No. 21-1496

In the Supreme Court of the United States

TWITTER, INC., PETITIONER

v.

MEHIER TAAMNEH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

The Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.*, authorizes United States nationals "injured * * * by reason of an act of international terrorism" to recover treble damages for their injuries. 18 U.S.C. 2333(a). The Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852, amended the ATA to provide that in an action under the ATA for "injury arising from an act of international terrorism committed, planned, or authorized by" a foreign terrorist organization, "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. 2333(d)(2). The questions presented are:

1. Whether plaintiffs plausibly allege that defendants aided and abetted an act of international terrorism through the knowing provision of substantial assistance, in violation of 18 U.S.C. 2333(d)(2), based on defendants' provision of widely available social media services and their failure to actively screen for use of those services by terrorist organizations and individuals affiliated with them.

2. Whether plaintiffs plausibly allege aiding-and-abetting liability in the absence of allegations that defendants' widely available social media services were used in connection with the act of international terrorism that caused plaintiffs' injuries.

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INTEREST OF THE UNITED STATES

This case concerns the scope of aiding-and-abetting liability under the Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.*, as amended by the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852. The ATA authorizes a United States national injured or killed by reason of a terrorist attack to seek compensation from those who aided and abetted the attack. The United States has an interest in recognizing appropriate invocations of that cause of action, which can afford a measure of justice to victims and their families and encourage private actors to be diligent in guarding against actions that support terrorism. At the same time, the United States has an interest in ensuring that the scope of ATA liability is consistent with Congress's incorporation of common-law tort principles that limit secondary liability to culpable actors.

STATEMENT

A. Legal Framework

1. The ATA authorizes United States nationals "injured * * * by reason of an act of international terrorism" to bring a civil action for treble damages in federal court. 18 U.S.C. 2333(a). The ATA defines "international terrorism" to mean criminal activities that occur primarily abroad or transcend national boundaries and that "appear to be intended" to "intimidate or coerce a civilian population," to "influence the policy of a government by intimidation or coercion," or to "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. 2331(1).

2. Following the ATA's enactment, courts considered whether the statute made persons who provided substantial assistance to terrorists civilly liable. Compare *Rothstein* v. *UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013), with *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 688-690 (7th Cir. 2008) (en banc), cert. denied, 558 U.S. 981 (2009). The United States expressed the view that the ATA imposes secondary liability on defendants who "knowingly provide[] substantial assistance to a terrorist organization," if the plaintiff "also show[s] that the act of international terrorism that actually injured the victim was reasonably foreseeable by the defendant." Gov't C.A. Amicus Br. at 26-27, *Boim*, *supra* (No. 05-1815) (*Boim* Br.); see U.S. Amicus Br. at 7-8, 15 n.6, *O'Neill* v. *Al Rajhi Bank*, 573 U.S. 954 (2014) (No. 13-318) (*O'Neill* Br.). The United States further stated that ATA aiding-and-abetting claims should be evaluated under tort-law principles, as "summarized in the seminal D.C. Circuit opinion" in *Halberstam* v. *Welch*, 705 F.2d 472 (1983). *Boim* Br. at 15-16; see *O'Neill* Br. at 7-8.

Halberstam identified three elements 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; [and] (3) the defendant must knowingly and substantially assist the principal violation.

705 F.2d at 477. *Halberstam* identified six factors relevant to whether the defendant has furnished substantial assistance. *Id.* at 483-484. And *Halberstam* explained that secondary liability attaches only where the act that injures the plaintiff is a "natural and foreseeable consequence" of the "activity" the defendant knowingly and substantially assisted. *Id.* at 488; see *id.* at 484.

The United States further explained in its *Boim* brief that while "liability can be imposed under Section 2333(a) if common law tort standards are met even in the absence of a specific intent by the defendant to assist in acts of international terrorism[,] * * * the defendant's intent will normally be a substantial factor in the analysis." *Boim* Br. at 2. The United States stated that "[i]n certain factual situations," conduct that would violate 18 U.S.C. 2339B—which makes it a crime to "knowingly provide[] material support or resources to a foreign terrorist organization"—"would not support civil tort liability under Section 2333(a), such as where the connection between a defendant's actions and the act of international terrorism that harms the victim is insubstantial." *Boim* Br. at 3; see *id.* at 23, 31.

3. In 2016, Congress amended the ATA to expressly provide for aiding-and-abetting liability. As amended by JASTA, the ATA states that in an action based on

"an injury arising from an act of international terrorism committed, planned, or authorized by" a foreign terrorist organization, "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. 2333(d)(2). JASTA further states that *Halberstam* "provides the proper legal framework for how [aiding-and-abetting] liability should function in th[is] context." § 2(a)(5), 130 Stat. 852 (18 U.S.C. 2333 note).

B. Factual And Procedural Background

1. On January 1, 2017, Abdulkadir Masharipov fired 120 rounds into a crowd at the Reina nightclub in Istanbul, Turkey, killing 39 people and injuring 69 others. Pet. App. 9a-10a. The Islamic State of Iraq and Syria (ISIS), a designated foreign terrorist organization, claimed responsibility for the attack. *Id.* at 10a.

Plaintiffs (the individual respondents here) are U.S.-national family members of Nawras Alassaf, a Jordanian citizen killed in the Reina attack. Plaintiffs brought this ATA action against three social media companies—Twitter, Facebook, and Google, which operates YouTube—that they claimed were directly and secondarily liable for the Reina attack. Pet. App. 3a.

Plaintiffs do not allege that the Reina attack was coordinated or planned via defendants' social media services. Instead, plaintiffs' First Amended Complaint (FAC) alleges that "Google, Twitter, and Facebook were a critical part of ISIS's growth." Pet. App. 10a; see J.A. 48-53. Plaintiffs allege that ISIS-affiliated accounts first appeared on Twitter in 2010, and that ISIS has used Facebook and YouTube since at least 2012 and 2013, respectively. J.A. 50, 92-93, 99; see Pet. App. 65a. Plaintiffs further allege that ISIS and its affiliated

media production and distribution networks have "openly maintained and used official Twitter, Facebook, and YouTube accounts" to recruit, radicalize, and instruct terrorists, fund terrorism, and spread propaganda. J.A. 52.

