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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FOREIGN TRADE COUNCIL, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The National Foreign Trade Council is the premier business association advancing trade and tax policies that support access to the global marketplace. Founded in 1914, the National Foreign Trade Council promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses.

The United States Council for International Business promotes open markets, competitiveness and innovation, sustainable development, and corporate responsibility, supported by international engagement and regulatory coherence. Its members include global companies and professional services firms. As the U.S. affiliate of the International Chamber of Commerce,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus* briefs.

Business at OECD, and the International Organization of Employers, it provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

Business Roundtable is an association of chief executive officers of over 230 leading U.S. companies that support 37 million American jobs, generate $10 trillion in sales activity, and account for 24% of the U.S. GDP. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy. Business Roundtable participates in litigation as *amicus curiae* when important business interests are at stake, as in this case.

Congress enacted the civil liability provisions of the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, to enable U.S. citizens who are victims of terrorism to hold accountable the terrorists who engage in those horrific acts, as well as the individuals or entities intimately involved in supporting those acts. That is a laudable and important goal.

To avoid entrapping legitimate businesses in ATA lawsuits, Congress limited secondary liability to 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(d)(2).

The Ninth Circuit determined that Plaintiffs properly stated such a claim by alleging that Google, Twitter, and Facebook were generally aware that some supporters or members of ISIS—an international terrorist organization—were among the billions of users on their social media platforms. It held that

Defendants could be subjected to liability for ISIS's terrorist acts, even though Defendants barred pro-terrorist content from their platforms and regularly removed such content when they become aware of it. Pet.App.71a-72a.

The court of appeals' ruling effectively eviscerates Congress's requirements that defendants must knowingly provide substantial assistance to an injury-causing terrorist attack before they may be held civilly liable under the Act. That dramatic expansion of liability would have significant adverse consequences for the entire business community. *Amici* therefore submit this brief to explain why the Ninth Circuit's decision should be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici condemn all acts of terrorism. Individuals and organizations that commit these heinous acts, and those who collaborate with them, should be brought to justice and required to compensate their victims.

Congress enacted the Anti-Terrorism Act (ATA) to provide U.S. victims of terrorism with a cause of action to obtain compensation for their injuries. The ATA initially limited liability to the persons who committed acts of international terrorism. *Rothstein* v. *UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013). Congress amended the law in 2016 by enacting the Justice Against Sponsors of Terrorism Act (JASTA), which imposes liability on those who aid and abet, or conspire with, persons who commit acts of international terrorism. Pub. L. No. 114-222, 130 Stat. 852 (2016).

Plaintiffs here did not sue the ISIS terrorists who killed their relative during an attack in Turkey. Nor have they sued individuals or entities that made common cause with those terrorists. Rather, they brought this action against Facebook, Twitter, and Google—social media companies with billions of users worldwide. Plaintiffs allege that members of ISIS used the free communication tools that these companies make available to the public at large and "exploited" those tools in order to recruit adherents and "instill fear" in others. Pet.App.71a.

This case is not unique. Plaintiffs' lawyers have filed numerous lawsuits asserting secondary-liability claims under the Anti-Terrorism Act against a wide

variety of legitimate businesses. These claims typically rest on expansive secondary-liability theories like the one asserted here, and the overwhelming majority have been dismissed for failing to plausibly allege facts satisfying the ATA's demanding requirements for aiding-and-abetting liability.

The Ninth Circuit, however, held the complaint here sufficient. That determination ignored requirements prescribed in the law's plain text and, if permitted to stand, would expand liability far beyond the bounds authorized by Congress.

First, the statute imposes liability on a person "who aids and abets, by *knowingly* providing substantial assistance." 18 U.S.C. § 2333(d)(2) (emphasis added). Congress stated in the statutory findings that *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983), provides the proper framework for interpreting the law's secondary-liability standard. That decision holds that the *mens rea* elements of an aiding-and-abetting claim require proof that the defendant was "generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance" and "*knowingly* and substantially assist[ed] the principal violation." *Id*. at 477 (emphasis added).

This *mens rea* requirement is critically important because the defendant's conduct typically is not wrongful by itself—if it were, the plaintiff would be able to assert a primary-liability claim. Rather, it is the defendant's mental state that separates actionable from non-actionable conduct.

To avoid dismissal on *mens rea* grounds, the complaint must allege facts supporting plausible inferences that (1) the defendant knew that a specific, identified customer or customers were either the terrorist-principal that injured the plaintiff or were providing support to that principal at the time the defendant was providing goods or services to those customers; and (2) the defendant knew that by providing those goods or services it was assuming a role in and providing substantial assistance to the principal's unlawful act of international terrorism that injured the plaintiff.

The allegations here do not come close to satisfying that standard. The complaint does not allege facts supporting a plausible inference that Defendants continued to provide services to customer accounts that they knew belonged to ISIS or persons or entities providing support to ISIS. Neither does the complaint allege facts supporting a plausible inference that Defendants knew that by providing services to their customers they were providing substantial assistance to the terrorist act.

Second, the complaint fails to satisfy the separate statutory requirement that it allege facts supporting a plausible inference that the aiding-and-abetting defendant substantially assisted the specific "act" of international terrorism that injured the plaintiff. The Ninth Circuit created a more permissive test, stating that a defendant can be held liable for injuries resulting from assisting a "broader campaign of terrorism." That approach contravenes the statutory text as well as *Halberstam*'s holding that "the defendant must

knowingly and substantially assist the principal violation"—with "principal violation" referring to the "wrongful act that causes an injury." 705 F.2d at 477.

