIS had come from equal multi-million-dollar contributions from Twitter, Facebook and Google, made with the avowed intent of supporting terrorism, under Twitter's proposed construction of JASTA none of those defendants could be held liable for aiding and abetting any of ISIS's attacks.

The complaint in this case plausibly alleges that ISIS used the defendants' services as an important method of soliciting financial support. Terrorist fundraising practices have long been a matter of concern to federal officials. But it is unlikely that records could be found, or were ever kept, that would make it possible to "connect[ ]" a specific act of fundraising assistance to a particular contribution and thence to a particular terrorist attack. Similarly, the black-market oil dealers who bought stolen oil from ISIS were an important source of revenue for that organization, but the proceeds from such sales—comingled with other funds—could not be "connect[ed]" to a particular attack.

Access to banking services is also important to terrorist organizations. Banking services permit those organizations to move funds from abroad into their own accounts, and to launder money in a way that will

prevent governments from ascertaining the source or ultimate beneficiary of funds. But because it would normally be impossible to connect a particular attack to the banking services utilized by a foreign terrorist organization, it would be equally impossible to hold a bank liable for operating an account of a terrorist organization, or its proxies. It is exceedingly unlikely that a terrorist organization would, for example, use bank checks to pay for the purchase of particular, traceable guns. So even if ISIS were to open a bank account in its own name, and were to write to the bank's CEO to indicate its satisfaction with the bank's services, the bank still would not be liable for aiding and abetting.

Plaintiffs also assert that ISIS utilized the defendants' services to recruit tens of thousands of foreign supporters to come to Syria or Iraq to become part of ISIS. Under Twitter's proposed standard, it would apparently be irrelevant whether Masharipov had been recruited that way. That assistance long preceded the planning or commission of the attack, and as Twitter apparently sees it Masharipov was the person who committed the attack, and the one who had to have used the defendants' services in doing so.

For Twitter, the quintessential act of aiding and abetting a terrorist attack would be providing an attacker with the gun used in the shooting. (Pet. Br. 34). But donors, banks, and social media companies never do that; they provide cash, banking services, and the ability to raise money, recruit terrorists, and terrorize the public, all assistance that Twitter would define as

outside the scope of §2333(d)(2). Limiting JASTA aiding-and-abetting liability to those who provide the specific weapon used in an attack would render the statute meaningless. The individuals who do that are ordinarily fellow terrorists.

At best, satisfying Twitter's proposed standard would require an extraordinary degree of quite specific knowledge about the internal operations of a foreign terrorist organization. Often only the terrorists themselves would know whether a particular act of assistance was directly helpful for a particular attack. Although the United States did eventually learn significant details about the 9/11 attack, doing so required utilizing the vast intelligence, military and law enforcement resources of the United States government, fielding a substantial military force in Afghanistan, kidnapping Al Qaeda leaders from foreign countries, and using interrogation techniques that are well outside the scope of the discovery authorized by the Federal Rules of Civil Procedure. Congress cannot have intended that §2333(d)(2) would be construed in a manner that would require the victims of terrorism to obtain types of evidence to which they would virtually never have access.

The Proposed Government Standard

The United States more or less rejects Twitter's proposed standard. The government brief devotes a subsection to asserting that "a plaintiff need *not* necessarily show that the defendant ... provided aid

specific to the particular terrorist attack that injured the victim[.]" (U.S. Br. 33) (bold and capitalization omitted; emphasis added). Although, in the government's view, aid "specific to" an attack is not always required, it is unclear in what circumstance something else would suffice. The government offers several different standards.

First, the government states that a defendant could be liable if it provided "support specifically directed to ... the particular act." (U.S. Br. 34). "Specifically directed to" suggests that a plaintiff might have to prove that the defendant intended that assistance to result in the terrorist act in question, not merely (as under the Twitter standard) to show that there was an act of assistance that (intentionally or not) was closely "connected" to that act.

Second, the government states that "generalized aid" to a foreign terrorist organization would suffice if there was a "substantial causal link between the aid and the act of terrorism." (U.S. Br. 31). It is not obvious what "substantial causal link" means. "But-for cause" and "proximate cause" are familiar legal concepts, but the government evidently is proposing something else. The complaint expressly asserted that the defendants' assistance was both a but-for cause of the attack and a proximate cause of the attack. *See* supra p. 9 and n.48. But both allegations were apparently insufficient to constitute a "substantial causal link." This Court has not applied a "substantial causal link" standard in any previous case. The government does not explain how a trier of fact could determine whether there was a

"substantial causal link" between a specific act of assistance to a foreign terrorist organization and a particular attack, given the highly secretive nature of the internal workings of foreign terrorist organizations.[68]

