No. 21-

IN THE

Supreme Court of the United States

TWITTER, INC.,

Petitioner,

v.

MEHIER TAAMNEH; LAWRENCE TAAMNEH; SARA TAAMNEH; DIMANA TAAMNEH,

Respondents.

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

CONDITIONAL PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Section 2333 of the Anti-Terrorism Act, as amended by the Justice Against Sponsors of Terrorism Act, U.S. nationals injured by "an act of international terrorism" that is "committed, planned, or authorized by" a designated foreign terrorist organization may sue 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," and recover treble damages. 18 U.S.C. § 2333(a), (d)(2). The questions presented are:

1. Whether a defendant that provides generic, widely available services to all its numerous users and "regularly" works to detect and prevent terrorists from using those services "knowingly" provided substantial assistance under Section 2333 merely because it allegedly could have taken more "meaningful" or "aggressive" action to prevent such use.

2. Whether a defendant whose generic, widely available services were not used in connection with the specific "act of international terrorism" that injured the plaintiff may be liable for aiding and abetting under Section 2333.

PARTIES TO THE PROCEEDING

Petitioner is Twitter, Inc., which was a defendant in the district court and an appellee in the court of appeals. Google LLC and Facebook, Inc. (now known as Meta Platforms, Inc.) were also defendants in the district court and appellees in the court of appeals.

Respondents are Mehier Taamneh, Lawrence Taamneh, Sara Taamneh, and Dimana Taamneh. They were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Twitter, Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

Taamneh, et al. v. *Twitter, Inc., et al.*, No. 18-17192 (9th Cir.) (opinion and judgment issued on June 22, 2021; rehearing denied on December 27, 2021).

Taamneh, et al. v. *Twitter, Inc., et al.*, No. 3:17-cv-04107-EMC (N.D. Cal.) (order granting motion to dismiss and judgment issued on October 29, 2018).

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Twitter, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case in the event that the Court grants the petition for certiorari currently pending in *Gonzalez* v. *Google LLC*, No. 21-1333 (U.S. Apr. 4, 2022).

INTRODUCTION

This is a protective, conditional petition relating to *Gonzalez*. The Court should deny review in that case, but if the Court grants review there, it should grant in this case as well. At a minimum, if the Court grants review in *Gonzalez*, it should hold this case pending its

disposition of two ATA cases currently before the Court at the certiorari stage, *Weiss* v. *National Westminster Bank, PLC*, No. 21-381 (U.S. Sept. 3, 2021) and *Strauss* v. *Crédit Lyonnais, S.A.*, No. 21-382 (U.S. Sept. 3, 2021).

Both *Gonzalez* and this case come to the Court in an unusual procedural posture. The Ninth Circuit decided both cases in a single opinion. But although both cases involved materially identical allegations and arguments on appeal, the Ninth Circuit reached different results in the two cases. In *Gonzalez*, the court held that the plaintiffs' claims were generally barred under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, and that the remaining allegations failed to state a claim for either direct or secondary liability under the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333(a), (d)(2). But in this case, the same panel declined to consider Section 230 at all and instead held that Twitter, Google, and Facebook ("Defendants") could be liable for aiding and abetting an act of international terrorism because they provided generic, widely available services to billions of users who allegedly included some supporters of ISIS. The court so held even though Defendants have policies prohibiting use by terrorist organizations, they regularly enforce those policies by removing content posted by supporters of such organizations, and their services were not used in connection with the relevant act of international terrorism.

The Court should deny certiorari in *Gonzalez*. If it does, that decision will also resolve this case. Because the two cases are materially indistinguishable, the parties here have stipulated to dismissal of this action if this Court denies the *Gonzalez* certiorari petition. *See* Stipulation and Order 3, Dist. Ct. Dkt. 88. But in the event the Court grants certiorari in *Gonzalez*, it should

also grant in this case. To the extent the claim in this case can proceed notwithstanding Section 230, the Ninth Circuit's misguided interpretation and application of the ATA's aiding-and-abetting provision warrants review.

As amended by the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016), the ATA allows any U.S. national injured by reason of "an act of international terrorism" to sue "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). A successful plaintiff is entitled to treble damages and the cost of the suit, including attorney's fees. *Id.* § 2333(a).

This case is the sole outlier among more than a dozen lawsuits seeking to hold social media companies liable under the ATA for the consequences of terrorist attacks committed around the world. The remaining cases all were dismissed, including in cases affirmed by the Second, Fifth, Sixth, and Eleventh Circuits. Departing from all of these, the Ninth Circuit held that respondents ("Plaintiffs") plausibly alleged the scienter demanded by Section 2333(d)(2)—i.e., that Defendants "knowingly" assisted the principal wrong—even though Defendants had policies prohibiting supporters of terrorism from using their platforms and regularly enforced those policies by terminating accounts and removing terrorist content. According to the Ninth Circuit, Defendants nonetheless possessed the requisite scienter because third parties had reported that some ISIS supporters were somewhere among the billions of individuals who used Defendants' platforms and Defendants' efforts to remove terrorist content allegedly could have been more "meaningful" and "aggressive."

App. 62a. The court further held that it did not matter that Defendants' widely available services were not used in connection with the specific terrorist act in question. According to the court, it was enough for Plaintiffs to have alleged that Defendants aided, in some general sense, "ISIS's terrorism campaign" or "enterprise." App. 52a-54a, 63a. Both holdings conflict with the ATA's text and structure, as well as longstanding principles of aiding-and-abetting law, and threaten liability for ordinary businesses providing widely available services, such as telephone companies providing run-of-the-mill telecommunications services.