In addition to allegedly hosting ISIS-affiliated accounts and maintaining features by which users may "follow," "friend," or "subscribe" to those accounts, *e.g.*, J.A. 87, 92, 97, plaintiffs allege that defendants use "computer algorithms" to "suggest[]" "content, videos, and accounts" to users based on their information and online activities, J.A. 52; see J.A. 143 n.72. According to plaintiffs, these features permit ISIS to use "Twitter, Facebook, and YouTube as tools to connect with others and promote its terrorist activities." J.A. 147.

Plaintiffs also allege that each defendant "places ads on ISIS postings and derives revenue for the ad placement," and that those advertisements are "targeted to the viewer" by computer algorithms based on "knowledge about the viewer as well as information about the content being viewed." J.A. 132. Plaintiffs further allege that through its "AdSense monetization program," Google "agrees to share a percentage of the revenue it generates from ads placed before YouTube videos with the user who posts the video." J.A. 139, 140. Plaintiffs allege that "each video must be reviewed and approved by Google before Google will permit ads to be placed with that video." J.A. 139. Plaintiffs assert that, "[u]pon information and belief, Google has reviewed and approved ISIS videos, including videos posted by ISIS-affiliated users, for 'monetization,'" and that "Google has [thus] agreed to share with ISIS and ISIS-affiliated users a percentage of revenues generated by these ads." J.A. 139-140.

Plaintiffs "do not dispute that defendants' policies prohibit posting content that promotes terrorist activity or other forms of violence." Pet. App. 64a-65a. And plaintiffs acknowledge that defendants have "suspended or blocked" some ISIS-related accounts. J.A. 135. But plaintiffs allege that prior to the Reina attack, defendants did not "actively monitor [their] online social media networks * * * to block ISIS's use of [their] services," and "generally only reviewed ISIS's use of [their] [s]ervices in response to third party complaints." J.A. 134. Plaintiffs allege that "[f]or years, the media has reported on * * * ISIS's use of Defendants' social media sites and their refusal to take any meaningful action to stop it," and "both the U.S. government and the public at large have urged Defendants to stop providing [their] services to terrorists." J.A. 88, 90; see J.A. 88-91. In addition, plaintiffs allege that in response to specific complaints about ISIS's use of their platforms, defendants "have at various times determined that ISIS's use of [their] [s]ervices did not violate Defendants' policies," and "permitted ISIS-affiliated accounts to remain active, or removed only a portion of the content posted on an ISIS-related account." J.A. 134-135; see J.A. 137.

Finally, plaintiffs allege that when defendants removed ISIS content prior to the Reina attack, they "did not make substantial or sustained efforts to ensure that ISIS would not reestablish the accounts using new identifiers" that resemble prior ones, despite defendants' alleged technical ability to "track" and remove such accounts. J.A. 135, 154-155; see J.A. 149-150, 155-156.

2. The district court dismissed the FAC with prejudice. Pet. App. 151a-180a.

As to direct liability, the district court relied on the Ninth Circuit's prior determination that by providing a cause of action for U.S. nationals injured "by reason of an act of international terrorism," the ATA requires proximate causation "between the injuries that [the plaintiff] suffered and the defendant's acts." Pet. App. 164a-165a (quoting *Fields* v. *Twitter, Inc.*, 881 F.3d 739, 744 (9th Cir. 2018)). Here, the court determined that plaintiffs' "conclusory" allegation that Masharipov was "'radicalized by ISIS's use of social media'" was "insufficient to support a plausible claim of proximate causation." *Id.* at 168a (quoting J.A. 157). The court noted that plaintiffs did not allege that Masharipov maintained an account on defendants' platforms, nor that Masharipov "ever saw any specific content on social media related to ISIS." *Ibid.*

With respect to aiding-and-abetting liability, the district court first expressed doubt that plaintiffs could succeed by showing that defendants aided and abetted ISIS's terrorist operations in general, "and not the Reina attack specifically." Pet. App. 173a. Even if they could do so, however, the court held that plaintiffs failed to plausibly allege the second and third elements required by *Halberstam*. *Id.* at 175a; see p.3, *supra*. Regarding defendants' general awareness, the court viewed plaintiffs' allegations that defendants knew "that ISIS previously recruited, raised funds, or spread propaganda through Defendants' platforms" as "more akin to" allegations that defendants provided material support to ISIS, not that they knowingly "assum[ed] a role in [its] terrorist activities." *Id.* at 177a. And with respect to the knowing provision of substantial assistance, the court pointed to the absence of allegations "that Defendants played a major or integral part in ISIS's

terrorist attacks"; the "arms-length" nature of the relationship between defendants and ISIS, pursuant to which defendants "provided routine services generally available to members of the public" rather than "targeted financial support"; and the lack of allegations "that Defendants have any intent to further ISIS's terrorism." *Id.* at 177a-179a.

3. Plaintiffs appealed the dismissal of their aiding-and-abetting claim. Pet. App. 60a. The court of appeals decided their appeal along with two separate appeals concerning claims that social media companies are liable for other terrorist attacks under the ATA, *id.* at 3a-4a, one of which is relevant here.

a. The court of appeals first addressed *Gonzalez* v. *Google LLC*, No. 18-16700 (9th Cir.), cert. granted, No. 21-1333 (Oct. 3, 2022), in which plaintiffs appealed the dismissal of their claims against Google for both direct and secondary liability. The court held that the *Gonzalez* plaintiffs' claims are barred by the statute commonly known as Section 230 of the Communications Decency Act of 1996, 47 U.S.C. 230, except insofar as they rely on Google's sharing of advertising revenue with ISIS. Pet. App. 15a-42a. The court held, however, that the revenue-sharing allegations do not state a claim for direct liability. *Id.* at 42a-46a.

As to aiding-and-abetting liability in *Gonzalez*, the court found with respect to the first two *Halberstam* elements that the plaintiffs plausibly allege that ISIS committed the relevant attack, and that Google was "generally aware of its role in ISIS's terrorist activities at the time it provided assistance to ISIS." Pet. App. 50a; see *id.* at 50a-52a. Regarding the third element, the court determined that the *Gonzalez* plaintiffs plausibly allege that Google provided "*knowing* assistance"

because, *inter alia*, Google allegedly reviewed videos before approving advertisements for revenue-sharing. *Id.* at 54a (emphasis added); see *id.* at 54a-55a. The court determined, however, that plaintiffs fail to plausibly allege that Google's assistance was substantial because "the [complaint] is devoid of any allegations about how much assistance Google provided," and does not allege that "Google intended to assist ISIS." *Id.* at 58a.

b. The court of appeals next explained that because the district court in *Taamneh* "did not reach § 230," the court of appeals would consider all of plaintiffs' allegations in this case under JASTA and the *Halberstam* framework. Pet. App. 60a.

