No. 21-1496

In The Supreme Court of the United States

TWITTER, INC.,

Petitioner,

v.

MEHIER TAAMNEH, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2333 provides in pertinent part:

(a) Action and jurisdiction.—Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

* * *

(d) Liability.—

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

(2) Liability.—In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

Section 2 of Pub. L. 144-222, 130 Stat. 852, provides:

> SEC. 2. FINDINGS AND PURPOSE.
>
> (a) FINDINGS.—Congress finds the following:
>
> (1) International terrorism is a serious and deadly problem that threatens the vital interests of the United States.
>
> (2) International terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States.
>
> (3) Some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States.
>
> (4) It is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code.
>
> (5) The decision of the United States Court of Appeals for the District of Columbia in Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework

for how such liability should function in the context of chapter 113B of title 18, United States Code.

(6) Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

(7) The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.

(b) PURPOSE.—The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations

or persons that engage in terrorist activities against the United States.

STATEMENT

The Complaint

This case arises from a terrorist attack on the Reina nightclub in Istanbul, Turkey, by Abdulkadir Masharipov, an individual affiliated with and trained by ISIS. On January 1, 2017, Masharipov carried out a shooting massacre, firing 120 rounds into the crowd of 700 people, killing 39 and injuring 69 others. On the day of the attack, ISIS issued a statement claiming responsibility for the killings.

This action was commenced by the relatives of Nawras Alassaf, a Jordanian citizen who was killed during the attack. The plaintiffs, all United States citizens, brought this action against three major social media companies, Twitter, Facebook and Google (which owns YouTube). The complaint alleged, inter alia, that the defendants had aided and abetted ISIS, and that their actions was a cause of Alassaf's death. The plaintiffs asserted that the defendants were liable under the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016). JASTA amended the Anti Terrorism Act (ATA), to impose liability for aiding and abetting certain terrorist acts. 18 U.S.C. § 2333(d)(2). The complaint set out a series of highly detailed allegations regarding the actions of the defendants, many of them documented with footnotes

to a variety of public sources, and included a series of screen shots of ISIS materials posted on Twitter, Facebook and Google. Examples of those screen shots are set out in the appendix to this brief.

The complaint alleged that assistance provided by the defendants' platforms had "played an essential role in the rise of ISIS to become the most feared terrorist organization in the world." First Amended Complaint ("FAC"), ¶ 160. "Without Defendants Twitter, Facebook, and Google (YouTube), the explosive growth of ISIS over the last few years into the most feared terrorist group in the world would not have been possible." FAC ¶ 13. "Defendants' services allow ISIS to carry out its terrorist activities, including recruiting, radicalizing, and instructing terrorists, raising funds, and creating fear." FAC ¶ 333. The complaint asserted that "[t]hrough its use of YouTube and other social media, ISIS has recruited more than 30,000 foreign recruits since 2014...." FAC ¶ 278. It described in detail the elaborate media operations established by ISIS to create videos and other materials to be posted on the defendants' websites, and elsewhere. FAC ¶¶ 239-252. The plaintiffs further alleged that the defendants had increased the visibility and impact of the ISIS videos and other ISIS content by recommending them to users. FAC ¶¶ 445, 459, 460. The attack on the Istanbul nightclub, and the killing of Alassaf, the complaint asserted, were the "direct, foreseeable and proximate result" of the defendants' actions. FAC ¶ 492; *see* FAC ¶¶ 530, 535, 536.

The complaint specifically alleged that the defendants knew that they were assisting the terrorist activities of ISIS,[1] and included several types of detailed allegations which indicated that knowledge.

The complaint identified 27 specific dated instances between 2014 and 2016 in which government officials, the media or private organizations called attention to the large amount of terrorist materials on defendants' platforms, often referring to ISIS specifically.[2] The defendants were alerted to the fact that they were assisting terrorist organizations in this way by the governments of the United States and Great Britain, and by the New York Times, Washington Post, Washington Times, Wall Street Journal, Time, NBC, CBS, CNN and the BBC.[3] Public hearings about the problem were held by committees of the House of Representatives and the House of Commons.[4] A 2016 Report of the Home Affairs Committee of the House of Commons concluded that "[s]ocial media companies are consciously failing to combat the use of their sites to promote terrorism and killings. Networks like Facebook Twitter and YouTube are the vehicle of choice in spreading propaganda and they have become the recruiting platforms for terrorism." FAC ¶ 489.

