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

AMICUS BRIEF FOR SENATOR CHARLES E. GRASSLEY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

Senator Grassley is committed to disrupting terrorist financing, ensuring justice for American victims of terrorism, and maintaining the carefully crafted national security architecture Congress developed over the past 25 years in close consultation with the Executive Branch.

He is the original sponsor of the Anti-Terrorism Act 1990 ("ATA"), Pub. L. No. 101-519, repealed for technical reasons and reenacted in 1992 at Pub. L. 102–572 (now codified at 18 U.S.C. §§ 2331-2239D). He has also sponsored or co-sponsored multiple amendments to the ATA prompted by court decisions that erroneously restricted the ATA's scope. These include the Justice Against Sponsors of Terrorism Act ("JASTA"), the Anti-Terrorism Clarification Act of 2018, and the Promoting Security and Justice for Victims of Terrorism Act of 2019, which further strengthened the ATA and clarified Congress's intent in response to lower court rulings restricting its scope.

He therefore has significant knowledge of Congress's intent and knows that civil liability plays an important role in deterring third parties from providing essential services, including communications equipment, to terrorists. *See* 18 U.S.C. § 2339A(b)(1).

He also writes as a representative of his, and many others', constituents. Hundreds of Americans are currently plaintiffs in lawsuits under the ATA,

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[1] Counsel of record for all parties consented in writing to this filing. Amici certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

including its aiding-and-abetting cause of action, which provides an especially powerful remedy to U.S. nationals killed or injured by acts of international terrorism that were committed, planned, or authorized by designated foreign terrorist organizations ("FTOs"). These plaintiffs include veterans who were grievously injured and Gold Star families whose loved ones were killed in Iraq and Afghanistan while serving our nation, the victims of the September 11th attacks, Americans who were tortured or killed by ISIS in Syria, and many others who also deserve the opportunity to have their cases decided on the merits.

The companion case of *Gonzalez v. Google*, No. 21-1333, presents weighty questions about whether Section 230 of the Communications Decency Act should continue to shield social media companies and other internet providers from liability for the consequences of third-party content. That case presents a fundamentally different question for this Court and therefore Senator Grassley takes no position here on the proper scope of Section 230. He also takes no position on the ultimate determination of liability. He only submits this brief to defend the plain meaning of statutes enacted by Congress.

SUMMARY OF ARGUMENT

This Court should hold that civil liability for aiding and abetting does not require that a defendant knowingly provide substantial assistance to the *specific* terrorist attack that injured a plaintiff. This is consistent with the plain text of the statute and with Congress's intent. Anything less would immunize even a defendant who knowingly donated a billion dollars to ISIS or al-Qaeda as long as the funds were not earmarked for, or traceable to, a particular attack. Such a result would be the very opposite of what

Congress intended when it enacted JASTA and is inconsistent with the text of the statute.

Instead, liability is available against persons and entities that knowingly provide substantial assistance to terrorists and their agents, from which acts of international terrorism are a reasonably foreseeable risk. This result is compelled by the ATA's plain text and context. Furthermore, the ATA contains no exception for "ordinary businesses providing widely available goods or services," Pet. Br. 2. If those goods or services are knowingly provided to terrorists and a jury determines they are substantial, then it violates the plain text of the ATA. Inferring such an exception to the ATA is inconsistent with the text of the statute and would compromise important cases involving not only social media but also terror financing. Under the ATA, the only way to determine the culpability of the defendant's assistance is, as JASTA requires, to permit a jury to decide whether that assistance was provided "knowingly," and whether it was "substantial"—an inquiry that permits the jury to weigh the parties' assertions and evidence. In support of this contention, amicus stresses three points.

First, the plain text of the ATA's aiding-and-abetting provision, created by JASTA in 2016, makes clear the defendants are liable if they knowingly provided substantial services to terrorist organizations and their agents when those organizations injured or killed Americans. Mindful of this Court's admonitions that Congress should speak clearly, the legislature did so here, unequivocally articulating that it was providing American victims of terrorism with "the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting

and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b).

JASTA thus imposes secondary liability on "any person who aids and abets, by knowingly providing substantial assistance." 18 U.S.C. § 2333(d)(2). There is no exception for particular types of assistance; the only requirement is that the assistance be "substantial"—a fact-intensive inquiry governed by the D.C. Circuit's opinion in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress found "provides the proper legal framework" for liability under the statute. *See* JASTA § 2(a)(5). Under *Halberstam*, even a "passive" contributor, whose "acts were neutral standing alone," can be held liable for violent acts that were "a natural and foreseeable consequence of the activity" they assisted. 705 F.2d at 474, 488.

