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 CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Defendants Knowingly Provided Substantial Assistance to ISIS. 6

A. Defendants Are Capable of Reducing Terrorists' Use of Their Platforms, but Chose Not to 7

B. Terrorists' Effective Use of Social Media Has Substantially Contributed to Their Violence 12

II. JASTA Extends Liability to Entities That Knowingly Provide Substantial Assistance to the "Person" Who Commits Acts of Terrorism. 15

A. JASTA's Text, Express Purpose, and Findings Show That Substantial Assistance to Either the Person Who Committed Terrorist Acts or to the Acts Can Establish Aiding and Abetting Liability. 16

B. The *Halberstam* Legal Framework Confirms That Substantial Assistance to a Foreign Terrorist Organization Can Establish Aiding and Abetting Liability. 19

III. JASTA Aiding and Abetting Liability Requires That the Defendant (a) Was Generally Aware of a Role in an Illegal or Tortious Enterprise From Which Terrorist Acts Are a Reasonably Foreseeable Risk, and (b) Provided Substantial Assistance Knowingly, not Inadvertently. 22

A. *Halberstam*'s Second Element Requires That a Defendant Be Generally Aware of Its Role in an Overall Illegal or Tortious Activity from Which Violent Acts Are a Foreseeable Risk. 23

B. *Halberstam*'s Third Element Requires Only That the Defendant Knowingly, and Not Negligently or Inadvertently, Provide Substantial Assistance to the Person Who Committed the Injurious Act. 26

IV. JASTA Does Not Immunize Substantial Assistance Knowingly Provided to an FTO Just Because It Is in the Form of "Generally Available" or "Routine Services." 27

CONCLUSION 30

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INTEREST OF THE AMICUS[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States, with 500,000 members from all 50 states, including Kentucky, Michigan, Ohio, and Tennessee. Through its grassroots organization, CWA encourages policies that strengthen families and advocates for the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked — middle-class American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment.

On January 11, 2023, President Biden published an op-ed in *The Wall Street Journal* calling for bipartisan legislation to reign in abuses by what he described as "Big Tech."

> To keep Americans on their platforms, Big Tech companies often use users' personal data to direct them toward extreme and polarizing content that is likely to keep them logged on and clicking. All too often, tragic

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[1] *Amicus* certifies that no party or party's counsel authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

> violence has been linked to toxic online echo chambers.
>
> ***
>
> [W]e need Big Tech companies to take responsibility for the content they spread and the algorithms they use.[2]

Unfortunately, the government's *amicus* brief ("USG Br.") in support of the petitioner in this case downplays the connection between the "extreme and polarizing content" that Google, Facebook and Twitter ("Defendants") knowingly carried for ISIS and the "tragic violence" to which it was linked. The government's new positions in that brief contradicts 25 years of bipartisan consensus on counterterrorism policy and its own prior consistent position on the proper application and scope of the Anti-Terrorism Act ("ATA") as amended by the Justice Against Sponsors of Terrorism Act ("JASTA").

Recent disclosures by petitioner's new owner, Elon Musk, together with discovery obtained in litigation brought by two states against the Biden administration, has revealed that the FBI, Department of Homeland Security and (indirectly) the CIA among other Executive Branch agencies actively encouraged and arguably coerced the Defendants in this case and other social media companies to suppress the speech of American citizens of which those agencies did not approve. The government has long claimed that it was

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[2] Joe Biden, *Republicans and Democrats, Unite Against Big Tech Abuses*, WALL STREET JOURNAL, (Jan. 11, 2023), https://www.wsj.com/articles/unite-against-big-tech-abuses-social-media-privacy-competition-antitrust-children-algorithm-11673439411.

merely assisting and advising these companies to make "voluntary" decisions to prevent misinformation, but it is now abundantly clear that Defendants have been screening, "shadow-banning" and de-platforming users at the behest of government agencies for many years.

Most relevant here, the disclosures also reveal the technical sophistication of these social media companies and their ability to monitor, micro-target – and when they choose to – ban the dissemination of content on their platforms. These disclosures belie their past refusal to wield these incredibly powerful and precise tools against ISIS accounts and their often horrific content. They also strongly support the inference that the fact that vast quantities of ISIS content was able to remain on their platforms was not accidental nor the result of insufficient knowledge or means.

Because conservative organizations and other individuals and institutions that do not conform to conventional wisdom are increasingly likely to be silenced for expressing what government agencies and Defendants regard as "extreme and polarizing content," CWA has a strong interest in protecting free speech, including on Defendants' near monopolistic platforms. Simultaneously, however, CWA believes that foreign terrorist organizations ("FTOs") like ISIS, and state sponsors of terrorism like Iran – rather than American citizens who disagree with COVID-related school closures or with policies allowing biological males to compete in women's sports – pose an actual threat to our national security.

Thanks to a long-standing bipartisan consensus on the threat posed by terrorism, Congress has passed

multiple statutes to empower American victims of terrorism with the legal tools to seek redress against aiders-and-abettors of terrorism and have provided them the "broadest possible basis for relief."

CWA respectfully submits that this Court should read the applicable statute broadly, as Congress plainly intended it.

SUMMARY OF ARGUMENT

This brief responds to the narrative advanced by Defendants and certain other *amici* that this case seeks to impose liability on social media platforms for mere inaction or, at most, for "failing to do more" to remove terrorist content from their platforms (which they claim they have been trying their best to do), as well as the government's *amicus* brief urging reversal.