Each error warrants review, but the two combined are particularly troubling. No other circuit has construed secondary liability under the ATA to sweep so broadly. In two ATA cases currently before the Court at the certiorari stage, the Second Circuit held that assisting an organization that allegedly had ties to terrorism without knowing that the aid would be used for a "terroristic purpose" does not support aiding-and-abetting liability under Section 2333. *Weiss* v. *National Westminster Bank, PLC*, 993 F.3d 144, 166-167 (2d Cir. 2021), *cert. filed*, No. 21-381 (U.S. Sept. 3, 2021); *see also Strauss* v. *Crédit Lyonnais, S.A.*, 842 F. App'x 701 (2d Cir. 2021) (mem.) (disposing of the case "for the reasons discussed in *Weiss*"), *cert. filed*, No. 21-382 (U.S. Sept. 3, 2021). Here, by contrast, the Ninth Circuit applied no "terroristic purpose" requirement. To the contrary, it acknowledged that Plaintiffs do not allege that Defendants had "any intent to further or aid ISIS's terrorist activities" or "shared any of ISIS's objectives," and that, even according to Plaintiffs, Defendants "regularly" enforced rules against terrorist content. App. 65a. Plaintiffs' allegations do not satisfy

the knowledge standard applied by the Second Circuit in *Weiss* and *Strauss*.

This Court's review is especially important given the broad impact of the questions presented. Civil lawsuits under the ATA are common. And as the United States explained (before JASTA's enactment) in emphasizing the importance of a proximate cause requirement, civil ATA liability should not reach "individuals and entities whose activities have only an attenuated relationship to the plaintiff's injuries," lest it "reach and inhibit routine activities and, given the ATA's extraterritorial reach, … adversely affect the United States' relationships with foreign Nations." U.S. Amicus Br. 14-15, *O'Neill* v. *Al Rajhi Bank*, No. 13-318 (U.S. May 27, 2014), 2014 WL 2202862; *see also* U.S. Amicus Br. 3-4, *Weiss*, *Strauss*, Nos. 21-381 & 21-382 (U.S. May 24, 2022) (even criminal conduct barred by the ATA's material support provision may not support "'civil tort liability under Section 2333(a)'" where "'the connection between a defendant's actions and the act of international terrorism that harms the victim is insubstantial'").

Accordingly, if the Court grants certiorari in *Gonzalez*, the Court also should grant review in this case (or, at a minimum, hold this case pending this Court's disposition of *Weiss* and *Strauss*) to ensure consistency and predictability under the ATA's frequently litigated aiding-and-abetting provision.

OPINIONS BELOW

The Ninth Circuit's decision (App. 1a-150a) is reported at 2 F.4th 871. The district court's order granting Defendants' motion to dismiss (App. 151a-180a) is reported at 343 F. Supp. 3d 904. The Ninth Circuit's

order denying panel rehearing and rehearing en banc (App. 181a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on June 22, 2021. It denied Defendants' timely petition for panel rehearing and rehearing en banc on December 27, 2021. On March 14, 2022, Justice Kagan granted Defendants' application to extend the time within which to file a petition for a writ of certiorari, making the deadline May 26, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2333 provides:

(a) Action and jurisdiction.—Any 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, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

* * *

(d) Liability.—

(1) Definition.—In this subsection, the term "person" has the meaning given the term in section 1 of title 1.

(2) Liability.—In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Na-

tionality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, 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.

STATEMENT

A. Plaintiffs' Allegations

In 2017, Abdulkadir Masharipov shot and killed 39 people at the Reina nightclub in Istanbul, Turkey ("Reina attack"). C.A.E.R.74 ¶ 1, C.A.E.R.141 ¶¶ 374-377. Among the victims of that attack was Nawras Alassaf, a citizen of Jordan and a relative of Plaintiffs, who identify themselves as American citizens. C.A.E.R.80-81 ¶¶ 33-37. Plaintiffs allege that Masharipov committed the attack at the direction of ISIS. *See* C.A.E.R.132-135 ¶¶ 325, 334, 337, 342-343, C.A.E.R.140-141 ¶¶ 367-370.

Plaintiffs sued Twitter, Google, and Facebook—operators of global Internet platforms that are used by billions of people across the world to send and share hundreds of millions of messages, Tweets, videos, and other posts on myriad topics every day. *See* C.A.E.R.107-108 ¶¶ 189-196; C.A.E.R.111-112 ¶¶ 212-219; C.A.E.R.115-116 ¶¶ 231-238. As relevant here, Plaintiffs sought to hold Defendants liable under the ATA for aiding and abetting. C.A.E.R.170-171.

The Amended Complaint does not allege that Defendants helped to commit the attack, or even had any connection to the attack or to Masharipov. Plaintiffs do not even allege that Masharipov ever had accounts on Twitter, Facebook, or YouTube (which is owned by

Google), or that he ever used the Defendants' platforms for any reason at all. The only online service Plaintiffs connect to Masharipov is "the messaging app Telegram"—a service with no connection to any Defendant—which he allegedly used to communicate in planning the attack. *See* Yayla, Combating Terrorism Center at West Point, *The Reina Nightclub Attack and the Islamic State Threat to Turkey*, 10 CTC Sentinel 9 (Mar. 2017), https://ctc.usma.edu/the-reina-nightclub-attack-and-the-islamic-state-threat-to-turkey/ (cited at C.A.E.R.135 ¶ 347 n.44).

The Amended Complaint instead alleges that some *other* ISIS adherents—who are not alleged to have been involved in the Reina attack—were among the billions of people who used Defendants' services. *See* C.A.E.R.76 ¶ 12. But the Amended Complaint acknowledges that, in doing so, those alleged supporters of terrorism violated Defendants' rules and evaded Defendants' enforcement of those rules. It concedes that each Defendant has rules against posting content that threatens or promotes terrorist activity or other forms of violence (*see, e.g.*, C.A.E.R.161 ¶ 473, C.A.E.R.168 ¶ 485), and that Defendants regularly enforced those rules by removing content and shutting down accounts (*see, e.g.*, C.A.E.R.99-100 ¶ 146, C.A.E.R.113 ¶ 223, C.A.E.R.160 ¶ 469).[1] The Amended Complaint concedes, for example, that Twitter repeatedly terminated the accounts of particular ISIS sup-

[1] Defendants' rules prohibit the use of their platforms for terrorist activities or content. *See* The Twitter Rules, https://support.twitter.com/articles/18311 (visited May 26, 2022); YouTube Violent or Graphic Content Policies, https://support.google.com/youtube/answer/2802008?hl=en (visited May 26, 2022); Facebook Community Standards, https://transparency.fb.com/policies/community-standards/ (visited May 26, 2022).

porters who had accessed its platform, yet faults Twitter for allegedly being insufficiently swift in shutting down accounts that those same supporters later established using different credentials. C.A.E.R.160-165 ¶¶ 469, 474-478. And the Amended Complaint does not identify any specific account or post that any Defendant failed to block or remove after becoming aware that it supported or had any connection to ISIS.