Second, the ATA and JASTA are part of a broader counterterrorism toolbox that includes criminal liability, sanctions, diplomatic efforts, and the use of force. These counterterrorism policies rest on the axiom that terrorists, and especially designated FTOs, are so dangerous that providing *any* material support to them necessarily supports their violent activities. Congress has long sought to prevent terrorists from accessing resources they can use to harm our national interests and our citizens, and so it has imposed sweeping criminal liability on those that provide any material support to terrorists, and especially FTOs. *See* 18 U.S.C. §§ 2339A(a), 2339B. To supplement the criminal provisions, Congress added the civil provision premised on the same understanding of the danger posed by supporting terrorists. Reading these provisions as a

cohesive whole, the Court should hold that any company that knowingly provides substantial material support to terrorists or their agents can be held liable as an aider and abettor under JASTA.

Third, this Court should affirm the Ninth Circuit's decision insofar as the court of appeals held that the *Taamneh* plaintiffs have stated a viable claim for aiding and abetting under JASTA. In most respects (save a few, addressed in detail in Part III, *infra*), the Ninth Circuit stated the law correctly, and it reached the right result.

ARGUMENT

I. JASTA's Text Imposes Civil Liability on Persons and Entities That Knowingly Provide Substantial Assistance to Terrorists and Their Agents

1. Since 1992, the ATA has empowered "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs," to sue and "recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees." 18 U.S.C. § 2333(a).

Congress was clear when it enacted the ATA that it wanted to reach not only suicide bombers and trigger-men (whom Congress understood are usually dead, hiding, or imprisoned after an attack, not to mention judgment-proof), but also the individuals and entities that enabled those terrorists—including especially financial supporters and facilitators of terrorism, who provide fungible resources that terrorists use to execute and promote violence. *See, e.g.*, S. Rep. No. 102-342, at 22 (1992) (explaining that the ATA seeks to impose "liability at any point along the causal chain

of terrorism," and thus "interrupt, or at least imperil, the flow of money" to terrorists); *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690–91 (7th Cir. 2008) ("Damages are a less effective remedy against terrorists and their organizations than against their financial angels. Terrorist organizations have been sued under section 2333 . . . but to collect a damages judgment against such an organization, let alone a judgment against the terrorists themselves (if they can even be identified and thus sued), is . . . well-nigh impossible.")

For years, however, judicial decisions inconsistently interpreted the ATA; although some courts gave the ATA its intended breadth, others resisted. The courts that declined to read the ATA to reach aiding and abetting often cited this Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994), which held that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." These courts reasoned that under this Court's precedents, it would be improper to read a cause of action for aiding and abetting into the statute absent clear direction from Congress. *See, e.g.*, *Rothstein v. UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013).

Congress responded by enacting JASTA in 2016, providing that when a U.S. national is injured by an act of international terrorism that was committed, planned, or authorized by a designated FTO, "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 codified findings accompanying JASTA are instructive. They explain that "[i]t is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability." JASTA § 2(a)(4). They provide that the D.C. Circuit's decision in *Halberstam*, "which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework for how such liability should function." *Id*. § 2(a)(5). And they explain that 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 . . . should reasonably anticipate being brought to court in the United States to answer for such activities.

Id. § 2(a)(6).

JASTA also has a codified purpose section, which explains that its purpose "is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against" anybody, including "entities," "wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b). "Material support" is a statutory term of art that includes "any property, tangible or intangible, or service," including "currency or monetary instruments or financial

securities, financial services," and "communications equipment," among others. 18 U.S.C. § 2339A(b)(1).

JASTA was enacted with overwhelming bipartisan support. The bill was introduced in the Senate by a bipartisan group of cosponsors, and it passed in both the Senate and the House of Representatives by voice vote. President Obama vetoed the statute, but not because of any controversy relating to the secondary liability provisions; instead, the President objected to a separate provision of JASTA relating to sovereign immunity. *See* Veto Message from the President-S.2040, (Sept. 23, 2016) *available at* https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040. Congress was unpersuaded: the Senate overrode President Obama's veto by a vote of 97 to 1; the House overrode the veto by a vote of 348 to 77.

Robust bipartisan majorities in both houses of Congress came together to override a Presidential veto and provide American victims of terrorism with the broadest possible basis to seek relief against those who have provided support to terrorists. The resulting statutory text, by its plain meaning, reaches any person or entity that "knowingly" provides services to terrorists directly or indirectly—as long as those services are "substantial."

Congress also directed courts to look to *Halberstam* when applying the statute. JASTA § 2(a)(5). The defendant in *Halberstam* was held liable for a murder that she did not directly assist, or even know about. Instead, she acted as a "banker, bookkeeper, record-keeper, and secretary" to a burglary enterprise. *Halberstam*, 705 F.2d at 487. The court described her as a "passive but compliant partner" to the burglar, *id*. at 474, and held that she could be liable even though "her own acts were neutral standing alone" because,

when "evaluated in the context of the enterprise they aided," they were "important," *id*. at 488.

