

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TWITTER, INC.,)
) Petitioner,
) v.) No. 21-1496
MEHIER TAAMNEH, ET AL.,)
) Respondents.

Pages: 1 through 151
Place: Washington, D.C.
Date: February 22, 2023

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9

10 Washington, D.C.

11 Wednesday, February 22, 2023

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:14 a.m.

16

17 APPEARANCES:

18 SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf
19 of the Petitioner.

20 EDWIN S. KNEEDLER, Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; for
22 the United States, as amicus curiae, supporting
23 reversal.

24 ERIC SCHNAPPER, ESQUIRE, Seattle, Washington; on
25 behalf of the Respondents.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-1496, Twitter versus Taamneh.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

JASTA permits any U.S. national injured by reason of an act of international terrorism to recover treble damages from a person who aids and abets by knowingly providing substantial assistance or who conspires with the person who committed such an act of international terrorism.

The foundational points here are not in dispute. First, the conceded and obvious act of international terrorism is the Reina attack, and the complaint includes no allegation that the defendants provided substantial assistance, much less knowing substantial assistance, to that attack or, for that matter, to any other attack.

1 Second, as the complaint concedes, the
2 defendants "had no intent to aid ISIS's
3 terrorist activities." Quite to the contrary,
4 they maintained and regularly enforced policies
5 prohibiting content that promotes terrorist
6 activity.

7 The plaintiff's claim that because
8 defendants were generally aware that among their
9 billions of users were ISIS adherents who
10 violated their policies and, therefore,
11 defendants should have done more to enforce
12 those policies does not constitute aiding and
13 abetting an act of international terrorism under
14 the operative terms of the text, the
15 constitutional principles articulated in
16 Halberstam, or any recognized understanding of
17 what it means to abet a criminal act.

18 If Congress had wanted to impose
19 treble damage liability for existing --
20 assisting a terrorist organization, it had a
21 ready model in the material support statute,
22 Section 2339(b). If it had wanted to create
23 such liability for supporting international
24 terrorism writ large, it likewise had a model in
25 Section 2331(1).

1 Instead, it provided a remedy against
2 those who conspire with terrorists or -- or who
3 knowingly aid and abet acts of terrorism. It
4 did not impose treble damage liability on
5 companies whose services were exploited by
6 terrorists in contravention of the company's
7 enforced antiterrorism policies.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Waxman, it seems
10 that you tie your analysis to knowledge of the
11 Reina attacks rather than just general knowledge
12 of terrorism.

13 MR. WAXMAN: So we -- it's -- thank
14 you, Justice Thomas. Let me clarify.

15 We do not contend that there is no
16 liability if these companies didn't know that
17 the Reina nightclub would be attacked. What
18 they had to have known to satisfy the operative
19 language of the statute was that they were, in
20 fact, providing substantial assistance to the
21 act of international terrorism that injured the
22 plaintiff and that they knew that their action
23 would substantially assist an act of
24 international terrorism.

25 The -- the flight trainers who provide

1 -- who taught the al-Qaeda terrorists how to fly
2 planes so they could fly them into the World
3 Trade Center and the Pentagon didn't need to
4 know that those were the targets, but he needed
5 to know that he was, in fact, providing
6 substantial assistance to people who aimed to
7 use that knowledge in order to commit a
8 terrorist attack.

9 JUSTICE THOMAS: So the -- and I may
10 have misunderstood your brief, but -- so you
11 would -- I assume you would agree that if I had
12 a friend who was a mugger, a murderer, and a
13 burglar --

14 MR. WAXMAN: Hard to imagine.

15 JUSTICE THOMAS: -- but, other than
16 that, he was a good guy --

17 (Laughter.)

18 JUSTICE THOMAS: -- and I -- I loaned
19 him a gun but not knowing and not wanting to
20 know what he was going to do with it, that I --
21 that he -- that that possibly could be aiding
22 and abetting?

23 MR. WAXMAN: So I think it wouldn't
24 be.

25 JUSTICE THOMAS: Why?

1 MR. WAXMAN: Because it would -- it --
2 while it would satisfy Steps 1 and 3 of the
3 Halberstam legal framework that is -- is meant
4 to be the model for -- interpretive model for
5 this statute, you also had to -- you also have
6 to have a general awareness that you are
7 assisting in overall illegal or tortious
8 activity.

9 So, for example, if I have a farm and
10 I -- I have a gate with my next-door neighbor's
11 pasture and it's got a padlock and I don't -- I
12 can't open the padlock, and I go to you, you're
13 my neighbor on the other side, and say, Justice
14 Thomas, I'm trying to open this gate, but I
15 can't get the padlock open, can I -- can -- do
16 you have any bolt cutters that could do this,
17 and you say, yes, I do, and, in fact, I'll cut
18 the bolt for you, and I then use the open gate
19 to steal my neighbor's sheep, you know that you
20 provided substantial assistance to me in
21 entering the property, but you don't have --
22 you're not culpable within the meaning of the
23 common understanding of the word "aiding and
24 abetting" or under Step 2 of the Halberstam
25 doctrine because you're not generally aware of

1 your role as part of an overall illegal or
2 tortious activity.

3 JUSTICE THOMAS: But I -- I think
4 you've changed somewhat my -- you know, my
5 example.

6 MR. WAXMAN: Oh. Well, I -- I
7 apologize.

8 JUSTICE THOMAS: My friend is a
9 burglar, he's a murderer, and he is a mugger,
10 and he says he has some business to conduct, and
11 I loan him a gun.

12 Now that's quite different from
13 opening the gate because you can open the gate
14 for quite a number of legal reasons and
15 legitimate reasons. But, if I know to -- to a
16 moral certainty the kind of person my friend is,
17 would I have to be more specific than that in
18 order to aid -- be aiding and abetting his
19 criminal conduct?

20 MR. WAXMAN: So I think, in that
21 instance, you would ask the question under the
22 operative language of the statute were you --
23 did you knowingly provide substantial
24 assistance.

25 Assume that -- assume that he -- your

1 friend then committed a crime with the gun.
2 That would be substantial assistance in the
3 commission of that crime. But whether you know
4 -- whether you knew you were substantially
5 assisting the crime would involve a
6 determination, under the circumstances, whether
7 it was fair as a matter of law to permit an
8 inference that you knew that although your
9 friend was otherwise a good guy, he was, in
10 fact, going to use it to commit some crime.

11 Now even that hypothetical is quite
12 removed from the circumstances of this case
13 because that involved an active provision from
14 one person to another of something that was, in
15 fact, of substantial assistance.

16 What we have here --

17 CHIEF JUSTICE ROBERTS: Well, if I
18 could just --

19 MR. WAXMAN: I'm sorry, can I just
20 finish my sentence?

21 CHIEF JUSTICE ROBERTS: Okay.

22 MR. WAXMAN: Okay. What we have here
23 is an alleged failure to do more to ferret out
24 violations of a clear and enforced policy
25 against assisting or allowing any postings

1 supporting terrorist organizations or
2 activities.

3 I'm sorry, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: You gave a
5 variety of considerations to take into account
6 in response to Justice Thomas's hypothetical,
7 but it seems to me that given the facts, you
8 ought to be able to give us a bottom line or
9 not. Would that be covered by the statute or
10 not?

11 MR. WAXMAN: Well, I -- in his
12 hypothetical?

13 CHIEF JUSTICE ROBERTS: Right. The
14 facts he gave, the friend who he knew was
15 committing all these crimes and all that, and he
16 gave him a gun. Now is that covered or not?

17 MR. WAXMAN: It would be covered if
18 the finder of fact concluded that under all the
19 facts and circumstances it was fair to infer
20 that he knew that it was going to be used for
21 this purpose.

22 CHIEF JUSTICE ROBERTS: Well, I'm just
23 trying to get you to answer. It seems a pretty
24 direct case. Would it be fair to infer that he
25 intended to use it for that -- for that purpose

1 if the facts were as posed by Justice Thomas?

2 MR. WAXMAN: And I -- I -- I -- I -- I
3 can't -- I don't think the facts posed by
4 Justice Thomas, which are that on the one hand
5 he's a good guy, but on the other hand he has
6 engaged in criminal acts before, would be
7 enough.

8 I would tend to think that that would
9 be sufficient to -- for a finder of fact to
10 infer knowledge that you were substantially
11 assisting a crime. It probably would -- it
12 therefore would survive a motion to dismiss.

13 But, again, I'm -- I -- I don't mean
14 to -- I'm not evading the question at all. In
15 every one of these instances, you would ask with
16 respect to all of the many difficult
17 hypotheticals that could be arrayed in this
18 case, is this -- is what you did -- did what you
19 did amount to substantial assistance to the
20 operative tort or, here, the act of
21 international terrorism, and did you know that
22 in providing that assistance you would be
23 substantially assisting an act of international
24 terrorism or a crime that Justice Thomas's
25 friend might commit?

1 JUSTICE BARRETT: But you agree that
2 we don't need to know where Justice Thomas's
3 friend is heading, right? Like, here --

4 MR. WAXMAN: Right.

5 JUSTICE BARRETT: -- Twitter didn't
6 need -- could conceivably have been liable even
7 if it didn't know about the Reina attacks --

8 MR. WAXMAN: Correct.

9 JUSTICE BARRETT: -- so long as it --
10 okay.

11 MR. WAXMAN: Correct. I mean --

12 JUSTICE SOTOMAYOR: I -- I guess I'm a
13 little confused from your brief because it need
14 -- from your brief, I thought you needed a
15 direct connection between the assistance given
16 and the actual act.

17 So I came away from your brief
18 thinking that what you were arguing was that
19 they had to provide something specifically for
20 this bombing. They had to provide either the
21 platform for the people to get together or for
22 the actual people doing the bombing to get
23 together or a text message or something that
24 tied them to the crime.

25 Are you moving away from that?

1 MR. WAXMAN: No. I apologize for any
2 unclarity, and I appreciate the opportunity,
3 therefore, to clarify it.

4 You have to have known -- well, number
5 one, you have to have provide -- the cause of
6 action in this remedial statute derives from the
7 act of international terrorism that injured the
8 plaintiff. You had to have provided substantial
9 assistance to an act of international terrorism
10 that happened to be the one that injured the
11 plaintiff. Otherwise, there's no connection
12 between your assistance and the cause of action.

13 What you don't have to know in advance
14 is that the target would be the Reina nightclub
15 as opposed to Taksim Square or the Paris metro.

16 JUSTICE SOTOMAYOR: So I -- I guess
17 I'm a little bit confused because, as I read
18 your brief -- I remain confused, Mr. Waxman --
19 you want a very direct tie between the form of
20 assistance and the actual act.

21 Am I correct?

22 MR. WAXMAN: I -- there must be --

23 JUSTICE SOTOMAYOR: With or without
24 knowledge that this will be the act.

25 MR. WAXMAN: Yes, yes.

1 JUSTICE SOTOMAYOR: Okay. So is there
2 a difference between providing the gun or just
3 providing money? Meaning we have cases in the
4 Second Circuit -- and I'm sure you're familiar
5 with them --

6 MR. WAXMAN: I am.

7 JUSTICE SOTOMAYOR: -- the Atchley
8 case and the Kaplan case, in which they didn't
9 provide a platform or a gun, but they provided
10 money to people, and a fair inference from the
11 evidence in both cases, people they knew were
12 using that money for terrorist acts.

13 And both circuits in this case
14 sustained the claims of action here. So why was
15 -- why was the indirect assistance, fungible
16 money, make those defendants liable, but you're
17 not liable for providing a platform that you
18 knew they were using to recruit people and to
19 help arrange other terrorist acts, perhaps not
20 this one, but to help the enterprise?

21 MR. WAXMAN: So --

22 JUSTICE SOTOMAYOR: Just in the same
23 way, in the case that JASTA talks about,
24 Halberstam. In Halberstam, the woman didn't
25 know which burglary, where. She didn't even

1 know he was committing burglaries necessarily.
2 She knew he was committing a property crime.
3 She was just assisting his enterprise generally.

4 So --

5 MR. WAXMAN: I -- I hear a lot --

6 JUSTICE SOTOMAYOR: -- talk to me
7 about what direct means.

8 MR. WAXMAN: -- I hear a lot of -- a
9 lot of questions, and I hope that I remember
10 them all.

11 JUSTICE SOTOMAYOR: Okay.

12 MR. WAXMAN: If I haven't answered
13 them all --

14 JUSTICE SOTOMAYOR: Don't worry. I'll
15 come back to you.

16 MR. WAXMAN: Okay, thank you.

17 (Laughter.)

18 MR. WAXMAN: First of all, the -- the
19 banking case -- the banking case is in the
20 Second Circuit and the pharmaceutical case in
21 the D.C. Circuit, are both -- I mean, they --
22 the -- the -- the salient distinction there is
23 that the culpable conduct was, in fact, the
24 active provision of something of assistance to
25 the tortfeasor, whereas, here, the actionable

1 conduct is a failure to better ferret out
2 violations of a --

3 JUSTICE KAGAN: I don't think that
4 that's right, Mister -- I realize you have a lot
5 of questions piled up there.

6 JUSTICE SOTOMAYOR: I -- I -- I do
7 want them to come back to them, though.

8 JUSTICE KAGAN: Yeah. Can I just --
9 just --

10 MR. WAXMAN: I -- I -- I --

11 JUSTICE KAGAN: I mean, the -- the --
12 the conduct is the provision of a platform by
13 which to communicate with each other and other
14 members of ISIS and by which to recruit. So you
15 can, you know, say it's the failure to better
16 police the platform, but it's the provision of a
17 platform.

18 MR. WAXMAN: The -- the -- the
19 distinction that the cases make between action
20 and inaction -- and the -- the -- the plaintiffs
21 in this case have repeatedly characterized the
22 gravamen here as inaction, failure to do better
23 to prevent more violations of an established
24 policy. The -- the distinction between --

25 JUSTICE KAGAN: Well --

1 MR. WAXMAN: I'm --

2 JUSTICE KAGAN: -- maybe that's right.
3 I'm going to rewrite their complaint for them.

4 MR. WAXMAN: Okay.

5 JUSTICE KAGAN: It's the provision of
6 a platform.

7 MR. WAXMAN: Okay. The distinction
8 that all of the cases, the aiding-and-abetting
9 cases draw between action and inaction is
10 culpability, and, therefore -- and what is
11 alleged to be culpable in this case is not the
12 provision to billions of users of a
13 communications platform subject to established
14 policies which are enforced.

15 What's -- what's alleged to be
16 culpable is that we knew from government reports
17 and from -- from newspaper reporting that
18 there -- notwithstanding whatever efforts we
19 were making to enforce our policies,
20 nonetheless, there were lots of terrorist
21 organizations or terrorist adherents that were
22 still doing it. That's the culpability.

23 And that's why the Restatement, for
24 example, when it talks about -- and I'm -- I'm
25 referring here to Restatement (Third) -- the

1 substantially assisting a wrongdoer means
2 affirmatively helping with the commission of the
3 tort. It does not mean -- it means "something
4 more than routine professional services provided
5 to the primary" --

6 JUSTICE KAGAN: I feel guilty that
7 you're not answering Justice Sotomayor's
8 questions, but I'm just going to pile on a
9 little bit if you'll forgive me.

10 MR. WAXMAN: I -- I -- I have --

11 JUSTICE SOTOMAYOR: Just --

12 MR. WAXMAN: -- I have them in mind --

13 JUSTICE SOTOMAYOR: -- just don't --

14 MR. WAXMAN: -- and I will come back
15 to them.

16 JUSTICE KAGAN: Yeah, the -- the same
17 thing could have been said about banking. It
18 was -- you know, we just provided the same
19 banking services to the terrorists as we did to
20 everybody else. But, in fact, that -- the
21 provision of that service materially supported
22 and the bank knew that it was going to
23 materially support terrorist operations.

24 MR. WAXMAN: So that may or may not be
25 the case. The -- we -- the Second Circuit and

1 the D.C. Circuit erred in, we think,
2 notwithstanding the distinction that I'm having
3 a hard time convincing you of, because they
4 collapsed the mental state required under Step 2
5 and Step 3 of Halberstam.

6 What they said is these -- the
7 pharmaceutical company was providing money and
8 kickbacks to a known terrorist organization. It
9 was generally aware that this was a terrorist
10 organization. And that satisfies Step 3, which
11 is the knowing provision of substantial
12 assistance to an act of international terrorism.

13 Likewise, the Second Circuit has said
14 expressly that the only knowledge required to
15 establish the requisite mental state for
16 abetting a crime is general awareness of -- that
17 you are aiding an enterprise.

18 Now the word "enterprise" -- maybe I
19 can shuffle back to -- to -- or march back to
20 Justice Sotomayor's question. You referred to
21 the -- the -- Halberstam's opinion's discussion
22 of the criminal enterprise and aiding and
23 abetting the criminal enterprise.

24 We are here -- I have three points to
25 make. One, we are here parsing the language of

1 a statute. The word "enterprise" does not
2 appear in this statute. The word that appears
3 over and over and over again is "the act of
4 international terrorism" that injured the
5 plaintiff.

6 Number two, Congress in its findings
7 said that it intended to import the legal
8 framework set forth in a section of Halberstam
9 conveniently called "Legal Framework." Again,
10 there is nothing in the legal framework set out
11 there that talks about aiding and abetting or
12 substantially assisting an enterprise. In any
13 event, we don't in any way contest that the
14 court, in applying the facts in Halberstam to
15 the legal framework, referred over and over
16 again to the substantial assistance that she was
17 providing to the enterprise.

18 Now the word "enterprise," if you look
19 in the dictionary, has a variety of different
20 meanings, but the two first meanings are, number
21 one, it can refer to an entity that is typically
22 a "unit of economic organization," or, quite
23 distinctly, it can refer to an undertaking,
24 systemic, purposeful activity.

25 What Halberstam was using the term to

1 do was to characterize a factual
2 characterization of a series of property crimes
3 in which it held that Bernard Welch and Linda
4 Hamilton played "symbiotic roles." It was not
5 announcing a legal standard that encompasses a
6 broad entity that provides general services to
7 billions of people subject to an unequivocal
8 enforced policy against terrorism.