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[1] FAC ¶¶ 398, 402, 506, 509, 514, 521, 524.

[2] FAC ¶¶ 198-209, 211, 220-23, 407-08, 412, 416-22, 489.

[3] *Id.*

[4] FAC ¶ 408.

The complaint also asserted that it was the policies of the defendants to *not* scrutinize materials posted on their websites to identify and remove terrorist materials, but to act only if and when a third party identified a specific account or video as originating from ISIS or otherwise promoting terrorism. At a 2013 hearing of the Home Affairs Committee of the House of Commons,

> [t]he Google representative admitted that ... Google did not actively guard against terrorists' use of the YouTube platform and services.... Rather, the Google representatives testified that Google only reviews a video posted on YouTube if it receives a complaint from a YouTube user....

FAC ¶¶ 408-09.

> Prior to the Reina Attack, Defendants refused to actively monitor its online social media networks, including Facebook, Twitter, and YouTube, to block ISIS's use of Defendants' Services. Instead, Defendants knowingly permitted ISIS and ISIS's members and affiliates to use Defendants' platforms and other services, and generally only reviewed ISIS's use of its Services in response to third party complaints.

FAC ¶ 402. "The Taamneh Plaintiffs allege that Twitter has the ability to remove tweets and accounts, but does not do so proactively. Instead, Twitter reviews content that is reported by others as violating its rules." App. 10a.

The complaint also asserted that the defendants could easily have identified the ISIS materials on their own websites, had they attempted to do so. FAC ¶¶ 155, 157, 159, 276, 278, 294, 296, 303, 310, 435, 445, 463, 467, 470, 471, 472, 482-84. It noted that the ISIS materials were actually located in the defendants' own computer equipment. FAC ¶¶ 455, 456. The terrorist purpose and function of the ISIS materials was evident from its content, as illustrated by the screen shots included in the complaint. FAC ¶¶ 155, 157, 159, 276, 294, 296, 278, 303, 310, 435, 445. In a number of instances, accounts were expressly established in the name of ISIS, or of one of its subsidiary components. FAC ¶¶ 14, 15, 17, 399. Identifying the ISIS materials was sufficiently easy, the complaint pointed out, that in 2015 the hacking group Anonymous had taken down several thousand ISIS Twitter accounts. "That an external party could identify and disrupt ISIS Twitter accounts," the complaint asserted, "confirms that Twitter itself could have prevented or substantially limited ISIS's use of Twitter." FAC ¶ 486. More generally, the complaint asserted, "Defendants have tools [with] which it can identify, flag, review and remove ISIS accounts." FAC ¶ 463.

Proceedings Below

The district court dismissed the complaint for failure to state a claim. It reasoned, first, that section 2333(d)(2) requires that a defendant in some specific way have aided and abetted the particular terrorist attack at issue; the complaint was deficient, the district

court concluded, because it only alleged that the defendants had aided and abetted ISIS as an organization. App. 173a-175a. Second, and relatedly, the district court concluded that the complaint failed to allege that the defendants had the requisite knowledge. Even if the defendants knew that they were assisting ISIS to recruit terrorists, raise funds, or spread propaganda. that was not enough. The complaint was deficient because it did not allege that the defendants knew that ISIS was using their platforms "to communicate specific plans to carry out terrorist attacks." App. 176a-177a.

The court of appeals concluded that the complaint adequately alleged that the defendants knew that they were assisting ISIS, and that such general awareness was sufficient under section 2333(d)(2). The opinion pointed to allegations that the government, media reports, and private organizations had for years expressly and repeatedly warned the defendants that they were assisting ISIS and other foreign terrorist organizations.

