No. 21-1496

IN THE

Supreme Court of the United States

TWITTER, INC.,

Petitioner,

v.

MEHIER TAAMNEH, ET AL.

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR 470 VICTIMS OF TERRORIST ATTACKS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE AMICI[1]

Amici are 470 individuals comprising direct and indirect victims of acts of international terrorism that were committed, planned, or authorized by foreign terrorist organizations including al-Qaeda, Hezbollah, the Haqqani Network, Hamas, ISIS, Palestine Islamic Jihad, and the Islamic Revolutionary Guard Corps (IRGC).[2] For years, we have been pursuing justice against the people and entities that enabled the attacks that injured us and killed our loved ones. In this effort, we stand alongside hundreds of Americans and American families who are pursuing redress under the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016).

We were heartened when Congress enacted this critically important legislation—explaining that it was "provid[ing] civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against" those who "have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b). We were further encouraged when appellate courts, including the Ninth Circuit, recognized the statute's proper scope by holding that JASTA reaches those who provide substantial support to the ongoing campaigns of terrorism that have claimed so many American lives.

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[1] All parties consented to this filing. No party or party's counsel authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission.

[2] A full list of the amici is appended to this brief.

We are dismayed, however, that the defendants in this case are urging this Court to impose novel and extreme limits on liability that would convert JASTA from the broad cause of action Congress intended into a dead letter. We accordingly file this brief to urge the Court to reject the defendants' legal rule—which would have devastating implications reaching far beyond this case.

SUMMARY OF ARGUMENT

Defendants urge this Court to accept a novel legal rule that limits aiding-and-abetting to situations in which the plaintiff shows that the defendant substantially assisted the specific act of international terrorism that injured the plaintiff, and that the defendant knowingly assisted that specific act. Under this proposed rule, knowingly providing support—however substantial—to a terrorist organization, or even to that organization's violent activities generally, is not enough. Instead, defendants would require plaintiffs to trace the path of assistance through a terrorist organization to a particular attack, and to show that the defendant knew of that particular attack at the time it provided the assistance.

No appellate court has ever adopted defendants' rule, and a simple hypothetical reveals why: Say that in early summer of 2014, a supporter of the terrorist organization ISIS hands a bag containing $1 million to the organization—knowing full well that ISIS carries out acts of international terrorism, but not directing ISIS to use the funds for any specific violent act, nor knowing of ISIS's plans to carry out any particular violent act.

From that point on, nobody outside of ISIS knows what happens to the money—and nobody can reasonably be expected to find out because once the money reaches ISIS, it becomes effectively impossible to trace. Cash is easy to move and spend without leaving a paper trail, and ISIS is unlikely to disclose how it uses the funds in any public forum.

Later in 2014, ISIS beheaded three Americans—two journalists and an aid worker—in despicable acts of international terrorism. ISIS publicized the murders as part of its overall campaign to expel Americans and other westerners from the Middle East. The murders and the subsequent publicity all required resources to carry out. But the victims' families cannot hope to find any records showing how ISIS financed these particular acts because the only people who truly know (ISIS) are unlikely to answer a subpoena and disclose the truth.

Defendants' rule would require the victims' families to somehow do the impossible, *i.e.*, to show that the cash the donor gave ISIS could somehow be traced to these specific beheadings—and to further show that the donor somehow knew that his support would be used in these specific acts at the time he gave it. Nobody could hope to carry that burden—and the problem would not be limited to cases involving ISIS. Myriad terrorist groups including al-Qaeda, Hezbollah, Hamas, the Haqqani Network, and the IRGC collect tremendous amounts of support from third parties—most of which is not expressly directed toward specific violent acts. The problem would also not be limited to situations involving cash. In many cases, materiel including weapons, bullets, explosives, technology, and other important goods would be similarly difficult to

trace. At a minimum, such goods could be given to terrorists without any specific attack in mind—and defendants' rule would exonerate the donor on that basis.

In sum, defendants' rule would effectively render JASTA a dead letter in all but the most obvious cases of terrorist support, *i.e.*, the ones in which terrorists' supporters happened to admit their intent to support specific acts of terrorism, and those statements were somehow documented and later found in litigation. That is borderline nonsensical—and certainly not the result Congress intended.