9 So even if I agree with you that you
10 can establish substantial assistance to the
11 principal tort by showing that there was a
12 course of -- you know, a series of like acts of
13 international terrorism or burglaries or
14 property crimes in which the aider and abettor
15 was, to quote the -- the -- the D.C. Circuit, "a
16 willing participant" and, therefore, aided and
17 abetted the -- the principal tort, which was the
18 burglary of the Halberstam home, I don't have a
19 problem with that.

20 CHIEF JUSTICE ROBERTS: Thank you --
21 thank you, Mr. Waxman.

22 Justice Thomas, anything further?

23 Justice Alito?

24 JUSTICE ALITO: A few questions. If
25 this were a criminal case, I think it's clear

1 that there would not be aiding and abetting
2 liability. The element in our -- and we've
3 addressed aiding and abetting in criminal cases
4 directly, and it requires the intention of
5 causing the crime to be committed. And that's
6 not alleged here.

7 But we have to decide this case,
8 presumably, under Halberstam, which has sort of
9 a statutory status as a result of the preamble
10 to this statute, and that makes it somewhat
11 difficult.

12 So the second -- there's no dispute, I
13 take it, that the first Halberstam factor is
14 satisfied, right?

15 MR. WAXMAN: Correct.

16 JUSTICE ALITO: Okay. The second one
17 to me is -- has very little meaning. Maybe you
18 can explain how we can read some meaning into
19 it. A defendant must be generally aware of his
20 role as part of an illegal or tortious activity.

21 Well, you know, if Twitter knows that
22 ISIS is a terrorist organization and ISIS
23 members are communicating for the purpose of
24 furthering their terrorist activity, then
25 Twitter is aware of its role. The second factor

1 doesn't even require that it be an important
2 role, a major role. It's just a role.

3 So what substance is there to that?

4 MR. WAXMAN: So, for purposes of this
5 case, we're not disputing that the second step
6 of Halberstam is satisfied.

7 JUSTICE ALITO: Okay. So then we go
8 on to the third --

9 MR. WAXMAN: Right.

10 JUSTICE ALITO: And I'm sorry. I
11 won't -- finish up.

12 MR. WAXMAN: No, no, no. I was going
13 to say I could -- in the fullness of time, which
14 I appreciate the Court may not permit me, I
15 could make an argument about what it means to
16 actually be playing a role, but let's move on.

17 The -- where the rubber meets the road
18 here is in what is Step 3 of Halberstam, but,
19 more significantly, the operative language of
20 the statute, which means that even if -- of
21 course, Twitter and -- and Meta and Google,
22 YouTube knew from all these reports that,
23 notwithstanding their efforts, there continued
24 to be posted on their communication services
25 messages, videos, whatever, that violated their

1 policies.

2 The question is, is a failure to do
3 more to prevent misuse of widely used services,
4 offered at arm's length and subject to an
5 enforced policy against terrorist content, the
6 knowing provision of substantial assistance, at
7 least absent specific knowledge of particular
8 accounts or posts that are or may be being used
9 to plan, commit, or support in some proximate
10 way a particular -- the particular act of
11 international terrorism that injured the
12 plaintiffs?

13 JUSTICE ALITO: Okay. So I see two
14 potential arguments that could win for you under
15 the third prong, and one is that -- one has to
16 do with knowingly, one has to do with
17 substantiality.

18 So "knowingly," I -- I think you're --
19 you're right to concede that it wasn't
20 necessary. It's not necessary that they know
21 that there's going to be --

22 MR. WAXMAN: Right.

23 JUSTICE ALITO: -- an attack on the
24 Reina nightclub, would it matter if it was a
25 different nightclub, would it matter if it was a

1 bombing at some facility in Istanbul during a
2 particular period of time when people would be
3 present and people would be killed. But, at a
4 certain point, it becomes too attenuated --

5 MR. WAXMAN: Correct.

6 JUSTICE ALITO: -- to support aiding
7 and abetting. So that's a difficult -- that's a
8 line-drawing problem.

9 Substantiality is also a line-drawing
10 problem. So what is substantial assistance?
11 What's the difference between substantial and
12 insubstantial assistance?

13 So why aren't these fact questions?
14 How can they be -- were they properly decided on
15 a motion to dismiss?

16 MR. WAXMAN: We think that they --
17 they are properly decided on a motion to
18 dismiss. You know, all cases present fact
19 questions. The question is whether the facts
20 asserted, the facts -- whether there are
21 plausibly pled facts that would permit a trier
22 of fact to conclude that what we have here
23 amounted to aiding an international crime --
24 aiding and abetting an international crime.

25 And we're -- what we're saying is,

1 Justice Alito, as a matter of law, a court
2 should conclude, consistent with the -- the
3 teachings of the common law cases that
4 Halberstam expressly used to extract its
5 three-part framework and that the Restatement
6 makes very, very clear that the failure to do
7 more to remove content in the context of a
8 service that is generally and widely provided to
9 anybody who complies with the policies, the
10 failure to do more or even a lot more to enforce
11 those policies does not amount to the knowing
12 provision of substantial assistance.

13 And the -- look, if the -- if the --
14 if the police chief in Istanbul came to Twitter
15 and said, look, we've been following three
16 accounts and these people -- these -- these
17 people appear to be planning some sort of
18 terrorist act, and Twitter basically said, you
19 know, people do lots of things, we're not going
20 to take these things down, we're not going to
21 look into it, there, we would have fairly
22 assumed culpable knowledge that there were, in
23 fact, accounts that they knew about that were
24 assertedly, plausibly being used to do this.

25 I mean, your -- your original point, I

1 think, is -- is absolutely right. If this were
2 a criminal case, obviously, it requires specific
3 intent.

4 JUSTICE ALITO: Right.

5 MR. WAXMAN: And the -- the statute
6 here says knowingly provides substantial
7 assistance, but insofar as, as you say, we're to
8 -- although we parse the statute, not
9 Halberstam, we should interpret the statute in
10 light of Halberstam's legal framework, there are
11 three separate -- and my friend agrees with me
12 -- there are three separate questions of
13 scienter that are posed in the Halberstam
14 framework.

15 And together, you know, if you're
16 generally aware that you're playing a role in
17 illegal activity and you know that you are
18 providing substantial assistance to some act of
19 international terrorism and, therefore, you look
20 at substantiality, where -- where scienter and
21 intent, as it did in Halberstam, played a major
22 role, I'm not sure there's a huge distinction
23 between the level of intent that's required in
24 this context in which what's alleged is a broad
25 provision of a commercial service and a failure

1 to do anything, you can't infer intent unless
2 you can allege we knew about some accounts that,
3 in fact --

4 JUSTICE ALITO: All right. I -- I --
5 I understand, Mr. Waxman.

6 MR. WAXMAN: Okay. Thank you.

7 JUSTICE ALITO: I don't want to take
8 up too much of my colleagues' time.

9 One more -- one more question, and
10 that has to do with the status of these six
11 factors that Halberstam says are to be
12 considered in assessing the third factor in its
13 test for a civil conspiracy.

14 Do you think the Ninth Circuit went
15 astray by regarding this as sort of a checklist,
16 so, you know, it's checking how many of these
17 boxes are checked, and if enough boxes are
18 checked, then that means that the third factor
19 is satisfied, or is what is required the
20 consideration of those insofar as they have a
21 bearing on the third factor?

22 MR. WAXMAN: It's definitely the
23 latter. And I -- I -- I think even the Ninth
24 Circuit -- although we think the Ninth Circuit
25 was utterly wrong in a way that I'll explain,

1 the Ninth Circuit conceded that three of the
2 factors plainly favor no liability because we
3 weren't present, these platforms weren't present
4 at the time of the attack. We had no
5 relationship with the attackers.

6 And -- and our state of mind was the
7 opposite. This is negative intent. We are
8 opposed to this. I think --

9 JUSTICE ALITO: Okay. I -- I
10 understand. Let me --

11 MR. WAXMAN: Where they went wrong was
12 in mixing up what the object of aids and abets
13 is. The object of aids and abets is either the
14 act of international terrorism or the person who
15 commits it in the commission of that.

16 JUSTICE ALITO: Let -- let me allow my
17 --

18 MR. WAXMAN: Okay.

19 JUSTICE ALITO: -- colleagues to ask
20 some questions.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: I think, as often
24 we do, that Justice Alito has touched on what I
25 think is the center of the issue, which is --

1 and you've conceded it's Item Number 3, is the
2 aid knowingly and substantial.

3 I'm a little afraid of going on the
4 knowing standard because willful blindness is
5 something we have said can constitute knowledge.
6 And their allegation is that there were similar
7 names to the ones you took off the platform and
8 that you did no work to find those similarly
9 named entities and determine whether they were
10 ISIS or not.

11 So there is an allegation of willful
12 blindness here. But I'd like to concentrate --
13 maybe I'm wrong about that, but that's what I --

14 MR. WAXMAN: I think you are.

15 JUSTICE SOTOMAYOR: All right. At any
16 rate, if I'm wrong about that, that's fine, but
17 not wrong about that you knew that ISIS was
18 using your platform.

19 But, on substantiality, there is a
20 focus on how much your platform helped ISIS and
21 less on how much you actually helped them. And
22 that -- there is a difference between the two
23 things, and I think that that's the difference
24 that you're trying to point to, which is, in a
25 neutral business setting, using something that

1 is otherwise not criminal, a platform, to
2 communicate with people and you're doing it not
3 by, as in the bank situation or in the
4 pharmaceutical situation, to help this
5 particular person commit a crime, but in a
6 general business situation, that others are
7 coming to you and you can't find them ahead of
8 time, that that doesn't constitute substantial
9 aid.

10 MR. WAXMAN: That's correct, it
11 doesn't -- it doesn't -- the -- the -- you know,
12 the case law and the Restatements, you know,
13 make -- and -- and Halberstam itself makes clear
14 that the culpable -- the culpable conduct has to
15 be, to quote Halberstam, "knowing action,"
16 knowing action that substantially aids tortious
17 conduct or, as the Restatement (Third) says,
18 active participation doesn't constitute --
19 active participation is what substantial
20 assistance means in the absence of an external,
21 legal, or fiduciary duty to act, which is not
22 alleged here. And we know it's -- it's a
23 fundamental principle of --

24 JUSTICE SOTOMAYOR: So how do you
25 answer Justice Alito's question? How do we

1 decide that as a matter of law on this
2 complaint? Write it for me --

3 MR. WAXMAN: As a --

4 JUSTICE SOTOMAYOR: -- if you were
5 going to write it, that this is not substantial
6 assistance because?

7 MR. WAXMAN: Where the culpable --
8 where the alleged culpable conduct is the
9 failure to do more to prevent misuse of widely
10 available services offered to the world at arm's
11 length subject to enforced policies against
12 terrorist content, it is not as a matter of law
13 the knowing provision of substantial assistance
14 to an act of international terrorism, absent
15 specific knowledge of particular accounts or
16 posts that were used to plan, commit, or
17 proximately support the act of international
18 terrorism that injured the plaintiff.

19 JUSTICE SOTOMAYOR: This is -- this is
20 a one-case disposition?

21 MR. WAXMAN: I -- I -- I don't think
22 so. The -- the rule that the Ninth Circuit has
23 posited and that the plaintiffs embrace, which
24 is essentially derived from the substitution of
25 ISIS as an entity, ISIS as some criminal

1 enterprise for the statutory trigger, which is
2 an act of international terrorism, means that as
3 a matter of course, every time somebody is
4 injured by an act of international terrorism
5 committed, planned, or supported by a foreign
6 terrorist organization, each one of these
7 platforms will be liable in treble damages and
8 so will the telephone companies that provided
9 telephone service, the bus company or the taxi
10 company that allowed the terrorists to move
11 about freely.

12 That is -- if Congress had wanted to
13 -- again, it's hard to imagine in the context of
14 a remedy to an injured person, but if Congress
15 had wanted to make actionable the provision of
16 substantial assistance to ISIS or a foreign
17 terrorist organization, it just had to change a
18 few words in 2339.

19 And even if you say, well, ISIS is a
20 whole terrorist enterprise and engages in lots
21 of terrorist activities, if they wanted to say
22 if you aid and abet by provide -- knowingly
23 providing substantial assistance to terrorist
24 activities, that's a defined term in 2333(1).
25 They could easily have said that.

1 Because this is a remedial statute
2 that requires treble damage liability against an
3 entity that actively, culpably is helping a --
4 the commission of a crime -- I mean, the -- the
5 word -- the definition of the word "abet" in
6 both the civil and criminal context is to "help
7 or encourage someone to do" --

8 JUSTICE SOTOMAYOR: I -- I think
9 you're going far beyond my question.

10 MR. WAXMAN: I'm sorry.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. Waxman, suppose
14 this set of facts: That many terrorist
15 organizations use the social media services
16 provided by your client, that they do so to
17 recruit other members for -- you know, for --
18 for purposes of enhancing their terrorist
19 activities, that your client knows this because
20 government officials, journalists, other people
21 have pointed it out.

22 Now I'm going to change one fact. I
23 think so far we're actually pretty much in the
24 real world.

25 MR. WAXMAN: Right.

1 JUSTICE KAGAN: I'm going to change
2 one fact, which is that instead of having a -- a
3 policy against this and trying to remove this --
4 this -- this various terrorist content, that
5 Twitter had just said let a thousand flowers
6 bloom, we're not going to touch a thing.

7 But, you know, it knows that all of
8 this is happening, but it just -- it -- it -- it
9 does not have a policy of trying to remove.
10 Then do you fall within the language of the
11 statute?

12 MR. WAXMAN: I don't think so. I
13 don't think -- I mean, that -- that's very far
14 from what the facts of the case are even as pled
15 and as the Ninth Circuit found, but.

16 JUSTICE KAGAN: Right, right, right,
17 blah, blah, blah.

18 MR. WAXMAN: -- I don't think so.

19 If they said, look, we don't want our
20 platforms to be used to support terrorist groups
21 or to support terrorist acts, but they don't do
22 anything to enforce it, I think it falls within
23 the hornbook aiding-and-abetting rule that was
24 established in the -- the cases that Halberstam
25 relied on to define the rule.

1 I mean, in -- in Woodward, the Fifth
2 Circuit's decision, which is -- is really the --
3 sort of the case that the -- that Judge Wald's
4 opinion most relies on, it says, when it is
5 impossible to find any duty of disclosure, an
6 alleged aider and abettor should be found liable
7 only if scienter of the high conscious intent
8 can be proved.

9 And in a case combining silence or
10 inaction with affirmative assistance, the degree
11 of knowledge --

12 JUSTICE KAGAN: I mean, I -- I -- I
13 guess it -- it just strikes me as quite -- your
14 answer strikes me as quite something actually.
15 It's like, what part of Halberstam or of the
16 statute do you think at that point that there's
17 not at least a jury question on?

18 You know, Twitter, in my hypothetical,
19 is basically saying, you know, we know that
20 there's a ton of terrorist use of our platform
21 that's going directly to enhance terrorist
22 activity worldwide, and we're not going to do a
23 thing about it.

24 So not like did you do too much, did
25 you do -- you know, could you have done a little

1 bit more, but we wipe our hands of it, such that
2 you know -- I mean, just -- I mean, you know
3 that that's going -- your platform is providing
4 substantial assistance to terrorist activity.
5 How can it be otherwise?

6 MR. WAXMAN: Again, you know, the --
7 the -- the outcome in this case doesn't turn on
8 it, but I think, as a matter of principle, the
9 -- the hornbook principle is that you are not
10 "helping or encouraging" someone to do something
11 wrong or illegal --

12 JUSTICE KAGAN: You're helping by --

13 MR. WAXMAN: -- by failing --

14 JUSTICE KAGAN: -- you're helping by
15 providing your service to those people --

16 MR. WAXMAN: And, again, I -- I would
17 just --

18 JUSTICE KAGAN: -- with the explicit
19 knowledge that those people are using it to
20 advance terrorism.

21 MR. WAXMAN: Justice -- ISIS is an
22 abhorrent institution, and it does sponsor acts
23 of international terrorism, but not everything
24 that ISIS does is terrorist activity within the
25 defined meaning of that term, which is crime --

1 JUSTICE KAGAN: Well, I take that
2 point, and I think that that is the difference
3 between the material support statute and this
4 statute, that the material support statute is,
5 if I help Hamas build hospitals, I'm still
6 liable under the material support statute --

7 MR. WAXMAN: Correct.

8 JUSTICE KAGAN: -- and I'm not liable
9 under this. But I don't see how it is, given
10 the set of facts that, you know, with the
11 exception of one, are the facts of this case,
12 which is a set of facts that's saying ISIS is
13 using these for terrorist activities, to advance
14 terrorist goals, and -- and if Twitter knew all
15 of that and did nothing to it, how could Twitter
16 be said not to have been knowingly providing
17 substantial assistance?

18 MR. WAXMAN: Knowing -- knowingly
19 providing substantial assistance to the act of
20 international terrorism that injured the
21 plaintiff. And I -- I think the proposition is
22 --

23 JUSTICE KAGAN: Well, now you're going
24 back to what I thought you dropped at the very
25 beginning of this -- of this argument, which is

1 they don't have to know --

2 MR. WAXMAN: No, but --

3 JUSTICE KAGAN: -- that it's the Reina
4 nightclub act.

5 MR. WAXMAN: But you have -- the
6 plaintiff has to demonstrate that they provided
7 substantial assistance in some proximate way
8 that their provision of a general service, open
9 to everybody, consistent with a policy which
10 maybe they don't enforce at all, at arm's length
11 to everybody in the world, does not amount to
12 the knowing provision of -- it doesn't amount --
13 you had -- you -- if the plaintiff could say
14 there were, in fact, posts and accounts that
15 were used to plan this attack or proximately
16 support this attack, that would be something.

17 It wouldn't be enough unless we knew
18 about it because, as the cases all establish,
19 there has to be "an affirmative help with the
20 commission of the tort that forms the basis for
21 the cause of action."

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: Mr. Waxman, I -- I

1 can't help but wonder whether some of the
2 struggle you've had this morning with my
3 colleagues about the scope of the
4 aiding-and-abetting statute comes from your
5 reading of the text.