> The Taamneh Plaintiffs' complaint alleges that ISIS and its affiliated entities have used YouTube, Twitter, and Facebook for many years with "little or no interference." "Despite extensive media coverage, complaints, legal warnings, petitions, congressional hearings, and other attention for providing [their] online social media platforms and communications services to ISIS, ... Defendants continued to provide these resources and services to ISIS and its affiliates."

App. 10a-11a; *see* App. 62a.

The panel noted that the method of assistance alleged was permitting ISIS and other terrorist organizations to post on social media sites maintained by the defendants content that expressly promoted terrorist activity. App. 10a, 11a, 61a-62a, 65a ("ISIS-affiliated accounts content," "ISIS's YouTube videos"). ISIS and its supporters did so by creating text, videos and audios, and uploading them to the defendants' computers, where that material was accessible to the public (and to the defendants themselves). The opinion described the types of content that was apparent on the face of the terrorist material posted on the defendants' sites. "[T]he *Taamneh* complaint alleges that ISIS uses defendants' social medial platforms to recruit members, issue terrorist threats, spread propaganda, instill fear, and intimidate civilian population." App. 10a; *see* App. 62a ("to solicit donations").

The panel pointed out that the complaint alleged that, despite all these public warnings about terrorist materials on their website, it was the policy of the defendants to make no effort to review their own websites (and computers) for terrorist materials, but to act only if and when they received a complaint about a particular account or posting. "The Taamneh Plaintiffs allege that ... defendants ... refus[e] to actively identify ISIS's Twitter, Facebook, and YouTube accounts, and 'only review[ ] accounts reported by other social media users.'" App. 61a-62a; *see* App. 10a-11a.

The court of appeals also held that section 2333(d)(2) did not require that the defendants have provided specific assistance for the Reina attack.

"[T]he act encouraged is ISIS's terrorism campaign, and the FAC alleges that this enterprise was heavily dependent on social media platforms to recruit members, to raise funds, and to disseminate propaganda." App. 63a.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Conflict Regarding The Knowledge Requirement of Section 2333(d)(2)

Petitioner asserts that the Ninth Circuit decision conflicts with decisions in other circuits because the Ninth Circuit "eliminated any meaningful knowledge requirement." Pet. 15. That is not an accurate characterization of the decision below. Petitioner suggests that the court of appeals held that a defendant can be deemed to know that it is assisting a terrorist organization even though the defendant is taking "aggressive" and "meaningful" steps to avoid doing so; the opinion below simply does not say that. Petitioner also contends that the Ninth Circuit eliminated any significant knowledge requirement because it held sufficient a complaint that is devoid of any evidence of such knowledge; but petitioner's description of the complaint simply ignores the critical allegations addressing that issue and that were cited by the court of appeals.

A. Petitioner repeatedly describes the Ninth Circuit as having held that knowledge can be established merely by asserting that a defendant could have been

more aggressive, or could have taken more meaningful actions, to remove terrorist content. If the court of appeals' opinion had been framed in that way, it would have at least implicitly acknowledged that the defendants *had* actually taken aggressive and meaningful actions to avoid assisting ISIS. A defendant that indeed diligently sought to exclude ISIS material from its website might well not know that its efforts had failed.

But this argument mischaracterizes the actual holding, and wording, of the Ninth Circuit decision. The five instances in which the petition so describes the decision of the court of appeals are as follows:

> [The question presented is] [w]hether a defendant ... 'knowingly' provided substantial assistance under section 2333 merely because it allegedly could have taken more "meaningful" or "aggressive" action to prevent such use? (Pet. i).
>
> According to the Ninth Circuit, Defendants nonetheless possessed the requisite scienter because ... Defendants' efforts to remove terrorist content allegedly could have been more "meaningful" and "aggressive." (Pet. 3).
>
> Defendants did not "knowingly' assist ISIS simply because their undisputed efforts ... allegedly could have been more "meaningful" or "aggressive." (Pet. 14-15).
>
> The Ninth Circuit held that Plaintiffs plausibly alleged the requisite knowledge merely because their complaint alleges that ... Defendants' acknowledged efforts to prevent

> such use could have been more "meaningful." (Pet. 15-16).
>
> The Ninth Circuit's h[e]ld[ ] that the statute's knowledge requirement may be satisfied even when a defendant is accused only **o**f being insufficiently aggressive in its efforts to exclude terrorist adherents from the vast population of users of its generic service.... (Pet. 20).

