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 ANTI-TERRORISM ACT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are 16 law professors who write about, research, and teach civil procedure, counterterrorism law, federal courts, and/or statutory interpretation. *Amici* have filed a series of briefs in this Court and the lower courts aiming to put into proper context claims seeking to impose secondary liability under the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, as amended by the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)). *See, e.g.*, Brief of Law Professors as *Amici Curiae* in Support of Petitioners, *Weiss* v. *Nat'l Westminster Bank, PLC*, 142 S. Ct. 2866 (2022) (No. 21-381), 2021 WL 4803879. Those briefs have, in turn, been relied upon for their independent analyses of the text and context of these statutes. *See, e.g.*, *Atchley* v. *AstraZeneca UK Ltd.*, 22 F.4th 204, 223 (D.C. Cir. 2022) (relying on one such brief).

In addition to putting the ATA and JASTA in their proper contexts, *amici* are impelled to write in this case in response to the Department of Justice (DOJ)'s *amicus* brief in support of petitioner, which, in several key respects, misstates or otherwise conflates the scope of secondary liability that Congress authorized under the ATA and reaffirmed in JASTA. As *amici* explain, much of DOJ's analysis is inconsistent with JASTA's plain text and with Congress's unambiguous purpose in enacting that statute—which was to adopt

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

the framework for secondary liability articulated in *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983). It is also inconsistent with prior submissions that DOJ has made to federal courts on the same issue.

Although *amici* take no position on any other issues in this case or in *Gonzalez* v. *Google LLC*, No. 21-1333, we offer this brief to explain why the analysis of secondary liability adopted by the court of appeals in its decision below and defended by respondents comports with JASTA's text and context—and why, if this Court ends up reaching them, the arguments to the contrary in DOJ's *amicus* brief should be rejected.

SUMMARY OF ARGUMENT

Congress enacted JASTA "to provide civil litigants with the *broadest possible basis*, consistent with the Constitution of the United States, to seek relief against [any person or entity that] provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b), 130 Stat. at 853 (emphases added); *see, e.g.*, *Kaplan* v. *Lebanese Can. Bank SAL*, 999 F.3d 842, 855 (2d Cir. 2021) (discussing this language). In that respect, and of especial relevance here, JASTA itself was a reaction to lower-court rulings that had narrowly interpreted the ATA—and was thus the culmination of a 25-year interbranch conversation over the appropriate scope of civil liability for acts of international terrorism.

Consistent with that goal, JASTA expressly authorized civil claims based upon theories of "secondary" liability—against anyone who conspired to violate the ATA or aided and abetted persons who violated the ATA or otherwise engaged in terrorist

activities. JASTA § 4(a), 130 Stat. at 854 (codified at 18 U.S.C. § 2333(d)(2)). And to avoid the potential uncertainty that would result from subjecting defendants to divergent state law secondary liability rules by codifying what it viewed as the appropriate judicial approach, Congress in JASTA expressly directed that courts analyzing claims for secondary liability under the ATA should follow the D.C. Circuit's 1983 ruling in *Halberstam*—in which Judges Wald, Bork, and Scalia carefully outlined the proper contours of such secondary civil liability at common law. JASTA § 2(a)(5), 130 Stat. at 853; *see also Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1991) (describing *Halberstam* as "a comprehensive opinion on the subject"). Congress thus codified *Halberstam* as the standard of secondary liability for ATA claims.

The DOJ *amicus* brief agrees that JASTA adopted the *Halberstam* framework, U.S. Br. 4, and that *Halberstam* therefore governs the scope of aiding-and-abetting liability under the ATA as amended by JASTA. *See id.* at 33. DOJ also agrees, as it must, that under *Halberstam*, "a secondary defendant's contributions may have a sufficient nexus to a terrorist act, even if the defendant has no advance knowledge of, and does not provide support specifically directed to, the particular act." *Id.* at 34. Among other circumstances, DOJ agrees that such liability is appropriate when defendants provide "atypical services" to terrorists, show "knowing complicity in a terrorist group's illegal activities," or knowingly provide "substantial funds or other fungible resources to a foreign terrorist organization or its close affiliates." *Id.* at 21, 24, 34. Even on DOJ's

view, all of these are situations that *suffice* to trigger secondary liability under JASTA.