With respect to the first point, the historical record shows that Defendants have, for years, had the ability to suppress content they disagree with, and have wielded that ability when it suited them. But they have not uniformly and consistently done so with respect to terrorist content. That represents a deliberate choice on their part—and that choice has had the clear effect of enabling terrorist violence.

With respect to the government's argument, *amicus* contends that the government's analysis of key elements of the statute is not only erroneous, but contrary to long-standing bipartisan counter-terrorism policies and its own prior legal positions over the past 25 years.

First, civil liability under 18 U.S.C. § 2333(d) does not require that a defendant knowingly assist an act of international terrorism. The plain text requires only that a defendant knowingly provide substantial assistance to the "person" that injured the plaintiff—even if the support takes the form of routine business transactions or "charitable" donations. Neither the plain text of the statute nor the governing framework of *Halberstam v. Welch*, 705 F.2d 462, 488 (D.C. Cir. 1983), require plaintiffs to plausibly allege that defendants' knowing and substantial assistance has a "sufficient nexus to … a series of" terrorist attacks, as the government contends. USG Br. 13.

Second, and perhaps most importantly, the government hopelessly confuses JASTA's scienter requirements under the proper legal framework laid out in *Halberstam*. *Halberstam*'s second element for aiding and abetting liability is that a defendant must be generally aware of its role in an illegal or tortious activity from which violence is a reasonably foreseeable risk. The guiding principle of secondary liability is this foreseeability of harm, not some "nexus" to a specific criminal act. As this Court recognized in *Holder v. Humanitarian L. Project,* 561 U.S. 1, 32 (2010), material support to FTOs "in any form … furthers terrorism." That proposition has been codified in our laws since 1996, when Congress determined that FTOs "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," Antiterrorism and Effective Death Penalty Act ("AEDPA") § 301(a)(7), Pub. L. No. 104-132, 110 Stat. 1214, and therefore, made the knowing provision of material support to FTOs a felony. *See* 18 U.S.C. § 2339B.

Consistent with these principles, the D.C. Circuit recently affirmed the empirical fact recognized in *Holder* that "[p]roviding fungible resources to a terrorist organization allows it to grow, recruit, and pay members, and obtain weapons and other equipment," and so it is "reasonably foreseeable that financially fortifying" an FTO "would lead to [terrorist] attacks," even if the aid is "directed to beneficial or legitimate-seeming operations." *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 227-28 (D.C. Cir. 2022).

Finally, the government's throw-away claim that JASTA "does not impose liability merely for providing generalized aid to a foreign terrorist organization," USG Br. 13, has no support either in its text, its findings, or the proper legal framework supplied by *Halberstam*. The test of a defendant's assistance is its substantiality under the factors identified by *Halberstam*, not its form. The assertion that there is something benign about "merely" providing "generalized" material support to FTOs is contrary to 25 years of Congressional and Executive Branch policy and findings for which the government's brief offers no explanation.

ARGUMENT

I. Defendants Knowingly Provided Substantial Assistance to ISIS.

The government and the petitioner argue that Defendants did not violate JASTA because they were essentially helpless to prevent ISIS from using their plaforms which "are used by millions (or billions) of people worldwide," USG Br. 25, and in any event, that assistance did not provide meaningful assistance to the FTO. Neither is true—Defendants did and still do have incredibly powerful capabilities to monitor and

monetize their users and control the content they see and the government itself has explained many times how crucial Defendants' assistance is to FTOs.

A. Defendants Are Capable of Reducing Terrorists' Use of Their Platforms, but Chose Not to.

After Twitter was purchased by Elon Musk, information leaked showing that Twitter has long engaged in what it internally describes as "Visibility Filtering," which permits Twitter employees to decide—on a relatively granular basis (*e.g.*, individual users or topics)—whether particular content will spread on the platform or not.[3] Visibility filtering was recently used to suppress messaging critical of coronavirus restrictions.[4] As one Twitter employee recently explained: "We control visibility quite a bit. And we control the amplification of your content quite a bit. And normal people do not know how much we do."[5] Those abilities are not limited to Twitter. Other tech giants like Google and Facebook similarly have the ability to ban accounts or reduce the visibility associated with particular accounts—and they use those capabilities when it suits them.

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[3] Greg Wehner, *Twitter Files Part Two Reveals 'Visibility Filtering' Used at Highest Levels to 'Suppress What People See'*, FOX NEWS (Dec. 8, 2022), https://www.foxnews.com/politics/twitter-files-part-two-reveals-visibility-filtering-highest-levels-suppress-people-see.

[4] *Id.*

[5] Bari Weiss, Abigail Shrier, Michael Shellenberger and Nellie Bowles, Twitter's Secret Blacklists, THE FREE PRESS (Dec. 15, 2022), https://www.thefp.com/p/twitters-secret-blacklists.

Notwithstanding those capabilities, for years Defendants largely ignored requests from government officials and national security experts to curtail terrorist use of their platforms. For example, in 2008, Senator Joseph Lieberman contacted YouTube and identified "numerous videos" from or featuring "several Islamic terrorist organizations" and asked that they be removed from YouTube. But YouTube declined to remove "[m]ost of the videos" identified by the Senator's team because "YouTube encourages free speech," and, in the company's view, hosting terrorist propaganda videos that do not violate YouTube guidelines makes YouTube "a richer and more relevant platform for users."[6] In other words, YouTube knowingly chose to continue hosting all but what it deemed to be the most openly violent and hateful terrorist propaganda that was directly brought to its attention—all so that it could become, in its own words, "richer and more relevant."[7]

Twitter has admitted to making similar choices to continue providing its platform and services to offending accounts based on "public interest factors such as

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[6] The YouTube Team, "Dialogue with Sen. Lieberman on terrorism videos," YouTube Official Blog (May 18, 2008), https://blog.youtube/news-and-events/dialogue-with-sen-lieberman-on/.