6 And -- and turning to 2333(d)(2), as I
7 understand it, you read the aiding-and-abetting
8 clause as taking as its object the act of
9 international terrorism rather than the person
10 who committed the act. And that -- that seems a
11 pretty abstract way to read the statute. Aiding
12 an action or an explosion or -- or some --
13 something like that in the world, it's very
14 different than how we normally read
15 aiding-and-abetting statutes, sort of the common
16 -- understanding of the common law, where you
17 have to aid and abet a person. And you read the
18 conspiracy clause to take as its object a
19 person, the -- the person.

20 And I just wonder whether the better
21 reading of the statute is that both of those
22 "who" clauses, both -- both the aiding and
23 abetting and the conspiracy clause, take as
24 their object the person who committed the act of
25 international terrorism.

1 And I wonder why you haven't pressed
2 that argument a little bit further, because it
3 seems to me it helps you. The -- the plaintiff
4 would have to plead and prove that the defendant
5 helped, aided and abetted or conspired with, a
6 person who committed an act of international
7 terrorism. And the Dictionary Act defines
8 "persons" as real persons and juridical
9 entities, not an explosion or some other action
10 in the world.

11 And, here, the complaint alleges three
12 people involved in the attack and doesn't link
13 up your conduct, your client's conduct,
14 necessarily in any very clear way to those three
15 persons. What am I missing?

16 MR. WAXMAN: I don't -- I don't think
17 you're missing anything with -- with respect,
18 but let me make clear what our position is with
19 respect to the object of the couplet "aids and
20 abets." Our brief doesn't --

21 JUSTICE GORSUCH: Are you sure you
22 want to do that?

23 (Laughter.)

24 MR. WAXMAN: I want to be -- I -- I
25 want my position to be as pellucid as it -- as I

1 can make it to the Court for the Court's
2 consideration.

3 We think that the better reading of
4 the object of "abets" is -- as the government
5 and the Respondents supporting the Petitioner
6 argue at length, is, in fact, the act of
7 international terrorism. It is not --

8 JUSTICE GORSUCH: Oh, I -- I didn't --
9 I -- I -- I was fearful. Maybe we ought to just
10 stop, Mr. Waxman, and maybe -- maybe I ought to
11 let my colleagues proceed.

12 MR. WAXMAN: Okay, I -- did I answer
13 your question?

14 JUSTICE GORSUCH: Yeah. I -- I -- I
15 -- I -- I don't know why you're resisting,
16 however --

17 MR. WAXMAN: I --

18 JUSTICE GORSUCH: -- that both of
19 those clauses take as their object the person.

20 MR. WAXMAN: I -- I am not. I think
21 it is perfectly fine to read the object as the
22 person who committed the act of international
23 terrorism, but it is in the nature of abetting
24 criminal activity that it is assisting and
25 aiding and abetting the person in the commission

1 of the act of international terrorism.

2 It is not coherent. It is not --

3 JUSTICE GORSUCH: How about -- how
4 about this? How about reading the statute for
5 just what exactly it says, a person who aids and
6 abets, dot, dot, dot, the person who committed
7 such an act of international terrorism? Would
8 you support reading the statute for what it
9 says?

10 MR. WAXMAN: I think the -- I support
11 reading the statute for what it says. The
12 statute says abetting, and --

13 JUSTICE GORSUCH: No, it says who aid
14 -- who aids and abets -- and then I'm going to
15 put in some ellipses because it then goes on to
16 conspiracy -- the person who committed such act
17 of international terrorism.

18 Any objection to that?

19 MR. WAXMAN: No, with the
20 understanding that the use of the verb "abets"
21 means assisting the person in committing the
22 act. And as the -- as -- as the Facebook and
23 Google brief points out, every time a statute
24 uses "person" as the object of aiding and
25 abetting, it goes on to make that clear.

1 JUSTICE GORSUCH: Of course. I take
2 that as given.

3 MR. WAXMAN: Okay.

4 JUSTICE GORSUCH: Thank you.

5 MR. WAXMAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: Just want to make
9 sure I understand your position.

10 So I think you're trying to translate
11 the elusive words of the statute into some kind
12 of general rule, and I just want to make sure I
13 have the general rule or general principle that
14 you're trying to articulate down, which I think
15 is that a -- when there's a legitimate business
16 that provides services on a widely available
17 basis in an arm's length manner, it's not going
18 to be liable under this statute even if it knows
19 bad people use its services for bad things.

20 MR. WAXMAN: Correct, unless it knows
21 of specific, in this case, it would be accounts
22 or posts, that are, in fact, being used to plan
23 or commit a terrorist act, including an -- an
24 attack like the one that injured the plaintiff.
25 That is, there has to be particular knowledge in

1 that context.

2 JUSTICE KAVANAUGH: Mm-hmm.

3 MR. WAXMAN: That's our rule.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Okay. So I'm having
8 a little bit of difficulty isolating exactly
9 your argument, so let me -- let me put it to you
10 this way.

11 So it seems to me that the flaws in
12 the Ninth Circuit opinion that you see are one,
13 in the unit of analysis --

14 MR. WAXMAN: Correct.

15 JUSTICE BARRETT: -- because they're
16 focusing on the enterprise rather than the act
17 or -- or, as Justice Gorsuch said, the person
18 who committed an act, but, in any event, you're
19 saying that we need to specifically focus on the
20 act here, the Reina bombing, didn't have to know
21 it was going to be there, okay.

22 Second is the substantial assistance,
23 and third is the knowledge requirement.

24 So I just want to make sure I
25 understand the difference between aiding the

1 enterprise writ large and aiding in an act,
2 because you've said in response to a few of my
3 colleagues, including just now Justice
4 Kavanaugh, that if you know bad people are using
5 the platform and you don't do anything about it
6 -- and I -- I'm pressing you now on what you
7 said about specific knowledge of the --

8 MR. WAXMAN: Mm-hmm.

9 JUSTICE BARRETT: -- specific
10 accounts, I guess, why -- if you know ISIS is
11 using it, you know ISIS is going to be doing bad
12 things. You know ISIS is going to be committing
13 acts of terrorism.

14 So what work does -- training your
15 focus on the specific act do in that case?
16 Because aiding ISIS is aiding the commission of
17 particular acts in the future. How specific
18 must the knowledge be?

19 There must be a range between aiding
20 the enterprise and knowing the time, date, and
21 location of the particular act, right?

22 MR. WAXMAN: So I -- I am -- I'm not
23 resisting as a categorical matter the use of the
24 word and Halberstam's use of the word
25 "enterprise."

1 My position is that where the court
2 below erred was in substituting as the object of
3 -- of -- whereas the statute clearly said the
4 object is either the act of international
5 terrorism that you're abetting or the person who
6 committed that act and commit -- you abetted
7 that person in committing the act, Halberstam
8 points out that, look, if you have a situation
9 in which, you know, you -- you have a partner,
10 you have a symbiotic relationship with a partner
11 in which every week there's a property crime and
12 he brings home the jewels and you smelt it down
13 and -- you know, and sell it, that you can be
14 deemed to have knowingly provided substantial
15 assistance to the act where, ultimately, he gets
16 caught, the Halberstam burglary. The fact that
17 you were part of this series of discrete acts
18 establishes Step 3 of Halberstam.

19 That's very different from basically
20 saying that all you have to do is aid and abet
21 ISIS generally. And the clarity with which the
22 Ninth Circuit made that error is -- is actually
23 revealed. I -- I don't have the page number,
24 but it's in the -- the discussion of the facts
25 of -- of Gonzalez before it gets to Taamneh.

1 The -- the Ninth -- the -- the Ninth
2 Circuit says, "The parties dispute whether the
3 relevant," quote, "principal violation is ISIS's
4 broader campaign of terrorism or the Paris
5 attacks." It chooses the former and therefore
6 says anything that ISIS does -- that you assist
7 anything that ISIS does is assisting an act of
8 international terrorism.

9 JUSTICE BARRETT: Okay.

10 MR. WAXMAN: Now --

11 JUSTICE BARRETT: So it's a level of
12 generality. I -- I -- I -- you were kind of
13 going back and forth with Justice Kagan about
14 this same issue. It's a level of generality.

15 You might know -- I -- I guess I'm
16 trying to figure out if the Ninth Circuit's
17 error matters because you might know that you're
18 aiding ISIS and, as I said, aiding ISIS is going
19 to result in aiding some terrorist attacks.

20 But you're saying that the plaintiff
21 would have to allege facts sufficient to show
22 that Twitter was being used to plan this attack,
23 put --

24 MR. WAXMAN: And that --

25 JUSTICE BARRETT: -- putting aside

1 right now the knowledge and substantial
2 assistance part, but that's the level of
3 inquiry?

4 MR. WAXMAN: -- you have to be -- the
5 plaintiff has to plausibly allege that
6 substantial assistance was provided to the act
7 of international terrorism that injured the
8 plaintiff in the case.

9 JUSTICE BARRETT: So that these
10 particular terrorists were communicating via
11 Twitter for the Reina attack, putting aside what
12 Twitter knew about it, would need to be looking
13 at tweets or accounts going back and forth to
14 share the details or recruit people to help
15 participate in this bombing?

16 MR. WAXMAN: No. I -- I mean, the --
17 Twitter would have to know there are accounts.
18 We know of these --

19 JUSTICE BARRETT: I'm not talking
20 about Twitter's knowledge.

21 MR. WAXMAN: Okay.

22 JUSTICE BARRETT: I'm just talking
23 about the unit of analysis.

24 MR. WAXMAN: Okay. The unit of
25 analysis is that there is a -- there is a --

1 there is a -- there are allegations in a
2 complaint that there were Twitter accounts or
3 Twitter posts that Twitter -- that -- that, in
4 fact, substantially assisted this terrorist
5 attack.

6 JUSTICE BARRETT: Bombing. So not the
7 general recruiting.

8 MR. WAXMAN: Not general recruiting.

9 JUSTICE BARRETT: Okay. All right.
10 I -- I think I understand you.

11 On -- on substantial assistance, you
12 kind of conceded to Justice Kagan in her
13 hypothetical that it would be substantial
14 assistance if Twitter knew that these accounts
15 were being used and didn't do anything to take
16 them down.

17 MR. WAXMAN: The -- yes, the
18 particular accounts.

19 JUSTICE BARRETT: So that's -- that
20 would be -- because I'm just wondering what the
21 test for substantial assistance is, right? I
22 mean, there's a -- there's a lot that goes into,
23 presumably, pulling off a terrorist attack. So
24 is providing the means of communication -- you
25 concede that would be substantial assistance?

1 MR. WAXMAN: I mean, it -- again, it
2 would depend on what was going -- what it turned
3 out was going on in those accounts that Twitter
4 actually knew about.

5 And if Twitter knows about -- and this
6 goes to -- to -- to Justice Sotomayor's question
7 about willful blindness, willful -- if -- if --
8 if in my hypothetical the Turkish police, the
9 Istanbul police come and say there are 10
10 accounts, 10 Twitter accounts that appear to be
11 involved in planning some sort of terrorist
12 attack here, and Twitter basically says, not our
13 problem, that is the level of knowledge.

14 And -- and, if, in fact --

15 JUSTICE BARRETT: But that's
16 knowledge. I was asking you about substantial
17 assistance.

18 MR. WAXMAN: I see. If the -- if what
19 was in those posts, in fact, were the planning
20 and preparation and commission of the attack
21 that happened to occur at the Reina nightclub,
22 that would be substantial assistance.

23 JUSTICE BARRETT: Okay. So, to
24 clarify, you're not saying that merely using the
25 platform is enough, but it would depend on how

1 significant the communications on the platform
2 were to the attack?

3 MR. WAXMAN: Correct.

4 JUSTICE BARRETT: Okay. And last
5 question. What daylight, if any, do you see
6 between your position and the government's
7 position?

8 MR. WAXMAN: Very little. I think
9 what the government says -- I mean, with respect
10 to the relevant object, we agree. It's the act
11 of international terrorism, not ISIS generally.

12 With respect to knowledge, I think
13 they also agree, the particularity in a context
14 in which there's this remote general arm's
15 length provision of services.

16 If we disagree, it's on the -- how one
17 calculates, I guess, or characterizes
18 substantiality. The government says that there
19 has to be a substantial causal link between the
20 assistance provided and the act that occurred.
21 And we -- I -- I don't -- in principle, I don't
22 disagree with that.

23 JUSTICE BARRETT: So no daylight
24 really?

25 MR. WAXMAN: I -- I -- can I --

1 JUSTICE BARRETT: Okay.

2 MR. WAXMAN: -- can I reserve judgment
3 until I hear Mr. Kneedler's answer?

4 JUSTICE BARRETT: Okay. You started
5 out saying very little and then you said in
6 principle.

7 MR. WAXMAN: I --

8 JUSTICE BARRETT: But that's -- that's
9 okay, I'll let Justice Jackson have a shot.

10 MR. WAXMAN: It -- it's -- I -- I --

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 MR. WAXMAN: -- I'm not sure.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: Yes, good morning,
17 Mr. Waxman.

18 MR. WAXMAN: Good morning.

19 JUSTICE JACKSON: I -- I had thought
20 that knowledge and substantial assistance were
21 two different elements or two different
22 criteria. Am I right that that's the case or
23 no?

24 MR. WAXMAN: I think you are --

25 JUSTICE JACKSON: You're looking --

1 MR. WAXMAN: -- you -- you --

2 JUSTICE JACKSON: Go ahead.

3 MR. WAXMAN: Yes, you are right. What
4 the -- the operative text says that aiding and
5 abetting by knowingly providing substantial
6 assistance.

7 JUSTICE JACKSON: All right. So we
8 have two different things.

9 MR. WAXMAN: So there are two
10 elements.

11 JUSTICE JACKSON: They are two
12 elements. But then the -- the -- your statement
13 of the rule that you explored with Justice
14 Kavanaugh seemed to have them both working in a
15 way that I was confused about, so --

16 MR. WAXMAN: Then let me -- yeah. I
17 can see --

18 JUSTICE JACKSON: Yeah. So -- so --

19 MR. WAXMAN: -- I can see how it's --
20 it's confusing. So you have -- your -- what's
21 alleged to be -- your culpable conduct has to
22 have, in fact, substantially assisted the act of
23 international terrorism that injured the
24 plaintiffs.

25 JUSTICE JACKSON: Independent of your

1 knowledge, it has to have --

2 MR. WAXMAN: It has to have done --

3 JUSTICE JACKSON: -- factually
4 substantially --

5 MR. WAXMAN: -- it has to have done
6 that.

7 JUSTICE JACKSON: Okay.

8 MR. WAXMAN: But the statute goes
9 further and says that you have to knowingly
10 provide that assistance, which we think must
11 mean that you must know, A, that you're
12 providing assistance and know that the
13 assistance you're providing is substantial.
14 That's --

15 JUSTICE JACKSON: But let me ask you,
16 does it have to run to the particular act?
17 Because, at the very beginning, in your
18 conversations with, I think, Justice Sotomayor,
19 we were trying to get to this point of
20 understanding your view that the particular
21 tortious act is what we're focusing on, not just
22 general assistance to the -- the terrorist
23 organization. I get that.

24 But, if we're looking at the
25 particular act, then you said at one point that

1 you can have general awareness that you're
2 assisting the particular act. And I don't
3 really understand what that means.

4 MR. WAXMAN: I misspoke if I said
5 that.

6 JUSTICE JACKSON: Okay.

7 MR. WAXMAN: So I -- I think I was
8 trying to explain that under Step 2 of the
9 Halberstam framework, you have to "be generally
10 aware of your role as part of the overall
11 illegal tortious activity at the time you
12 provide the assistance." But this --

13 JUSTICE JACKSON: And you conceded
14 that in this case?

15 MR. WAXMAN: I conceded --

16 JUSTICE JACKSON: Okay.

17 MR. WAXMAN: -- for purposes of this
18 case --

19 JUSTICE JACKSON: Okay.

20 MR. WAXMAN: -- that that's establish
21 -- that's fairly pled in the complaint.

22 JUSTICE JACKSON: So then what's the
23 knowledge that's working at Step 3?

24 MR. WAXMAN: Right. You have to know
25 that you are providing substantial assistance to

1 an act of international terrorism and the -- and
2 an act of international terrorism that happened
3 to be a terrorist attack that injured the
4 plaintiff.

5 JUSTICE JACKSON: But it doesn't have
6 to be the Reina attack; you just have to know
7 that you're assisting ISIS, that ISIS
8 participates in --

9 MR. WAXMAN: It's not just the --
10 there's a -- a wide gulf between knowing that
11 the -- that the location of the attack will be
12 the Reina nightclub and knowing that you're
13 somehow generally assisting ISIS in some way.

14 JUSTICE JACKSON: Yes, and it's the
15 gulf I'm trying to explore, so what --

16 MR. WAXMAN: Right.

17 JUSTICE JACKSON: I -- I want to chart
18 it. What do you have to know in 3 that is
19 sufficient under your view?

20 MR. WAXMAN: Yes. You have to know
21 that you, in fact -- well, I'm sorry, was it
22 what did you have to know?

23 JUSTICE JACKSON: In 3, in Step 3,
24 when you say -- we -- we've -- we've --

25 MR. WAXMAN: The -- the knowledge --

1 JUSTICE JACKSON: -- we've disposed of
2 2, which is the general knowledge of your role.
3 You know you have a platform and people are
4 using it and some of those people are bad
5 people.

6 MR. WAXMAN: Got it.

7 JUSTICE JACKSON: Three, you say home
8 in on the act, it has to be act of -- of
9 terrorism. And I guess I'm just trying -- that
10 -- that you substantially assist in that.

11 MR. WAXMAN: Correct, right.

12 JUSTICE JACKSON: But then what's
13 "knowing" doing there?

14 MR. WAXMAN: You have to know that
15 your action would substantially assist an act of
16 international terrorism. That's the independent
17 work that "knowing" -- that the know -- that you
18 knowingly provide substantial assistance does.

19 JUSTICE JACKSON: So they don't have
20 to allege or they do have to allege that you
21 knew something about the fact that this group
22 was going to do an act of international
23 terrorism that turned into the Reina attack?