However, the DOJ *amicus* brief then misapplies *Halberstam* in at least three respects that wrongly circumscribe secondary liability, each of which could improperly skew the Court's analysis in this case: It reads new elements into JASTA's "knowing-and-substantial assistance" requirement that are inconsistent with *Halberstam*; it ramps up the "knowledge" requirement by suggesting that it cannot be satisfied through general business activities or acts of omission; and it obscures *Halberstam*'s holding that "substantial" assistance to a criminal enterprise hinges primarily on the underlying *nature* of the support.

These unjustified narrowings paint an incorrect picture of how a JASTA plaintiff can plausibly allege aiding-and-abetting liability—erroneously focusing on respondents' failure to allege that "defendants provided atypical services or bent their usual policies so to support ISIS's terrorist attacks, that they intended to further ISIS's terrorist acts, or that they had anything more than an arms-length transactional relationship with ISIS." *Id.* at 34. Properly understood, these allegations could *suffice* to establish aiding-and-abetting liability under *Halberstam*, but they are not *necessary* to do so—and are therefore not required to state a claim under JASTA.

ARGUMENT

To understand the significance of the DOJ *amicus* brief's misreadings of *Halberstam* (and, thus, JASTA), it is necessary first to place the 2016 amendments to the ATA into their proper context.

I. JASTA AMENDED THE ANTI-TERRORISM ACT TO EXPRESSLY AUTHORIZE BROAD THEORIES OF SECONDARY LIABILITY

As the text and history of both JASTA and the ATA make clear, Congress knew exactly what it was doing in 2016 when it authorized secondary civil liability—on "the broadest possible basis"—against those who provide assistance or conspire with a "person" who commit acts of international terrorism. JASTA § 2(b), 130 Stat. at 853. In so providing, Congress not only clarified an ambiguity in the ATA as originally encacted (and subsequently interpreted); it expressly authorized theories of secondary liability that run to the outer bounds of what common law courts have recognized.

A. As Initially Enacted, the ATA Did Not Expressly Provide for Secondary Liability

First enacted in 1990,[2] the core of the current ATA has been on the books since 1992. *See* Federal Courts

2. The same language Congress enacted in 1992 was initially enacted on November 5, 1990 as part of the Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250 (1990), and known as the "Anti-Terrorism Act of 1990." *Id*. Because of an enrolling error, though, it was repealed five months later—and promptly reenacted. *See Almog* v. *Arab Bank*, *PLC*, 471 F. Supp. 2d 257, 265–66 (E.D.N.Y. 2007) (retracing this history).

Administration Act of 1992, Pub. L. No. 102-572, § 1003(a)(4), 106 Stat. 4506, 4522 (codified as amended at 18 U.S.C. §§ 2331–2339D (2018)). As the House Judiciary Committee explained, the ATA was designed to provide "a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals." H.R. REP. No. 102-1040, at 1 (1992).

Congress had first provided for extraterritorial *criminal* jurisdiction over terrorist acts in 1986, and the ATA was designed to provide a complementary civil remedy for the victims of such acts. *See id*. To that end, the ATA "would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed." S. REP. No. 102-342, at 22 (1992). Congress also recognized that, to provide both a meaningful remedy and a meaningful deterrent, civil liability had to extend beyond terror operatives to all who helped to facilitate their unlawful activities, even donors: "By its provisions for compensatory damages, tremble [*sic*] damages, and the imposition of liability *at any point* along the causal chain of terrorism, [the ATA] would interrupt, or at least imperil, the flow of money." *Id.* (emphasis added).

As relevant here, the ATA added 18 U.S.C. § 2333(a), which provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue

> therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

The ATA further defines "international terrorism" as activities that meet three requirements. First, they must "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1)(A). Second, they must "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination, or kidnapping." *Id.* § 2331(1)(B). Finally, they must "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum." *Id.* § 2331(1)(C).[3]

In enacting the ATA, Congress explained that its purpose was to close "gap[s] in our efforts to develop a comprehensive legal response to international terrorism," H.R. REP. No. 102-1040, *supra*, at 5, and to thereby impose liability "*at any point* along the causal chain of terrorism," S. REP. No. 102-342, *supra*, at 22 (emphasis added). Nevertheless, other than barring

3. This definition has been amended once in three decades—to add "mass destruction" to § 2331(1)(B)(iii). USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 802(a)(1), 115 Stat. 272, 376.

actions against the U.S. government, foreign governments, and agents or employees thereof, *see* 18 U.S.C. § 2337, the text of the ATA said nothing whatsoever about who could be held liable for violating the statute—or under which theories of liability.