[7] As another example, YouTube in 2012 had a practice of removing terror-related videos from its platform based on users flagging content as promoting terrorism but declined to adopt a blanket ban on content posted by Hezbollah, which has at all times been a designated FTO. *See Should Terror Groups Be Able To Tweet and Use YouTube?*, THE FORWARD (Aug. 17, 2012).

the newsworthiness of the content."[8] Even that rationale is difficult to square with Twitter's more recent ban of former President Trump from its platform in the aftermath of the events of January 6, 2021 while permitting the Taliban and several of its most prominent spokesmen to maintain their Twitter accounts and broadcast thousands of tweets even as they were conducting a violent insurgency against the U.S.-backed government in Afghanistan.

For example, in response to a 2012 pressure campaign to block accounts run by Hezbollah (an FTO) and its media outlet al-Manar (designated by the U.S. Treasury Department as a Specially Designated Global Terrorist ("SDGT") in 2006), Facebook did—but Twitter did not on free speech grounds.[9] As one Twitter official told Mother Jones magazine when asked about its lack of interest in eradicating ISIS from its platform, "[o]ne man's terrorist is another man's freedom fighter."[10] Similarly, when more than 30,000 members of Christians United for Israel emailed Twit-

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[8] *Charlie Hebdo and the Jihadi Online Network: Assessing the Role of American Commercial Social Media Platforms, "The Evolution of Terrorist Propaganda: The Paris Attack and Social Media,"* Testimony before House Subcommittee on Terrorism, Nonproliferation, and Trade of the H. Comm. on Foreign Affairs (Jan. 27, 2015), 4-5 (Testimony of Evan Kohlmann with Laith Alkhouri and Alexandra Kassirer, quoting Twitter CEO Dick Costolo), https://docs.house.gov/meetings/FA/FA18/20150127/102855/HHRG-114-FA18-Wstate-KohlmannE-20150127.pdf.

[9] The Forward, *supra* note 7.

[10] Jenna McLaughlin, *Twitter Is Not at War With ISIS. Here's Why.*, MOTHER JONES (Nov. 18, 2014).

ter in 2010 and asked it to ban an account (@AlqassamBrigade) run by the military wing of Hamas (also an FTO), Twitter did nothing.[11]

In late 2011, various members of Congress called on Twitter to take down pro-Taliban posts hailing terrorist attacks on coalition troops. Twitter declined to do so "because the Taliban is not listed by the State Department as a foreign terrorist organization."[12] Putting aside that the Taliban has been designated as a SDGT since 2002, Twitter had no problem successfully cutting off services to a Russian SDGT in 2020.[13]

Defendants showed they are capable of removing ISIS-sponsored content on its platform when they wanted to. In 2018, for example, Facebook demonstrated its technical capacity to block content in targeted regions when it yielded to demands made by the Turkish government to block posts from the People's Protection Units, a mostly Kurdish militia group also known as YPG.[14]

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[11] David Brog, *Is Twitter Above the Law?*, CONGRESSIONAL QUARTERLY NEWS (Dec. 17, 2012).

[12] Brian Bennett, *Lawmakers, Twitter locked in dispute over Taliban tweets*, LOS ANGELES TIMES (Nov. 23, 2011), https://www.latimes.com/world/la-xpm-2011-nov-23-la-fg-taliban-twitter-20111124-story.html.

[13] *See* U.S. State Dep't, *Country Reports on Terrorism 2020*, at 5 (Dec. 2021), https://www.state.gov/wp-content/uploads/2021/07/Country_Reports_on_Terrorism_2020.pdf.

[14] Jack Gillum and Justin Elliott, Sheryl Sandberg and Top Facebook Execs Silenced an Enemy of Turkey to Prevent a Hit to the Company's Business, PROPUBLICA (Feb. 24, 2021), https://www.propublica.org/article/sheryl-sandberg-and-top-facebook-execs-silenced-an-enemy-of-turkey-to-prevent-a-hit-to-their-business.

At the same time, in late January 2015, for example—less than three weeks after designated FTO al-Qaeda in the Arabian Peninsula ("AQAP") killed 12 people in a terrorist attack on the Paris headquarters of Charlie Hebdo magazine, terrorism expert Evan Kohlmann testified before Congress that AQAP used various official Twitter accounts to disseminate propaganda and links to audio and video from its senior leaders praising the attacks and condemning France.[15]

Twitter did little to de-platform AQAP. As Mr. Kohlmann further testified:

> Over the past three months, AQAP's public Twitter account has only been disabled by system administrators on four occasions. Each time it has been disabled, AQAP has merely created a new account with the same name, appended with "1", "2", "3", and "4" respectively. Thus, there is hardly any mystery in what Twitter account AQAP will register next. The failure of Twitter to learn from and adapt to this rudimentary pattern would suggest fundamental failures in its responsibility to prevent its service from becoming a mouthpiece for terrorist organizations.[16]

Roughly 26 percent (at least) of the remaining FTOs appeared to have at least one official Twitter account that was operating "both openly and flagrantly"

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[15] Kohlmann, *supra* note 8.

