No. 21-1496

IN THE

Supreme Court of the United States

TWITTER, INC.,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Ninth Circuit held that companies may "knowingly" assist "an act of international terrorism" by offering standardized, widely available services to the general public. 18 U.S.C. § 2333(d)(2). It reached that conclusion in a case where the defendants admittedly had no intent to aid terrorist activities, regularly enforced policies against terrorist content, and had no connection to the terrorist attack that harmed the plaintiffs. No other court of appeals has adopted this expansive conception of secondary liability under the Anti-Terrorism Act (ATA). Permitting a claim on these facts contravenes the text and purpose of the statute, and threatens significant damages against businesses whose generally available services have been hijacked by terrorists.

The Brief in Opposition embraces the Ninth Circuit's outlier holding and its severe consequences. Rather than meaningfully address the splits created by the court's approach, Respondents ("Plaintiffs") try to rehabilitate the Ninth Circuit's novel legal standard by criticizing the petition's characterization of the Complaint and decision below. But these objections are misplaced and immaterial to the questions presented. All agree on the relevant issues: the Ninth Circuit found aiding and abetting to be adequately alleged even though Twitter, Google, and Facebook ("Defendants") did not intend to aid ISIS, regularly removed ISIS content, and provided only generic services that were not used to plan or carry out the attack at issue. The court instead found it sufficient for Plaintiffs to allege that third parties had reported that ISIS supporters were somewhere among the billions who used Defendants' platforms, without any allegation that such usage was connected to the specific shooting that allegedly caused Plaintiffs' injury. A claim

alleging only such conduct would be rejected in every other circuit.

If the Court grants certiorari in *Gonzalez* v. *Google LLC*, No. 21-1333 (U.S. Apr. 4, 2022)—and it should not, because the splitless question presented in that case is not certworthy—it should also grant review here to correct the Ninth Circuit's anomalous approach to aiding-and-abetting liability under the ATA.

ARGUMENT

I. THE NINTH CIRCUIT'S UNIQUELY EXPANSIVE VIEW OF ATA AIDING-AND-ABETTING LIABILITY WARRANTS REVIEW

A. Plaintiffs Cannot Reconcile Courts Of Appeals' Divergent Knowledge Standards

Aiding-and-abetting liability under Section 2333(d)(2) requires that a defendant "knowingly" assist "an act of international terrorism." The Ninth Circuit held that Plaintiffs adequately pleaded scienter under that provision by alleging that Defendants were "aware of ISIS's use of [Defendants'] 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." Pet. App. 62a. As the petition explains (15-16), this conclusion effectively reads the "knowledge" requirement out of the statute by permitting aiding-and-abetting claims whenever a plaintiff identifies third-party reports that terrorist supporters are among the users of a generally available service, notwithstanding the defendant's regular termination of accounts operated by such persons. Whether those efforts were "meaningful" (whatever Plaintiffs may think that means, Opp. 13-14) provides no limiting principle

because a plaintiff can *always* allege that a provider of a service, especially one made generally available to the public, could have done *more* to prevent terrorist supporters from using that service.

Other circuits avoid this absurd result by enforcing a more rigorous "knowledge" requirement that demands additional indicia of knowledge beyond a generalized awareness of unwanted, prohibited terrorist usage and an allegedly inadequate response. The Second Circuit, for example, has repeatedly rejected aiding-and-abetting liability when there is no indication that the defendant knew that a particular account or customer made a specific use of its service for a "terroristic purpose." *Weiss* v. *National Westminster Bank, PLC*, 993 F.3d 144, 166 (2d Cir. 2021); *accord Strauss* v. *Crédit Lyonnais, S.A.*, 842 F. App'x 701, 704 (2d Cir. 2021) (mem.) (same); *see Siegel* v. *HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 225 (2d Cir. 2019) (aiding and abetting requires allegation that defendant "knew or intended" specific funds would be transferred to terrorist group, not just general awareness of unidentified financial services being provided).

Contrast those decisions with *Kaplan* v. *Lebanese Canadian Bank*, 999 F.3d 842 (2d Cir. 2021). There, the court found the requisite knowledge based on the defendant's continued provision of services to specifically identified customers following public reports of those customers being part of a terrorist group *and* the defendant's longstanding support for the terrorist group's "goals." *Id.* at 866.

