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

REPLY BRIEF FOR RESPONDENTS FACEBOOK, INC. AND GOOGLE LLC SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

Under §2333(d)(2) of the Anti-Terrorism Act, a defendant can face treble damages liability for aiding and abetting "an act of international terrorism" only if the defendant "knowingly provid[ed] substantial assistance" to "such an act of international terrorism." Unlike the criminal prohibition on providing material support to a terrorist organization, §2333(d)(2)'s focus is not on supporting the terrorist organization or enterprise generally. The provision instead targets knowingly providing substantial assistance to the specific "act" of international terrorism that injured the plaintiff. Text, context, common-law principles of aiding-and-abetting liability, and common sense all compel that conclusion.

Plaintiffs do not deny that they failed to allege that Facebook or Google knowingly provided substantial assistance to the Reina attack—which they acknowledge is the specific "act of international terrorism" that caused their injuries. Plaintiffs would instead rewrite the ATA to require only that defendants aided ISIS's "terrorist enterprise" generally. But Congress knows how to draft a statute that imposes liability for assisting a terrorist organization. That is what the criminal material-support statute does. *See* 18 U.S.C. §2339B. Congress took a decidedly different approach in authorizing a civil treble damages remedy for secondary liability. By its terms, §2333(d) extends liability only to those who aid and abet a particular act of terrorism or conspire with its perpetrators.

Unable to ground their reading in the operative statutory text, plaintiffs devote the bulk of their brief

to discussing JASTA's statutory findings and trying to map this case onto the facts in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). But JASTA's findings state that §2332(d)(2) incorporates the "*legal framework"* set out in *Halberstam*; they do not elevate *Halberstam*'s facts above the statutory text Congress enacted. And *Halberstam*'s "Legal Framework" section confirms what the statutory text makes clear: Section 2333(d)(2) creates a cause of action for aiding and abetting the "principal violation," *i.e.*, the specific act of international terrorism that injured the plaintiff. In all events, the facts in *Halberstam*—an aider and abettor who cohabitated with the primary perpetrator and knowingly served as a classic accessory after the fact for multiple burglaries—could not be further from the allegations here, where plaintiffs seek to impose aiding-and-abetting liability on defendants for allegedly failing to adequately enforce their policies affirmatively prohibiting terrorism content.

When plaintiffs address the second question presented (what it means to "knowingly provide substantial assistance"), they again favor the facts of *Halberstam* over the text of §2333(d)(2). But §2333(d)(2) plainly requires a defendant to know that it is providing substantial assistance to the specific act of terrorism at hand. And plaintiffs failed to allege that defendants knowingly provided *substantial* assistance, let alone knowingly provided substantial assistance *to the Reina attack*. They instead allege only unintentional and attenuated aid that comes nowhere close to meeting the demanding "knowingly" standard. This Court should reverse.

I. Section 2333(d)(2) Imposes Aiding-And-Abetting Liability Only If A Defendant Aided And Abetted The Act Of International Terrorism That Injured The Plaintiff.

The ATA authorizes victims of an "act of international terrorism" to recover treble damages from "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." 18 U.S.C. §2333(a), (d)(2). Here, the act of terrorism that caused plaintiffs' injuries is concededly the Reina attack, and plaintiffs undisputedly fail to allege that defendants knowingly provided substantial assistance *to that attack*.

Plaintiffs instead insist that they need only plead and prove that defendants aided ISIS's "terrorist enterprise"—in other words, that defendants provided ISIS writ large with some support. Taamneh.Br.70-71. That reading finds no support in the text of §2333(a) and makes little sense given that Congress had the criminal material-support statute as a potential model but chose a markedly different approach in imposing civil liability—a context where there is no role for prosecutorial discretion. Plaintiffs thus begin not with the ATA's operative text, but with JASTA's statutory findings and a lengthy discussion of *Halberstam*. But the operative text is always the focal point in statutory interpretation. *See, e.g., Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016). Here, the operative text makes clear that §2333(d)(2) imposes liability for aiding and abetting a specific terrorist *attack*, not for aiding a terrorist *organization*.

