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

AMICUS BRIEF FOR 123 VICTIMS OF TERRORIST ATTACKS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Amici are 123 individuals comprising American service members and civilians, or family members of service members and civilians, who served our country in Iraq between 2005 and 2011. While in Iraq, each was brutally attacked by a Hezbollah-sponsored terrorist group called Jaysh al-Mahdi. A full list of the *amici* is appended to this brief.

In 2017, *amici* and hundreds of other Americans injured by Jaysh al-Mahdi terrorist attacks filed claims under the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 8852 (2016) against five major pharmaceutical and medical-device companies (the "Pharma Defendants") and their affiliates. In *Atchley v. AstraZeneca UK Ltd.*, No. 1:17-cv-02136 (D.D.C.), *amici* and their fellow plaintiffs alleged that the Pharma Defendants knowingly financed Jaysh al-Mahdi's terrorist attacks by paying millions of dollars in bribes to Jaysh al-Mahdi terrorists who openly controlled an Iraqi ministry and used it to fund their terrorist operations.

In January 2022, the D.C. Circuit vindicated the plaintiffs' allegations, holding that they plausibly stated claims against the Pharma Defendants for (among other things) aiding and abetting Jaysh al-Mahdi and its terrorist acts. *Atchley v. AstraZeneca*

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[1] All parties have filed blanket consents. No party or party's counsel authored this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

UK Ltd., 22 F.4th 204 (D.C. Cir. 2022).[2] In making their case, the plaintiffs were supported by a bipartisan group of U.S. Senators, by forty-four former military officers, intelligence officials, and analysts, by experts in anti-corruption efforts, by legal scholars, and by others, too.[3] This chorus of experts explained to the D.C. Circuit that applying JASTA as written was critical to preventing and redressing terrorist attacks on Americans, and would not produce negative policy consequences. The court agreed unanimously. The case remains before the D.C. Circuit pending resolution of the Pharma Defendants' petitions for rehearing en banc.

When Twitter petitioned for certiorari, it argued that the Ninth Circuit's decision in this case conflicted with *Atchley*. As Twitter explained, the *Atchley* plaintiffs alleged that the defendants "provided medical goods (including free goods) and money to a particular entity that was publicly reported to have a mission to

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[2] The D.C. Circuit also concluded that the Pharma Defendants potentially faced primary liability under the Anti-Terrorism Act, 18 U.S.C. § 2333(a), because the plaintiffs plausibly alleged that the Pharma Defendants' support to Jaysh al-Mahdi proximately caused the attacks that injured the plaintiffs. *See Atchley*, 22 F.4th at 225-30. The court remanded for the district court to consider the other elements of primary liability. *See id.* at 226.

[3] *See* Brief of Eight United States Senators as *Amici Curiae* in Support of Plaintiffs-Appellants, *Atchley v. AstraZeneca UK Ltd.,* 2021 WL 1599304 (D.C. Cir. April 23, 2021); *Amicus Curiae* Brief of 44 Former Military Officers, Intelligence Officials, and Analysts in Support of Appellants and Reversal, *Atchley v. AstraZeneca UK Ltd.*, 2021 WL 1599301 (D.C. Cir. April 23, 2021); Brief for *Amici Curiae* Iraq Anti-Corruption Experts in Support of Plaintiffs-Appellants, *Atchley v. AstraZeneca UK Ltd.*, 2021 WL 391325 (D.C. Cir. April 23, 2021).

engage in terrorist acts . . . and the defendants allegedly were aware that the goods they provided would be used . . . to support terrorist attacks." Pet. 18-19 (quotation marks omitted). Twitter contrasted those facts with the ones alleged here—which, according to Twitter, involve mere failure to do more to stop terrorists from using its generic, widely available services—when urging this Court to seek review.

Now that certiorari has been granted, Twitter and its *amici*, including most specifically the Pharmaceutical Research and Manufacturers of America ("PhRMA"), urge the Court to issue a decision far broader than necessary to resolve this case, and instead to reach out and reverse cases like *Atchley* by adopting rules limiting liability to those who directly assist specific terrorist acts. *Amici* submit this brief to respond to PhRMA's arguments and explain why no matter how this Court resolves the case before it, it should confirm that a JASTA aiding and abetting claim will lie against any defendant who, like the Pharma Defendants, knowingly assists terrorists and their terrorist acts by providing cash bribes and free goods to the terrorists.