The court of appeals determined that plaintiffs plausibly allege the first *Halberstam* element: The Reina Attack was an "'act of international terrorism'" that was "'committed, planned, or authorized' by ISIS." Pet. App. 61a. The court next determined that plaintiffs plausibly allege that defendants were "generally aware they were playing an important role in ISIS's terrorism enterprise." *Id.* at 62a. The court noted plaintiffs' allegation that "at the time of the Reina Attack, defendants were generally aware that ISIS used defendants' platforms to recruit, raise funds, and spread propaganda in support of their terrorist activities." *Id.* at 61a. And plaintiffs allege that despite "'extensive media coverage' and legal and governmental pressure, defendants 'continued to provide these resources and services to ISIS and its affiliates, refusing to actively identify ISIS Twitter, Facebook, and YouTube accounts, and only reviewing accounts reported by other social media users.'" *Id.* at 62a (quoting J.A. 52-53).

With respect to the third *Halberstam* element, the court of appeals held that plaintiffs adequately allege

that defendants "knowingly" provided assistance. Pet. App. 62a-66a. The court again pointed to plaintiffs' allegations that defendants were "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.* at 62a.

The court of appeals then determined that plaintiffs plausibly allege that defendants' assistance to ISIS was "substantial," Pet. App. 65a, applying the six *Halberstam* factors. The court stated that the act subjecting defendants to potential secondary liability was "ISIS's terrorism campaign," and reasoned that that campaign was "heavily dependent on [the] social media platforms"; that the assistance provided by those platforms was "integral to ISIS's expansion, and to its success as a terrorist organization"; and that defendants provided this assistance for "many years." *Id.* at 63a-65a. The court acknowledged, however, that defendants were not present during the Reina attack; that "defendants had, at most, an arms-length transactional relationship with ISIS," which "may be even further attenuated" because defendants "regularly removed ISIS content and ISIS-affiliated accounts," and their policies "prohibit posting content that promotes terrorist activity or other forms of violence"; and that plaintiffs do not allege that defendants intended to further ISIS's terrorist activities. *Id.* at 64a-65a; see *id.* at 65a-66a.

c. Judge Berzon issued a concurring opinion, and Judge Gould issued an opinion concurring in part and dissenting in part; those separate opinions addressed the panel's resolution of the other two appeals. Pet. App. 72a-150a.

SUMMARY OF ARGUMENT

As amended by JASTA, the ATA authorizes U.S. nationals "injured * * * by reason of an act of international terrorism" committed, planned, or authorized by a foreign terrorist organization to recover damages from "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" the act. 18 U.S.C. 2333(a) and (d)(2). JASTA further states that *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983), provides "the proper legal framework for how such liability should function in th[is] context." § 2(a)(5), 130 Stat. 852 (18 U.S.C. 2333 note). Under the statute's text and *Halberstam*, plaintiffs have not plausibly alleged that defendants "aid[ed] and abet[ted], by knowingly providing substantial assistance" to, the Reina attack, 18 U.S.C. 2333(d)(2).

I. Plaintiffs fail to plausibly allege the knowledge and substantial assistance required for aiding-and-abetting liability.

A. The ATA's text and *Halberstam* require that an aiding-and-abetting defendant "knowingly" provide "substantial assistance" to unlawful conduct. 18 U.S.C. 2333(d)(2); see *Halberstam*, 705 F.2d at 477. *Halberstam*'s discussion of the common law explains that substantial assistance may take the form of supportive acts or encouragement, and *Halberstam* equates aiding and abetting with conscious participation in wrongdoing. 705 F.2d at 477, 478, 481-485.

B. *Halberstam* and the decisions on which it relied make clear that the knowing-and-substantial assistance requirement is less likely to be satisfied where a defendant provided only routine business services in an ordinary manner, was remote from the unlawful act that

injured the plaintiff, or is accused of aiding and abetting another's conduct through inaction. Consistent with those principles, other courts applying the ATA have been reluctant to hold an aiding-and-abetting defendant liable when it provided only widely available services in the context of an arms-length business relationship.

C. The court of appeals erred in holding that plaintiffs plausibly allege that defendants knowingly provided substantial assistance to the Reina attack. With respect to knowledge, plaintiffs do not allege that defendants aided ISIS through atypical transactions; nor do they dispute that defendants' policies prohibit terrorist content or that defendants removed some ISIS-related content when they became specifically aware of it. Rather, plaintiffs allege that defendants knew that ISIS and its affiliates used defendants' widely available social media platforms, in common with millions, if not billions, of other people around the world, and that defendants failed to actively monitor for and stop such use. Those allegations do not plausibly allege that defendants knowingly provided substantial assistance to the Reina attack.

The court of appeals' application of *Halberstam*'s substantiality factors was incorrect. Among other things, the court gave the amount of assistance outsized weight, seeming to suggest that because social media platforms were allegedly important to ISIS's growth generally, defendants substantially assisted any and all ISIS terrorist attacks. The court also misconstrued the import of the duration-of-assistance factor. And it gave insufficient weight to the arms-length relationship between defendants and ISIS, as well as plaintiffs' acknowledgment that defendants had no intent to further its terrorist acts. Properly viewed, defendants' alleged

actions cannot be deemed a substantial cause of plaintiffs' injuries.

II. JASTA requires that the defendant aid and abet, by knowingly providing substantial assistance to, the act of international terrorism that caused the plaintiffs' injuries.

A. JASTA permits U.S. nationals to obtain treble damages from defendants who "aid[] and abet[], by knowingly providing substantial assistance, or who conspire[] with the person who committed * * * an act of international terrorism." 18 U.S.C. 2333(d)(2). That text focuses on the act of international terrorism itself; it does not impose liability merely for providing generalized aid to a foreign terrorist organization.

B. Nonetheless, JASTA does not necessarily require that a defendant knew about the particular terrorist act in question or provided support specific to it. JASTA adopts the secondary-liability framework set forth in *Halberstam*. And *Halberstam* makes clear that in some circumstances, a secondary defendant's contributions may have a sufficient nexus to a tortious act even if the defendant assisted a series of such acts but did not have advance knowledge of, or provide support specifically directed to, the particular act that injured the plaintiff. Plaintiffs' allegations, however, do not meet that standard.

