No. 21-1496

IN THE

Supreme Court of the United States

TWITTER, INC.,

Petitioner,

v.

MEHIER TAAMNEH, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures. Since 2000, PhRMA member companies have invested more than $1.1 trillion in the search for new treatments and cures, including an estimated $102.3 billion in 2021 alone.[2] PhRMA's mission is to advocate for public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the biopharmaceutical industry.

PhRMA's mission extends beyond domestic borders, with its member companies working with countries around the world to ensure that innovative medicines and treatments reach patients wherever

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties providing blanket consent to the filing of *amicus* briefs have been submitted to the Clerk.

[2] *See* PhRMA, *Research and Development Policy Framework*, https://phrma.org/policy-issues/Research-and-Development-Policy-Framework (last visited Dec. 5, 2022).

they may be.[3] This case concerns the scope of aiding-and-abetting liability under the Anti-Terrorism Act ("ATA"), 18 U.S.C. §§ 2331 *et seq*, which has been erroneously invoked in a different case against PhRMA member companies in connection with their global provision of life-saving medicines. Determination of the scope of the ATA is thus of critical importance to member companies of PhRMA and to the biopharmaceutical industry generally.

To continue the necessary provision of life-saving and life-enhancing treatments to countries where they are most needed, pharmaceutical companies must be able to confidently deliver these medical goods around the world, including when the U.S. Government calls upon them for their support. Yet a number of pharmaceutical companies now stand accused of aiding and abetting acts of international terrorism in the course of an armed conflict in Iraq. These companies face allegations that they sold medicines and medical devices to the U.S.-backed, sovereign Iraqi Ministry of Health, which are alleged to have been subsequently misappropriated and sold on the black market, with the proceeds used to finance attacks by a sectarian militia. A panel of the D.C. Circuit reversed the district court's dismissal of the case, and petitions for rehearing en banc remain pending in that court. The panel adopted an interpretation of aiding-and-abetting liability under the ATA that is similar to the Ninth Circuit's view in the case under review here. That misinterpretation of aiding-and-abetting liability under the ATA is

[3] *See* PhRMA, *International*, https://phrma.org/resource-center/Topics/International (last visited Dec. 5, 2022).

contrary to the statutory text, structure, and purpose and, if allowed to stand, would risk additional unwarranted litigation disruptive to the global access to life-saving and life-enhancing treatments.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Anti-Terrorism Act ("ATA") creates a private, treble-damages cause of action for Americans injured by acts of international terrorism. In 2016, Congress added a provision to allow ATA suits against those aiding and abetting such acts of international terrorism, in carefully delineated circumstances. The ATA and its aiding-and-abetting provision hold bad actors accountable and require them to provide redress to victims. But the court of appeals in this case, and in another pending case, have misconstrued the ATA's aiding-and-abetting provision to expand its reach beyond the statutory text in a manner that not only undermines the counter-terrorism objectives of the statute but also harms other public-policy objectives, including global public health and humanitarian assistance.

The Ninth Circuit here allowed an ATA aiding-and-abetting claim to proceed against social media companies based on allegations that they failed to prevent certain ISIS adherents from using their services. Adoption of the erroneous reasoning underlying that ruling would have broad adverse consequences. For example, similar flawed reasoning was used by a panel of the D.C. Circuit to reverse a district court's dismissal of an ATA aiding-and-abetting suit against pharmaceutical companies

which had provided cancer medicines, hemophilia injections, electrocardiogram machines, and similar medical products to the Iraqi Ministry of Health. That Ministry is an agency of a foreign sovereign with which the United States Government was also engaged, and which operates that country's public healthcare system. The D.C. Circuit allowed aiding-and-abetting claims to go forward against the companies based on allegations that a militia fighting in an armed conflict in Iraq had supporters who misappropriated from the Health Ministry some of those medicines and medical devices, sold them on the black market, and then used the proceeds to finance the militia attacks.