Note that the words "meaningful" and "aggressive" are actual quotations, but the key term "more" (and "insufficiently") is never in quotation marks.

The petition is worded that way because the word "more" (and "insufficiently") simply is not in cited portion of the Ninth Circuit opinion. The decision below, far from acknowledging that the defendants took meaningful and aggressive action, instead (correctly) describes the complaint it upheld as expressly denying that the defendants took any meaningful steps or ever acted aggressively to prevent ISIS from using their platforms. The portion of that decision cited by the petition emphasizes that the complaint asserted there was *no* meaningful or aggressive action, not that there was some such action but could have been more.

> These allegations suggest the defendants, after years of media coverage and legal and government pressure concerning ISIS's use of their platforms, were generally aware they were playing an important role in ISIS's terrorism enterprise by providing access to their platforms and *not taking* aggressive measures to restrict ISIS-affiliated content.... The Taamneh

> Plaintiffs' complaint alleges that each defendant has been aware of ISIS's use of their respective social media platforms for many years—through media reports, statements from U.S. government officials, and threatened lawsuits—but have *refused to take meaningful* steps to prevent that use.

App. 62a (emphasis added). A defendant's failure to take meaningful steps to prevent ISIS from posting terrorist material could of course support an inference that it knew the posting of such material would be the result of its inaction.

Similarly, the petition describes the complaint as seeking to impose liability "on Defendants for allegedly not taking sufficiently 'meaningful action to stop' ISIS...." Pet. 9. But "sufficiently" is not in quotation remarks, and the cited paragraph of the Amended Complaint actually asserts that the defendants took *no* such action. "For years, the media has reported on the ISIS's use of Defendants' social media sites and their *refusal to take* any meaningful action to stop it." C.A.E.R. 108, ¶ 197 (emphasis added). The petition also refers to the "Plaintiffs' 'failure to do more' theory that the Ninth Circuit deemed sufficient." Pet. 19 n.4. But the quoted phrase "failure to do more" is not accompanied by a record citation; this is petitioner's own (mis)characterization of plaintiffs' claim, not an actual quotation from the complaint or any brief.

B. Petitioner suggests that the Ninth Circuit has eliminated any meaningful knowledge requirement because the allegations of the complaint—as described

by petitioner—lacked any assertions that could possibly support a finding that the defendants knew they were aiding ISIS by permitting ISIS to post terrorist materials on their websites and by recommending such content to users. That contention simply ignores the key allegations of the complaint.

Petitioner asserts that the Ninth Circuit grounded its finding of the requisite scienter on an allegation that "third parties had reported that some ISIS supporters were somewhere among the billions of individuals who used Defendants' platforms." Pet. 3; *see* Pet. 15-16. Petitioners repeated reference to unnamed (by petitioner) "third parties" invites the Court to assume the reports were from some unknown anonymous source, or perhaps from a known purveyor of falsehoods, such as QAnon. In fact, the "third parties" were officials of the United States and British governments, and virtually every major media source in the United States. This is essentially the opposite of the situation in *Weiss v. National Westminster Bank, PLC*, 993 F.3d 144 (2d Cir. 2021) and *Strauss v. Credit Lyonnais, S.A.*, 842 Fed.Appx. 701 (2d Cir. 2021) (mem.), where, as the Solicitor General pointed out, the defendants had been reassured by the British and French governments, respectively, that they were not dealing with terrorist organizations. U.S. Amicus Br., Nos. 21-381 & 21-382, 16 (in *Weiss*, "'British authorities * * * condoned NatWest's relationship with Interpal' after finding insufficient evidence that Interpal funded Hamas's political or violent activities"), 18 (in *Strauss*, "French authorities found insufficient evidence that CBSP committed

any offense"). Petitioner acknowledges that the Second and District of Columbia Circuits have grounded a finding of knowledge in part on such credible public reports. Pet. 18-19. *Kaplan v. Lebanese Canadian Bank*, 999 F.3d 842, 865 (2d Cir. 2021), relied on a United Nations report, and *Atchley v. AstraZeneka UK Limited*, 22 F.4th 204, 221 (D.C. Cir. 2022), relied on public reports.