The Amended Complaint nonetheless seeks to impose aiding-and-abetting liability on Defendants for allegedly not taking sufficiently "meaningful action to stop" ISIS by, for example, "proactively" detecting and removing ISIS-related accounts or posts. C.A.E.R.108 ¶ 197, C.A.E.R.159-160 ¶ 466; *see also* C.A.E.R.76 ¶ 12, C.A.E.R.113 ¶¶ 222-223, C.A.E.R.160 ¶ 469. On that basis, Plaintiffs allege that Defendants are civilly liable for any and all injuries that can somehow be attributed to or blamed on ISIS, including injuries arising from the attack at the Reina nightclub. C.A.E.R 171 ¶ 506.

B. Proceedings Below

Plaintiffs sued Defendants in the Northern District of California, seeking treble damages. *See* C.A.E.R.117. Defendants moved to dismiss the Amended Complaint for failure to allege essential elements of the claims and on the additional ground that all of Plaintiffs' claims are barred by Section 230 of the Communications Decency Act. *See* Mot. to Dismiss, Dist. Ct. Dkt. 62.[2]

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[2] Plaintiffs alleged more claims initially but appealed only the district court's dismissal of their aiding-and-abetting claim. App. 60a. Only the aiding-and-abetting claim is at issue in this petition.

At a hearing on the motion to dismiss, the district court noted that Plaintiffs do not assert any direct link between the alleged general use of Defendants' platforms by some ISIS sympathizers and either Masharipov or the Reina attack. C.A.E.R.26. In response, Plaintiffs' counsel confirmed the absence of any allegations that Masharipov ever used any of Defendants' platforms. C.A.E.R.28. Plaintiffs' counsel argued that Defendants should be held liable nonetheless because ISIS allegedly directed Masharipov to conduct the attack and because ISIS allegedly had previously benefited from its supporters' general use of Defendants' online platforms. *See* C.A.E.R.28-30.

The district court rejected that argument and dismissed Plaintiffs' claims with prejudice. The court noted at the outset that Plaintiffs' entire theory raised "concerns" because "Plaintiffs seem to take the position that … ISIS's 'act of international terrorism' encompasses *all* of ISIS's terrorist operations, and not the Reina attack specifically." App. 173a. The court found it "questionable that this is what Congress intended" because that could "effectively transform" Section 2333(d) into a statute that "provides for liability for aiding/abetting or conspiring with a foreign terrorist organization generally," contrary to the statutory text. *Id.* The court explained, for example, that the statute imposes liability for injuries arising from "'*an act* of international terrorism'" and only where "the secondary tortfeasor assisted the principal tortfeasor in committing '*such an act* of international terrorism.'" App. 173a-174a (emphasis added by the district court) (quoting 18 U.S.C. § 2333(d)(2)). The court emphasized that Section 2333(d) "does not refer to assisting a foreign terrorist organization generally or such an organization's general course of conduct." App. 174a.

The district court further held that Plaintiffs' allegations would fail even if ATA secondary liability could attach to a defendant's general assistance of a terrorist organization. App. 175a. The court explained that, in enacting JASTA, Congress instructed that the "'proper legal framework for how [aiding-and-abetting] liability should function'" is the framework identified in *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983). App. 175a; *see* 18 U.S.C. § 2333 Statutory Note (Findings and Purpose § 5). *Halberstam* set forth three elements for civil aiding-and-abetting liability: (1) "the party whom the defendant aids must perform a wrongful act that causes an injury"; (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance"; and (3) "the defendant must knowingly and substantially assist the principal violation." 705 F.2d at 487-488.

The district court held that Plaintiffs failed to plausibly allege the second and third elements. Addressing the scienter requirement, the court held that there is no plausible allegation that "Defendants were generally aware … they were playing or assuming a 'role' … in ISIS's terrorist activities" or that "Defendants knew that ISIS members had previously used Defendants' platforms" to plan or carry out terrorist attacks. App. 176a-177a, 179a. The court also held that Plaintiffs failed to adequately allege Defendants provided "substantial assistance," even assuming that assisting ISIS generally (as opposed to the Reina attack in particular) could support aiding-and-abetting liability under the ATA. App. 177a-179a. Having ruled that Plaintiffs failed to state a plausible claim for relief under the ATA, the district court declined to reach Defendants' separate argument that Plaintiffs' claims are barred by Section 230.

The Ninth Circuit reversed. App. 71a. The court acknowledged that Defendants did not have any "intent to further or aid ISIS's terrorist activities" or share "any of ISIS's objectives"; that Defendants had, "at most, an arms-length transactional relationship with ISIS" and did not provide any specialized assistance, tailored to terrorists; that Defendants' "policies prohibit posting content that promotes terrorist activity"; and that Defendants "regularly removed ISIS content and ISIS-affiliated accounts." App. 64a-65a. The court nonetheless concluded that the Amended Complaint's allegations were sufficient to establish that Defendants "knowingly" provided substantial assistance because Defendants allegedly have "been aware of ISIS's use of their respective social media platforms for many years" but allegedly have not "take[n] meaningful steps to prevent that use." App. 62a.

In addition, the Ninth Circuit acknowledged that "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself." App. 64a. But the court held that, under *Halberstam*, the "principal violation" that a defendant must "knowingly and substantially assist[]" includes the broader illicit enterprise and thus Plaintiffs need only allege that Defendants assisted "ISIS's terrorism campaign" or "enterprise," not the Reina attack. App. 52a-54a, 63a. Because the district court had not reached the question of Section 230's application, the Ninth Circuit declined to consider that statute as an alternative basis to affirm. App. 16a n.6.