Such overbroad aiding-and-abetting claims, and the incorrect statutory construction undergirding them, vividly illustrate the dangers of discarding the guardrails on aiding-and-abetting liability Congress enacted in the ATA. If following the U.S. Government's lead by supplying life-saving medicines and medical supplies to the health ministry of a war-torn foreign nation can be mischaracterized as "knowingly" providing "substantial assistance" to another person's commission of "an act of international terrorism" against Americans, the delivery of vital medicines and medical equipment would be jeopardized in such countries, contrary to the United States' global health objectives.

Allegations that a defendant had general awareness that other entities or individuals were somehow engaged in some illegal activity is not sufficient to state an aiding-and-abetting claim against the defendant under the ATA. The ATA

allows a person who was injured "by reason of" an "act of international terrorism" to assert secondary liability against only 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." 18 U.S.C. § 2333(a), (d)(2). Congress further directed courts applying Section 2333(d)(2) to apply the *Halberstam* legal framework, which confirms that the substantial assistance must be for "the principal violation," which in an ATA case is the act of international terrorism. *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). Thus, under Section 2333(d)(2), a defendant must have actual knowledge, and what it must know is that it is substantially assisting another person's commission of an act of international terrorism. Further, in directing that the aiding-and-abetting provision of the ATA be governed by a traditional common-law framework, Congress incorporated the requirement of a particularly strong showing of knowledge before concluding that a business transaction constitutes aiding and abetting another person's commission of an act of international terrorism.

Interpreting the ATA consistently with these limits that Congress placed on its aiding-and-abetting liability, and reversing the Ninth Circuit here, will avoid a perverse result: that companies providing life-saving medicines to a country in crisis could be branded aiders-and-abettors of acts of international terrorism against Americans.

ARGUMENT

The Court of Appeals' Misinterpretation of the ATA's Aiding-and-Abetting Provision Risks Undermining The Global Distribution of Life-Saving Medicines.

The Ninth Circuit in this case misinterpreted the scope of liability that Congress created, which is limited to a defendant who "aids and abets" another person's commission of an "act of international terrorism" by "knowingly providing substantial assistance." 18 U.S.C. § 2333(d)(2). Twitter, Facebook, and Google correctly explain that the court of appeals is not only wrong, but that its reasoning threatens harmful real-world consequences.

A different, currently pending case targeting medical companies vividly illustrates the broader implications and what is at stake. A panel of the D.C. Circuit reversed a district court's dismissal of that case based on many of the same errors as the Ninth Circuit made here. *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022). In fact, the D.C. Circuit cited the Ninth Circuit's decision in the instant case with approval. *Id.* at 218, 222. Both panels (1) effectively reduced the statute's "knowingly" requirement to one of mere recklessness; (2) incorrectly conflated that "knowingly" requirement with the "general awareness" component of the *Halberstam* aiding-and-abetting framework; (3) failed to require a significant basis for inferring knowledge that a company's business activities constituted substantial assistance to another person's commission of an act of international terrorism; and

(4) treated a purported "campaign," rather than an "act of international terrorism," as the object of a defendant's substantial assistance.

The D.C. Circuit reached the jarring conclusion that ATA claims could proceed against pharmaceutical and medical-device companies that supplied cancer medicines, hemophilia injections, electrocardiogram machines, and similar medical goods to Iraq's U.S.-supported Health Ministry. The D.C. Circuit ruled that those allegations state a claim of "knowingly" providing "substantial assistance" to another person's commission of an "act of international terrorism," because militia supporters were alleged to have infiltrated the Health Ministry, misappropriated some of the goods, and used funds from their black market resale to fund the militia's terrorist acts. The Court's reversal of the Ninth Circuit in this case and correction of its errors will also shed light on the similar errors of the panel ruling in that case, where rehearing en banc petitions remain pending. The Court's correction of the misinterpretation of the ATA's aiding-and-abetting provision will redress the risk posed to the supply of life-saving medicines to conflict-ridden regions where they are needed most.

A. The D.C. Circuit Erroneously Reversed Dismissal of an ATA Aiding-and-Abetting Claim Against Manufacturers and Suppliers of Medical Goods Based on Legal Errors Similar to Those Presented Here.