With respect to the element of knowledge, *Halberstam* held that it was enough that the defendant assisted the burglar "with knowledge that he had engaged in illegal acquisition of goods." 705 F.2d at 488. Indeed, to hold her liable for the murder, "it was not necessary that [she] knew specifically that [he] 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*.

Halberstam then assessed whether that assistance was "substantial" using a six-factor test including the nature of the act encouraged (there, burglary), the amount of assistance given by the defendant, the defendant's presence or absence at the time of the tort, relation to the other tortfeasor, state of mind, and the duration of assistance. *Id.* at 483-84. The court stressed that when determining whether assistance is substantial, courts should "apply a proportionality test to particularly bad or opprobrious acts," so that "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. Under this standard, even "relatively trivial" assistance can count as "substantial" when the underlying acts are bad enough. *Id.*

Halberstam further explained that the principles enunciated therein would have to "be adapted as new cases test their usefulness in evaluating vicarious liability." 705 F.2d at 489. The court understood that tort law constituted an important "supplement to the

criminal justice process and possibly [served] as a deterrent to criminal activity," as well as a way to provide "economic justice for victims of crime." *Id*. From that language, Congress understood that courts would read *Halberstam* in harmony with Congress's command to construe JASTA broadly.

The plain meaning of JASTA allows American victims of terrorism to seek secondary liability against persons or entities that knowingly provide substantial services to terrorists and their agents. The element of knowledge is satisfied if the defendant knows that it is providing services to a terrorist enterprise—because violence and killing are a natural and foreseeable consequence of terrorist enterprises. *Cf. Halberstam*, 705 F.2d at 488 ("violence and killing is a foreseeable risk in [stolen property] enterprises"). And the "substantial" element is satisfied if those services qualify as such based on the six-factor test in *Halberstam*. Substantial assistance, in whatever form, foreseeably enables terrorists to carry out violent campaigns against Americans, and Congress has sought for decades to prevent terrorists from accessing exactly that sort of support.

2. Petitioner argues that, because the injury giving rise to JASTA aiding-and-abetting liability was caused by an "act of international terrorism," it follows that the defendant must knowingly provide substantial assistance to the specific terrorist attack that injured the plaintiff. In effect, petitioner would require plaintiffs to prove that defendants knew they were assisting *specific* attacks, and to trace the assistance they provided through to those attacks. That is incorrect for four reasons.

First, if this Court accepts petitioner's argument, knowingly facilitating a billion-dollar payment to ISIS

would not be actionable unless the payment was earmarked for a specific terrorist attack or funds from that payment could be traced to the financing of that attack. Such a result would be absurd and discredits any rule that compels it.

Second, as the plaintiffs explain, the correct reading of the statute is that JASTA reaches any person who knowingly provides substantial assistance. The operative words in Section 2333(d)(2) do not include the word "to." When it enacted JASTA, Congress's focus was always on terrorist organizations and their agents, as opposed to specific acts of terror. *See, e.g.*, JASTA § 2(a)(6)-(7), (b) (describing, three separate times, Congress's intent to impose liability on anybody who provides material support or resources to terrorists and terrorist organizations, and not once suggesting a requirement to trace that assistance to specific attacks).

Third, JASTA's aiding and abetting theory of liability does not require that the defendant's substantial assistance must be traceable to the act of international terrorism that injured the plaintiff. Instead, Congress understood that one of the primary ways terrorist attacks are aided and abetted is when "persons, entities, and foreign countries … provide[] material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States. JASTA § 2(b). That is because these organizations are adept at converting any form of support—however innocuous—into fuel for further violence. *See* Part II, *infra*. Indeed, because of the fungibility of money, providing support to a terrorist organization engaged in an ongoing campaign of violence necessarily aids that violence because it allows the organization to spend less on its other activities, and more on its attacks.

Fourth, *Halberstam* refutes petitioner's argument. Contrary to petitioner's assertion, Pet. Br. 24, the "principal violation" in *Halberstam* was the "burglary enterprise," not the unplanned murder. 705 F.2d at 488. What is more, the defendant did not have to assist burglaries *directly*, and the plaintiffs did not have to trace the defendant's assistance to the specific burglary that injured them. Thus, the D.C. Circuit observed that Hamilton's "own acts were neutral standing alone"; that the amount of assistance she gave was not "overwhelming as to any given burglary"; and that she was "not present at the time of the murder or even at the time of any burglary." *Id*. Indeed, "it was not necessary that Hamilton knew specifically that Welch was committing burglaries" at all—let alone that he was going to burglarize the plaintiffs' home. Instead, "it was enough that she knew he was involved in some type of personal property crime at night," because "violence and killing [was] a foreseeable risk" in any such enterprise. *Id*.