In the same opinion, however, the Ninth Circuit also disposed of *Gonzalez*. As the court explained, "the complaints in *Gonzalez* and *Taamneh* are similar," based on similar theories of liability. App. 60a; *see* App. 5a-12a. But the court disposed of *Gonzalez* and

Taamneh differently because, whereas "the bulk of the Gonzalez Plaintiffs' claims were properly dismissed [below] on the basis of § 230 immunity," "the district court in *Taamneh* did not reach § 230" and "only addressed whether the Taamneh Plaintiffs plausibly alleged" aiding-and-abetting liability under the ATA. App. 60a. Thus, although the Ninth Circuit affirmed dismissal in *Gonzalez* on the ground that Section 230 protected Google from liability arising from content on its platform, the court "decline[d] to reach" Section 230 "in the first instance" in *Taamneh* because the district court had not. App. 16a n.6. The *Gonzalez* plaintiffs have petitioned for review of the Ninth Circuit's Section 230 decision. *See* Pet., *Gonzalez*, No. 21-1333 (U.S. Apr. 4, 2022).

The court of appeals denied rehearing. App. 181a. On remand, the parties stipulated to automatic dismissal of this action upon this Court's denial of the plaintiffs' certiorari petition in *Gonzalez*. *See* Stipulation and Order 3, Dist. Ct. Dkt. 88. The parties stated that *Gonzalez* involved a claim against Google for aiding-and-abetting liability that is "materially identical" to the claim in this case. *Id.* at 2. Accordingly, the parties stipulated, "if the Supreme Court denies the petition for a writ of certiorari in *Gonzalez*, or if the Supreme Court grants the petition and affirms the Ninth Circuit's ruling in regard to Section 230, then Plaintiffs' claim for aiding and abetting under the ATA (their only remaining claim) fails as a matter of law based on the Ninth Circuit's holding in *Gonzalez*." *Id.* In those circumstances, the parties stipulated, this action "shall immediately be dismissed with prejudice." *Id.* at 3.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit misconstrued a critically important federal statute. In an unprecedented ruling, the court of appeals held that a defendant may be secondarily liable under the ATA for "knowingly" assisting "an act of international terrorism" even though the defendant's services were not used in connection with the specific attack or by the individuals who committed or directed it, the defendant did not share any terroristic purpose, and the defendant regularly enforced its rules to prevent terrorists from using its services. That is not "knowing" assistance, nor does it square with the statute's repeated use of the phrase "an act of international terrorism." No other court of appeals has authorized such a broad scope of ATA aiding-and-abetting liability. And its erroneous statutory construction threatens harmful consequences for ordinary businesses that provide generally available services or engage in arms-length transactions with large numbers of consumers.

If the Court were to grant review in *Gonzalez*, which it should not because the question presented in that case is not certworthy, this case would be an appropriate vehicle for addressing the important ATA questions presented here and thereby restoring uniformity in the interpretation of the ATA. At a minimum, if the Court grants review in *Gonzalez*, the Court should hold this case until the Court disposes of the petitions now pending in *Weiss* and *Strauss*.

I. THE DECISION BELOW IS WRONG AND CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit's decision is incorrect and contrary to decisions of other circuits, for two reasons. First, Defendants did not "knowingly" assist ISIS

simply because their undisputed efforts to detect and prevent terrorists from using their widely available services allegedly could have been more "meaningful" or "aggressive." App. 62a. Second, Defendants cannot be liable for aiding and abetting under the ATA when their provision of generic, widely available services had no alleged connection to the specific "act of international terrorism" from which the suit arose. The Ninth Circuit is the only court of appeals that has construed the ATA secondary-liability provision in both of these ways. If the Court grants certiorari in *Gonzalez*, that decision would also warrant this Court's review, especially given the competing interpretation of the ATA that the plaintiffs in *Weiss* and *Strauss* have asked this Court to adopt, and the frequency with which civil ATA suits are brought.

A. Allegations That Defendants Provided Widely Available Services That Were Used By Terrorists—Despite Defendants' Efforts To Prevent Such Use—Cannot Establish "Knowing" Assistance

Section 2333(d) permits aiding-and-abetting liability only when a defendant "knowingly" provides substantial assistance to the principal wrong. Yet the Ninth Circuit eliminated any meaningful knowledge requirement, adopting a standard that is far less demanding than other circuits apply under the ATA and that breaks sharply from traditional civil aiding-and-abetting standards.

1. The Ninth Circuit held that Plaintiffs plausibly alleged the requisite knowledge merely because their complaint alleges that, according to third-party reports, some ISIS supporters were among the billions of users of Defendants' platforms, and Defendants' acknowl-

edged efforts to prevent such use could have been more "meaningful." App. 62a; *see* App. 61a. The court held that this alleged failure to do more could establish the requisite "knowledge," even though:

- Defendants did not share ISIS's goals or have any "intent to further or aid ISIS's terrorist activities," App. 65a;
- Defendants had, "at most, an arms-length transactional relationship with ISIS" and did not provide any specialized assistance, tailored to terrorists, App. 64a;
- Defendants' "policies prohibit posting content that promotes terrorist activity," App. 64a-65a;
- Defendants "regularly removed ISIS-affiliated accounts and content," App. 65a; and
- Plaintiffs do not identify any specific account or post that any Defendant failed to block or remove after becoming aware that it supported or was connected to ISIS.

In the Ninth Circuit, therefore, a business knowingly assists terrorism under the ATA so long as it is generally aware that supporters of a terrorist group are among the numerous (even billions of) people using its widely accessible service and the business falls short in trying "to *prevent* that use." App. 62a (emphasis added). In other words, in the Ninth Circuit, even where a plaintiff's claim is predicated solely on a defendant's alleged failure to do more to exclude a terrorist group's supporters from the many who use its generic services (rather than any affirmative decision to do something that aids terrorists), Section 2333(d)'s mental state requirement may be satisfied through mere general awareness of such users.