Third, the government suggests that the Court adopt a multi-part standard, which involves a number of subsidiary factors. (U.S. Br. 33-34). With regard to providing money to a foreign terrorist organization, the government asks the Court to hold that "direct channeling of substantial funds ... to a foreign terrorist organization or its close affiliates with a knowing acquiescence in their potential use ... may have a sufficient nexus to a terrorist act...." *Id*. This standard raises a number of issues: (1) What is "channeling"? Suppose a black-market oil broker arranges for ISIS to sell stolen oil to a third party, but the money received by ISIS is paid directly by the third party, and does not pass through the hands of the broker. Would the broker

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[68] McKune Declaration, *Holder v. Humanitarian Law Project*, J.A. 136-37:

> Because money is fungible and difficult to trace, and because terrorist groups do not open their books to the outside world, it is exceedingly difficult for U.S. law enforcement agencies to distinguish between funds used to support exclusively non-violent humanitarian activities, and those used to support criminal, terrorist activities. The means by which terrorist organizations transfer funds abroad are varied and obfuscatory: wire transfers; check cashing services; couriers carrying cash; and complex real estate transactions and bogus commercial transactions. Once funds are transferred to foreign institutions, the ability of the U.S. government to identify the end-recipients and beneficiaries of such funds is dramatically diminished.

be channeling funds? (2) What is "direct" versus indirect channeling?[69] Would that be satisfied if the funds passed through several intermediaries over a period of time before reaching the foreign terrorist organization? (3) How much money is "substantial"? Is this the same "substantial" standard as in *Halberstam* and the text of §2333(d)(2), or a larger or smaller amount? (4) What is the standard of "close affiliat[ion]"? Does it depend on whether the foreign terrorist organization controls the affiliate, or can divert resources provided to the affiliate, or merely works with the affiliate in some circumstances? (5) What is "knowing acquiescence"? Would a claim be defeated if the donor specifically instructed the foreign terrorist organization only to use the money for humanitarian purposes, or perhaps only for attacks in some other country? (6) If the first five elements of this standard are satisfied, what additional requirements are implicit in the cautionary term "may"?

The government proposes that a similar standard would apply to "fungible resources" (*id.*) but fungible has several possible meanings. The common meaning of "fungible" is interchangeable. In that sense, small caliber ammunition and baby food are fungible, but not a one of-a-kind field hospital. On the other hand, in *Holder* the Court and the United States used "fungible" to refer to a resource that could be used for either terrorist or non-terrorist purposes. In that sense,

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[69] The requirement that the channeling be "direct[ ]" is inconsistent with §§2(a)(6) and 2(b) of JASTA, which indicate that JASTA is intended to apply to "indirect" assistance.

ammunition would not be fungible (it can only be used in firearms), but a field hospital could be (it might be set up at the site of a natural disaster, or used near the battle front). If the amounts of funds and resources, considered separately, were not enough to be "substantial," it is unclear whether the value of the two types of assistance could be combined to satisfy that standard.

Under the proposed government standard, services (which apparently are not "resources" at all) and non-fungible resources would be subject to yet a different standard. But the government explains only that the assistance in this case did not meet the standard (whatever it might be) for services and non-fungible resources because (1) the plaintiffs "primarily fault defendants for their inaction," (2) the defendants did not provide "atypical services," (3) the defendants did not bend "their usual policies to support ISIS's terrorist attacks," (4) the defendants did not "intend[] to further ISIS's terrorist acts," and (5) the defendants had an "arms-length relationship with ISIS." (U.S. Br. 34). But of course the complaint did allege that the defendants affirmatively recommended terrorist material; the standard of and justification for a "primary fault" rule are both unclear. Services that might be "atypical" for an American defense firm might be quite normal for a Middle Eastern bomb maker.

Given the complex nature of the government's standards, a firm doing business with a foreign terrorist organization, or the foreign terrorist organization itself, might with a modest degree of ingenuity be able to structure its conduct to avoid aiding-and-abetting

liability under those standards. The proposed standards, moreover, would clearly protect arrangements of considerable value to a foreign terrorist organization, because if the conduct falls outside the standards, there is no possible aiding-and-abetting liability, even if a defendant *knows* that it is providing substantial assistance to a foreign terrorist organization, and even if it does so out of sympathy for the organization's cause. Under the government's standard, ISIS, Al Qaeda, or any other foreign terrorist organization apparently could open a "routine" account in its own name at a foreign bank, deposit into that account large sums of money (e.g., from the sale of stolen archeological artifacts), and then regularly use the bank account to pay its agents or buy weapons or other supplies. That would not constitute "channeling ... funds ... to a foreign terrorist organization" because the terrorist organization would already have the funds, and the channeling would instead be directed to the organization's creditors. The account would be typical and arms-length. So long as a terrorist was not being paid through the bank at the time of an attack, and the plaintiff could not show that bullets used in the attack were purchased in that way, the bank would not be liable. That would be true even if the account was given a name indicating that it would be used for terrorist purposes (e.g., "ISIS Bomb Supplies Account") and if the existence of the terrorist account was personally known to the bank's CEO and board of directors.