Instead, of adopting defendants' rule, this Court should hold that knowingly providing material support or resources to terrorists or terrorist organizations will ordinarily support a claim for aiding and abetting under JASTA—even if that support was not directed toward or used in the specific attack that injured the plaintiff.

That proposition should be uncontroversial because when Congress enacted JASTA, it expressly stated that its purpose was "to provide civil litigants with the broadest possible basis . . . to seek relief against persons, entities, and foreign countries . . . that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b). Congress did not indicate any desire to limit that liability only to those who direct support or resources to particular attacks. Moreover, for decades, the knowing provision of material support to terrorists and terrorist organizations has been a federal felony. *See* 18 U.S.C. §§ 2339A, 2339B, 2339C. Both the civil and the criminal prohibitions rest on the same policy understanding: providing support to terrorists and

terrorist organizations causes terrorist attacks. Congress has spoken clearly and unequivocally that it wants to stop all such support, and to impose liability on anybody who knowingly provides it.

JASTA's text—properly read—embodies that principle by providing that any person who knowingly provides substantial assistance is liable. Importantly, Congress did not require that the substantial assistance be provided "to" any particular person or act. The omission of the preposition "to" was deliberately intended to expand the scope of liability, so that JASTA reaches any person who knowingly provides substantial assistance to a terrorist enterprise—as long as the acts of international terrorism that injured the plaintiff were a foreseeable consequence of that enterprise.

That point is reinforced by the facts of *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress expressly incorporated into the statute. There, the court held that a defendant was liable for aiding and abetting a murder because she provided substantial assistance to a burglary enterprise. Even though there was no evidence that the defendant knew the murder would occur, nor that she provided any assistance directed to it, the court imposed liability because the murder was a foreseeable consequence of the enterprise she assisted. *Halberstam* stands plainly for the proposition that a defendant can aid and abet an act of violence by providing substantial assistance to an underlying tortious enterprise. In the context of JASTA, Congress's decision to incorporate *Halberstam* alone extends liability for aiding and abetting terrorist acts to those who provide substantial assistance to terrorist enterprises.

Nevertheless, the defendants refuse to give JASTA its proper scope. Splitting hairs, they argue that there is a difference between providing material support to terrorists and aiding those terrorists' acts. That is wrong because providing material support to terrorists has, for decades, been understood as the paradigmatic way to aid their violent acts. Terrorists are adept at converting any form of fungible assistance into increased capacity for violence, and so anybody who knowingly provides such assistance is knowingly contributing to the foreseeable ensuing violence. That is why the knowing provision of material support to terrorists is a felony—and why no person who engages in that conduct can argue with a straight face that they are innocent.

To be sure, this cause of action is broad (as Congress intended). But it is not unbounded. Some cases will come out in defendants' favor depending on the facts (and indeed, some have). As a threshold matter, plaintiffs must show that the act that injured them was committed, planned, or authorized by a designated foreign terrorist organization. They must also establish scienter by showing that the defendant was generally aware that it was playing a role in an illegal activity. Most importantly, they must show that the assistance the defendant provided to that illegal activity was substantial. That requirement allows courts to consider all of the policy and equitable considerations defendants raise here and weigh them appropriately. Thus, if the assistance the defendant provided was small or innocuous, a court or a jury might determine that the assistance was not substantial, or that an act of terror was not a foreseeable consequence of the activity the defendant assisted. Those are appropriate

safeguards to protect innocent defendants from liability. But defendants that knowingly provide substantial support to terrorist enterprises are not innocent, and so in the mine run of cases, those who provide such support are proper aiding-and-abetting defendants under JASTA. There is absolutely no need—let alone any textual justification—to engraft additional requirements onto the statute.