SUMMARY OF ARGUMENT

In *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), the D.C. Circuit unanimously reversed a district court decision dismissing JASTA claims brought against pharmaceutical and medical-device companies by families of hundreds of Americans victimized by terrorists in Iraq—terrorists to whom the Pharma Defendants knowingly provided assistance in the form of cash bribes and free goods de-

signed to serve as cash equivalents. *Atchley* was correctly decided, and in any event is readily distinguishable from this case.

The D.C. Circuit's opinion in *Atchley* cogently explains that the plaintiffs' complaint alleged "in unusual detail," based on "hundreds of identified sources," how the Pharma Defendants gave "millions of dollars of cash and cash-equivalents" to an Iraqi terrorist group called Jaysh al-Mahdi. 22 F.4th at 210, 213. It was well known to the Pharma Defendants that Jaysh al-Mahdi had "completely overrun" Iraq's Ministry of Health, such that the terrorists "controlled [it] and used it as a terrorist headquarters," making the "defendants' dealings with the Ministry … equivalent to dealing with the terrorist organization directly." *Id*. at 210. The pharmaceutical-company defendants obtained lucrative contracts from that Ministry by "giving corrupt payments" to the terrorists who ran it, despite knowing that those payments supplied Jaysh al-Mahdi with vital funding for attacking Americans throughout Iraq. *Id*. at 209-11. Taking the plaintiffs' well-pleaded allegations as true, the D.C. Circuit unanimously determined that the plaintiffs stated a valid aiding-and-abetting claim.

PhRMA's characterization of those allegations distorts them beyond recognition. In one particularly egregious example, PhRMA repeatedly suggests that the *Atchley* defendants were encouraged by the United States government to do business with the Iraqi Ministry of Health—a suggestion that the D.C. Circuit expressly declined to credit as contrary to the plaintiffs' allegations. *Atchley*, 22 F.4th at 229-30.

Its effort to re-litigate the underlying facts of an unrelated, still-pending appeal aside, PhRMA's brief is

wrongheaded on every level. Its claim that the D.C. Circuit inappropriately applied a *mens rea* of "recklessness" lacks any foundation in the court's opinion, which repeatedly states that the defendants acted "knowingly." Its assertion that the Court of Appeals failed to require the plaintiffs to allege that the defendants acted with a "wrongful purpose" is similarly misguided: to the extent there is such a requirement, the plaintiffs' allegations satisfied it by plausibly alleging that the defendants knowingly bribed Jaysh al-Mahdi terrorists at the Ministry who they knew would use those bribes to fund their terrorist attacks on Americans. If that is not a "wrongful purpose," it is difficult to imagine what is. As for PhRMA's claim that the Court of Appeals improperly allowed claims that the defendants knowingly and substantially assisted the terrorists "campaign," rather than individual acts of terrorism, respondents and others have ably explained that both the text of 18 U.S.C. § 2333(d)(2) and the *Halberstam* standard that Congress instructed the courts to apply to JASTA claims support liability for assistance to terrorist enterprises, not just discrete acts.[4]

PhRMA devotes nearly half its Argument section to policy arguments suggesting that the result in *Atchley* threatens to "undermin[e] the global distribution of

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[4] JASTA § 2(a)(5) (stating that "[t]he decision of the United States Court of Appeals for the District of Columbia in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability … provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code").

life-saving medicines." PhRMA Br. 6 (capitalization altered); *see also id*. at 17-21. That claim is fantastical: it flatly ignores the allegations of knowing and corrupt conduct that formed the basis for the Court of Appeals' decision and substitutes a wholly manufactured and self-serving account of defendants who bribed no one, failed to see the armed terrorists who openly stalked the halls of the Ministry, and wanted nothing but to distribute medicines and vaccines to needy Iraqis. PhRMA's pretty picture accordingly bears no resemblance to what the plaintiffs—supported by "hundreds of identified sources"—plausibly alleged. *Atchley*, 22 F.4th at 213. If the Pharma Defendants actually have evidence to support these grandiose policy claims, they will have the opportunity to present it at trial. For this Court to consider those claims here would be wholly inappropriate.

Finally, PhRMA's attacks on *Atchley* have little relevance here. *Atchley* and *Taamneh* are different cases involving strikingly different conduct. Most obviously, *Atchley* does not involve the kind of "generic, widely available services" that are central to both Questions Presented here. Nor does it involve questions about the enforcement of policies barring terroristic "content" that are key to the first Question Presented. The outcome here might well not affect the outcome in *Atchley* either way, making PhRMA's brief much ado about nothing.

