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 OF *AMICI CURIAE* INSTITUTE OF INTERNATIONAL BANKERS, EUROPEAN BANKING FEDERATION, AND THE BANK POLICY INSTITUTE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICI CURIAE*

The Institute of International Bankers (the "IIB") is the only national association devoted exclusively to representing and advancing the interests of banking organizations headquartered outside the United States that operate in the United States. The IIB's membership consists of internationally headquartered banking and financial institutions from over 35 countries. In the aggregate, IIB members' U.S. operations hold more than $5 trillion—or one-fifth—of total banking assets; provide one-third of small-business loans; and finance more than one-third of infrastructure projects. The IIB frequently appears before this and other federal courts as *amicus curiae* in cases that raise significant legal issues related to banking, including those involving the scope of the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.* (the "ATA"), as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), codified at 18 U.S.C. § 2333(d).[1]

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 3,500 banks—large and small, wholesale and retail, local and international—employing about 2.6 million people.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that: no counsel for a party authored this brief in whole or in part; no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici* and their respective members or counsel made a monetary contribution to fund this brief's preparation or submission. Letters from Petitioners and Respondents giving blanket consent to the filing of *amicus curiae* briefs are on file with the Court.

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ nearly 2 million Americans, make nearly half of the nation's bank-originated small business loans and are an engine for financial innovation and economic growth.

It is important to *amici* and their members that federal courts faithfully apply the prerequisites for aiding and abetting liability under JASTA as established by Congress. Banks engaged in international transactions are among the most frequent targets of JASTA aiding and abetting claims. By effectively reading out of the statute two key express limitations on the cause of action Congress created—the requirements that the alleged aider and abettor acted knowingly and substantially assisted the commission of an act of international terrorism—the Ninth Circuit's decision threatens to subject banks to an explosion of treble-damage claims which, although insufficient under the statute's plain meaning, would nonetheless survive motions to dismiss under that court's precedent. As a result, banks would be unjustifiably branded as supporters of terrorism for engaging in routine and legitimate transactions with foreign banks and entities that are not terrorists and have not been designated by the executive branch as foreign terrorist organizations ("FTOs"); they would also be forced to defend themselves in protracted and expensive litigation, including especially costly and difficult discovery, much of which would have to proceed in challenging jurisdictions abroad. These consequences would inevitably pressure banks to settle claims despite their ultimate lack of merit.

Unless reversed by this Court, the decision below would also threaten international finance and trade, undercut a complex, comprehensive and carefully crafted federal regulatory regime prohibiting terrorism financing, and violate the constitutional separation of powers. *Amici* therefore urge this Court to reaffirm what Congress plainly intended: there can be no aiding and abetting liability under JASTA unless the defendant knowingly and substantially assisted the commission of an act of international terrorism.

INTRODUCTION AND SUMMARY OF ARGUMENT

To adequately plead an aiding and abetting claim under the ATA, as amended by JASTA, a plaintiff must allege not merely "an injury arising from an act of international terrorism" that was "committed, planned, or authorized by" an FTO designated by the Secretary of State, but also facts that, if proved, would establish that the defendant "aid[ed] and abet[ted], by knowingly providing substantial assistance" to the commission of that "act of international terrorism." 18 U.S.C. § 2333(d)(2). In the preamble to JASTA, Congress "found" that the analysis of secondary liability in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) "provides the proper legal framework for how such liability should function." Pub. L. 114-222, § 2(a)(5), 130 Stat. 852 (2016). That framework requires plaintiffs to plead and prove that: "(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 he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam*, 705 F.2d at 477. Congress enacted

such "express limitations on liability under the Anti-Terrorism Act" as "part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing" and "reflect[s] the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism." *Jesner v. Arab Bank, PLC,* 584 U.S. ___, ___, 138 S. Ct. 1386, 1405 (2018) (Kennedy, J., joined by Roberts, C.J. and Thomas, J.).

In disregard of JASTA's "express limitations on liability," *id.*, the Ninth Circuit sustained Respondents' complaint. In doing so, the court effectively eliminated the statute's *scienter* requirement and relieved Respondents of their obligation to plead that Petitioner's provision of routine services played a part in the "principal violation"—*i.e.*, the "act of international terrorism," 18 U.S.C. § 2333(d)(2)—that allegedly caused the injuries for which Respondents seek redress. The Ninth Circuit held that Respondents adequately pleaded both Petitioner's "general awareness" that it played a role in "ISIS's terrorism enterprise" and "knowing" assistance of the principal wrong (a shooting massacre at a nightclub in Istanbul), merely by alleging that (a) third parties had reported that ISIS supporters were among the users of Petitioner's social media platform and (b) Petitioner omitted to "tak[e] aggressive measures to restrict ISIS-affiliated content," and "refused to take meaningful steps to prevent" ISIS sympathizers' "use" of that platform. Pet. App. 62a. The Ninth Circuit, moreover, excused Respondents from the requirement that they allege facts connecting conduct by Petitioner to the terrorist attack at issue, instead accepting as sufficient Respondents' general assertion that Petitioner's "services . . . were central to ISIS's growth and expansion . . . over many years." Pet. App. 64a.