ARGUMENT

PROVIDING SUBSTANTIAL ASSISTANCE TO A TERRORIST ENTERPRISE IS ONE WAY TO AID AND ABET THE ENTERPRISE'S VIOLENT ACTS

A. JASTA's Text Does Not Require the Defendant to Provide Substantial Assistance Specifically "To" the Act of International Terrorism or the Person Who Committed It

1. JASTA's text and the common law principles it embodies support a claim for aiding and abetting against those who knowingly provide substantial assistance to terrorists. The statute imposes liability on "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). "Person" is defined broadly under 18 U.S.C. § 2333(d)(1) to include terrorist organizations and their agents.

The parties in this case debate whether the object of "aids and abets" is the "person," or instead the "act of international terrorism." Thus, plaintiffs argue that aiding and abetting terrorists is sufficient, while defendants contend that the statute applies only when

the defendant aids and abets the specific act that injured the plaintiff. Amici believe that the better answer is the "person," but this debate elides a potentially more important textual point: whatever the object of "aids and abets," the phrase "knowingly providing substantial assistance" is not followed by the preposition "to," and therefore does not have a defined object. That omission was deliberate—and it matters because one can aid and abet a person *or* an act by providing substantial assistance to a different person or act. In other words, liability for aiding and abetting does not require the defendant to provide substantial assistance to the specific person who carried out an act of terrorism, let alone to that specific act. This is one way that Congress operationalized its goal of imposing liability on anybody who provides support to terrorists and terrorist organizations, whether "directly or indirectly." JASTA § 2(b).

Defendants, in particular, pretend that the statute contains a preposition that it does not. Thus, Twitter argues that "a defendant is liable for aiding and abetting only if it 'knowingly provid[es] substantial assistance' **to** the 'act of international terrorism' that gave rise to the plaintiff's claim." Twitter Br. 21 (quoting 18 U.S.C. § 2333(d)(2)) (bolding added; brackets in original). Facebook and Google make a similar argument, insisting that "Congress carefully cabined aiding-and-abetting liability to those who 'knowingly provid[e] substantial assistance' **to** the specific 'act of international terrorism' that injured the plaintiff." Facebook Br. 1 (quoting 18 U.S.C. § 2333(d)(2)) (bolding added; brackets in original). The punctuation in these sentences gives the game away: in both instances, defendants refer to providing assistance **to** an act, but

the word "to" never appears within quotation marks because Congress omitted it from the statutory text.

Defendants' interpretation thus requires the Court to add a limiting word to the statute. Under their reading, the proper construction of the statute is:

> liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance **[to]**, or who conspires with the person who committed**[,]** such an act of international terrorism.

The addition of the word "to" plays a key role in defendants' reading of the statute because it connects the assistance to an object, thus limiting JASTA's scope. That is impermissible because "this Court may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Had Congress intended to cabin liability in the way defendants suggest, it easily could have done so. Instead, Congress chose phrasing that is grammatically incompatible with treating either the person or the act as the sole potential recipients of assistance.

The Second Circuit considered this point in *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021). There, the court rejected the defense argument that JASTA requires the defendant to provide assistance directly to the person or organization who committed a terrorist attack. Instead, the court explained that JASTA "does not say that for aiding-and-abetting liability to be imposed a defendant must have given 'substantial assistance to' the principal; it simply says the defendant must have given 'substantial assistance.'" *Id*. at 855. The court determined

that "[t]he expressly stated Purpose of having JASTA reach persons who provide support for international terrorism 'directly or indirectly,' reveals that Congress's use of the uncabined phrase 'providing substantial assistance' without adding the word 'to,' was intentional rather than inadvertent." *Id*. at 856 (quoting JASTA § 2(b)) (internal citation omitted).

Under the correct reading of the statute, a defendant can aid and abet a terrorist or a terrorist attack by knowingly providing substantial assistance to something else—*e.g.*, a terrorist enterprise. The assistance need not be directed specifically to the act of international terrorism. That follows not only from Congress's decision to omit the word "to" from JASTA's operative provision, but also from two other sources in the text.

First, JASTA's findings and purpose repeatedly stress Congress's desire to impose liability on anybody who provides material support or resources to terrorists and terrorist organizations. These provisions play a key role in construing any ambiguity in the language of the operative provision. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) (explaining that "[a] preamble, purpose clause, or recital is a permissible indicator of meaning"); *Holder v Humanitarian Law Project*, 561 U.S. 1, 29 (2010) (citing enacted findings—which closely resemble JASTA's findings—to determine whether certain assistance to terrorist organizations was prohibited by statute).