24 MR. WAXMAN: You have -- that is
25 exactly what you have -- you have to -- they

1 have to plausibly allege and ultimately prove
2 not only that our actions substantially assisted
3 the Reina attack but that we knew that we were
4 providing substantial assistance to some act of
5 international terrorism, period.

6 JUSTICE JACKSON: But not enough to
7 know that -- that you're providing substantial
8 assistance to a group that does this kind of
9 thing?

10 MR. WAXMAN: Of course not.

11 JUSTICE JACKSON: I -- I don't know
12 that I see that clearly, the distinction, but
13 let me ask you just a quick question about
14 Halberstam.

15 So I guess I'm a little concerned
16 about framing this as the defendant is offering
17 generally available services. What if in
18 Halberstam itself, instead of Linda Hamilton
19 providing bookkeeping services, we had an
20 accounting firm, and their usual course of
21 business was to provide the bookkeeping
22 services, they did exactly what she did with
23 exactly the same level of -- of knowledge in the
24 sense that they knew that these were pretty --
25 you know, the -- the -- they knew this guy

1 didn't have a job and suddenly he was showing up
2 with, you know --

3 MR. WAXMAN: Jewels, right.

4 JUSTICE JACKSON: -- thousands of
5 dollars in jewels and whatnot and asking them
6 for bookkeeping services. Are they -- are they
7 on the hook or not?

8 MR. WAXMAN: I think they probably
9 would be on the hook. I mean, it's different
10 than Hamilton, where she had no other job. She
11 didn't do anything other than have this
12 symbiotic criminal relationship.

13 But, if you had an accounting firm
14 that somebody comes and basically says, you
15 know, I'd like you to help me with the
16 following, I'd like you to help me, you know,
17 smelt down jewelry and then sell it --

18 JUSTICE JACKSON: No, no, they're
19 doing their -- their usual bookkeeping services.
20 They have a lot of clients. They have very, you
21 know, well-to-do regular clients who do have
22 jobs and are bringing them money, and then they
23 have this guy who starts coming and saying,
24 please, I'd like to do bookkeeping, and they're
25 a little suspicious, but they don't do anything

1 other than the regular bookkeeping services that
2 they ordinarily would provide to their other
3 clients.

4 MR. WAXMAN: I mean, if the
5 circumstances of the services that's being
6 requested and that they provided would not
7 permit a fair inference that they were
8 "generally aware" of the role they were playing
9 as part of overall illegal or tortious activity,
10 they wouldn't be libel for aiding and abetting.

11 I -- I do want to just --

12 CHIEF JUSTICE ROBERTS: Thank you.
13 You can finish your sentence.

14 (Laughter.)

15 MR. WAXMAN: Sadly, I'm afraid I did
16 finish my sentence.

17 (Laughter.)

18 JUSTICE JACKSON: Thank you.

19 MR. WAXMAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

21 ORAL ARGUMENT OF EDWIN S. KNEEDLER
22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING REVERSAL

24 MR. KNEEDLER: Mr. Chief -- excuse me.
25 Mr. Chief Justice, and may it please the Court:

1 The United States condemns in the
2 strongest terms the terrorist act that caused
3 Mr. Alassaf's death and sympathizes with the
4 profound loss that the plaintiffs in this case
5 have experienced.

6 We submit, however, that the
7 allegations in this complaint do not state a
8 claim that the defendants aided and abetted,
9 that is, that they assumed a culpable role in
10 the commission of that murder.

11 JASTA requires more than allegations
12 that a terrorist organization availed itself of
13 interactive computer services that -- that were
14 remote from the act of terrorism, were widely
15 and routinely available to hundreds of millions,
16 if not billions, of persons through the
17 automatic features of those services, and did
18 not single out ISIS for favorable treatment.

19 JASTA permits recovery against persons
20 who become complicit by rendering substantial
21 assistance that encourages the commission of
22 terrorist acts, but by JASTA's express terms and
23 its incorporation of Halberstam's common law
24 standards, Congress ensured that JASTA does not
25 reach so broadly as to inhibit legitimate and

1 important activities by businesses, charities,
2 and others, both in the United States and in
3 other parts of the world that may be unstable or
4 underdeveloped.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Kneedler, I -- I
7 think I'd just like to get a finer point on your
8 position. When we talk about Twitter or YouTube
9 or Facebook, it's because of the algorithms and
10 how broadly these -- these businesses are. It's
11 complicated.

12 But I'd like to simplify it just a bit
13 and see where you come out. You recall PageNet,
14 don't you, when pagers were ubiquitous?

15 MR. KNEEDLER: Yes.

16 JUSTICE THOMAS: And --

17 MR. KNEEDLER: I don't recall PageNet,
18 but --

19 JUSTICE THOMAS: Okay. Well, let's
20 just --

21 MR. KNEEDLER: -- I -- I'm not an
22 expert in --

23 JUSTICE THOMAS: Well, yeah. Well,
24 just pagers were ubiquitous at one point, right?

25 MR. KNEEDLER: Right.

1 JUSTICE THOMAS: And we ought -- let's
2 assume that, as with certain criminal elements
3 who used pagers back then, you had terrorists
4 who had an affinity for these and that the --
5 the PageNet -- let's assume there was a company,
6 PageNet -- understood that they used their
7 services, as did doctors, as did other people,
8 businesspeople.

9 Would that constitute aiding and
10 abetting if they did nothing and permitted them
11 to use it and engage in terrorist activity?

12 MR. KNEEDLER: By application of the
13 Halberstam standards --

14 JUSTICE THOMAS: Yes, yes.

15 MR. KNEEDLER: -- that may be -- that
16 may be unclear, but I think it would probably
17 not be substantial assistance or knowing
18 substantial assistance.

19 JUSTICE THOMAS: Okay. So if you
20 would just parse that for me.

21 MR. KNEEDLER: Right.

22 JUSTICE THOMAS: You know -- you know
23 they're using it, and you know it's probably
24 central to what they're doing. So what's --
25 where does it fail the Halberstam test?

1 MR. KNEEDLER: I -- I think there's
2 one distinction between this and -- between your
3 hypo and this case, which is the distance
4 between the aid and -- and the -- and the
5 commission of the act. In your example, it's
6 much more proximate, I think, if I understand
7 the hypothetical.

8 The -- the -- using the pager will be
9 alerting somebody to the immediate commission of
10 the crime. That's not what we have here. Here,
11 we have something that's much more remote, the
12 use of an automatic service that the claim is
13 that that enhances ISIS, which, in turn, maybe
14 in combination with a -- a number of other
15 factors, might ultimately --

16 JUSTICE THOMAS: Well, that's why I
17 went to pagers, because I wanted it to be
18 closer.

19 MR. KNEEDLER: Right.

20 JUSTICE THOMAS: And I wanted to put a
21 finer point on it, because, you know, of course,
22 a billion people or hundreds of millions of
23 people are using these services and so you get
24 lost in that. I understand you say that's
25 too -- too amorphous or it's too attenuated.

1 But, if you tighten it somewhat and
2 use pagers, it would seem that you would be able
3 to answer that with, you know, more clarity.

4 MR. KNEEDLER: Yes, but I -- I think,
5 frankly, it's somewhat in between. And -- and
6 the -- the hypothetical that you're describing,
7 I think, if you -- if you look at the Halberstam
8 factors --

9 JUSTICE THOMAS: Mm-hmm.

10 MR. KNEEDLER: -- which is an
11 important part of the Halberstam test in
12 deciding what's substantial assistance -- and,
13 by the way, that's not just a factual question.

14 In Halberstam itself, the Court first
15 affirmed the district court's factual findings
16 and then applied its legal test, and by
17 application of the legal test, which was those
18 six factors, the Court was able to find
19 liability.

20 In a number of the other cases,
21 they've been dismissed because the allegations
22 don't make out a legal standard. It's not so
23 much a question of fact. But, in your -- in
24 your hypothetical, the three most important
25 factors we think in this case, I think, bear on

1 your -- on your question.

2 And -- and one of those is, Halberstam
3 puts it in terms of, was the person present at
4 the commission of the offense? I think that's
5 maybe a proxy or -- or a window into the
6 question of how proximate was the -- was the
7 person, the -- the defendant's action to the
8 ultimate act. And, in Halberstam, obviously,
9 the Court said she was integrally related.

10 Here, we think it's not proximate
11 either in the legal proximate cause sense or in
12 the factual, the way the Internet works sense.
13 In your example, it's more proximate both, I
14 think, in a factual and maybe in a legal sense,
15 that -- that the use of the -- of the pager
16 would have, depending on -- you know, there may
17 be other facts, and -- and the level of
18 knowledge would be -- would be an important
19 element of that.

20 And another very important factor, I
21 think, in Halberstam that would be relevant in
22 the -- in the case that you're describing but I
23 think is very relevant here is what is the state
24 of mind of the person -- of the defendant in the
25 case. And, here, the -- the court of appeals

1 said it's undisputed that Twitter and the other
2 defendants here did not have an intent to
3 further ISIS activities or the particular
4 terrorist act here.

5 JUSTICE KAGAN: So can I --

6 CHIEF JUSTICE ROBERTS: How --

7 JUSTICE KAGAN: I'm sorry.

8 CHIEF JUSTICE ROBERTS: I was just
9 going to say, Mr. Kneeder, I think the
10 discussion this morning has really taken on a
11 very academic tone. You -- you say both of the
12 tests, the plaintiff's and Twitter's, they're --
13 they're wrong, and you come up with your own
14 test on page 34 of your 34-page brief -- the
15 suspense was killing me -- and this is what you
16 say.

17 (Laughter.)

18 CHIEF JUSTICE ROBERTS: You say, "In
19 some circumstances -- such as the direct
20 channeling of substantial funds or other
21 fungible resources to a foreign terrorist
22 organization or its close affiliates with
23 knowing acquiescence in their potential use -- a
24 secondary defendant's contributions may have a
25 sufficient nexus to a terrorist act, even if the

1 defendant has no advance knowledge of, or does
2 not provide support specifically directed to,
3 the particular act."

4 And I counted six different factors in
5 there, and that's added on top of the six-factor
6 Halberstam test. I guess that's six squared.
7 And it -- it seems to me that I don't know how
8 helpful it is to parse each of those different
9 requirements or try to decide if there should be
10 five or six into -- in trying to draw a line
11 between, you know, assistance with respect to a
12 particular terrorist act and assistance to a
13 terrorist organization.

14 You know, each one of these situations
15 that will come along will have different of
16 these facts prominent and different ones not
17 there, and, I mean, is there any way to
18 articulate how to approach these cases without
19 having a 6- or 12-, I guess, or maybe 36-factor
20 test?

21 MR. KNEEDLER: Well, several things.

22 First of all, what -- what you quoted
23 from page 36 was not intended --

24 CHIEF JUSTICE ROBERTS: Thirty-four.

25 MR. KNEEDLER: Thirty-four, sorry, was

1 not intended to be a legal test. It was an
2 example of what might make out a case of knowing
3 substantial assistance under the Halberstam
4 test.

5 But I think, because of the
6 incorporation, express incorporation of
7 Halberstam into the act, it is necessary to look
8 to Halberstam. And Halberstam did not come out
9 of nowhere. It was based on the Restatement of
10 -- of Torts.

11 And what -- what -- in other
12 circumstances, this Court has held that Congress
13 should not be understood to displace the common
14 law. Here, it incorporated the common law, as
15 set forth in the Restatement of Torts, which
16 Halberstam relied upon, and then this -- and
17 then Congress incorporated it.

18 And the six factors are really guides
19 or guideposts to getting at whether what the
20 defendant's conduct was, is it culpable enough?
21 And -- and you can't come up with a -- with a
22 test that will answer every case, and that's why
23 Halberstam looked to factors, but that's not --

24 CHIEF JUSTICE ROBERTS: Well, but each
25 factor, I mean, one, substantial assistance,

1 okay. Well, that -- I mean, if you only give a
2 hundred bucks to assist the terrorist act that's
3 going to result in the murder of different
4 people, you say, well, that's not real
5 substantial --

6 MR. KNEEDLER: Well --

7 CHIEF JUSTICE ROBERTS: -- but, if you
8 give 10,000, it is? That seems like a very odd
9 factor.

10 MR. KNEEDLER: Well, I -- I think it's
11 not so odd if you think about the different ways
12 in which it might arise. If somebody is about
13 to commit a terrorist act and -- and you know
14 it, and -- and -- and the -- the terrorist said,
15 you know, could you give me \$10 to buy a knife,
16 and you give him the \$10, and he commits the
17 terrorist act with that knife, I think that that
18 would count as substantial assistance both --
19 because it was -- it was an essential element in
20 allowing the -- the act to occur.

21 CHIEF JUSTICE ROBERTS: Okay. Thank
22 -- thank you.

23 MR. KNEEDLER: If you gave a hundred
24 dollars to ISIS and -- and just wrote a check --

25 CHIEF JUSTICE ROBERTS: No, with

1 respect to the act.

2 MR. KNEEDLER: Oh, with -- with --
3 anything that is -- that is specifically with
4 respect to the act, I -- I think your example,
5 the \$100, in any way that says I'm writing this
6 check to commit this particular terrorist act,
7 that would count. So it's not -- it's not just
8 the amount that is a factor, but the amount
9 matters in terms of the overall context or what
10 the defendant --

11 CHIEF JUSTICE ROBERTS: Okay. I think
12 I have your point.

13 JUSTICE KAGAN: Mr. -- Mr. -- Mr.
14 Kneedler, let's say a known terrorist walks into
15 a bank and avails himself -- opens up an
16 account, avails himself of various banking
17 services. The bank knows who this person is.
18 The bank knows that terrorists need banking
19 services to conduct their terrorist activities.
20 The bank provides him with those banking
21 services.

22 They provide a hundred other clients
23 who are not terrorists with the same banking
24 services, but they provide this known terrorist
25 with these banking services that are very

1 important to its terrorist activities.

2 Can you go after that person under
3 this statute?

4 MR. KNEEDLER: I -- I -- I think you
5 probably could, but when you say known
6 terrorist, I -- I -- I'm not -- if it's just
7 somebody who is affiliated with ISIS, you might
8 have the connect -- the proximate connection,
9 but --

10 JUSTICE KAGAN: Yeah. No, this is
11 like Osama bin Laden.

12 MR. KNEEDLER: Yeah. Yes. Some --
13 somebody who is a leader or somebody who you
14 know has committed or is about to commit a
15 terrorist act --

16 JUSTICE KAGAN: Okay.

17 MR. KNEEDLER: -- yes, I think you
18 can. And the -- the --

19 JUSTICE KAGAN: Because I would be
20 shocked if the government gave that one away,
21 right?

22 MR. KNEEDLER: Right. No. And -- and
23 I think that's the -- really, all this Court
24 needs to decide in this case is --

25 JUSTICE KAGAN: Well, but I guess what

1 I'm trying to -- to focus on is, like, what's
2 the difference? You know, I mean, we're --
3 we're used to thinking about banks as providing
4 very important services to terrorists.

5 Maybe we're not so used to, but it
6 seems to be true that various kinds of social
7 media platforms also provide very important
8 services to terrorists. And if you know that
9 you're providing a very important service to
10 terrorists, why isn't -- why aren't you
11 providing substantial assistance and just doing
12 it knowingly? What's the difference between the
13 banking case and this case?

14 MR. KNEEDLER: I -- I -- I think there
15 is a very large difference in terms of the
16 nature of the interaction. And, again, one of
17 the Halberstam factors is, what is the
18 relationship between the defendant and the
19 person who committed the act?

20 And in -- in Halberstam, you know, she
21 was daily engaged --

22 JUSTICE KAGAN: The bank doesn't know
23 anything about any particular acts.

24 MR. KNEEDLER: No, I'm -- I'm not
25 saying the particular act, but -- but the -- the

1 two -- the -- the two banking cases or the --
2 the banking case, Kaplan, and the drug kickback
3 case, Atchley, that are discussed in the briefs,
4 there was personal interaction. There was a --
5 there were transactions, specific, knowing
6 interactions between the bank or -- or the -- or
7 the drug companies and the entity that was known
8 to be a terrorist act -- actor engaged actively
9 in terrorist acts, Hamas --

10 JUSTICE KAGAN: So it has to be like
11 personal banking? I mean, suppose the banking
12 were less personal than that, but, you know,
13 they were providing, you know, very important
14 financial services to a terrorist organization.

15 MR. KNEEDLER: But I -- but
16 substantial assistance, again, is -- is partly a
17 question -- I mean, it -- it goes to the
18 ultimate question of culpability and proximate
19 causation.

20 And the -- and the -- the -- the
21 ultimate issue is, is society prepared to hold
22 the -- the person alleged to be an aider and
23 abettor culpable, essentially, equally with a
24 person who committed --

25 JUSTICE ALITO: Mr. Kneedler, take --

1 take -- had you finished?

2 JUSTICE KAGAN: Go.

3 JUSTICE ALITO: Take Justice Kagan's
4 hypothetical and substitute going back even
5 further than the days of pagers to the days of
6 -- of landline phones and phone booths. And so
7 the telephone company -- the -- the telephone
8 company knows that a particular person is -- has
9 a criminal background and is probably engaging
10 in criminal activity and is using the phone to
11 communicate with other members of that person's
12 gang. Is that aiding and abetting the crimes
13 that they commit?

14 MR. KNEEDLER: No. No, that would not
15 be. And I -- so I -- I think the availing
16 oneself of a -- of a service that is universally
17 open, that is furnished automatically by the
18 features of the system, that is mostly, you
19 know, helping lawful businesses, that is not --
20 I think one of the hypos yesterday mentioned --

21 JUSTICE KAGAN: Why doesn't that apply
22 to my bank too?

23 MR. KNEEDLER: Well, the bank cases
24 actually that have been decided in the lower
25 courts go both ways. And -- and they -- I think

1 they -- they turn on the level of knowledge.
2 They turn on -- ultimately, on the culpability.

3 Several of the cases, Siegel for one,
4 turn on the fact that the -- that the -- the --
5 the bank took steps to ensure the -- the -- the
6 bank was not intending to -- to further the
7 services. It was not -- it -- it didn't have a
8 culpable intent.

