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 PETITIONER

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QUESTIONS PRESENTED

Under Section 2333 of the Anti-Terrorism Act, as amended by the Justice Against Sponsors of Terrorism Act, U.S. nationals injured by "an act of international terrorism" that is "committed, planned, or authorized by" a designated foreign terrorist organization may sue 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," and recover treble damages. 18 U.S.C. §2333(a), (d)(2). The questions presented are:

1. Whether a defendant that provides generic, widely available services to all its numerous users and "regularly" works to detect and prevent terrorists from using those services "knowingly" provided substantial assistance under Section 2333 merely because it allegedly could have taken more "meaningful" or "aggressive" action to prevent such use.

2. Whether a defendant whose generic, widely available services were not used in connection with the specific "act of international terrorism" that injured the plaintiff may be liable for aiding and abetting under Section 2333.

PARTIES TO THE PROCEEDING

Petitioner Twitter, Inc. was a defendant in the district court and an appellee in the court of appeals.

Respondents Facebook, Inc. (now known as Meta Platforms, Inc.) and Google LLC were also defendants in the district court and appellees in the court of appeals. Pursuant to this Court's Rule 12.6, Google LLC and Facebook, Inc. filed letters at the certiorari stage indicating that they support Petitioner.

Respondents Mehier Taamneh, Lawrence Taamneh, Sara Taamneh, and Dimana Taamneh were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Twitter, Inc. is a privately held company, and its parent corporation is X Holdings I, Inc. No publicly held corporation owns 10 percent or more of Twitter, Inc.

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BRIEF FOR PETITIONER

INTRODUCTION

In the Justice Against Sponsors of Terrorism Act (JASTA), Congress enacted a traditional civil aiding-and-abetting provision, rooted in common law principles. That provision creates a cause of action that can be asserted by any U.S. national injured by reason of "an act of international terrorism" against anyone who "aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. §2333(d)(2). The Ninth Circuit held that Twitter, Google, and Facebook ("Defendants") could be liable

under this provision for the killing of Plaintiffs' relative in an ISIS attack at the Reina nightclub in Turkey. The court so held despite acknowledging that Defendants had no "intent to further or aid ISIS's terrorist activities" and had adopted and "regularly" enforced policies against terrorist content, Pet.App.64a-65a, and despite the absence of any allegation that Defendants' services were used to plan or commit the Reina attack itself. According to the Ninth Circuit, it is enough for Plaintiffs to allege that Defendants were generally aware that ISIS adherents were somewhere among the billions using their ordinary services, this use benefitted the organization generally, and Defendants' efforts to remove terrorist content were not sufficiently "meaningful" and "aggressive," Pet.App.62a. That holding breaks sharply from the well-established legal framework for aiding and abetting and exposes ordinary businesses providing widely available goods or services and humanitarian organizations to staggering terrorism liability, burdensome discovery, and reputational damage. This is not the law Congress created.

The Ninth Circuit reached its mistaken conclusion by committing two fundamental errors that cannot be squared with the plain language of the statute, the governing legal framework, or the common law principles on which the statute is based.

First, the Ninth Circuit was wrong to hold that aiding-and-abetting liability can attach based on generalized assistance to a terrorist organization, rather than assistance to the attack that injured the plaintiff. Congress enacted a separate statutory provision, 18 U.S.C. §2339B, to address the former scenario. But in enacting Section 2333(d), Congress imposed civil aiding-and-

abetting liability only where the defendant assists the specific "act of international terrorism" that injured the plaintiff. That act of international terrorism is the only actionable tort under Section 2333(d). *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983)—which "provides the proper legal framework" for ATA aiding-and-abetting liability, Pub. L. No. 114-222, §2(a)(5), 130 Stat. 852 (2016) (18 U.S.C. §2333 Note)—requires the same result, making clear the defendant must substantially assist the "principal violation" that gave rise to the claim. 705 F.2d at 477. Here, "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself." Pet.App.64a. But Plaintiffs do not allege that Defendants assisted in committing that attack at all, much less substantially.

Second, the Ninth Circuit independently erred in holding that a defendant "knowingly" provides substantial assistance if it was merely generally aware that terrorist adherents were among the many using its ordinary services, notwithstanding a regularly enforced policy against such use. The statutory language demands that a defendant "knowingly provid[e] substantial assistance," 18 U.S.C. §2333(d)(2), and *Halberstam* also requires the defendant to "knowingly and substantially assist" the principal tort, 705 F. 2d at 477. A defendant must therefore actually know of the particular substantial assistance it provided. Here that means, at a minimum, that Defendants must have known of specific accounts that substantially assisted the Reina attack and also have known that not blocking those accounts would substantially assist such an attack. Yet Plaintiffs concede that Defendants "rarely knew about 'specific' terrorism accounts or posts," Opp. 17, and do not allege that any Defendant knew about yet failed to

block any account that was used to plan or commit the Reina attack or any other terrorist attack. What Plaintiffs allege instead—that Defendants were generally aware some terrorist adherents were among the billions using Defendants' services—might, at most, amount to recklessness in some circumstances. But those allegations cannot establish that Defendants "knowingly provided substantial assistance," especially where, as here, the aiding-and-abetting theory is premised on Defendants' alleged failure to do more to stop terrorists from misusing their widely available services.

The Ninth Circuit's errors would have disastrous consequences if left uncorrected. It is unclear what a business that broadly provides generalized services could do to avoid liability for aiding and abetting an act of international terrorism, because Plaintiffs acknowledge that Defendants regularly removed terrorist content from their platforms, and a plaintiff can always allege that a defendant could have done more. Congress did not enact a statute that attaches liability based on such an ill-defined and capacious theory. The Court should reverse.

OPINIONS BELOW

The Ninth Circuit's decision (Pet.App.1a-150a) is reported at 2 F.4th 871. The district court's order granting Defendants' motion to dismiss (Pet.App.151a-180a) is reported at 343 F. Supp. 3d 904. The Ninth Circuit's order denying panel rehearing and rehearing en banc (Pet.App.181a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on June 22, 2021. It denied Defendants' timely petition for panel rehearing and rehearing en banc on December 27, 2021. On March 14, 2022, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including May 26, 2022. The conditional petition for a writ of certiorari was filed May 26, 2022, and granted October 3, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant subsections of 18 U.S.C. §§2331, 2333, and 2339B are set out in the appendix to this brief. App.1a-3a.

STATEMENT

A. Twitter And Its Policy Against Harmful Content

Twitter is a global communications company founded in 2006. It provides an Internet communications platform free of charge to hundreds of millions of individuals who use the platform to share their views, engage with the views of others, and follow current events. People who promise to follow Twitter's rules and terms of use may post "Tweets," short messages limited to 280 characters that can also contain images, videos, and links to other websites or media sources. The brevity of Tweets and the ability to react in real time to current events have made Twitter a popular online platform. On any given day, users post more

than 500 million Tweets—5,700 Tweets per second.[1] The volume of Tweets increases when culturally notable or newsworthy events occur. During a 2013 film airing in Japan, for example, more than 140,000 Tweets were posted in a single second.[2]

Twitter welcomes diverse people, ideas, and information. At the same time, it is committed to providing a safe space for conversation, and has established policies, processes, and tools to achieve that goal. Twitter's rules against "threatening or promoting terrorism" and against using Twitter "for any unlawful purposes or in furtherance of illegal activities" have been important to that effort.[3] As Plaintiffs concede, throughout the period relevant to their claim, Twitter prohibited content promoting terrorism. Pet.App.64a-65a.[4] Plaintiffs also

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[1] Twitter Blog, *New Tweets per second record, and how!* (Aug. 16, 2013), https://tinyurl.com/42ebxke9 (visited Nov. 28, 2022).

[2] *Id.*

[3] Twitter Rules (as of Jan. 1, 2017), https://tinyurl.com/2snjkx8x (Internet archive version) (visited Nov. 28, 2022). The attack at issue in this case occurred on January 1, 2017.

[4] Twitter's current rules also prohibit terrorist content. Its Violent Organizations Policy bars individuals who "affiliate with and promote the illicit activities of a terrorist organization or violent extremist group," and prohibits content "engaging in or promoting acts on behalf of a violent organization; recruiting for a violent organization; providing or distributing services (e.g., financial, media/propaganda) to further a violent organization's stated goals; and using the insignia or symbol of violent organizations to promote them or indicate affiliation or support," among other things. Twitter, Violent Organizations Policy, https://tinyurl.com/8wu6u2km (visited Nov. 28, 2022).

acknowledge that Twitter enforced that prohibition by removing terrorist content and accounts from its platform. Pet.App.64a; JA149-150.