The petition asserts that there were "undisputed efforts to detect ... terrorists ... using" the defendants' platforms. Pet. 14-15; *see* Pet. i (describing the defendants as "'regularly' work[ing] to detect ... terrorists ... using [the defendant's services]"), 8 (describing anyone posting terrorist content as having "evaded Defendants' enforcement of [its] rules").[5] To the contrary, the complaint specifically alleges that the defendants did not attempt to "detect" such usage by terrorists at all, but instead took no action unless someone else detected a terrorist account or posting and told the relevant defendant where that terrorist material was to be found on its website. This is essentially the opposite of the situation in *Weiss* and *Strauss* where, as the Solicitor General pointed out, both defendants had "repeatedly investigated" the parties with which they were dealing. U.S. Amicus Br., 16, 18.

The petition asserts that "the Amended Complaint does not identify any *specific* account or post that any

[5] Elsewhere, the petition takes the opposite position, objecting that the complaint was asserting the defendants were liable, in part, because they were *not* attempting to "'proactively' detect ... ISIS-related accounts or posts." Pet. 9.

Defendant failed to block or remove after becoming aware that it supported or had any connection to ISIS." Pet. 9 (emphasis added); *see* Pet. 16 (no failure to block or remove material in "any specific account or post ... after becoming aware that it supported or was connected to ISIS"). The word "specific" is key, because the complaint alleged that the defendants knew from several governments and numerous other sources that there were large numbers of terrorist accounts and posts. The defendants rarely knew about "specific" terrorist accounts or posts because, the complaint alleged, the defendants ignored those warnings, generally did not attempt to identify specific terrorist accounts and posts, and instead waited until someone else made them "aware" of a particular terrorist account or post before taking any action. Similarly, in the absence of a concerted effort to actually detect such accounts and content, petitioner's assertion that defendants "regularly" removed terrorist accounts and content they knew about (Pet. 2, 3, 8, 12, 16, 17 n.3, 26) does not suggest that the defendants were unaware of the large amount of ISIS materials on their websites. "Regularly" means little in a case where the complaint alleges there were literally thousands of ISIS accounts on Twitter alone.

The petition repeatedly describes the panel as holding that the defendants could be liable for aiding and abetting terrorism because "some ISIS supporters were somewhere among the billons of individuals who used Defendants' platforms." Pet. 3; *see id.* at 2 ("some supporters of ISIS"), 8 ("some other ISIS adherents"),

15-16 ("some ISIS supporters"), 16 ("supporters of a terrorist group"; "a terrorist group's supporters"), 27 ("terrorist supporters"). Petitioner objects that the complaint failed to "allege that Defendants knew that general use of its platforms by ISIS adherents would 'support terrorist attacks.'" Pet. 19 (quoting *Atchley v. AstraZeneka UK Limited*, 22 F.4th 204, 223 (D.C. Cir. 2022)). That account mischaracterizes in two important ways the allegations of the complaint and the decision of the Ninth Circuit. First, the allegation here is that ISIS itself maintained thousands of accounts and posted numerous materials on the defendants' websites, not that there were accounts of individuals who happened (also) to support ISIS. Petitioners do not seriously suggest that a defendant which knew ISIS was using its website would have been unaware that ISIS was doing so to promote its campaign of terror. Second, the gravamen of the complaint concerned the content of the accounts and posts, not simply who posted them. That distinction is critical, because whatever difficulties a defendant might have in determining whether a particular user subjectively supported ISIS (or supported the New York Jets or supported saving the whales), the complaint alleged that the defendants could easily ascertain the content of accounts and posts on its website, because that content resided in the defendants' own computers. Petitioner objects that the defendants could not know if "somewhere" among its users there were ISIS supporters; but the defendants knew precisely where to find the computers that would have contained terrorist accounts or posts. The defendants' billions of users were scattered all over the globe, but the defendants' primary computers were

readily accessible in San Francisco (Twitter), San Bruno (Google and YouTube), and Menlo Park (Facebook).