ARGUMENT

The United States condemns in the strongest terms the terrorist act that caused Alassaf's death and sympathizes with the profound loss plaintiffs have suffered. In this case, however, the court of appeals erred in holding that plaintiffs' allegations state a claim that defendants are secondarily liable for the Reina attack under the ATA. In particular, the FAC fails to plausibly allege

that defendants aided and abetted that attack by the knowing provision of substantial assistance. In the United States' view, such a showing does not necessarily require that an aiding-and-abetting defendant have had specific knowledge of the particular terrorist attack that injured the victim, or have provided resources specific to that attack. But JASTA requires more than generalized support to a terrorist organization through the provision of widely available services. Plaintiffs' allegations do not clear that threshold.

I. PLAINTIFFS DO NOT PLAUSIBLY ALLEGE THE KNOWLEDGE AND SUBSTANTIAL ASSISTANCE REQUIRED FOR AIDING-AND-ABETTING LIABILITY

Civil liability for aiding and abetting requires a finding that the defendant's actions affirmatively advanced or encouraged the commission of the tort in a manner that rendered the defendant complicit in it. To that end, JASTA's plain text and the *Halberstam* decision it invokes both require that an aiding-and-abetting defendant knowingly provided substantial assistance to the primary tortfeasor's wrongful act. The FAC's allegations do not meet that standard.

A. JASTA And *Halberstam* Require Knowing And Substantial Assistance

1. JASTA amended the ATA to provide that "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" the act of international terrorism that injured the victim. 18 U.S.C. 2333(d)(2) (emphasis added). The statutory text thus requires that a defendant's aiding and abetting be through the provision of assistance that is both knowing and substantial. JASTA further explains that the D.C.

Circuit's decision in *Halberstam* v. *Welch*, 705 F.2d 472 (1983), "provides the proper legal framework for how such liability should function." 18 U.S.C. 2333 note. *Halberstam* likewise requires a showing of knowing and substantial assistance.

"The scenario presented in *Halberstam* is, to put it mildly, dissimilar to the one at issue here." Pet. App. 48a. In *Halberstam*, the D.C. Circuit considered whether Linda Hamilton could be held liable for aiding and abetting an unplanned murder that her live-in partner, Michael Welch, committed during a burglary. The court explained that Welch had committed "innumerable burglaries" over five years, and that Hamilton served as "banker, bookkeeper, recordkeeper, and secretary" for that series of burglaries, helping to launder the "fortune" she and Welch acquired by selling his stolen goods. 705 F.2d at 474, 476, 486-487. Buyers "made their checks payable to [Hamilton]," and she deposited them into her own bank accounts. *Id.* at 475. She also kept records of these "asymmetrical transactions—which included payments coming in from buyers, but no money going out to the sellers from whom Welch had supposedly bought the goods." *Ibid.* Hamilton further knew that Welch "installed a smelting furnace in the garage and used it to melt gold and silver into bars." *Ibid.* Given this evidence, the court of appeals credited the district court's factual findings that although Hamilton did not intend the murder, she "knew full well the purpose of Welch's evening forays" and "was a willing partner in his criminal activities." *Id.* at 486 (brackets and citation omitted); see *id.* at 474, 488.

To determine whether those facts sufficed for aiding-and-abetting liability, *Halberstam* canvassed the common-law jurisprudence. See 705 F.2d at 489. The

court identified three elements of a civil aiding-and-abetting claim: First, "the party whom the defendant aids must perform a wrongful act that causes an injury." *Id.* at 477. Second, "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." *Ibid.* Third, "the defendant must knowingly and substantially assist the principal violation." *Ibid.* Consistent with the common law, the court indicated that its three-part test for aiding-and-abetting liability requires conscious participation in the wrongdoing. See *id.* at 477 (quoting Restatement (Second) of Torts § 876(b) (1979)) (person is secondarily liable if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"); *id.* at 479, 481, 482, 483, 484, 488; see also *Black's Law Dictionary* 4 (10th ed. 2014) ("abet": "To aid, encourage, or assist (someone)."); *id.* at 84 ("aid and abet": "To assist or facilitate the commission of a crime, or to promote its accomplishment.").

2. The *Halberstam* court found all three elements set out in its opinion met. First, Welch performed a wrongful act that caused an injury by murdering Halberstam during a burglary. 705 F.2d at 488. Second, the district court's "conclusions that Hamilton knew about and acted to support Welch's illicit enterprise" were sufficient to "establish that Hamilton had a general awareness of her role in a continuing criminal enterprise." *Ibid.*; see *id.* at 487-488.

The third element required a more extensive analysis. *Halberstam*, 705 F.2d at 488. Although Hamilton might not have known of any particular burglary in advance, the court of appeals held that the district court

"justifiably inferred that Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods." *Ibid.* The court observed that Hamilton provided "invaluable service to the enterprise as banker, bookkeeper, recordkeeper, and secretary," and that she had "performed these services in an unusual way under unusual circumstances for a long period of time." *Id.* at 487 (holding that the district court's finding of "*knowing* assistance" was not clearly erroneous).

Thus, the only remaining issue was whether "Hamilton's assistance was * * * substantial enough to justify liability on an aider-abettor theory." *Halberstam*, 705 F.2d at 488. Applying six factors it had discerned from the common law, the court determined that it was. *Ibid.* "[A]lthough the amount of assistance" Hamilton provided may not have been "overwhelming as to any given burglary, it added up over time to an essential part of the pattern." *Ibid.* Hamilton's state of mind "assume[d] a special importance," and the duration of her assistance also "strongly influenced" the court's conclusion: Hamilton's "continuous participation reflected her intent and desire to make the venture succeed; it was no passing fancy or impetuous act." *Ibid.* Finally, *Halberstam* determined that Hamilton was liable for the murder because "violence and killing" were a reasonably foreseeable consequence of the activity she had helped Welch to undertake. *Ibid.*

B. The Knowing-and-Substantial Assistance Requirement Takes On Particular Importance Where The Theory Of Liability Rests On The Defendant's Routine Business Activities Or Inaction

1. As *Halberstam* explained, "an 'awareness of wrong-doing requirement' for an aider-abettor is designed to avoid subjecting innocent, incidental

participants to harsh penalties or damages." 705 F.2d at 485 n.14 (quoting *Investors Research Corp.* v. *SEC*, 628 F.2d 168, 177-178 (D.C. Cir.), cert. denied, 449 U.S. 919 (1980)). JASTA incorporates a knowledge requirement twice over: It requires that the defendant "knowingly provid[e] substantial assistance," 28 U.S.C. 2333(d)(2), and it invokes the *Halberstam* framework and thus adopts its similar mens rea requirements.