1. In *Atchley v. AstraZeneca UK Ltd.*, hundreds of plaintiffs filed an ATA lawsuit in the U.S. District Court for the District of Columbia against manufacturers and suppliers of medicines and medical equipment that sold or donated such goods to Iraq's Ministry of Health. According to the plaintiffs in that case, that provision of medical goods was an act of international terrorism and also constituted aiding and abetting the acts of international terrorism committed by an Iraqi sectarian militia, Jaysh al-Mahdi.

The premise of the suit is that Iraq's Health Ministry, which was responsible for delivering public healthcare to 25 million Iraqis, no longer functioned as a Health Ministry. The plaintiffs characterized the Health Ministry as a "front," or "alter ego," of the Jaysh al-Mahdi militia. *See* Reply Br. of Pls.-Appellants at 3, 5–6, *Atchley*, 22 F.4th 204 (No. 20-7077), 2021 WL 1599295 (D.C. Cir. Apr. 23, 2021). They derived this label from the appointment of a Health Minister from the party of Muqtada al-Sadr, a popular Shi'a leader whose movement pursued both a political track (winning elections to secure the largest number of seats in Iraq's parliament, and thus control of government ministries) and a military track (creating Jaysh al-Mahdi as one of the forces in Iraq's spiraling civil war).

Amidst the Health Ministry's "sprawling bureaucracy" and "more than 100,000 employees," Br. *Amici Curiae* Iraq Reconstruction Experts Supp. Defs.-Appellees at 17, *Atchley*, 22 F.4th 204 (No. 20-7077), 2021 WL 1599307 (D.C. Cir. Apr. 23, 2021) [hereinafter Iraq Experts Br.], some members of the militia allegedly "work[ed] around the fringes" of the Health Ministry to "infiltrate" it, in order to "steal," "divert," and "misappropriate" medical supplies from Ministry warehouses and hospitals. Third Am. Compl. ¶¶ 108, 168, 177, *Atchley v. AstraZeneca UK Ltd.*, 474 F. Supp. 3d 194 (No. 17-cv-02136-RJL), 2020 WL 755075 (D.D.C. Jan. 21, 2020) [hereinafter *Atchley* Compl.]. According to the plaintiffs, militia members subsequently used those medicines and medical devices to support attacks that Jaysh al-Mahdi committed against Coalition forces, including plaintiffs, by selling them on the black market. *Id.* ¶¶ 8–9.

The United States has never designated Jaysh al-Mahdi as a foreign terrorist organization, and it must be a designated organization that commits, plans, or authorizes the act of international terrorism that injured the plaintiff as a prerequisite for imposing aiding-and-abetting liability under the ATA. *See* 18 U.S.C. § 2333(d)(2). Plaintiffs allege, however, that the Jaysh al-Mahdi attacks nevertheless qualified because Jaysh al-Mahdi had various ties to the terrorist group Hezbollah, which has been designated a foreign terrorist organization. *Atchley* Compl. ¶¶ 357–404 (asserting that, among other things, Hezbollah "authorized" and "planned" the attacks).

The *Atchley* plaintiffs also alleged that the Health Ministry was corrupt, and that the defendants had engaged in what they characterized as corrupt transactions before, during, and after the period of Sadrist leadership,[4] but plaintiffs also stressed that corruption was not the *sine qua non* of their claims. They alleged that, corrupt or not, any "transaction[]" with the Health Ministry, as a supposed "counterparty that was openly controlled by terrorists," necessarily "supplied" terrorists. *Id.* ¶ 179.

It is undisputed that the Health Ministry continued performing legitimate activities, such as "running clinics and employing doctors," despite alleged infiltration. *Atchley v. AstraZeneca UK Ltd.* (*Atchley I*), 474 F. Supp. 3d 194, 210 (D.D.C. 2020), *rev'd & remanded*, 22 F.4th 204 (D.C. Cir. 2022). It is also undeniable that through the Health Ministry's period of Sadrist leadership, the U.S. Government continued to support the Health Ministry. In 2006, for example, the U.S. Agency for International Development reported that it was "supporting the Iraqi Ministry of Health (MoH) to strengthen essential health services, improve the capacity of health personnel, and respond to the specific health needs of vulnerable populations such as women and children." U.S. Agency Int'l Dev., *Reconstruction Weekly Update* at 5 (Jan. 20, 2006), https://tinyurl.com/37ebhne7. The U.S. Government