1. Plaintiffs have little to say about the operative statutory text. They argue that the phrase "aids and abets" modifies "person who committed such an act of international terrorism," not "act of international terrorism." Taamneh.Br.34. That premise is both wrong and ultimately beside the point.

The modifies-the-person theory is wrong because multiple textual clues make clear that the direct object of "aids and abets" is the "act of international terrorism" that gives rise to the plaintiff's injuries. *See* Facebook-Google.Br.22-24; U.S.Br.31-32. The most natural direct object of "aids and abets" is "such an act of international terrorism." 18 U.S.C. §2333(d)(2). The only other word that could serve as the object is "person." But that noun is already spoken for. It is the object of the separate phrase "conspires with." All manner of textual clues reinforce the statute's focus on a specific act of terrorism, not terrorist organizations. The statute provides a cause of action to plaintiffs injured by "*an act* of international terrorism." 18 U.S.C. §2333(a) (emphasis added). The act must be committed by an organization designated a terrorist organization by the specific "*date* on which *such act* of international terrorism was committed." *Id.* §2333(d)(2) (emphasis added). And the statute's abrogation of sovereign immunity focuses on the location of the specific act of terrorism. 28 U.S.C. §1605B(b)(1) (abrogating sovereign immunity for "an act of international terrorism *in the United States*").

Plaintiffs contend that both "aids and abets" and "conspires with" modify "person who committed such an act of international terrorism" because "parallel

verbs" generally "have the same object." Taamneh.Br.36. But that ignores that the text contains two separate verb phrases ("aids and abets" and "conspires with") and two separate objects ("act" and "person"). Ordinary usage confirms that one conspires with a person but aids and abets an act. The phrase "aid and abet" is generally defined in terms of specific acts, not persons, whereas the phrase "conspires with" generally refers to an agreement with other persons, not acts. *Black's Law Dictionary* 84 (10th ed. 2014) (to "aid and abet" is to "[t]o assist or facilitate the commission of a crime, or to promote its accomplishment"); *id.* at 374 (defining "conspiracy" to mean an "agreement by two or more persons to commit an unlawful act"); *see also Halberstam*, 705 F.2d at 477 (explaining that "[a]iding-abetting" requires that "the defendant must knowingly and substantially assist the principal violation," while "civil conspiracy" requires "an agreement between two or more persons").

Equally important, plaintiffs' modifies-the-person claim is beside the point. Facebook-Google.Br.24-25. Regardless of which phrase is the direct object of "aids and abets," in both ordinary and legal usage, one cannot aid and abet someone in the abstract; one can aid and abet someone only in committing a particular act. *Black's* 1054 (defining "aid and abet" in the civil context as "assisting in or facilitating *the commission of an act* that results in harm or loss"); U.S.Br.32. And the ATA leaves no doubt that the act that counts is the specific act of international terrorism that caused the plaintiff's injuries. That is particularly obvious because the ATA ties the phrase "aids and abets" to "knowingly providing *substantial* assistance." 18

U.S.C. §2333(d)(2). It is impossible to assess whether assistance is substantial without knowing what act is being assisted. Facebook-Google.Br.24. A $5 gift might substantially assist someone in purchasing a hotdog, but not a car. Similarly, giving a criminal a ride home from his day job is not the same as giving him a ride home from a bank robbery.

Plaintiffs protest that this Court has often used the phrase "aiding and abetting" to "refer to assisting *people*." Taamneh.Br.39 & n.60 (emphasis added). But in their examples, the Court used the phrase "aiding and abetting" not to "refer to assisting people" generally, but *in committing a particular wrongful act*. *See, e.g.*, *Standefer v. United States*, 447 U.S. 10, 11 (1980) ("aiding and abetting a revenue official *in accepting compensation in addition to that authorized by law*"); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("aid and abet another *to commit a crime*"); *Evans v. United States*, 153 U.S. 584, 597 (1894) ("aiding and abetting the president of the bank *to misapply its moneys, funds, and credits*"). Plaintiffs omit that key italicized language, which confirms that one "aids and abets" a person in committing a specific act, and the act makes all the difference. It is no crime to assist revenue officers and bank presidents—unless it is in furtherance of accepting a bribe or embezzling funds.