ARGUMENT

I. PhRMA's Criticism Of The D.C. Circuit's Reasoning In *Atchley v. AstraZeneca UK Ltd.* Impermissibly Distorts The Record And Decision In That Case.

In *Atchley*, the D.C. Circuit unanimously held that *amici* and more than 1,200 fellow American victims of Jaysh al-Mahdi attacks stated a valid JASTA claim against the Pharma Defendants for aiding and abetting terrorist attacks. It based its decision on the plaintiffs' plausible allegations, based on "hundreds of identified sources," that the Pharma Defendants had provided bribes (in cash and in "free goods" used as cash equivalents, including pharmaceuticals) to the Iraqi Ministry of Health, which had been openly seized by Jaysh al-Mahdi and "used as a front and headquarters for its campaign of terrorist violence "and "to obtain financing for its terrorist activities." 22 F.4th at 212, 213.

1. As the D.C. Circuit explained, the plaintiffs in *Atchley* alleged that the Iraqi Ministry of Health was completely captured by Jaysh al-Mahdi during the relevant time period. Those allegations include, for example, that:

- "By early 2005, [Muqtada al-]Sadr, the Jaysh al-Mahdi leader, had officially taken over the Ministry and placed his operatives at every level of its leadership." *Id*. at 228.
- "At the height of Sadrist control, the Ministry employed about 70,000 Jaysh al-Mahdi members"—a number that provides context for PhRMA's claim that the agency had 100,000 employees *total*, PhRMA Br. at 9—"and largely purged Sunnis and

unaligned technocrats, even killing or running out doctors who were not loyal." *Atchley*, 22 F.4th at 228.

- "Under Jaysh al-Mahdi, public hospitals were converted into terrorist bases where Sunnis were abducted, tortured, and murdered. Ministry 'ambulances transported Jaysh al-Mahdi death squads around Baghdad, and terrorists openly patrolled the halls of [the Ministry] headquarters.'" *Ibid.* (cleaned up).
- "Hakim al-Zamili, Deputy Minister of Health and Jaysh al-Mahdi commander, even launched attacks from the roof of the Ministry headquarters" in Baghdad. *Ibid.*

In short, the plaintiffs plausibly alleged that "the Ministry functioned more as a terrorist apparatus than a health organization" during the relevant time. *Id*. at 212.[5]

When the Pharma Defendants dealt with the Ministry, they *knew* they were dealing with terrorists. The plaintiffs pointed to published "reports extensively documenting both Jaysh al-Mahdi's domination of the

[5] PhRMA's assertion (at 10) that "[i]t is undisputed that the Health Ministry continued performing legitimate activities, such as 'running clinics and employing doctors,'" is, like so much else in its brief, false. As the plaintiffs explained to the D.C. Circuit, this "misreads Plaintiffs' allegations. Although the Ministry in theory was supposed to offer[] free medical care to all Iraqis,'" Jaysh al-Mahdi actually "used the Ministry to purge doctors, hijack Iraq's health infrastructure, and deny care to its enemies. Whatever welfare services remained served only to build Jaysh al-Mahdi's membership and reinforce its terrorist activities." Pl. Opening Br., *Atchley v. AstraZeneca UK Ltd*., 2021 WL 1599293, at *25-26 (D.C. Cir. April 23, 2021) (citations omitted).

Ministry and its mission to engage in terrorist acts." *Ibid*. Moreover, the pharmaceutical companies' local agents worked with the Ministry at its headquarters, and the terrorists' "dominance was obvious to anyone physically present at Ministry headquarters," where "'Death to America' slogans adorned the halls, Jaysh al-Mahdi fighters freely roamed while Americans could not safely enter, and Jaysh al-Mahdi's flag flew at the entrance." *Ibid*.