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[4] The *Atchley* defendants have strongly denied the complaint's corruption allegations. Br. of Defs.-Appellees at 3, *Atchley*, 22 F.4th 204 (No. 20-7077), 2021 WL 1599309 (D.C. Cir. Mar. 12, 2021).

also encouraged private medical companies to supply the Health Ministry, and contracted for such companies to supply medical equipment for Ministry facilities. Stuart W. Bowen, Office of Special Inspector Gen. for Iraq Reconstruction, *The Year of Transition Enters the Fourth Quarter* (Oct. 30, 2006), https://tinyurl.com/37ebhne7.

2. The district court in *Atchley* correctly dismissed that complaint, including its aiding-and-abetting claims. The court made the overarching point that defendants provided medical goods to a Health Ministry, not a militia for use in acts of international terrorism. *Atchley I*, 474 F. Supp. 3d at 214, *rev'd & remanded*, 22 F.4th 204 (D.C. Cir. 2022). The plaintiffs' allegations did not suggest that the medicine companies "were 'one in spirit' with [the militia's] desire to kill American citizens in Iraq . . . or that [the companies] intended to help [the militia] succeed in doing so." *Id.* at 213. Moreover, allegations that defendants provided medical goods to the Health Ministry, not the Jaysh al-Mahdi militia, failed "to allege a direct link between the defendants and the individual perpetrator" thereby "warrant[ing] a dismissal" of the aiding-and-abetting claims. *Id.* at 212.

3. A panel of the D.C. Circuit reversed, based on errors similar to those made by the Ninth Circuit here. *Atchley*, 22 F.4th at 204. Indeed, the Plaintiffs-Respondents here have noted that the D.C. Circuit "construed section 2333 in the same manner as the Ninth Circuit," and that "[t]he D.C. Circuit decision in *Atchley* cited with approval the Ninth Circuit decision in the instant case." Br. in Opp'n at 20. Petitions for

rehearing en banc in the *Atchley* case were filed in February 2022, and remain pending.

First, like the Ninth Circuit, the D.C. Circuit effectively read the word "knowingly" out of Section 2333(d)(2), and replaced it with a standard akin to recklessness. *See* Br. for Pet'r Twitter, Inc. at 20 [hereinafter Twitter Br.]. The sole requirement on this issue that the D.C. Circuit recognized was that the defendants had to be "generally aware they were engaged in illegal activity"—not necessarily international terrorism—and know that "their role in [this] activity *foreseeably* lend[s] support to acts of international terrorism." *Atchley*, 22 F.4th at 221, 223 (emphasis added) (describing that "[k]nowledge of one's own actions and general awareness of their foreseeable results . . . are all that is required"). That standard, like the erroneous standard adopted by the Ninth Circuit, relieves plaintiffs of the requirement enacted by Congress that the defendant actually knew that it provided substantial assistance to another person's commission of an act of international terrorism. Instead, the court of appeals allowed plaintiffs to plead mere awareness of some generalized wrongdoing, so long as a subsequent act of international terrorism could be deemed "foreseeable" as a result. *See* Twitter Br. at 35.

Applying the wrong legal standard mattered. The D.C. Circuit found knowledge adequately pled on the allegations that "local agents" of the defendants saw "terrorist propaganda" such as "Sadr posters" at the Health Ministry; defendants were aware of press reports that the Minister of Health was a "devotee of Sadr's movement"; and defendants were aware of

reports that militia members took steps such as "siphon[]ing] off" some Ministry supplies to be "sold elsewhere for profit because of corruption in the Iraqi Ministry of Health." *Atchley*, 22 F.4th at 209, 213, 221. Those allegations indicate abuse of the Health Ministry by the Sadrist movement and its affiliated militia, but they do not plausibly allege that the makers and suppliers of medical goods knew that providing medicines to a Health Ministry facing issues of diversion from militia infiltrators, but still supported by the U.S. Government, knowingly provided substantial assistance to another person's commission of an act of international terrorism.