JASTA's statement of purpose manifests Congress's intent "to provide civil litigants with the broadest possible basis . . . to seek relief against" those "that have provided material support, directly or indirectly,

to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b). That statement does not stand alone. In JASTA's findings, Congress explained that it wanted to provide redress in U.S. courts against those who "knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States," *id.* § 2(a)(6), and to provide victims of attacks with the ability "to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries," *id.* § 2(a)(7).

Second, Congress expressly incorporated the D.C. Circuit's decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), to provide the framework for how secondary liability under JASTA's new cause of action should function. *See* JASTA § 2(a)(5). In *Halberstam*, the court described the defendant as "the passive but compliant partner" to a burglar. 705 F.2d at 474. Specifically, she provided "invaluable service to the enterprise as banker, bookkeeper, recordkeeper, and secretary." *Id.* at 487. When the burglar murdered a homeowner during a getaway from a botched burglary, the homeowner's family successfully sued the defendant, and the D.C. Circuit upheld liability, holding that the defendant had aided and abetted the murder.

The court explained that "[a]iding-abetting focuses on whether a defendant knowingly gave 'sub-

stantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct." 705 F.2d at 478. The tort has three elements: "(1) the party 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." *Id*. at 487-88.

In *Halberstam* itself, the three elements were met. The first was met because the burglar murdered the homeowner in the course of a burglary. *See* 705 F.2d at 488. The second element (general awareness) was met because the defendant "knew about and acted to support [the burglar's] illicit enterprise." *Id*. The third element (knowing and substantial assistance) was likewise met. The "knowing" aspect was met because the defendant "assisted [the burglar] with knowledge that he had engaged in illegal acquisition of goods." *Id*.

The "substantial" aspect of the third element turned on a six-factor inquiry, which the court likewise held was met. 705 F.2d at 483-84, 488. The court's discussion of several of the factors is illuminating here because it shows that by incorporating *Halberstam*'s test, Congress intended for liability to attach to those who aid an enterprise that foreseeably leads to terrorist violence.

The first factor—the nature of the act assisted—was "a long-running burglary enterprise." *Halberstam*, 705 F.2d at 488. The court explained that "the nature of the act involved dictates what aid might matter." *Id*. at 484. For some torts, verbal encouragement is important; for others, logistical support is

more important. And, the court explained, "[u]nder the 'nature of the act' criterion, a court might also apply a proportionality test to particularly bad or opprobrious acts, *i.e.*, a defendant's responsibility for the same amount of assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences." *Id*. at 484 n.13. Naturally, this factor weighs heavily in favor of liability for anybody who knowingly provides support to a terrorist enterprise—as it is virtually impossible to imagine a more blameworthy underlying tort.

The second factor was the amount and kind of assistance provided. The court recognized that the amount of assistance the defendant gave the burglar "may not have been overwhelming as to any given burglary in the five-year life of this criminal operation," but nevertheless held that this factor supported liability because "it added up over time to an essential part of the pattern." *Halberstam*, 705 F.2d at 488.

The third factor was the defendant's presence at the time of the tort. The court noted that the defendant "was admittedly not present at the time of the murder or even at the time of any burglary," but noted that her "role in [the other] side of the business was substantial." *Halberstam*, 705 F.2d at 488.

The fifth factor was the defendant's state of mind. Here, the court held that because the defendant's "assistance was knowing," it evidenced "a deliberate long-term intention to participate in an ongoing illicit enterprise," as opposed to a "passing fancy or impetuous act." *Halberstam*, 705 F.2d at 488. Relatedly, sixth, the court considered the "duration of the assistance," which naturally could relate only to her long assistance to the enterprise, as opposed to her non-existent

direct assistance to the burglary that caused the plaintiff's injury. *Id*.