To be sure, there was never any question as to whether the direct perpetrators of the qualifying acts of international terrorism could be sued; clearly, they could. But those individuals often (1) died in the attack; (2) were usually not subject to personal jurisdiction in the United States; or (3) were judgment-proof. Thus, one of the dominant questions the ATA raised was whether any species of secondary liability would be available under the statute.

Perhaps the most important and widely cited decision addressing that question was *Boim* v. *Holy Land Foundation for Relief and Development* ("*Boim III*"), 549 F.3d 685 (7th Cir. 2008) (en banc). Writing for a majority of the en banc court, Judge Posner held that "statutory silence on the subject of secondary liability means there is none; and section 2333(a) authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors." *Id.* at 689 (citing *Cent. Bank of Denver, N.A.*, 511 U.S. at 200). Quoting this exact analysis, the Second Circuit reached a similar conclusion in *Rothstein* v. *UBS AG*, 708 F.3d 82, 97–98 (2d Cir. 2013). *But see Wultz* v. *Islamic Republic of Iran*, 755 F. Supp. 2d 1, 54–57 (D.D.C. 2010) (recognizing common law aiding-and-abetting liability under the ATA, and citing other district courts that had held the same).

The *Boim III* court did not end its analysis with its foreclosure of common law secondary liability, however. Instead, as Judge Posner explained, the *primary* liability imposed by the ATA includes circumstances in which the predicate federal criminal violation is nothing more than the provision of material support to terrorists—which is, itself, a form of secondary liability. *See, e.g.*, 18 U.S.C. §§ 2339A–2339B. In his words, "[p]rimary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Boim III*, 549 F.3d at 691–92.

This reasoning, which has been usefully described as "statutory secondary liability," *see* STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 937 (3d ed. 2016), reflected an overt, if awkward, compromise—between the common law secondary liability that Congress seems to have intended, *see Boim III*, 549 F.3d at 705–19 (Rovner, J., concurring in part and dissenting in part), and the silence of the statute's original text on that specific point. *See Rothstein*, 708 F.3d at 97–98.[4]

4. DOJ also appeared as an *amicus* in *Boim III*, where it argued (correctly, in our view) that

> in order to recover under an aiding/abetting claim, a plaintiff under Section 2333(a) must show that the defendant knowingly provided substantial assistance to a terrorist organization. Whether the assistance provided qualifies as substantial will depend on an analysis of the relevant conduct by reference to the six *Restatement* and *Halberstam* factors. The plaintiff must then also show that the act of international terrorism that actually

Under *Boim III*, establishing "statutory secondary liability" of a defendant other than the perpetrator of the underlying act of international terrorism requires demonstrating not only that the defendant aided or abetted (or conspired to commit) an act of international terrorism; it also requires showing that the defendant's *primary* conduct meets the definition of "international terrorism" in § 2331(1). *Boim III* is thus significant in two respects. First, it underscores the debate over the availability of secondary liability under the ATA prior to JASTA. Second, it provides a baseline against which to compare the post-JASTA ATA, as well.

B. JASTA Expressly Provided That Secondary Liability Is Available Under the ATA, and Expressly Articulated the Standards Governing Such Claims

Following *Boim III*, the Second Circuit rejected common law secondary liability under the original ATA in *Rothstein*, implicitly adopting Judge Posner's theory of "statutory secondary liability." *See* 708 F.3d at 98. But as Judge Kearse presciently noted, "[i]t of course remains within the prerogative of Congress to create civil liability on an aiding-and-abetting basis." *Id*.

Enter, JASTA. Enacted in 2016 over President Obama's veto, JASTA garnered headlines primarily for its amendments to the Foreign Sovereign Immunities Act (FSIA). Far more quietly, JASTA also

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injured the victim was reasonably foreseeable by the defendant.