2. Courts outside the Ninth Circuit demand a far greater showing to establish knowledge under the ATA.

For example, in *Weiss* and *Strauss* (two cases currently on petitions for certiorari in this Court), the Second Circuit rejected the plaintiffs' argument that the requisite knowledge could be shown through the defendants' transfers of funds to charities that the defendants allegedly knew were controlled by or were alter egos of Hamas, because there was no indication that the defendants knew the transfers would be used for "any terroristic purpose." *Weiss*, 993 F.3d at 166-167; *accord Strauss*, 842 F. App'x at 704 (disposing of the case "for the reasons discussed in *Weiss*").[3] The court deemed the defendants' knowing but general assistance to organizations that allegedly had ties to Hamas to be

[3] In seeking this Court's review, the plaintiffs in *Weiss* and *Strauss* cite *Boim* v. *Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008), and *United States* v. *El-Mezain*, 664 F.3d 467 (5th Cir. 2011), as conflicting with the Second Circuit's decisions. *See* Pet. 21-27, *Weiss*, No. 21-381 (U.S. Sept. 3, 2021); Pet. 15-17, *Strauss*, No. 21-382 (U.S. Sept. 3, 2021). Even if that were so, those cases do not support what the Ninth Circuit did in this case. In *Boim*, the Seventh Circuit required that the defendant have knowingly contributed to the "nonviolent wing of an organization that he *knows to engage in terrorism*." 549 F.3d at 698 (emphasis added). *El-Mezain* is a criminal case that involved the "material support" provision of 18 U.S.C. § 2339B, which prohibits "knowingly" providing "material support or resources to a foreign terrorist organization." 664 F.3d at 536; *see also infra* p.23. Neither case suggests that a social media platform knowingly assisted an act of international terrorism merely because terrorist sympathizers used its services in violation of the platform's rules barring such use, particularly where, as here, the plaintiff alleged that the platform prohibited terrorism content and regularly removed it, and did not allege that the platform failed to block any specific account or post after becoming aware that it was tied to the terrorist organization at issue.

insufficient to satisfy knowledge. And in *Honickman* v. *BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021), the Second Circuit rejected an ATA aiding-and-abetting claim because the plaintiffs' allegations failed to show that the defendant bank knew that its specific customers were connected to Hamas "at the time that it provided banking services" to those customers. *Id.* at 501.

Similarly, when courts outside the Ninth Circuit have deemed the knowledge requirement satisfied, they have relied on the defendant's affirmative assistance to a specific individual or entity whom the defendant allegedly knew was a terrorist or the defendants' alleged knowledge that the assistance would be used for terrorist acts. For example, in *Kaplan* v. *Lebanese Canadian Bank*, 999 F.3d 842 (2d Cir. 2021), the Second Circuit held the necessary scienter satisfied because (among other things) the defendant bank allegedly provided banking services "to Hizbollah affiliates" that "permitted the laundering of money—nearly half a million dollars or dollar equivalents per day—in violation of regulatory restrictions meant to hinder the ability of [foreign terrorist organizations] to carry out terrorist attacks." *Id.* at 865. The plaintiffs also alleged—regarding the defendant's assistance—that the defendant "had long supported Hizbollah's 'anti-Israel program, goals and activities.'" *Id.* at 866. For example, a United Nations report had flagged a customer of the defendant's as laundering money for Hizbollah, but the defendant "responded to that report by asserting that the report was Israeli propaganda." *Id.* In *Atchley* v. *AstraZeneka UK Limited*, 22 F.4th 204 (D.C. Cir. 2022), the D.C. Circuit held that the plaintiffs plausibly alleged scienter for ATA aiding-and-abetting liability because the defendants allegedly provided medical goods (including free goods) and money to a particular

entity that was publicly reported to have a "mission to engage in terrorist acts" (albeit through an intermediary), and the defendants allegedly "were aware" that the goods they provided "'would be used … to support terrorist attacks.'" *Id.* at 221, 223.[4]

Plaintiffs' allegations would not suffice under those decisions. Like in *Weiss* and *Strauss*, there is no indication here that any Defendant ever had knowledge that any specific account or post on its platform was attributable to an ISIS adherent without promptly removing that account or post, much less knowledge that any such account or post served "any terroristic purpose." *Weiss*, 993 F.3d at 166-167. And, unlike in *Kaplan*, Plaintiffs fail to allege that Defendants knew about (and yet did not promptly block or remove) a particular account or specific post that was connected to ISIS or that Defendants had "long supported" ISIS's agenda. *Kaplan*, 999 F.3d at 866. Nor, unlike in *Atchley*, do Plaintiffs allege that Defendants knew that general use of its platforms by ISIS adherents would "'support terrorist attacks.'" *Atchley*, 22 F.4th at 223. To the contrary, the Ninth Circuit acknowledged that Plaintiffs do not allege that Defendants had "any intent to further or aid ISIS's terrorist activities" or "shared any of ISIS's objectives." App. 65a. The Ninth Circuit's decisions that Plaintiffs nonetheless plausibly alleged knowledge under Section 2333 conflicts with those decisions.

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[4] Although Twitter disagrees with the D.C. Circuit's holding that a defendant need not have "specific intent" or be "'one in spirit'" with terrorists to be liable for aiding and abetting, *Atchley*, 22 F.4th at 223-224, the D.C. Circuit still relied on more than Plaintiffs' "failure to do more" theory that the Ninth Circuit deemed sufficient.