Moreover, eliminating the link between the alleged aid and the act injuring the plaintiff, and permitting a complaint to proceed based on allegations of general aid to a terrorist organization, would allow plaintiffs' lawyers to threaten gargantuan liability, and thereby coerce unjustified settlements. They could assert that the company targeted as an alleged aider and abettor is liable for every terrorist act during the period that it was allegedly providing goods or services—even though imposing liability without a connection to the "act of international terrorism" that injured the plaintiff contravenes the statute's plain text and long-established principles of aiding-and-abetting liability.

The Ninth Circuit's failure to faithfully apply the liability standards enacted by Congress opens the door to abusive claims alleging only that somewhere in a company's customer base—which for many companies includes tens or hundreds of millions of people—unidentified individuals are using the business's products or services in a way that supposedly furthers terrorists' goals. These actions would impose significant reputational harm by labeling defendants as collaborators with terrorists; tremendous financial risk; and onerous discovery burdens due to the cross-border nature of the claims. Companies would be forced either to absorb the high costs of settling unjustified lawsuits or to stop doing business in the conflict-ridden, developing parts of the world in which such claims typically arise, contrary to U.S. government policy that recognizes the benefits of commercial engagement in such regions.

Congress limited aiding-and-abetting liability to prevent those perverse consequences. The Ninth Circuit's judgment should be reversed and the complaint dismissed.

ARGUMENT

I. Legitimate Companies Are Increasingly Targeted By Unjustified Anti-Terrorism Act Lawsuits.

The Anti-Terrorism Act enables victims of international terrorism to seek compensation from the terrorist groups that attacked them and from others intimately involved in planning or executing the attack. See, *e.g.*, *Pescatore* v. *Palmera Pineda*, 345 F. Supp. 3d 68, 69-70 (D.D.C. 2018).

But very few Anti-Terrorism Act cases are brought against the individuals or groups that planned, committed, or directly supported the attacks injuring the plaintiffs. Rather, virtually all of these claims target deep-pocketed, legitimate companies. They virtually always rest on attenuated liability theories asserting that goods or services provided to customers in conflict-ridden areas of the world somehow assisted a terrorist organization and thereby aided and abetted a terrorist act. And they have ensnared numerous companies in multiple economic sectors.

For example, ATA lawsuits against banks typically allege that the bank defendant had one or more customers with ties to entities or governments that supposedly funded terrorist groups and that the provision of banking services to those customers therefore aided and abetted the terrorist acts committed by those groups.

These suits frequently assert claims on behalf of dozens, or even hundreds, of plaintiffs, and name multiple banks as defendants. See, *e.g.*, *Freeman* v. *HSBC Holdings PLC*, 413 F. Supp. 3d 67 (E.D.N.Y. 2019) (bringing claims on behalf of over 280 plaintiffs against 10 banking institutions); *O'Sullivan* v. *Deutsche Bank AG*, 2019 WL 1409446 (S.D.N.Y. Mar. 28, 2019) (bringing claims on behalf of over 150 plaintiffs against 17 banking institutions). Lower courts frequently dismiss these claims,[2] but many ATA banking cases remain pending and still others are being filed.[3]

Plaintiffs have also asserted Anti-Terrorism Act claims against businesses in a variety of other industries. These include:

- energy companies;[4]

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[2] See, *e.g.*, *Honickman* v. *BLOM Bank SAL*, 6 F.4th 487, 490 (2d Cir. 2021); *Bernhardt* v. *Islamic Republic of Iran*, 47 F.4th 856, 859 (D.C. Cir. 2022); *Owens* v. *BNP Paribas*, 897 F.3d 266, 269 (D.C. Cir. 2018); *Siegel* v. *HSBC N. Am. Holdings*, 933 F.3d 217, 222 (2d Cir. 2019).

[3] See, *e.g.*, *Lelchook* v. *Société Générale de Banque au Liban SAL*, 2021 WL 4931845 (E.D.N.Y. Mar. 31, 2021), *appeal docketed*, No. 21-975 (2d Cir. Apr. 20, 2021); *Averbach* v. *Cairo Amman Bank*, No. 19-cv-004 (S.D.N.Y.) (filed Jan. 1, 2019); *Bonacasa* v. *Standard Chartered PLC*, No. 22-cv-3320 (S.D.N.Y.) (filed Apr. 22, 2022); *Bowman* v. *HSBC Holdings PLC*, No. 19-cv-2146 (E.D.N.Y.) (filed Apr. 11, 2019); *Schansman* v. *Sberbank of Russia PJSC*, No. 19-cv-2985 (S.D.N.Y.) (filed Apr. 4, 2019); *Singer* v. *Bank of Palestine*, No. 19-cv-006 (E.D.N.Y.) (filed Jan. 1, 2019).

[4] *Brill* v. *Chevron Corp.*, 804 F. App'x 630 (9th Cir. 2020).

- defense contractors;[5]
- pharmaceutical companies;[6]
- agricultural businesses;[7]
- charitable foundations;[8] and
- media companies.[9]

These claims likewise rest on attenuated theories that the businesses provided services or money that may have incidentally aided and abetted terrorist activity. And again, the cases are usually dismissed.