Since 2016, Twitter has publicly reported the number of accounts terminated for violating its rules against terrorism-related content. According to those reports, Twitter has terminated over 1.7 million accounts for violating those rules since August 2015, including over 630,000 accounts between August 2015 and December 31, 2016.[5]

B. Statutory Background

1. The Anti-Terrorism Act of 1990, 18 U.S.C. §§2331 *et seq.*, allows U.S. nationals "injured … by reason of an act of international terrorism" to bring suit for treble damages in federal court. 18 U.S.C. §2333(a). Courts have construed "by reason of" to require proximate causation, meaning an ATA claim can arise only from an injury proximately caused by "an act of international terrorism." *See Fields* v. *Twitter, Inc.*, 881 F.3d 739, 743-745 (9th Cir. 2018) (citing *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). The statute defines "international terrorism" to include "activities" that "involve violent acts or acts dangerous to human life that are a violation of" U.S. or

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[5] Twitter, Transparency Reports, July-December 2016, https://tinyurl.com/bdhjk2ak (Internet archive version); January-June 2017, https://tinyurl.com/r7sdu3wx (archived); January-June 2018, https://tinyurl.com/56bkk4k2 (archived); July-December 2018, https://tinyurl.com/bddbpvtb (archived); January-June 2019, https://tinyurl.com/2vxcsbv8 (archived); July-December 2021, https://tinyurl.com/y58wkkaj (contains links for reports from July 2019 onward) (all visited Nov. 28, 2022).

state criminal laws (or that would be if committed within their jurisdiction), and "appear to be intended" to "intimidate or coerce a civilian population" or to "influence" or "affect" a government in certain ways. 18 U.S.C. §2331(1).

In 1996, Congress enacted Section 2339B, which makes it a crime to "knowingly provide[] material support or resources to a foreign terrorist organization." 18 U.S.C. §2339B(a)(1). To violate this provision, "a person must have knowledge that the organization is a designated terrorist organization," or that "the organization has engaged or engages in" statutorily defined "terrorist activity" or "terrorism." *Id.*; *see id.* §2339B(g)(6). This Court has held that Section 2339B requires "knowledge about the organization's connection to terrorism," though "not specific intent to further the organization's objectives." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010).

2. Prior to 2016, the ATA did not expressly encompass secondary liability. *See Rothstein* v. *UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013); *Boim* v. *Holy Land Foundation for Relief & Development*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc). That year, Congress enacted JASTA to provide for civil secondary liability under the ATA. *See* 130 Stat. at 852 (§4). Section 2333(d) states that "[i]n an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), … liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the per-

son who committed such an act of international terrorism." 18 U.S.C. §2333(d)(2). ISIS is a designated foreign terrorist organization. *See* U.S. Dep't of State, Designated Foreign Terrorist Organizations, https://tinyurl.com/em9y6a9d (visited Nov. 28, 2022); JA48.

In enacting JASTA, Congress deliberated on the scope and elements of secondary liability. Representative Goodlatte, Chairman of the House Judiciary Committee, noted that "JASTA's extension of secondary liability under the Anti-Terrorism Act closely tracks the common law standard for aiding and abetting liability." 162 Cong. Rec. H5239, H5240 (daily ed. Sept. 9, 2016). He explained that revisions to the bill during the Senate markup—which specified that a defendant must "knowingly provid[e] substantial assistance"[6]—ensure that aiding-and-abetting liability "should only attach to persons who have *actual knowledge* that they are directly providing substantial assistance to a designated foreign terrorist organization in connection with the *commission of an act of international terrorism*." *Id.* (emphases added).

In JASTA's preamble, Congress stated that *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983), "provides the proper legal framework for how [secondary] liability should function in the context of" the ATA. 130 Stat. at 852 (§2(a)(5)). *Halberstam* canvassed the common law jurisprudence, including the Restatement (Second) of Torts and caselaw, and recognized three el-

[6] Senate Legis. Counsel for the S. Comm. on the Judiciary, 114th Cong., S. 2040 Substitute Redline (Comm. Print. 2016) (reflecting amendment by Sen. Cornyn), https://tinyurl.com/47cxuysc.

ements of civil aiding-and-abetting liability: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." 705 F.2d at 477-478. *Halberstam* adopted the elements as articulated in *Woodward* v. *Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975), and other cases, and noted that the second element requires not just "knowledge of the wrong's existence" but also "awareness of a role in an improper activity," and that the third element too contains a "scienter requirement" of knowledge. 705 F.2d at 478 n.8.

Halberstam identified six factors for determining "how much aid is 'substantial aid'" under the third element: (1) "the nature of the act encouraged"; (2) "the amount [and kind] of assistance given"; (3) "the defendant's absence or presence at the time of the tort"; (4) the defendant's "relation to the tortious actor"; (5) "the defendant's state of mind"; and (6) the "duration of the assistance provided." 705 F.2d at 483-484 (emphasis omitted).

C. This Case

1. Plaintiffs' Theory Of Liability

In the wake of JASTA's enactment, lawsuits ensued seeking to hold secondary actors liable under Section 2333(d) for terrorist attacks committed around the world. Defendants in this case have faced more than a

dozen such lawsuits.[7] All of those suits—dismissed in every case but this one, where the court of appeals reversed dismissal—share a similar theory of liability. The plaintiffs claimed that one or more Defendant was liable for aiding and abetting because content or accounts promoting terrorism had remained on the platforms, despite Defendants' rules against such content and regular removal of it. Such use of Defendants' services, the plaintiffs alleged, assisted a terrorist organization's operations in disseminating propaganda, fundraising, or recruiting members. In no case were Defendants alleged to have assisted directly in committing the attack that injured the plaintiffs, or to have intentionally supported a terrorist organization's goals or activities.

This lawsuit is no different. It arises from a January 2017 attack committed by Abdulkadir Masharipov, who killed 39 people at the Reina nightclub in Istanbul, Turkey ("Reina attack"). JA49; JA116-117. Among the victims of the Reina attack was Nawras Alassaf, a citi-

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[7] *See Gonzalez* v. *Google LLC*, No. 21-1333 (U.S.); *Clayborn* v. *Twitter, Inc.*, No. 19-15043 (9th Cir.); *Colon* v. *Twitter, Inc.*, 14 F.4th 1213 (11th Cir. 2021); *Retana* v. *Twitter, Inc.*, 1 F.4th 378 (5th Cir. 2021); *Force* v. *Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Crosby* v. *Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019); *Palmucci* v. *Twitter Inc.*, 2019 WL 1676079 (N.D. Cal. Apr. 17, 2019), *appeal filed*, No. 19-15937 (9th Cir.); *Sinclair for Tucker* v. *Twitter, Inc.*, 2019 WL 10252752 (N.D. Cal. Mar. 20, 2019), *appeal filed*, No. 19-15625 (9th Cir.); *Megalla* v. *Twitter, Inc.*, No. 3:18-cv-00543 (N.D. Cal.) (consolidated with *Clayborn*); *Copeland* v. *Twitter, Inc.*, 352 F. Supp. 3d 965 (N.D. Cal. 2018), *appeal filed*, No. 18-17327 (9th Cir.); *Cain* v. *Twitter Inc.*, 2018 WL 4657275 (N.D. Cal. Sept. 24, 2018), *appeal filed*, No. 19-16265 (9th Cir.); *Pennie* v. *Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017).

zen of Jordan and a relative of Plaintiffs. JA49; JA54. Plaintiffs allege that Masharipov committed the attack at ISIS's direction and under the guidance of Abu Shuhada, who Plaintiffs allege was responsible for ISIS's operations in Turkey. JA118-119; JA126-128. Plaintiffs sued Twitter, Google, and Facebook under Section 2333(d), seeking to hold them liable for aiding and abetting the Reina attack. JA158-160.

In the Ninth Circuit, "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself." Pet.App.64a. Yet in their 106-page Amended Complaint, Plaintiffs nowhere allege that Defendants' services were used to plan or commit the attack. They do not allege that Masharipov or Shuhada ever used any of Defendants' platforms at all, much less in regard to the Reina attack. *See* Pet.App.155a; Pet.App.168a; Pet.App.172a. The only online service the Amended Complaint even attempts to connect to the attackers is the messaging app Telegram—which has nothing to do with any Defendant—that Masharipov may have used to communicate with Shuhada.[8] Plaintiffs' counsel told the district court that "it does not matter one lick … whether the perpetrator ever used Google, Facebook, or Twitter for any purpose" because "[t]hat has nothing to do with this case." Dist. Dkt. 74, at 6. As the district court summarized it, Plaintiffs' theory is that "anybody who lends any kind of assistance, does any kind of business with ISIS, knowing that [it] … solely exist[s] to conduct terrorist

[8] *See* Yayla, Combating Terrorism Center at West Point, *The Reina Nightclub Attack and the Islamic State Threat to Turkey*, 10 CTC Sentinel 9, 10 (Mar. 2017), https://tinyurl.com/24v96rkf (cited at JA120 n.44).

activities, would be liable for any activities thereafter conducted by ISIS[.]" *Id.* at 31.

Plaintiffs do not claim that Defendants "shared any of ISIS's objectives" or "had any intent to further or aid ISIS's terrorist activities." Pet.App.65a. To the contrary, Plaintiffs acknowledge, Defendants had policies prohibiting content that promotes terrorism and Defendants "regularly" removed such content. *See* JA149-150; Pet.App.64a-65a.