Second, like the Ninth Circuit, the D.C. Circuit conflated the *Halberstam* framework's element of "*knowingly* providing *substantial* assistance" to another person's commission of an international terrorism act, with the separate "general awareness" element of that standard. 18 U.S.C. § 2333(d)(2) (emphasis added); *Halberstam*, 705 F.2d at 472; *see* Br. for Resp'ts Facebook, Inc. & Google LLC Supp. Pet'r at 39–40 [hereinafter Facebook Br.] In a cursory discussion, the D.C. Circuit held that as long as the defendants' "provision of cash and free goods" to the Health Ministry was not "accidental," then "the assistance was given knowingly." *Atchley*, 22 F.4th at 222. As a result, the D.C. Circuit declined to consider what both the plain text of Section 2333(d)(2) and the *Halberstam* framework require: not just knowledge by the defendant that the defendant took some action volitionally, but that it took the action knowing that it was substantially assisting another person's commission of an act of international terrorism. *See* Facebook Br. at 28.

As in this case, applying the wrong legal standard in *Atchley* opened the door to unwarranted liability unmoored from the statutory text. To find that substantial assistance under the ATA's aiding-and-abetting provision was adequately pled, the D.C. Circuit relied on the notion that "defendants gave Jaysh al-Mahdi at least several million dollars per year in cash or goods." *Atchley*, 22 F.4th at 222. But even that notion would not plausibly suggest that the defendants knew the critical facts that supposedly constituted their substantial assistance, *i.e.*, that supplying a U.S.-backed Health Ministry with millions of dollars' worth of medical goods was equivalent to "giving Jaysh al-Mahdi" millions of dollars directly which it would use to commit acts of international terrorism.

Third, like the Ninth Circuit, the D.C. Circuit failed to require that the plaintiffs adequately plead that defendants "know when and to what degree [it] is furthering" the principal wrong. *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95 (5th Cir. 1975); *see* Twitter Br. at 42. The court of appeals did not recognize that the word "abet" requires at least "knowledge of a wrongful purpose," and that aiding-and-abetting liability demands a "higher degree of knowledge" where "business practices" are said to aid and abet a wrong. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991); *see* Twitter Br. at 40. Similarly, in applying *Halberstam*'s standard for what constitutes "substantial assistance," the D.C. Circuit did not give weight to the arms-length, commercial nature of "the defendant's relation to the principal actor," or its lack of any intention to participate in the wrongful act. *Halberstam*, 705 F.2d at 488; *see* Facebook Br. at 41–

42. Under the applicable common-law approach reflected in *Halberstam* and invoked by Congress for ATA aiding-and-abetting liability, particularly strong allegations of knowledge are needed before inferring that by supplying medical goods to a U.S.-backed Health Ministry, global medical companies knew they were actually providing substantial assistance to terrorists' commission of acts of international terrorism against Americans. Likewise, a commercial relationship and lack of any intent to assist another person's commission of an act of international terrorism count strongly against a finding of "substantial assistance."

Some appellate courts have resolved ATA cases consistent with the correct legal approach. The Second Circuit, for example, has rejected ATA claims against a bank that transferred funds for a charity allegedly connected to Hamas, because there was no indication the specific transfers were for "any terroristic purpose." *Weiss v. Nat'l Westminster Bank, PLC*, 993 F.3d 144, 166–167 (2d Cir. 2021), *cert. denied*, No. 21-381 (U.S. June 27, 2021); *see also Strauss v. Crédit Lyonnais, S.A.*, 842 F. App'x 701, 704 (2d Cir. 2021) (mem.) (disposing of the case "for the reasons discussed in *Weiss*"), *cert. denied*, No. 21-382 (U.S. June 27, 2021). A court also dismissed aiding-and-abetting claims against a defendant who provided banking services to a foreign bank allegedly knowing that the foreign bank had ties to terrorists, because the services provided did not constitute knowing substantial assistance. *Siegel v. HSBC N. Am. Holdings*, 933 F.3d 217, 224 (2d Cir. 2019).