[16] *Id.* at 4.

as of early 2016.[17] Even now, Taliban-branded accounts (including that of Taliban leader, Anas Haqqani, linked to the FTO Haqqani Network), are still on Twitter—and are sometimes monetized with accompanying ads.[18]

In short, social media companies have the power to stop FTOs from using their services—or at a minimum to make that use far less effective. They make choices every day about whether and how to use that power, and they have often chosen to let terrorists use their platforms. That choice is not mere inaction.

B. Terrorists' Effective Use of Social Media Has Substantially Contributed to Their Violence.

The choice the social media companies made is especially culpable in light of the many public reports highlighting that the easy access and global reach of social media has long been viewed as a force multiplier

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[17] Zoe Bedell, Benjamin Wittes, "Tweeting Terrorists, Part I: Don't Look Now But a Lot of Terrorist Groups are Using Twitter," LAWFARE BLOG (Feb. 14, 2016), https://www.lawfareblog.com/tweeting-terrorists-part-i-dont-look-now-lot-terrorist-groups-are-using-twitter.

[18] Laura Courchesne, Bahar Rasikh, Brian McQuinn, and Cody Buntain, *Powered by Twitter? The Taliban's Takeover of Afghanistan*, Center for Artificial Intelligence, Data, and Conflict (June 2022), https://esoc.princeton.edu/WP30, at 7, (noting adds from Amazon, McDonald's, and Disney on Taliban account feeds); *see also id.* at 23, 47 (Image 27 in the appendix is a screenshot of Mr. Haqqani's account taken on June 5, 2022, which shows an ad for Game 3 of the NHL Eastern Conference Final). *See also* Abdirahim Saeed, *Taliban start buying blue ticks on Twitter*, BRITISH BROACASTING COMPANY (Jan. 16, 2023), https://www.bbc.com/news/world-asia-64294613.

for terrorists.[19] Social media also allows terrorist groups to effectively and inexpensively disseminate propaganda and disinformation designed to elicit sympathy and support for their causes.[20]

In 2014, U.S. Homeland Security officials testified before Congress their observations of how ISIS "exhibits a very sophisticated propaganda capability, disseminating high-quality media content on multiple online platforms, including social media, to enhance its appeal." Those officials further predicted that ISIS would "almost certainly continue Twitter 'hashtag' campaigns that have gained mainstream media attention and have been able to quickly reach a global audience and encourage acts of violence."[21]

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[19] *See, e.g.*, John Hudson, *The Most Infamous Terrorists on Twitter*, THE ATLANTIC (Jan. 2, 2012), https://www.theatlantic.com/international/archive/2012/01/most-infamous-terrorists-twitter/333662/ (describing extensive Twitter usage by Hezbollah, Hamas, the Taliban, and al-Shabaab).

[20] Jytte Clausen, *Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq*, Studies in Conflict & Terrorism, 38:1, pp. 17-20 (2015), https://www.ojp.gov/ncjrs/virtual-library/abstracts/tweeting-jihad-social-media-networks-western-foreign-fighters-syria.

[21] "Cybersecurity, Terrorism and Beyond: Addressing Evolving Threats to the Homeland," hearing before Senate Comm, on Homeland Security and Governmental Affairs, States News Service (written testimony of I&A Under Secretary Francis Tallor and NPPD Under Secretary Suzanne Spaulding), (Sept. 10, 2014), https://www.dhs.gov/news/2014/09/10/written-testimony-ia-and-nppd-senate-committee-homeland-security-and-governmental; *see also* Russell A. Berman, *Social Media, New Technologies and the Middle East*, HOOVER INSTITUTION, THE CARAVAN (June 6, 2017), https://www.hoover.org/research/social-media-new-technologies-and-middle-east (discussing utilization of social media for jihadist recruitment, particularly by ISIS).

A study of the Taliban's activity on Twitter between April and mid-September 2021 found that the Taliban "was so effective at using Twitter to reach domestic audiences that it generated over four times more engagement on the platform than the content of 18 mainstream Afghan news organizations combined."[22]

Terrorists have also long used social media as a key recruitment and radicalization tool. In 2012, a U.S. Army publication reported that "[e]very serious ... militant actor with a stake in what is happening in Syria [including designated FTO Jabhat al-Nusra] has a presence on social media through some combination of ... Facebook, Twitter, Tumblr, YouTube, … and other venues."[23] Twitter, in particular, was described in 2013 as "a new jihadist recruiter [that] orchestrates thousands of introductions every day, connecting people at risk of radicalization with extremist clerics and terrorist propagandists – even facilitating online meetings with hardcore al Qaeda members," through its targeted algorithmic recommendations of accounts to follow.[24] And in January 2015, Mark Wallace, former U.S. ambassador to the U.N. and currently CEO of both United Against Nuclear Iran and the Counter Extremism Project, referred to Twitter as "the gateway drug" for "jihadis online" in testimony before the

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[22] Courchesne, *supra* note 18, at 6.

[23] Derek Hebry Flood, *Between Islamization and Secession: The Contest for Northern Mali*, CTC Sentinel, Combating Terrorism Center at West Point (Jul. 2012) 5:7, at 19.