Finally, as here, Anti-Terrorism Act plaintiffs have sued social media companies such as Twitter, Facebook, and Google, arguing that these companies provide a platform for terrorist groups to recruit, raise funds, and otherwise promote attacks on civilians. Courts have consistently dismissed these claims as too attenuated to support liability under the Anti-Terrorism Act.[10]

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[5] *Cabrera* v. *Black & Veatch Special Projects Corps.*, 2021 WL 3508091 (D.D.C. July 30, 2021).

[6] *Atchley* v. *AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022).

[7] *In re Chiquita Brands*, 2015 WL 71562 (S.D. Fla. Jan. 6, 2015).

[8] *Peled v. Netanyahu*, 2017 WL 7047931 (D.D.C. Oct. 16, 2017) (asserting claims against Israeli government officials and an American foundation).

[9] *Kaplan* v. *Al Jazeera*, 2011 WL 2314783 (S.D.N.Y. June 7, 2011).

[10] See Twitter Br. 11 n.7.

The increase in Anti-Terrorism Act claims parallels the decline in private actions against large international companies under the Alien Tort Statute, 28 U.S.C. § 1350.

Beginning in the 1990s, plaintiffs frequently invoked the Alien Tort Statute to assert claims against multinational corporations, alleging that the defendants' business activities somehow aided and abetted human rights violations in foreign countries.[11] The complaints often alleged that simply by engaging in business transactions in a particular market, or with particular counterparties, the companies aided and abetted human rights violations committed by government officials or private parties in the foreign country.

The Alien Tort Statute was attractive for plaintiffs' lawyers because it provided a vehicle to file lawsuits on behalf of sympathetic plaintiffs—individuals who had been injured by violations of their human rights. And it enabled them to publicly label legitimate companies as "human-rights violators" by tying these companies (through tenuous theories of liability) to individuals, businesses, or governments that had committed atrocities in foreign countries. The reputational damage inflicted by the filing of these claims, along with the expense and uncertainty surrounding the prospect of litigation and cross-border discovery, imposed significant settlement pressure on corporate defendants.

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[11] One report found 150 such lawsuits "filed against companies in practically every industry sector for business activities in over sixty countries." U.S. Chamber Instit. for Legal Reform, *Federal Cases from Foreign Places* 23 (Oct. 2014), https://instituteforlegalreform.com/wp-content/uploads/media/federal-cases.pdf.

But a series of decisions by this Court significantly curtailed Alien Tort Statute claims. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004) (holding that courts could only recognize claims under the Alien Tort Statute analogous to the "historical paradigms familiar when § 1350 was enacted"); *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (holding that the Alien Tort Statute does not apply extraterritorially); *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1389 (2018) (holding that the Alien Tort Statute does not extend to non-U.S. corporations); *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1937 (2021) (holding that domestic application of the Alien Tort Statute requires more than a defendant's "general corporate activity").

In the wake of those decisions, plaintiffs' lawyers have turned to the Anti-Terrorism Act. That statute provides similar opportunities to coerce settlements through reputational harm—associating legitimate companies with horrific acts of violence—and massive claims for treble damages. Indeed, because ATA plaintiffs must be U.S. nationals—and often are military veterans or their survivors asserting claims based on terrorist acts occurring in Iraq and other areas of conflict—these lawsuits arguably inflict greater reputational damage than ATS claims (which are available only to foreign citizens).

In contrast to the ATS, which relied on judicially created claims, Congress in the ATA specified liability standards that, properly applied, protect legitimate businesses against the expansive claims asserted in these lawsuits—as most lower courts have concluded.

II. Congress Carefully Cabined Aiding-And-Abetting Liability—And The Claim Here Falls Far Outside Those Limits.

When Congress enacted JASTA and created a claim for aiding-and-abetting liability under the Anti-Terrorism Act, it imposed specific, express limitations on the scope of the cause of action.

The statutory text provides, in pertinent part, that when a plaintiff asserts a claim "for an injury arising from an act of international terrorism committed, planned, or authorized by" a designated foreign terrorist organization, "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, * * * such an act of international terrorism." 18 U.S.C. § 2333(d)(2). The statute thus requires that the defendant must "knowingly provide substantial assistance" that "aids and abets" the "act of international terrorism" that injured the plaintiff.[12]

In addition, Congress, in the findings enacted in JASTA, specified that *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983), "provides the proper legal framework for how [aiding-and-abetting] liability should function" under the ATA. See Pub. L. 114-222, § 2(a)(5), 130 Stat. 852, 852. *Halberstam* states that aiding-and-abetting liability

> includes the following elements: (1) the party whom the defendant aids must perform a

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[12] The first statutory prerequisite—that the plaintiff's injury must arise from an act of international terrorism committed, planned, or authorized by a federally-designated foreign terrorist organization—is not at issue here, because ISIS has been designed as a terrorist organization by the federal government.

> wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.

705 F.2d at 477. This case involves the proper application of the second and third elements, which are essential to ensure that legitimate companies engaging in routine business activities will not find themselves labeled as terrorists, ensnared in costly cross-border litigation, and facing treble damages in unjustified lawsuits.

A. The "Knowing[]" Element Requires Proof That The Defendant Knew It Was Assuming A Role In Terrorist Activities And Substantially Assisting The Act That Injured The Plaintiff.