These holdings conclusively refute petitioner's suggestion that a defendant must have knowledge of specific assistance provided to the commission of the terrorist attack, or that the plaintiffs here must somehow trace the assistance defendants provided to the attack that injured them. Instead, the knowing provision of substantial assistance to an ongoing criminal enterprise has always been sufficient under *Halberstam* to make the provider liable for the enterprise's foreseeable torts. And that is why Congress incorporated *Halberstam* into JASTA: to make it crystal-clear that a defendant can be liable for terrorist attacks when it knowingly provides substantial assistance to the terrorist organization or terrorist enterprise that foreseeably committed those attacks.

3. Petitioner also asks the Court to fashion an exception to the statute's application that makes it harder to state or prove a claim when the defendant provides "generic, widely available services" like social media services. Pet. i. Petitioner further contends that liability hinges on whether knowing assistance to terrorist organizations comes in the form of "ordinary business" or even nominally "humanitarian" assistance. Pet. Br. 2. But these exceptions have no textual basis, and *Halberstam* makes clear that conduct that appears "neutral standing alone" may nevertheless be culpable. 705 F.2d at 488.

What matters is not whether the support the defendant provides is widely available or generic—but instead whether the defendant provided that support knowingly, and whether the support was substantial. As this Court has explained, "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). Although Congress was not specifically addressing material support provided by social media services at the time it enacted JASTA, that is of no relevance: "the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Id*. (cleaned up).

The Court should also not accept petitioner's suggestion that it add any heightened intent requirement into JASTA based on the type of services at issue that does not exist in the statute's text. This argument is similar to one the respondents made in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which related to the meaning and constitutionality of

§ 2339B, the ATA's criminal statute prohibiting the provision of material support to terrorist organizations. The respondents there, who concededly did not intend to advance terrorism, urged the Court to read a specific intent requirement into the statute when the material support at issue involved speech. This Court rejected that argument, explaining that it would make no sense to read the statute "as requiring intent in some circumstances but not others," when the statutory text did not draw that distinction. *Id*. Here, too, the statute does not impose different knowledge standards based on the type of assistance at issue—and this Court's precedents foreclose adding qualifications that Congress eschewed.

The easiest way to understand that petitioner's arguments are erroneous is to consider the most fungible kind of support that Congress sought to prevent: the transfer of cash to terrorists. One could not imagine any commodity more generic, nor more widely available; cash is a completely generic medium of exchange, and there are trillions of dollars in circulation. Once cash makes its way to a terrorist organization, it is impossible to prove that a particular note was used in connection with a particular terrorist attack: "Money, 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 defendants that make knowing contributions to terrorist organizations are "jointly and severally liable" even if "the death could not be traced to any of the contributors" because "[a]nyone who knowingly contributes to . . . an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities").

It is also at least debatable whether the social media services at issue here qualify as widely available, generic services. Only a handful of companies have the power to permit people instantly to broadcast messages to billions of recipients. As the plaintiffs in this case alleged, "social media platforms were essential to ISIS's growth and expansion." Pet. App. 63a. Without them, "ISIS would have no means of radicalizing recruits beyond ISIS's territorial borders," but would instead have been stuck with "short, low-quality videos on websites that could handle only limited traffic." *Id*. at 63a-64a.

Instead, defendants' platforms allowed ISIS to create "its own media divisions and production companies aimed at producing highly stylized, professional-quality propaganda," and then spread those messages, thus expanding its reach, and raising its profile "beyond that of other terrorist groups." *Id*. at 64a. That these companies provided access to incredibly potent communications tools indiscriminately during the relevant period does not make those services innocuous or harmless when terrorists use them to fundraise, recruit, spread propaganda, and promote violence. In other words, defendants are not merely selling bread or dry-cleaning services; they allegedly provided ISIS with access to a multi-billion-dollar global communications infrastructure that has clear and obvious utility to terrorists and their agents. That the technology also has nonviolent applications is irrelevant because the same is true of many other kinds of material support identified by Congress as problematic, *e.g.*, cash. *See* 18 U.S.C. § 2339A(b)(1).

Under this Court's precedents, the textual analysis should end the inquiry. Congress spoke clearly, commanding courts to construe the aiding-and-

abetting cause of action as broadly as the Constitution permits. This Court should do so here and apply the statute according to its terms.

II. American Counterterrorism Policy Supports Liability for Persons or Entities That Knowingly Provide Services to Terrorists and Their Agents

The broader context of American counterterrorism policy only confirms that companies that knowingly provide substantial services to terrorists and their agents are liable for aiding and abetting. This includes both the ATA's enactment history and its relationship to criminal and administrative counterterrorism laws.