9 But we're -- in the example that
10 you're describing, I -- I think it's a lot
11 easier to make a judgment, basically, a societal
12 or -- or -- judgment, are we prepared to hold
13 that person liable? And if --

14 JUSTICE JACKSON: Suppose we have
15 Justice Alito's scenario with the providing to
16 the gangsters or whatnot, and you say, no,
17 that's not going to be covered, but what if that
18 same company gets specific information about
19 these people, and now we're not talking about
20 generally provided services that, you know, they
21 sign up for somewhere and the company thinks --
22 it doesn't have any information about them. But
23 we know suddenly, the company knows, that these
24 individual people are in a gang and generally
25 using the cell phones that they have acquired

1 from the company for criminal activity.

2 Does that change the scenario?

3 MR. KNEEDLER: Yes, it changes it
4 dramatically, I think. And I -- I think that
5 that's the difference between, I think, the two
6 examples that Mr. Waxman was offering.

7 The -- the making available the
8 general services that you would make available
9 to anyone is -- is ordinary, not face-to-face
10 business. But, if you know facts that -- that
11 zero in on a -- a known act or known actor who
12 you know is committing those acts --

13 JUSTICE JACKSON: But wait. What
14 about the --

15 CHIEF JUSTICE ROBERTS: Thank -- thank
16 you -- thank you.

17 Wrap up?

18 JUSTICE JACKSON: I just wanted to say
19 what about the difference between actor and act?
20 If you -- do you have to know that the -- that
21 the gangster is going to commit a particular
22 act, or is it just -- is it enough to know that
23 he's a gangster and, therefore, is likely to do
24 so?

25 MR. KNEEDLER: I -- I think, because

1 you're talking about a specific person who you
2 know is likely to, I think that would be enough.

3 That's very different from an
4 organization like -- like one of these platforms
5 that does -- is not acting on a transaction-by-
6 transaction basis to know whether this account
7 or this person is -- is furthering an act.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Kneedler.

10 Justice Thomas?

11 Justice Alito?

12 JUSTICE ALITO: I mean, Bell --
13 J. Edgar Hoover tells Bell Telephone that Dutch
14 Schultz is a gangster and he's using his phone
15 to carry out mob activities that -- and the
16 phone company says, well, we don't pull -- we
17 don't deprive people of service based on that.
18 That makes them an aider and abettor?

19 MR. KNEEDLER: Perhaps not.
20 Probably not. I mean, it depends. But -- but
21 --

22 JUSTICE ALITO: Wow. That's a
23 perhaps?

24 MR. KNEEDLER: No, no, no. I -- I --
25 I -- I think that even with that knowledge,

1 there -- the Halberstam factors require an -- an
2 intent or -- to move the -- to move the crime
3 forward.

4 JUSTICE ALITO: The problem -- the
5 problem is Halberstam, and we're stuck with
6 Halberstam because those three factors are met
7 in -- in my telephone example. They're arguably
8 met in the telephone example, are they not?

9 MR. KNEEDLER: Perhaps, but -- but,
10 again, it's a judgment call. It's the nature of
11 the act, the nature of the defendant's
12 contribution. So I -- I don't think -- I don't
13 think the hypotheticals lend themselves to one
14 basic rule. It's a judgment call as to whether
15 the defendant is culpable, has become complicit,
16 in -- in the way a conspirator would.

17 I mean, this statute equates or -- or
18 puts on -- pairs together conspiracy and aiding
19 and abetting, requiring, again, some culpable --
20 becoming a willing participant in -- in the act.
21 And, here, the furnishing of services as a
22 general matter, which is all the Court needs to
23 decide in this case, we do not think rises to
24 that level.

25 JUSTICE ALITO: Would it be consistent

1 with Halberstam to read "knowingly" to mean, oh,
2 just a shade short of "purposefully"? That
3 would give some substance to this.

4 MR. KNEEDLER: Yeah, I -- I -- again,
5 I -- I -- I think there is some overlap between
6 the -- the knowing and the substantial. For
7 example, you -- you may know as a general matter
8 that ISIS- affiliated persons are using your
9 system, but you may not know by how much. You
10 may not know for how long. You may not know
11 which accounts. And so it's very generalized
12 information.

13 And any -- any -- that assistance with
14 the idea that it might encourage recruiting is
15 far removed from a specific act of terrorism.

16 JUSTICE ALITO: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Mr. Stewart, would
20 you answer the question that Justice Barrett
21 placed to Mr. Waxman, which is what's the
22 daylight between you and the Petitioners? And
23 how would you write the bottom line of this
24 opinion? They're not liable because?

25 MR. KNEEDLER: On -- on the first -- I

1 think one place where we might have a difference
2 is to use the Atchley and Kaplan examples, not
3 necessarily saying whether those were right or
4 wrong, but the general proposition is those were
5 banks -- or banks or companies engaged in
6 interpersonal, direct communications with the
7 client. They had knowledge that the client was
8 either a front for or closely aligned with Hamas
9 -- I think it was Hamas in both cases -- that
10 was actively committing terrorist acts,
11 including against Americans, in the -- you know,
12 in the proximate area. And so that --

13 JUSTICE SOTOMAYOR: And -- and -- and
14 --

15 MR. KNEEDLER: -- there's a degree of
16 culpability there.

17 JUSTICE SOTOMAYOR: -- because they
18 were doing something outside the ordinary course
19 of business?

20 MR. KNEEDLER: Yes. Yes, they -- they
21 --

22 JUSTICE SOTOMAYOR: Okay. So that
23 sort of prong --

24 MR. KNEEDLER: -- they bent the rules,
25 which there's no allegation here that -- that

1 these defendants treated ISIS any -- ISIS
2 content any differently than they did anything
3 else in the -- in the -- in their usual course
4 of business. We think that's a critical fact,
5 and it's --

6 JUSTICE SOTOMAYOR: But what does that
7 go to, knowledge or substantiality? And so to
8 which factor does it go to?

9 MR. KNEEDLER: I -- I -- I think it --
10 I -- it goes somewhat to both, but I think it --
11 I think it's really substantiality, and -- and I
12 think that's an objective test. And, frankly, I
13 think that would be a -- a useful way for the
14 Court to think about it here in terms of being
15 able -- for courts to be able to dismiss these
16 cases at the outset, without having to go
17 through extensive discovery that would require
18 analysis of all the -- all the accounts and
19 everything over a period of time, because I -- I
20 think it's a judgment that a company engaged in
21 this sort of activity which is overall very
22 helpful to society should not be held
23 responsible, culpable, a willing participant --

24 JUSTICE SOTOMAYOR: Unless what?
25 Write the bottom line for me. Okay?

1 MR. KNEEDLER: I -- I think we're --

2 JUSTICE SOTOMAYOR: I -- I -- I go as
3 far as you go, but -- so what -- what does
4 substantiality mean or not mean?

5 MR. KNEEDLER: In -- in -- in the case
6 of the Internet service providers, we think it
7 means that they are not -- that the -- the
8 regular course of business, as alleged here,
9 does not constitute knowing, substantial
10 assistance. The situation in which it might is
11 if -- if specific accounts are called to the
12 defendant's attention saying this -- this
13 account is about to be used for the -- the -- to
14 facilitate the commission of -- of an account
15 that was --

16 JUSTICE SOTOMAYOR: So what do I do
17 with -- we know what ISIS does. I -- I think,
18 if I read the complaint or something, they even
19 know that ISIS has certain accounts. But they
20 haven't taken off all the ISIS accounts. No?
21 And Mr. Waxman is --

22 MR. KNEEDLER: Well, no, I -- I --

23 JUSTICE SOTOMAYOR: I can ask the
24 other side.

25 MR. KNEEDLER: The court -- the court

1 of -- the court of appeals stated that on page
2 63A and 64 --

3 JUSTICE SOTOMAYOR: Okay.

4 MR. KNEEDLER: -- where we think it
5 addressed the -- the -- the most important
6 factors, that ISIS regular -- or ISIS -- that
7 the defendants regularly take down the accounts,
8 but -- at least when they're called to their
9 attention.

10 Now they may have missed some, but
11 that's inherent in a system that -- that
12 services hundreds of millions of customers. So,
13 in this case, it would require something more
14 specific about a particular act because of the
15 nature of the services they're offering.

16 That doesn't mean in every case, like
17 in the Atchley case or -- or the bank cases,
18 that the bank has to know of the specific act,
19 because it was -- they were -- they were aware
20 of proximate --

21 JUSTICE SOTOMAYOR: Is it fair --

22 MR. KNEEDLER: -- nefarious activity.

23 JUSTICE SOTOMAYOR: -- is it fair for
24 me to summarize in a way that Justice Alito did
25 that substantiality in your view has to have

1 some purpose to it?

2 MR. KNEEDLER: The -- the -- the state
3 of mind is --

4 JUSTICE SOTOMAYOR: Instead of
5 knowledge, purpose?

6 MR. KNEEDLER: The state of mind is
7 one of -- is one of the factors. And the state
8 of mind is -- is how -- it does not require
9 specific intent, which, as Justice Alito pointed
10 out, is required, but what it -- but -- what is
11 required in -- in the criminal context.

12 What is required in the civil context
13 is encouragement, something that -- something
14 that the --

15 JUSTICE SOTOMAYOR: Some purposeful
16 act on it.

17 MR. KNEEDLER: -- defendant knowingly
18 does, encourages in -- in a -- in a -- in a
19 meaningful way because proximate cause is about
20 -- is about deciding how far responsibility
21 should go.

22 And, you know, the -- the -- this
23 statute, and I -- I think we're concerned about
24 not extending it so far that legitimate business
25 activities could be inhibited. The banks, for

1 example, in -- in underdeveloped parts of the
2 world and charities that may depend on those
3 banks, concerns about how they may -- they may
4 pull back as a result of legitimate businesses,
5 so that -- that is a concern that should enter
6 into the analysis, and including here the type
7 of the service and how remote it -- that service
8 is from the commission of any particular act.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Sotomayor?

11 Justice Kagan?

12 JUSTICE KAGAN: Mr. Kneedler, a -- a
13 few times, in talking about differences among
14 hypothetical cases and real cases, you said this
15 is really a societal judgment about who counts
16 as complicit, who counts as culpable, and that
17 seems right to me. But it seems to suggest that
18 this should be a jury question, shouldn't it?

19 MR. KNEEDLER: No, I think there's a
20 very -- there's a big difference. Juries decide
21 facts. The law decides what -- what
22 consequences to attach to the facts that are
23 found or alleged.

24 And -- and we think this is
25 essentially a question of -- question of law.

1 Now, to be sure, it's a question of law that
2 turns on looking at the particular factors in
3 Halberstam, but that's exactly what Halberstam
4 itself did. As I said, after making the factual
5 findings, it went on to apply the -- the
6 standards in the nature of the common law,
7 drawing on the -- on the Restatement of -- of --
8 of Torts.

9 And I think there's a -- a practical,
10 common-sense judgment that most people would
11 understand that when you are running a -- a -- a
12 business that is open to all comers, that it's
13 not face-to-face. You're not singling out one
14 person for favorable treatment. It's an
15 important service that we all benefit from that
16 you would -- you would look at that conduct
17 quite differently than you would somebody who is
18 engaged in a face-to-face encounter, asked to
19 lend money or give money or -- or give services
20 that are specific to that person that you know
21 is about to commit or is a member of a group
22 that all around you is committing terrorist
23 acts, as -- as in -- as in Atchley and -- and --
24 and -- and Kaplan.

25 So there -- that's a -- that's a

1 judgment that the law makes about whether the
2 conduct is culpable, whether the person has --
3 has become a willing partner. I mean, there are
4 a lot of expressions trying to get at the
5 question of whether the person is sufficiently
6 complicit --

7 JUSTICE KAGAN: Thank you.

8 MR. KNEEDLER: -- in the actual
9 murder.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: Mr. Kneedler, I -- I
13 appreciate that Congress approved the Halberstam
14 decision, but do we really have to wade through
15 its three elements where the third element has
16 two prongs and the second prong is made up of
17 six factors, some of which you tell us don't
18 apparently count for very much? Is there some
19 way to cut through that kudzu and -- and -- and
20 decide this case on the statutory terms? Please
21 say yes.

22 (Laughter.)

23 MR. KNEEDLER: Yes.

24 (Laughter.)

25 MR. KNEEDLER: There is. And -- and I

1 -- and I think that the -- you can look at the
2 overall context of this statute. JASTA was
3 passed largely in -- you know, almost entirely
4 in response to decisions that -- that came out
5 of the Second Circuit concerning responsibility
6 for the 9/11 attacks and -- and specifically
7 where plaintiffs were trying to hold responsible
8 the Saudi government, Saudi officials, Saudi
9 charities, but the courts had said, no, there's
10 no personal jurisdiction over some of them.

11 The -- the -- the Saudi state wasn't
12 liable or couldn't be sued under the Foreign
13 Sovereign Immunities Act because of limitations
14 on the Foreign Sovereign Immunities Act --

15 JUSTICE GORSUCH: Mr. -- Mr. Kneedler,
16 I'm -- I'm sorry to interrupt, but I -- I was
17 hoping for an answer -- answer having something
18 to do with the statutory text.

19 And -- and let me just again offer one
20 possibility, that -- that the -- the -- the two
21 clauses, the two "who" clauses in -- in this
22 statute might modify the person who committed
23 such an act, rather than the act itself, would
24 -- an event in the world.

25 And -- and it seems to me that that's

1 a pretty important limitation on aiding and
2 abetting liability and conspiracy liability,
3 both secondary forms of liability, in our law
4 generally, that you have to aid an actual
5 person. It's not just a pedantic point. It has
6 to do with the idea that -- that you're singling
7 somebody out and that that is different than
8 just doing your business normally and that that
9 does help limit the scope of the act.

10 But what am I missing?

11 MR. KNEEDLER: Well, I -- I think that
12 the act in -- in our view overall does not
13 require that the assistance be zeroed in on the
14 individual who committed the act. I mean, it's
15 liability --

16 JUSTICE GORSUCH: Why -- why not?

17 MR. KNEEDLER: -- may be asserted
18 against any --

19 JUSTICE GORSUCH: Why not? Because
20 that's normally how secondary liability works.
21 And it's an important limitation that -- that --
22 that cabins in the scope and prevents secondary
23 liability from becoming liability for just doing
24 business.

25 MR. KNEEDLER: Yeah. Well, I -- I --

1 I think -- I -- I think the sense that you have
2 is correct in the sense that an act -- an act is
3 actually committed by a -- a human being, a
4 natural person, or at least in -- in most
5 instances.

6 JUSTICE GORSUCH: Or -- or -- or a
7 corporate person. The Dictionary Act, which
8 defines person, includes those kinds of
9 juridical entities.

10 MR. KNEEDLER: Yes. Now --

11 JUSTICE GORSUCH: And we -- and we
12 have two "who" clauses, "who aids and abets" or
13 "who conspires." And -- and the language then
14 says "with the person."

15 MR. KNEEDLER: Right. So the -- the
16 point I was about to make was that even if you
17 regard the person as the individual, if the --
18 in this case, for example, ISIS would commit the
19 terrorist act through the act of an individual.

20 JUSTICE GORSUCH: Right.

21 MR. KNEEDLER: So I'm not sure the
22 distinction is --

23 JUSTICE GORSUCH: And -- and, here --
24 and, here, the point would be that, okay, the
25 defendant, Twitter, was -- was -- Facebook,

1 Google, whatever, was -- was -- was doing its
2 business, but there are very few points in this
3 complaint that allege that they aided the
4 persons who actually engaged in the terrorist
5 act.

6 I mean, with all -- we all appreciate
7 how horrible the attack was, but there's very
8 little linking the defendants in this complaint
9 to those persons.

10 MR. KNEEDLER: Yes, but -- I -- I
11 agree with that, and -- but I think -- I think
12 that also means there's very little, next to
13 nothing, that links it with the act that the
14 person committed. So --

15 JUSTICE GORSUCH: Well, in -- in a
16 very abstract way in the world, everything's
17 connected to everything else. And what the
18 defendant did may have in some abstract way
19 helped advance ISIS. And ISIS helped conduct
20 the -- the attack.

21 And so, in -- in a -- in a world in
22 which we're all and everything is
23 interconnected, all acts touch on one another,
24 there's some butterfly effect anywhere, but what
25 helps limit secondary liability, it -- one thing

1 that helps limit secondary liability is that
2 you're intentionally or knowingly in this case
3 helping a person do something in the world.

4 MR. KNEEDLER: I -- I -- I think
5 that's right. I think that's right. I think
6 that principle --

7 JUSTICE GORSUCH: Perhaps we should
8 stop there.

9 (Laughter.)

10 MR. KNEEDLER: Well, yes.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: I just want to
14 make sure I understand how you think this is
15 different from a material support statute, so if
16 you have a communications business or a
17 financial business or a food business or a
18 travel business and you serve lots of customers,
19 but you knowingly provide your services to a
20 terrorist organization that you know is a
21 terrorist organization.

22 MR. KNEEDLER: Yes, that -- that would
23 be criminal liability. That's a very important
24 distinction.

25 JUSTICE KAVANAUGH: Is that liability

1 under this?

2 MR. KNEEDLER: Not -- not under -- not
3 under -- I mean, again --

4 JUSTICE KAVANAUGH: That's what I --

5 MR. KNEEDLER: -- again, I would --

6 JUSTICE KAVANAUGH: I -- I just want
7 to --

8 MR. KNEEDLER: -- you know, I'd want
9 -- I'd want -- I would maybe want to know more.
10 But what I -- but -- but basic --

11 JUSTICE KAVANAUGH: That's what we
12 have. What we have is you know they're
13 terrorists, picking up on Justice Kagan's
14 hypothetical. You provide services,
15 communications, food, travel to lots of people,
16 and this one comes in -- you know, I know this
17 person is a terrorist, but I'm going to provide
18 the same service, no favorable treatment, the
19 same service to that person as to everyone else.

20 Congress has passed statutes to get at
21 that kind of situation. The question is, is
22 this statute getting at that situation?