Plaintiffs' theory of liability is that Defendants' actions to stop ISIS adherents from using Defendants' services were insufficient. Despite Defendants' regular enforcement of their policies, Plaintiffs allege that ISIS adherents evaded those policies and used Defendants' platforms to recruit members, raise funds, and spread propaganda, JA77-86, which allegedly contributed to ISIS becoming "one of the most recognizable and feared terrorist organizations," Pet.App.10a. According to Plaintiffs, Defendants did not take "meaningful steps to prevent" ISIS's misuse of the platforms, including by "proactively" removing content and accounts, Pet.App.10a; Pet.App.62a, and blocking ISIS-related accounts from "springing right back up," JA149. For example, while the Amended Complaint concedes that Twitter repeatedly terminated accounts affiliated with ISIS, it faults Twitter for not always terminating new, similarly named accounts that cropped up in place of the terminated ones. JA149-154. Plaintiffs also allege that, with such content remaining on the platforms, Defendants' "computer algorithms" allowed interested users to "locate other videos and accounts related to ISIS." JA147. In essence, Plaintiffs claim that Defendants' purported assistance—*i.e.*, failing to do

more to block ISIS adherents' "posting of" terrorism-promoting content on the platforms—resulted from Defendants' alleged "inaction." Opp. 14.

Although they do not allege that Defendants had "any intent to further or aid ISIS's terrorist activities," Pet.App.65a, Plaintiffs claim that Defendants were "fully aware" that ISIS was "using their networks to engage in illegal activity," JA155, because other users reported violations of Defendants' rules and news outlets and government officials reported on ISIS's use of Defendants' services, *see* JA88-116. But Plaintiffs acknowledge that Defendants "regularly removed" ISIS accounts and content. Pet.App.64a. Plaintiffs also acknowledge that Defendants "rarely knew about 'specific' terrorism accounts or posts." Opp. 17. And Plaintiffs do not allege that that any Defendant knew about yet failed to block any account that was used to plan or commit the Reina attack or any other terrorist attack. Plaintiffs allege that a terrorist adherent described use of one of Defendants' services as "success[fully] … raiding" that platform. JA135. Based on these allegations, Plaintiffs accuse Defendants of "knowingly" providing "substantial assistance" under Section 2333(d).

2. District Court Proceeding

Plaintiffs filed suit in the Northern District of California, seeking treble damages. JA166-167. Plaintiffs alleged eight claims for relief, including an aiding-and-abetting claim under Section 2333(d), and direct liability claims under Section 2333(a) for violations of Section 2339A, Section 2339B(a)(1), and Section 2339C(c). JA158-166. Defendants moved to dismiss the Amended Complaint for failure to allege essential elements of

their claims and on the additional ground that all of Plaintiffs' claims are barred by Section 230 of the Communications Decency Act. *See* Dist. Dkt. 62. The district court dismissed all claims with prejudice for failure to state a claim, without reaching the Section 230 defense.

At the outset, the district court expressed "concerns" about Plaintiffs' aiding-and-abetting claim because "Plaintiffs seem to take the position that, in the instant case, ISIS's 'act of international terrorism' encompasses *all* of ISIS's terrorist operations, and not the Reina attack specifically." Pet.App.173a (emphasis in district court opinion). The court found it "questionable that this is what Congress intended because that could effectively transform" Section 2333(d) "into a statute that provides for liability for aiding/abetting or conspiring with a foreign terrorist organization generally," even though the statute "does not refer to assisting a foreign terrorist organization generally or such an organization's general course of conduct." Pet.App.173a-174a. The court noted, "[i]f Congress had so intended, it could easily have used language similar to that in the ATA, § 2339B, but it did not do so." Pet.App.173a. Instead, Section 2333(d) imposes liability for injuries arising from "'*an act* of international terrorism'" and only where "the secondary tortfeasor assisted the principal tortfeasor in committing '*such an act* of international terrorism.'" Pet.App.173a-174a (quoting 18 U.S.C. §2333(d)(2)) (emphases in district court opinion). The court reasoned that "requiring secondary liability to be connected with a specific crime is consistent with the common law's understanding of aiding and abetting." Pet.App.174a-175a.

The district court further held that "even if Plaintiffs were correct that a JASTA claim is viable based on a defendant's assistance of a foreign terrorist organization or such an organization's general course of conduct," Plaintiffs' allegations still fail because they do not meet the second and third elements of aiding-and-abetting liability under *Halberstam*. Pet.App.175a-176a. Regarding the second element, the court held that Plaintiffs "failed to adequately allege that Defendants were generally aware that, through their actions, they were playing or assuming a 'role' … in ISIS's terrorist activities." Pet.App.176a. There is no allegation, the court noted, that "Defendants knew that ISIS members had previously used Defendants' platforms to communicate specific plans to carry out terrorist attacks." Pet.App.177a. The court also reasoned that "Defendants' purported knowledge that ISIS previously recruited, raised funds, or spread propaganda through Defendants' platforms … is more akin to providing material support to a foreign terrorist organization than assuming a role in terrorist activities." *Id.*

Regarding *Halberstam*'s third element requiring knowing and substantial assistance, the district court found "insufficient allegations of substantial assistance given that … there are insufficient allegations that Defendants played a role in any particular terrorist activities." Pet.App.177a. Addressing *Halberstam*'s six factors, the court further found that Plaintiffs "failed to allege that Defendants played a major or integral part in ISIS's terrorist attacks; for example, there are no allegations that ISIS has regularly used Defendants' platforms to communicate in support of terrorist attacks." Pet.App.178a. The court also noted that "the relationship between Defendants and ISIS is an arms'-

length one—a market relationship at best." *Id.* Unlike "targeted financial support," the district court explained, "Defendants provided routine services generally available to members of the public." *Id.* And the court noted that "there is no allegation that Defendants have any intent to further ISIS's terrorism." Pet.App.179a.

3. Court Of Appeals Proceeding

Plaintiffs appealed only the dismissal of their ATA aiding-and-abetting claim. Pet.App.60a. The Ninth Circuit reversed in a consolidated decision that also disposed of a materially identical claim in *Gonzalez* v. *Google LLC*, No. 21-1333 (U.S.). The court held that the claim in *Gonzalez* was barred by Section 230 of the Communications Decency Act, Pet.App.71a; it did not address Section 230 in this case because the district court had not, Pet.App.16a n.6.

In addressing this case, the Ninth Circuit acknowledged that Defendants had no "intent to further or aid ISIS's terrorist activities"; Defendants' "policies prohibit posting content that promotes terrorist activity"; Defendants "regularly removed ISIS-affiliated accounts and posts"; and Defendants "had, at most, an arms-length transactional relationship with ISIS" and did not provide any specialized assistance tailored to terrorist supporters. Pet.App.64a-65a.

The court nonetheless held that Plaintiffs adequately alleged aiding-and-abetting liability under Section 2333(d). As for the object of assistance, the Ninth Circuit acknowledged, in the *Gonzalez* portion of the consolidated opinion, that a plaintiff must "show the defendant knowingly and substantially assisted the act of

[international] terrorism that injured the plaintiff." Pet.App.52a. The court also acknowledged that, in this case, "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself." Pet.App.64a. But the court held that, under *Halberstam*, the "principal violation" a defendant must knowingly and substantially assist may be an "illegal … enterprise" and thus, under Section 2333(d), Defendants needed only to assist ISIS's "broader campaign of terrorism," not the attack that gave rise to the claim. Pet.App.53a-54a (*Gonzalez* portion); *accord* Pet.App.63a (*Taamneh* portion noting "the act encouraged is ISIS's terrorism campaign"). The court evidently understood ISIS's "broader campaign of terrorism" to encompass the organization's general activities, beyond a series of attacks—like the "Paris Attacks" in *Gonzalez* (Pet.App.5a)—that injured the plaintiff. Pet.App.53a (addressing whether "the relevant 'principal violation'" is "ISIS's broader campaign of terrorism or the Paris Attacks"). Applying that interpretation in this case, the court concluded that Plaintiffs plausibly alleged substantial assistance to ISIS's terrorism campaign because Defendants' platforms—"available to members of the public" and used by "billions of people around the world"—were "central to ISIS's growth and expansion" and "this assistance was provided over many years." Pet.App.64a-65a.

The court also deemed JASTA's scienter requirement satisfied. Applying the *Halberstam* framework, the court found the second element met because Defendants, "after years of media coverage and legal and government pressure concerning ISIS's use of their platforms, were generally aware they were playing an important role in ISIS's terrorism enterprise by

providing access to their platforms and not taking aggressive measures to restrict ISIS-affiliated content." Pet.App.62a. As to the third *Halberstam* element, the court held that Plaintiffs adequately alleged Defendants "knowingly" provided substantial assistance because "each defendant has been aware of ISIS's use of their respective social media platforms for many years" but "refused to take meaningful steps to prevent that use." *Id.*

The Ninth Circuit denied rehearing. Pet.App.181a. The parties thereafter stipulated to dismissal of this action if this Court were to deny certiorari in *Gonzalez* or affirm the Ninth Circuit's judgment there, because *Gonzalez* involves a "materially identical" claim as in this case. JA171-173. Twitter filed a conditional petition for certiorari, asking the Court to grant review were it to grant review in *Gonzalez*. On October 3, 2022, the Court granted certiorari in *Gonzalez* and this case.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is incorrect and threatens to assign terrorism liability and treble damages to a vast array of businesses providing ordinary services and humanitarian organizations.