Or consider *Atchley* v. *AstraZeneca UK Limited*, 22 F.4th 204, 221, 223 (D.C. Cir. 2022), where the D.C. Circuit also treated allegations of additional indicia as important to satisfaction of the knowledge element. The

court held that the plaintiffs adequately pleaded aiding-and-abetting liability because the defendants were allegedly aware the goods and money they provided "would be used … to support terrorist attacks" and allegedly had seen "armed terrorist fighters" and "'Death to America' slogans on display" in the offices of the entity to which the goods and money were being transferred. *Id.* Plaintiffs here fail to allege any such indicia of knowledge. To the contrary, they acknowledge that Defendants "rarely knew about 'specific' terrorist accounts or posts," and that when Defendants *did* receive particularized reports of ISIS-affiliated content, the offending material was "regularly removed." Opp. 16-17; *see* Pet. App. 64a. That is far removed from the situation in *Atchley*, and even more so from the one in *Kaplan*.

Plaintiffs do not attempt to reconcile these conflicting cases, instead devoting just two paragraphs to comparing their facts. Opp. 15-16. But facts do not resolve the divergent legal standards, and here any factual distinctions only deepen the conflict.

Plaintiffs primarily contend that other courts have accepted allegations of generalized, third-party reports about terrorist supporters' use of a defendant's services as sufficient to plead knowledge, observing that *Kaplan* and *Atchley* "grounded a finding of knowledge *in part* on such credible public reports." Opp. 15-16 (emphasis added). But Plaintiffs do not dispute that the reports in those cases were accompanied by further allegations that the defendants knew their assistance would be used to support terrorist attacks (*Atchley*) or that the defendant supported the terrorists' goals (*Kaplan*). Here, in contrast, Plaintiffs (1) acknowledge that Defendants had rules banning terrorists from using their platforms; (2) do not allege that Defendants supported any ISIS goal; and (3) do not identify any specific ISIS-affiliated

accounts that were permitted to keep operating on Defendants' platforms after being reported for terrorist ties. Instead, the Complaint "alleges defendants regularly removed ISIS content and ISIS-affiliated accounts" when made aware of particular terrorist content. Pet. App. 64a. Knowledge cannot be inferred from those allegations.

As for *Weiss* and *Strauss*—which found insufficient knowledge—Plaintiffs try to distinguish the defendants' knowledge regarding terrorists' use of their services in those cases on the ground that the defendants were "reassured by" regulators that such use was permissible. Opp. 15. But the Second Circuit did not rely on those assurances in finding the lack of knowledge; rather, it focused solely on the defendant not knowing the specific funds it transferred were for "any terroristic purpose." *Weiss*, 993 F.3d at 166-167; *see Strauss*, 842 F. App'x at 704. The assurances Plaintiffs cite instead come from earlier decisions in the litigations, Opp. 15, and even then Plaintiffs omit the key context: In *Weiss*, the Second Circuit was *criticizing* the district court for giving too much "weight to the British authorities' decisions" in determining whether the defendant "exhibit[ed] deliberate indifference" to its counterparty's terrorist ties. *Weiss* v. *National Westminster Bank PLC*, 768 F.3d 202, 209 (2d Cir. 2014). An earlier decision in the *Strauss* litigation applied similar reasoning. *See* 925 F. Supp. 2d 414, 431 (E.D.N.Y. 2013) (rejecting knowledge defense premised on European authorities' reassurances). The regulators' reassurances thus did not operate as the defense Plaintiffs posit in even those earlier cases. And although Plaintiffs also argue (Opp. 16) the defendants in *Weiss* and *Strauss* lacked knowledge because, unlike Defendants here, they had "'repeatedly investigated' the parties with which they were dealing," the Ninth Circuit

observed that here too Defendants sought to identify content from terrorist supporters through a reporting system, "review[ed]" it, and "regularly removed ISIS content and ISIS-affiliated accounts" as a result of those investigations, Pet. App. 10a, 11a, 62a, 64a.

Plaintiffs offer no further analysis of the conflicting caselaw described in the petition, and instead turn to attacking Defendants' characterization of the Complaint and decision below. In particular, they assert that the Ninth Circuit found the requisite knowledge to have been pleaded not because Defendants allegedly failed to take *sufficiently* meaningful and aggressive actions to stop terrorists from using their platforms, but because Defendants allegedly did not take "*any* meaningful steps or *ever* act[] aggressively" in seeking to purge such users. Opp. 11-14, 16 (emphases added). None of this matters. Other circuits require far more specific indicia of knowledge to support an aiding-and-abetting claim, such as knowledge that terrorists have made specific use of the defendant's goods or service for terroristic purposes (*Weiss* and *Strauss*), to support terrorist attacks (*Atchley*), or while supporting the terror group's goals (*Kaplan*). Pet. 14-22. The Ninth Circuit does not. That conflict does not turn on whether the defendant took any meaningful steps to prevent terrorist use. The Court should consider and resolve that split.