Plaintiffs in this case, and indeed plaintiffs in virtually any ATA case, have a ready answer: what is at issue in their case is claimed to be not "routine" or "ordinary business," but rather support for terrorists. Br. in Opp'n at 23–24. But that assumes the answer to the question of knowingly providing substantial assistance to another person's commission of an act of international terrorism. The same sleight-of-hand is illustrated by the *Atchley* case. The plaintiffs there rely heavily on allegations of corrupt dealings with the Iraqi Health Ministry, principally in the form of free goods added to deliveries of medicines. *Atchley* Compl. ¶¶ 116–141. Yet the provision of free goods is a common pharmaceutical industry practice to provide a legitimate, discounted price-per-unit, as the *Atchley* complaint itself acknowledges. *See id.* ¶ 120 (alleging that the Health Ministry's importing arm continues to require "free goods" as part of its standard instructions). It is thus all too easy to assert, as in *Atchley*, that business activities are corrupt and thus not routine. The point remains that under a correct interpretation of the ATA's aiding-and-abetting provision, a strong showing of knowledge is required before concluding that business activities, such as a pharmaceutical company's sales or donations of medicine to a Health Ministry, constitute the knowing provision of substantial assistance to another person's commission of an act of international terrorism.

Fourth, like the Ninth Circuit, the D.C. Circuit incorrectly treated an alleged "campaign," rather than a specific act of international terrorism, as the object of a defendant's substantial assistance. *See* Twitter Br. at 19, 22; Facebook Br. at 37. In applying the

Halberstam "substantial assistance" analysis, the D.C. Circuit held that "allegations that defendants' funding substantially assisted Jaysh al-Mahdi's *terrorist campaign* in Iraq suffice to meet the requirement that defendants' acts were a 'substantial factor' in the events leading to plaintiffs' injuries." *Atchley*, 22 F.4th at 226 (emphasis added). This conflation of aiding and abetting a person's commission of an *act* of international terrorism that harmed the plaintiff bringing the claim, with aiding and abetting a more general *campaign*, departs from both the text of Section 2333(d)(2) and the legal framework of *Halberstam*. *See* Facebook Br. at 24.

B. Reversal of the Ninth Circuit's Incorrect Construction of ATA Aiding-and-Abetting Liability Is Necessary to Avoid Undermining Global Public Health.

Interpreting the ATA's aiding-and-abetting provision in a way that leads to the results in the *Atchley* case carries dangerous consequences for global public health. Globalization leading to an increasingly interconnected world has meant that along with people, products, and food, diseases and viruses travel the world at unprecedented speed. Inst. Med. Nat'l Acads., *The Impact of Globalization on Infectious Disease Emergence and Control* at xii (Stacey Knobler et al., eds., 2006), https://www.ncbi.nlm.nih.gov/books/n/nap11588/pdf. The U.S. Government's vital interest in global public health reflects, in part, that "[n]o nation is immune to the growing global threat that can be posed by an isolated outbreak of infectious disease in a seemingly remote part of the world." *Id.* When new vaccines are

created, there is a substantial interest in ensuring distribution around the world, regardless of local conditions and challenges. More broadly, U.S. foreign policy interests often include helping conflict-torn societies rebuild through humanitarian, economic, and development work. These efforts not only promote peace and protect global health, but they help address circumstances of under-resourced communities that contribute to the development of terrorist organizations in the first place. *See* Br. *Amici Curiae* Charity & Security Network, et al. Supp. Defs.-Appellees at 7, *Atchley*, 22 F.4th 204 (No. 20-7077), 2021 WL 1599308 (D.C. Cir. Apr. 23, 2021).

Iraq is a case in point. When Saddam Hussein's regime fell, it left the country's public-health system in shambles. Restoring the Health Ministry's ability to deliver care to the Iraqi people became a "humanitarian imperative," as well as a foreign policy one: "the absence of healthcare would only foment additional civil unrest, which would further threaten the stability of the country, the implementation of U.S. policy, and the safety of U.S. personnel in Iraq." Iraq Experts Br. at 7. This was the view not just of the U.S. Government, but of "[t]he United Nations, the World Health Organization, the World Bank, the International Monetary Fund, the Italian Red Cross, Save the Children United Kingdom, Catholic Relief Services, Samaritan's Purse, and numerous other non-governmental organizations," who "committed significant funds and personnel to support the Ministry of Health." *Id.* at 9.