The Ninth Circuit misconstrued Section 2333 to permit liability based on assistance to a terrorism "campaign" or "enterprise," rather than to the attack that proximately caused the plaintiff's injury. Pet.App.53a-54a; Pet.App.62a-63a. The statutory text and *Halberstam* are in lockstep in imposing liability only where the defendant has substantially assisted the primary tort that injured the plaintiff and thus gave

rise to the claim—the "act of international terrorism" under Section 2333, and the "wrongful act" and "principal violation" under *Halberstam*, 705 F.2d at 477. Here, that means Defendants must have substantially assisted the Reina attack because, as the Ninth Circuit acknowledged, "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself," Pet.App.64a. Yet Plaintiffs do not allege that Defendants assisted commission of the Reina attack at all, let alone substantially. The Ninth Circuit's summary of Plaintiffs' claim—that Defendants aided and abetted "by allowing ISIS to use their social media platforms," Pet.App.11a—speaks volumes. There is no way Defendants can be held liable under the correct reading of Section 2333(d), which requires assistance to commission of the Reina attack.

The court compounded its error by diluting the statutory knowledge requirement to something akin to recklessness or negligence. Section 2333(d) requires a defendant to "knowingly provid[e] substantial assistance," 18 U.S.C. §2333(d)(2), and *Halberstam* likewise requires the defendant to "knowingly and substantially assist" the principal tort, 705 F.2d at 477. Those elements make clear that the defendant must have known of the particular substantial assistance it provided. In this case that means Defendants must, at a minimum, have known of the particular accounts that substantially assisted the Reina attack and also have known that not blocking those accounts would substantially assist such an attack. It is not enough for Defendants to have been generally aware that their alleged "inaction," Opp. 14, would allow ISIS to misuse their widely available services; allegations of that sort would amount, at most, to recklessness. Indeed, the common law has required

heightened scienter where, as here, a plaintiff seeks to impose liability based on alleged inaction. Plaintiffs admit, however, that Defendants "rarely knew about 'specific' terrorist accounts or posts," Opp. 17, and do not allege that Defendants knew about yet failed to block any account or post that was used to plan or commit the Reina attack or any other terrorist attack. Plaintiffs therefore cannot establish even the most basic requirement of the statute's knowledge element.

If left to stand, the decision below would have far-reaching negative consequences. It ensnares defendants whose routine services assisted a terrorist organization (though not the attack that injured the plaintiffs), based on only general awareness that terrorist adherents were misusing those services, even where the defendants worked to avoid transacting with terrorists. Under that decision, it is far from clear what a provider of ordinary services can do to avoid terrorism liability, since a plaintiff can readily allege that the defendant could have done more to prevent terrorists' use. That broad and indeterminate scope of liability would subject countless businesses and humanitarian groups to debilitating risks of burdensome litigation, treble damages, and reputational harms. The plain statutory text, *Halberstam*, and the underlying common law principles do not countenance such a reading of Section 2333.

ARGUMENT

Under the plain language of the statute, a defendant is liable for aiding and abetting only if it "knowingly provid[es] substantial assistance" to the "act of international terrorism" that gave rise to the plaintiff's claim.

18 U.S.C. §2333(d)(2). That raises two questions: What is the "act of international terrorism" that a defendant must substantially assist (Part I)? And what does it mean for a defendant to "knowingly" provide substantial assistance (Part II)? The two are related, but the Ninth Circuit's misapplication of each is an independent basis for reversal.

I. SECTION 2333(d) REQUIRES A DEFENDANT TO SUBSTANTIALLY ASSIST A SPECIFIC "ACT OF INTERNATIONAL TERRORISM," NOT A GENERAL TERRORISM CAMPAIGN

As the Ninth Circuit recognized, "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself." Pet.App.64a. Yet Plaintiffs have not alleged that Defendants provided any assistance, much less substantial assistance, to the commission of the Reina attack. Here, there is not even an allegation that any of the individuals who perpetrated or directed the Reina attack *ever* used Defendants' platforms. That deficiency is fatal to Plaintiffs' claim. The Ninth Circuit's contrary holding that, under *Halberstam*, the "relevant 'principal violation'" a defendant must assist can be "ISIS's broader campaign of terrorism" or "enterprise," Pet.App.53a-54a; Pet.App.63a, contravenes the plain text of the statute, *Halberstam*, and common law principles.

A. Section 2333(d) Requires That A Defendant Substantially Assist The "Act Of International Terrorism" That Gave Rise To The Claim

Congress expressly provided that *Halberstam*'s "legal framework" should govern secondary liability

under Section 2333(d). 130 Stat. at 852 (§2(a)(5)). *Halberstam*'s first element requires that "the party whom the defendant aids must perform a *wrongful act* that causes an injury," and its third element requires that a defendant "substantially assist *the principal violation*." 705 F.2d at 477 (emphases added). In the context of Section 2333, the "wrongful act" and the "principal violation" that a defendant must substantially assist is the specific "act of international terrorism" that proximately caused the plaintiff's injury and thus gave rise to the claim.

Start with the statutory text, which "controls the definition of conduct covered by" a statute. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175 (1994). Section 2333(a) allows U.S. nationals injured "by reason of *an act of international terrorism*" to bring suit and recover treble damages. 18 U.S.C. §2333(a) (emphasis added). Subsection (d) then provides that "[i]n an action *under subsection (a)* for an injury arising from *an act of international terrorism* committed, planned, or authorized by" a designated foreign terrorist organization, secondary liability may be asserted against "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*." *Id.* §2333(d)(2) (emphases added).

That structure, which closely tracks *Halberstam*'s framework, establishes two things. First, subsection (a) is coextensive with *Halberstam*'s first element: a plaintiff must identify the "act of international terrorism" (*i.e.*, the "wrongful act") that gives rise to the claim. Second, by situating secondary liability "[i]n an

action under subsection (a)" and repeating "an act of international terrorism" three times, subsection (d) makes clear that the "act of international terrorism" that provides an actionable claim is the "principal violation" the defendant must assist. There is no other tortious conduct that Section 2333 deems actionable. As the district court noted, the statutory language "does not refer to assisting a foreign terrorist organization generally or such an organization's general course of conduct." Pet.App.174a. Rather, "the injury at issue must have arisen from '*an act* of international terrorism,'" and the secondary actor must assist "the principal tortfeasor in committing '*such an act* of international terrorism.'" *Id.*

That makes eminent sense given that "abet" means "to help or encourage someone to do something wrong or illegal," not merely to aid a general course of conduct. *Cambridge English Dictionary* (2022). Black's Law Dictionary defines "aid and abet" similarly: "[t]o facilitate the commission of a crime, or to promote its accomplishment." Aid and abet, *Black's Law Dictionary* (11th ed. 2019). It accordingly is not enough to assist a wrongful *actor*, like ISIS, in some general way; an aider-abettor instead must assist the act that injured the plaintiff—under Section 2333(d), the particular "act of international terrorism."

That concludes the statutory inquiry in this case because Plaintiffs conceded the "act of international terrorism" giving rise to their claim is the Reina attack. Pet.App.64a. Thus, the Reina attack is the "principal violation" that Defendants must have substantially assisted to be secondarily liable under Section 2333(d).

Even absent Plaintiffs' concession, the result is the same because "an act of international terrorism" is a discrete tortious act, not an amorphous and non-actionable terrorism enterprise. As this Court explained, "Congress's decision to use the indefinite article," such as "an," can provide evidence that Congress meant "a discrete … thing." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1481 (2021). Notably, moreover, the statute uses an "act" as the unit of international terrorism. Had Congress intended to impose liability for assisting a terrorism "campaign" or "enterprise," it could have used either of those words instead, or left it as "international terrorism," which is a defined term under the ATA and arguably encompasses a terrorism campaign. *See* 18 U.S.C. §2331(1).

The broader statutory scheme reinforces this construction. In contrast to Section 2333(d)'s focus on "an act of international terrorism," another provision in the same chapter, Section 2339B, establishes criminal liability for "knowingly provid[ing] material support or resources to a foreign terrorist organization." 18 U.S.C. §2339B(a)(1). As the district court recognized, had Congress intended to impose secondary liability for aiding and abetting "a foreign terrorist organization generally," it "could easily have used language similar" to Section 2339B. Pet.App.173a. This Court "must give effect to … Congress' choice to include limiting language" in Section 2333(d) that is not in Section 2339B, *Gallardo by and through Vasallo* v. *Marstiller*, 142 S. Ct. 1751, 1759 (2022), rather than transform Section 2333(d) "into a statute that provides for liability for aiding/abetting … a foreign terrorist organization generally," Pet.App.173a (district court opinion). The Ninth Circuit impermissibly took the latter course, by extend-

ing liability to a defendant that assisted a terrorist organization without assisting the attack that injured the plaintiff.

B. Common Law Principles Confirm That Aiding And Abetting Requires Assisting The Principal Tort

1. A fundamental principle of the common law, as reflected in *Halberstam*, is that to be liable for aiding and abetting, a secondary actor must assist in the principal tort that gives rise to the claim, not generalized wrongdoing that is not actionable. Under Section 2333, that means a defendant must assist the "act of international terrorism" that proximately caused the plaintiff's injury because that is the only tortious conduct actionable under the statute.