In any event, Plaintiffs' distinction between inaction and insufficient action is entirely illusory. The Ninth Circuit repeatedly acknowledged that Defendants sought to and did remove or prevent terrorist content on their platforms by implementing "policies prohibit[ing] posting content that promotes terrorist activity," Pet. App. 64a-65a; "regularly remov[ing] ISIS-affiliated accounts and content," Pet. App. 65a; seeking "to prevent ads from appearing on ISIS videos," *id.*; and "reviewing

accounts reported by other social media users," Pet. App. 62a. Plaintiffs asserted that these efforts were deficient, and the Ninth Circuit agreed. But no one disputes they occurred, making this case an excellent vehicle to consider what satisfies the Act's knowledge requirement, if this Court grants certiorari in *Gonzalez*.

Moreover, Plaintiffs' reading only confirms the Ninth Circuit's divergence from settled law. According to Plaintiffs, the Ninth Circuit held that Defendants could have "knowingly provided substantial assistance" through their purported "inaction." Opp. 14. But traditional principles of aiding-and-abetting liability—which the ATA incorporates, Pet. 20-22—have long required a heightened showing of scienter when the alleged assistance is mere failure to act. "[W]here the secondary defendant's conduct is nothing more than inaction," a plaintiff must demonstrate "that the aider-abettor [c]onsciously intended to assist in the perpetration of a wrongful act." *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d Cir. 1978). Such a heightened showing is doubly necessary in cases, like this one, involving "nothing more than routine business transactions." *Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991). *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983), stands for the same proposition, emphasizing the need for additional indicia of knowledge—there the defendant's "intent and desire to make the [illegal] venture succeed," *id.* at 488; *see id.* at 484 (cautioning against inferring intent from "normal activities"). Plaintiffs allege no additional facts to support an inference of knowledge from inaction, Pet. 7-9 (describing allegations); Pet. App. 10a-12a (same), thereby widening the conflict.

B. The Ninth Circuit Created A Circuit Split By Holding That A General Terrorist Campaign Could Be The "Principal Violation" Defendants Assisted

The Ninth Circuit also broke from other circuits when it held that Defendants' alleged assistance to ISIS's general activities could support aiding-and-abetting liability under Section 2333(d). The ATA provides a cause of action to plaintiffs injured by "an act of international terrorism." 18 U.S.C. § 2333(a). Section 2333(d), in turn, extends liability for injuries from "an act of international terrorism" 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." These consistent references to "an act of international terrorism"—buttressed by longstanding principles of aiding-and-abetting liability and a contrasting provision in the ATA regarding material support to a designated "foreign terrorist organization," 18 U.S.C. § 2339B(a)(1)—require that Defendants have knowingly and substantially assisted *the act* of international terrorism that caused Plaintiffs' harm. Pet. 23-24.

Here, Plaintiffs do not allege Defendants' services were used in the act that injured them. Pet. App. 64a. The Ninth Circuit nevertheless held that Plaintiffs adequately alleged aiding-and-abetting liability because ISIS supporters' alleged use of Defendants' platforms aided "ISIS's terrorism campaign" or "enterprise," which the court below construed as the "relevant 'principal violation.'" Pet. App. 53a, 63a. That decision conflicts with decisions of other circuits and is incorrect.

Plaintiffs contend this error is not certworthy because the petition "does not claim that there is a circuit

conflict" on this question. Opp. 20. That is wrong. As the petition explains (24-25), the Fifth and Sixth Circuits have correctly read the ATA by "focus[ing] on the relationship between the act of international terrorism and the secondary actor's alleged supportive conduct." *Retana* v. *Twitter, Inc.*, 1 F.4th 378, 382, 382 (5th Cir. 2021); *accord Crosby* v. *Twitter*, 921 F.3d 617, 626-627 (6th Cir. 2019) (rejecting aiding-and-abetting liability when defendants did not "directly help[]" "the person who 'committed' the shooting"). Plaintiffs notably fail to mention either decision. That the Second, Ninth, and D.C. Circuits extend secondary liability to alleged assistance of a general "terrorism enterprise" (*see* Opp. 20-21), thus counsels in favor of review, not against it.