To be sure, Respondents allege that they were victims of a heinous crime. *Amici* deplore such attacks and all acts of terrorism; they condemn such horrific acts of violence and agree that perpetrators should not escape responsibility for their crimes. The grave nature of the principal wrongdoing alleged by Respondents, however, cannot justify expanding ATA aiding and abetting liability far beyond the limits expressly set by Congress when it enacted JASTA. Yet that is precisely what the Ninth Circuit did.

No fair reading of the statute permits plaintiffs to maintain such claims without pleading facts that, if proven, would establish both that the alleged aider and abettor "knowingly" assisted the "act of international terrorism" and that its conduct was linked to that particular act. The decision below, however, eviscerates these important statutory limitations. Under the Ninth Circuit's approach, for example, a bank transferring funds from the United States to a foreign bank in a routine transaction—*e.g.*, U.S. dollar clearing, *see Jesner*, 138 S. Ct. at 1394-95—could face treble damage liability for "aiding and abetting" alleged acts of international terrorism committed abroad by third persons unknown to it, such as customers of the defendant bank's foreign bank customer, or others still more remote from the defendant. Such liability could attach even though the defendant bank was unaware that the transfers it routinely executed actually contributed to the commission of an act of international terrorism—indeed, even if its conduct did not contribute to the act at issue. Vastly increasing legitimate financial institutions' litigation risk arising from transactions that are both commonplace and of tremendous importance to the global financial system could incentivize banks to exit or reduce their involvement in providing certain important financial services

and/or serving customers in certain regions of the world. The consequences would be baleful for the U.S. and global economy.

The Ninth Circuit's expansive approach to aiding and abetting liability under JASTA also undercuts "[t]he detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions" that "prohibit[] terrorism and terrorism financing." *Jesner*, 138 S. Ct. at 1405 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.). This includes other provisions of the ATA itself, the USA PATRIOT Act of 2001, several statutes authorizing the imposition of sanctions aimed at state sponsors of terrorism and specially designated nationals ("SDNs") listed by departments of the Executive Branch, and the copious series of complex regulations promulgated by the Department of the Treasury and administered by its Financial Crimes Enforcement Network ("FinCEN") and Office of Foreign Asset Control ("OFAC"). Banks are required to adhere strictly to this regulatory regime, including in their processing of international payments. To fulfill such obligations, banks have spent billions of dollars and employed thousands of compliance professionals. And although violations of these statutes and regulations can result in substantial financial penalties, they do not create a private right of action.

Cutting against the choices made by Congress and regulators in the Executive Branch, the Ninth Circuit's decision would drastically expand banks' potential liability in private treble damage actions—even for processing payments in full compliance with the political branches' regulatory scheme. Under the Ninth Circuit's approach, such compliance would be no defense; a jury would nonetheless be free to impose liability based on its retrospective judgment, unguided

by any articulable standards, that the bank could have taken still more "aggressive measures" or more "meaningful steps." Pet. App. 62a.

The conflict between the Ninth Circuit's expansion of aiding and abetting liability under JASTA and the federal legislative and regulatory scheme also raises serious separation of powers concerns. By inviting juries to impose such liability where Congress elected not to create it, the decision below flouts Justice Kennedy's admonition that it is for the "political branches" to "decide whether to expand the scope of liability" in this field. *Jesner*, 138 S. Ct. at 1405.

This Court should reverse the judgment below and reiterate that JASTA's prerequisites to aiding and abetting liability are to be scrupulously applied as written.

ARGUMENT

I. The Decision Below Exposes Banks to Unwarranted Treble Damage Litigation and Reputational Risk and Threatens to Harm International Finance and Trade.

A. Banks are Frequent Targets of JASTA Aiding and Abetting Claims.

More than one-half of all aiding and abetting claims asserted under JASTA have targeted banks—and in the majority of those cases, plaintiffs have sued members of *amici*.[2]

The allegations in such actions often fall into the following general pattern: (1) U.S. citizens were tragically killed or wounded by a terrorist attack, attributed

[2] Relevant data are presented in the Addendum on JASTA Aiding and Abetting Claims, *infra* at 1a-6a.

to an FTO, in a foreign country; (2) the terrorists perpetrating the attack allegedly received funds from or through banks or other entities in that country, and used such funds to plan or execute the attack; (3) the defendant bank, operating in the U.S., had engaged in routine, arm's-length transactions with such foreign banks or other entities; and (4) there was no evidence of any connection between the defendant bank's transactions and the terrorist attack, much less that the bank knew of any such connection. In addition, in many such cases the defendant bank and/or its affiliates had settled regulatory proceedings in the U.S. relating to sanctions violations concerning payments to the foreign country involved or entities in that country—without a specific connection between the bank's conduct and the terrorist attack at issue. In such circumstances, banks have repeatedly been sued under JASTA for allegedly aiding and abetting the commission of terrorist attacks—even though the transactions they executed were not connected to the acts of international terrorism and they did not know of any such connection.[3]

[3] *See, e.g., Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 862 (D.C. Cir. 2022) (petition for rehearing *en banc* filed Oct. 6, 2022); *Weiss v. National Westminster Bank, PLC*, 993 F.3d 144 (2d Cir. 2021); *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019); *O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446 (S.D.N.Y. Mar. 28, 2019).