Brief for the United States as *Amicus Curiae* at 26–27, *Boim III*, 549 F.3d 685 (No. 05-1815), 2008 WL 3993242.

amended the ATA to clarify the rules governing suits against non-governmental defendants. As Congress explained in the text of the statute, "[i]t is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under [the ATA]." JASTA § 2(a)(4), 130 Stat. at 852 (codified at 18 U.S.C. § 2333 note).

Thus, JASTA sought to make explicit that the ATA provides a civil damages remedy against "persons or entities" "that knowingly or recklessly contribute material support or resources, *directly or indirectly*, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States." *Id.* § 2(a)(6) (emphasis added). Indeed, Congress could hardly have been clearer in JASTA's text as to its purpose:

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

Id. § 2(b), 130 Stat. at 853 (emphases added). To that end, JASTA created 18 U.S.C. § 2333(d)(2):

> In an action under [§ 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an

> organization that had been designated as a foreign terrorist organization [(FTO)] as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to *any person who aids and abets*, by knowingly providing substantial assistance, *or who conspires with the person who committed such an act of international terrorism*.

Id. § 4(a), 130 Stat. at 854 (emphases added).

But Congress went even further. JASTA also expressly identified the standards it intended courts to apply in considering secondary liability claims under the ATA. As the statute provided, the D.C. Circuit's canonical decision in *Halberstam*, "which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, . . . provides the proper legal framework for how such liability should function in the context of [the ATA]." *Id.* § 2(a)(5), 130 Stat. at 852. Finally, JASTA provided that its amendments to the FSIA and the ATA applied to any civil action arising out of injuries on or after September 11, 2001, pending as of, or commenced after, its date of enactment—September 28, 2016. *Id.* § 7, 130 Stat. at 855.

In JASTA, Congress therefore (1) expressly authorized ATA claims based upon conspiracy and aiding-and-abetting theories of liability; (2) expressly identified the standards courts should apply in reviewing ATA conspiracy and aiding-and-abetting claims; (3) emphasized that its purpose was to "to provide civil litigants with the broadest possible basis to seek relief against [those] that have provided material support, directly or indirectly, to foreign

organizations or persons that engage in terrorist activities against the United States"; and (4) made those amendments applicable retroactively to any claim arising on or after September 11, 2001.

II. DOJ'S *AMICUS* BRIEF IS INCONSISTENT WITH JASTA'S PLAIN TEXT AND CONGRESS'S UNAMBIGUOUS PURPOSE

DOJ's *amicus* brief does not dispute any element of this descriptive account. It acknowledges that JASTA expressly incorporates the *Halberstam* standard for aiding-and-abetting liability into the ATA, and it concedes that Congress's unambiguous purpose in so providing was to authorize secondary liability that went *beyond* what courts had previously recognized under the ATA. As DOJ rightly summarizes the statute today, "a secondary defendant's contributions may have a sufficient nexus to a terrorist act, even if the defendant has no advance knowledge of, and does not provide support specifically directed to, the particular act," to support aiding-and-abetting liability under the ATA. U.S. Br. 34.

DOJ nevertheless argues against the aiding-and-abetting claims advanced by the respondents here by articulating three limiting principles, none of which find support either in JASTA's text or in the D.C. Circuit's reasoning in *Halberstam*.

First, DOJ argues that JASTA's "knowing-and-substantial assistance requirement is less likely to be satisfied where a defendant [1] provided only routine business services in an ordinary manner, [2] was remote from the unlawful act that injured the plaintiff, or [3] is accused of aiding and abetting another's conduct through inaction." *Id.* at 11–12.

None of these three caveats appear in *Halberstam* (or elsewhere in JASTA)—and for good reason.

Halberstam arose out of the murder of Dr. Michael A. Halberstam by Bernard Welch in the course of Welch's burglary of Halberstam's home. The specific question before the D.C. Circuit was whether Linda Hamilton, Welch's live-in companion and partner, could be held secondarily liable for Halberstam's wrongful death by dint of the more general support that she provided for Welch's criminal activities.

In holding that the answer was "yes," the D.C. Circuit reviewed common law cases across the country, and set forth three elements for establishing a civil aiding-and-abetting claim:

> (1) the party whom the defendant aids must perform a 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.