3. The Ninth Circuit's holding that the statute's knowledge requirement may be satisfied even when a defendant is accused only of being insufficiently aggressive in its efforts to exclude terrorist adherents from the vast population of users of its generic service also conflicts with traditional aiding-and-abetting principles. In enacting civil aiding-and-abetting liability under the ATA, Congress instructed courts to apply these traditional standards. In particular, Congress stated that the "'proper legal framework'" for assessing ATA aiding-and-abetting liability is the one identified in *Halberstam*. App. 47a; *see* 18 U.S.C. § 2333 Statutory Note (Findings and Purpose § 5). *Halberstam* established that framework based on cases evaluating liability for aiding and abetting violations of federal securities laws, including *Woodward* v. *Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975) and *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793 (3d Cir. 1978). *See Halberstam*, 705 F.2d at 477-478 & n.8.

As the Eighth Circuit explained in a securities case after *Halberstam* was decided, the "knowledge element is critical" for aiding-and-abetting liability. *See Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991). Without it, "aiding and abetting would be indistinguishable from simply aiding" and "would cast too wide a net, bringing under it parties involved in nothing more than routine business transactions." *Id.* Thus, the Eighth Circuit held in that case that a defendant "whose actions are routine and part of normal everyday business practices" is not liable as an aider and abettor absent "a higher degree of knowledge," including "knowledge of a wrongful purpose." *Id.*

Likewise, in *Woodward*—one of the cases on which *Halberstam* relied—the Fifth Circuit held that "[i]f the evidence shows no more than transactions constituting

the daily grist of the mill, we would be loathe to find … liability without clear proof of intent." 522 F.2d at 97. In *Woods* v. *Barnett Bank of Fort Lauderdale*, the Eleventh Circuit agreed that "'stronger evidence of complicity would be required for the alleged aider and abettor who conducts what appears to be a transaction in the ordinary course of his business.'" 765 F.2d 1004, 1009-1010 (11th Cir. 1985) (quoting *Woodward*, 522 F.2d at 96). And in *Monsen*—also cited in *Halberstam*—the Third Circuit similarly held that "[w]here the secondary defendant's conduct is nothing more than inaction," aiding-and-abetting liability may attach when a plaintiff demonstrates "that the aider-abettor [c]onsciously intended to assist in the perpetration of a wrongful act." 579 F.2d at 800.

The Ninth Circuit had no justification for departing from that prevailing view. As noted, *Halberstam* relied on this securities law precedent. And *Halberstam* itself only confirms that the Ninth Circuit erred. There the D.C. Circuit affirmed the defendant's liability for aiding and abetting a burglary and resulting murder committed by her live-in partner—a scenario that is, "to put it mildly, dissimilar to the one at issue here," App. 48a. The defendant gave individualized assistance to her partner after the fact in each of a long-running series of burglaries, providing "invaluable" services in an "unusual way"—including documenting and liquidating the contraband from each burglary, and serving for years as the operation's "banker, bookkeeper, recordkeeper, and secretary." 705 F.2d at 486-487. This "continuous participation reflected her intent and desire to make the [illegal] venture succeed." *Id.* at 488. The *Halberstam* court nowhere suggested, as the Ninth Circuit held here, that the requisite scienter could be inferred from standardized "arms-length" services used by bil-

lions of people, much less Defendants' alleged general awareness that their vast user bases included persons posting terrorist content in violation of regularly-enforced policies prohibiting such use. App. 64a.

B. The Terrorist Attack That Injured The Plaintiff Is The "Act Of International Terrorism" And "Principal Violation" That A Defendant Must Assist, Not Some General Terrorist Campaign

The Ninth Circuit was also incorrect to hold that ATA aiding-and-abetting liability may rest on allegedly providing generalized assistance to a terrorist organization, rather than to the actual "act of international terrorism" that injured the plaintiff. As the court of appeals noted, "Plaintiffs unambiguously conceded the act of international terrorism they allege is the Reina Attack itself." App. 64a. Nonetheless, applying *Halberstam*'s legal framework, *see* 18 U.S.C. § 2333 Statutory Note (Findings and Purpose § 5), that a defendant must substantially assist "the principal violation" to be liable for aiding and abetting, 705 F.2d at 477-478, the Ninth Circuit construed the "relevant 'principal violation'" as "ISIS's terrorism campaign" or "enterprise," rather than the Reina attack itself, App. 52a-54a, 63a. Under this holding, a defendant may face liability and treble damages for aiding and abetting a terrorist attack without having done anything connected to that attack.

The Ninth Circuit's interpretation contravenes the ATA's text and structure. Section 2333(a) provides a cause of action for U.S. nationals injured "by reason of *an act of international terrorism*." 18 U.S.C. § 2333(a) (emphasis added). Then, Section 2333(d) states that, "[i]n an action under subsection (a) for an injury arising

from *an act of international terrorism* committed, planned, or authorized by [a designated foreign terrorist] organization … , liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed *such an act of international terrorism*." *Id.* § 2333(d) (emphases added). By using the singular, "an act," throughout Section 2333, Congress made clear that aiding-and-abetting liability attaches only when the defendant assists a specific crime, not merely an overall "campaign" or "enterprise." As this Court explained recently, "Congress's decision to use the indefinite article 'a'" can provide "evidence that it used the term" to mean "a discrete … thing." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1481 (2021); *see also Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 638 (2007) (distinguishing between "[a] discrete act of discrimination" and "a succession of harassing acts" that would constitute "a hostile work environment"), *overturned due to legislative action* (Jan. 29, 2009).

Moreover, as the district court noted, the statute "does not refer to assisting a foreign terrorist organization generally or such an organization's general course of conduct." App. 174a. And as the district court also explained, the "material support" provision of 18 U.S.C. § 2339B establishes criminal liability for "'knowingly provid[ing] material support or resources to a foreign terrorist organization,'" and thus Congress "could easily have used language similar to that" in Section 2333 if it intended to create aiding-and-abetting liability for generalized aid. App. 173a. The fact that Congress did not do so indicates that Congress "'intentionally and purposely'" declined to create liability for aiding and abetting a terrorist organization generally. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The black-letter definition of aiding and abetting likewise requires a link between the defendant's assistance and the particular wrong that injured the plaintiff. The Restatement of Torts, for example, provides that to be secondarily liable, a secondary actor must have substantially assisted the primary tortfeasor's "conduct." *Restatement (Second) of Torts* § 876(b) (1979); *see also Halberstam*, 705 F.2d at 477-478 (discussing the Restatement of Torts). If Congress had meant to depart from "the established meaning of" aiding and abetting by severing the link between aiding and abetting and the principal wrong, it would have done so expressly. *Field* v. *Mans*, 516 U.S. 59, 69 (1995). The court of appeals' decision implying that Congress did sever this link in enacting JASTA conflicts with how other courts, and even the Ninth Circuit itself, have read similar aiding-and-abetting provisions in other statutes. *See SEC* v. *Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996) (Securities Exchange Act aiding and abetting required "'substantial assistance' in the commission of the primary violation"); *Camp*, 948 F.2d at 462 ("[T]here must be a 'substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to plaintiff.'").