Doctrinally, it is difficult to understand the basis for the critical distinction that the United States

asks this Court to draw between assistance in the form of funds or fungible resources, and assistance in the form of services or non-fungible resources. Section 2333(d)(2) simply says "substantial assistance"; it is not limited to any particular type of aid. Assistance in the form of services can be of equal or greater value to a foreign terrorist organization, and be of equal or greater assistance of its terrorist enterprise, as aid in other forms. A free communications platform through which a foreign terrorist organization is able to raise $100,000 assists the organization more than $10,000 in cash. And in the Middle East, a region often awash with small arms, a free communications service that is used to recruit an additional 100 terrorists is far more valuable to a foreign terrorist organization than the donation of 100 Kalashnikovs.

II. THE COURT SHOULD NOT ADOPT ANY OF THE NEW LEGAL RULES AND REQUIREMENTS PROPOSED BY DEFENDANTS OR THE UNITED STATES

The gravamen of the original petition was that the allegations in the complaint were insufficient, if proven, to permit a jury to infer that the defendants knew they were assisting ISIS's terrorist enterprise. At the merits stage, Twitter's approach has evolved. It now urges this Court to adopt one or more per se legal rules or requirements for aiding-and-abetting cases generally. The United States supports some of these proposed new legal standards, and offers others of its own.

Whether this Court should adopt all, or any, of those proposed legal rules is not fairly encompassed within the questions presented.[70] Equally importantly, none of them was advanced in the court of appeals below. Defendants' joint brief in the Ninth Circuit was expressly about and limited to whether there was sufficient evidence to prove knowledge the defendants were assisting ISIS's terrorist activities.[71] Twitter and the government disagree with the result in the court below, but neither faults the court of appeals for having failed to adopt a legal standard that was never proposed in that court.

This is not merely a procedural problem. Each of the legal rules which this Court is being asked to adopt would have considerable, and unpredictable, implications for decades of lower court litigation. The formulations proposed by the defendants and the United States would apply to all civil aiding-and-abetting cases, not just to JASTA cases. What implications that would have for criminal aiding-and-abetting cases is important but far from obvious. None of this was vetted in the court of appeals below. These issues are too important to be decided by this Court without the advantage of a full, adversarial airing in multiple courts

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[70] Whether a defendant's assistance must be the proximate cause of the plaintiff's injury is outside the scope of the questions presented. *See* Pet. Br. 19, 23, 26. So is the issue of whether the assistance in this case was substantial. *See* U.S. Br. 27-30.

[71] Brief for Defendants-Appellees, 35-36, (arguing that there was insufficient evidence of knowledge "even if the Court were to accept Plaintiff's misconception that knowing and substantial assistance to ISIS generally is sufficient").

of appeals. If the Court wishes to consider adopting any of these legal rules, it should do so in a case in which the correctness of that rule was expressly raised and well-developed earlier in the litigation. Defendants will be free on remand to urge the district court or the Ninth Circuit to adopt some or all of the now-proposed rules, and to suggest others, and if dissatisfied with the Ninth Circuit's ultimate response, defendants will be free to again seek review by this Court.

Because, however, the Court may wish to consider in the instant case one or more of those proposed legal standards, plaintiffs briefly set forth below our view of each of them.

Twitter proposes several different additional scienter requirements. It suggests that the Court require proof that a defendant (a) knew of the specific account that aided the attack at issue, (b) knew of specific accounts that aided particular attacks, and (c) knew that its actions were providing substantial assistance to those activities. The first two legal standards are in the alternative, and Twitter clearly prefers that the Court adopt the first one. Pet. Br. 36-42. Each proposal raises its own distinct issues, but all of these suggested legal standards share three common flaws.

First, all of the suggestions disregard the difference between two distinct *Halberstam* scienter requirements: knowledge that a defendant is assisting wrongful conduct (the issue here) and a general awareness of the role a defendant's assistance is playing in that conduct. A defendant can know it is assisting

wrongdoing without having any idea how that is occurring; that is one of the reasons why knowing support for a foreign terrorist organization (which would violate §2339B) may not constitute aiding and abetting. A defendant must also have some understanding of the role of its assistance, but *Halberstam* reiterated that the understanding need only be general. The proposed specific knowledge requirements are irrelevant to whether a defendant's assistance was knowing, and are more particularized than would be required "general awareness."