23 MR. KNEEDLER: I -- I think ordinarily
24 not, but it --

25 JUSTICE KAVANAUGH: And why not?

1 MR. KNEEDLER: Because it is --

2 JUSTICE KAVANAUGH: It's the phrase
3 "act," right?

4 MR. KNEEDLER: It's the phrase "act,"
5 and --

6 JUSTICE KAVANAUGH: Or the word "act."

7 MR. KNEEDLER: It's the word "act,"
8 but it's also application of the, frankly,
9 common-sense factors or way of looking at it.
10 In Halberstam, it has to be substantial
11 assistance to the act. Now it --

12 JUSTICE KAVANAUGH: Now why is your
13 answer to Justice Kagan's hypothetical that may
14 be liability in that case? Is it because you
15 could prove some suspicion that that terrorist
16 was going to commit a particular act?

17 MR. KNEEDLER: Yeah, and I --

18 JUSTICE KAVANAUGH: If you don't have
19 that, then I don't understand your answer --

20 MR. KNEEDLER: No, no.

21 JUSTICE KAVANAUGH: -- to Justice
22 Kagan.

23 MR. KNEEDLER: I took that to be --
24 maybe I misunderstood -- I took that to be an
25 important part of the -- of her question when --

1 when I said, do you have an awareness or
2 knowledge that that person has committed or is
3 about to commit or -- or something, so there's
4 that --

5 JUSTICE KAVANAUGH: Well, you know
6 they're a terrorist, though. Let's go back to
7 what I said. You know they're a terrorist. So,
8 by that -- they're a member of ISIS. They've
9 been involved in past activities. But you're
10 like, well, I'm still going to give them food.

11 MR. KNEEDLER: Well --

12 JUSTICE KAVANAUGH: I'm still going to
13 sell a phone. I'm still going to rent a car.

14 MR. KNEEDLER: There may be
15 differences in the services. I mean, a
16 restaurant serving somebody, I -- I don't think
17 you would regard that as substantial.

18 JUSTICE KAVANAUGH: Well, a rental
19 car?

20 MR. KNEEDLER: Well, if -- if he says,
21 I -- I need it -- I need a car to get to the
22 airport quick so that I can get to Istanbul --

23 JUSTICE KAVANAUGH: I mean, that's --
24 well, okay.

25 MR. KNEEDLER: But -- but -- but,

1 again, the -- the question is, how much has the
2 defendant willingly associated himself or become
3 a willing partner and been complicit in what
4 that person is doing?

5 And I think it depends on both the
6 nature of the assistance, what intent or state
7 of -- of mind you have. I think a restaurant is
8 very different from offering somebody, you know,
9 here's my cell phone so you can call your
10 compatriot. I think those -- those are -- those
11 are, in -- in common-sense terms, very different
12 acts. But, in your --

13 JUSTICE KAVANAUGH: I think that's --
14 under this statute, that has to be your
15 position, but I've seen -- you've got to
16 maintain a hard line there, and in response to
17 some of the hypotheticals, I'm not sure you've
18 maintained the hard line --

19 MR. KNEEDLER: Well, I --

20 JUSTICE KAVANAUGH: -- which then
21 swallows the whole principle.

22 MR. KNEEDLER: No, no, I -- I tried to
23 maintain a hard -- a hard -- a hard line with
24 respect to this service in particular, which is
25 all the Court has to decide. It's generally

1 available, no favorable treatment. It's not
2 face-to-face, which, in your example, is another
3 very important distinguishing characteristic.
4 It's an individualized transaction where you --
5 you know who that person is by your --

6 JUSTICE KAVANAUGH: That's -- I -- I
7 don't want to prolong this, but that's very
8 elusive. You know ISIS is using the
9 organization -- some human being in the -- in
10 the defendant company knows that ISIS, a group
11 of individuals, is using this service to help
12 recruit others to kill people.

13 MR. KNEEDLER: But that --

14 JUSTICE KAVANAUGH: You know that. I
15 don't know why the face-to-face really changes
16 that.

17 MR. KNEEDLER: Oh, I think it changes
18 it a lot. And, again, Halberstam -- Halberstam
19 talks about was the person present, which, as I
20 said, I think, in this context, really means
21 what is -- how remote or how proximate was the
22 defendant's association with it.

23 And if you -- if you aid in something
24 as generalized as -- as recruiting, that would
25 render these defendants culpable, responsible,

1 complicit in every terrorist act affecting --

2 JUSTICE KAVANAUGH: Okay.

3 MR. KNEEDLER: -- affecting a -- a
4 U.S. national --

5 JUSTICE KAVANAUGH: Thank -- thank
6 you.

7 MR. KNEEDLER: -- in the country.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: Mr. Kneedler, taking
11 Justice Gorsuch's point about aid to the person
12 in the statute, Justice Gorsuch was pointing out
13 that the Dictionary Act treats juridical
14 entities as persons. Would the government
15 consider ISIS a juridical entity? Or, if we're
16 focusing on the person, would we have to be
17 focusing on the people who actually carried out
18 the attack?

19 MR. KNEEDLER: I don't know if we
20 would consider it to be a juridical person. I
21 -- I think ISIS is -- is an identifiable if
22 somewhat amorphous entity --

23 JUSTICE BARRETT: Entity?

24 MR. KNEEDLER: -- entity. But it's
25 important -- I think this is really a

1 misunderstanding a lot of the -- of the -- that
2 -- that Respondent has and some of the amici on
3 that side. The -- the notion of an enterprise
4 in Halberstam was not like some distinct entity.
5 That -- sometimes "enterprise" is used that way.
6 It was used there. The enterprise was a series
7 of discrete acts.

8 JUSTICE BARRETT: I -- I -- I
9 understand, and I -- I agree with that reading
10 of Halberstam actually.

11 All right. Looking -- if we rule in
12 favor of Twitter and -- and I'm thinking about
13 ways in which to do that if that's what we do,
14 it seems to me -- well, tell me if you agree
15 with this: One thing to say would be to say
16 that because you have to assist a person who
17 commits the particular act of terrorism, whether
18 that person is ISIS or the particular
19 individuals that carried out the attack, there
20 would have to be allegations in the complaint
21 showing the use of the defendant's service, of
22 Twitter's service, to the end of the Paris
23 attack and not just general recruitment or
24 radicalizing people and that this complaint
25 lacks those allegations, like using DMs or using

1 comment threads on Twitter to actually
2 coordinate the activities for the act. Would
3 that be one way to do it?

4 MR. KNEEDLER: Yes. I -- I think that
5 is the distinction in this case. I mean, again,
6 if they knew about -- if they knew about a
7 specific account --

8 JUSTICE BARRETT: But -- but -- but --
9 but I'm -- knowledge is a different thing.
10 That's not what I'm -- I'm asking. If --

11 MR. KNEEDLER: But -- but just the --
12 yes?

13 JUSTICE BARRETT: Before you even get
14 to knowledge, you have to say that there was the
15 use of the service in the particular attack on
16 the -- on the government's view, right?

17 MR. KNEEDLER: Yes.

18 JUSTICE BARRETT: You have to link it
19 up to the attack?

20 MR. KNEEDLER: If -- if you can do
21 that, but for -- in this context, yes, for the
22 use of these services, because of the nature of
23 these -- of these services.

24 JUSTICE BARRETT: But in the attack --
25 I mean, I -- I took the whole point to be, and

1 the point of agreement between you and Mr.
2 Waxman, that the statute refers not just
3 generally to helping, as you were just saying,
4 the enterprise but to aiding and abetting the
5 act of terrorism that injured the plaintiff.

6 MR. KNEEDLER: That's correct.

7 JUSTICE BARRETT: So, here, in order
8 to state a claim, we would need to see in the
9 complaint some allegations that Twitter was used
10 to carry out this specific attack, not just
11 generally used to build up ISIS and recruit?

12 MR. KNEEDLER: Yes.

13 JUSTICE BARRETT: Okay. Another thing
14 it seems like we could say, it's kind of to the
15 colloquy you were having with both Justices
16 Kavanaugh and Kagan, which is about a business
17 that operates and it's open to all comers. That
18 seems to go to knowledge. Am I right?

19 MR. KNEEDLER: I think it goes to
20 knowledge but also the -- the --

21 JUSTICE BARRETT: Substantial
22 assistance?

23 MR. KNEEDLER: -- substantial
24 assistance, because it goes to how remote is it.
25 Is it face-to-face? Some -- some companies open

1 to all business are -- are face-to-face. Some
2 are not. Like, this is automatic.

3 JUSTICE BARRETT: So it could be a
4 little bit trickier, but an opinion to that
5 effect might have to say something like, if the
6 defendant is a business that's open to all
7 comers, a page company, PageNet, or the phone
8 service or a bank or Twitter, social media
9 company, there has to be some allegation of,
10 what, specific knowledge?

11 MR. KNEEDLER: Of specific knowledge,
12 some specific action with respect to that
13 particular person or that particular act. I
14 want to be clear, I don't -- I don't want to be
15 taken to be saying absolute rules for every
16 situation. The -- the points I'm making here
17 about --

18 JUSTICE BARRETT: But I thought you
19 said it would be helpful to give lower courts
20 some way to dismiss these cases without wading
21 into the facts. And it seems like the first
22 thing I said, which was about linking up
23 attacks, wouldn't serve that end because it
24 sounds like you were saying that you thought it
25 would be helpful to have a -- a holding that

1 related to generally open businesses. Am I
2 right?

3 MR. KNEEDLER: Again, because of the
4 banking example, a bank may hold itself out to
5 be open to all comers, but, in the -- in the
6 context of conducting that business, they may
7 have an individualized encounter.

8 Some -- you don't just open an account
9 in most banks online or get a loan online.
10 There's going to be some back and forth by which
11 the bank will get to know something about the
12 person it's doing business with or know that
13 that person is affiliated --

14 JUSTICE BARRETT: Sure. But that goes
15 to the point of knowledge, right? You know --

16 MR. KNEEDLER: Well, it also goes to
17 the nature of the -- of the --

18 JUSTICE BARRETT: The nature of the
19 assistance?

20 MR. KNEEDLER: Yes.

21 JUSTICE BARRETT: Yes.

22 MR. KNEEDLER: Yes.

23 JUSTICE BARRETT: Yes.

24 MR. KNEEDLER: So -- so, here, the
25 primary point I'm making here is about these

1 businesses which are open to the public on an
2 automated way, without -- without any occasion
3 or ability for an individualized determination
4 about --

5 JUSTICE BARRETT: Sure. So I wasn't
6 suggesting that you were asking us to say any
7 business that's generally open to the public can
8 never be liable. But any business that's
9 generally open to all comers, absent some
10 allegation of more specific knowledge or
11 specific interaction, cannot be liable under
12 JASTA?

13 MR. KNEEDLER: Yes. And one other
14 point I'd like to make, it -- it -- it -- I -- I
15 think it is possible, as I think Atchley and
16 Kaplan show, in that situation, it doesn't
17 necessarily require that you know that a
18 particular person is going to commit a
19 particular act. If you know because of the
20 proximate relationship with the person you're --
21 you're assisting that there -- that they --
22 there -- a group of acts that they are about to
23 commit or that they are -- that -- that they
24 have an ongoing practice of committing, you
25 don't have to know of the specific act in that

1 -- in -- in that situation. That's why I think
2 it is -- it is context-specific.

3 But this is open --

4 JUSTICE BARRETT: And banks are what
5 you're worried about? Banks is what the
6 government is --

7 MR. KNEEDLER: We are worried about --

8 JUSTICE BARRETT: -- worried about in
9 that?

10 MR. KNEEDLER: -- and the -- and the
11 cases, some of them have been dismissed and we
12 think it's important for them to be able to be
13 dismissed, where you don't have that -- the sort
14 of knowledge or intent, the state of mind, the
15 -- the -- the things that go to whether this --

16 JUSTICE BARRETT: You want to make
17 sure the banks aren't automatically dismissed.
18 Like, you're trying to make sure that whatever
19 we said about social media companies wouldn't
20 get banks off the hook when they have those
21 kinds of special relationships that you're
22 talking about?

23 MR. KNEEDLER: Yes.

24 JUSTICE BARRETT: Yes.

25 MR. KNEEDLER: Special relationships

1 and knowledge. It's not just banks. There
2 could be other institutions. Charities are
3 another one, charities both in their own right,
4 in operating problematic --

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I've been kind of
8 going back in my mind to what I started with Mr.
9 Waxman in terms of separating out knowledge and
10 substantial, and it -- in listening to you, it
11 was very clear that you are putting a lot of
12 stock in substantial, and I was trying to figure
13 out why that is.

14 And I went back to Halberstam, and I'm
15 looking at the opinion, and I am noting now for
16 the first time that after the Court in aiding --
17 in the aiding-and-abetting section lists the
18 three elements, it very quickly disposes of them
19 and, in particular, with respect to the third
20 element, it just says, "The district court also
21 justifiably inferred that Hamilton assisted
22 Welch with knowledge that he had engaged in
23 illegal acquisition of goods."

24 Then it goes on to say, "The only
25 remaining issue, then, is whether her assistance

1 was 'substantial.'" So all the factors and all
2 the things you've been talking about are
3 insubstantial, so it seems as though, at least
4 per this opinion, the only real knowledge is of
5 the kind that you're talking about with these
6 banks if they have a personal relationship and
7 they know that this, you know, person or
8 somebody who's using their services has engaged
9 in illegal activity.

10 Is that the government's position?

11 MR. KNEEDLER: Yeah. I -- I -- I
12 don't think -- I think, in Halberstam, that was
13 an easy line to draw because she was obviously
14 intimately integrally related, as the Court
15 said, in his -- in what he did.

16 I think there are situations -- but I
17 don't think the Court needs to reach it here
18 because I think this case could be decided on
19 the basis of substantial assistance, applying
20 the objective factors.

21 JUSTICE JACKSON: But it seems like
22 substantial is harder. Substantial is where all
23 the six factors come in. I'm trying to say, if
24 we have a third that's knowledge and according
25 to Halberstam, you know, if you don't even have

1 a knowledge that he was, you know, engaged in
2 the illegal acquisition or was a gangster or was
3 a -- a terrorist in a way, that should be
4 enough, right?

5 MR. KNEEDLER: Oh, yeah, no. Yeah,
6 no, no, I'm sorry, I was taking the question to
7 be about Halberstam itself. Yes, if you don't
8 have knowledge that the -- or that would -- that
9 would even go into Prong 2, if you don't have a
10 general awareness.

11 JUSTICE JACKSON: No, you have -- you
12 might have a general awareness that Twitter or
13 your services are being used in terrorist
14 activities.

15 MR. KNEEDLER: Right.

16 JUSTICE JACKSON: What you may not
17 have according to this is knowledge that with
18 respect to the attacks that the person is now
19 accusing you of assisting, you were helping
20 those people who were involved in that act.

21 Is that enough to get you out?

22 MR. KNEEDLER: I -- I -- I think you
23 could look at it that way, yes, because of the
24 attenuation. Knowledge -- I -- I think
25 knowledge would ordinarily --

1 JUSTICE JACKSON: Yeah.

2 MR. KNEEDLER: -- entail some concrete
3 or some immediate perception that what they're
4 doing --

5 JUSTICE JACKSON: All right. But one
6 final question is just with respect to this
7 notion that Justice Gorsuch brings up about the
8 person. I'm wondering whether the concern about
9 that that I hear from both you and Mr. Waxman is
10 that if you're focusing on the person who
11 committed such an act of international
12 terrorism, which is what the statute says, that
13 it seems to make the focus -- take the focus
14 away from the act itself.

15 So that, conceivably, if you separated
16 out the clauses, aiding and abetting the person
17 who committed such an act, it's almost like
18 Justice Kavanaugh's materiality statute in the
19 sense that you could, I guess, aid and abet a
20 person who committed the act even if it's not
21 with respect to that act, because that's not
22 what the statute seems to say.

23 And so the reluctance, I think, is in
24 focusing on the person in that way.

25 MR. KNEEDLER: Yes, I -- the --

1 JUSTICE JACKSON: Yeah.

2 MR. KNEEDLER: -- I think that's --
3 that is fair to say. And even focusing on the
4 organization, the organization is acting through
5 an individual in -- in the commission of the
6 act.

7 And the -- the -- the criminal
8 aiding-and-abetting statute refers -- says that
9 somebody who commits a criminal act or aids and
10 abets its commission, referring to a specific
11 criminal act. And, here, the definition of --
12 of terrorist -- terrorist activity, I think it
13 is, says it's activities that involve violent or
14 dangerous acts --

15 JUSTICE JACKSON: Acts. And if we
16 don't --

17 MR. KNEEDLER: -- that are criminal.

18 JUSTICE JACKSON: -- if we don't
19 stay -- if we don't stay focused on the acts,
20 then we get worried about Justice Alito's
21 hypotheticals, where you might be aiding and
22 abetting a person who is engaging in certain
23 things, but you aren't really assisting in those
24 things with knowledge?

25 MR. KNEEDLER: Right. It has to be --

1 the act itself has to be culpable, which is why
2 the definition of terrorism refers to acts that
3 are punishable by the criminal law.

4 And so whether you -- whether you
5 focus on is it the person who committed the act
6 or the commission of the act, I think, in that
7 sense, it all comes to the same thing.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Kneedler.

10 Mr. Schnapper.

11 ORAL ARGUMENT OF ERIC SCHNAPPER
12 ON BEHALF OF THE RESPONDENTS

13 MR. SCHNAPPER: Mr. Chief Justice, and
14 may it please the Court:

15 I'm going to -- I'd like to waive my
16 two minutes of silence to move the process
17 forward.

18 CHIEF JUSTICE ROBERTS: Granted.

19 (Laughter.)

20 MR. SCHNAPPER: I hope you won't make
21 me regret that. And I'd like to -- I'd like to
22 respond to some of the questions that were asked
23 earlier. I'll try to do this in seniority
24 order.

25 So I'd like to start with the question

1 that you asked about trying to understand what
2 the government's position was in the multiple
3 factors that were there. I -- I think that
4 question really went to the heart of the
5 difficulty with the government's position.