1. The ATA was enacted in response to a series of horrific terrorist attacks on U.S. nationals abroad. In 1983, 241 Americans were murdered in a terrorist bombing of the Marine barracks in Beirut. In 1985, Palestine Liberation Organization ("PLO") terrorists hijacked a cruise ship in the Mediterranean and murdered a wheelchair-bound American passenger, Leon Klinghoffer, by shooting him in the head and throwing his body into the sea. And just days before Christmas in 1988, Libyan terrorist operatives planted bombs on Pan Am Flight 103, which exploded over Lockerbie, Scotland, killing hundreds of passengers (including 190 American citizens) and 11 individuals on the ground. *See* 136 Cong. Rec. S7593–94 (daily ed. Apr. 19, 1990) (statement of Sen. Heflin).

On top of their grief, victims and their families struggled to hold accountable the perpetrators of these attacks and their enablers because of "reluctant courts and numerous jurisdictional hurdles." 136 Cong. Rec. S7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley). For instance, in the *Klinghoffer* litigation,

the PLO raised jurisdictional defenses that the plaintiffs managed to overcome "[o]nly by virtue of the fact that the attack violated certain Admiralty laws and that the [PLO] had assets and carried on activities in New York." H.R. Rep. No. 102-105, at 5 (1992). Even then, Leon Klinghoffer's family had to endure over a decade of protracted litigation before the PLO agreed to settle.

To confront the growing terrorist threat and provide a forum for victims to have their day in court, Congress undertook a careful examination of terrorist financing networks to understand how best to disrupt terrorist activity while providing justice and compensation to victims. The result was the ATA's civil liability provision, which "fill[ed] [a] gap" in U.S. counterterrorism strategy by "establishing a civil counterpart" to existing criminal penalties for international terrorism. 136 Cong. Rec. at S14283 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley); *see* 137 Cong. Rec. S8143 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley) ("The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation.").

When the ATA was reported to the Senate floor, Senator Grassley, its champion and author, made clear that civil liability would hold terrorists "accountable where it hurts them most, at their lifeline, their funds." 136 Cong. Rec. at S14284 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley). Creating civil liability for terrorists and their sponsors was no symbolic move. Rather, it reflected Congress's recognition that, to stop terrorist activity, the United States must also cut perpetrators off from "the resource that keeps

them in business—their money." 138 Cong. Rec. S33629 (daily ed. Oct. 7, 1992) (statement of Sen. Grassley).

Thus, the ATA's civil liability provisions were intended to deter those who may or may not share a terrorist's murderous purpose from providing contributions or services that foreseeably facilitate terrorist activity. As Congress explained in enacting criminal penalties for material support for terrorism, liability reflects "the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services" to terrorists and their agents "frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 104-383, at 81 (1995); *see also* Oral Arg. Tr. 39, Nos. 08-1498, 09-89, *Holder v. Humanitarian Law Project* (Feb. 23, 2010) ("Congress reasonably decided that when you help a . . . foreign terrorist organization's legal activities, you are also helping the foreign terrorist organization's illegal activities") (statement of then-Solicitor General Kagan). As Senator Schumer noted in support of JASTA when it was introduced, terrorists "need a great deal of money and material support to carry out attacks such as what occurred on 9/11." 160 Cong. Rec. S6657-01, S6659 (daily ed. Dec. 11, 2014) (statement of Sen. Schumer). To deny terrorists access to funds—and, importantly, to the financial services that enable terrorists to make use of those funds—the Senate Report accompanying the ATA expressly stated that the statute imposed broad "liability at any point along the causal chain of terrorism," to "interrupt, or at least imperil, the flow of money." S. Rep. No. 102-342, at 22 (1992).

Congress also crafted a broad remedy to provide justice to individual victims. As Senator Grassley

explained when introducing the ATA, "our civil justice system provides little civil relief to the victims of terrorism," because "victims who turn to the common law of tort or Federal statutes, find it virtually impossible to pursue their claims because of reluctant courts and numerous jurisdictional hurdles." 136 Cong. Rec. S7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley). Congress therefore sought to "codify" the principles that allowed Leon Klinghoffer's family to recover and "make the rights of American victims definitive," including for victims who, without the ATA, would find jurisdictional hurdles insurmountable. 137 Cong. Rec. S8143 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley). By enacting a broad remedy, Congress intended to "open[] the courthouse door to victims of international terrorism." S. Rep. No. 102-342, at 45 (1992).

As noted above, some previous judicial interpretations of the ATA have been inconsistent with the intent of the statute. Accordingly, Congress repeatedly amended the statute to strengthen it and reemphasize that Congress explicitly means what the text says. Most notably, Congress enacted JASTA, codifying an action for aiding and abetting in 2016. Congress would go on to enact the ATCA, as well as the PSJVTA, both of which address judicial decisions improperly limiting the scope of jurisdiction for terrorism torts.