B. The Ninth Circuit's Expansive Approach Improperly Authorizes Aiding and Abetting Claims Against Banks for Engaging in Routine International Banking Transactions, Although They Lacked the *Scienter* Required by JASTA and Did Not Provide Substantial Assistance to the Commission of an Act of International Terrorism.

The statutory limitations on JASTA's aiding and abetting cause of action on their face require dismissal of these sorts of claims, both because plaintiffs fail to allege that the bank defendants acted with the requisite *scienter* and because they fail to allege that anything the bank defendants did substantially assisted the commission of the actual terrorist attack at issue. As for *scienter*, JASTA requires both that the defendant provided "knowing" assistance to the principal violation and was "'aware' that, by assisting the principal, it [was] itself assuming a 'role' in terrorist activities." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018) (quoting *Halberstam*, 705 F.2d at 477). And "the substantiality inquiry for aiding and abetting" under JASTA "focuses on the relationship between the act of international terrorism and the secondary actor's alleged supportive conduct." *Linde*, 882 F.3d at 330, 331 (citing *Halberstam*, 705 F.2d at 488). That is, "liability is cabined to defendants who aid and abet 'an act of international terrorism.'" *Bernhardt*, 47 F.4th at 870 (quoting 18 U.S.C. § 2333(d)(2)).

The decision below, however, ignored these important statutory prerequisites, leaving banks and other legitimate businesses exposed to potential treble damage liability for aiding and abetting, *see* 18 U.S.C. § 2333(a), even though (i) they lacked the knowledge that JASTA

requires and (ii) their conduct did not substantially assist the commission of the relevant "act of international terrorism," *id*. § 2333(d)(2). Unless the Ninth Circuit's misinterpretations of JASTA are corrected, the kind of claims against banks described above, although facially insufficient, could survive motions to dismiss.

1. *The Ninth Circuit Improperly Read* Scienter *Out of JASTA.*

Respondents' factual allegations did not plausibly establish that Petitioner either knew it was providing assistance to any terrorist attack or was aware that by providing its social media platform to hundreds of millions of users around the world, including some who sympathized with or supported ISIS, it was somehow assuming a role in the "act of international terrorism" at issue. 18 U.S.C. § 2333(d)(2). In nevertheless holding that Respondents had pleaded *scienter*, the Ninth Circuit failed to recognize that "the knowledge component" of an aiding and abetting claim under JASTA "'is designed to avoid' imposing liability on 'innocent, incidental participants.'" *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 864 (2d Cir. 2021) (quoting *Halberstam*, 705 F.2d at 485 n.14). The Ninth Circuit instead deemed Respondents' complaint sufficient because they alleged that Petitioner was generally "aware of ISIS's use" of its social media platform but did "not take[e] aggressive measures to restrict ISIS-affiliated content" and "refused to take meaningful steps to prevent that use." Pet. App. 64a. This falls far short of what JASTA requires.

As the Second Circuit has explained, the knowledge needed to establish JASTA aiding and abetting "is different from the *mens rea* required to establish material support in violation of 18 U.S.C. § 2339B,

which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities." *Linde*, 882 F.3d at 329-330 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010)).[4]

The Ninth Circuit, however, effectively adopted a completely different *mens rea* requirement from the one specified by Congress when it enacted JASTA: it imposed on Petitioner a sort of negligence standard, predicated solely on Respondents' allegations that some supporters of an FTO were among the hundreds of millions of individuals worldwide who made use of Petitioner's services. That standard is a far cry from the one Congress settled on after due deliberation. Representative Goodlatte, then Chairman of the House Judiciary Committee, explained that revisions to the bill during the Senate markup were intended to 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*." 162 Cong. Rec. H5239, H5240 (daily ed. Sept. 9, 2016) (emphasis added).

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[4] 18 U.S.C. § 2339B, added to the ATA in 1996, extended criminal liability to anyone who "knowingly provides material support or resources to [an FTO], or conspires to do so." *Id*. § 2339B(a)(1). This case raises no issues under 18 U.S.C. § 2339B. Respondents' complaint originally alleged a primary claim under the ATA, 18 U.S.C. § 2333(a), predicated on a "material support" theory, *see* Pet. App. 11a, but Respondents did not appeal the district court's dismissal of that claim. *See* Pet. App. 60a ("[T]he Taamneh Plaintiffs only appealed the dismissal of their aiding-and-abetting claim.").

The Ninth Circuit coupled its deletion of the "actual knowledge" requirement with the imposition of a novel, and standardless, duty that JASTA defendants do something more to prevent terrorists from using their services—failing which they would incur aiding and abetting liability.[5] The court below thus drained all meaning from JASTA's clearly stated *scienter* requirement. By reading "knowingly" out of JASTA, the Ninth Circuit ignored what this Court has "stated time and again"—"that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also Yates v. Jones Nat'l Bank*, 206 U.S. 158, 180 (1907) ("where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required . . . .").