The court then explained that the defendant's "assistance to [the burglar's] illegal enterprise should make her liable for [his] killing of" the homeowner. *Halberstam*, 705 F.2d at 488. This was so because the killing "was a natural and foreseeable consequence of the activity [the defendant] helped [the burglar] to undertake." *Id*. In this regard, it "was not necessary that [the defendant] knew specifically that [the burglar] was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night" because "violence and killing is a foreseeable risk in any of these enterprises." *Id*.

Time and again in its discussion of substantial assistance, the court referred to the defendant's assistance to the burglary enterprise. It never required the plaintiffs to trace that assistance through to the burglary or murder that injured them, or to show that the defendant intended to encourage that crime—or even that the defendant knew about it, whether before or after the fact. Instead, it was enough that the murder was a foreseeable consequence of the overall enterprise.[3]

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[3] *Halberstam*'s rule is consistent with general principles of civil aiding and abetting—which likewise turn on foreseeability of harm. As Judge Learned Hand famously observed, whereas a criminal aider and abettor or conspirator "must in some sense promote [the unlawful] venture himself, make it his own, have a stake in its outcome," a defendant's civil liability "extends to any injuries which he should have apprehended to be likely to follow from his acts." *United States v. Falcone*, 109 F.2d 579, 581 (2d

By incorporating *Halberstam* into JASTA, Congress made clear that its intent was to impose liability on any person who knowingly provides substantial assistance to a terrorist enterprise, as long as the violent attacks that injured the plaintiff were a foreseeable consequence of that enterprise. To be sure, that is not the only way to establish liability under the statute. But recognizing liability in that circumstance is the only way to reconcile the text of the operative provision, JASTA's explicit findings and purpose, and the broad holding of *Halberstam*.

2. The textual arguments in the other direction are meritless. Defendants principally argue that Congress intended to limit liability to those who aid and abet the act of international terrorism that injured the plaintiff. But even if the Court accepts defendant's argument that the object of "aids and abets" is the act of international terrorism that injured the plaintiff, defendants have no cogent explanation for why the provision of substantial assistance is limited in the same way. Or, to put it slightly differently, defendants have no explanation for why providing substantial assistance to a terrorist enterprise cannot be *a way* to aid and abet acts of international terrorism.

Defendants also point to the portion of *Halberstam* describing the third element of aiding-abet-

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Cir.), *aff'd*, 311 U.S. 205 (1940); *see also United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (holding that criminal aiding and abetting requires evidence that the defendant "participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed," whereas civil aiding and abetting requires only that the wrong be "a natural consequence of [the aider's] original act").

ting, *i.e.*, that "the defendant must knowingly and substantially assist the principal violation." *Halberstam*, 705 F.2d at 488. Defendants argue that the "principal violation" in a JASTA case is the act of international terrorism that injured the plaintiff, and so the assistance must go to that act. But nothing about *Halberstam* suggests that the "principal violation" must also be the act that injures the plaintiff, and the facts of *Halberstam* belie that reading. In *Halberstam* itself, the act that injured the plaintiff was a murder—but the principal violation the defendant assisted was a burglary enterprise. Similarly, in JASTA, the principal violation need not be the object of aiding-abetting (*e.g.*, act of international terrorism); it can be the unlawful activity the defendant assisted (*i.e.*, a terrorist enterprise). Indeed, the U.S. government explained that point very clearly in its amicus brief in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (en banc). There, the government argued that

> the "principal violation" language in *Halberstam* does not refer to the direct, specific cause of injury . . . because in *Halberstam* itself the defendant was found liable to the family of a murder victim when her assistance to the murderer consisted of helping him to launder the proceeds of his ongoing series of burglaries; the defendant was not present when the murder occurred, and knew nothing about it.

Boim U.S. Amicus Br. 18 n.3. Here, too, the government correctly encourages the Court to reject defendants' rule requiring plaintiffs to trace assistance to specific attacks. U.S. Amicus Br. 34.

Finally, defendants argue that if Congress wanted to impose liability on anybody who provides material support or resources to terrorists, it would have used that precise language in JASTA instead of the "knowingly providing substantial assistance" language. In support, defendants note that in the criminal material support statute, Congress expressly imposed liability on those who knowingly provide material support or resources to terrorist organizations, and they contend that Congress would have used the same language if it wanted JASTA to have the same scope.