This was the environment in which PhRMA's members knowingly paid bribes in the form of cash payments and "free goods," including "off-the-books batches of valuable medical goods that Jaysh al-Mahdi monetized on the black market."[6] *Id*. at 209. That "stream of bribes and free goods helped finance Jaysh al-Mahdi's terrorist attacks on Americans, including plaintiffs." *Id*. at 212-13. Indeed, "because Jaysh al-Mahdi fighters were sometimes even paid in drugs that they then sold for cash on the black market, some

[6] As the D.C. Circuit noted, the Pharma Defendants' corrupt "methods for currying favor" with the Ministry under Jaysh al-Mahdi were "already familiar from [their] corrupt dealings with [the Ministry] under the Oil-for-Food program" during the reign of Saddam Hussein. *Atchley*, 22 F.4th at 212. Prior to the U.S. invasion, the Ministry's corrupt procurement processes benefited Saddam; following his ouster, Jaysh al-Mahdi simply took control of those processes to fund its terrorist operations. In 2011, Pharma Defendant Johnson & Johnson entered into a Deferred Prosecution Agreement with the Department of Justice for violations of the Foreign Corrupt Practices Act in connection with its Ministry contracts during Oil-for-Food. Third Amended Complaint ¶ 273, *Atchley v. AstraZeneca UK Ltd*., 2020 WL 755075 (D.D.C. Jan. 21, 2020).

U.S. government personnel in Iraq referred to the organization as 'The Pill Army.'" *Id.* at 213.

PhRMA's attempt to obscure these allegations is risible. PhRMA mentions almost none of the foregoing allegations. Instead, it venerates Muqtada al-Sadr as "a popular Shi'a leader," and describes Jaysh al-Mahdi not as a Hezbollah terrorist proxy created to kill Americans, but instead as merely "one of the forces in Iraq's spiraling civil war" that "had various ties to the terrorist group Hezbollah." PhRMA Br. 8-9. Rather than credit the plaintiffs' allegations that Jaysh al-Mahdi had effectively seized the Ministry and installed 70,000 of its operatives there, PhRMA cites the district court (which in turn cited sources outside the record) to suggest only that "some members of the militia allegedly worked around the fringes of the Health Ministry." *Id*. at 9 (cleaned up).

In addition to its absurd spin on the plaintiffs' allegations, PhRMA persistently relies on "evidence" that the D.C. Circuit expressly refused to credit because it was neither in the plaintiffs' complaint nor subject to judicial notice. Most prominently, PhRMA repeatedly suggests that its illegal bribery scheme was somehow approved by the U.S. government. PhRMA Br. 2, 4, 7, 10, 13, 14, 15, 19-21. This was their primary theme on appeal, too, but the D.C. Circuit expressly rejected it, observing that it squarely contradicted the complaint (which "allege[d] that U.S. government efforts to bolster health infrastructure for the benefit of the Iraqi people generally steered clear of the Mahdi-controlled Ministry") and at most presented a fact question inappropriate for resolution at the pleading stage. *Atchley*, 22 F.4th at 229-30. Indeed, PhRMA's continued insist-

ence that the government approved of the Pharma Defendants' conduct rings especially hollow now because the United States' *amicus* brief in this case identifies *Atchley* as a case in which liability was appropriate. *See* U.S. Br. 34 (explaining that liability was appropriate in *Atchley* because the defendants directly channeled substantial funds or other fungible resources to a terrorist organization or its close affiliates through atypical transactions, knowing that the funds and resources would potentially be used for terrorism).[7]

PhRMA's characterization of *Atchley* is unmoored from both the D.C. Circuit's opinion and the allegations there at issue. To the extent *Atchley* is relevant to the questions presented here, we urge the Court to base its understanding on the opinion itself, not PhRMA's distorted and self-serving account of it.

2. PhRMA's criticisms of the D.C. Circuit's legal reasoning in *Atchley* fare no better. The D.C. Circuit appropriately credited the allegations that "defendants, aware of Jaysh al-Mahdi's command of the Ministry, secured lucrative medical-supply contracts with

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[7] Even the District Court declined the defendants' attempt to wrap their illegal conduct in the American flag, noting that even if "the United States provided support to the Ministry and encouraged defendants to transact with the Ministry," it would not matter, because "Plaintiffs do not allege that defendants violated the ATA simply by providing support to the Ministry." *Atchley v. AstraZeneca UK Ltd.*, 474 F.Supp.3d 194, 208 (D.D.C. 2020), *rev'd & remanded*, 22 F.4th 204 (D.C. Cir. 2022). Rather, "they contend that [Jaysh al-Mahdi] 'captured' the Ministry at some time after the invasion, and defendants subsequently engaged in corrupt transactions with that compromised entity." *Ibid*. Accordingly, "[a]ccepting plaintiffs' theory condemns defendants' conduct, not the United States Government's general policy supporting the Iraqi healthcare system." *Ibid*.