As applied to banks, the Ninth Circuit's watering down of JASTA's *scienter* requirement would likely allow plaintiffs' aiding and abetting claims to survive motions to dismiss where, for example, a defendant bank, operating in the U.S., made routine wire transfers to a foreign bank which in turn (unbeknownst to the defendant) had customers who were supporters of an FTO, one of which committed an act of international terrorism. Under the decision below, in such a case a jury would be free to apply its hindsight and

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[5] As the Ninth Circuit acknowledged, Petitioner's "policies prohibit posting content that promotes terrorist activity" and Petitioner regularly removed ISIS content and ISIS-affiliated accounts. Pet. App. 64a-65a. The court below nevertheless held sufficient Respondents' allegations that Petitioner had not "take[n] meaningful steps" to prevent that use, Pet. App. 62a, without providing any guidance as to what steps would be sufficiently "meaningful" to avoid liability.

speculate that the bank had aided and abetted an "act of international terrorism" merely because it might have done something more than it did to prevent an FTO or its members from obtaining even an indirect benefit from its services. And the jury would be free to make this finding under JASTA even if the bank had diligently attempted to avoid dealing with FTOs and the plaintiffs presented no evidence that the bank had acted "knowingly" to provide substantial assistance to the commission of an "act of international terrorism."

In adjudicating JASTA claims against banks, lower federal courts have for the most part properly rejected plaintiffs' invitations to thus eviscerate JASTA's *scienter* requirement and impose liability for unwitting conduct. In particular, courts have generally held that plaintiffs failed to state such claims where they did not allege that the defendants knew that their provision of banking services assisted, much less substantially assisted, the commission of acts of international terrorism.[6] If, however, courts were to follow the

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[6] *See, e.g., Weiss*, 993 F.3d at 167 (affirming denial, on futility grounds, of plaintiffs' motion for leave to add JASTA aiding and abetting claim not supported by an allegation of *scienter*; the proposed pleading did not indicate the banks' knowledge that wire transfers would be used for "any terroristic purpose"); *O'Sullivan*, 2019 WL 1409446, at *10 (granting motion to dismiss; "the Complaint is devoid of any factual allegations from which the Court can properly infer that Defendants knew the financial services the provided to the various Iranian entities were destined to aid the FTOs responsible for the attacks that injured Plaintiffs"). On the other hand, in *Kaplan*, the Second Circuit sustained a complaint alleging that a Lebanese bank aided and abetted Hizbollah, an FTO, because the defendant bank there allegedly provided non-routine financial services to customers that it actually knew were affiliated with Hizbollah and disregarded its

Ninth Circuit's erroneous—and outlier—decision, they would apply a seriously diluted *mens rea* standard to JASTA aiding and abetting claims, even though Congress made "knowing" conduct a prerequisite for liability.

2. *The Ninth Circuit Improperly Dispensed With the Requirement that Plaintiffs Plead and Prove that the Defendant Provided Substantial Assistance to the Act of International Terrorism at Issue.*

The Ninth Circuit, moreover, ignored Congress' equally clear limit on the imposition of secondary liability to those who "knowingly provid[e] substantial assistance" to the commission of the at-issue "act of international terrorism." 18 U.S.C. § 2333(d)(2). JASTA's requirement that the defendant have substantially assisted the commission of that act of primary wrongdoing is consistent with the fundamentals of civil aiding and abetting law, as summarized by this Court: "An actor is liable for harm resulting to a third person from the tortious conduct of another 'if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other. . . .'" *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994), *partially superseded by statute on other grounds, see* 15 U.S.C. § 78t(e) (quoting Restatement (Second) of Torts § 876 (1979)).

Respondents failed to allege that Petitioner gave substantial assistance to the commission of the Istanbul attack. That failure required affirmance of the district court's dismissal of Respondents' aiding

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own policies to enable the FTO-affiliated customers to launder money. 999 F.3d at 849-50, 858, 860, 862, 865.

and abetting claim. Instead, the Ninth Circuit held it sufficient that their pleading "alleges that defendants provided services that were central to ISIS's growth and expansion, and that this assistance was provided over many years." Pet. App. 65a. This misses the point. Under JASTA, aiding and abetting liability may be imposed only if the defendant provided knowing and substantial assistance to the commission of an "act of international terrorism." 18 U.S.C. § 2333(d)(2). Respondents pleaded no such thing, and therefore failed to state an aiding and abetting claim.

The Ninth Circuit effectively rewrote JASTA to impose civil liability for providing general assistance to an FTO, rather than for aiding and abetting an "act of international terrorism" committed, planned or authorized by an FTO. That is simply not what JASTA provides. The ATA's "material support" provision, 18 U.S.C. § 2339B (*see supra* at 11 n.4), imposes criminal liability for "knowingly providing material support or resources to" an FTO, but when Congress later amended the ATA to provide for secondary civil liability (by enacting JASTA), it did not create a civil claim for aiding and abetting an FTO generally. Rather, Congress limited the scope of the new cause of action to aiding and abetting a specific "act of international terrorism." 18 U.S.C. § 2333(d)(2). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[W]e give weight to Congress' amendment to the [Securities Exchange] Act restoring aiding and abetting liability in certain cases but not others").

The proper application of this element of the JASTA cause of action for aiding and abetting is important to the members of *amici*. Based on allegations of the type described *supra* at 7-8, plaintiffs often predicate such claims against banks on their transactions with foreign banks or other entities, on the theory that such transactions indirectly benefit FTOs generally—without any connection to the specific "act of international terrorism" at issue. Such claims are not cognizable under the plain language of JASTA. The Ninth Circuit's contrary approach threatens to impose broad liability beyond anything Congress intended.[7]

C. The Ninth Circuit's Expansive Approach to JASTA Aiding and Abetting Liability Would Have Adverse Consequences For International Banking and Trade.