This argument ignores that Congress *did* use the "material support" language in JASTA, expressly stating its intent to provide "civil litigants with the broadest possible basis" to seek relief against anybody who "provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States," JASTA § 2(b), and reinforcing that desire two more times in JASTA's findings and purpose, *id*. § 2(a)(6), (7). Defendants manage not to cite or discuss these three, independent references to liability for material support anywhere in their briefs.

Defendants also read too much into the fact that Congress did not repeat that language a fourth time in the operative provision. At most, Congress's decision to impose liability on those who provide "substantial assistance" as opposed to those who provide "material support" establishes that the material criminal support statute and JASTA are not completely congruent. But it does not establish that JASTA is *narrower* than the material support statute. Instead, the best way to read JASTA as a whole is to understand that Congress regards the provision of material support to a terrorist

enterprise as *one way* to aid and abet—but not the *only way*. That would be the ordinary relationship between civil and criminal liability: the civil provision would ordinarily be broader than the criminal one.

Even if the Court agrees with defendants that this is the unusual situation in which civil liability is somehow narrower than criminal liability, their argument only shows that *not every instance* of knowingly providing material support to terrorists will also trigger civil liability. But that does not mean that providing such support will not *ordinarily* or *usually* trigger civil liability—and it certainly does not mean that Congress intended to incorporate a separate requirement that the support must be directed to specific acts of terrorism, as opposed to terrorist enterprises. Indeed, for the reasons explained in Part B, *infra*, conduct that is culpable enough to violate the criminal material support statute—and thereby subject the perpetrator to a 20-year prison term—is culpable enough to warrant civil liability, too.

B. JASTA Rests on the Empirical Premise That Providing Material Support to Terrorists or Terrorist Organizations Is Tantamount to Aiding Their Violent Acts

Amici's interpretation of JASTA is also the only one consistent with our government's long-held views about the ways terrorists and terrorist organizations operate. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. There, Congress imposed criminal liability on "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." 18

U.S.C. § 2339B(a)(1). That prohibition rests on Congress's explicit finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct*." AEDPA § 301(a)(7) (emphasis added).

This Court credited that specific finding in *Holder*, explaining that "[i]t is vital in this context not to substitute our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." 561 U.S. at 34 (quotation marks and alteration omitted). The Court thus held that the knowing provision of material support to a terrorist organization "in any form" "furthers terrorism." *Id*. at 32. This is true even if the aid is "ostensibly peaceful," *id*. at 29, and "intended to support non-violent, non-terrorist activities," *id*. at 33 (quotation marks omitted). That is because any support to terrorists "frees up other resources within the organization that may be put to violent ends," and also "helps lend legitimacy to foreign terrorist groups" that "makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks." *Id*. at 30. On this basis, the Court upheld the criminal material support statute even in the face of a constitutional challenge applying the demanding strict scrutiny standard. *See id.* at 40.

This underlying reality—that all contributions to terrorist organizations foreseeably cause terrorist violence—is no less true in civil cases. Courts evaluating civil claims have accordingly recognized that "[a]nyone who knowingly contributes to . . . an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." *Boim*, 549 F.3d at 698; *see also Atchley v. AstraZeneca UK*

Ltd., 22 F.4th 204, 227 (D.C. Cir. 2022) ("Providing fungible resources to a terrorist organization allows it to grow, recruit and pay members, and obtain weapons and other equipment. It was reasonably foreseeable that financially fortifying [a terrorist group] would lead to the attacks that plaintiffs suffered.").

Given that underlying reality and given that knowingly providing any material support to a terrorist organization is already a felony, it is hard to understand why Congress would have wanted to exempt any defendant who provided such support from civil liability under JASTA. Certainly, nothing in the text or context of the statute suggests any such intent.

In response, defendants argue that because the criminal prohibition already covers this conduct, JASTA need not be read to cover it again. But federal criminal and civil prohibitions frequently overlap—and such overlap is beneficial because it facilitates access to justice for victims, and creates additional mechanisms for accountability that do not require prosecutorial resources. Accordingly, there is nothing unusual or untoward about construing JASTA to have a similar scope to the existing criminal prohibition.