Unable to reconcile their position with the plain meaning of "aid and abet," plaintiffs invite the Court to excise the word "abet" from the statute altogether. Taamneh.Br.39. Plaintiffs then contend that the statute must refer to aiding a terrorist organization because a "literal reading of 'aids … an act of

international terrorism' would not quite make sense." *Id*. But courts must consider the meaning of phrases as a whole, rather than reading individual words in isolation. *See FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011); A. Scalia & B. Garner, Reading Law 356 (2012). That rule has especial force when it comes to a familiar doublet like "aid and abet." *See, e.g.*, *George v. McDonough*, 142 S.Ct. 1953, 1959 (2022). Moreover, statutes routinely employ the formulation of aiding and abetting an act. *See, e.g.*, 6 U.S.C. §442(e) ("aids and abets, or commits any act of terrorism"); 19 U.S.C. §1526 ("aids and abets the importation of merchandise"). And at least one uses the terms disjunctively, underscoring that there is nothing particularly odd about aiding an act. *See* 21 U.S.C. §841(h)(1)(B) ("aid or abet … any activity described in subparagraph (A)").

To be sure, sometimes Congress uses the wordier formulation of aiding and abetting someone in committing a particular act. *See* Taamneh.Br.40-41 & nn.61-62. But despite their exhaustive survey of the U.S. Code, plaintiffs have not identified a single statute punishing aiding and abetting someone in the abstract, untethered from any wrongful conduct. That dooms their effort to make §2332(d)(2) the first such statute notwithstanding its repeated references to the specific "act" of terrorism.

Plaintiffs' effort to shift the focus from aiding and abetting specific acts of terrorism to providing general assistance to a terrorist organization makes even less sense when §2333(d)(2) is considered in its entirety. After all, §2333(d)(2) specifically mentions designated foreign terrorist organizations, but it does not make

those organizations the object of aiding and abetting, let alone deem the provision of unwitting assistance to those organizations sufficient for treble damages. Section 2333(d)(2) imposes liability *only* 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 … as of the date on which *such act* of international terrorism was committed, planned, or authorized." 18 U.S.C. §2333(d)(2) (emphasis added).

If merely providing assistance to "an organization … designated as a foreign terrorist organization" were enough for liability, Congress would have said so—and could have done so with far fewer words. Congress needed more words because its focus was not on simply aiding organizations, but on knowingly providing substantial assistance to the specific act of terrorism that caused the plaintiff's injury. *Cf. Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1481 (2021). Similarly, had Congress wanted to reach all aid that facilitated terrorist activities, rather than specific acts of terrorism, it could easily have referenced the broad definition of "international terrorism" in 18 U.S.C. §2331(1). *See id.* (defining "international terrorism" as "*activities* that … involve violent *acts* or *acts* dangerous to human life" (emphasis added)). Instead, Congress chose to keep the focus on the singular "act" that caused the plaintiff's injury.

Moreover, if Congress wanted to provide a civil remedy for providing material support to a designated foreign terrorist organization, it could have simply added one to the very differently worded criminal

material-support statute, which pre-dates JASTA by more than a decade. 18 U.S.C. §2339B(a)(1). The material-support statute confirms that Congress knows how to create liability for assisting a terrorist *organization* without regard to whether there was knowing assistance of particular terrorist acts. Facebook-Google.Br.25. Yet instead of borrowing the language of the material-support statute, Congress opted in JASTA to impose aiding-and-abetting liability, which has long required knowingly providing substantial support for a specific wrongful act. Congress did so even though some of the litigation that helped prompt the enactment of JASTA featured arguments in favor of importing the material support model into the ATA. Facebook-Google.Br.5. Plaintiffs dismiss the material-support statute as "in some respects broader" and in others "narrower" than §2333(d)(2). Taamneh.Br.48-49. But that just concedes that the statutes are different and that the efforts of plaintiffs' and their amici to morph §2333(d)(2) into a material-support statute are fundamentally misguided. *E.g.*, 470.Victims.Br.18-22; Grassley.Br.22-23.