6 The -- the Halberstam factors, there
7 are six of them. It's complicated. The
8 government's standard is much harder to
9 understand, and that was brought home by the
10 question from Justice Kagan about banking
11 services. It seemed clear as I read the magical
12 few words on page 34 that banking services
13 weren't covered, but then it turned out that
14 they were. It's difficult to understand how we
15 got there.

16 Our view is that -- and the government
17 says there's a special nexus requirement. Our
18 view is that once the statutory elements have
19 been met on the Halberstam factors, the nexus is
20 foreseeability. This other rule -- these other
21 rules aren't there. It's not as simple as you
22 might have hoped. We still have the six
23 factors, but it stops there.

24 Now Justice Alito made the point
25 earlier on, and we think this is very important,

1 that Halberstam has, as you put it, and I wish I
2 had thought to say it as -- as well, essentially
3 statutory status. The courts are directed to
4 use Halberstam.

5 And that's been particularly important
6 with regard to a number of the questions here,
7 one of them being whether the assistance has to
8 go to assisting the particular act that -- that
9 harmed the plaintiff.

10 The Halberstam facts fail that
11 standard. And -- and you may want to hold
12 that -- that in general aiding and abetting
13 requires assisting a particular act, and -- and
14 you may want to overrule Halberstam when it gets
15 here, but Halberstam is the standard, and it
16 says aiding and abetting an enterprise.

17 And a number of the times, as my
18 friends articulated the standard they were
19 asking the Court to adopt, they would articulate
20 a standard that would be -- that would -- that
21 would require you to conclude that Halberstam
22 was wrongly decided.

23 Justice Kagan, you asked and you
24 framed this as a hypothetical, and I want to
25 respond that it's not. You asked what would

1 happen in a case far afield from this in which a
2 defendant said they really weren't going to do
3 much of anything at all, even though knew --
4 they knew that they were assisting terrorists.

5 There's a factual dispute about this,
6 but the contention in the complaint is that that
7 was really going on, that this policy was just
8 window dressing.

9 The complaint specifically alleges
10 that unless someone came to one of the
11 defendants and identified a particular post that
12 was from ISIS, they would not do anything. They
13 wouldn't look for posts on their own.

14 JUSTICE JACKSON: Mr. Schnapper,
15 you -- you -- you want to cut to the chase, and
16 I appreciate that, so let me ask you this. With
17 respect to your claims --

18 MR. SCHNAPPER: Yes.

19 JUSTICE JACKSON: -- that Twitter knew
20 about these things and it didn't do anything,
21 how -- how do you survive Section 230?

22 I mean, you were here yesterday and we
23 sort of had a preview of your thoughts on this
24 case but also I thought a concession that that's
25 sort of the heartland of a 230 issue in terms of

1 immunity, the -- the claim that here is this
2 Internet platform and they have these terrorist
3 videos and things on their website and they
4 don't take them down.

5 MR. SCHNAPPER: Well, I -- I framed my
6 comment somewhat too generally. Our position is
7 that they continue to recommend things apace.

8 JUSTICE JACKSON: All right. So we're
9 on recommendations.

10 MR. SCHNAPPER: Yeah. And that they
11 continue to do that apace, knowing -- knowing
12 what's -- what's happening. And --

13 JUSTICE JACKSON: So why is the
14 recommendation aiding and abetting? Why does it
15 fit -- so we're only looking at recommendations,
16 not Twitter's --

17 MR. SCHNAPPER: Yes. Yes.

18 JUSTICE JACKSON: -- you know, take --
19 not taking down things because you concede that
20 that that --

21 MR. SCHNAPPER: Right.

22 JUSTICE JACKSON: -- would be a
23 heartland immunity issue. So the claims are
24 recommendations related to various terrorist
25 activities, and with respect to that, can you

1 just walk us through why you think that
2 qualifies under Halberstam as aiding and
3 abetting?

4 MR. SCHNAPPER: Well, the -- the
5 aiding and abet -- the recommendation function
6 is at issue here potentially more broadly
7 because we have three different defendants in
8 this case. There's only one Petitioner. And so
9 their practices would be varied.

10 But insofar as the recommendations
11 were affirmatively calling the attention of --
12 of users to ISIS materials, that would -- that
13 would be extremely valuable to ISIS in
14 recruiting more fighters, which was, of course,
15 a --

16 JUSTICE JACKSON: That has nothing to
17 do with the attack. So you say the -- this
18 particular attack, they didn't have to have any
19 knowledge or awareness or assistance with
20 respect to the particular attack?

21 MR. SCHNAPPER: That is precisely our
22 position.

23 JUSTICE BARRETT: Mr. Schnapper, does
24 your complaint contain any specific allegations
25 about ways in which Twitter was used to

1 perpetrate this attack? Or is it -- it's all --
2 as I read it, it's all about recruiting
3 generally, the ways in which Twitter was used --

4 MR. SCHNAPPER: That -- that's
5 correct.

6 JUSTICE BARRETT: -- to recruit
7 generally?

8 MR. SCHNAPPER: It's recruiting and
9 fundraising.

10 JUSTICE BARRETT: Okay.

11 MR. SCHNAPPER: That -- that's my --

12 JUSTICE BARRETT: So nothing about the
13 Paris attack in particular?

14 MR. SCHNAPPER: No.

15 JUSTICE BARRETT: Okay.

16 MR. SCHNAPPER: No. That -- that's
17 the -- that's where we part company.

18 JUSTICE KAVANAUGH: Suppose that --
19 well, go back to 1997, CNN did an interview of
20 Osama bin Laden, a very famous interview of him.
21 Could, under your theory -- and that -- that
22 interview became where he first time declared
23 war against the United States to a western
24 audience, and that interview became famous, tool
25 for recruiting, notoriety. Could, under your

1 theory, CNN have been sued for aiding and
2 abetting the September 11th attacks?

3 MR. SCHNAPPER: I -- I -- it would
4 probably fail several elements, I think, general
5 --

6 JUSTICE KAVANAUGH: Which -- which
7 ones?

8 MR. SCHNAPPER: I think general
9 awareness of his role. It --

10 JUSTICE KAVANAUGH: General or what --
11 you don't think they were generally aware of his
12 role when he declared war against the United
13 States and said --

14 MR. SCHNAPPER: No, I --

15 JUSTICE KAVANAUGH: That seems -- and
16 that was known beforehand. That was the first
17 time he did it to a western audience.

18 MR. SCHNAPPER: Well, the standard is
19 whether they would have necessarily understood
20 the role that the -- that the interview would
21 play. Look, the First Amendment is going to --

22 JUSTICE KAVANAUGH: Well --

23 MR. SCHNAPPER: -- solve that -- I'm
24 sorry.

25 JUSTICE KAVANAUGH: The First

1 Amendment's going to solve that? And does it?

2 MR. SCHNAPPER: I think the First
3 Amendment would solve that problem.

4 JUSTICE KAVANAUGH: Mm-hmm.

5 MR. SCHNAPPER: And --

6 JUSTICE KAVANAUGH: But the liability
7 under this statute. But for that, there would
8 be liability under this statute?

9 MR. SCHNAPPER: It's -- it's difficult
10 to see how it would get through the six elements
11 of substantiality in terms of duration, it's one
12 interview; in terms of nature of the assistance,
13 which is just a -- a television interview.

14 The -- there would -- I -- I think --
15 I think it usually would not, but -- but I think
16 the First Amendment would -- would be a --

17 JUSTICE KAVANAUGH: Different --
18 different tack.

19 Just more generally, I think you've
20 heard Mr. Waxman and Mr. Kneedler talk about
21 businesses that provide services on an arm's
22 length basis to a variety -- all comers and not
23 on a favorable basis.

24 So how does that involve aiding and
25 abetting a particular act when, even though you

1 know, okay, this person is a bank robber, this
2 person is a terrorist, they use my communication
3 services or whatever else it may be, you don't
4 know they're going to use it for particular
5 acts? So how do you -- how do you get around
6 that?

7 And then the implications of that, I
8 think, that they raise are this would put a
9 heavy burden on a wide variety of businesses to
10 try to ferret out more information about their
11 customers to prevent liability under this kind
12 of statute.

13 MR. SCHNAPPER: That's a lot of
14 questions I'm not going to get to -- I -- I -- I
15 do --

16 JUSTICE KAVANAUGH: Well, try to start
17 with the --

18 MR. SCHNAPPER: No, no, I don't mean
19 to cut you off. I'll do the best I can. If --
20 if it's not responsive, just tell me.

21 JUSTICE KAVANAUGH: Yeah. The general
22 business --

23 MR. SCHNAPPER: Yes.

24 JUSTICE KAVANAUGH: -- it's not
25 connected to a specific act.

1 MR. SCHNAPPER: Right.

2 JUSTICE KAVANAUGH: Why liability?

3 MR. SCHNAPPER: Okay. So, first of
4 all, it's our position, as I've said, that the
5 assistance doesn't have to be connected to a
6 specific act. Nothing that Hamilton did in
7 Halberstam assisted any particular act. It was
8 all after the fact.

9 With regard to it being a -- a general
10 --

11 JUSTICE KAVANAUGH: That wasn't the --
12 I'm sorry to interrupt, but that wasn't a
13 business of the kind that I was hypothesizing.

14 MR. SCHNAPPER: Yes. I understand
15 that. I'm sorry if that wasn't responsive.

16 The fact that a defendant is a general
17 business open to all comers could be very
18 relevant to knowledge if someone just shows up
19 and -- and wants to rent a pager or buy a pager
20 or whatever the technology. It's -- it's
21 unlikely that the defendant's going to know that
22 they're dealing with a terrorist.

23 But there was a hypothetical that, you
24 know, Osama bin Laden walks in and says, I'd
25 like to buy a laptop with -- with the capacity

1 to -- maybe a -- a -- a cell -- a satellite cell
2 phone. And I think they would -- they would
3 know that this was going to be used for
4 terrorist purposes. They wouldn't know the
5 specific act. Our view is they don't have to
6 know that.

7 JUSTICE KAVANAUGH: And how's it
8 different from a material support statute, which
9 are distinct language?

10 MR. SCHNAPPER: The material support
11 statute is both broader and narrower than aiding
12 and abetting. First, the material support
13 statute doesn't require a showing of general
14 awareness of a role -- of the role that the
15 support may be playing.

16 Secondly, the aiding-and-abetting
17 statute requires you to work your way through
18 the six factors that we've been talking about,
19 and that's not required under material support.

20 Conversely, aiding and abetting can
21 include encouragement, and that would not be
22 materially -- material support.

23 So they're -- they're just different.
24 And I think Congress chose to use aiding and
25 abetting rather than just strict liability for

1 material support that causes harm because it
2 wanted to use that more nuanced set of rules for
3 aiding and abetting.

4 JUSTICE KAGAN: I mean, I -- I would
5 have thought that there is a simpler answer to
6 how is the material support statute different,
7 because the material support statute says, when
8 Osama bin Laden walks in, you can't give him the
9 money to buy a hospital either, right? It has
10 just nothing -- in other words, it says there
11 are some people that even when you know it
12 doesn't have anything to do with their terrorist
13 activities, you can't support their
14 non-terrorist activities.

15 And that's what the whole theory of
16 the material support statute was. It was to
17 prevent people from giving money to Hamas to
18 build houses.

19 MR. SCHNAPPER: I amend my answer to
20 include that point.

21 (Laughter.)

22 JUSTICE JACKSON: What about this --
23 what about this point -- what about this point
24 --

25 MR. SCHNAPPER: Yes.

1 JUSTICE JACKSON: -- because I'm still
2 a little confused about your disclaiming that
3 the support that is being given has to run to
4 the act.

5 So we have Osama bin Laden coming in
6 to rent a satellite cell phone. You say the
7 sellers don't need to know that he will use the
8 phone to commit a terrorist act, but I take it
9 that you're also saying that he doesn't actually
10 have to use the phone to commit the terrorist
11 act. He could still -- they could still be on
12 the hook for assisting him, even if he doesn't
13 actually use the thing that they have provided
14 in the act that injures your client, right?

15 MR. SCHNAPPER: No.

16 JUSTICE JACKSON: I'm sorry, that was
17 very long-winded.

18 MR. SCHNAPPER: No, I think there were
19 -- there were several questions there. So we --

20 JUSTICE JACKSON: The -- the point is
21 that in the hypo --

22 MR. SCHNAPPER: Yes, yes.

23 JUSTICE JACKSON: -- does the cell
24 phone that is sold to --

25 MR. SCHNAPPER: Yes. Yes.

1 JUSTICE JACKSON: -- Osama bin Laden
2 actually have to be used to commit the terrorist
3 act?

4 MR. SCHNAPPER: No.

5 JUSTICE JACKSON: Why not?

6 MR. SCHNAPPER: Because providing him
7 the cell phone aids -- I mean, is a -- is a
8 piece of the answer. There are other elements.
9 It counts because it -- it aids the -- the
10 terrorist enterprise. That's the -- that's the
11 formula that we're advocating.

12 JUSTICE JACKSON: But what --

13 JUSTICE BARRETT: Because he uses it
14 to make calls to other associates and to -- to
15 fundraise and that sort of thing, so he uses the
16 phone for other things that are unconnected to
17 the act, and you're saying that's enough?

18 MR. SCHNAPPER: Yes, and -- and --

19 JUSTICE JACKSON: But would you have
20 to allege that, or could you just say you -- I
21 mean, does the complaint have to show -- so
22 let's say the complaint doesn't say he used it
23 in the particular act. Would you have to have
24 allegations that the phone was used to call
25 associates and other things, or is it just

1 enough that we -- that you know Osama bin Laden
2 is a terrorist and you allege that this phone
3 was sold to him?

4 MR. SCHNAPPER: In terms of -- in
5 terms of what you need to prove, you need it,
6 but to answer it in terms of pleading -- in
7 terms of pleading --

8 JUSTICE JACKSON: Mm-hmm.

9 MR. SCHNAPPER: -- Rule 9 requires
10 pleading with particularity about fraud, not
11 other things. The general -- the courts have
12 handed down a number of decisions, in Leatherman
13 and Swierkiewicz, disclaiming the notion that
14 additional rules of particularity of pleading
15 should be required. There are other procedural
16 methods for -- for -- for bringing all of that
17 out.

18 But the -- the general trend in
19 pleadings since the abolition of the Field Code
20 is not to require specific allegations of that
21 sort.

22 It might be deficient given the
23 overall context.

24 JUSTICE BARRETT: But wouldn't you
25 still have to allege, in Justice Jackson's

1 hypothetical, that he used the phone in
2 furtherance of terrorist activities? You
3 couldn't just say he sold him a cell phone and
4 have that be enough.

5 MR. SCHNAPPER: You -- you would
6 probably need to say that, although it would be
7 fairly implicit in his name, but, yes, but --
8 but true, I think that would be the -- that
9 would be the better way to -- to plead it.

10 But, if I could follow up on a
11 question that you asked, one of the points the
12 government officials have made in testimony,
13 some of which we've quoted, is that of the
14 overall cost of running a terrorist
15 organization. The cost of a particular attack
16 is a very small part. Running terrorist
17 organizations is very expensive. It involves
18 fundraising. There are lots of salaries.
19 There's travel. There's bribery. There's
20 forging documents.

21 That's why it's so important that the
22 Court hold that the entire enterprise being
23 aided matters. If you -- if you -- if you limit
24 the aid that matters to the tip of the sphere,
25 you've -- you've written out of the statute

1 almost all the assistance that matters, and you
2 shouldn't do that in our view.

3 CHIEF JUSTICE ROBERTS: Counsel, I
4 understand you to have abandoned the claim
5 against Google based on its failure to remove
6 ISIS material, but you haven't done that in this
7 case with respect to Twitter?

8 MR. SCHNAPPER: We -- we're not
9 advancing that view. That's because of the
10 procedural posture of the case, which is it
11 wasn't decided on 230 grounds, it was decided on
12 aiding-and-abetting grounds. The 230 issue was
13 then remanded. We just never got there. So it
14 just hasn't come up.

15 But -- but we would not be advancing
16 that argument on remand, to be clear.

17 CHIEF JUSTICE ROBERTS: Okay.

18 JUSTICE SOTOMAYOR: So what argument
19 -- what argument are you advancing? Meaning
20 what's the aiding and abetting if it's not the
21 failure to remove?

22 MR. SCHNAPPER: The aiding and
23 abetting would be the various recommendation
24 functions that we talked about yesterday.
25 They're -- they're different for different

1 entities. But -- but the distinction between
2 affirmatively recommending as opposed to just
3 posting, we think that's the distinction that
4 the statute draws.

5 I -- I think I owe you a few more
6 answers. Justice Gorsuch, you asked whether
7 the -- the answer to the case could be found in
8 treating the word "person" as referring only to
9 the individuals. And -- and we think the answer
10 to that is no.

11 The -- the purpose of, you know,
12 invoking the Dictionary Act was to make it clear
13 that a terrorist organization could be the
14 person who would be covered by the statute. And
15 I -- I should note that the statute itself,
16 before we get to those last words, talks about
17 one of the -- one of the premise acts that has
18 to have occurred is authorization, planning, or
19 committing the act by a terrorist group.

20 This is an act that was committed by
21 the terrorist group. They didn't have a passing
22 role. They selected Masharipov. They sent him
23 to Istanbul. They told him to wait as a sleeper
24 agent. They apparently supported him while he
25 was there. Somebody brought him a gun and stun

1 grenades. And then the -- the evening of the
2 attack, a few days before the attack, he was
3 told the attack's going to be on New Year's Eve,
4 and there was communication back and forth.
5 They were --

6 JUSTICE GORSUCH: Mr. Schnapper, if I
7 might --

8 MR. SCHNAPPER: Yes.

9 JUSTICE GORSUCH: -- since you raised
10 that point, you know, the statute, again, I -- I
11 do think focuses our attention on who aids and
12 abets the person who committed such an act of
13 international terrorism, but it doesn't -- it
14 doesn't just focus us on the person, though
15 that's helpful and it narrows things. It also
16 says you must knowingly provide substantial
17 assistance.