DOJ's *amicus* brief does not dispute the first element in this case. It instead focuses on, but conflates, the scienter aspects of the second and third elements. But as *Halberstam* makes clear, these are two *separate* elements—that ought to be analyzed separately.

The first scienter element is whether the secondary defendant is generally aware of his role in the broader illegal or tortious activity from which the violence causing the underlying injury was a foreseeable risk. That "activity" in *Halberstam* was

not Welch's murder of Halberstam; it wasn't even Welch's *burglary* of Halberstam's home. Rather, the murder "was a natural and foreseeable consequence of the activity Hamilton helped Welch to undertake," *id.* at 488, *i.e.*, the broader scheme of property theft.

Moreover, as the Second Circuit has recognized, "[w]hile the word 'aware' normally denotes full recognition of the existence or qualities of an object or circumstance, *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*, 999 F.3d at 863.

The second scienter element is whether the assistance was provided *knowingly*. This relates not to a secondary defendant's knowledge of his role, but rather to his knowing—rather than negligent—provision of assistance itself; it "is designed to avoid subjecting innocent, incidental participants to harsh penalties or damages." *Halberstam*, 705 F.2d at 485 n.14. As the Second Circuit explained in *Kaplan*, "[i]f the defendant knowingly—and not innocently or inadvertently—gave assistance, directly or indirectly, and if that assistance was substantial, then aiding and abetting is sufficiently established if the defendant was '*generally* aware' that it was playing a role in international terrorism." 999 F.3d at 864; *see also Atchley*, 22 F.4th at 222 ("Defendants do not argue that their provision of cash and free goods was in any way accidental, so the assistance was given knowingly.").

To establish Hamilton's general awareness, the *Halberstam* court relied on the district court's inference that Hamilton knew "that something illegal was afoot," 705 F.2d at 486, and was generally aware

of her role in that illegal enterprise. Because she denied such awareness, that inference relied on circumstantial evidence (in a post-trial review) of some of the "unusual circumstances" surrounding her assistance and the "unusual way" she performed it. *See id.* Here, respondents' allegations rely on the actual notice that petitioner received from third parties, *including* the U.S. government, the media, and other terror victims that ISIS was making use of their platforms. In *amici*'s view, no additional evidence is needed at the pleading stage to show that petitioner was aware of its role in assisting ISIS's "tortious or illegal" conduct.

To establish the knowing provision of assistance, the *Halberstam* relied on its own conclusion that Hamilton provided substantial assistance through "invaluable service to the enterprise as banker, bookkeeper, recordkeeper, and secretary." *Id.* at 487. She did so knowing she was providing it to Welch, and knowing only that it generally benefitted his stolen goods enterprise.

Nothing in the D.C. Circuit's ruling required that Hamilton (1) have specific intent to commit *any* of Welch's crimes (let alone Halberstam's murder); (2) have any knowledge of the specific crimes Welch was committing; or (3) have taken any affirmative action to facilitate the specific criminal activity at issue. To the contrary,

> It was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber

> made no difference—because violence and killing is a foreseeable risk in any of these enterprises.

Id. at 488.

DOJ's claim that the scienter standards for aiding-and-abetting liability under JASTA increase where the assistance constitutes "routine business services" is belied by *Halberstam*, in which the D.C. Circuit characterized Hamilton's "assistance" as "banker, bookkeeper, recordkeeper, and secretary"—assistance that is "neutral standing alone." *Id.*

Of course, because Hamilton denied knowing anything about Welch's burglary enterprise, the *Halberstam* court had to look to other circumstantial evidence from which her state of mind could be inferred. While Hamilton's routine business services were not inrtrinsically illegal, they furthered Welch's criminal activities. To the extent that she "performed these services in an unusual way under unusual circumstances for a long period of time," *id*. at 487, that drives home that the relevant question is not whether outwardly lawful activities can *ever* constitute substantial assistance (as DOJ suggests they rarely will); it goes to whether the secondary defendant *knows* that their provision of outwardly lawful business services assisted an "illegal enterprise." Petitioner here does not argue that it believed ISIS's use of its platform was legitimate or legal, nor does it contest that some (if not much) of that use was in violation of its internal rules and/or terms of service.