"The practical consequences of an expansion" of secondary liability under a federal statute "provide a further reason to reject [an expansionary] approach." *Stoneridge*, 552 U.S. at 163. The Ninth Circuit's decision, if left standing, would have significant adverse real-world consequences for banks and their provision of financial services on which the international

[7] Other courts have at times also veered from enforcing the statute's requirement that the alleged aider and abettor have provided substantial assistance to the "act of international terrorism" pleaded. For example, in *Linde*, the Second Circuit accurately stated that "aiding and abetting focuses on the relationship between the act of international terrorism and the secondary actor's alleged supportive conduct," 882 F.3d at 331, but more recently the same court held that "knowing and substantial assistance to the actual injury-causing act—here, Hamas's attacks—is unnecessary." *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 499 (2d Cir. 2021). The latter holding is inconsistent with the statute, and *amici* urge this Court to make that clear in its decision in this case.

financial system and global trade—which are critical to the domestic and world economy—heavily depend.

First, permitting JASTA aiding and abetting claims to proceed beyond the motion to dismiss stage where plaintiffs have alleged only that defendants (a) provided broadly available services that benefited FTOs in some general and indirect way and (b) could have done something more to stop terrorists (who were unknown to defendants) from thus benefiting will inevitably cause banks providing ordinary financial services to be labeled supporters of terrorism. Such branding would be unjustified—as it would result only from application of the Ninth Circuit's watered-down standards, rather than the statute's actual requirements—but reputational damage nevertheless will result.

Second, bank defendants in JASTA cases that survive Rule 12(b) motions will be forced to participate in costly, complex and time-consuming discovery. Discovery in such cases is likely to be particularly challenging in light of their subject matter, the ten-year statute of limitations applicable to such claims, *see* 18 U.S.C. § 2335(a), and the locations of the events at issue in the type of JASTA cases brought against banks—typically, distant countries from which obtaining fact discovery is likely to be difficult. In JASTA claims, no less than in the kinds of antitrust claims this Court addressed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), there is a serious risk that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment, much less trial. *Id*. at 559; *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (expressing concern about "permit[ting] a plaintiff with a largely groundless claim to simply take up the

time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence") (cleaned up; internal quotations omitted)); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742-43 (1975) ("[T]he mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial . . . .").[8]

Third, the Ninth Circuit's decision licenses juries to impose liability based on their practically unreviewable determination that the defendant bank, even if it complied with applicable laws and regulations, could somehow have done better. Such an expansion of JASTA liability, not limited by any meaningful standards, may incentivize U.S. financial institutions and the U.S. branches of non-U.S. financial institutions to reduce their participation in lines of business that are important to the domestic and global economy and international trade, but which ATA/JASTA claims often place at issue—such as U.S. dollar clearing transactions and the provision of U.S. dollar bank notes.

In *Jesner*, this Court (citing an *amicus* brief submitted on behalf of IIB), explained that U.S. dollar clearing transactions "are enormous both in volume

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[8] What this Court said in *Blue Chip Stamps* about private securities fraud actions applies, with equal if not greater force, to JASTA secondary liability actions: they "present a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." 421 U.S. at 739.

and in dollar amounts," 138 S. Ct. at 1394.[9] Nearly "all wholesale international transactions involving the use of the dollar go through CHIPS [the Clearing House Interbank Payments System]." *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014). Such transactions provide much-needed U.S. dollar liquidity to the global economy and allow the U.S. dollar to remain the world's reserve currency. Also critical to achieving these same important purposes is the provision by designated banks of U.S. dollar banknotes to foreign banks under the aegis of the Federal Reserve.[10] But if JASTA liability is expanded so that banks engaging in such transactions are subjected to claims even where they did not provide substantial assistance to the commission of terrorist attacks and lacked the culpable knowledge JASTA requires, banks may be motivated to "de-risk"—*i.e.*, to cease or reduce their provision of important services to certain regions or clients, regardless of their legitimate and even pressing needs.

According to the Financial Action Task Force ("FATF"), de-risking in the banking sector already "is

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[9] "In New York each day, on average, about 440,000 of these transfers occur, in dollar amounts totaling about $1.5 trillion." *Jesner*, 138 S. Ct. at 1395 (relying on 2017 CHIPS statistics). For 2021, the corresponding figures are 507,000 transfers and $1.8 trillion. *See* CHIPS, *Annual Statistics from 1970 to 2022*, *available at* https://www.theclearinghouse.org/payment-systems/chips (last visited Dec. 1, 2022).

[10] *See generally Rothstein v. UBS AG*, 708 F.3d 82, 86 (2d Cir. 2013) (describing program permitting certain banks to facilitate the international distribution of U.S. banknotes). Each bank participating in the program maintains an account for this purpose with the Federal Reserve and "is obligated to provide monthly reports of its transactions to comply with all regulations issued by" OFAC. *Id.* (internal quotation marks omitted).

having a significant impact in certain regions and sectors" and "may drive financial transactions underground which creates financial exclusions and reduces transparency, thereby increasing money laundering and terrorist financing risks."[11] The Comptroller of the Currency has warned that de-risking effectively cuts off legitimate businesses, "[a]nd there have been many instances of real human hardship that results when customers find themselves unable to transmit funds to family members in troubled countries."[12]

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[11] FATF, *FATF Takes Action to Tackle De-Risking* (Oct. 23, 2015), *available at* https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html (last visited Dec. 1, 2022).