The Restatement (Second) of Torts, on which *Halberstam* relied, 705 F.2d at 477, explains that a secondary actor may be liable "[f]or harm … to a third person" resulting "from the *tortious conduct* of another" if the secondary actor "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement" to the principal "*so to conduct himself*." *Restatement (Second) of Torts* §876(b) (Oct. 2022 Update) (emphases added). Thus, a defendant must assist the "tortious conduct" that caused the plaintiff's injury. It is not enough to have generally assisted the perpetrator or to have aided generalized wrongdoing that is not actionable. Indeed, the civil aiding-and-abetting doctrine draws from its criminal analog, *Central Bank*, 511 U.S. at 181, under which a person may be held "responsible for a crime he has not personally carried out if he helps another to *complete its commis-*

sion," *Rosemond* v. *United States*, 572 U.S. 65, 70 (2014) (emphasis added). As the Restatement explains, a "defendant's encouragement or assistance" must be a "substantial factor in *causing the resulting tort*." *Restatement (Second) of Torts* §876 cmt. d (emphasis added).

Courts have long applied those principles and assessed the defendant's aid to the principal tort that gave rise to injury. For example, in *Duke* v. *Feldman*, 226 A.2d 345 (Md. 1967), discussed in *Halberstam*, 705 F.2d at 483, the court held that a defendant could not be held liable for aiding and abetting an assault committed by her husband because, although she "asked her husband to try to get their money back" from the plaintiff, "she did not say or intimate that he should assault [the plaintiff] in order to do so." 226 A.2d at 347-348. The court also found it insufficient that the defendant "drove her husband away from the scene after the assault" because there was no evidence that she did so as "part of a design to perpetrate the assault." *Id.* at 348. The court noted that even if she had helped him leave the scene "in order to keep him from being injured, that would not make her liable for the assault without evidence that she aided or abetted him *in the commission of the assault*." *Id.* (emphasis added); *cf. Keel* v. *Hainline*, 331 P.2d 397, 400 (Okla. 1958) (defendant liable because he "aided, abetted or encouraged *the wrongful activity* of throwing wooden erasers at" persons other than the plaintiff, "which *resulted in the injury*" to the plaintiff (emphases added)) (discussed in *Halberstam*, 705 F.2d at 482).

Other federal aiding-and-abetting statutes incorporating common law principles have likewise focused on

assistance in the principal tortious act. Using language similar to Section 2333(d), Section 20(e) of the Securities Exchange Act permits the SEC to assert liability against "any person that knowingly or recklessly provides substantial assistance to another person in violation of" certain securities laws. 15 U.S.C. §78t(e). Courts of appeals have uniformly interpreted that provision to require that the SEC show both "the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party" and "substantial assistance by the aider and abettor *in the achievement of the primary violation*." *Gonnella* v. *SEC*, 954 F.3d 536, 550 (2d Cir. 2020) (emphasis added); *see SEC* v. *Life Partner Holdings, Inc.*, 854 F.3d 765, 778 (5th Cir. 2017); *SEC* v. *Goble*, 682 F.3d 934, 947 (11th Cir. 2012).

In *Gonnella*, for example, the Second Circuit concluded that the defendant had substantially assisted "his employer's violations of the books and records provisions" because he failed to properly document his trades "and thus made the books inaccurate." 954 F.3d at 550. Likewise, in *Goble*, the Eleventh Circuit upheld aiding-and-abetting liability because the defendant "knew his actions surrounding … [a] sham money market transaction would violate the books and records requirements and the [SEC's] Customer Protection Rule" and yet "substantially assisted in the violation of these regulations." 682 F.3d at 947. And in *SEC* v. *Fehn*, the Ninth Circuit upheld aiding-and-abetting liability because the defendant participated in "editing the Form-10-Q's" containing inaccurate statements, "and because he failed to properly advise" his clients "of the material omissions in the Form 10-Q's, instead submitting those forms to the SEC for filing." 97 F.3d 1276, 1293-1294

(9th Cir. 1996). All attached liability to assisting commission of the primary violation.

The same rule was applied in securities cases predating enactment of Section 20(e) on which *Halberstam* relied in formulating its aiding-and-abetting framework, 705 F.2d at 477-478.[9] Those cases made clear that a defendant is not liable for aiding and abetting unless he assisted the statutorily defined and independently actionable principal violation from which the plaintiff's claim arose. For example, in *Landy* v. *Federal Deposit Insurance Corp.*, 486 F.2d 139 (3d Cir. 1973), cited in *Halberstam*, 705 F.2d at 477-478 & n.8, 485, the Third Circuit rejected aiding-and-abetting liability in part because the defendants "were not involved in any manner with the sale of the … shares" underlying the plaintiffs' claims, "or the actual making of any misrepresentations" about those particular sales. 486 F.2d at 163. It was insufficient that the defendants had allegedly assisted the principal tortfeasor by executing *other* transactions, because those activities lacked a "close[] connection" with the sales that actually injured the plaintiffs. *Id.* at 159-162.

2. *Halberstam* reflects the same common law principle. *Halberstam* addressed whether Linda Hamilton was liable for aiding and abetting a burglary and resulting murder committed by her live-in partner, Bernard Welch, who committed a string of burglaries over several years—a scenario that is, "to put it mildly, dissimi-

[9] Section 20(e) was enacted in response to *Central Bank*, which held that the Securities Exchange Act in effect at the time did not provide an implied private right of action for aiding-and-abetting liability. 511 U.S. at 191.

lar to the one at issue here," Pet.App.48a (*Gonzalez* portion). The D.C. Circuit resolved two issues in that case: "what kind of activities of a secondary defendant (Hamilton) will establish vicarious liability for *tortious conduct* (burglaries) by the primary wrongdoer (Welch), and to what extent will the secondary defendant be liable for *another* tortious act (murder) committed by the primary tortfeasor while pursuing the underlying tortious activity." 705 F.2d at 476 (emphases added). The first issue—whether Hamilton's assistance made her liable for Welch's "tortious conduct (burglaries)"—focused on what the court identified as the relevant principal violation: there, a series of burglaries Welch had committed, each constituting actionable tortious conduct. The second issue about the extent of liability was entirely different; it involved the corollary common law principle that when a secondary actor has substantially assisted the principal tort, the secondary defendant may also "be liable for other reasonably foreseeable acts done in connection" with the principal tort. *Id.* at 484.

Addressing the first issue, *Halberstam* held that Hamilton had aided and abetted Welch's burglaries over five years, a "long-running burglary enterprise." 705 F.2d at 488. As the court noted, Hamilton provided "invaluable service to the enterprise as banker, bookkeeper, recordkeeper, and secretary." *Id.* at 487. Hamilton "typed transmittal letters" for sales of Welch's stolen goods and conducted other "secretarial work" for Welch. *Id.* at 475. She also "kept inventories of antiques sold" and maintained records on "asymmetrical transactions" in which buyers of Welch's goods would pay her, but "no money [was] going out to the sellers from whom Welch had supposedly bought the

goods." *Id.* Notably, the court distinguished such burglary-related assistance from generalized aid that is distinct from the principal tort, like performing "normal spousal support activities" and "household chores." *Id.* at 488. The D.C. Circuit found it a permissible inference that Hamilton "knew she was assisting Welch's wrongful acts"—*i.e.*, each of Welch's burglaries—and deemed her "assistance … substantial enough to justify liability on an aider-abettor theory." *Id.* at 487-488.

After holding Hamilton liable for the burglary at issue, the D.C. Circuit addressed the second issue regarding "the scope of [Hamilton's] liability" for "another tortious act"—the murder that occurred in the course of that burglary. 705 F.2d at 476, 488. 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. *Id.* at 488.

Halberstam thus recognized the unremarkable proposition that where a secondary actor who substantially assists a tortious act (each and every burglary Welch committed), that defendant may also be liable for a foreseeable and independently tortious act (murder). But *Halberstam* did not hold that a secondary actor can be held liable for generalized assistance to an actor that subsequently commits an actionable tort, or that a secondary actor can be held liable for any foreseeable consequence of such generalized assistance.

C. The Ninth Circuit Erroneously Construed Section 2333(d)

The Ninth Circuit disregarded both the statutory text and the foregoing authorities in holding that a defendant need assist only a "broader campaign of terrorism" or "enterprise" to be liable for aiding and abetting under Section 2333(d). Pet.App.53a-54a; Pet.App.62a-63a. The court's principal analysis on this issue appears in the *Gonzalez* portion of its opinion. Pet.App.52a-54a. Initially, the court observed correctly that, under *Halberstam*'s third element, the plaintiff must "show the defendant knowingly and substantially assisted the act of [international] terrorism that injured the plaintiff." Pet.App.52a. And in the *Taamneh* portion of its opinion, the court acknowledged, also correctly, that "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack." Pet.App.64a. In a bizarre turn, however, the Ninth Circuit did not examine whether Plaintiffs plausibly alleged that Defendants aided and abetted the Reina attack. Instead, the court concluded that under its reading of *Halberstam*, it "consider[ed] ISIS's broader campaign of terrorism to be the relevant 'principal violation'" that the defendant must have substantially assisted. Pet.App.54a (*Gonzalez* portion); *see* Pet.App.63a (*Taamneh* portion noting "the act encouraged is ISIS's terrorism campaign").