Unusual conduct is far from a prerequisite, and *Halberstam* makes clear that a secondary defendant

can knowingly provide substantial assistance even through routine business activities *if* she "has a general awareness of her role in a continuing criminal enterprise." *Id.*; *see also Atchley*, 22 F.4th at 221 ("[T]he fact that [Hamilton] performed her otherwise-innocuous services for him 'in an unusual way under unusual circumstances for a long period of time' suggested her general awareness of illegality." (citing *Halberstam*, 705 F.2d at 487)).

DOJ's claim about remoteness from the underlying tort cutting against secondary liability in general (as opposed to as part of the "substantial assistance" analysis) is also inconsistent with *Halberstam*. In that case, although Hamilton was generally aware of Welch's unlawful enterprise, she had no foreknowledge of, or physical or temporal proximity to, the specific burglary that culminated in Halberstam's murder—much less the murder itself.

Indeed, the D.C. Circuit made clear that Hamilton could properly be held liable even though she "was admittedly not *present at the time* of the murder or even at the time of any burglary" because her back-office role nevertheless substantially supported the enterprise. 705 F.2d at 488 (emphasis added). And, again, "[i]t was not necessary that Hamilton knew specifically that Welch was committing burglaries" *at all*, let alone that she be in any kind of physical or substantive proximity to those specific offenses. *Id.* Hamilton's support was essential to the enterprise, but it was both physically and temporally removed from the underlying tortious activity, *i.e.*, "some type of personal property crime at night" being committed by Welch. *See id.* And JASTA itself reinforces this reading of *Halberstam*, making plain that it

authorizes liability over those who support acts of international terrorism whether "directly *or* indirectly." JASTA § 2(b), 130 Stat. at 853 (emphasis added). Any kind of proximity requirement is belied by this text.

DOJ's claim about inaction fares no better. Even assuming for the sake of argument that the provision of social media services without adequate stopgaps or oversight (or enforcement of internal rules and/or terms of service) is "inaction" (as opposed to affirmatively tortious conduct), nothing in *Halberstam* supports the conclusion that aiding-and-abetting liability is available only against those whose substantial assistance is affirmative rather than negative. To the contrary, *Halberstam* cited with approval *Woodward* v. *Metro Bank of Dallas*, which held that, as to whether "silence and inaction" can be a basis for secondary liability, the "issue turns on the nature of the duty owed by the alleged aider and abettor to the other parties to the transaction." 522 F.2d 84, 96 (5th Cir. 1975) (cited in *Halberstam*, 705 F.2d at 485 n.14). Whatever duties the bank in *Woodward* owed to non-customers like the plaintiff (especially before modern know-your-customer obligations), it is undisputed that petitioner here had a *criminally* enforceable legal obligation to not provide material support to ISIS. *See* 18 U.S.C. § 2339B.

Second, DOJ argues that petitioner did not *knowingly* provide substantial assistance to ISIS because respondents allege only that "defendants knew that ISIS and its affiliates used defendants' widely available social media platforms, in common with millions, if not billions, of other people around the world, and that defendants failed to actively

monitor for and stop such use." U.S. Br. 13. These allegations, in DOJ's view, "differ substantially from the provision of atypical and particularized services" such as those Hamilton provided in *Halberstam*, and "are insufficient to plausibly allege that defendants knowingly provided substantial support to the Reina attack." *Id.* at 24.

This argument once again ignores both petitioner's obligation to not provide material support to ISIS and its knowledge that ISIS was not just using its platform, but was doing so in violation of its internal rules. As noted above, DOJ's *amicus* brief thus misstates the principal scienter requirement from *Halberstam*—which is "general awareness," *not* "knowing and substantial assistance."[5] And in any event, it mistakes whether petitioner's assistance was "knowing" for whether it was "substantial." Indeed, *Halberstam* was clear beyond peradventure that the *knowledge* requirement runs to general awareness of the criminal enterprise, not to specific awareness either of the underlying criminal act or of the effects of the assistance being provided. *See Halberstam*, 705 F.2d at 488 (holding that this requirement was satisfied because "Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods").