In terms of *what* a defendant must know, JASTA makes clear that it is not sufficient for a defendant to knowingly provide material support to a foreign terrorist *organization*, as would suffice for criminal liability under Section 2339B. See, *e.g.*, *Weiss* v. *National Westminster Bank PLC*, 993 F.3d 144, 165 (2d Cir. 2021), cert. denied, 142 S. Ct. 2866 (2022); see pp. 31-32, *infra*. Rather, Section 2333(d)'s "knowing" requirement modifies the defendant's own substantial assistance to the commission of a terrorist *act* that injured the plaintiff. Thus, the statute requires "the secondary actor to be aware that, by assisting the principal, it is itself assuming a role in terrorist activities." *Ibid.* (internal quotation marks omitted). JASTA does not necessarily require that the defendant knew of any particular terrorist attack before it occurred—just as Hamilton did not necessarily know in advance of any particular burglary. See pp. 33-34, *infra*. But a court must at least be able to infer that the secondary defendant was aiding and abetting terrorist acts by knowingly providing substantial support to their commission.

2. *Halberstam* provides significant guidance for that inquiry. The decision strongly suggests that courts may more readily infer the requisite knowledge and find a defendant's support sufficiently substantial where the secondary defendant engaged in atypical conduct linked

to the principal violator's wrongful acts than if she had provided generally available business services through ordinary arms-length transactions. *Halberstam* affirmed the district court's "inference of *knowing* assistance" in part because Hamilton provided services in connection with Welch's burglaries "in an unusual way under unusual circumstances for a long period of time"; "their activities were symbiotic," and they "performed some of their different parts of the illegal operation together at the same location." 705 F.2d at 487; see *ibid.* (finding that Hamilton "knew she was assisting Welch's wrongful acts"). By contrast, had Hamilton been an ordinary "banker, bookkeeper, recordkeeper, [or] secretary," *ibid.*, processing ordinary transactions at arm's length in the regular course of a business separate from Welch's undertakings, it would have been more difficult to conclude that she aided and abetted—that is, knowingly and substantially assisted—Welch's burglaries.

Halberstam relied on securities-law cases that likewise distinguished between routine and atypical transactions, at a time before this Court held that Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), does not create a private right of action for aiding and abetting. See *Central Bank, N. A.* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 169 (1994). For example, in *Woodward* v. *Metro Bank of Dallas*, 522 F.2d 84 (1975), the Fifth Circuit explained that "[i]f the alleged aider and abettor conducts what appears to be a transaction in the ordinary course of his business, more evidence of his complicity is essential." *Id.* at 95 (discussing the general-awareness requirement); see *Halberstam*, 705 F.2d at 477 & n.8, 485 n.14. *Woodward* made similar statements in evaluating whether "silence and inaction" can constitute the knowing provision of substantial

assistance (a question *Halberstam* left open, 705 F.2d at 485 n.14). See *Woodward*, 522 F.2d at 96-97. And in *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793 (3d Cir.), cert. denied, 439 U.S. 930 (1978)—which *Halberstam* also cited—the court explained that "inaction * * * may provide a predicate for liability where the plaintiff demonstrates that the aider-abettor [c]onsciously intended to assist in the perpetration of a wrongful act." *Id.* at 800; see *Halberstam*, 705 F.2d at 478 (citing *Monsen*).

Woodward likewise explained that "[t]he scienter requirement scales upward when activity is more remote" from the legal violation. 522 F.3d at 95. "A remote party must not only be aware of his role, but he should also know when and to what degree he is furthering the fraud." *Ibid.*

Following *Halberstam*, other courts made a similar point. For example, in *Camp* v. *Dema*, 948 F.2d 455 (1991), the Eighth Circuit stated that knowledge, which "permeates" both the second and third requirements for aiding-and-abetting liability, is essential to distinguish "aiding and abetting * * * from simply aiding," because "'abet'" entails some measure of encouragement. *Id.* at 459 (citation omitted). The court explained that "[a] party who engages in atypical business transactions or actions which lack business justification may be found liable as an aider and abettor with a minimal showing of knowledge," whereas "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." *Ibid.*; see, *e.g.*, *Abbott* v. *Equity Grp., Inc.*, 2 F.3d 613, 621 (5th Cir. 1993), cert. denied, 510 U.S. 1177 (1994).

3. Courts applying JASTA's secondary-liability provision have followed the same approach: They have been reluctant to find remote defendants liable for aiding and abetting an act of terrorism based on allegations that they provided routine business services through arms-length transactions, but more willing to impose liability for atypical services provided in an atypical way.

In *Weiss*, for example, the Second Circuit sustained the district court's holding that it would be futile for plaintiffs to amend their complaint to add an aiding-and-abetting claim against a financial institution that provided routine services to charities suspected of affiliation with Hamas. The district court explained that "[e]vidence that Defendant knowingly provided banking services to a terrorist organization," in violation of Section 2339B, "without more, is insufficient to satisfy JASTA's scienter requirement." *Weiss* v. *National Westminster Bank PLC*, 381 F. Supp. 223, 239 (E.D.N.Y. 2019). In affirming, the court of appeals explained that the plaintiffs could not show that the bank was "knowingly providing substantial assistance to Hamas, or that [it] was generally aware that it was playing a role in Hamas's acts of terrorism," where it investigated allegations that specific customers were aiding Hamas, and there was no evidence that the bank knew of any transfer made for a terroristic purpose. *Weiss*, 993 F.3d at 165; see *id.* at 166-167.

By contrast, in *Kaplan* v. *Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2021), the Second Circuit held that a plaintiff sufficiently pleaded an aiding-and-abetting claim against a bank. The complaint there did not allege the provision of only "routine banking services," *id.* at 858 (citation omitted); rather, it alleged that the bank provided "special treatment" to particular customers

that were "'openly, publicly and repeatedly acknowledged and publicized'" as being integral parts of Hezbollah, and did so in "knowing violation of banking regulations," which allowed the customers to "circumvent[] sanctions imposed in order to hinder terrorist activity." *Id.* at 850, 862, 866 (citations and emphases omitted). The court determined that these allegations of individualized treatment "adequately pleaded that [the defendant] knowingly gave the Customers assistance that both aided H[e]zbollah and was qualitatively and quantitatively substantial." *Id.* at 866.