2. Plaintiffs devote the bulk of their argument to JASTA's findings. But it is bedrock law that a statute's "prefatory clause" cannot "change the plain meaning of the operative clause." *Kingdomware*, 579 U.S. at 173; *accord District of Columbia v. Heller*, 554 U.S. 570, 577-78 (2008). And a prefatory clause that identifies a statutory purpose is of particularly limited utility because, as this Court has repeatedly observed, "no legislation pursues its purposes at all costs." *Mohamad v. Palestinian Authority*, 566 U.S. 449, 460 (2012); *see also Freeman v. Quicken Loans, Inc.*, 566

U.S. 624, 637 (2012) (rejecting "expansion of limited text by the positing of an unlimited purpose" even where purpose was "stated goal" of statute). In all events, plaintiffs identify nothing in JASTA's findings that provides any basis to read §2333(d)(2) to mean anything other than what its plain text says.

Plaintiffs begin with a lengthy recounting of *Halberstam*. But they misunderstand both its relevance and its holding. At the outset, nothing in JASTA purports to give the *facts* of *Halberstam* talismanic significance, which is unsurprising given that those facts have no counterpart in the terrorism setting. JASTA's findings simply state that *Halberstam* "provides the proper *legal framework* for how" "civil aiding and abetting and conspiracy" "liability should function" in §2333(d)(2). JASTA §2(a)(5), 130 Stat. 852 (emphasis added). That reference was not designed to infuse the facts of *Halberstam* with the force of law; indeed, it corresponds *en haec verba* to a section in *Halberstam* labeled "Legal Framework." That section explains that, to be liable as an aider-and-abettor, "the defendant must knowingly and substantially assist *the principal violation*." 705 F.2d at 477 (emphasis added). Requiring a plaintiff to plead and prove that the defendant aided and abetted the underlying principal wrong is thus neither novel nor contrary to what Congress itself described as the "leading case regarding Federal civil aiding and abetting and conspiracy liability." JASTA §2(a)(5).

Nor can plaintiffs reconcile the rule they would divine from *Halberstam* with the components of that "Legal Framework." Facebook-Google.Br.34. The

framework *Halberstam* articulates for an aiding-and-abetting analysis focuses on factors designed to assess whether assistance is "substantial" in relation to the "principal violation," examining things like "the nature of the act encouraged," the defendant's "presence or absence at the time of the tort," and the defendant's "state of mind" when it was committed. 705 F.2d at 478. Those factors are useful tools in ascertaining whether the connection between the assistance and the underlying wrong is substantial. But they make no sense if the task is to measure whether the assistance to *the wrongdoer* in the abstract is substantial. It is nonsensical to ask, for example, whether the defendant was present, or what it was thinking, at the time of the wrongdoer. Facebook-Google.Br.34. Plaintiffs' detour into *Halberstam* thus just confirms that their reading of §2333(d)(2) is untethered from both the statutory text and *Halberstam*'s "legal framework."

Rather than focus on *Halberstam*'s "legal framework," plaintiffs fixate on its facts. But that focus is not only misdirected, but ultimately unavailing. To be sure, Linda Hamilton was not there when Bernard Welch committed the burglary that led to the murder that precipitated the *Halberstam* lawsuit. But the district court expressly found that she "knew full well" that Welch was spending his nights committing property crimes and "was a willing partner in his criminal activities," providing "indisputably important" aid by, *e.g.*, regularly "laundering" and "disposing of the loot." 705 F.2d at 486, 488. That role was akin to a classic accessory after the fact and gave Hamilton clear insights into

the series of property crimes committed by Welch with her assistance. Nothing like that is alleged here.

Plaintiffs emphasize the D.C. Circuit's focus on Hamilton's aid for Welch's "criminal enterprise," and from there insist that aiding-and-abetting a "terrorist enterprise" is sufficient. Taamneh.Br.21-24. Again, that is not what the D.C. Circuit said. When the D.C. Circuit spoke of Welch's "illegal enterprise," it was speaking of Welch's criminal *activities*, not of some criminal *entity* to which Hamilton was providing general assistance unconnected to the crimes. There was no criminal entity in *Halberstam*—just Welch. Indeed, the D.C. Circuit went out of its way to make clear that merely providing aid to a wrongdoer is *not* enough for aiding-and-abetting liability, lest "normal spousal support activities" like "household chores" convert anyone who suspects their significant other of wrongdoing into a tortfeasor. *Id.* at 487-88. Nor does it work for plaintiffs to try to reconceive of support for ISIS's general "terrorist activities" as distinct from support for ISIS the "enterprise." By their own theory and allegations, *any* support for ISIS the "enterprise" is support for *all* of its "terrorist activities," which creates the precise kind of liability that the D.C. Circuit disclaimed.