[24] J.M. Berger, *Zero Degrees of al Qaeda; How Twitter is supercharging jihadist recruitment*, FOREIGN POLICY (Aug. 14, 2013), https://foreignpolicy.com/2013/08/14/zero-degrees-of-al-qaeda/.

House Foreign Affairs Subcommittee on Terrorism, Nonproliferation, and Trade.[25]

The increasing use of social media as a fundraising tool by many FTOs, particularly ISIS, is also a matter of public record.[26] That makes sense because creating a social media post costs next to nothing, appeals for funds posted on social media have immediate global reach, and they can be spread by any number of third parties.

II. JASTA Extends Liability to Entities That Knowingly Provide Substantial Assistance to the "Person" Who Commits Acts of Terrorism.

The government and the petitioner argue that "a court must at least be able to infer that the secondary defendant was aiding and abetting terrorist acts by knowingly providing substantial support to their commission." USG Br. 19; Pet. Br. 22-31. Petitioner adds that it "is not enough to assist a wrongful *actor*, like ISIS, in some general way; an aider-abettor instead must assist the act that injured the plaintiff—under

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[25] Hearing before the H. Subcomm. on Terrorism, Nonproliferation, and Trade of the H. Comm. of Foreign Affairs (Jan. 27, 2015) (Statement by Mark D. Wallace), https://docs.house.gov/meetings/FA/FA18/20150127/102855/HHRG-114-FA18-Wstate-WallaceM-20150127.pdf.

[26] *See* Office of the Press Secretary, The White House, Press Briefing by Press Secretary Josh Earnest (Oct. 23, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/10/23/press-briefing-press-secretary-josh-earnest-10232014; *see also* U.S. State Dep't, *Country Reports on Terrorism 2016* at 183, 420 (July 2017), https://www.state.gov/wp-content/uploads/2019/04/crt_2016.pdf (citing FTO ISIL Sinai Province's use of Twitter to solicit funds to finance terrorist activities in Egypt and FTO Kata'ib Hizballah's appeal for donations through YouTube to finance recruitment of fighters to Syria and Iraq).

Section 2333(d), the particular 'act of international terrorism.'" Pet. Br. 24. The government makes the same error when it states that "JASTA requires that the defendant aid and abet, by knowingly providing substantial assistance to, the act of international terrorism that caused the plaintiffs' injuries." U.S. Br. 13.

These readings are not only contrary to the plain text of the statute and interpretive guidance of *Halberstam*, but also profoundly narrow the statute—which Congress enacted to provide "civil litigants with the broadest possible basis" for relief against those who "provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b).

A. JASTA's Text, Express Purpose, and Findings Show That Substantial Assistance to Either the Person Who Committed Terrorist Acts or to the Acts Can Establish Aiding and Abetting Liability.

The Second Circuit, in a decision cited approvingly by both Twitter and the government, squarely rejected a narrow reading of the statute's "substantial assistance" language. In *Kaplan v. Lebanese Canadian Bank, SAL*, the defendant bank argued that the complaint in that case was deficient because it alleged that the funds which flowed through the bank went to Hezbollah operatives and institutions and not directly to Hezbollah itself. The bank argued that the substantial assistance must be given directly "to" the person who committed the act of international terrorism, but the Second Circuit held that this would disregard "Congress's instruction that JASTA is to be read broadly and to reach persons who aid and abet international

terrorism 'directly or indirectly.'" 999 F.3d 842, 855 (2d Cir. 2021). It went on to observe that:

> while JASTA states that to be liable for conspiracy a defendant would have to be shown to have "conspire[d] with" the principal, it 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. It therefore concluded that such assistance could be provided through intermediary entities, consistent with JASTA's express purpose to target those that provide material support, "directly or indirectly," to terrorist organizations. *See id.* at 856.

The government's rebuttal is that "[t]he couplet 'aid and abet' is generally defined in terms of *specific acts*, not people." USG Br. 32. Not so. For example, the following statutory provisions all speak of aiding or abetting a person: 5 U.S.C. § 7313(a)(3); 18 U.S.C. § 175c(b)(5); 18 U.S.C. § 2101(a)(4); 42 U.S.C. § 2122(b)(4); 18 U.S.C. § 2339B(d)(1)(F); 18 U.S.C. § 2339D(b)(6); 18 U.S.C. § 2332g(b)(5); 18 U.S.C. § 2332h(b)(5). The individual terms, too, frequently refer to people as opposed to acts. For example, the first definition of the word "abet" in *Black's Law Dictionary* (10th ed. 2014) is "[t]o aid, encourage, or assist (someone) ...."

Moreover, if this Court found the text of § 2333(d)(2) susceptible to more than one interpretation, textualist principles hold that preambles and statements of purpose can and should resolve which interpretation is correct. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of*

Legal Texts 177 (2012 Kindle ed.). Here, JASTA's codified findings and purpose establish that the statute is not narrowly focused only on assistance to specific acts of international terrorism. JASTA's express purpose is to extend liability to entities that "have provided material support, directly or indirectly, *to foreign organizations or persons that engage in terrorist activities,"* JASTA § 2(b) (emphasis added), and not to only the terrorist acts themselves.[27] "The words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)); *see also King v. Burwell*, 576 U.S. 473, 492 (2015) ("'A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'") (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)); *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (same); *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (explaining that even if "[t]he text does not expressly foreclose" one

[27] *See also* JASTA § 2(a)(6) (providing 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* ... should reasonably anticipate being brought to court in the United States to answer for such activities") (emphasis added); *id.* § 2(a)(7) (JASTA is intended to reach those who "have knowingly or recklessly provided material support or resources, directly or indirectly, *to the persons or organizations responsible for their injuries*") (emphasis added).

party's reading of a statute, the Court will adopt a different reading that is better supported by the statute "as a whole") (internal citations and quotation marks omitted).