2. The ATA and JASTA's cause of action also work alongside criminal and administrative efforts to deter terrorism. American counterterrorism policy relies substantially on the axiom that terrorist organizations are so irredeemably violent that any support for them inevitably advances that violence. That proposition is codified in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132,

§ 301(a)(7), which provides 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." Indeed, to designate an organization as an FTO, the Secretary of State must determine that "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1)(C).

This Court considered the nature of terrorist organizations in *Holder*. There, humanitarian groups sought to provide limited assistance to certain terrorist organizations by training those organizations' members "how to use humanitarian and international law to peacefully resolve disputes," "petition various representative bodies such as the United Nations for relief," "present claims for tsunami-related aid to mediators and international bodies," participate in peace negotiations, and engage in political advocacy on behalf of people living abroad. *See Holder*, 561 U.S. at 14-15. In addition to unsuccessfully arguing that the statute could not be interpreted to reach defendants that lacked specific intent to further terrorism, *see supra* p.13, the humanitarian groups argued that it would violate the First Amendment to treat their speech as criminal material support.

This Court addressed that constitutional argument by applying strict scrutiny and found that the statute survived it. The parties agreed, and the Court found, that the government's "interest in combating terrorism [was] an urgent objective of the highest order," and therefore a compelling interest for First Amendment purposes. *Holder*, 561 U.S. at 28. The humanitarian groups argued, however, that the statute was not

narrowly tailored to that interest because "their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism." *Id.* at 28-29.

This Court rejected that argument. It observed that "[w]hether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question," which Congress resolved in 1996 by making "specific findings," including that "*any contribution to [a terrorist organization]* facilitates" its terrorist conduct. *Holder*, 561 U.S. at 29 (quoting AEDPA § 301(a)(7)). Congress also specifically "considered and rejected the view that ostensibly peaceful aid would have no harmful effects" when, during drafting, it "removed an exception" to liability "for the provision of material support in the form of 'humanitarian assistance to persons not directly involved in' terrorist activity." *Id*. (citation omitted).

Consistent with the requirements of strict scrutiny, the Court did not just accept Congress's conclusion, but instead found it "justified." *Holder*, 561 U.S. at 29. The Court held that peaceful support still "further[s] terrorism by foreign groups in multiple ways." *Id*. at 30. Teaching terrorists how to request international disaster relief would enable them to access funds. *Id*. at 37. Those funds would "free[] up other resources within the organization that may be put to violent ends." *Id*. at 30. After all, "[m]oney is fungible." *Id*. at 31. Thus, when terrorist organizations raise funds for "civilian and humanitarian ends," that money is often redirected "to fund the purchase of arms and explosives." *Id*. (quotation marks omitted). The Court further found that support legitimizes terrorist organizations, enabling recruiting and fundraising. *Id*. at 30.

The Court also held that in this foreign affairs context, it was appropriate to defer to Congress; indeed, the Court believed that it was "vital in this context not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Holder*, 561 U.S. at 34 (quotation marks omitted). Accordingly, the Court determined that it would be inappropriate to demand "hard proof—with 'detail,' 'specific facts,' and 'specific evidence'—that [the humanitarian groups'] proposed activities will support terrorist attacks." *Id*. Deeming this "a dangerous requirement," the Court concluded that the law does not require the government to "conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions." *Id*. at 34-35.

The Court thus accepted "the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization." *Holder*, 561 U.S. at 36. It therefore upheld the material support statute against a constitutional challenge.

The ATA, as amended by JASTA, is an important complement to the material-support statutes. Both laws are intentionally broad and designed to prevent and deter third parties from knowingly providing material support to terrorists. Both also rest on the same empirical judgment that any person who knowingly provides such support is knowingly contributing to the terrorists' violent activities, and therefore a proper target for liability. JASTA intentionally opens the courthouse door to American victims of terrorism where the material support to terrorists is substantial. *See* H.R. Rep. No. 115-858, at 3 (2018) ("The ATA's civil liability provision is aimed at deterring support

for terrorism, buttressing the country's counter-terrorism initiatives, and providing justice for victims of terrorist attacks.").

The empirical principles underlying the criminal material-support statutes also inform the scope of liability under JASTA. That is because *Halberstam* establishes that a defendant who knowingly assists an illegal enterprise can be held liable for unlawful acts that are a natural and foreseeable consequence of that enterprise. *See* 705 F.2d at 488. The criminal material-support statutes, and this Court's precedents interpreting them, help courts understand what consequences are "foreseeable" when a defendant provides material support to terrorists. Specifically, in *Holder*, this Court held that it was "wholly foreseeable" that terrorists could use peaceful dispute resolution skills "as part of a broader strategy to promote terrorism," describing that possibility as "real, not remote." 561 U.S. at 36-37. That is because it has been a known, codified fact since at least 1996—embraced by this Court by 2010—that any contribution to terrorists and their agents furthers terrorism. *See* AEDPA § 301(a)(7); *Holder*, 561 U.S. at 29. Accordingly, no company familiar with U.S. law should be able to profess that acts of terrorism were an unforeseeable risk of knowing and substantial assistance to terrorists—regardless of whether the assistance came in a "routine" or "ordinary" form. That argument did not work for humanitarian groups allegedly pursuing peace, and it cannot work any better for corporations seeking to conduct business.