[12] Remarks by Thomas J. Curry, Comptroller of the Currency, Before the Institute of International Bankers (Mar. 7, 2016), *available at* https://www.occ.gov/news-issuances/speeches/2016/pub-speech-2016-25.pdf; *see also* Tracey Durner & Liat Shetret, Global Center on Cooperative Security/Oxfam, *Understanding Bank De-Risking and its Effects on Financial Inclusion* 19 (2015), *available at* https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-bank-de-risking-181115-en_0.pdf; Opinion of the European Banking Authority on 'de-risking' (Jan. 5, 2022), at 2, *available at* https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2022/Opinion%20on%20de-risking%20%28EBA-Op-2022-01%29/1025705/EBA%20Opinion%20and%20annexed%20report%20on%20de-risking.pdf (last visited Dec. 1, 2022) ("[D]e-risking can lead to adverse economic outcomes or amount to financial exclusion. Financial exclusion is of concern, as access to at least basic financial products and services is a prerequisite for participation in modern economic and social life."); Memorandum to Members, Committee on Financial Services, announcing hearing entitled "When Banks Leave: The Impacts of De-Risking on the Caribbean and Strategies for Ensuring Financial Access" (Sept. 9, 2022), *available at* https://financialservices.house.gov/uploadedfiles/hmtg-117-ba00-20220914-sd001-u1.pdf (last visited Dec. 1, 2022) (listing examples of communities affected by de-risking).

II. The Decision Below Undermines the Established Regulatory Framework Countering Terrorist Financing and Raises Serious Separation of Powers Concerns.

In *Jesner*, a case arising out of terrorist attacks abroad, Justice Kennedy explained that if a common-law cause of action under the Alien Tort Statute ("ATS") for claims against foreign corporate defendants were permitted, "foreign plaintiffs could bypass Congress' express limitations on liability under the [ATA] simply by bringing an ATS lawsuit." 138 S. Ct. at 1405 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.). That opinion described the ATA as "part of a comprehensive statutory and regulatory scheme that prohibits terrorism and terrorism financing." *Id*.

That extensive scheme includes the ATA's "material support" provision, 18 U.S.C. § 2339B (*see supra* at 11 n.4, 15), its prohibition on engaging in a financial transaction with a country designated under the Export Administration Act as a country supporting international terrorism, 18 U.S.C. § 2332d, several provisions of the USA PATRIOT Act of 2001,[13] and the various financial sanctions programs administered by the Office of Foreign Assets Control ("OFAC") of the Department of the Treasury, under authority of, *inter alia*, the International Emergency Economic Powers Act of 1977 (50 U.S.C. §§ 1701 *et seq.*), the National Emergencies Act of 1976 (50 U.S.C. §§ 1601 *et seq.*), Sections 5 and 16 of the Trading With the Enemy Act (50 U.S.C. §§ 5, 16), and the Countering America's

[13] *See generally* U.S. Treasury Dept., Financial Crimes Enforcement Network, USA PATRIOT Act, *available at* https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act (last visited Dec. 1, 2022)

Adversaries Through Sanctions Act (Public Law 115-44, 131 Stat. 886 (2017)).[14] OFAC, for example, maintains a list of specially designated nationals (the "SDN List")—individuals and entities with which banks operating in the U.S. are typically barred from dealing—and several "Non-SDN Lists" including the Foreign Sanctions Evaders List, the Non-SDN Iran Sanctions Act List, the Sectoral Sanctions Identifications List, the List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions and the Non-SDN Palestinian Legislative Council List.[15]

These statutes and regulations reflect the political branches' considered judgment to exclude from the U.S. banking system specified foreign countries, entities and individuals—including organizations that the Secretary of State, through the authority granted by Congress in section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189, has designated as FTOs. Although violations of the "material support" provision of the ATA, the USA PATRIOT Act of 2001 and the sanctions programs administered by OFAC are subject to substantial criminal and regulatory

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[14] *See generally* U.S. Treasury Dept., Office of Foreign Assets Control -- Sanctions Programs and Information, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-informa tion (last visited Dec. 1, 2022).

[15] *See* U.S. Treasury Dept., Specially Designated Nationals and Blocked Persons List (SDN), OFAC's Sanctions Lists, *available at* https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx; *see also* U.S. Treasury Dept., Consolidated Sanctions List (Non-SDN Lists), OFAC's Sanctions Lists, *available at* https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-non-sdn-lists.

penalties, Congress did not create a private right of action for violation of these statutes and regulations.[16]

In *Jesner*, Justice Kennedy explained that

> [t]he detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability in actions filed under the ATS.