Congress never expressed any desire to limit liability to those who assist specific attacks—and it certainly never indicated that it wanted to give a free pass to anybody who knowingly provides substantial assistance to a foreign terrorist organization. Neither the government nor the Defendants ever discuss or grapple with Congress's clear findings and unusually emphatic statement of purpose. But they cannot argue that these findings are irrelevant. Indeed, the government relies on JASTA's findings for the proposition that *Halberstam* provides the governing framework for liability. *See* USG Br. 4, 11 (citing JASTA § 2(a)(5)). If the government will give JASTA's fifth finding controlling weight, as it should, then it is hard to imagine any principled reason why it fails to even mention or discuss the three paragraphs that immediately follow that finding.

B. The *Halberstam* Legal Framework Confirms That Substantial Assistance to a Foreign Terrorist Organization Can Establish Aiding and Abetting Liability.

The framework provided by *Halberstam* also provides that "[a]iding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct." 705 F.2d at 478; *see also id.* at 488 ("Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods"). *Halberstam* also starts

its comprehensive analysis with the *Restatement (Second) of Torts* § 876 (1979), which describes aiding and abetting liability of a defendant if he "*knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement* **to the other** *so to conduct himself." Id.* at 477 (italics in original, bold emphasis added). Likewise, *Halberstam* expressly looks to "[t]he *amount [and kind] of assistance given* **the wrongdoer** …." 705 F.2d at 484 (italics in the original; bold emphasis added).

In assisting someone "so to conduct himself," the defendant must assist the "overall illegal or tortious activity," not the ultimate injury-causing act. *Id.* at 477. The D.C. Circuit noted the district court's conclusion that "Hamilton 'knowingly and willingly assisted in *Welch's burglary enterprise*.'" *Id.* at 486 (emphasis added). Elsewhere, *Halberstam* states that "the district court also justifiably inferred that Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods" and that "[a]lthough her own acts were neutral standing alone, they must be evaluated in the context of *the enterprise they aided*, *i.e.*, a five-year-long burglary campaign against private homes." *Id.* at 488 (emphasis added). The object of the assistance by these formulations is not the murder, or even the particular burglary that resulted in the murder, but the larger enterprise of which it was just a part.

The petitioner's and the government's arguments confuse the term "aiding and abetting," which characterizes the *form or theory of secondary liability*, with "assistance" which is the *means* by which the secondary tort is committed. Under an aiding and abetting *theory of liability*, the defendant is liable for *assisting*

the principal in performing tortious or illegal acts from which the wrongful act causing plaintiff's injury is reasonably foreseeable.

When the government contends that *Halberstam* requires plaintiffs to plausibly allege that defendants' knowing and substantial assistance have a "sufficient nexus to … a series of" terrorist attacks, USG Br. 13, it is erroneously substituting Welch's burglaries for the murder.

The correct formulation applicable in this case can be depicted as follows:

	Halberstam	*Twitter*
Means of Substantial Assistance	Banking, Bookkeeping	Communications Equipment / Advertisement Revenue Sharing
Principal Tortfeasor	Welch	ISIS
Principal Violations Assisted	"Personal property crimes at night"	Communications equipment used to recruit and fundraise for an FTO
Foreseeable Risk and Consequence of Violence	Violence during nighttime property crimes	Violent acts of terrorism
Injury-Causing Act	Unplanned murder	Istanbul Nightclub Attack

Hamilton thus did not assist the (unplanned) murder of Dr. Halberstam. She did not know it occurred, or even "that Welch was committing burglaries" at all. 705 F.2d at 488. Nor did she supply a weapon or anything that assisted the murder—rather, she served "the enterprise as banker, bookkeeper, recordkeeper, and secretary." *Id.* at 487. Indeed—she did not even assist the burglary which resulted in the unplanned murder: "although the *amount of assistance* Hamilton gave Welch may not have been overwhelming as to any given burglary in the five-year life of this criminal operation, it added up over time to an essential part of the pattern." *Id.* at 488. Knowingly providing assistance to the primary tortfeasor in conducting the overall illegal or tortious enterprise is sufficient.

III. JASTA Aiding and Abetting Liability Requires That the Defendant (a) Was Generally Aware of a Role in an Illegal or Tortious Enterprise From Which Terrorist Acts Are a Reasonably Foreseeable Risk, and (b) Provided Substantial Assistance Knowingly, not Inadvertently.

The government locates JASTA's scienter requirement in the third element—"knowing and substantial assistance"—arguing that:

> Section 2333(d)'s "knowing" requirement modifies the defendant's own substantial assistance to the commission of a terrorist *act* that injured the plaintiff. Thus, the statute requires "the secondary actor to be aware that, by assisting the principal, it is itself assuming a role in terrorist activities."

USG Br. 18 (citation omitted). This confuses *Halberstam*'s second element and scienter standard of "general[] aware[ness] of [a] role as part of an overall illegal or tortious activity" with its third element of "knowing[] and substantial[] assist[ance]." *Halberstam*, 705 F.2d at 477.