If anything, defendants' argument gets the relationship between criminal and civil liability backwards: Limitations on civil liability are intended "to avoid subjecting innocent, incidental participants to harsh penalties or damages." *Halberstam*, 705 F.2d at 485 n.14. But the criminal prohibition—and the legislative findings underpinning it—show that *there is no innocent way to knowingly provide material support or resources to terrorists*. That act is *malum in se* because of what we know about terrorist organizations and the

ways they convert any assistance into increased capacity for violence against Americans.

Similarly, there is no reason to think that Congress wanted to force the victims of terrorist attacks to trace a defendant's assistance through to the specific attack that injured them. Such a requirement would impose an impossible burden because "[m]oney, after all, is fungible, and terrorist organizations can hardly be counted on to keep careful bookkeeping records." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004); *see also Boim*, 549 F.3d at 698 (explaining that in the context of terrorist finance, the fact that the plaintiff's injury "could not be traced to any of the contributors . . . would be irrelevant" to liability); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 433 (E.D.N.Y. 2013) (explaining that requiring plaintiffs to trace money to attacks "would be impossible and would make the ATA practically dead letter because money is fungible") (cleaned up), *on reconsideration in part*, 2017 WL 4480755 (E.D.N.Y. Sept. 30, 2017). In fact, in *Holder*, a senior official at the State Department submitted an affidavit explaining that "[b]ecause money is fungible and difficult to trace, and because terrorist groups do not open their books to the outside world, it is exceedingly difficult for U.S. law enforcement agencies to distinguish between funds used to support exclusively non-violent humanitarian activities, and those used to support criminal, terrorist activities." *Holder* J.A. 136-37. "Once funds are transferred to foreign institutions, the ability of the U.S. government to identify the end-recipients and beneficiaries of such funds is dramatically diminished." *Id.* at 137. If the U.S. government, with all of its formidable resources, cannot trace the

flow of funds through terrorist organizations, then it is fanciful to expect the ordinary Americans victimized by terrorists (and their families) to do so. When it enacted JASTA, Congress did not intend to impose such an impossible burden.

To be clear, these propositions are all specific to terrorism. In other contexts, it may make sense to hold that a defendant's provision of general support to a wrongdoer is not enough to support a claim that the defendant aided and abetted the wrongdoer's misdeeds. For example, in the securities context, merely providing ordinary underwriting services to an issuer, without more, may be insufficient to make the underwriter liable for aiding and abetting the issuer's securities fraud. That is because the issuer is not fundamentally tainted by criminality. In the terrorism context, by contrast, we know that the provision of any assistance to these organizations furthers their violent terrorism. Congress has codified that finding as a matter of law; this Court embraced it in *Holder*; and it remains true today. This Court should abide by it when interpreting JASTA, and should accordingly hold that the knowing provision of support to terrorist enterprises is one way to aid and abet them and their terrorism.

C. JASTA's Elements Provide Appropriate Safeguards Against Overbroad Liability

The foregoing shows why the Court should not be concerned about imposing liability on defendants that knowingly provide substantial assistance to terrorists and terrorist organizations. Put simply, those defendants deserve to be held liable for assisting terrorists

who seek to murder our people and undermine our national security and foreign policy. And again, in JASTA's purpose section, Congress was quite clear that it was not concerned about overbroad liability; it wanted to provide the "broadest possible basis" for relief that the Constitution permits. JASTA § 2(b).

But if the Court is concerned at all about JASTA's breadth, a review of the elements of the cause of action should put those concerns to rest. Notwithstanding the breadth of the cause of action Congress created, it also incorporated well-established legal limits that ensure fairness for defendants.

First, JASTA applies only if the act of international terrorism that injured the plaintiff was committed, planned, or authorized by a designated foreign terrorist organization. *See* 18 U.S.C. § 2333(d)(2). This limits the pool of eligible plaintiffs to those who have suffered injury at the hands of our Nation's worst enemies.