the Ministry by giving corrupt payments and valuable gifts to Jaysh al-Mahdi." *Atchley*, 22 F.4th at 209. Based on the "unusual[ly] detail[ed]" complaint, the panel concluded that the Pharma Defendants were "[a]ware of Jaysh al-Mahdi's ongoing terrorist operations," yet still "gave the organization millions of dollars in cash and cash equivalents over a period of many years." *Id*. at 210. Those allegations sufficed "at the motion-to-dismiss stage" to plead aiding and abetting claims. *Id*. at 209.

The *Atchley* decision is correct, and indeed is an easy case under § 2333(d) and the *Halberstam* analysis that governs it. PhRMA's attacks on the decision are misplaced.

First, the D.C. Circuit did not somehow write the word "knowingly" out of the statutory phrase "knowingly providing substantial assistance" and replace it with "recklessly." *Cf*. PhRMA Br. at 12. The word "reckless" (in any of its forms) appears nowhere in the D.C. Circuit's opinion; instead, the court's rule is drawn directly from *Halberstam*, the precedent Congress commanded courts to apply, and from which the statutory language is derived.[8] Under *Halberstam*, aiding and abetting requires that the defendant was "generally aware" of its involvement in an "overall illegal activity" from which the tort that injured the plaintiff—here, acts of international terrorism—was foreseeable, and that the defendant's assistance be

[8] *Compare* § 2333(d)(2) (phrasing aiding and abetting liability in terms of "*knowingly providing substantial assistance*") *with Halberstam*, 705 F.2d at 478 (explaining that "[a]iding-abetting focuses on whether a defendant *knowingly gave 'substantial assistance'* to someone who performed wrongful conduct").

"knowing" and "substantial." *Atchley*, 22 F.4th at 220 (quoting *Halberstam*, 705 F.2d at 477).

Specifically, the Court of Appeals held that the plaintiffs had plausibly alleged that the pharmaceutical companies "*knowingly* provided substantial assistance to Jaysh al-Mahdi … through their corrupt provision of free goods and cash bribes to do business with a Ministry completely overrun by Jaysh al-Mahdi" despite being "[a]ware of Jaysh al-Mahdi's ongoing terrorist operations." *Atchley*, 22 F.4th at 209-10 (emphasis added); *see also id*. at 221 (noting that the plaintiffs alleged "the corrupt provision of free goods and cash bribes to an entity defendants *knew* was engaged in anti-American acts of terrorism and was using its takeover of the Ministry to fund and facilitate those acts") (emphasis added).[9] That is, the Court of Appeals found that the defendants knowingly provided cash and goods to people they knew to engaging in terrorist acts. That is a finding of knowledge, not recklessness, and it is more than sufficient to satisfy PhRMA's proposed requirement that plaintiffs allege that "the defendant actually knew that it provided substantial assistance to another person's commission of an act of international terrorism." PhRMA Br. at 12.

Second, the Court of Appeals correctly distinguished between the "general awareness" element of the *Halberstam* analysis and the "knowingly" element.

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[9] Even the district court, which ultimately dismissed all the plaintiffs' claims, acknowledged that "plaintiffs allege [that] defendants knowingly provided medical goods to the Ministry for economic gain and were aware [that] those goods would be used by [Jaysh al-Mahdi] to support terrorist attacks"). *Atchley*, 474 F.Supp.3d at 213.

As the court recognized, the two elements serve discrete functions. "General awareness" of involvement in an illegal activity from which the injurious tort was foreseeable is the primary scienter requirement for aiding and abetting liability. The requirement that assistance be provided "knowingly" serves the limited function of distinguishing advertent from inadvertent or innocent assistance: as *Halberstam* itself explains, the "knowing assistance" requirement is "designed to avoid subjecting innocent, incidental participants to harsh penalties or damages." *Halberstam*, 705 F.2d at 485 n.14; *see also Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 863-64 (2d Cir. 2021) (analyzing *Halberstam*); *Atchley*, 22 F.4tht 222 (citing *Kaplan*).