That construction cannot stand. Under both the plain text of Section 2333 and the *Halberstam* framework, the liability question must be whether the defendant substantially assisted the principal tort that gave rise to the claim. Because "the 'act of international terrorism' [Plaintiffs] allege is the Reina Attack,"

Pet.App.64, Defendants could be liable under the statute only if they substantially assisted the Reina attack—the only actionable tort under Section 2333. But the court construed the "principal violation" under *Halberstam* to have a different meaning, capable of including "ISIS's broader campaign of terrorism" or "enterprise." Pet.App.53a-54a; Pet.App.62a-63a. That directly contradicts the statute's focus on "an act" and Congress's intent to make Section 2333 aiding-and-abetting liability "function" the same way as aiding-and-abetting liability under *Halberstam*, 130 Stat. at 852 (§2(a)(5)).

The Ninth Circuit also misapprehended *Halberstam*'s discussion about why Hamilton's assistance to Welch's burglaries made her liable for the murder. The Ninth Circuit focused solely on the corollary principle in stating that "the extent of liability under aiding and abetting encompasses foreseeability, such that a defendant 'who assists a tortious act may be liable for other foreseeable acts done in connection with it.'" Pet.App.53a. The Ninth Circuit reasoned that, under that principle, Hamilton was liable for Welch's murder because "the killing 'was a natural and foreseeable consequence of the activity Hamilton helped Welch to undertake,'" which, in the Ninth Circuit's view, was "Welch's illegal burglary enterprise." Pet.App.54a. From that, the Ninth Circuit concluded that the terrorist attack or attacks at issue (the "Paris Attacks" in *Gonzalez* and the Reina attack here) was a "foreseeable result of ISIS's broader campaign of terrorism," and therefore it "consider[ed] ISIS's broader campaign of terrorism to be the relevant 'principal violation.'" *Id.*

That is incorrect for three reasons. First, insofar as the Ninth Circuit equated *Halberstam*'s use of the word "enterprise" with a terrorism enterprise in construing the latter to be the principal violation, not all enterprises are alike. The "burglary enterprise" in *Halberstam* consisted of a series of burglaries—each of which was individually and independently tortious. In contrast, the Ninth Circuit used "campaign" or "enterprise" to refer to *all* of ISIS's wide-ranging activities.[10] But while such general assistance to ISIS could be covered by the material-support statute, Section 2339B, *supra* pp.25-26, ISIS's disparate activities writ large are not independently actionable in a suit under Section 2333. The only principal violation Section 2333 deems actionable is the specific "act of international terrorism"—the Reina attack—that proximately caused the plaintiff's injury.

Second, *Halberstam* used foreseeability solely to define the extent of liability that could flow from assisting the actionable "principal violation," not to define the "principal violation" itself. Under *Halberstam*'s foreseeability analysis, a secondary actor that knowingly and substantially assists "an act of international terrorism" under Section 2333 may also be liable for a foreseeable consequence of that act. For example, a defendant who provided the guns that the defendant

[10] Indeed, in interpreting the "principal violation," the Ninth Circuit chose "ISIS's broader campaign of terrorism" over the "Paris Attacks," which the court defined as a "series of attacks perpetrated by ISIS in Paris" on a certain date. Pet.App.5a; Pet.App.53a-54a. The Ninth Circuit made clear, in other words, that ISIS's terrorism campaign that Defendants must have substantially assisted is ISIS's general operation.

knew would be used by others in committing a terrorist shooting may be held liable for the property damage that foreseeably resulted from the shooting. Or that same defendant may be held liable for injuries caused by the terrorist perpetrator during his escape after the shooting, as an escape attempt is foreseeable following a violent crime. That is how the common law cases have used foreseeability—*i.e.*, to determine the extent of liability for aiding and abetting the principal tort.[11] *Halberstam* does not hold that a secondary actor can be held liable for assisting some generalized wrongdoing that Section 2333 does not make actionable, on the backwards theory that the *injurious act* (the Reina attack) was foreseeable from that general wrongdoing (ISIS's terrorism campaign).

Third, the Ninth Circuit's reading renders incoherent its analysis of the six *Halberstam* factors for determining substantiality of assistance. For example, the court acknowledged that Defendants were not present "at the time of the tort" because they "were not present during the Reina Attack," but for other factors, the court treated "ISIS's terrorism campaign" as the relevant "act encouraged." Pet.App.63a-64a.

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[11] *American Family Mutual Insurance Co.* v. *Grim*, 440 P.2d 621 (Kan. 1968), which *Halberstam* discussed, 705 F.2d at 482-483, is illustrative. There, a boy who broke into a church with friends at night to steal sodas from the kitchen was liable for the fire caused by a torch his companions used. As the court explained, the boy had assisted his friends' "tortious act" (presumably trespassing and burglary), and "the need for adequate lighting" "to reach" the kitchen at night "could reasonably be anticipated." *Id.* at 626.

Under the correct reading of both Section 2333's text and *Halberstam*, Plaintiffs' allegations indisputably fail. Plaintiffs do not allege that Defendants helped commit the Reina attack at all, much less substantially. Plaintiffs do not even allege that Masharipov, Shuhada, or any ISIS adherent used any of Defendants' services in committing the Reina attack. Indeed, Plaintiffs' counsel has asserted that this case "has nothing to do with" "whether the perpetrator ever used Google, Facebook, or Twitter for any purpose." Dist. Dkt. 74, at 6. Plaintiffs' failure to allege that Defendants substantially assisted in committing the Reina attack requires reversal.

II. SECTION 2333(d) REQUIRES, AT A MINIMUM, THAT DEFENDANTS KNEW OF SPECIFIC ACCOUNTS THAT SUBSTANTIALLY ASSISTED THE REINA ATTACK AND THAT NOT BLOCKING THOSE ACCOUNTS WOULD SUBSTANTIALLY ASSIST SUCH AN ATTACK

The common law has long considered the "knowledge element … critical" to aiding-and-abetting liability, *Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991), because without it, aiding and abetting "would become an amorphous snare for guilty and innocent alike," *Woodward*, 522 F.2d at 97, effectively "indistinguishable from simply aiding," *Camp*, 948 F.2d at 459.

The text of Section 2333 and *Halberstam* give effect to that principle by requiring that a defendant know she was providing the particular substantial assistance at issue. Adherence to that requirement is especially important where (as here) a defendant is accused of merely failing to prevent misuse of its widely available, ordinary services. That means, at a mini-

mum, that Defendants must have known both of specific accounts that substantially assisted the Reina attack and that not blocking those accounts would substantially assist such an attack. The Ninth Circuit, however, effectively transformed the statute's knowledge requirement into something akin to recklessness or negligence—requiring only general awareness that ISIS adherents were among the billions using Defendants' services, notwithstanding that Defendants prohibited and regularly removed terrorist accounts and posts.

Under the correct knowledge standard, Plaintiffs could not satisfy even the first part of that requirement—*i.e.*, alleging that Defendants knew of and failed to block specific accounts used by ISIS that substantially assisted the Reina attack. Indeed, Plaintiffs concede that Defendants "rarely knew about 'specific' terrorist accounts or posts" at all, Opp. 17, and do not allege that Defendants knew about, yet failed to block, any account or post that was used to plan or commit any terrorist attack. The Amended Complaint would thus fall short even if, as the Ninth Circuit incorrectly held, *see supra* Part I, the "act of international terrorism" that must have been substantially assisted is ISIS's general terrorism enterprise.

A. Statutory Text, *Halberstam*, And Common Law Principles Require Specific Knowledge Of The Alleged Substantial Assistance

1. Section 2333(d) imposes secondary liability on "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." 18 U.S.C. §2333(d)(2) (emphasis added). As to

aiding and abetting, the requisite scienter ("knowingly") directly modifies the prohibited act ("providing substantial assistance"). Under the statutory text, liability therefore turns on whether a defendant both knowingly undertook the specific conduct that comprised substantial assistance to the act of international terrorism (for a defendant must knowingly "provid[e]" substantial assistance) and understood that its conduct would substantially assist such an act (for the assistance must be knowingly "substantial"). A defendant cannot be liable based on awareness of generalized information divorced from the alleged substantial aid. Allegations of that sort would suggest negligence or at most recklessness, which encompasses "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47, 68 (2007).

Halberstam confirms this straightforward reading. *Halberstam*'s third element aligns with the statutory text, thereby reinforcing the construction just explained. As *Woodward*—from which *Halberstam* derived the third element, 705 F.2d at 477-478 & n.8—explained, that element requires a defendant to "knowingly render substantial assistance." *Woodward*, 522 F.2d at 97. And *Halberstam*'s second element requires specificity in scienter beyond mere "knowledge of the wrong's existence," since it emphasizes awareness of the "role" the defendant purportedly played in the illegal activity. 705 F.2d at 478 n.8; *see Woodward*, 522 F.2d at 95.

Halberstam's application of these scienter requirements likewise establishes that a defendant must know its specific actions constituted substantial assis-

tance. The D.C. Circuit identified numerous facts establishing Hamilton's particularized knowledge of the assistance she was providing to Welch's burglaries. For example, "[w]ith Hamilton's knowledge, Welch installed a smelting furnace in the garage and used it to melt gold and silver" he had stolen into bars, which he then sold to refiners. *Halberstam*, 705 F.2d at 475. Hamilton also performed various "secretarial work," including depositing checks that the "buyers of Welch's goods made … payable to her" in "her own bank accounts." *Id.*

The D.C. Circuit found it a permissible inference, therefore, that Hamilton "knew about and acted to support Welch's illicit enterprise"; "Hamilton's assistance was knowing" and "evidence[d] a deliberate long-term intention to participate in an ongoing illicit enterprise"; and "Hamilton's continuous participation reflected her intent and desire to make the venture succeed." 705 F.2d at 488. In short, the facts showed that Hamilton knowingly undertook specific actions that provided "invaluable" (and substantial) assistance to Welch's ongoing burglaries and that Hamilton knew her aid would substantially advance Welch's nighttime property crimes, including the one that led to Halberstam's murder. *Id.* at 487-488.