Second, JASTA has a scienter element, provided by *Halberstam*, that the defendant must be generally aware that it is playing a role in an illegal or tortious activity. *See* 705 F.2d at 487-88. This requirement protects innocent defendants, or those who provide support to terrorists inadvertently, from facing liability. It also strikes the appropriate balance between protecting the innocent and ensuring that defendants are not able to circumvent the statute—which would be a significant risk if the Court were to follow defendants' suggestion and read a specific intent requirement into the law.

Third, any assistance provided must be substantial under the six-factor *Halberstam* test. Under that

rule, certain types or amounts of assistance—for example, small amounts of assistance provided on a one-time basis with a relatively innocent state of mind—will not qualify as substantial. This would likely protect, for example, an ordinary person making a small donation to an ostensible charity run by a terrorist organization. At the same time, it would maintain liability for large-scale terrorist financiers, as well as those who enable them.

Importantly, the "substantial" inquiry accounts for all of the concerns that defendants and the government raise about potentially overbroad liability. For example, if a defendant is accused only of "inaction," that would be weighed when a court considers the "type of assistance" (the second *Halberstam* substantiality factor). When the defendant provided support remotely, that relates to the third factor (presence at the time of the tort). And when the defendant provided assistance reluctantly, that relates to the fifth factor (state of mind). Accordingly, there is absolutely no need to supplement the Congressionally mandated *Halberstam* test in this or any other JASTA case. Instead, courts should do what they always do, weighing all the factors to determine whether a particular defendant's assistance is substantial.

Fourth, the act that injured the plaintiff must be a foreseeable consequence of the activity the defendant aided. In some cases, a defendant may be able to show (*e.g.*, with expert evidence) that certain types of assistance do not foreseeably cause terrorist violence. For example, the temporal or geographic distance between the assistance and the violence may be too great for the violence to have been a foreseeable consequence of the activity assisted. But when the defendant provides

the sort of assistance that a terrorist organization can readily convert into a capacity for violence (*e.g.*, cash or other fungible resources), liability would likely attach.

All of those elements provide important protections to innocent defendants. Accordingly, there is no need to interpret the statute to require victims to tie the defendant's assistance to the specific attack that injured them. Indeed, for the reasons explained above, imposing such a requirement would be contrary to JASTA's text, to Congress's clear intent, and to longstanding policy regarding terrorists and terrorist organizations.

Finally, we offer a thought about the government's position in this case. The government correctly argues that JASTA does not "require the plaintiff to show that the defendant knew about or provided aid specific to the particular terrorist attack in question." U.S. Br. 33. Instead, "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." *Id*. at 33-34. The government provides specific examples of cases that, in its view, sufficiently allege liability. Among other circumstances, DOJ recognizes that liability is appropriate when defendants provide "atypical services" to terrorists, show "knowing complicity in a terrorist group's illegal activities," or knowingly provide "substantial funds or other fungible resources to a foreign terrorist organization or its close affiliates." *Id*. at 21, 24, 34. The government specifically cites approvingly to the

D.C. Circuit's decision in *Atchley*, and the Second Circuit's decision in *Kaplan*.

Amici agree with the government that all of these are situations that are *sufficient* to trigger secondary liability under JASTA, and that the inquiry generally will turn on the facts of a particular case. At the absolute minimum, this Court should make that clear when it rejects defendants' rigid limitations on JASTA. We disagree, however, to the extent the government argues that it is ever *necessary* for the plaintiff to show that the support the defendant provided was atypical, or intended to promote violence specifically. Instead, these factors are properly accounted for as part of the inquiry into whether assistance was "substantial." In most cases, support provided to terrorists will qualify because, as the authorities cited in this brief illustrate, there is no innocent way to knowingly provide such support to terrorists—and such support foreseeably promotes terrorist violence. This Court already held as much in *Holder*. It should not disturb that holding here.

CONCLUSION

This Court should hold that knowingly providing substantial assistance to a terrorist enterprise is one way to aid and abet that enterprise's acts of terrorism—and that there is no need for plaintiffs asserting such claims to trace the assistance through to specific attacks, or to establish that the defendant knew its assistance would be used in any particular attack.

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