To establish aiding-and-abetting liability, an ATA plaintiff must prove that the defendant "knowingly" provided substantial assistance to the terrorist act—and at the pleading stage, the plaintiff must allege facts supporting a plausible inference of that element. The statutory text and *Halberstam*'s discussion of the *mens rea* element make clear that the plaintiff must allege and prove that the defendant actually knew that, through its conduct, the defendant was assuming a role in, and providing substantial assistance to, the principal wrongdoer's unlawful terrorist act that injured the plaintiff.

1. The knowledge element serves the critical role of protecting innocent actors from unjustified liability.

When a plaintiff seeks to hold a defendant liable under an aiding-and-abetting theory, the standard governing the *mens rea* element is critically important. That is because the defendant's actions by themselves typically are not wrongful—if they were, the plaintiff would be able to assert a primary-liability claim. Rather, it is the defendant's mental state that separates actionable from non-actionable conduct.

Halberstam itself recognized the crucial role of the knowledge element in preventing the imposition of liability on innocent parties. Citing authorities from the securities law context, the court of appeals explained that "an 'awareness of wrong-doing requirement' for an aider-abettor is designed to avoid subjecting innocent, incidental participants to harsh penalties or damages." 705 F.2d at 485 n.14 (citing *Investors Res. Corp.* v. *SEC*, 628 F.2d 168, 177-78 (D.C. Cir. 1980); David Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 630-38 (1972)).

Dean Ruder observed in the law review article cited in *Halberstam* that "[i]n most cases, the alleged aider and abettor * * * will merely be engaging in customary business activities, such as loaning money, managing a corporation, preparing financial statements, distributing press releases, completing brokerage transactions, or giving legal advice"; the knowledge requirement is therefore the "crucial element" that prevents "automatic liability" for the conduct of the primary violator, who relied on or used the

defendant in some manner. Ruder, *supra*, at 631, 632. That is because, as one of the decisions cited in *Halberstam* put it, such routine business activities "could constitute substantial assistance to the principal wrongdoer, yet * * * can be performed in complete good faith by an actor totally unaware that anything improper is occurring." *Investors Res. Corp.*, 628 F.2d at 178 n.61.

For these reasons, in Dean Ruder's words, "knowledge of the primary illegal course of conduct should be required for aiding and abetting * * * liability." Ruder, *supra*, at 638; see also *id.* at 634 (stating that "the knowledge must include knowledge of the illegality of the act in question").[13]

> *2. A plaintiff must prove that, at the time the defendant provided the substantial assistance, the defendant actually knew of its role in the terrorist act and knew that the act was unlawful.*

The statutory requirement that an aiding-and-abetting defendant "knowingly" provide substantial assistance, see 18 U.S.C. § 2333(d)(2), by itself makes clear that a plaintiff must prove that the aiding-and-abetting defendant actually knew that his actions

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[13] Numerous other authorities recognize the *mens rea* element's key role in screening out innocent conduct. See, *e.g.*, *Woodward* v. *Metro Bank of Dallas*, 522 F.2d 84, 96 (5th Cir. 1975); *K & S P'ship* v. *Cont'l Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991); *Aetna Cas. & Sur. Co.* v. *Leahey Constr. Co.*, 219 F.3d 519, 534 (6th Cir. 2000); see also Baruch Weiss, *What Were They Thinking?: The Mental State Of The Aider And Abettor And The Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1348 (2002) ("[T]he mental element is really what defines the aider and abettor.").

substantially assisted the principal in accomplishing the principal's unlawful act. Cf. *Rosemond* v. *United States*, 572 U.S. 65, 79 (2014) ("What matters for purposes of gauging intent" for an aiding-and-abetting claim "is that the defendant has chosen, with full knowledge, to participate in the illegal scheme.").

Halberstam confirms that conclusion, stating that the *mens rea* element requires proof that the defendant must be "generally aware of his role as part of" the illegal activity "at the time that he provides the assistance." 705 F.2d at 477. The defendant must "kn[o]w about" the principal's act; know that the principal's act is unlawful—have "a general awareness of [the defendant's] role in a continuing criminal enterprise"; and "act[] to support" that unlawful act. *Id*. at 488.

The court in *Halberstam* relied in part on the discussion of aiding-and-abetting liability in the Restatement of Torts. See 705 F.2d at 477. The Restatement provision, too, requires proof that the alleged aider and abettor "knows that the other's conduct constitutes a breach of duty." RESTATEMENT (SECOND) OF TORTS § 876(b) (1979); see also *id*. § 876, comment d (liability applies "if the act encouraged is known to be tortious").

Halberstam's application of the *mens rea* element to the record in that case demonstrates the type of proof that is required. The aiding-and-abetting defendant, Hamilton, had a long-time, live-in partner who had been engaged in a five-year-long burglary enterprise. 705 F.2d at 474-476. During those five years, Hamilton watched her partner, who "had no outside employment," disappear "four or five" evenings each week; saw him smelt gold and silver into bars in their garage—with no explanation regarding the source of

that metal; and performed the secretarial and administrative tasks necessary to sell those bars, depositing the receipts into her own bank accounts. *Ibid.* And Hamilton could not have believed that her partner's gains were legally purchased; she never saw money go out, only come in. *Ibid.* In sum, Hamilton actually knew that her partner was engaged in criminal acts and also knew how her actions supported those acts.