The petition repeatedly describes the Ninth Circuit as holding that knowledge can be established "merely" based on some not very probative circumstances. Pet. i ("merely because"), 14-15 ("simply because"), 15-16 ("merely because"), 17 n.3 ("merely because"), 20 ("accused of only"), 28 ("merely"). But these characterizations of the decision below are invariably followed by a description of the complaint allegations that omits the key elements—that the defendants had been repeatedly told by reliable authorities that there were large numbers of terrorist accounts and posts on their websites, that the defendants made no effort to identify those terrorist accounts and posts, and that the defendants could easily have identified from among files in their own computers the accounts and posts with terrorist content.

II. There Is No Circuit Conflict Regarding What Type of Assistance Constitutes Aiding and Abetting Under Section 2333(d)(2)

The Ninth Circuit held that section 2333(d)(2) applies to a defendant which has aided and abetted a "terrorism enterprise." App. 63; *see id*. ("terrorist campaign"). Petitioner contends that the aiding-and-abetting provision requires that a defendant have specifically directed assistance to the particular terrorist act that injured the plaintiff. Pet. 22-26.

Petitioner does not claim that there is a circuit conflict regarding the Ninth Circuit's interpretation of section 2333(d)(2). To the contrary, the petition acknowledges that the Second and District of Columbia Circuits have construed section 2333 in the same manner as the Ninth Circuit. Pet. 25; *see Honickman v. BLOM Bank SAL*, 6 F.4th 487, 499 (2d Cir. 2021); *Atchley v. AstraZeneka UK Limited*, 22 F.4th 204, 222 (D.C. Cir. 2022). The D.C. Circuit decision in *Atchley* cited with approval the Ninth Circuit decision in the instant case. 22 F.4th at 222 (citing *Gonzalez v. Google, LLC*, 2 F.4th 871, 905 (2021)). Similarly, the Second Circuit in *Honickman* concluded that a plaintiff need not show that a defendant knowingly assisted the specific terrorist act that injured the plaintiff, but is required to demonstrate only that the act that injured the plaintiff was "foreseeable from the illegal activity that the defendant assisted." 6 F.4th at 499; *see id*. at 501 (the question is whether the defendant "was generally aware of its role in unlawful activities from which the attacks were foreseeable"). Petitioner insists that the decisions in the Second and D.C. Circuits, like the similar decision in the Ninth Circuit, are "incorrect[]." Pet. 25. But in the absence of a circuit conflict, a petitioner's mere disagreement with the decision of a lower court does not warrant review by this Court.

The interpretation of section 2333(d)(2) adopted by the Second, Ninth and D.C. Circuits is correct. The Findings adopted by Congress as part of the bill enacting the aiding-and-abetting provision of section 2333(d)(2) expressly endorsed the legal standard

regarding civil aiding-and-abetting claims set out in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). 130 Stat. 852, § (a)(2). "The decision of the United States Court of Appeals for the District of Columbia in *Halberstam v. Welch*, ... , which has been widely recognized as the leading case regarding Federal civil aiding and abetting ... liability, ... , provides the proper legal framework for how such liability should function...." *Halberstam* made clear that a defendant is liable if it aided the general unlawful enterprise of which a particular act was a part. The defendant in *Halberstam* had aided a serial burglar, *after* each crime, by helping to dispose of the stolen property, but did not assist in the actual burglaries themselves.