18 So it -- it does two things. It
19 focuses on the person and it focuses on the mens
20 rea and then it focuses on the actus reus about
21 substantial assistance.

22 So I see all three of those things,
23 not just the person, but all three of those
24 things in the statute. And, again, I'm -- I'm
25 just struggling with how -- how your -- your

1 complaint lines up with those three requirements
2 in the statute.

3 MR. SCHNAPPER: Thank you. Let me
4 begin by responding to a point you made earlier
5 because this is relevant here, where you
6 expressed the hope that one could put aside the
7 complicated formula in Halberstam and just use
8 the text of the statute.

9 As we turn to the issue of what does
10 knowing mean and what does substantial
11 assistance mean, that's where we need to go to
12 Halberstam. And it's a complicated assessment.

13 And so, in -- in terms of substantial
14 assistance, one would need to walk through each
15 of the six elements on the Halberstam list and
16 assess them individually.

17 And I could walk you through that in
18 -- in this case in terms of what we think the
19 facts are, but I think you're just asking about
20 the methodology, and that's what -- what we
21 believe the correct methodology to be.

22 JUSTICE KAVANAUGH: What -- what do
23 you say to the argument about the charitable and
24 humanitarian organizations? So I think one of
25 the arguments that the -- as pointed out by Mr.

1 Waxman and Mr. Kneedler and some of the amicus
2 briefs, is that humanitarian and charitable
3 organizations are going to be caught up in this.

4 And I think one of the background
5 points about aiding-and-abetting liability is
6 it's not -- moral complicity is different from
7 legal liability. There might be moral
8 complicity without necessarily legal liability,
9 and we want to have fair notice for major
10 sanctions, civil or criminal.

11 MR. SCHNAPPER: Right.

12 JUSTICE KAVANAUGH: And that fair
13 notice for these humanitarian organizations is
14 not present under your theory and they could be
15 swept up in that. That's at least the statement
16 on the other side, which appears sincere to me
17 from the amicus briefs.

18 So how do you respond to that?

19 MR. SCHNAPPER: First of all, let me
20 just say I take all the representations of the
21 amicus briefs to be sincere. The -- the
22 specific elements of the statute will normally
23 protect a charitable organization. So let's
24 start with the requirement of knowledge and --
25 and look at the -- the type of knowledge alleged

1 in this case.

2 If -- if -- let me just take a --
3 let's assume a hypothetical charitable
4 organization, and, first, there are reports on
5 four networks that they're providing assistance
6 to ISIS, and then there are reports in all the
7 major newspapers in the United States that
8 that's happening.

9 And then there comes a time, and the
10 complaint alleges this happened, in which the
11 attorney general, the director of the FBI, the
12 director of national intelligence, and the White
13 House chief of staff meet with the officials of
14 the -- of the NGO and tell them they're
15 asserting ISIS -- they're assisting ISIS.

16 That would satisfy knowledge. And
17 those are obviously extreme facts. And -- and
18 it would be appropriate in -- in assessing these
19 cases to consider the kinds of circumstances
20 that NGOs would face.

21 And I think it's very relevant to --
22 to -- to the state of mind issue. The -- the --
23 our view is that the state of mind here is
24 highly culpable. And I would use the language,
25 I've forgotten who used it earlier, of -- of

1 willful blindness, and, again, I say there's a
2 factual dispute about what's happening.

3 But our contention is that the policy
4 was not to look at all. And there's a -- in --
5 in the brief of the Concerned Women for America,
6 there's an extraordinary quote from Twitter, and
7 it -- and it was made three months after two
8 Americans were executed by ISIS. And when asked
9 why Twitter wasn't taking down ISIS materials,
10 the comment was: Well, one man's terrorist is
11 another man's freedom fighter.

12 Now I think, if a -- if a charitable
13 organization had that knowledge and had that
14 attitude, they should be held liable.

15 JUSTICE JACKSON: Can I just ask you,
16 Mr. Schnapper, before we run out of time, I
17 guess I don't know why Halberstam helps your
18 argument that it's enough to support the
19 enterprise.

20 I know that they use the word
21 "enterprise," but when you look at the actual
22 case, they're talking about the criminal
23 enterprise. It wasn't as though she was
24 assisting Welch or whatever the name of the guy
25 was with, you know, laundry and children, you

1 know, child support and she was helping him to
2 raise money for some other thing. That would
3 have been supporting the enterprise. But she
4 was actually engaged in conduct that supported
5 the criminal activity.

6 And yet you seem to be arguing that
7 looking at that case, it would be enough for,
8 you know, the cell phone to be sold to Osama bin
9 Laden with some knowledge that it might be used
10 generally by his -- himself or his compatriots,
11 as opposed to, you know, this is actually going
12 to be involved in a terrorist attack, which is
13 the kind of thing that was going on in
14 Halberstam.

15 So can you clear up?

16 MR. SCHNAPPER: Yes. So the -- the
17 word Halberstam -- the word "enterprise" in
18 Halberstam is used to refer to a -- a wrongful
19 enterprise because it's proceeding as a tort
20 case and -- but -- but not to refer to other
21 kinds of assistance the court draws that
22 distinction.

23 We -- we would make that distinction
24 here, that is to say, if -- that insofar as
25 social media -- bearing in mind the

1 recommendation qualification here -- is
2 assisting ISIS in its terrorist enterprise,
3 that's what's covered, the -- and -- and --
4 and -- and that's the -- that's the claim we're
5 making here. So I think that there's --

6 JUSTICE JACKSON: I don't understand.
7 I -- I mean, wouldn't -- wouldn't, in the Welch
8 case, you know, her taking care of his children
9 be assisting him so that he doesn't have to be
10 at home at night? He's actually out committing
11 robberies. She would be assisting his, you
12 know, illegal activities, but I understood that
13 what made her liable in this situation is that
14 the assistance that she was providing was, you
15 know, assistance that was directly aimed at the
16 criminal activity. It was not sort of this
17 indirect supporting him so that he can actually
18 engage in the criminal activity.

19 MR. SCHNAPPER: I'm not entirely sure
20 where I'm disagreeing with you, but -- but let
21 me see if this is helpful. I'm not sure it will
22 be.

23 The -- the -- the assistance she was
24 playing was not in the commission of any of the
25 burglaries. Her role was in helping to sell the

1 loot and keeping the books. The books were
2 apparently kept in a perfectly straightforward
3 way. There was nothing unusual about it, except
4 there were no expenses for the --

5 JUSTICE JACKSON: Right. That's the
6 -- that's the essence of aiding and abetting.

7 MR. SCHNAPPER: Right.

8 JUSTICE JACKSON: All right. So we
9 know she wasn't a principal. She wasn't
10 actually --

11 MR. SCHNAPPER: Yes.

12 JUSTICE JACKSON: -- committing the
13 robbers --

14 MR. SCHNAPPER: Right.

15 JUSTICE JACKSON: -- robberies. She
16 was an aider and abettor. The question is, what
17 does your aid have to go to? And they seem to
18 be saying your aid has to go to the act that is
19 the thing that injures the plaintiff, right, the
20 Reina attack.

21 You seem to be saying that the aid has
22 to go to or can go to the larger set of
23 activities, illegal --

24 MR. SCHNAPPER: Yes.

25 JUSTICE JACKSON: -- terrorist

1 activities --

2 MR. SCHNAPPER: Yes.

3 JUSTICE JACKSON: -- but not
4 necessarily the act. And I -- I don't know that
5 Halberstam helps you as much as you may think
6 because she was in that case aiding in the act
7 of the burglaries that, you know, injured the
8 people whose money and things were stolen.

9 MR. SCHNAPPER: I wouldn't
10 characterize what happened that way, but -- but
11 I -- I'm a little concerned that this is going
12 to seem semantic. She was not -- she didn't do
13 anything to assist the commission of a burglary.
14 Her role was only after the fact.

15 JUSTICE JACKSON: I think we may
16 disagree. I mean, that's why she was an aider
17 and abettor. She wasn't a principal. Right.
18 She didn't -- she didn't assist the burglaries
19 in that sense, but she assisted them insofar as
20 she, as Mr. Waxman said, took the stuff, wrote
21 up inventories -- I mean, she was assisting the
22 burglaries, right?

23 MR. SCHNAPPER: Again, at the risk --
24 I'm -- I'm not feeling this is responsive.
25 No -- no act that occurred by -- by Welch was

1 aided by anything she did. He was not better
2 able to do any of it.

3 And to go back to the issue of
4 principal, I mean, the -- if -- if she had said
5 I'll buy you some new burglary tools, or how
6 about picking the Halberstam case -- house
7 tomorrow, I think they've got a lot of money,
8 that would have --

9 JUSTICE JACKSON: Or how about when
10 you bring the loot home, I'll write down the --
11 the things that you have and make sure that it's
12 all recorded properly so that we know what you
13 brought home?

14 MR. SCHNAPPER: It -- it's helpful to
15 the enterprise, but it doesn't -- it doesn't
16 make him better able to commit the burglary.
17 And I think that's the distinction they're
18 trying to advance.

19 If the Court has no further questions?

20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas?

22 JUSTICE THOMAS: The -- in paragraph
23 30 of your first amended complaint, you say
24 "Plaintiff's claims are based not upon the
25 content of ISIS's social media postings but upon

1 Defendants' provision of the infrastructure
2 which provides material support to ISIS."

3 What does that mean?

4 MR. SCHNAPPER: Well, I don't think at
5 this -- when this was written, it's trying to
6 parse out the distinction we're now making in
7 terms of the role, but I think the -- the thrust
8 of that -- of that was to be that insofar as an
9 assertion was being made against the social
10 media companies, is that they were helping to
11 propagate that content. The argument is we're
12 not trying to hold you liable merely because
13 there's content there but because you helped to
14 propagate it.

15 Now -- now we would draw a more fine
16 distinction, but -- but I think that's the --
17 the thrust of that paragraph.

18 JUSTICE THOMAS: So you're not
19 pointing to -- the thrust that I understand is
20 that you're not pointing to specific instances
21 of this; you're -- just a general idea that
22 they're using the service to their -- to their
23 advantage, to ISIS's advantage?

24 MR. SCHNAPPER: Yes. Let me give you
25 a more fulsome answer to that. One of the

1 arguments that the defendant makes is it's not
2 enough to allege that there were 50- or 70- or
3 90,000 ISIS accounts. You have to name some.
4 We do not think that the Federal Rules of Civil
5 Procedure require that.

6 Indeed, the whole gravamen of the
7 problem here was that it was possible to
8 identify tens of thousands of these, and they
9 weren't doing -- but -- but they weren't using
10 that capacity. There was one instance in which
11 the hacker group Anonymous took down several
12 thousand ISIS accounts at Twitter.

13 Now the -- the complaint doesn't name
14 -- doesn't give you the URLs of the accounts,
15 but I don't think the federal rules require
16 that.

17 JUSTICE THOMAS: So --

18 MR. SCHNAPPER: The allegation isn't
19 any less plausible because it doesn't name URLs.

20 JUSTICE THOMAS: But on the -- but
21 does it also mean -- the fact that you are
22 focused on the infrastructure rather than
23 specific conduct or specific accounts, does that
24 also mean that Twitter could be held liable --
25 Twitter is the aid -- is an aider and abettor in

1 every terrorist act -- terrorist act?

2 MR. SCHNAPPER: That's -- that's a --
3 that's a somewhat different question, so let me
4 -- let me address that.

5 JUSTICE THOMAS: Well, I think the
6 reason I'm asking is, if we're not pinpointing
7 cause and effect or proximate cause for specific
8 things, then -- and you're focused on
9 infrastructure or just the availability of -- of
10 -- of -- of these platforms, then it would seem
11 that every terrorist act that uses this platform
12 would also mean that Twitter is a -- an aider
13 and abettor in those instances?

14 MR. SCHNAPPER: I think, as you phrase
15 it, the answer would probably be yes, and they
16 would agree the way you phrased it. Let me
17 phrase it a little differently, because I
18 understand the point you're trying to make.

19 I -- I think their view is if -- as to
20 any -- is if in every single instance in which
21 you could point to, ISIS using Twitter to commit
22 the attack, would they be liable, I think my --
23 my friend would say yes.

24 We're advancing a different argument,
25 and I think this is the thrust of where your --

1 your concern is -- is directed, which is that if
2 our claim is based on providing generalized
3 assistance to the terrorist enterprise, where
4 does that end?

5 And let me say that that's not a
6 question that arises merely under our standard.
7 It arises under the government's standard
8 because the government's formula on page 34
9 includes channeling, directly channeling,
10 substantial amounts of money to ISIS, and the
11 exact same problem would arise there.

12 We think that the appropriate way of
13 addressing that situation is to understand the
14 remoteness issue in -- standard in Halberstam to
15 refer not merely to remoteness in -- in space
16 but to remoteness in time, and that would have
17 been true in -- in the Halberstam case.

18 If -- if there came a point when
19 Hamilton stopped doing the books, let's say,
20 Quicken came along and Welch wasn't using her
21 assistance anymore, there would come a point
22 when it had been too long since she was playing
23 much of a role and she would no longer be
24 liable.

25 So we -- we would suggest -- we would

1 suggest that the standard include remoteness in
2 time, weighed together with the volume of
3 activity, and that -- that would address that
4 problem.

5 And we would suggest, if you use some
6 variant of the government's standard, you -- you
7 include that there as well because it presents
8 the same problem.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: Let's say that a
11 particular person is known in a particular city
12 to be a member of a gang that carries out --
13 carries out crimes. Not charged, hasn't -- they
14 haven't -- prosecution hasn't been able to amass
15 enough proof for a criminal charge, but it's
16 pretty well-known, suspected that that's what
17 this person is doing.

18 The chief of police from the town goes
19 to the cell phone provider and says, look, this
20 gang uses cell phones in carrying out their
21 crimes, cut off their service, goes to the
22 Internet service provider and says that
23 sometimes they use e-mails, cut off the e-mail,
24 goes to the car dealers and -- and repair shops
25 and says they use cars, don't fix their cars,

1 goes to all the gas stations and says don't sell
2 them gas. On Wednesday evening, the -- the gang
3 gets together and they always order in meals
4 from a particular place. They go there. They
5 say don't feed them food.

6 Are they -- are they -- have they
7 aided and abetted the crimes that this gang
8 commits?

9 MR. SCHNAPPER: I -- I think it's
10 probably -- the answer is probably going to
11 depend on the nature of -- of the materials.
12 So, unfortunately, this is difficult, but let's
13 say that the first person on their list is a gun
14 dealer, and the gun dealer is told this person
15 is -- is -- we -- we think this person is an
16 assassin and he's looking for weapons.

17 And they -- and -- and they sell him a
18 -- a gun. They -- that -- that might be aiding
19 and abetting. At the far end of things,
20 take-out Chinese food, no, it's not really
21 connected particularly to the -- to the offense.

22 I -- I think that's a difficult
23 question. But -- but, clearly, at one end of
24 the spectrum, if you sell guns -- and this goes
25 back to Justice Thomas's question. If you

1 provide a gun to someone who you know is a
2 murderer, I think you could be held liable for
3 aiding and abetting.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 Justice Kagan?

7 Justice Gorsuch?

8 JUSTICE GORSUCH: No, thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: No.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 Justice Jackson?

15 Thank you, counsel.

16 MR. SCHNAPPER: Thank you very much.

17 CHIEF JUSTICE ROBERTS: Three minutes
18 for rebuttal, Mr. Waxman.

19 REBUTTAL ARGUMENT OF SETH P. WAXMAN

20 ON BEHALF OF THE PETITIONER

21 MR. WAXMAN: Thank you.

22 So guns and banks is what seems to be,
23 you know, most of the hypotheticals here. And
24 I -- I want to go to -- to Justice Kagan's
25 question about the bank and know your customer

1 and what your customer is doing, but I'm going
2 to start -- because there are special know your
3 customer rules involving banks, I want to start
4 with guns and the -- the -- the point that my
5 friend just brought up about somebody walks into
6 a gun store and says: I hate my wife, please
7 sell me a Glock. I'm going to kill my wife,
8 please sell me a Glock.

9 Obviously, he takes the Glock. If he
10 buys the Glock and never kills his wife, there's
11 no aiding and abetting any crime. If he buys
12 the gun and kills his wife, there obviously is.

13 Walmart is the largest gun dealer, I
14 believe, in the United States. They know for a
15 certainty that some of the people that buy guns
16 are criminals. Some of them are drug gangs.
17 Some of them are terrorists. Nobody would say
18 -- but they don't know anybody in particular.

19 They know that they're there. There's
20 been a newspaper report. The State Department
21 has issued a pronouncement. Nobody would say
22 that they are aiding and abetting particular
23 crimes that happen to be committed by somebody
24 who bought a gun at Walmart.

25 Now, in the bank example, I think the

1 key point as I understood it at -- at least,
2 Justice Kagan, between your colloquy with --
3 with my friend, Mr. Kneeder, was somebody comes
4 into the bank and says -- and either comes in or
5 comes in online or by Zoom. The banker knows
6 this guy is a terrorist, that is, a terrorist in
7 the sense that this person commits acts of
8 international terrorism.

9 And the guy says, love the checking
10 account services you've provided me, I've got a
11 cash flow issue with the thing that I do, please
12 lend me a million dollars. Okay. That's a case
13 in which certainly you would survive a motion to
14 dismiss on the notion that you know this guy
15 commits acts of international terrorism.

16 He has asked you for what he says he
17 needs to "keep doing his thing." That is
18 materially different than a situation in which
19 the bank has 100,000 customers, it knows to a
20 certainty that some of its customers are
21 terrorists and they are making use of the -- the
22 general services that a bank provides. Maybe
23 it's a bank that does business in the Middle
24 East. They are not aiding and abetting an act
25 of terrorism that that bank occurs.

1 Now, according to my friend today, he
2 says, well, this case isn't about the failure to
3 do better at taking things down. This is about
4 recommendations.

5 There are 545 paragraphs in this
6 complaint, and there are four that mention
7 recommendations, each one of which is
8 essentially the sort of neutral algorithm that
9 was talked about before.

10 I see I've come to the end of my
11 sentence.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 12:45 p.m., the case
15 was submitted.)

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Official

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