Thus, to satisfy the *mens rea* requirement, a plaintiff must establish—and at the motion-to-dismiss stage must plausibly allege—that the defendant knew that it was assuming a role in the principal wrongdoer's unlawful terrorist acts by substantially assisting the terrorist act that injured the plaintiff.

Plaintiffs may attempt to water down the *mens rea* requirement by invoking two arguments. Both are meritless.

First, they may point to the Second Circuit's assertion that "*Halberstam*'s attachment of the 'generally' modifier imparts to the concept 'generally aware' a connotation of something less than full, or fully focused recognition." *Kaplan* v. *Lebanese Canadian Bank, SAL*, 999 F.3d 842, 863 (2d Cir. 2021). Nothing in *Halberstam* supports the contention that less than actual knowledge can suffice; rather, as just discussed, *Halberstam* makes clear that actual knowledge is required.

The *Halberstam* court's use of "generally aware" means only that the defendant need not know all of the details of the principal's unlawful activities, but requires that the defendant know that by its conduct it assumed a role in activities that the defendant knew were unlawful. See also *Halberstam*, 705 F.2d at 477

(requiring that the substantial assistance be provided "knowingly"). Thus, Hamilton was not proven to be aware of all of her partner's unlawful activities, but was nonetheless liable as an aider and abettor because it "defie[d] credulity that Hamilton did not know that something illegal was afoot"—and because she knew that she was actively assisting those activities. *Id*. at 486.

Second, Plaintiffs may cite JASTA's statutory "[p]urpose" clause, which states:

> 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.

Pub. L. No. 114-222, § 2(b), 130 Stat. 852, 853.

A declaration of statutory purpose cannot expand liability beyond the operative statutory text. See *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1086 (2019) (statements of purpose "by their nature 'cannot override [a statute's] operative language'") (citation omitted); *Honeycutt* v. *United States,* 137 S. Ct. 1626, 1635 n.2 (2017) (same).

Moreover, this provision is immediately preceded by statutory findings regarding U.S. courts' exercise of personal jurisdiction, see Pub. L. No. 114-222, § 2(a)(6) & (7), and the "purpose" provision itself refers to enabling plaintiffs to "seek[] relief" against defendants "wherever acting and wherever they may be

found"—making clear that the declaration of purpose relates to Congress's goal of providing for expansive personal jurisdiction by U.S. courts over foreign persons accused of terrorism, and does not address the liability standard.[14] Because Congress expressly specified that the scope of secondary liability should be based on *Halberstam*, *id.* § (2)(a)(5), it would be inconsistent—indeed, contradictory—to interpret the "purpose" provision to override the standards in *Halberstam*.[15]

Plaintiffs therefore can avoid dismissal only if the complaint contains factual allegations supporting a plausible inference that Defendants knew that, through their provision of services to customers linked to ISIS, they were assuming a role in the unlawful terrorist act that injured Plaintiffs' relative.[16]

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[14] Of course, Congress cannot override the due process limits on personal jurisdiction.

[15] See also Br. for United States as Amicus Curiae at 21, *Weiss* v. *National Westminster Bank, PLC*, 142 S. Ct. 706 (No. 21-381). ("Nothing suggests that JASTA's 'purpose' provision was specifically targeted at Section 2333(d)(2)'s standard for aiding-and-abetting liability—much less that it should override Congress's clear invocation of the *Halberstam* framework.").

Moreover, as explained below (at 28-29), Congress expressly declined to impose secondary ATA liability based on the provision of material support to terrorists. But the "purpose" provision states that the law provides a basis for "seek[ing] relief" against persons or entities "that have provided material support, directly or indirectly, to foreign organizations or persons" that engage in terrorism. That contradiction provides further confirmation that the purpose clause does not relate to JASTA's liability standard.

[16] Because the only unlawful activity alleged here is terrorism, this case does not present the question whether ATA aiding-and-abetting liability may be premised on the defendant's knowledge that its actions provided substantial assistance to illegal activity

3. The allegations here fall far short.

The complaint does not allege facts supporting a plausible inference that Defendants knew that they were continuing to provide services to specific customers that Defendants knew were using the companies' services to substantially assist terrorist acts, much less the attack on Plaintiffs' relative. Neither does it allege facts supporting a plausible inference that Defendants knew that by providing services to their customers they were assuming a role in ISIS's terrorist activities generally, or in the particular terrorist attack. Those failures are fatal to Plaintiffs' claim.

For the most part, Plaintiffs allege generally that Defendants knew they had some customer accounts that were using their services to support terrorism. To the extent that the complaint identifies particular customers or customer accounts as linked to ISIS, it does not contain any allegations supporting a plausible inference that Defendants knew that they were continuing to provide services to specific ISIS accounts, much less that Defendants knowingly assumed a role in ISIS's terrorist activities. See J.A. 140-42, 149-53.

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other than terrorism. The D.C. Circuit correctly concluded that the statutory text—by imposing liability only on those who aid "person[s] who commit[] * * * an act of international terrorism," 18 U.S.C. § 2333(d)(2)—requires a defendant to knowingly assist terrorist activities, not other unlawful conduct from which harm from terrorist activities is foreseeable. See *Bernhardt*, 47 F.4th at 868 (rejecting argument that ATA liability could be based on sanctions violations); compare *Kaplan*, 999 F.3d at 860 (appearing, in dicta, to permit liability based on the aiding-and-abetting defendant's knowledge of and assistance to non-terrorist activities).