It never mattered to the D.C. Circuit in *Halberstam* whether Hamilton *knew* that it was her assistance on which "the success of the tortious enterprise" rested. *Id.* The question is only whether

5. If a secondary defendant has to be specifically aware of his participation in a particular tort for his assistance to be "knowing," that would render *Halberstam*'s general awareness requirement meaningless.

the defendant knows that they are assisting the principal's unlawful acts—regardless of the form such assistance takes or the effects it produces. The knowledge question is therefore *not* whether petitioner knew that its platform was being used specifically to support acts of international terrorism; it is only whether it knew that its platform were being used to facilitate a criminal enterprise from which the underlying act of international terrorism was a foreseeable risk. *See id.* Nothing in DOJ's *amicus* brief argues that petitioner lacked such awareness.

As in *Halberstam*, for a party alleged to have knowingly provided substantial assistance to an FTO, "violence and killing is a foreseeable risk" of that enterprise *by definition*. *Id.*; *see also Holder* v. *Humanitarian Law Proj.*, 561 U.S. 1, 32 n.6 (2010) ("Both common sense and the evidence submitted by the Government make clear that material support of a terrorist group's lawful activities facilitates the group's ability to attract 'funds,' 'financing,' and 'goods' *that will further its terrorist acts*." (emphasis added)); *id.* at 33 (deferring to the U.S. government's experience and analysis strongly supporting Congress's finding "that all contributions to foreign terrorist organizations *further their terrorism"* (emphasis added)) *id.* at 36 ("[T]he considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organizations—even seemingly benign support—*bolsters the terrorist activities of the organization*" is "entitled to significant weight" (emphasis added)).

Indeed, Congress specifically found that FTOs "are so tainted by their criminal conduct that any

contribution to such an organization facilitates that conduct." 18 U.S.C. § 2339B note. And as in *Halberstam*, a party can aid and abet such an act even if its role is "neutral standing alone," 705 F.2d at 488—or, as in *Holder*, "seemingly benign" when it foreseeably 'furthers" or "bolsters" terrorism. 561 U.S. at 36.

By *Halberstam*'s logic, then (which, again, Congress expressly adopted in JASTA), a third party aids and abets an act of international terrorism (and is therefore liable under the ATA) if it is generally aware of the nature of the criminal activities that its conduct is facilitating, and if it knowingly provides substantial assistance to the criminal *enterprise* from which acts of international terrorism are a foreseeable risk—not assistance to specific acts of international terrorism themselves. In other words, although DOJ repeatedly frames its arguments as going to different prongs of the *Halberstam* analysis, its *real* dispute, properly understood, is with whether the assistance allegedly provided by petitioner was, in fact, "substantial."

Third, and to that point, DOJ argues that the assistance petitioner provided to ISIS was not in fact "substantial" not by *disputing* the Ninth Circuit's application of the six factors that the D.C. Circuit identified in *Halberstam*, but by weighting those factors differently than the court of appeals did. *See, e.g.*, U.S. Br. 28–30. This recalibration does not dispute the applicable legal standard; it just substitutes the government's assessment of the allegations in respondents' complaint for the court's.

The crux of DOJ's argument is that petitioner did little more than provide services generally available to

the public at large, and thus can't be said to have provided "substantial" assistance even if it knew that those services were facilitating ISIS's criminal enterprise. But *Halberstam*'s discussion of whether Hamilton's support for Welch was "substantial" did not turn on whether it was more than "general support" for Welch's illicit enterprise or whether Hamilton's services were only being provided to Welch. It turned on the *nature* of that "general support," by reference to the five factors set out in the *Restatement (Second) of Torts* § 876 (1979), plus a sixth factor, "duration of the assistance provided." *Halberstam*, 705 F.2d at 484. There was no "direct link" between Hamilton's ability to dispose of the goods Welch illicitly acquired and Welch's unplanned murder of Halberstam; the issue was whether the broader criminal *enterprise* was substantially assisted by Hamilton's knowing support *of the enterprise*.

In that respect, the question of whether petitioner provided substantial assistance to ISIS turns not on whether its services were bespoke; it turns on whether the services had a meaningful impact on ISIS's ability to carry out illicit activities. It therefore doesn't defeat aiding-and-abetting liability under the ATA, contra DOJ's *amicus* brief, "that the relationship between defendants and ISIS remained (at most) arms-length; that defendants provided only generally available services; and that defendants had no intent to further ISIS's terrorist acts." U.S. Br. 29–30.