Second, all of these proposed rules create a compelling incentive for companies to adopt a policy of deliberate ignorance, seeking to assure that no individual at the company acquired knowledge about what was being posted, disseminated, or recommended. Ignorance of the facts would be an ironclad defense. To see such a defense in action, one need only read the defendants' briefs. In the face of an allegation (assumed true at this point in the litigation) that each of the defendants had a policy of not scrutinizing potential terrorist posts unless there was an outside complaint, each defendant adamantly insists that it just did not know what was in its own computers. Any legal disincentive to monitor posted materials would be likely to have major consequences. As recent events have made clear, social media companies are at best ambivalent about whether to review, or to cease disseminating and recommending, objectionable material. Doing so is expensive, and every excluded item is a lost opportunity to display revenue-generating advertisements.

Third, the meaning and effectiveness of these proposed rules requires assuming that a corporation does not "know" what is in its computers or other records unless some individual employee actually is personally aware of a particular item. But that is not how the word "know" is ordinarily used with regard to an institution. It is normal to refer to an institution as "knowing" things that are not personally known to any individual employee, so long as the relevant information is in the institution's possession and readily accessible. When a taxpayer states that the IRS "knows" how much she made last year, the taxpayer is not necessarily saying that anyone at the IRS personally knows that. Her Form 1040 may have been processed automatically, and never been seen by human eyes, but that would not matter. So long as the IRS itself has her filing, and can access it without undue difficulty, it would be entirely appropriate to describe the agency as knowing the taxpayer's income. In the instant case, the complaint alleges that ISIS materials at issue are in the defendants' own computers, and that the defendants could readily locate them.

(1) Knowledge of Accounts or Postings Connected To The Reina Attack

This proposed standard is related to the defendants' argument that §2333(d)(2) requires assistance directly connected to a particular attack. But even in cases in which there was such a connection, adding this special scienter requirement would assure that the statute would almost never apply. The complaint

alleges that there were tens of thousands of ISIS accounts on the defendants' websites, and a far larger number of individual posts. Even if one of them was indeed about the Reina attack, the likelihood that it would have been seen by any of the defendants' employees would be virtually non-existent.

(2) Knowledge of Accounts or Postings Used for Particular Attacks

This proposal would, as a practical matter, greatly narrow the decisions in the Second, Ninth and District of Columbia Circuits that section 2333(d)(2) applies to aiding and abetting terrorist activities. There would have to be knowledge of specific accounts used to perpetrate specific attacks. It would be insufficient to show knowledge of accounts used for other terrorist purposes, such as recruiting and inciting terrorists, raising money, or intimidating the public. The terrorist activities thus excluded would be precisely the activities which the defendants are alleged to have assisted, and which matter the most to foreign terrorist organizations.

(3) Knowledge of Substantial Assistance

Twitter urges that a plaintiff should be required to show that the defendant knew and "understood that its conduct would substantially assist [the wrongful] act." (Pet. Br. 38; *see id*. at 3, 20; Facebook Br. 40). It is not obvious how such a standard could be administered in practice. Substantial assistance is a term of

art in aiding-and-abetting law, involving a distinct six-part standard established by *Halberstam*. For a defendant to "know" that it was (in the legal sense) substantially assisting a wrongful act, the defendant would have to be familiar with the six-part test, understand the correct interpretation of each part, correctly assess each part, and then balance them in the legally appropriate manner. If a defendant made an error in any part of this analysis, and believed (however mistakenly) that its actions did not constitute substantial assistance, the requisite knowledge would not exist, and the defendant would be off the hook.

(4) Intent Requirement

The government asserts that where the aiding-and-abetting takes the form of inaction, the plaintiff must prove that the defendant "[c]onsciously intended to assist in the perpetration of a wrongful act." (U.S. Br. 20) (quoting *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d Cir.), cert denied, 439 U.S. 930 (1978)). At page 41 of its brief, Twitter cites *Monsen* for the same proposed rule. But on the next page of its brief, Twitter properly abandons that proposal, conceding that the scienter requirement in the text of §2333(d)(2) is only knowledge, not intent. (Pet. Br. 42).