138 S. Ct. at 1405 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.).

It was equally inappropriate for the Ninth Circuit to expand the scope of JASTA aiding and abetting liability beyond what Congress provided. When processing international payments, banks are required to adhere to the requirements of, *inter alia*, the ATA's "material support" provision, the USA PATRIOT Act of 2001, the regulations thereunder and an array of OFAC sanctions programs; they must avoid dealing with certain foreign countries and with the individuals and entities on the SDN List, and are required to

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[16] *See, e.g., Schilling v. Rogers*, 363 U.S. 666, 676 (1960) (no private right of action under Trading with the Enemy Act); *AmSouth Bank v. Dale*, 386 F.3d 763, 777 (6th Cir. 2004) ("[T]he Bank Secrecy Act does not create a private right of action."); *cf. Iran Thalassemia Soc'y v. Office of Foreign Assets Control*, 2022 WL 9888593, at *6 (D. Ore. Oct. 14, 2022), *appeal docketed*, No. 22-35850 (9th Cir. Oct. 27, 2022) (statute authorizing the President to impose sanctions on Iranian financial institutions did not authorize a private right of action).

report suspicious activities to the Department of the Treasury's FinCEN.[17] Banks have spent vast sums and hired many thousands of employees to comply with these regulations. *See* LexisNexis Risk Solutions, 2022 True Cost of Financial Crime Compliance Study – U.S. and Canada Edition, Sept. 2022 at 9 (projected total cost of financial crime compliance across U.S. financial institutions is $45.9 billion); LexisNexis Risk Solutions, True Cost of Financial Crime Compliance Study, Global Report, June 2021, at 7 (projected total cost of financial crime compliance across all financial institutions globally is $213.9 billion). Among other things, clearing banks employ sophisticated and specialized software to interdict funds transfers with SDNs. *See* R. Richard Newcombe, Targeted Financial Sanctions: The U.S. Model, in Smart Sanctions: Targeting Economic Statecraft 41, 58-59 (David Cortright & George A. Lopez eds., 2002).

The Ninth Circuit's expansion of aiding and abetting liability under JASTA conflicts with the comprehensive regulatory regime applicable to banks, including the members of *amici*. Broadening the scope of private rights of action as the court below has done threatens to undermine the choices the political branches make when they legislate and regulate in this highly sensitive area. Under the Ninth Circuit's approach, banks in compliance with the relevant anti-terrorism financing

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[17] *See* 18 U.S.C. §2339B(a)(1) ("material support" provision); H.R. 3162 (USA PATRIOT Act of 2001, Title III); 50 U.S.C. §§ 1701 *et seq*. (International Emergency Economic Powers Act); 50 U.S.C. §§ 1601 *et seq*. (National Emergencies Act); 31 C.F.R. Part 501 (Reporting, Procedures and Penalties Regulations); 31 C.F.R. Part 596 (Terrorism List Government Sanctions Regulations); 31 C.F.R. Part 597 (Foreign Terrorist Organizations Sanctions Regulations).

statutory and regulatory provisions may nevertheless be liable to private parties in treble damage actions under JASTA without satisfying that statute's *scienter* and "substantiality" requirements—a result Congress never authorized. For example, based on the decision below, a bank may be held liable under JASTA for making a payment to a person or entity not on the SDN or other lists (and not in a jurisdiction subject to country-based sanctions), without knowing that the funds would be used to further the commission of "an act of international terrorism." 18 U.S.C. § 2333(d)(2). And, according to the court below, the bank's aiding and abetting liability would not be circumscribed by any clear standards. Juries instead would have broad discretion to impose treble damage liability—potentially at odds with the judgments made by Congress and the executive branch—based solely on their *post hoc* findings, without the benefit of any articulable rules (and therefore virtually unreviewable in practice), that whatever a bank did to avoid assisting terrorists, it nonetheless could have taken yet more "aggressive measures" or more "meaningful steps." Pet. App. 62a. By thus expanding JASTA's scope, the Ninth Circuit usurped Congress' authority.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

ADDENDUM ON JASTA AIDING AND ABETTING CLAIMS

The lists below identify, to the extent revealed by research undertaken by counsel for *amici*, the actions currently or formerly pending in federal district courts in which aiding and abetting claims under JASTA have been asserted or were sought to be asserted. Information about these actions is presented in a series of lists, organized by the industry sector to which the defendants named or sought to be named in such claims belong.[1]

[1] Counsel for *amici* are not aware of any comprehensive publicly available database or list of actions in which claims have been asserted under JASTA. Accordingly, counsel compiled the information presented in this Addendum by first conducting Westlaw and LEXIS searches for cases (both pending and closed) in which the text of judicial decisions or other materials available on Westlaw or LEXIS databases included the terms "JASTA," "Justice Against Sponsors of Terrorism Act" or "18 U.S.C. § 2333(d)," and then reviewing the pleadings and court decisions in those cases to determine whether an aiding and abetting claim under JASTA was either: (1) pleaded by plaintiffs; (2) raised by plaintiffs in a motion for leave to amend and/or proposed amended complaint; or (3) addressed by a court decision (at the district court level or on appeal) issued after the effective date of JASTA (September 28, 2016), even if no such claim had been pleaded, because the retroactivity provision of JASTA, Pub. L. 114-222 § 7, made such a claim potentially viable in an action filed before that date. Based on that review, counsel has categorized the 45 cases meeting these criteria according to the type of private sector defendant(s) against which JASTA aiding and abetting claims were asserted (or sought to be asserted)—*i.e.*, by industry group.