These allegations differ dramatically from the facts in *Halberstam*, where the defendant had direct, actual knowledge of the principal's illegal activities and her role in furthering them.

The fundamental purpose of the *mens rea* requirement is to avoid the imposition of liability on innocent parties by requiring proof that the defendant provided substantial assistance *with knowledge at the time that the assistance would help the principal to engage in the unlawful act that injured the plaintiff*. Acting with that knowledge is what makes the conduct of the alleged aider and abettor culpable. The Ninth Circuit's approach imposes liability without the requisite culpability, because Defendants are not alleged to have known that particular customers were using their services to substantially assist the injury-causing terrorist act—and therefore had no opportunity to avoid liability by refusing to provide services.

Moreover, the Ninth Circuit based its decision in part on allegations regarding Defendants' efforts to remove terrorist-related customers, stating that those efforts showed that Defendants knew that terrorist supporters used their services. Pet.App.65a-66a. In other words, Defendants were penalized because they were undertaking efforts to identify and remove terrorist supporters. On that view, a company could avoid liability by not engaging in any efforts to remove terrorist supporters and other unlawful users and instead acting only upon complaints. There is no sense to a legal rule that discourages such efforts.

The deficiencies in the complaint here make this an easy case for dismissal. The Court should not just hold this complaint insufficient—to provide guidance to the lower courts, this Court should make clear what

is required for a complaint to survive a motion to dismiss.

To avoid dismissal on *mens rea* grounds, the complaint must allege facts supporting plausible inferences that (1) the defendant knew that a specific, identified customer or customers were either the terrorist-principal that injured the plaintiff or were providing support to that principal at the time the defendant was providing goods or services to those customers; and (2) the defendant knew that by providing those goods or services it was assuming a role in and providing substantial assistance to the principal's unlawful terrorist act that injured the plaintiff.

These requirements are not just compelled by the *Halberstam* standard. They also are required by the principle, applied generally to aiding-and-abetting claims, that when a plaintiff accuses a business engaged in "routine" commercial transactions of aiding and abetting an unlawful scheme, an even "higher degree of knowledge" is required. *Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991); see also *Woodward*, 522 F.2d at 95 ("If the alleged aider and abettor conducts what appears to be a transaction in the ordinary course of his business, more evidence of his complicity is essential.").

For example, in *Kaplan*), the plaintiffs asserted that the defendant bank aided and abetted Hizbollah, an international terrorist organization, in carrying out rocket attacks on civilians. The complaint alleged that the bank provided services to customers that it knew were Hizbollah affiliates because Hizbollah itself had publicized that information—and because the bank had publicly attacked (and therefore was aware of) a U.N. report stating that one of the customers was

laundering money for Hizbollah. 999 F.3d at 849-50, 860, 862, 865-66. Additionally, the complaint alleged that the bank's "provision of banking services" to the Hizbollah affiliates was not "routine" and "that [the bank] had violated banking regulations and disregarded its own internal policies in order to grant its known Hizbollah-affiliated Customers 'special exceptions' that permitted those Customers to deposit hundreds of thousands of dollars a day without complying with the requirement that the source of funds be disclosed." *Id.* at 858. The court therefore held that the bank was generally aware that it was "playing a role in Hizbollah's terrorist activities." *Id.* at 865.

In *Siegel* v. *HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019), by contrast, the court of appeals affirmed the dismissal of aiding-and-abetting claims against several bank entities alleged to have substantially assisted al-Qaeda through the provision of banking services to a Saudi bank with alleged ties to the terrorist group. The complaint cited newspaper articles, U.S. government reports, and the defendants' own documents in alleging that the defendants were aware that owners of the Saudi bank were linked to terrorist groups, "including evidence that the bank's key founder was an early financial benefactor of al Qaeda." *Id.* at 220.

The court of appeals concluded that these allegations, "[a]t most," asserted that the defendants were "aware that [the Saudi bank] was believed by some to have links to [al-Qaeda] and other terrorist organizations." 933 F.3d at 224. They were insufficient to "support a conclusion that [the defendants] knowingly played a role in the terrorist activities," because the complaint alleged that the Saudi bank was "a large

bank with vast operations" and "d[id] not allege that most, or even many, of the [Saudi bank's] banking activities are linked to terrorists." *Ibid.* For that reason, merely doing business with the Saudi bank did not support a plausible inference that the defendants were playing a role in al-Qaeda's terrorist activities.

Congress determined that when a business knows it is assuming a substantial role in terrorist activities—based on proof that the defendant knew that a particular customer or account was being used by terrorists and that by providing services to that customer the defendant was providing substantial assistance to the terrorists' unlawful act of international terrorism that injured the plaintiff—then the business may be held liable as an aider and abettor. The Ninth Circuit failed to apply that standard, and instead greatly expanded the scope of the Anti-Terrorism Act beyond the bounds fixed by Congress. This Court should clarify the proper *mens rea* standard and hold that the complaint here falls short of that standard's requirements.

B. A Plaintiff Must Prove That The Defendant Substantially Assisted The Act Of International Terrorism That Harmed The Plaintiff.