(5) Special Standard for Remoteness

Twitter and the government argue that when the wrongful act is "remote" from the defendant, there

should be a special knowledge requirement. They quote a passage in a securities case stating that "[a] remote party must not only be aware of his role [in connection with the wrongful act], but he should also know when and to what degree he is furthering the fraud." (U.S. Br. 20; Pet. Br. 42) (quoting *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95 (5th Cir. 1975)). But *Woodward* does not adopt a special standard for instances of remoteness; this passage instead is merely part of the reasoning for the adoption of the actual rule in that case, that assistance must be knowing and substantial. *Halberstam* cites *Woodward* only for that rule. 705 F.2d at 477. And, in any event, a special scienter requirement for instances of remoteness would clearly conflict with *Halberstam* itself, which states that the required awareness is only of a defendant's role, 705 F.2d at 477, and specifies that a defendant's presence or absence at the time of the tort, while relevant, is only one of the six factors to be considered in determining whether the assistance provided was "substantial," 705 F.2d at 478, 484.

(6) Special Standard for Routine Services

Twitter and the government assert that "a party whose actions are routine and part of normal everyday business practices would need a higher degree of knowledge for liability as an aider and abettor to attach." (U.S. Br. 20; Pet. Br. 40) (both quoting *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991)). This sounds like a holding that in such circumstances a plaintiff must prove that the defendant had a special kind of

knowledge, perhaps absolute certainty, compared to the type of knowledge ordinarily required in run-of-the-mill cases. But the context of this passage in *Camp* makes clear that was not its meaning. The immediately preceding sentence reads, "A party who engages in atypical business transactions or actions which lack business justification may be found liable as an aider and abettor with a minimal showing of knowledge," 948 F.2d at 459. The Eighth Circuit was in this sentence explaining that where a defendant's activities were suspicious by their very nature, not much additional evidence would be needed to prove knowledge. The "higher degree" referred to in the quoted sentence means more evidence than would be required in a case of suspicious activity; that higher degree is just ordinary evidence of ordinary knowledge.

(7) Special Standard for Widely Available, Ordinary Services

Twitter asserts that *Woodward* requires that "the scienter standard must 'scale up' for a defendant accused of merely failing to prevent misuses of its widely available, ordinary services, to require an especially robust showing that the defendant knew its assistance was substantial." (Pet. Br. 42). "[R]obust showing" might mean something like clear and convincing evidence, rather than proof by a preponderance of the evidence. But when Congress has wanted to impose a requirement of clear and convincing evidence, or some other "robust" evidentiary showing, it has done so expressly. The passage in *Woodward* on which Twitter

relies actually concerns a "remote party," 522 F.2d at 95, not a party (whatever its location) providing "widely available ordinary services."

(8) Requirement of Direct Knowledge

The United States asserts that under certain circumstances a complaint must contain "meaningful allegations of direct knowledge." (U.S. Br. 25). Direct knowledge appears to be required if the assistance alleged is a particular type of inaction, and the defendant is a very large company. *Id*. "Direct knowledge" might be satisfied by proof that a Twitter official had actually gone to the trouble of personally reviewing thousands of ISIS posts, realized they were promoting a terrorist enterprise, and then decided to nothing about it, a fairly unlikely scenario. There are only a handful of federal statutes requiring "direct knowledge," none involving a method of satisfying scienter requirement.[72] Neither defendant calls for direct knowledge under any circumstances.

III. THE COMPLAINT PLAUSIBLY ALLEGED THE DEFENDANTS KNOWINGLY ASSISTED ISIS'S TERRORIST ACTIVITIES

Both *Halberstam* and the text of §2333(d)(2) permit a plaintiff to establish liability by showing, *inter alia*, that a defendant "knowingly" provided

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[72] 6 U.S.C. §411(a)(1)(B); 15 U.S.C. §1681d(d)(4)(A); 19 U.S.C. §1415(a)(3)(B); 42 U.S.C. §256(b).

substantial assistance to the terrorist enterprise of the foreign terrorist organization which committed the attack that injured the plaintiff. The complaint in this case adequately alleges such knowledge.

Knowledge is a factual issue. *Halberstam* treated knowledge as a matter of fact, and upheld the district court's finding of knowledge because it was not clearly erroneous, 705 F.2d at 487. The lower courts applying JASTA have repeatedly characterized this statutory element as a factual matter. The United States in its recent amicus brief in *Weiss* correctly characterized the knowledge requirement in JASTA as a jury issue. (U.S. *Weiss* Br. 14, 20). The government's brief in the instant case seems at times to suggest that under JASTA the existence of knowledge is a matter for judicial determination.[73] The defendants do not appear to support that characterization, which is clearly incorrect.