Applying that standard, there is no question that the Court of Appeals was correct to find it satisfied in *Atchley*. The assistance the defendants provided consisted of intentional acts—bribes paid in cash and in kind. That assistance was thus neither inadvertent nor innocent. Even if PhRMA were correct that "knowing" assistance requires that the defendant "took the action knowing that it was substantially assisting another person's commission of an act of international terrorism," PhRMA Br. at 13, the result would be the same: the Court of Appeals found that the defendants engaged in "the corrupt provision of free goods and cash bribes *to an entity defendants knew was engaged in anti-American acts of terrorism* and was using its takeover of the Ministry to fund and facilitate those acts." *Atchley*, 22 F.4th at 221 (emphasis added). That determination is more than sufficient to satisfy the requirement of "knowing assistance" under any standard. PhRMA's contention (at 14) that the plaintiffs' al-

legations did "not plausibly suggest that the defendants knew the critical facts that supposedly constituted their substantial assistance" simply ignores what the Court of Appeals found were the plaintiffs' plausible allegations.

Third, the Court of Appeals did not err by "fail[ing] to require that the plaintiffs adequately plead that defendants 'know when and to what degree [it] is furthering' the principal wrong." PhRMA Br. at 14 (quoting *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95 (5th Cir. 1975)). Nor did it fail to recognize "that the word 'abet' requires at least 'knowledge of a wrongful purpose.'" *Ibid*. (citing *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991)). Knowingly providing millions of dollars in illegal bribes to "an entity defendants knew was engaged in anti-American acts of terrorism" is inherently a wrongful purpose. *Atchley*, 22 F.4th at 221. And PhRMA's suggestion (at 15) that such corrupt conduct is a "business practice" that warrants some kind of deference from the courts is, frankly, shocking. If JASTA means anything, it surely means that American companies whose idea of "business" involves bribing terrorists to win corrupt contracts must be called to account for that conduct.[10]

PhRMA's brief discussion of authorities that purportedly support its position is as misleading as it is selective. The Second Circuit's decisions in *Weiss v. National Westminster Bank, PLC*, 993 F.3d 144 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2866 (2021), and

[10] PhRMA's characterization of the alleged conduct (at 16) as "supplying medical goods to a U.S.-backed Health Ministry" is, like much of its brief, a gross mischaracterization of both the plaintiffs' allegations and the Court of Appeals' opinion.

Strauss v. Crédit Lyonnais, S.A., 842 F. App'x 701 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2868 (2021), involved allegations that the defendant facilitated third parties' financial transfers to charities; neither involved a situation like *Atchley* where the defendant knowingly paid bribes to violent terrorists. Moreover, those cases principally addressed primary liability; to the extent they discussed aiding and abetting at all, it was only in the context of holding that the district court did not abuse its discretion in denying the plaintiffs leave to amend to assert a new aiding and abetting theory. *See Weiss*, 993 F.3d at 163-67. The Second Circuit's decision in *Siegel v. HSBC North America Holdings*, 933 F.3d 217 (2d Cir. 2019), likewise bears little resemblance to *Atchley*. *Siegel* involved a defendant bank that provided banking services to another bank that that had connections to terrorists—and the Second Circuit deemed it important that the defendant stopped providing those services at least ten months before the attack at issue in that case. *See id*. at 225. The relationship between the defendants and any terrorism was accordingly indirect and temporally remote. The Pharma Defendants, by contrast, engaged in corrupt transactions directly with the terrorists who had taken over the Ministry of Health—and they did not stop until long after that organization viciously attacked the plaintiffs.

Far more relevant to *Atchley* are the Second Circuit's post-*Siegel* decisions in *Kaplan* and *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021), which are both cited favorably in *Atchley* and which take the same approach to the "general awareness" and "knowingly" elements as *Atchley* does. PhRMA is silent about those cases, perhaps because the petitioner they claim

to support cites both *Kaplan* and *Honickman* as examples of the *correct* approach to JASTA scienter. *See* Twitter Br. 46 (favorably citing *Kaplan*); Pet. 18 (favorably citing *Honickman*). If the approach to aiding and abetting scienter in *Kaplan* and *Honickman* is correct, then so is the approach in *Atchley*. And neither of those cases—or any of which we are aware—supports PhRMA's implicit claim that a company that knowingly pays bribes "to an entity defendants knew was engaged in anti-American acts of terrorism" while "aware [that] those [bribes] would be used by [terrorists] to support terrorist attacks" is beyond the reach of JASTA liability. *Atchley*, 22 F.4th at 223 (quotation omitted).