In other contexts, too, courts have found JASTA's knowing-and-substantial assistance requirement more easily met where defendants engaged in transactions outside the regular course of business. In *Atchley* v. *AstraZeneca UK Limited*, 22 F.4th 204 (2022), the D.C. Circuit held that plaintiffs plausibly alleged aiding-and-abetting liability based on claims that defendants secured lucrative medical-supply contracts by giving an entity affiliated with a known terrorist group millions of dollars in cash kickbacks, as well as medical goods that defendants knew would be sold on the black market to fund terrorism. *Id.* at 221-222. The court analogized to *Halberstam*, in which Hamilton "performed her otherwise-innocuous services for [Welch] 'in an unusual way under unusual circumstances.'" *Id.* at 221 (quoting *Halberstam*, 705 F.2d at 487). So too, in *Atchley*, "the corrupt provision of free goods and cash bribes to an entity defendants knew was engaged in anti-American acts of terrorism" supported an inference of the requisite mens rea. *Ibid.*; see *id.* at 223 (similar discussion in substantiality analysis).[1]

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[1] *Atchley* grounded its mens rea discussion in the defendant's general awareness of its role in facilitating terrorism. *Atchley*, 22

C. Plaintiffs Do Not Plausibly Allege That Defendants Knowingly Provided Substantial Assistance To The Reina Attack

Under these principles, the court of appeals erred in determining that plaintiffs plausibly allege that defendants knowingly provided substantial assistance to the Reina attack.

1. a. As to knowledge, plaintiffs do not allege that specific accounts on their platforms were being used to plot or prepare for the Reina attack or for attacks that included Reina, or that defendants knew of any such accounts.[2] Cf. J.A. 117-118. Nor do plaintiffs plausibly allege that defendants aided and abetted the Reina attack or other ISIS terrorist attacks by, for example, knowingly bending their normal policies to treat ISIS and its affiliates differently from the millions (or billions) of other users of their services so to facilitate those attacks. Instead, most of plaintiffs' allegations

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F.4th at 221-222; cf. *Kaplan*, 999 F.3d at 863-864. In the United States' view, whether the defendant engaged in atypical business transactions is likewise relevant to whether a court may infer that a defendant *knowingly* provided substantial assistance.

[2] Plaintiffs more generally allege that Masharipov was "radicalized by ISIS's use of social media." J.A. 157; see J.A. 158. Such an allegation, standing alone, is insufficient to suggest that defendants knowingly provided substantial assistance to the Reina attack. See, *e.g.*, *Crosby* v. *Twitter, Inc.*, 921 F.3d 617, 625 (9th Cir. 2019) (explaining that a contrary holding would make social media companies "liable for seemingly endless acts of modern violence"). And even if it could, the FAC is devoid of facts to substantiate that "conclusory allegation." Pet. App. 168a. Plaintiffs do not allege that Masharipov "ever saw any specific content on social media related to ISIS," or that he "maintained a Facebook, YouTube, and/or Twitter account." *Ibid.* Instead, the FAC suggests other potential sources of Masharipov's radicalization, including his military training with al-Qaeda and maintenance of ISIS contacts in Syria. J.A. 118-119.

indicate that defendants made their social media platforms available to anyone with access to the Internet; that although defendants' "policies prohibit posting content that promotes terrorist activity," Pet. App. 64a-65a, ISIS and its affiliates used defendants' services; and that although defendants generally removed terrorist content and accounts when they had specific knowledge of them, defendants failed to affirmatively search for and remove such content. See Br. in Opp. 17-18; see Pet. App. 64a; pp. 26-27, *infra* (addressing additional allegations). Plaintiffs further allege that defendants continued to make their social media platforms available in this manner despite media reports that ISIS and its affiliates used their services, as well as government encouragement to take more aggressive action against ISIS-affiliated content. *E.g.*, J.A. 88-91; see Br. in Opp. 15-16.

A defendant's knowing complicity in a terrorist group's illegal activities can, in some circumstances, give rise to aiding-and-abetting liability. Here, however, most of plaintiffs' allegations suggest only that defendants were aware that some ISIS-affiliated users and ISIS content remained on their platforms, along with millions (or billions) of other users and pieces of content, and that defendants did not search for and remove those users and content. These allegations differ substantially from the provision of atypical and particularized services that furnished the basis for finding the requisite mens rea and substantial support with respect to the conduct that injured the plaintiff in *Halberstam* and the cases discussed above. They are insufficient to plausibly allege that defendants knowingly provided substantial support to the Reina attack.

b. Much of plaintiffs' theory of liability rests on the proposition that ISIS's overall success is "heavily dependent" upon its use of social media services. *Halberstam*, 705 F.2d at 488. From this predicate, plaintiffs contend that the ATA's aiding-and-abetting provision imposes on defendants an affirmative obligation in tort to "actively monitor" for ISIS-affiliated accounts and postings generally, and to make "substantial or sustained efforts to ensure that ISIS would not reestablish" deleted accounts "using new identifiers." J.A. 134-135; see, *e.g.*, J.A. 155. Plaintiffs thus contend that although defendants generally removed ISIS-related content in response to complaints, their failure to do more, despite general reporting of ISIS's use of their services, is sufficient to make them liable for aiding and abetting ISIS's commission of terrorist acts. But as discussed above, the common-law principles Congress incorporated into Section 2333(d)(2) would at least require more meaningful allegations of direct knowledge for the failure to take such measures to result in liability for aiding-and-abetting terrorist acts. Treating such "inaction" in the context of generalized information as proof of the requisite knowledge—and thus imposing, through the ATA's civil-liability provisions, an affirmative duty to monitor—would be particularly inappropriate in this context, where defendants' social media platforms are used by millions (or billions) of people worldwide.[3]

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[3] Defendants suggest that under the court of appeals' decision, a foreign state could be sued in a United States court "if it takes insufficiently 'meaningful' or 'aggressive' steps to stamp out known terrorist activity within its borders, so long as a designated terrorist organization that benefited from that policy later committed an act of terrorism within the United States." Google/Facebook Br. 47

c. At times, plaintiffs frame a subset of their allegations more affirmatively. Plaintiffs suggest (J.A. 147) that defendants' algorithms promote connections and interactions among otherwise independent users, which could amplify communication of ISIS messaging to sympathetic audiences. See Pet. App. 103a-104a (Gould, J., concurring in part and dissenting in part). But plaintiffs describe those algorithms as an automated part of defendants' widely available services; the automatic instigation of such effects does not show that defendants knowingly provided substantial assistance to terrorist acts that persons affiliated with ISIS might commit.