The Ninth Circuit held that a defendant may be held liable on an ATA aiding-and-abetting claim if the defendant provides substantial assistance to a group that commits the terrorist act that injures the plaintiff, even if there is no identifiable link between the defendant's assistance and that terrorist act. That expansive interpretation of the ATA is contrary to the statutory text and to the standard applied in *Halberstam*—both of which make clear that the defendant

must substantially assist the terrorist act that harms the plaintiff.

The Anti-Terrorism Act states that "[i]n an action * * * for an injury arising from an act of international terrorism * * *, liability may be asserted as to any person who aids and abets * * * the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). Several aspects of this statutory formulation require the plaintiff to prove that the defendant substantially assisted the act of international terrorism that harmed the plaintiff.

To begin with, the text makes clear that the principal violation for which the aider and abettor is held responsible is "an act" of international terrorism—*i.e.*, a specific, injury-causing attack. See *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1481 (2021) ("Congress's decision to use the indefinite article 'a'" can provide "evidence that it used the term" to mean "a discrete * * * thing.").

Next, the phrase "aids and abets * * * the person who commits *such an act of international terrorism*," 18 U.S.C. § 2333(d)(2) (emphasis added), refers back to the phrase "injury arising from *an act of international terrorism*," *id.* (emphasis added), at the beginning of the sentence. That reference makes clear that the defendant must aid and abet the particular act of international terrorism that injured the plaintiff.

Further support for that conclusion is provided by another aspect of the provision's text. In delineating the separate prerequisite for aiding-and-abetting liability that a foreign terrorist organization (FTO) must be involved in the terrorist act, Congress stated that an aiding-and-abetting action could be brought for an injury arising "from an act of international terrorism

committed, planned, or authorized by" a designated FTO. 18 U.S.C. § 2333(d)(2) (emphasis added). But later in that same subsection, Congress specified that liability attaches only if the defendant "aids and abets . . . the person who *committed* [that] act of international terrorism." *Ibid.* (emphasis added).

Congress's decision to require that the defendant aid and abet the person who "committed" the terrorist act, and not to impose liability for aiding and abetting those who planned or authorized it, makes clear the limited scope of aiding-and-abetting liability. This Court has "often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court presumes that Congress intended a difference in meaning." *Loughrin* v. *United States,* 573 U.S. 351, 358 (2014).

Finally, if Congress had wanted to cast the civil liability more broadly—to encompass support of terrorists generally rather than aiding and abetting specific terrorist acts—it would have used the different language it used to criminalize material support of a terrorist group. That provision, 18 U.S.C. § 2339B, imposes criminal liability on "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." The absence of that broad language from the aiding-and-abetting provision provides further confirmation that aiding-and-abetting liability cannot be based on general support of a terrorist group, because the Court "must give effect to, not nullify, Congress' choice to include limiting language in some provisions but not

others." *Gallardo By and Through Vassallo* v. *Marstiller*, 142 S. Ct. 1751, 1759 (2022).[17]

That understanding is also consistent with *Halberstam*, which stated that "the party whom the defendant aids must perform a wrongful act that causes an injury" and "the defendant must knowingly and substantially assist the principal violation"—with the "principal violation" referring back to the "wrongful act that causes an injury." 705 F.2d at 477. In other words, the aider and abettor must substantially assist the principal violation that harms the plaintiff.

The Restatement of Torts, relied on in *Halberstam*, adopts the same requirement: An aider and abettor may be held liable if he "knows that the other's *conduct* constitutes a breach of duty and gives substantial assistance or encouragement to the other *so to conduct himself*." RESTATEMENT (SECOND) OF TORTS § 876(b) (emphases added).

The Ninth Circuit held that the principal violation was "ISIS's broader campaign of terrorism," and that Plaintiffs therefore were not required to allege facts supporting a plausible inference that Defendants assisted the specific terrorist act that caused Plaintiffs' injury. Pet.App.54a.

That holding conflicts with the statute's express requirement that the alleged aider and abettor must be shown to have assisted the specific injury-causing terrorist act. And the Ninth Circuit's broad rule effectively imposes liability on anyone who provides mate-

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[17] Plaintiffs may try to rely on the reference in JASTA's purpose declaration to "indirect[]" support of material support. That argument fails for the same reasons explained above. See pp. 19-20 *supra*.

rial support to a terrorist group, even though Congress used different statutory language when it wanted to prohibit material support for terrorists.

The Ninth Circuit rested its contrary holding on *Halberstam*'s determination that the defendant was liable for a murder that occurred during the course of a burglary on the ground that the murder was a foreseeable consequence of her aiding and abetting of the burglaries. Pet.App.54a (citing *Halberstam*, 705 F.2d at 488). But that aspect of *Halberstam* addressed a different issue—the scope of liability once a defendant has been found liable for aiding and abetting. *Ibid.*

Here, as explained above, the statute expressly requires that the defendant aid and abet the act of terrorism that injures the plaintiff. Liability for harm from that act of terrorism therefore can't be premised on aiding and abetting a terrorist group generally, which is what the Ninth Circuit's rationale appears to do.