Fourth, the Court of Appeals did not err by concluding that allegations of the defendants' assistance to Jaysh al-Mahdi's "terrorist campaign" were sufficient to state an aiding and abetting claim. PhRMA Br. at 16-17. As respondents have explained, the natural object of the verbs "aid[ ] and abet[ ] in § 2333(d)(2) is the "person who committed such an act of international terrorism." Resp. Br. at 34. To the extent the text is ambiguous, that interpretation is strongly supported by JASTA §§ 2(a)(6), (a)(7) and (b), which set forth Congress's intention to impose liability on both "persons" and "entities" that "knowingly or recklessly contribute material support or resources" to "persons pr organizations that pose a significant risk of committing acts of terrorism" against Americans. It is also supported by the definition of "person" as used in § 2333(d)(2) ("any person who aids and abets…"), which expressly includes entities. 18 U.S.C. § 2331(3).

In addition, PhRMA's attempt to cabin aiding and abetting liability to defendants who directly aid specific terrorist attacks is necessarily fails in light of *Halberstam*, in which the court found a defendant liable for aiding and abetting a murder because she knowingly assisted a property-crime "enterprise," not the murder that foreseeably resulted from it. *Halberstam*, 705 F.2d at 487. If Congress had intended to confine aiding and abetting liability narrowly to defendants who directly aided specific acts of terrorism, it would have made that clear in the statutory text, and would not have incorporated *Halberstam* as the appropriate analytical framework.[11]

II. PhRMA's Policy Arguments Have No Basis In *Atchley* Or Bearing On This Case.

PhRMA's policy arguments are as unpersuasive as they are hyperbolic. The suggestion that the *Atchley* decision (never mind the *Taamneh* decision actually at issue here) risks "undermining global public health" is a fantasy rooted in PhRMA's insistence on mischaracterizing the plaintiffs' members' conduct as merely "suppl[ying] cancer medicines, hemophilia injections, electrocardiogram machines, and similar medical goods to Iraq's U.S.-supported Health Ministry" in Iraq. PhRMA Br. 4, 7. As explained, this rosy description bears no resemblance to the defendants' conduct as the plaintiffs alleged it, which (it bears repeating) the D.C. Circuit characterized as "the corrupt provi-

[11] PhRMA's suggestion (at 17) that the *Atchley* decision was somehow inconsistent with *Halberstam* on this issue is sufficiently divorced from reality to require no specific rebuttal here. *Halberstam* stands for itself.

sion of free goods and cash bribes to an entity defendants knew was engaged in anti-American acts of terrorism and was using its takeover of the Ministry to fund and facilitate those acts." *Atchley*, 22 F.4th at 221. At no point did either the plaintiffs or the Court of Appeals suggest that companies who innocently provide critical medicines to Third World countries should be subject to JASTA liability. Indeed, the Court of Appeals specifically noted (in the context of finding proximate causation of the plaintiffs' direct liability claims) that its decision was "a far cry from holding the causation requirement met by non-governmental organizations providing assistance to a non-sanctioned organization if the aid is later stolen, diverted, or extorted by groups that engage in terrorism.'" *Id*. at 228. PhRMA's parade of public-health horribles is at best a strawman, and at worst a deliberate distortion of the record.

PhRMA's persistent attempt to clothe its members' conduct in U.S. government policy garb is particularly egregious. The *Atchley* court was obliged to accept the plaintiffs' allegations as true, and as the Court of Appeals pointed out, the "plaintiffs nowhere allege[d] that the [U.S.] government either made or encouraged the corrupt payments to Jaysh al-Mahdi that are the centerpiece of plaintiffs' claims." *Id*. at 229. "To the contrary, they allege[d] that U.S. government efforts to bolster health infrastructure for the benefit of the Iraqi people generally steered clear of the Mahdi-controlled Ministry." *Ibid*. The court appropriately "decline[d] to take judicial notice of the defendants' invitation to take judicial notice of documents reciting complex facts that appear subject to dispute," noting that "[t]he precise nature and context of any U.S. dealings with the Ministry, or encouragement of others to

aid it, remain open to evidentiary development" at trial. *Id*. at 229-30. PhRMA is presenting to this Court as true purported "facts" that both contradict the plaintiffs' allegations and are subject to vigorous dispute. PhRMA and its members should not be permitted to "pre-litigate" these issues in this Court in the hope of obtaining a preemptive ruling that would avoid exposing their assertions to the crucible of trial.