III. This Court Should Affirm the Judgment Below

In light of the foregoing principles, the portion of the Ninth Circuit's judgment holding that the *Taamneh* plaintiffs stated a valid claim for aiding and abetting should be affirmed. The court of appeals' analysis—which considers two separate complaints—broadly tracks JASTA's intent, with a few exceptions where the court did not go far enough in recognizing the breadth of JASTA's cause of action.

First, the Ninth Circuit correctly concluded that the organization ISIS, and not the specific shooter, was the relevant "person" for purposes of the first element of the *Halberstam* analysis. Pet. App. 49a. Under JASTA, the word "person" takes the meaning given in 1 U.S.C. § 1, which includes, in addition to individuals, "associations" and other entities, properly understood to include organizations. *See* 18 U.S.C. § 2333(d)(1). Thus, a "person" need not be a natural person—and an attack committed by a terrorist organization suffices.

Second, the Ninth Circuit held that plaintiffs plausibly alleged the "general awareness" element of their claim—but the court phrased this element somewhat imprecisely. As the court acknowledged when it quoted *Halberstam*, this element requires the defendant to be "generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance." Pet. App. 48a (quoting *Halberstam*, 705 F.2d at 477); *see also* Pet. App. 61a. In *Halberstam* itself, the defendant was aware that she was playing a role only in the burglary enterprise. *See* 705 F.2d at 488. She was liable for the unplanned murder not because she played any role in it, but because "it was a natural and foreseeable consequence

of the activity" she aided (*i.e.*, the burglary enterprise). *Id*.

In this case, the Ninth Circuit held that the element was satisfied by a showing that the defendant "was generally aware of its role in ISIS's terrorist activities at the time it provided assistance to ISIS." Pet. App. 50a; *see also id.* at 62a (holding that the defendants "after years of media coverage and legal and government pressure concerning ISIS's use of their platforms, were generally aware they were playing an important role in ISIS's terrorism enterprise by providing access to their platforms and not taking aggressive measures to restrict ISIS-affiliated content").

While showing that a defendant knew that it was playing a role in *terrorist* activities would certainly be *sufficient* to satisfy JASTA's scienter element, it is not *required*. There are many "illegal or tortious" activities that can foreseeably lead to terrorism ranging from money laundering and counterterrorism sanctions evasion to donating to terrorist organizations' nominally non-violent activities. To the extent this Court discusses the general awareness element, it should reflect *Halberstam's* precise articulation of the governing standard to make it clear that the overall illegal or tortious activity in which the defendant plays a role need not itself be acts of terrorism (let alone the specific act that injured the plaintiff), as long as terrorism is a foreseeable risk of that illegal or tortious activity.[2]

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[2] The Court should also reject petitioner's attempt to characterize *Taamneh* as holding that petitioner merely failed to do enough to stop ISIS from using its platform. As the Ninth Circuit clearly explained, petitioner allegedly did more than that; it also proactively provided access to the platform despite knowledge that ISIS was using it. Pet. App. 62a. Indeed, the court

The Ninth Circuit also correctly held that "the allegation that Google knowingly gave 'fungible dollars to a terrorist organization' plausibly alleges that Google was aware of the role it played in activities that may be dangerous to human life." Pet. App. 51a (quotation marks omitted). As explained in Part II *supra*, Congress has long recognized that money is fungible, such that providing financial assistance to terrorist organizations foreseeably enables them to carry out acts of violence (either using those funds or using other funds that are freed up as a result of the financial assistance). Although it will seldom be possible to trace funds through a terrorist organization, it is a well-established empirical reality that the provision of fungible resources to terrorists foreseeably causes terrorist violence. Accordingly, courts should hold that the knowing provision of such resources can satisfy JASTA's scienter element.

On the other hand, the Ninth Circuit was wrong to suggest that "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*." Pet. App. 51a (quoting *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018)). The Second Circuit made this statement in *Linde* but has since then explained that the statement has been misconstrued. Thus, the Second Circuit has clarified that:

> Our statement that aiding-and-abetting liability "requires *more than* the provision of material support to a terrorist organization," *Linde*,

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noted plaintiffs' allegation that despite being "aware of ISIS's use of their respective social media platforms for many years—through media reports, statements from U.S. government officials, and threatened lawsuits," they have "refused to take meaningful steps to prevent that use." *Id*.