A. *Halberstam*'s Second Element Requires That a Defendant Be Generally Aware of Its Role in an Overall Illegal or Tortious Activity from Which Violent Acts Are a Foreseeable Risk.

"General awareness" of a role in an overall tortious or illegal activity is the first and most important *Halberstam* scienter standard. Where terrorist acts are a foreseeable risk of that illegal activity or enterprise, the general awareness element is satisfied—no matter whether the goods and services are, in *Halberstam's* words, "neutral standing alone" *id.* at 488, or intrinsically nefarious. "*General* awareness," moreover, carries "a connotation of something less than full, or fully focused, recognition." *Kaplan*, 999 F.3d at 863.

In contrast to its criminal counterpart, civil aiding and abetting premises liability on the foreseeability of a wrong, not the intent to cause it. As Judge Learned Hand famously observed in *United States v. Falcone* and *United States v. Peoni*, 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." *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940); *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"). *See also Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 251 (4th Cir. 1997).

Consistent with Judge Hand's observation in *Peoni*, in *Halberstam*, a civil aider and abettor was found liable for "a natural and foreseeable consequence of the activity" that she helped the principal tortfeasor undertake, even though she had no specific knowledge of the activity. 705 F.2d at 488. In that case, Hamilton, who assisted what she claimed was her boyfriend's antiques business, did not know about the murder—or even the burglary:

> It was not necessary that Hamilton knew specifically that Welch 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—whether as a fence, burglar, or armed robber made no difference—because violence and killing is a foreseeable risk in any of these enterprises.

Id.

Hamilton provided bookkeeping and banking services for her boyfriend—the acts which "were neutral standing alone." *Id.* However, the court reasoned that the evidence of Hamilton's knowledge of her boyfriend's "criminal doings" supported the inference that she knew "something illegal was afoot." *Id.* at 486. Thus, even though Hamilton could not have had fore-

knowledge of an *unplanned* murder (let alone an intent to commit murder, let alone the specific burglary, let alone burglaries generally, as opposed to other personal property crimes), she therefore "had a general awareness of her role in a continuing criminal enterprise." *Id.* at 488.

Just as violence was a foreseeable risk of that enterprise, it is a foreseeable risk of the criminal act of knowingly providing material support to a terrorist organization. As this Court recognized in *Holder v. Humanitarian Law Project,* 561 U.S. at 32, material support to FTOs "in any form … furthers terrorism." That proposition has been codified in our laws since 1996, when Congress determined that FTOs "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," AEDPA § 301(a)(7), and therefore made knowingly providing material support to FTOs a felony. 18 U.S.C. § 2339B. That finding is reinforced by the Executive Branch's determination that "it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions," a finding that this Court held "entitled to deference" and "significant weight." *Holder*, 561 U.S. at 33, 36 (citations to the record and quotation marks omitted).

The nature of terrorist organizations do not change in civil cases or when a new administration takes office, and Congress's findings about them are entitled to no less deference and weight now than before. Whether a case is criminal or civil, the underlying reality—*i.e.*, that any material support to FTOs furthers terrorism—remains the same. Thus, when a sophisticated entity knowingly provides such support, it is reasonable to conclude that the entity was generally

aware that it was playing a role in unlawful activity that foreseeably risks terrorism. *See Halberstam*, 705 F.2d at 488. Just like the complementary material support statutes, JASTA's scienter requirements are aimed at "not terrorist attacks themselves, but aid that makes the attacks more likely to occur" (*Holder*, 561 U.S. at 35)—*e.g.*, more foreseeable.

B. *Halberstam*'s Third Element Requires Only That the Defendant Knowingly, and Not Negligently or Inadvertently, Provide Substantial Assistance to the Person Who Committed the Injurious Act.

Appellate courts applying *Halberstam* in the JASTA context have uniformly held that *Halberstam*'s third element does not require any knowledge of wrongdoing over and above the second "general awareness" element. The Second Circuit discussed this point clearly in *Honickman v. BLOM Bank SAL,* 6 F.4th 487, 499 (2d Cir. 2021), finding that the district court "impose[d] a higher standard on the '*knowing*' prong of 'knowingly and substantially' assisted than required." Quoting *Kaplan* (which the government cites with approval), the court explained that "[t]he 'knowledge component' is satisfied '[i]f the defendant knowingly—and not innocently or inadvertently—gave assistance.'" *Id.* at 499-500 (quoting *Kaplan*, 999 F.3d at 864). Harkening back to *Halberstam*, the Second Circuit noted that this element "did not require Hamilton to 'know' anything more about Welch's unlawful activities than what she knew for the general awareness

element." *Honickman,* 6 F.4th at 500.[28] *Accord*, *Atchley,* 22 F.4th at 222 ("Defendants do not argue that their provision of cash and free goods was in any way accidental, so the assistance was given knowingly.").

Thus, the "knowing substantial assistance" component of the *Halberstam* standard requires that the defendant know that it is providing assistance, whether directly to an FTO or indirectly through an intermediary. A mistake or negligent omission does not suffice. As the *Halberstam* court explained, that knowledge component "is designed to avoid" imposing liability on "innocent, incidental participants." *Halberstam,* 705 F.2d at 485 n.14.

IV. JASTA Does Not Immunize Substantial Assistance Knowingly Provided to an FTO Just Because It Is in the Form of "Generally Available" or "Routine Services."