PhRMA's appeals to COVID vaccines are particularly dishonest. The word "vaccine" appears nowhere in the *Atchley* complaint. This was for good reason: in Iraq from 2000 through at least 2017 (the relevant period in *Atchley*), vaccines always were the one and only class of medical goods in Iraq that were ***not*** converted to cash equivalents on the black market. Among other reasons, vaccines required refrigeration while also being inexpensive, which made them particularly ill-suited to being monetized on the black market in Iraq, where unstable power meant refrigeration was at a premium and such "shelf space" was limited to the high-dollar drugs that required refrigeration (*e.g.*, chemotherapy drugs). The above vaccine-related facts were widely known to anyone, like PhRMA, who has devoted meaningful time to learning about the black markets relating to Iraqi medical goods. PhRMA's dishonest invocation of a non-existent threat vaccines to shield its members from liability for their bribes to terrorists should not be countenanced, and speaks volumes to the credibility of PhRMA's representations to this Court more generally.

At most, the *Atchley* decision and others like it may encourage companies to tread carefully when transacting with those who have terrorist links. PhRMA points to no evidence that this outcome—already encouraged

by other Circuits for years[12]—will invite humanitarian catastrophe. Regardless, chilling transactions with terrorists matches Congress's intent. As a bipartisan group of U.S. Senators explained in an *amicus* brief in *Atchley*, JASTA is "an integral component of our nation's broader strategy to combat the financing of international terrorism." Brief *Amici Curiae* of Eight United States Senators in Support of Plaintiffs-Appellants, *Atchley v. AstraZeneca UK Ltd.,* 2021 WL 1599304, at *1 (D.C. Cir. April 23, 2021). Allowing companies like PhRMA's members to evade liability by laundering payments through "a terrorist group's intermediary" would cripple that strategy. *Id*. at 9.

III. In Any Event, *Atchley* Is Readily Distinguishable From This Case.

Finally, principles of basic judicial modesty preclude this Court from reaching beyond this case to decide distinguishable ones like *Atchley*. The defendants' alleged conduct in the two cases—and thus the basis for their JASTA liability or nonliability—is strikingly different. Unlike the internet-company defendants before the Court—who argue that they provided only generic, widely available services to all comers, and took every reasonable step they could take to prevent terrorists from using their platforms[13]—the *Atchley* de-

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[12] *See, e.g.*, *Boim v. Holy Land Found. for Relief and Dev*., 549 F.3d 685, 690-91, 702 (7th Cir. 2008) (en banc) (adopting broad proximate-cause standard to promote "suits against financiers of terrorism," and to impose liability on those who funnel "donations through a chain of intermediate organizations").

[13] To be clear, those arguments appear to be inconsistent with the plaintiffs' allegations here—and to the extent they are, the arguments should not be credited at the pleading stage.

fendants are plausibly alleged to have knowingly engaged in bespoke corrupt transactions directly with a terrorist group. *Atchley* thus does not involve the kind of "generic, widely available services" that are central to both Questions Presented here. For that reason, a ruling in *Taamneh* either affirming or denying liability should not affect the outcome of *Atchley* at all.

Nor does *Atchley* involve questions about the enforcement of policies barring terroristic "content" that are central to the first Question Presented. Whether or not a provider of Internet services like YouTube or Twitter may be liable as an aider-abettor for failing to sufficiently enforce its anti-terrorism policies (*see, e.g.*, Pet. Br. at 13) has little bearing on whether the *Atchley* defendants should be liable for affirmatively reaching out to obtain corrupt medical-supply contracts by bribing notorious terrorists.

The important point for present purposes is that whatever the Court thinks of the allegations and theory of liability in this case, there is no reason for the Court to issue a sweeping decision limiting JASTA liability in cases like *Atchley* where the defendant's assistance to terrorists has a very close nexus with terrorist violence—and where that assistance was knowing, illegal, direct, substantial, and persistent.

CONCLUSION

For the reasons given, this Court should decline PhRMA's invitation to opine on an unrelated case still pending in the Court of Appeals with (at best) tangential relevance to the Questions Presented. For the reasons given by the Respondents and the *amici* supporting them, the Court should hold that the knowing pro-

vision of substantial assistance to a terrorist organization can be enough to constitute aiding and abetting under JASTA.

Respectfully submitted,

s/Geoffrey P. Eaton

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APPENDIX

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