Plaintiffs further allege that defendants "have at various times" reviewed certain posts or accounts flagged for violation of their policies against promoting terrorist activity and determined that the content did not violate the policies "or removed only a portion of the content posted on an ISIS-related account." J.A. 134-135; see J.A. 137. But plaintiffs do not provide any details regarding the content that allegedly remained, and

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(quoting Pet. App. 62a). As defendants note (*ibid.*), 28 U.S.C. 1605B provides an exception to foreign sovereign immunity in an ATA action for physical injuries or death if those injuries are "caused by" "(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state" or its officials, employees, or agents acting in the scope of their office. 28 U.S.C. 1605B(b) and (c). Section 1605B also includes a "[r]ule of [c]onstruction": "A foreign state shall not be subject to the jurisdiction of the courts of the United States" under Section 1605B(b) "on the basis of an omission or a tortious act or acts that constitute mere negligence." 28 U.S.C. 1605B(d). This case does not present the questions whether jurisdiction over a foreign state under Section 1605B extends to claims based on aiding-and-abetting liability, or whether a failure to take sufficiently "meaningful" or "aggressive" measures against a terrorist organization could meet the jurisdictional threshold under that provision and its rule of construction.

they do not suggest how the remaining content would have substantially assisted the Reina attack or other acts of terrorism. This Court therefore need not determine whether such allegations could plausibly allege the knowing provision of substantial assistance in other circumstances.[4]

2. With respect to substantial assistance in particular, the court of appeals erred for similar reasons in holding that plaintiffs plausibly allege that defendants' assistance was "substantial enough to justify liability on an aider-abettor theory." *Halberstam*, 705 F.2d at 488.

Halberstam delineated six factors that govern the substantiality analysis: (i) the nature of the act assisted, (ii) the amount and kind of assistance, (iii) the defendant's presence at the time of the tort, (iv) the defendant's relationship to the tortious actor, (v) the defendant's state of mind, and (vi) the duration of assistance. 705 F.2d at 483-484. As courts have explained, the "substantial assistance" factor effectively requires plaintiffs to show that "the secondary party proximately caused

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[4] Plaintiffs also allege that Google (but not the other defendants) shared advertising revenue with ISIS, which required Google to review ISIS-affiliated videos. See J.A. 137-138. Even if those allegations plausibly alleged that Google knew it was providing ISIS with some financial assistance, see Pet. App. 62a-63a; but see *id.* at 65a (stating that "the articles incorporated into the complaint suggest that Google took at least some steps to prevent ads from appearing on ISIS videos"), they would not plausibly allege substantial assistance because the FAC includes "no information" about the number or content of allegedly approved videos or the "amount of [financial] assistance provided by Google." *Id.* at 56a (so holding regarding financial assistance in *Gonzalez*). Accordingly, this case provides no occasion for this Court to consider the circumstances under which allegations that a defendant knowingly provided substantial funding to a terrorist organization might be liable for aiding and abetting a terrorist act of the organization.

the violation," *i.e.*, that a "substantial causal connection" existed "between the culpable conduct" of the alleged aider and abettor "and the harm to the plaintiff" or that "the encouragement or assistance is a substantial factor in causing the resulting tort." *Metge* v. *Baehler*, 762 F.2d 621, 624 (8th Cir. 1985) (internal quotation marks omitted); see, *e.g. Aetna Cas. & Sur. Co.* v. *Leahey Const. Co.*, 219 F.3d 519, 537 (6th Cir. 2000); see also Restatement (Second) of Torts § 876 cmt. d (1979).

In considering whether plaintiffs adequately alleged that defendants provided substantial assistance, the court of appeals primarily relied on plaintiffs' allegations that "defendants provided services that were central to ISIS's growth and expansion, and that this assistance was provided over many years," counting the first, second, and sixth factors in plaintiffs' favor. Pet. App. 65a; see *id.* at 63a-65a.

That analysis was flawed. The court gave the amount of ISIS's or its adherents' general use of defendants' services predominant weight, seeming to suggest that because social media platforms were allegedly important to ISIS's growth generally, defendants substantially assisted any terrorist attack by ISIS anywhere in the world. Pet. App. 63a-64a. But the amount of assistance—which must be considered in light of the kind of assistance—is only one of the six substantiality factors, and it must take into account the degree of connection between the assistance provided and the ultimate act. See *Halberstam*, 705 F.2d at 484 (discussing cases in which the aider and abettor played a "major part in prompting the tort" or provided "integral" support to it).

Similarly, *Halberstam* explained that the first factor —the "nature of the act involved"—"dictates what aid

might matter, *i.e.*, be substantial." 705 F.2d at 484 (emphasis omitted). The murder in *Halberstam* was committed during one of a long series of burglaries that Welch committed, and the court emphasized that "the success of the tortious enterprise clearly required [Hamilton's] expeditious and unsuspicious disposal of the goods." *Id.* at 488. Here, the court of appeals again gave great weight to plaintiffs' allegations that ISIS and its adherents have made significant use of defendants' platforms, without accounting for the fact that those platforms were widely available; that the assistance ISIS derived was automatic, not particularized; and that the assistance was far more remote from terrorist attacks by ISIS than Hamilton's assistance was from Welch's burglaries. Pet. App. 65a. The court of appeals thus gave too much weight to the second factor, even accounting for the heinous nature of the Reina attack. See *Halberstam*, 705 F.2d at 484 n.13.

As to the period of assistance, *Halberstam* added that consideration to the other, then-prevailing five factors. 705 F.2d at 484. The court explained that "[t]he length of time an alleged aider-abettor has been involved with a tortfeasor" is significant insofar as it interacts with other factors: It may "affect[] the quality and extent of the[] relationship" between the primary and alleged secondary tortfeasors; it may "influence[] the amount of aid provided"; and it "may afford evidence of the defendant's state of mind." *Ibid.* Yet the court of appeals afforded significant weight to the length of time that ISIS and its affiliates used defendants' services, even though it acknowledged that the relationship between defendants and ISIS remained (at most) arms-length; that defendants provided only

generally available services; and that defendants had no intent to further ISIS's terrorist acts.