Consistent with these principles, courts of appeals in all previous ATA cases involving social media platforms have focused on whether the defendants assisted the specific attack that injured the plaintiff. In *Crosby* v. *Twitter, Inc.*, the Sixth Circuit examined whether the defendants substantially assisted the person who committed "the shooting" at the nightclub. 921 F.3d 617, 626-627 (6th Cir. 2019). In *Retana* v. *Twitter, Inc.*, the Fifth Circuit emphasized that ATA aiding-and-abetting liability "focuses on the relationship between the act of international terrorism and the secondary ac-

tor's alleged supportive conduct." 1 F.4th 378, 383 (5th Cir. 2021) (quoting *Linde* v. *Arab Bank PLC*, 882 F.3d 314, 331 (2d Cir. 2018)) (emphasis omitted). The Ninth Circuit's decision requiring only that the defendant assisted a general terrorist enterprise, even while acknowledging that the "act of international terrorism" is the specific attack at issue, cannot be logically reconciled with those decisions.[5]

In *Halberstam*, the D.C. Circuit held the defendant liable for the murder at issue based on her substantial assistance to her domestic partner's burglary "enterprise." 705 F.2d at 488; *see* App. 53a-54a. And recently, the Second and D.C. Circuits relied on *Halberstam* to conclude incorrectly (as did the Ninth Circuit below) that a plaintiff need allege only that the defendant assisted some illegal "enterprise", *Atchley*, 22 F.4th at 222, not the specific "injury-causing act," *Honickman*, 6 F.4th at 499. But *Halberstam*'s conclusion was based on the fact that the defendant was a full and willing participant in, and logically and practically aided, each of her live-in partner's burglaries that made up the so-called "enterprise." 705 F.3d at 488. Here, the Amended Complaint is fatally deficient because it alleges no connection whatsoever between Defendants' alleged assistance and the Reina attack.

These factual distinctions are especially important in light of JASTA's preamble, which notes only that *Halberstam* "provides the proper legal framework,"

[5] The Second and Eleventh Circuits have also affirmed dismissal of ATA aiding-and-abetting claims against operators of social media platforms. *See Force* v. *Facebook, Inc.*, 934 F.3d 53, 71 (2d Cir. 2019) (affirming dismissal on Section 230 grounds), *cert. denied*, 140 S. Ct. 761 (2020); *Colon* v. *Twitter, Inc.*, 14 F.4th 1213, 1228 (11th Cir. 2021) (affirming dismissal for failure to plausibly allege the elements of an ATA aiding-and-abetting claim).

Pub. L. No. 114-222, § 2, 130 Stat. 852; Congress did not elevate *Halberstam*'s unusual facts above JASTA's text. And in its "Legal Framework" section, *Halberstam* explains that aiding-and-abetting liability requires that "the defendant … knowingly and substantially assist *the principal violation*." 705 F.2d at 476-478 (emphasis added). Thus, the "principal violation" that a defendant must substantially assist under *Halberstam* is the "act of international terrorism" from which the plaintiff's injury arose. 18 U.S.C. § 2333(d)(2).

II. TOGETHER, THE NINTH CIRCUIT'S TWO HOLDINGS ELIMINATE ANY MEANINGFUL LIMITATION ON ATA AIDING-AND-ABETTING LIABILITY

Either of the Ninth Circuit's holdings would warrant this Court's review, but combined they make the Court's clarification of the ATA's secondary liability provision even more necessary. The two holdings paint a bleak picture. The Ninth Circuit would impose ATA aiding-and-abetting liability on defendants who were generally aware that their vast user base included adherents of a terrorist organization even where the defendants admittedly: (1) lacked "any intent to further or aid [the organization's] terrorist activities" or "objectives"; (2) affirmatively (if imperfectly) worked to avoid assisting the organization by "regularly" enforcing rules barring usage by terrorists; and (3) had no role whatsoever in planning or assisting the attack that injured the plaintiffs. App. 65a. That expansive scope of liability threatens significant harm to countless entities.

Although the Second and D.C. Circuits have recently held—in the absence of this Court's guidance—that a defendant need not assist the specific attack that injures the plaintiff, even those circuits have relied on

more than Plaintiffs' lack-of-sufficient policing theory to satisfy the statutory knowledge requirement, such as awareness that the defendant's assistance would be for a "terroristic purpose," *Weiss*, 993 F.3d at 166-167, or "'used … to support terrorist attacks,'" *Atchley*, 22 F.4th at 223. By contrast, the Ninth Circuit held it sufficient to plead general knowledge that terrorist supporters were somewhere among the Defendants' billions of customers, even without a connection between the assistance and the terrorist act. That approach—allowing liability based on only alleged generalized knowledge and alleged generalized aid—creates precisely the sort of "seemingly boundless litigation risks" that earlier "troubled" another panel of the Ninth Circuit about expansively interpreting ATA's direct liability provision prior to JASTA. *Fields* v. *Twitter, Inc.*, 881 F.3d 739, 749 (9th Cir. 2018). As that court recognized, the "highly interconnected" nature of social media, the internet, and "modern economic and social life" might mean that certain uses of Defendants' websites cause distant "ripples of harm," but "[n]othing in § 2333 indicates that Congress intended to provide a remedy to every person reached by these ripples." *Id.*; *accord Crosby*, 921 F.3d at 625. The Ninth Circuit's ruling below threatens particularly broad liability because primary liability is expressly limited by the requirement that the defendant's acts proximately caused the plaintiff's injury, *Fields*, 881 F.3d at 744-745, whereas secondary liability (according to the Ninth Circuit) can attach to any terrorist attack, anywhere in the world, without any meaningful showing of knowledge or any connection between the defendant's conduct and the attack.