> [W]e look first at the nature of the act assisted, here a long-running burglary *enterprise* heavily dependent on aid in transforming large quantities of stolen goods into "legitimate" wealth. [The defendant's] assistance was indisputably important to this laundering function; she gave not only her time and talents but also her name to accomplish that objective, through having checks made out to her and falsifying income tax returns. Although her own acts were neutral standing along, they must be evaluated in the context of the *enterprise* aided, i.e., a five-year-long burglary campaign against private homes.

705 F.2d at 488 (emphasis added); *see id*. at 486 ("assisted in Welch's burglary *enterprise*") (emphasis added), 488 ("the success of the tortious *enterprise* clearly required expeditions and unsuspicious disposal of the

goods, and [the defendant's] role in that side of the business was substantial.") (emphasis added).

The defendant's function in *Halberstam* was limited to disposing of the stolen property; she did nothing to assist in the commission of any burglary, and she had played no such after-the-fact role with regard to the particular crime at issue, because the burglar was promptly arrested near the scene of the crime.

The standard applied in *Halberstam* is entirely consistent with the text of section 2333(d)(2). The statute forbids aiding and abetting certain persons, not aiding and abetting certain acts. Section 2333(d)(2) imposes liability on "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed ... an act of international terrorism." The object of the verbs "aids" and "abets," like the object of the phrase "conspires with," is "person," not "act." The statute imposes liability for "aid[ing] and abet[ing]" a particular designated "person."[6] "[A]ct of international terrorism" is part of the description of the "person[s]" assistance to whom will give rise to liability, not a designation of conduct that must not be assisted.

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[6] Similarly, the focus of the jurisdiction-related provision of the statute is on "entities ... that knowingly.... contribute material support.... *to* ... *organizations* that pose a significant risk of committing acts of terrorism...." Pub. L. 144-222, § 2(a)(6) (emphasis added).

III. The Atypical Circumstances of This Case Do Not Present An Issue of General Importance

The petition predicts that the Ninth Circuit's decision will have dire consequences "consequences for ordinary businesses that provide generally available services or engage in arms-length transactions with large number of consumers." Pet. 14; *see id*. 4, 14, 26, 27, 28. But that warning rests on the petition's disregard of the detailed allegations of the complaint, which would easily support an inference that the defendants knew full well that they were providing considerable assistance to ISIS. "Ordinary businesses" do not receive warnings from federal officials or foreign governments that they are assisting terrorist enterprises, or disregard repeated credible accounts of such assistance by a wide range of major news organizations. And "countless entities" (Pet. 26) do not, in the teeth of such serious warnings, pursue a policy of refusing to inquire whether they are assisting terrorists except when some outside source tells them specifically how that assistance is occurring. This case is an "outlier," as petitioner suggests (Pet. 3), not because of the legal standards applied by the Ninth Circuit, but because of the extraordinary degree of culpability alleged in the detailed and well-documented complaint.

Petitioner's contention that action by this Court is essential to avoid widespread harm to countless businesses is in obvious tension with petitioner's recommendation that the Court deny certiorari in *Gonzalez v. Google LLC*, No. 21-1333. Pet. 1, 2, 14, 28. As the

petition correctly explains (Pet. 13), if certiorari is denied in *Gonzalez*, it would moot the claims in the instant case, thus precluding this Court from correcting what petitioner insists are the grave errors in the decision below.

In recommending that this Court deny certiorari in *Weiss v. National Westminster Bank, PLC*, No. 21-381, and *Strauss v. Credit Lyonnais, S.A.*, No. 21-381, the Solicitor General observed that

> JASTA is a relatively recent statute, and few circuits have addressed its application to the provision of routine financial services. To the extent the application of the *Halberstam* framework to such facts might warrant this Court's review, further percolation would be helpful as courts continue to refine their jurisprudence in this area.

U.S. Amicus Br., Nos. 21-381 & 21-382, 23 (U.S. May 24, 2022). To the extent that important questions may arise about the application of the *Halberstam* standards to truly ordinary businesses, they should be resolved in a case that does not involve the manifestly atypical circumstances alleged in the complaint in this case.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

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