The question presented is not whether the Court itself would find, based on the allegations of the complaint, the plaintiffs have shown by a preponderance of the evidence that the defendants had the requisite knowledge. That would be the question for the trier of fact based on an actual record. Nor is the issue here whether a reasonable jury could make such a finding; that question would only be presented by a motion for

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[73] (U.S. Br. 18) ("a court must ... be able to infer that the secondary defendant was [acting] knowingly"; "court may more readily infer the requisite knowledge"), 23 n.1 ("[nature of the transaction] is ... relevant to whether a court may infer that a defendant knowingly provided substantial assistance").

summary judgment. At this early stage in the proceedings, when a defendant seeks dismissal of a complaint on the ground that it does not even state a claim on which relief can be granted, the role of a court is limited to determining whether the factual allegation at issue—here knowledge—is sufficiently supported by specific factual allegations that it is at least plausible. *Iqbal v. Twombly*, 556 U.S. 662 (2009).

A. The Allegations of The Complaint

The complaint advances four types of specific factual allegations which make plausible the claim that the defendants knew that their websites were disseminating, and recommending, materials that supported ISIS's terrorist activities.

First, the complaint alleges that for years there were detailed credible public reports that this was happening, in the nation's major newspapers, on most of its television networks, from government officials in the United States and Great Britain, and from credible private organizations. The complaint also asserts that there was a meeting between high-ranking federal officials and leaders of social media companies to discuss this very practice.[74] It is certainly plausible that officials of the defendants were well aware of those reports

[74] According to a contemporaneous news account, the federal officials who took part in the discussions were the Attorney General, the Director of the Federal Bureau of Investigation, and the Director of National Intelligence. *See* https://www.dowjones.com/scoops/top-obama-officials-to-hold-summit-with-tech-ceos-friday-on-terror-concerns, visited Dec. 12, 2022.

and that meeting, and as a result realized that their websites were disseminating and recommending terrorist materials, including such materials from ISIS. The Ninth Circuit correctly held that this allegation was particularly significant. (Pet. App. 61a-62a).

Second, 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. The defendants would have known that those exceptionally modest efforts would have left a large amount of such terrorist materials on their websites, where they would continue to be disseminated and recommended.

Third, the complaint alleges that the defendants understood the nature of the ISIS content they were disseminating and recommending. The public reports had made that clear. In addition, the complaint alleges that in some instances defendants' officials personally examined the materials in question, either in response to a complaint or in the process of approving revenue sharing (with ISIS) based on advertisements that appeared with the ISIS-related materials, and would thus have known that the materials were used to recruit and incite supporters, to raise funds, and to intimidate members of the public.

Fourth, the complaint alleges that the nature and volume of materials was such that the defendants would have known that their dissemination and recommendation would "aid[]" ISIS's terrorist enterprise.

The complaint asserted that there were tens of thousands of ISIS or ISIS-related accounts, which were viewed in some instances tens of thousands of times in one day. Based on the nature of the reports known to defendants' officials, as well as their own experiences, it is certainly plausible that the defendants realized that the resulting assistance to ISIS was not de minimis.

Defendants and the government insist that there are other imaginable types of evidence which the complaint does not allege. For example, they fault the complaint for failing to assert that the websites provided ISIS with special, atypical services, or that the websites had a closer than arms-length relationship with that terrorist organization. But defendants do not explain why such circumstances would have been far more probative of knowledge than evidence that the defendants were expressly and repeatedly told that they were providing services to ISIS and other terrorist groups. Routine materials and services are often exactly what a terrorist organization would want: standard issue Kalashnikovs, not some special hand made one-of-a-kind automatic rifle that no terrorist would know how to use or clean. A unique social media site created just for ISIS would be useless, lacking the visibility of a regular Twitter, Facebook or YouTube account. Conversely, a flag dealer which in 2016 received an arms-length order for 500 off-the-shelf black flags to be shipped to an address in Raqqa would surely have known whom the flags were for.

The defendants assert that they were being faulted for mere inaction. But it is not clear what the connection is between whether the defendants knew whom they were assisting, and whether the assistance was in some sense active or passive. And the complaint in this case expressly asserts the assistance was indeed active, that the defendants were affirmatively recommending ISIS material. *See Gonzalez v. Google*, No. 21-1333.

The government suggests the Court adopt a definition of "knowingly" that would be dispositive of the instant case, and would have exceptionally broad implications. Where a defendant programs its computer to take actions "automatically," the United States urges, the events that follow simply are not "knowing" at all. The complaint alleges that the defendants' algorithms recommended material (in this case ISIS posts and videos) to particular users (individuals the algorithm determined would be interested in such materials). The government argues that is insufficient as a matter of law to constitute knowing assistance.

> [P]laintiffs describe those algorithms as an *automated* part of defendants' widely available services; the *automatic* instigation of such effects does not show that defendants knowingly provided substantial assistance to terrorist acts that persons affiliated with ISIS might commit.

U.S. Br. 26 (emphasis added).