Banks as Defendants (26)[2]

Case Name	Docket No.	District Court.
Applebaum v. National Westminster Bank	**1:07-CV-00916**	**E.D.N.Y.**
Averbach for Estate of Averbach v. Cairo Amman Bank	1:19-CV-00004	S.D.N.Y.
Bartlett v. Societe Generale de Banque au Liban et al.	**1:19-CV-00007**	**E.D.N.Y.**
Bernhardt v. Islamic Republic of Iran et al.	**1:18-CV-02739**	**D.D.C.**
Bonacasa v. Standard Chartered PLC	**1:22-CV-03320**	**S.D.N.Y.**
Bowman v. HSBC Holdings et al.	**1:19-CV-02146**	**E.D.N.Y.**
Brown v. National Bank of Pakistan	**1:19-CV-11876**	**S.D.N.Y.**
Donaldson v. HSBC Holdings PLC et al.	**1:18-CV-07442**	**E.D.N.Y.**
Estate of Henkin v. Kuveyt Turk Katilim Bankasi	1:19-CV-05394	E.D.N.Y.

[2] Cases in which one or more of the banks sued are members of one or more *amici* are listed in bold-faced font; these represent 17 (nearly two-thirds) of the 26. Cases in which plaintiffs did not expressly assert or seek to add a JASTA claim, but in which the court nonetheless treated the claim as arising under JASTA are denoted with an asterisk.

Freeman v. HSBC Holdings et al.	**1:14-CV-06601 ("Freeman I")/1:18-CV-07359 ("Freeman II")**	**E.D.N.Y.**
Honickman v. BLOM Bank SAL	1:19-CV-00008	E.D.N.Y.
Kaplan v. Lebanese Canadian Bank (Lelchook v. Lebanese Canadian Bank)	1:18-CV-12401	S.D.N.Y.
King v. Habib Bank	1:20-CV-04322	S.D.N.Y.
Licci v. American Express Bank et al.	1:08-CV-07253	S.D.N.Y.
Linde v. Arab Bank et al.*	**1:04-CV-02799**	**E.D.N.Y.**
Miller v. Arab Bank	**1:18-CV-02192**	**E.D.N.Y.**
Neiberger v. Deutsche Bank	**1:19-CV-03005**	**S.D.N.Y.**
O'Sullivan v. Deutsche Bank et al.	**1:17-CV-08709**	**S.D.N.Y.**
Siegel v. HSBC Bank USA et al.	**1:17-CV-06593**	**S.D.N.Y.**
Singer v. Bank of Palestine	1:19-CV-00006	E.D.N.Y.

Spetner v. Palestine Investment Bank	1:19-CV-00005	E.D.N.Y.
Stephens v. HSBC Holdings PLC et al.	**1:18-CV-07439**	**E.D.N.Y.**
Tavera v. HSBC Bank USA, N.A. et al.	**1:18-CV-07312**	**E.D.N.Y.**
The Charter Oak Fire Ins. Co. v. Al Rajhi Bank et al.	1:17-CV-02651	S.D.N.Y.
Wildman v. Deutsche Bank Aktiengesellschaft et al.	**1:21-CV-04400**	**E.D.N.Y.**
Wolf v. Credit Lyonnais	**1:07-CV-00914**	**E.D.N.Y.**

Social Media Companies as Defendants (14)

Case Name	Docket No.	District Court.
Cain v. Twitter	3:17-CV-02506	N.D. Cal.
Clayborn v. Twitter et al.	3:17-CV-06894	N.D. Cal.
Colon v. Twitter et al.	6:18-CV-00515	M.D. Fla.
Copeland v. Twitter	3:17-CV-05851	N.D. Cal.
Crosby v. Twitter	2:16-CV-14406	E.D. Mich.
Force v. Facebook	1:16-CV-05490, 1:16-cv-05158	S.D.N.Y., transferred to E.D.N.Y.

Goldstein v. Facebook	6:19-CV-00389	E.D. Tex.
Gonzalez v. Google	4:16-CV-03282	N.D. Cal.
Megalla v. Twitter et al.	3:18-CV-00543	N.D. Cal
Palmucci v. Twitter et al.	3:18-CV-03947	N.D. Cal.
Pennie v. Twitter et al.	3:17-CV-00230	N.D. Cal.
Retana v. Twitter et al.	3:19-CV-00359	N.D. Tex.
Sinclair for Tucker v. Twitter	4:17-CV-05710	N.D. Cal.
Taamneh v. Twitter	3:17-CV-04107	N.D. Cal.

Chemical Companies as Defendants (2)

Case Name	**Docket No.**	**District Court.**
Adams v. Alcolac et al.	3:18-CV-00185	S.D. Tex.
Brill v. Chevron Corporation*	3:15-CV-04916	N.D. Cal.

Not-For-Profit Organizations as Defendants (1)

Case Name	Docket No.	District Court.
Keren Kayemeth Leisrael-Jewish National Fund v. Education for a Just Peace in the Middle East	1:19-CV-03425	D.D.C.

Construction and Development Companies as Defendants (1)

Case Name	Docket No.	District Court.
Cabrera v. Black & Veatch Special Projects Corporations et al.	1:19-CV-03833	D.D.C.

Pharmaceutical Companies as Defendants (1)

Case Name	Docket No.	District Court.
Atchley v. AstraZeneca UK Ltd., et al.	1:17-CV-02136	D.D.C.