To the contrary, nothing in *Halberstam*, or in the common law cases on which it relied, requires that defendants who aid and abet a tort share the primary tortfeasor's specific intent or even their specific knowledge. Otherwise, they would themselves be

subject to primary liability—defeating the need for (and purpose of) secondary liability. *See, e.g.*, *Restatement (Third) of Torts* § 28 cmt. c (2020) ("It need not be shown that the defendant desired the tortious outcome. Nor does the defendant need to have understood the full legal significance of the facts, or all the details of the primary wrongdoing. It is sufficient if the defendant was aware of facts that made the primary conduct wrongful."). State of mind is merely one of five factors involved in deciding whether assistance was substantial, and is neither required nor dispositive.

Under DOJ's new approach to substantial assistance, this prong of aiding and abetting liability would be satisfied if and only if respondents had plausibly alleged "that defendants had any intent to further or aid ISIS's terrorist activities, or that defendants shared any of ISIS's objectives." U.S. Br. 30.[6] Leaving aside the inconsistency with DOJ's prior

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6. If anything, the DOJ *amicus* brief attempts to narrow JASTA even further—arguing that a defendant can be secondarily liable only where he "aids and abets *the terrorist attack in question*, or (2) conspires with the person who commits *the attack* with regard to its commission." U.S. Br. 32 (emphases added).

Again, though, the critical point from *Halberstam* is that Hamilton did not have to be aware of the specific burglary in which Welch killed Halberstam—or even that Welch was committing burglaries in general. All that *Halberstam* requires is that the defendant "be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance." 705 F.2d at 488. Just like Hamilton didn't have to be aware of Welch's burglary or murder of Halberstam, so too, petitioner did not have to be aware of the Reina attack to be secondarily liable for aiding and abetting those who were primarily responsible for it.

position in *Boim III*, *see ante* at 9 n.4, JASTA indisputably recognizes aiding-and-abetting liability in cases in which secondary defendants shared neither the intent nor the objectives of the primary tortfeasor—so long as they know that they are substantially assisting a criminal enterprise, whether or not they *intend* to do so. As *Halberstam* concluded, "[i]n practice, liability for aiding-abetting often turns on how much encouragement or assistance is substantial enough," 705 F.2d at 478, a determination that turns on properly balancing all six factors. As the Second Circuit correctly noted: "Plainly these factors are 'variables' . . . and the absence of some need not be dispositive." *Kaplan*, 999 F.3d at 856 (internal citation omitted).

CONCLUSION

Welch was a burglar, not a professional killer. Even though Halberstam's death was a foreseeable byproduct of Welch's criminal efforts, it was not Welch's primary objective; it was a burglary gone wrong. By contrast, FTOs are, by definition, devoted to acts of international terrorism—*i.e.*, violence and murder. Therefore, as all three branches of the U.S. government have concluded, violence is a far more foreseeable risk of *any* assistance given to the facially illegal enterprise that is an FTO; indeed, it's one of an FTO's primary objectives. In that context, sustained assistance that a defendant *knows* is facilitating the FTO's illegal enterprise ought to have an *easier* time meeting the *Halberstam* test—not a harder time. In arguing to the contrary, DOJ's *amicus* brief runs headlong away not only from *Halberstam* itself, but from the plain text and unambiguous purpose of

JASTA—to authorize aiding-and-abetting liability on the "broadest possible basis."

Reasonable minds can differ about the wisdom of Congress authorizing such sweeping secondary liability. But such policy debates are for the political branches, not this Court. *See, e.g.*, *Ysleta del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1943–44 (2022) ("It is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt.").

Amici are thus of the view that the Ninth Circuit correctly applied the *Halberstam* standard for aiding-and-abetting liability under the ATA as amended by JASTA—and that the DOJ *amicus* brief is incorrect insofar as it argues otherwise. If this Court reaches the scope of aiding-and-abetting liability under the ATA as amended by JASTA in its resolution of this case and/or *Gonzalez*, *amici* therefore submit that the Ninth Circuit's analysis should be affirmed.

Respectfully submitted,

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