Such a restrictive definition of "knowing" conduct would have enormous implications for a wide variety of civil and criminal laws of which knowledge is an element. With regard to social media companies, such a rule would convey a sweeping immunity far wider than anything being proposed in *Gonzalez v. Google*; virtually everything that those companies do is automated. Much of the activities of private companies, government agencies, and even some individuals today is automated. Often that is beneficial, but misconduct can be automated as well. A felonious bank employee need not just take money from the till; he can program a bank computer to automatically move into his account a portion of deposits by customers. A spy at the Department of Defense need not drop stolen documents in a hollowed-out tree trunk; he can just program his computer to forward top secret documents to a foreign military attaché.

Automation does not preclude knowledge. In tort, the positioning of a spring gun, which automatically kills a trespasser, is a battery, even though the action was automatic, and the defendant was not on the scene when the killing occurred. If a defendant knows that a computer program will act in a specific way in response to a given input, and understands the kind of input the computer might receive, the foreseeable action of that computer is knowing action by the defendant. A defendant need not be involved in the subsequent events he has set in motion; he need not be personally aware of the particular input (e.g., which passerby would trigger the spring gun or which ISIS video was posted) or

of the automated action that followed (the shooting of that particular victim, or the recommendation of that video to a particular user).

B. Defendants' Asserted Lack of More Specific Knowledge

A particular gravamen of the defendants' argument is that the knowledge that they had was only "general." A defendant may have known that ISIS was posting terrorist material on its website, and that the defendant itself was as a consequence (automatically) disseminating and recommending the material, but (so the argument goes) the defendant did not more specifically know which among the many posts or videos in its computer contained such terrorist materials. Lacking such specific knowledge, a defendant might argue, there was nothing it could do to end the dissemination and recommendation of terrorist material. On our view, in some situations the absence of such knowledge would matter under JASTA, but not for the reason that the defendants suggest.

JASTA and *Halberstam* have three distinct types of scienter elements. First, a defendant must know that it is assisting the wrongful activity at issue; this requires actual (not constructive) knowledge, although ignorance of the nature or details of the assistance would not matter. Second, a defendant must have a "general" understanding of its role in connection with that wrongful activity. Third, in assessing whether the

assistance was "substantial," one of the six factors is the state of mind of the defendant.

State of mind encompasses a range of attitudes, from highly culpable (e.g., intending the assistance to further the terrorist activity) to non-culpable (e.g., making a good faith concerted effort to avoid providing such assistance). Twitter objects that mere recklessness should be irrelevant under JASTA. Recklessness would indeed be irrelevant with regard to the first type of scienter; it requires actual knowledge of assistance, not a reckless failure to ascertain whether assistance is occurring. But recklessness is quite relevant to the third scienter element, the state of mind of a defendant. Reckless disregard of the fact that a defendant is assisting terrorism would be highly culpable, and could weigh heavily in the assessment of whether the assistance was substantial. The point is not that JASTA or *Halberstam* impose on a defendant an obligation to take affirmative steps to avoid unintentionally assisting wrongful activity, but that the presence or absence of such efforts to do so can be of importance in the assessment of a defendant's state of mind.

Thus it *could* matter if a defendant, although knowing that it was assisting terrorist activities by disseminating and recommending terrorist materials (what defendants call general knowledge), did not know specifically where those materials were in its computers. The lack of such specific knowledge might make it impossible to avoid such assistance. But whether the absence of that more specific knowledge

was exculpatory—or inculpatory—would turn on *why* a defendant lacked it. If a defendant had made a serious good faith but unsuccessful effort to obtain that specific information, the defendant's state of mind would be exculpatory. On the other hand, if a defendant could have obtained that specific information but simply chose not to do so, that would demonstrate a culpable state of mind that would be relevant and inculpatory under JASTA and *Halberstam*.

A simple hypothetical illustrates the distinction. Suppose a rogue computer engineer at Twitter wrote a program that generated a list of every ISIS account on the company's website, and gave that list (unread) to the company's president, in an envelope marked "ISIS Accounts at Twitter Today." If the president simply refused to open the envelope (or permit anyone else to read it), the company could not obtain dismissal of a subsequent JASTA complaint by asserting that the company only had "general knowledge" that there were ISIS materials on its website.

Usually an evidentiary record would be necessary to ascertain whether a defendant's lack of specific information, resulting in an ability to avoid assisting a terrorist enterprise, reflected an inculpatory state of mind. But the defendants and United States argue that no such record is required here. In this case, they assert, the complaint contains such significant acknowledgements of exculpatory circumstances, and so few inculpatory assertions, that the plaintiffs have pled themselves out of court. But that is incorrect.