The remaining factors support defendants based on plaintiffs' own admissions. "There is no dispute that defendants were not present during the Reina Attack." Pet. App. 64a. As to the defendants' relationship with ISIS, plaintiffs "do not dispute that defendants' policies prohibit posting content that promotes terrorist activity or other forms of violence." *Id.* at 64a-65a. And plaintiffs' allegations suggest that "defendants had, at most, an arms-length transactional relationship with ISIS," which may have been "even further attenuated than the ones defendants have with some of their other users because the FAC alleges defendants regularly removed ISIS content and ISIS-affiliated accounts." *Id.* at 64a; see *id.* at 65a ("[T]he record indicates that defendants took steps to remove ISIS-affiliated accounts and videos."). Regarding defendants' state of mind—which the court of appeals acknowledged is "an important factor"—plaintiffs allege that defendants allowed some ISIS content to remain on their platforms, but they "do not allege that defendants had any intent to further or aid ISIS's terrorist activities, or that defendants shared any of ISIS's objectives." *Id.* at 65a.

In sum, plaintiffs' allegations, properly viewed, fail to allege that defendants knowingly provided substantial assistance to the Reina attack.

II. JASTA'S AIDING-AND-ABETTING STANDARD FOCUSES ON THE ACT THAT INJURED THE PLAINTIFF, BUT DOES NOT NECESSARILY REQUIRE THAT THE DEFENDANT KNEW ABOUT OR SPECIFICALLY AIDED THAT ACT

A. Aiding-And-Abetting Liability Under The ATA Focuses On The "Act of International Terrorism" Itself

The ATA's primary liability provision authorizes a U.S. national "injured * * * by reason of an act of international terrorism" to recover treble damages from defendants who commit the act. 18 U.S.C. 2333(a). JASTA amended Section 2333 to further permit such a victim to obtain treble damages from "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," if the act was "committed, planned, or authorized" by a designated foreign terrorist organization. 18 U.S.C. 2333(d)(2). Like the primary-liability provision, the secondary-liability provision focuses on the "act of international terrorism" that injured the plaintiff. It requires that the defendant aid and abet—*i.e.*, knowingly provide substantial assistance to—the act of international terrorism, rather than the foreign terrorist organization itself or its activities more generally. Thus, a defendant's knowing provision of "generalized aid" to a foreign terrorist organization is on its own insufficient to satisfy the statute, Twitter Br. 31; see Google/Facebook Br. 21-26, at least where there is no substantial causal link between the aid and the act of terrorism.

Plaintiffs contend that Section 2333(d)(2) "forbids aiding and abetting certain persons, not aiding and abetting certain acts." Br. in Opp. 22. That is incorrect. The statute makes civilly liable one 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). The phrase "the person" is the object of "conspires with," not "aids and abets." See Facebook/Google Br. 24-25. Thus, a defendant may be secondarily liable under the ATA where he (1) aids and abets the terrorist attack in question, *or* (2) conspires with the person who commits the attack with regard to its commission.

The plain meanings of the words "aid and abet" and "conspire" confirm that result. The couplet "aid and abet" is generally defined in terms of *specific acts*, not people, and conspiracy is defined as an agreement with other persons to commit an unlawful *act*. See *Black's Law Dictionary* at 84 ("aid and abet": "To assist or facilitate the commission of a crime, or to promote its accomplishment"); *id.* at 376 ("conspire": "To engage in conspiracy; to join in a conspiracy"); *id.* at 374 ("conspiracy": An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objection, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose").

In addition, Section 2333(d)(2) differs markedly from the criminal material-support statute, 18 U.S.C. 2339B. Section 2339B makes it a crime to "knowingly provide[] material support or resources to a foreign terrorist *organization*," without requiring a nexus to any particular terrorist *act*. *Ibid.* (emphasis added). Had Congress envisioned a similar standard in Section 2333(d)(2), it most likely would have used similar language.

B. A Plaintiff Need Not Necessarily Show That The Defendant Knew About Or Provided Aid Specific To The Particular Terrorist Attack That Injured The Victim

Although Section 2333(d)(2) requires that the defendant "aid[] and abet[], by knowingly providing substantial assistance" to a particular terrorist act, it does not necessarily require the plaintiff to show that the defendant knew about or provided aid specific to the particular terrorist attack in question. But see, *e.g.*, Twitter Br. 37 (stating that plaintiffs must have plausibly alleged "at a minimum, 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"). Rather, JASTA specifically invokes *Halberstam* as the "proper legal framework for how [secondary] liability should function in th[is] context." 18 U.S.C. 2333 note. And *Halberstam* explained that Hamilton was liable for each of Welch's burglaries—and the murder he committed during one of them—even though Hamilton did not "specifically" know that the crimes Welch was committing were burglaries, and she may not have known of the particular criminal episode during which he committed murder. 705 F.2d at 488. Similarly, there was no suggestion in *Halberstam* that Hamilton provided her post-burglary services to the particular crime that resulted in the murder. For aiding-and-abetting liability, it was sufficient that Hamilton provided her substantial aid to a series of crimes committed by Welch with the knowledge that "he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference." *Ibid.*; see *id.* at 484-485.

Of course, whether a secondary defendant's actions could reasonably be considered to knowingly and

substantially assist the act of international terrorism that caused the plaintiffs' injury in the absence of specific knowledge or particularized support will depend on the facts of the case. In some circumstances—such as the direct channeling of substantial funds or other fungible resources to a foreign terrorist organization or its close affiliates with a knowing acquiescence in their potential use—a secondary defendant's contributions may have a sufficient nexus to a terrorist act, even if the defendant has no advance knowledge of, and does not provide support specifically directed to, the particular act. See, *e.g.*, *Atchley*, 22 F.4th at 227 (holding that a defendant could be held secondarily liable for "financially fortifying" entities known to be affiliated with foreign terrorist organizations through atypical transactions because such actions would foreseeably result in acts of terrorism). As discussed above, however, plaintiffs' allegations in this case do not meet that standard, because plaintiffs primarily fault defendants for their inaction and do not allege, *inter alia*, that defendants provided atypical services or bent their usual policies so to support ISIS's terrorist attacks, that they intended to further ISIS's terrorist acts, or that they had anything more than an arms-length transactional relationship with ISIS.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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