The U.S. Government, other governments, international institutions, and non-governmental

organizations often cannot do this work alone. Iraq again illustrates the point. As former officials involved in the reconstruction of Iraq have explained, "[t]he U.S. Government actively encouraged the private sector to provide equipment and pharmaceuticals to the Ministry of Health." *Id.* at 5. Indeed, during the time period in which the Health Ministry was under Sadrist leadership, U.S. agencies contracted with private companies to deliver medical equipment to the Health Ministry. Bowen, *supra*, at 5. And today, Iraq continues to benefit from the supply of needed medical goods, including a delivery of almost 3 million doses of a COVID-19 vaccine made by a member of PhRMA.[5]

As the Iraq experience illustrates, providing needed medicines or other humanitarian goods will often be most complicated where it is most needed. In Iraq, longstanding political structures and U.S. Government reconstruction policies meant that the only way to supply medical goods desperately needed by the population was to deal with the Ministry of Health. And after elections resulted in Sadr's movement gaining political leadership at the Ministry of Health, that meant dealing with a Health Ministry led by individuals with potentially problematic affiliations. Of course, if the U.S. Government had decided that dealing with a problematic Health Ministry caused more harm than good, it had myriad tools at its disposal, including sanctions and terrorism designations to cut the Health Ministry off from

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[5] UNICEF, *Iraq Receives Almost 3 Million Doses of the COVID-19 Vaccine Through COVAX* (Dec. 1, 2021), https://tinyurl.com/5n7k5tpp.

assistance from the government as well as private actors. The United States did not invoke such sanctions or designations, thereby confirming the importance that policymakers placed on ensuring the supply of medical goods to conflict-ridden Iraq and its people.

These challenging decisions and circumstances are made more problematic by the threat of sprawling private ATA litigation based on incorrect interpretations of the statute's aiding-and-abetting provisions. By watering down the statutory requirements that Congress enacted as guardrails against overbroad liability, misinterpretations like the Ninth and D.C. Circuits' expose the makers and suppliers of life-saving medicine to unwarranted litigation and the threat of treble damages. Absent adherence to the specific limitations that Congress placed on aiding-and-abetting liability under the ATA, the biopharmaceutical industry would not be able to rely upon even the U.S. Government's judgment that it is important to work with, and supply, certain foreign Health Ministries. Faced with this risk and uncertainty, some companies may be reluctant to supply governments whose people are desperately in need of medical supplies, or to answer the call the next time the United States asks them to ensure medical supplies are delivered to zones of civil strife and armed conflict.

This potential chilling effect derives in part from the potent adverse impact that misdirected ATA litigation can have. It exposes defendants to the threat of treble damages, *see* 18 U.S.C. § 2333(a), and raises the specter of companies whose mission is to

save lives being inaccurately tarred with a reputation as a supporter of terrorism. Particularly in the post-9/11 era, few opprobriums are more serious than being slandered as an aider-and-abettor of international terrorism. And *Atchley* illustrates that, to defend itself from such a claim, a company may face extraordinarily complex and burdensome discovery seeking to establish what happened on battlefields across numerous years and provinces; what relationships existed among government ministries, countless political parties, religious movements, and militias amidst a complex and long-running armed conflict; and how the U.S. Government balanced the myriad foreign-policy and national-security interests at stake and encouraged private engagement. All of this may add up to tremendous settlement pressure, irrespective of the merits.

The experience of the biopharmaceutical industry in *Atchley*, and the broader dangers to the global supply of medicines presented by overbroad misinterpretations of the ATA's aiding-and-abetting provision, are critical context for consideration of the case now before this Court. In construing 18 U.S.C. § 2333(d)(2) for the first time, the Court should adhere to the statutory text and the common-law limitations on aiding-and-abetting liability reflected in the *Halberstam* framework that Congress invoked. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016). In doing so, the Court can avoid the perverse consequence that a law aimed at protecting lives would discourage drugmakers from providing necessary medicines to the world's neediest countries.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the briefs of petitioner and respondents supporting petitioner, this Court should reverse the decision of the court of appeals.

Respectfully submitted,

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