The government asserts that "the provision of atypical and particularized services" in *Halberstam* "furnished the basis for finding the requisite mens rea and substantial support with respect to the conduct that injured the plaintiff." USG Br. 24. But the government makes two errors here. First, it conflates "general awareness" with "knowing substantial assistance." Second, the defendant in *Halberstam* denied knowledge of the burglary enterprise and there was no

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[28] Indeed, even in *Weiss v. Nat'l Westminster Bank, PLC,* which the government cites for its articulation of the "knowing" standard, the Second Circuit was discussing the general awareness element, and not knowing-and-substantial assistance, when it discussed what the defendant must be "aware" of. *See* 993 F.3d 144, 165 (2d Cir. 2021), cert. denied, 213 L. Ed. 2d 1090, 142 S. Ct. 2866 (2022).

other extrinsic evidence of scienter, so the factfinder drew reasonable inferences of awareness from the totality of the circumstances, which included the unusual ways she assisted the enterprise.

The government converts these inferences into a litmus test asserting that "the relationship between defendants and ISIS remained (at most) arms-length" and involved "generally available services" without "intent to further ISIS's terrorist acts." USG Br. 29-30. The government also claims that "evidence that a defendant knowingly provided banking services to a terrorist organization" does not qualify as substantial assistance if it comes in the form of "routine services." *Id.* at 21. But no safe harbor for "generally available" or "routine services" is found in the statute. What matters is whether the defendant is "generally aware" – regardless of whether evidence of that knowledge comes in the form of direct evidence or circumstantial evidence.

To be sure, JASTA liability does not extend to acts of gross negligence and the fact that Defendants made efforts to remove at least some ISIS content from their platforms offers a competing factual inference as to the level of their "general awareness." Thus, in *Halberstam*, had the court drawn a reasonable inference at trial that the defendant was unusually obtuse or gullible she would not have been found liable, but the circumstantial evidence strongly suggested that she knew she was involved in "personal property crimes at night." The same is true here: Defendants should make their arguments to a jury at the appropriate stage.

The government points to the plaintiffs' allegations that "describe those algorithms as an automated part

of defendants' widely available services" but discount them, arguing that "the automatic instigation of such effects does not show that defendants knowingly provided substantial assistance to terrorist acts that persons affiliated with ISIS might commit." USG Br. 26. But in its companion brief in *Gonzalez v. Google LLC*, the government itself acknowledges that "[i]n addition to alleging that YouTube has failed to remove ISIS-related content from its platform, plaintiffs allege that YouTube has violated the ATA by using 'computer algorithms' and related features to 'suggest[]' to particular users 'YouTube videos and accounts' that are 'similar' to videos and accounts those users have previously watched." Brief for the United States as Amicus Curiae In Support of Vacatur, *Gonzalez v. Google*, 26. The factual allegations are substantially the same here. J.A. 143-47.

Only last week, President Biden publicly demanded that defendants "take responsibility for the content they spread and the algorithms they use."[29] The fact that a particular form of assistance may be automated does not, as a matter of law, make its delivery innocent or inadvertent.

Here, the Ninth Circuit reasonably concluded that the allegations in the complaint were sufficient to draw an inference of more than mere negligence in failing to adequately remove ISIS-related content. Back in 2014, years before the Reina nightclub attack, petitioner's spokesman told *The Wall Street Journal*

[29] Biden, *supra* note 2.

that "a group's status as a terrorist group is 'one of several factors' it considers when deciding whether to suspend an account."[30]

But Defendants' willingness to curtail access to their platforms has been self-serving rather than a function of any technical limitations, as the examples in section I.A *supra* make clear. Despite numerous public appeals by lawmakers, hundreds of reports on jihadists' Twitter activity and briefings of Twitter executives prior to the Reina nightclub attack, petitioner took no meaningful action to block ISIS from its platform and "by December 2015, ISIS was telling followers that Twitter and Facebook should be used as the main social media platforms 'where the general public is found.'"[31]

CONCLUSION

CWA is acutely sensitive to the need for the protection of free speech, including speech our organization strongly disagrees with, but the allegations here do not implicate those concerns. JASTA was intended to provide "the broadest possible basis, consistent with the Constitution of the United States, to seek relief

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[30] Yoree Koh and Reed Albergotti, *Twitter Faces Free-Speech Dilemma: Social-Media Site Began Removing Foley Images After Family Request, but Isn't Actively Searching for Them*, WALL STREET JOURNAL (Aug. 21, 2014), https://www.wsj.com/articles/twitter-is-walking-a-fine-line-confronted-with-grisly-images-1408659519.

[31] Steven Salinky, *Keep ISIS Off Twitter: While Elon Musk is restoring banned users, he should take care to keep jihadists off the platform*, WALL STREET JOURNAL (Jan. 10, 2023), https://www.wsj.com/articles/keep-isis-off-twitter-jihadists-al-qaeda-terrorism-platform-attack-soial-media-activist-members-sympathizers-11673382393.

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).

In sum, Congress unequivocally sought to empower "an army of Davids"[32] to pursue the Goliath of aiders and abettors of terrorism. Yet the government's amicus brief asks this Court to effectively deny those Davids their slingshot and thereby deprive each of them of their day in court.

For those reasons, we respectfully request the Court affirm the decision of the court of appeals.

Respectfully submitted,

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[32] Glenn Reynolds, "An Army of Davids: How Markets and Technology Empower Ordinary People to Beat Big Media, Big Government, and Other Goliaths" (Thomas Nelson, 2007).