That distinction is especially important because, unlike the burglar who was the primary violator in *Halberstam*, the Ninth Circuit seemingly assumed that the alleged primary violator here was ISIS, a large and complex organization. Eliminating any link between the alleged substantial assistance and the act injuring the plaintiff, and permitting liability based on general aid to the terrorist organization, would allow plaintiffs' lawyers to coerce unjustified settlements by threatening draconian liability. Indeed, in some ATA cases, plaintiffs have sought to hold the defendants liable for dozens of separate alleged terrorist acts based on the "aid to the organization" theory. See, *e.g.*, *Freeman*, 413 F. Supp. 3d at 96 (noting 92 terrorist attacks at issue in the case). That unbounded liability is squarely inconsistent with the statutory text

and long-recognized limits on aiding-and-abetting liability that require a connection between the alleged assistance and the principal's act injuring the plaintiff.

The Ninth Circuit's misreading of *Halberstam* would thus work a dramatic expansion of aiding-and-abetting liability—far beyond what Congress specified in the statutory text and the limited scope of liability recognized at common law. This Court should reject that result.

III. Expansive Liability Standards Will Impose Significant Costs On Legitimate Businesses With Responsible Anti-Terrorism Policies.

Congress limited the scope of ATA aiding-and-abetting liability to protect innocent companies against the burdens of unjustified litigation and coerced settlements. The adverse consequences of upholding the Ninth Circuit's broad theory of Anti-Terrorism Act liability would be dramatic.

First, any company that can be accused of having "some terrorists" among its customer base could be alleged to be aiding and abetting terrorist activity simply by interacting with its customers—even if the company has no knowledge of any particular transactions with customers that it knows to be terrorists. That is a recipe for extremely broad assertions of liability. For example, a plaintiff could argue that a bank is liable as an aider and abettor based on a general allegation that its customers include alleged terrorists—without identifying the particular customers or alleging facts supporting a plausible inference that the bank knew that particular customers were terrorists or affiliated with terrorists and that providing

them with services would substantially assist the act of international terrorism.

Moreover, the Ninth Circuit's approach penalizes companies that adopt anti-terrorism policies by using those policies as evidence of the company's "knowledge" that terrorists use their services and then imposing liability because the policy is not 100% effective. That would discourage the very business practices that the Anti-Terrorism Act was enacted to promote.

Second, the Ninth Circuit's test will subject legitimate businesses to costly and invasive discovery. The discovery burdens for defendants facing Anti-Terrorism Act claims are particularly onerous, because the relevant conduct often "occurs in a foreign country with an undeveloped legal system that does not, or cannot, cooperate with discovery or in a country with a government that is hostile to the litigation and associated discovery." Alan Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2190-91 (2012).

These discovery burdens "will push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007); see also *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) ("[A] plaintiff with a largely groundless claim [may] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." (internal quotations omitted)).

The pressure to settle is particularly acute in the Anti-Terrorism Act context because the mere pendency of claims inflicts significant reputational harm

on companies by branding them as "supporters of terrorism" complicit in horrific attacks on American citizens, including military veterans. Indeed, enterprising plaintiffs may seek to publicly associate responsible companies with terrorism simply to increase the pressure to settle.

Third, the increase in litigation expenses and settlements will impose significant costs on companies across the economy. Those burdens will not only target wrongdoers, as Congress intended, but also will fall on innocent companies, and their customers as well.

In many areas of the world—such as developing countries and conflict-ridden nations—it would be practically impossible to eliminate counterparty risk, given the small-scale and insular nature of these markets and conflicting views of the legitimacy of businesses, charities, or humanitarian groups that operate there.

Multinational businesses would therefore be forced to "de-risk"—stop providing services to certain regions or clients, even those with legitimate and pressing needs, because of the threat of liability and expensive, drawn-out litigation. According to the Financial Action Task Force, de-risking "is having a significant impact in certain regions and sectors" and "may drive financial transactions underground which creates financial exclusion and reduces transparency, thereby increasing money laundering and terrorist financing risks."[18]

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[18] Financial Action Task Force, *FATF Takes Action to Tackle De-risking* (Oct. 23, 2015), https://tinyurl.com/yyot5v83; see also

De-risking may produce particularly perverse consequences in parts of the world where companies are working closely with the United States government to promote stability by delivering much-needed products, services, health care, or infrastructure—because those are the places where goods or services may fall into the wrong hands, or that the downstream recipients may be accused of supporting terrorism.[19] In the context of the Alien Tort Statute, this Court cautioned against "unwarranted judicial interference in the conduct of foreign policy." *Kiobel*, 569 U.S. at 116; see also *Jesner*, 138 S. Ct. at 1403. But that would be the inevitable result of failing to adhere to Congress's carefully-crafted limits on the scope of aiding-and-abetting claims under the Anti-Terrorism Act.

Staff of House of Representatives Task Force to Investigate Terrorism Financing, 114th Cong., *Stopping Terror Finance: Securing the U.S. Financial Sector* 26-27 (2016), https://tinyurl.com/y2saxcgy (noting that financial institutions have ceased processing remittance transfers to certain countries, which "eventually will drive legitimate transfers into the illegitimate underground economy"); Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 586-87 (2013) (explaining that Anti-Terrorism Act liability will likely "drive legitimate international banks out of troubled regions, with 'terrorist-controlled banks' taking over their market share").

[19] See Samuel Oakford, *Aid Groups Worry New US Anti-Terror Law Could Leave Them Liable*, The New Humanitarian (Mar. 12, 2019), https://tinyurl.com/47yfy2wz (noting the ATA's "chilling effect" on nongovernmental organizations that accept aid from the United States).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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