2. Hamilton was a classic aider-abettor whose knowledge was evident from having closely participated in the principal wrong—she provided "services in an unusual way under unusual circumstances." *Halberstam*, 705 F.2d at 487. But where (as here) a defendant is accused of merely failing to prevent misuse of its widely available, ordinary services, courts have been especially reluctant to assign culpability and have

required heightened scienter. That scienter standard, at a minimum, requires that a defendant knew of the particular uses of its services that constituted substantial assistance in committing the actionable tort.

Start with the securities cases that *Halberstam* relied on in synthesizing the elements of aiding-and-abetting liability. Those pre-*Central Bank* decisions, which inferred aiding-and-abetting liability from the common law, required heightened scienter for claims premised on routine business transactions. In *Woodward*, for example, the Fifth Circuit explained that where "the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find … liability without clear proof of intent to violate the securities laws." 522 F.2d at 97. In *Camp*, the Eighth Circuit similarly held 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." 948 F.2d at 459. As the court explained, "aiding and abetting not only requires assistance, but also knowledge of a wrongful purpose" because the word "abet" inherently includes such knowledge. *Id.* Thus, "[k]nowingly engaging in a customary business transaction which incidentally aids the violation of securities laws, without more, will not lead to liability." *Id.* The Eighth Circuit held that a defendant's business conduct at issue was "not so atypical as to make [it] suspect" and found the requisite knowledge lacking. *Id.* at 462-463; *see also Investors Research Corp.* v. *SEC*, 628 F.2d 168, 178 n.61 (D.C. Cir. 1980) (guarding against extending liability to "customary business activities"), *cited in Halberstam*, 705 F.2d at 477.

Moreover, courts have demanded heightened scienter to establish culpability where the alleged assistance is a *failure to act*.[12] The Restatement (Second) of Torts explains that "liability for non-feasance was slow to receive any recognition in the law" and "is still largely confined to[] situations in which there was some special relation between the parties." *Restatement (Second) of Torts* §314 cmt. c. In *Woodward*, the court noted that, absent a special obligation to prevent harm (a duty that is not alleged in the present case), a failure to act can support civil aiding-and-abetting liability "only if scienter of the high 'conscious intent' variety can be proved." 522 F.2d at 97. In *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793 (3d Cir. 1978), also cited in *Halberstam*, 705 F.2d at 485, the Third Circuit noted that courts have generally declined to extend secondary liability "where the secondary defendant's conduct is nothing more than inaction"; inaction "may provide a predicate for liability [only] where the plaintiff demonstrates that the aider-abettor consciously intended to assist in the perpetration of a wrongful act." *Id.* at 800. Other courts have observed the same. *See SEC* v. *Coffey*, 493 F.2d 1304, 1317 (6th Cir. 1974) ("Inaction may be a form of assistance … only where it is shown that the silence of the accused aider and abettor was consciously intended to aid the securities law violation."); *Schatz* v. *Rosenberg*, 943 F.2d 485, 496 (4th Cir. 1991) (similar).

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[12] In *Halberstam*, the court discussed but did not decide whether "silence or inaction" may constitute substantial assistance. 705 F.2d at 485 n.14.

Although these cases require intent, whereas Section 2333(d) speaks of knowledge, they illustrate the rule that the "scienter requirement [for aiding-and-abetting liability] scales upward when activity is more remote," such that the remote party must "know when and to what degree he is furthering" the primary wrong. *Woodward*, 522 F.2d at 95. Thus, the scienter standard must "scale up" for a defendant accused of merely failing to prevent misuse of its widely available, ordinary services, to require an especially robust showing that the defendant knew its assistance was substantial. Such a defendant cannot be liable for aiding and abetting unless (at a minimum) the defendant knowingly refrained from taking specific actions it knew would enable the wrongdoer to receive substantial assistance in committing the crime or actionable tort. Here, that at least requires plausible allegations that Defendants knew ISIS was operating specific accounts that substantially assisted the Reina attack and also knew that not blocking those accounts would substantially assist such an attack.[13]

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[13] A similar knowledge requirement has been applied in trademark and copyright contributory liability cases that involve, as in this case, providers of widely available services or products that are merely aware of general wrongful uses of those services or products. In *Tiffany (NJ) Inc.* v. *eBay Inc.*, 600 F.3d 93 (2d Cir. 2010), for example, the Second Circuit explained that, barring intentional inducement, contributory trademark infringement requires "a service provider" to have "more than a general knowledge or reason to know that its service is being used to sell counterfeit goods." *Id.* at 107. Rather, "[s]ome contemporary knowledge of which *particular* listings are infringing or will infringe in the future is necessary." *Id.* (emphasis added); *see also Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 440 n.19 (1984) (noting in dicta that the standard for contribu-

B. The Ninth Circuit Misconstrued The Statutory Knowledge Requirement

The Ninth Circuit's construction of Section 2333(d)'s knowledge requirement cannot be squared with either the statutory text or the foregoing authorities. Plaintiffs seek to hold Defendants liable because ISIS evaded Defendants' policies and misused Defendants' ordinary services. They argue that Defendants' services assisted ISIS as a "result of [their] inaction," Opp. 14—*i.e.*, Defendants' alleged failure to take "meaningful" or "aggressive" steps to prevent ISIS's use of the platforms, Pet.App.62a. Under that theory of liability, Defendants are liable only if they at least knew of the specific, substantial assistance they allegedly provided to "the act of international terrorism." In this case that act was the Reina attack. Therefore, Defendants must have knowingly failed to block the particular ISIS accounts and posts that allegedly substantially assisted in committing the Reina attack and also have known that failure to block them would substantially assist such an attack. Even were this Court to hold (*contra* Part I) that Defendants need only have assisted ISIS's general terrorism "enterprise," Defendants would still (at a minimum) need to have knowingly

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tory trademark infringement requires (absent intentional inducement) that an accused contributory infringer "supply its products to *identified individuals known by it* to be engaging in continuing infringement") (emphasis added). In *BMG Rights Management (US) LLC* v. *Cox Communications, Inc.*, 881 F.3d 293 (4th Cir. 2018), the Fourth Circuit noted that "[s]elling a product with both lawful and unlawful uses suggests an intent to cause [copyright] infringement only if the seller knows of *specific* instances of infringement, but not if the seller only *generally* knows of infringement." *Id.* at 311.

failed to block the particular accounts that allegedly substantially assisted ISIS's campaign of terror and also have known that failure to block them would substantially assist such a campaign.

The Ninth Circuit required no such knowledge. It held *Halberstam*'s scienter elements satisfied by the allegation that Defendants "were generally aware," through third-party reports, that "ISIS used defendants' platforms to recruit, raise funds, and spread propaganda in support of [its] terrorist activities," Pet.App.61a-62a, "but have refused to take meaningful steps to prevent that use," Pet.App.62a. Those allegations evoke at most standards of recklessness or negligence rather than knowledge. *See Safeco*, 551 U.S. at 68 (recklessness includes "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known'"). They do not indicate knowledge of any "role" Defendants played in the illegal activities, much less that Defendants *knowingly* provided specific and substantial assistance.

That is particularly so because Plaintiffs acknowledge not only that Defendants lacked "any intent to further or aid ISIS's terrorist activities," but also that Defendants' "policies prohibit posting content that promotes terrorist activity or other forms of violence" and that Defendants "regularly removed ISIS content and ISIS-affiliated accounts." Pet.App.64a-65a. As the Eighth Circuit noted in *Camp*, a defendant's lack of knowledge may be "demonstrated by the actions he took upon discovering" the relevant conduct by the primary tortfeasor. 948 F.2d at 463. Defendants' regular removal of ISIS accounts and content, including Twitter's undisputed removal of many ISIS-related ac-

counts created on its platform, JA149, supports their lack of scienter. Indeed, Plaintiffs do not allege that Defendants knew about yet failed to block any account or post that was used to plan or commit the Reina attack or any other terrorist attack. Plaintiffs also concede that Defendants "*rarely* knew about 'specific' terrorist accounts or posts," Opp. 17 (emphasis added)—underscoring, at the very least, that Defendants lacked knowledge of *substantial* assistance.

In sum, where Defendants worked to rid their platforms of ISIS's usage but allegedly fell short, Defendants did not knowingly provide substantial assistance just because they were aware of third-party reports that ISIS adherents were still misusing their widely available, ordinary services. It certainly is not the case here, as it was with Hamilton in *Halberstam*, that Defendants "knew about and acted to support" ISIS's terrorism activities, had "a deliberate … intention to participate" in those activities, or shared "intent and desire to make" those activities succeed. 705 F.2d at 488.