The defendants and the government note the defendants had written policies against posting (and thus recommendations of) terrorist material, and they assert that those rules were "enforced" "regularly," that there was a "reporting system" to find such material, "undisputed efforts to detect [it]," and "investigations" triggered by that reporting system (e.g., Pet. Br. 3-7, 44; Facebook Br. 41-42; U.S. Br. 10, 12, 13; Pet. Rep. 6; Pet. 14-15). If any terrorist material remained, they suggest, it was only because ISIS or its supporters had managed to evade this well-crafted system. What more, Twitter and Facebook ask, could they have done? If a jury were to find that all of that is true, that jury might conclude that the defendants could not have known there was any non-trivial amount of terrorist material left to be recommended, and that those considerable and thorough efforts demonstrated that the state of mind of the defendants was not in the least culpable.

But the complaint paints a very different picture. It specifically alleges that it was the policy of each of the defendants to take no steps of their own to detect terrorist material, and to do nothing unless some outside party complained about a specific identified terrorist post or video. The complaint alleges that a Google official testified before a Committee of the House of Commons that this was indeed that defendant's policy. Plaintiffs contend that Twitter's assertion (at Pet. Rep. 6) that there was a "reporting system" that triggered "investigations" is not supported by the

portions of the record which it cites.[75] The only reason terrorist material was removed, and the only circumstance in which it occurred, was in response to an outside complaint. The number of instances in which terrorist material was removed was thus a function of the number of complaints. Although the term "regularly" appears in the Ninth Circuit opinion, it is not in the complaint. Removing one terrorist post a week might be labeled "regular," but it would be trivial if—as the complaint alleged—there were tens of thousands of ISIS accounts. At that rate, it would take Twitter thirty years to remove the 1,500 ISIS accounts that the hacker group Anonymous allegedly removed in a single day. A jury which found that those were indeed the facts could conclude that the defendants' policies were little more than window dressing, and that the defendants knew all too well that a large amount of terrorist material remained on their websites, and was regularly being recommended to viewers by the defendants' algorithms.

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[75] Petitioner's reply brief asserts that "[d]efendants sought to identify content from terrorist supporters through a reporting system," "review[ed]" it, and "regularly removed ISIS content and ISIS affiliated accounts as a result of these investigations." (Pet. Rep. 6 (citing Pet. App. 10a, 11a, 62a, 64a)). The cited portions of the opinion below do not contain any reference to any "reporting system"; that phrase does not appear anywhere in the opinion. The quoted term "review[ed]" is not about reviewing anything reported by some internal system, but instead refers to reviewing complaints from outsiders. (Pet. App. 10, 11, 62). The cited portion of the Ninth Circuit opinion does not contain any reference to "investigations" triggered by an internal reporting system.

The defendants characterize the underlying problem as concerning a handful of ISIS supporters somewhere in the world who may have had accounts on Twitter, Facebook or YouTube. If that were the case, a jury might well conclude that the defendants had done all they could; after all, the defendants could hardly have been expected to send investigators into ISIS-occupied Raqqa or Mosul to look into the motives and backgrounds of individuals with such accounts. So, at the least, the defendants' conduct was not at all culpable, and their exemplary state of mind would weigh heavily against a finding that any aid was substantial. And if only a few such ISIS supporters were at issue, recommending their posts and videos might not be of sufficient practical importance to amount to "aiding" a terrorist enterprise.

But again the allegations in the actual complaint are quite different. The complaint alleges that the defendants did not need to know identity and motives of whoever was posting the materials at issue; the terrorist nature of those materials was self-evident from their text and or graphics. Indeed, the material in question only served ISIS's purposes *because* it openly called for recruits and donations, and overtly incited followers to engage in terrorist attacks. The complaint asserted that there was no need to hire investigators to track down the materials themselves; the materials were stored in the defendants' own computers, whether at their headquarters in California or elsewhere under their control. The complaint specifically alleged that it was within the technical capacity of the

defendants to write software that would identify that terrorist material, and that the defendants' algorithms in practice were already doing just that, and then recommending that material to potential ISIS supporters.

To be sure, these are only allegations. The defendants will doubtless dispute some, perhaps many of them. But at this stage, on a motion to dismiss, these allegations are more than sufficient to state a claim on which relief can be granted.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

KEITH L. ALTMAN
THE LAW OFFICE OF KEITH ALTMAN
33228 West 12 Mile Rd.
Suite 375
Farmington Hills, MI 48334
(516) 456-5885
keithaltman@kaltmanlaw.com

ROBERT J. TOLCHIN
THE BERKMAN LAW OFFICE, LLC
829 East 15th St.
Brooklyn, NY 11230
(718) 855-3627
rtolchin@berkmanlaw.com

Counsel for Respondents