Plaintiffs try to defend the Ninth Circuit's reading of the statute, but fail to address the arguments raised in the petition. Plaintiffs claim the statutory text prohibits "aiding and abetting certain persons, not aiding and abetting certain acts," and analogize the holding below to *Halberstam*. Opp. 22. But as explained in the petition, it is black-letter law that secondary liability requires a defendant to aid and abet the tortfeasor's "conduct" that injured the plaintiff. Pet. 24 (quoting *Restatement (Second) of Torts* § 876(b) (1979)). The ATA and *Halberstam* incorporated, rather than displaced, these principles. *Id.*

C. The Court's Denial Of Certiorari In *Weiss* And *Strauss* Cements A Split

The petition requested that this Court hold this case if the Court were to grant in *Weiss* or *Strauss* given the similar issues presented. Pet. 29-30. Those petitions have since been denied. Orders, Nos. 21-381 & 21-382 (U.S. June 27, 2022). That denial reinforces the importance of the Court's review here (if certiorari is

granted in *Gonzalez*) because it entrenches the conflict among the circuits' aiding-and-abetting standards. As the petition explained, Plaintiffs' claim would fail under *Weiss* and *Strauss*. Pet. 30. Meanwhile, there is little prospect of self-correction by the Ninth Circuit, which denied rehearing *en banc* in this case. Pet. App. 181a.

II. THE DECISION BELOW WOULD HAVE HARMFUL CONSEQUENCES

Both of the Ninth Circuit's erroneous holdings departed from other circuits, ignored the ATA's text and purpose, and discarded longstanding aiding-and-abetting principles. Together, they create an extraordinarily broad scope of liability: providers of generally available, generic services can be held responsible for terrorist attacks anywhere in the world that had no specific connection to their offerings, so long as a plaintiff alleges (a) general awareness that terrorist supporters were among the billions who used the services, (b) such use aided the organization's broader enterprise, though not the specific attack that injured the plaintiffs, and (c) the defendant's attempts to preclude that use could have been more effective. Plaintiffs do not deny that no other circuit has taken such a loose approach to secondary liability. For good reason—nothing in the text of the ATA supports it. And insofar as Plaintiffs rely on *Halberstam* to justify those holdings, Defendants' alleged conduct in no way resembles the actions of the aider-and-abettor there—the longtime, live-in partner of a murderous burglar, who worked as a "banker, bookkeeper, recordkeeper, and secretary" for the criminal enterprise. *Halberstam*, 705 F.2d at 486-487. As the Ninth Circuit observed, Defendants' alleged role here is, "to put it mildly, dissimilar" to the circumstances in *Halberstam*. Pet. App. 48a.

Plaintiffs' attempt to mitigate the impact of the decision below is unpersuasive. Despite Plaintiffs emphasizing the "the detailed allegations" that purportedly set this case apart (Opp. 23), their allegations concerning use of Defendants' platforms by ISIS supporters and the third-party reports of such activities sweep more broadly than this case, and have nothing to do with the terrorist attack that injured Plaintiffs. The Ninth Circuit's holding that such allegations could support aiding-and-abetting liability thus creates exactly the kind of boundless litigation risks that courts have long guarded against in the context of secondary liability generally and the ATA—with its provision for treble damages—specifically. Congress could not have intended such a result. Pet. 27.

Plaintiffs assert that the conditional nature of this petition means these concerns are not genuine. Opp. 23-24. But that conditionality arises solely because Defendants will have no further direct stake in this litigation if certiorari is denied in *Gonzalez*, as Plaintiffs have stipulated to dismissal of this action in that circumstance. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("[F]ederal court[s] may resolve only 'a real controversy with real impact on real persons'"). The constitutional limits on this Court's jurisdiction do not diminish the harms to other providers of generally available services.

Plaintiffs' argument for further percolation (Opp. 24) falls flat. The Ninth Circuit's decision will have immediate impact, as several ATA cases against Defendants stayed in the Ninth Circuit will be governed by the consolidated opinion below, subject to the disposition of the petitions in *Gonzalez* and here. Percolation, moreover, is of negligible value because the vast majority of cases involving aiding-and-abetting liability under the

ATA are filed in the Second, Ninth, and D.C. Circuits. *See, e.g.*, Petrs. Supp. Br. 12, Nos. 21-381 and 21-382 (U.S. June 7, 2022) ("[N]early every JASTA case against foreign financial institutions is currently pending in the Second Circuit, and future cases against similar entities will overwhelmingly be brought or moved there"). Those courts have weighed in on the issues presented and reached divergent conclusions.

CONCLUSION

If the Court grants review in *Gonzalez*, this petition should be granted.

Respectfully submitted.

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