The implications of the decision below reach beyond online services. *Weiss* and *Strauss* involve bank

defendants, *see Weiss*, 993 F.3d at 151; *Strauss*, 842 F. App'x at 703-704, and *Atchley* involves pharmaceutical companies. 22 F.4th at 209. Absent this Court's review, the uncertainty created by the Ninth Circuit's expansive construction could give purchase to creative theories of liability against ordinary businesses providing standardized goods or services to the general public. That is particularly worrisome because, as the U.S. Chamber of Commerce explained below, "even well-meaning and responsible defendants facing Anti-Terrorism Act claims will have difficulty staving off costly and invasive discovery, a result that 'will push cost-conscious defendants to settle even anemic cases.'" U.S. Chamber of Commerce Amicus Br. 13-14, Ct. App. Dkt. 74. Similarly, for many businesses, the mere pendency of such actions "inflicts significant harm … by branding them as 'supporters of terrorism' that are complicit in horrific terrorist attacks." *Id.* at 14.

Had Congress intended to expose businesses to treble damages merely for falling short in their efforts to prevent misuse of their generic, widely available services, it would have said so clearly. It did not. The Court should grant review to clarify that Congress meant what it said when it permitted aiding-and-abetting liability only where a defendant "*knowingly*" assisted "*an act* of international terrorism." 18 U.S.C. § 2333(d)(2) (emphases added).

* * *

As noted above, if this Court denies the petition for certiorari pending in *Gonzalez*—as it should—that denial will fully resolve this case pursuant to the parties' stipulation. But if this Court grants review in *Gonzalez*, this petition should also be granted because, left undisturbed, the decision below would both create con-

flicts among the circuits and impose the significant harms described above.

III. If The Court Grants Certiorari In *Weiss* Or *Strauss*, The Court Should At Least Hold This Case And Appropriately Dispose Of It In A Manner Consistent With Any Merits Decision In *Weiss* Or *Strauss*

The pending petitions in *Weiss* and *Strauss* present a question closely related to one presented here regarding the ATA's knowledge requirement for aiding-and-abetting liability. The plaintiffs there argued that a bank could be held liable under Section 2333 for aiding and abetting terrorist attacks committed by Hamas because they transferred funds to charities allegedly knowing the charities had ties to Hamas. *See, e.g.*, *Weiss*, 993 F.3d at 151-152; *Strauss*, 842 F. App'x at 704. The Second Circuit held those claims not viable, however, because there was no indication that the defendants knew that "the transfers were for any terroristic purpose" or that the charities with alleged ties to Hamas "funded terrorist attacks or recruited persons to carry out such attacks." *Weiss*, 993 F.3d at 166. The court concluded, therefore, that the plaintiffs could not show that the defendants were "knowingly providing substantial assistance to Hamas" or that they were "generally aware" they were "playing a role in Hamas's acts of terrorism." *Id.* at 167.

Objecting to that interpretation of the scienter requirement, the plaintiffs in *Weiss* and *Strauss* have asked this Court to decide "[w]hether a person who knowingly transfers substantial funds to a designated" foreign terrorist organization "aids and abets that organization's terrorist acts" under Section 2333(d)(2). Pet. i, *Weiss*, No. 21-381 (U.S. Sept. 3, 2021); *accord*

Pet. i, *Strauss*, No. 21-382 (U.S. Sept. 3, 2021). This Court called for the views of the Solicitor General, and on May 24, 2022, the Solicitor General recommended denial of the petitions. *See* U.S. Amicus Br., Nos. 21-381 & 21-382 (U.S. May 24, 2022).[6]

If this Court decides to grant certiorari in *Weiss* or *Strauss* (while the petition in *Gonzalez* remains pending), the Court should hold this case given the similarity of the issues presented. As the Ninth Circuit acknowledged, Plaintiffs do not allege that Defendants had "any intent to further or aid ISIS's terrorist activities" or "shared any of ISIS's objectives," and to the contrary concede that Defendants regularly enforced rules against terrorist content. App. 65a. There is no allegation, in other words, that Defendants knew that any specific ISIS-related account or post that remained on their platforms was for "any terroristic purpose." *Weiss*, 993 F.3d at 166. A merits decision by this Court in *Weiss* or *Strauss* is thus likely to substantially affect disposition of Plaintiffs' claim in this case. Accordingly, the Court should, at a minimum, hold this case if it grants certiorari in *Weiss* or *Strauss*, and appropriately dispose of this case in a manner consistent with any merits decision in *Weiss* or *Strauss*.

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[6] The United States stated in a footnote that the Ninth Circuit's analysis of the ATA in *Gonzalez* does not conflict with the Second Circuit's ATA decisions because the Ninth Circuit favorably discussed other Second Circuit decisions. U.S. Amicus Br. 23 n.3, Nos. 21-381 & 21-382 (U.S. May 24, 2022). The Ninth Circuit did not, however, discuss the recent *Weiss* or *Strauss* decisions and it is the scienter analysis in those decisions that conflicts with the Ninth Circuit's scienter analysis in this case.

CONCLUSION

The Court should resolve this petition for certiorari as follows:

1. If certiorari is denied in *Gonzalez*, deny this petition as well, because this case will have ceased to be a vehicle for the Court's review of the questions presented in this petition.

2. If certiorari is granted in *Gonzalez*, grant this petition as well.

3. Alternatively, hold this petition until the Court disposes of *Weiss* or *Strauss* and then dispose of this case as appropriate, conditional on the petition in *Gonzalez* remaining outstanding.

Respectfully submitted.

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