> 882 F.3d at 329 (emphasis added), does not establish that material support to an FTO is never sufficient for aiding-and-abetting liability. Instead, that statement articulates the principle that knowingly providing material support to an FTO, without more, does not *as a matter of law* satisfy the general awareness element.

Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 860 (2d Cir. 2021) (emphasis added). That clarification was clearly warranted because, where the assistance is substantial, the knowing provision of material support to a terrorist organization will almost always qualify as aiding and abetting. For example, the provision of substantial amounts of money to an organization that a defendant knows to be a terrorist organization qualifies because, for the reasons explained above, it is eminently foreseeable that providing such support will cause terrorist attacks. *See, e.g.*, *Holder*, 561 U.S. at 36-37 (holding that it was "wholly foreseeable" that a terrorist organization could use any contribution "as part of a broader strategy to promote terrorism," and that because "[m]oney is fungible," any "money a terrorist group . . . obtains . . . could be redirected to funding the group's violent activities"); *Boim*, 549 F.3d at 698 ("Anyone who knowingly contributes to . . . an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."). This Court should affirm this Congressional finding.

With respect to the requirement that the defendant "knowingly and substantially assist the principal violation," the Ninth Circuit held that the relevant "principal violation" was ISIS's overall terrorist campaign, not the specific attack that injured the plaintiff.

Pet. App. 54a; *id*. at 63a. For the reasons stated above, this is, broadly-speaking, correct. Under *Halberstam*, a defendant can be secondarily liable not only for the specific acts it assisted, but also for any reasonably foreseeable (tortious or illicit) acts done in connection with the acts assisted. 705 F.2d at 488.

Petitioner takes issue with this holding, arguing that liability should only be available if the defendant aided the *specific* attack—and not an overall campaign of terrorism or a particular terrorist organization.[3] For the reasons given above, this is incorrect and inconsistent with the plain language of the statute. Petitioner (and the other defendants) fail to acknowledge JASTA's findings and purpose section, which makes clear that Congress intended liability to reach 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*." JASTA § 2(a)(6) (emphasis added); *id*. § 2(a)(7) (explaining that JASTA creates "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 Americans' injuries); *id*. § 2(b) (explaining that JASTA provides "civil litigants with the broadest possible basis" to seek relief against anyone that has "provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States"). This Court has repeatedly recognized that such codified findings and statements of purpose shed important light on the meaning of statutes. *See, e.g.*,

[3] Because terrorist organizations constitute a criminal enterprise, knowingly providing substantial assistance to an FTO or its agents satisfies this element.

King v. Burwell, 576 U.S. 473, 482 (2015); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999), *overturned on other grounds due to legislative action*, Pub. L. No. 110-325 (2009); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006).

Petitioner's proposed reading would render JASTA's enforcement mechanism useless because in most cases it is impossible to trace specific support to specific attacks. Indeed, to the best of amicus's knowledge, no court has interpreted JASTA to require further tracing to a specific attack when, as here, the defendants provided substantial assistance to terrorists or their agents. That is because the provision of such support is an unlawful activity that foreseeably risks terrorist violence *per se*. *See, e.g.*, AEDPA § 301(a)(7).

Limiting liability in this situation is also not necessary to avoid ensnaring innocent companies because *knowingly* providing material support to a terrorist organization is already a felony. There is nothing innocent about a company that receives repeated warnings from the government and news outlets and continues to provide a platform to the world's deadliest terrorists. Such a company already faces criminal liability; in that context, civil judgments present no trap for the unwary.

Petitioner argues that the Ninth Circuit required only that it was "generally aware that ISIS adherents were somewhere among the billions using their ordinary services" and that Defendants' efforts to remove terrorist content were insufficient. Pet. Br. 2. If that had been the Ninth Circuit's holding, it would have been erroneous, but this misstates the holding of that court. JASTA is not a negligence statute. The Ninth Circuit credited the plausibility of the plaintiffs' allegations that the defendants *chose* not to remove

ISIS users, and multiple factors in the "substantial assistance" inquiry weighed in favor of liability—including the nature of the act assisted (terrorism), the importance of the assistance provided (very important), and the duration of the assistance (years, despite multiple warnings from many authoritative sources).

Of course, discovery may show that during the relevant period the defendants were merely negligent or lacked the technological capacity to effectively prevent ISIS users from using their platforms. But for purposes of the pleading stage, the Ninth Circuit was correct to hold that allegations of knowingly providing substantial assistance to ISIS are enough for ISIS's victims to state a claim.

CONCLUSION

The judgment below should be affirmed insofar as it holds that the *Taamneh* plaintiffs have stated a valid aiding-and-abetting claim.

Respectfully submitted,

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