C. Decisions From Other Courts Of Appeals Confirm The Ninth Circuit's Error

No other court of appeals has permitted ATA aiding-and-abetting liability for having failed adequately to prevent terrorists from misusing ordinary services. Although the decisions in those cases have not fully explicated the contours of the scienter required by Section 2333(d), they illustrate that other courts have been careful to limit ATA aiding-and-abetting liability where only ordinary business services are involved.

In *Siegel* v. *HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019), for example, the Second

Circuit rejected the argument that the defendants' "willingness to do business with Al Rajhi Bank despite their knowledge of its links to terrorism [was] sufficient to" make them liable for aiding and abetting under Section 2333(d). *Id.* at 219. In *Weiss* v. *National Westminster Bank, PLC*, 993 F.3d 144 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2866 (2022), the Second Circuit rejected ATA aiding-and-abetting liability where the defendant bank transferred funds to charities that it allegedly knew had ties to Hamas but the defendant did not know the funds were "for any terroristic purpose." *Id.* at 165-166.

When other courts of appeals have allowed an aiding-and-abetting claim under Section 2333(d), they have done so based on allegations that indicate far more specific knowledge than the general awareness of terrorists' misuse of ordinary services that the Ninth Circuit found adequate. In *Kaplan* v. *Lebanese Canadian Bank*, 999 F.3d 842 (2d Cir. 2021), for example, plaintiffs alleged that the defendant bank provided atypical banking services to specific customers whom the bank had "'actual knowledge … were integral constituent parts of Hizbollah'"—a "'fact'" that was "'openly, publicly and repeatedly acknowledged and publicized by Hizbollah.'" *Id.* at 850 (emphasis omitted). Plaintiffs further alleged that the defendant nonetheless gave those customers "special treatment, exempting them from submitting" necessary documentation for disclosing sources of cash deposits exceeding a certain amount. *Id.* That exceptional treatment allowed those customers to "circumvent[] sanctions imposed in order to hinder terrorist activity." *Id.* at 866. The Second Circuit found those allegations sufficient to establish scienter.

This case is markedly different, which underscores the Ninth Circuit's error. Unlike in *Kaplan*, Defendants are not alleged to have provided any atypical services to specific terrorist adherents that it knew were integral to a terrorist organization. Instead, Defendants are accused of merely falling short in preventing misuse of their ordinary, widely available services—allegations that are much closer to routine transactions at issue in *Siegel* and *Weiss*. The Ninth Circuit's holding that Plaintiffs nonetheless plausibly alleged scienter through general awareness of misuse of ordinary services is incorrect.

III. Reversal Is Necessary To Prevent Far-Reaching Harmful Consequences

Affirmance in this case would have devastating impacts, not just on a broad range of communications services, but on everyday businesses providing widely available goods or services and humanitarian organizations. Taken together, the Ninth Circuit's two erroneous holdings would impose Section 2333(d) liability on defendants that (1) lack "any intent to further or aid [an organization's] terrorist activities"; (2) affirmatively (if allegedly inadequately) work to avoid assisting terrorist organizations by "regularly" enforcing rules that bar terrorists' use of their services; and (3) have no role whatsoever in committing the attack that injured the plaintiffs. Pet.App.64a-65a. That could ensnare a wide range of ordinary businesses and humanitarian organizations in terrorism liability and treble damages, or at least in burdensome discovery and reputational harm. The Court should reject a construction of Section 2333(d) that would produce practical harms Congress never intended.

The consequences for general-purpose communications services are particularly worrisome. Under the decision below, a plaintiff need allege only that the defendant was generally aware its vast user base included adherents of a terrorist organization (who were not the perpetrators of the attack at issue) and that such use allowed the terrorist organization to grow—even if the defendant regularly removed terrorist accounts and content.

That is not a tenable scope of liability. Plaintiffs may recover damages under Section 2333 in suits "commenced within 10 years after the date the cause of action accrued." 18 U.S.C. §2335(a); *see* Pub. L. No. 112-239, §1251, 126 Stat. 1632, 2017 (2013) (extending the statute of limitations from four years to ten years). That unusually long period could cover countless lawsuits for communications services' alleged past failure to adequately remove terrorism-related content, thereby threatening precisely the sort of "seemingly boundless litigation risks" that courts have guarded against in interpreting Section 2333(a). *Fields*, 881 F.3d at 749; *see Crosby* v. *Twitter, Inc.*, 921 F.3d 617, 625 (6th Cir. 2019). As one court explained with respect to Section 2333(a), the "highly interconnected" nature of social media, the Internet, and "modern economic and social life" might mean that certain uses of Defendants' services cause distant "ripples of harm," but "[n]othing in § 2333 indicates that Congress intended to provide a remedy to every person reached by these ripples." *Fields*, 881 F.3d at 749; *see Crosby*, 921 F.3d at 625.

Nor do the Ninth Circuit's holdings limit liability exposure going forward. In determining aiding-and-abetting liability, this Court has cautioned against "the

uncertainty of the governing rules" that could lead to "excessive litigation" and settlement pressure. *Central Bank*, 511 U.S. at 188-189. But the Ninth Circuit's decision leaves uncertain what actual standard will be applied. Plaintiffs allege that Defendants "refused to take meaningful steps" to "proactively" prevent the use of their platforms by terrorist adherents, Pet.App.10a; Pet.App.62a, even while admitting that Defendants "regularly removed ISIS content and ISIS-affiliated accounts," Pet.App.64a. If those allegations can support aiding-and-abetting liability, it is unclear what Defendants must do to avoid an accusation of "inaction," Opp. 14, and thus terrorism liability, since a plaintiff will always be able to argue that a platform could have done *more* to eliminate harmful content. After all, upwards of 5,700 Tweets are posted per second, and perfect removal of all harmful content is not realistic. The Ninth Circuit's decision thus creates grave uncertainty about the prospect of liability whenever a plaintiff alleges the defendant was generally aware of terrorists' use of its ordinary services and the defendant could have more aggressively prevented such use. That makes the line between routine commercial activity and ATA aiding-and-abetting liability opaque.

This open-ended and extraordinarily broad scope of liability has profound consequences. As the U.S. Chamber of Commerce explained below, "[a]ny company that can be accused of having 'some terrorists' among its customer base could be alleged to be aiding and abetting terrorist activity simply by interacting with its customers—even if the company has no knowledge of any particular transactions with customers that it knows to be terrorists." U.S. Chamber of Commerce Amicus Br., C.A. Dkt. 74, at 12. The district

court similarly expressed concern that if Plaintiffs were to prevail, "anybody who lends any kind of assistance, does any kind of business with ISIS, knowing that [it] … solely exist[s] to conduct terrorist activities, would be liable for any activities thereafter conducted by ISIS[.]" Dist. Dkt. 74, at 31.

The impact would be especially severe on humanitarian organizations that operate in war-torn countries where terrorist organizations may be active. An aid organization that operates a hospital in a conflict zone might know that members of a terrorist organization are sometimes among the sick who seek care and yet might continue to treat all patients. That may well satisfy the Ninth Circuit's watered-down scienter and principal violation standards, on the theory that the aid organization is generally aware terrorist fighters are among the patients and it is assisting the terrorist group's general operation as a result.

Nonmedical aid could similarly be swept up. USAID-supported NGOs provide extensive humanitarian support in Syria—where ISIS has proclaimed its capital, JA74—including by providing monthly food assistance to more than 6.6 million Syrians.[14] And humanitarian organizations make significant "[e]fforts to prevent the diversion of aid and other support intended to benefit the civilian population by armed groups."[15] Under the Ninth Circuit's decision, however, these or-

[14] USAID, *Fact Sheet #11: Syria—Complex Emergency* (Sept. 30, 2022), https://tinyurl.com/2zf64twn.

[15] Mackintosh & Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* 12-13 (July 2013), https://tinyurl.com/mtstzjpp.

ganizations could nonetheless face ATA aiding-and-abetting liability and treble damages if the food or other aid they provided ended up assisting the general operation of a terrorist organization, despite having no connection to any terrorist attack that injured the plaintiff, based on allegations that the humanitarian organization was generally aware members of the terrorist group were among those who received aid.

All those impacts are compounded by the fact that the decision below makes it virtually impossible in such circumstances to prevail on a motion to dismiss and avoid burdensome discovery. That could force defendants to choose between, on one hand, proceeding with expensive and invasive discovery, and on the other, settling meritless cases. And even if a defendant were to settle, it may still be branded a supporter of terrorism and complicit in murders. For humanitarian organizations, such reputational harm can have serious "potential ramifications for funding" and jeopardize their operations.[16]

The ATA's text and structure, as well as the established principles of secondary liability, do not authorize such far-reaching aiding-and-abetting liability. That broad scope could also harm the United States' foreign relations, as explained in the brief of Respondents Supporting Petitioner. The Court should reverse the judgment below and hold that Section 2333(d) permits aiding-and-abetting liability only where the defendant "knowingly provid[ed] substantial assistance" in committing the "act of international terrorism" that injured the plaintiff.

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[16] *Id.* at 84.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2331(1)

§2331. Definitions

As used in this chapter—

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

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

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

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

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

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

* * *

18 U.S.C. §2333(a) & (d)

§2333. Civil remedies

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

* * *

(d) LIABILITY.—

(1) DEFINITION.—In this subsection, the term "person" has the meaning given the term in section 1 of title 1.

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

* * *

18 U.S.C. §2339B(a)(1)

§2339B. Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

* * *