That leaves plaintiffs insisting (at 42) that their capacious reading of the statute must be correct because Congress said that JASTA's goal is to provide "civil litigants with the broadest possible basis" to seek relief against anybody who "provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA §§2(a)(6)-(7), (b); *see also*

470.Victims.Br.17-18; Grassley.Br.11. But that is precisely the kind of generic purpose that no statute pursues at all costs. The statute plainly does not empower civil litigants to saddle with treble damages anyone who provided any aid to a terrorist organization, no matter how trivial, unintentional, or divorced from any actual terrorist act. There are plenty of federal statutes that do not provide a civil remedy against aiders and abettors, *see Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177-78 (1994), and very few that impose treble damages on aiders and abettors, let alone abrogate foreign sovereign immunity for aiders and abettors. Thus, the actual remedy Congress provided in the text of §2333(d)(2) was unusually capacious and provided the "broadest possible basis" for relief given the competing considerations Congress was evaluating.[1]

Plaintiffs' claim that a plain-text reading would leave §2333(d)(2) a narrow and useless remedy is mistaken. For instance, plaintiffs insist that requiring a defendant to have aided and abetted the act of terrorism would somehow exclude from the

[1] Plaintiffs also ignore the history behind the "broadest possible" language. JASTA's initial draft included a subsection authorizing personal jurisdiction "to the maximum extent permissible under the 5th Amendment to the Constitution of the United States." H.R. 3143, 113th Cong., 1st Sess. §5. The enacted version deleted that long-arm provision but retained the "broadest possible basis, consistent with the Constitution of the United States," language in the findings. That finding is likely just a residue of the abandoned long-arm provision, and Congress' deletion of the operative provision while leaving the finding underscores the limited import of findings.

statute's reach those who provide aid in the form of money. Taamneh.Br.45. But the fact that money is fungible does not mean that its provision cannot be tied to particular terrorist attacks.

Moreover, many of plaintiffs' consequentialist arguments proceed as if §2333(d)(2) were solely an aiding-and-abetting statute. But §2333(d)(2) also creates liability for those who "conspire[d] with the person who committed" the "act of international terrorism" that injured the plaintiff. 18 U.S.C. §2333(d)(2). Civil conspiracy liability is narrower in some respects than aiding-and-abetting liability, as it requires an actual "agreement" "to participate in an unlawful act." *Halberstam*, 705 F.2d at 477. But it is also broader, as one who enters into a conspiracy is liable for any act that "advance[s] the overall object of the conspiracy." *Id.* at 487. Accordingly, "liability may be based on a more attenuated relation with the principal violation in a conspiracy than in aiding-and-abetting." *Id.* at 485. Thus, if someone wrote Abu Shuhada a check with an implicit understanding that he would use the money to commit acts of terrorism, maybe they would not have the requisite connection to the Reina attack to be liable for aiding and abetting it, but they could certainly face liability for the Reina attack under §2333(d)(2) as a co-conspirator.

The *full* text of §2333(d)(2) is therefore entirely in keeping with JASTA's goal of providing a broad civil remedy against those who knowingly and willingly facilitate acts of international terrorism. The additional conspiracy path to liability just does not help plaintiffs, as they do not claim that any defendant ever entered into any agreement with anyone to aid

ISIS in any way.[2] Indeed, plaintiffs do not even "alleg[e] that defendants ha[d] any intent to further ISIS's terrorism," Pet.App.179a, let alone to further the Reina attack. It is therefore neither surprising nor remarkable that the ATA does not reach defendants. Congress provided a broad remedy against those who conspire with terrorists or knowingly aid and abet their terrorist acts; it did not impose treble-damage liability on companies whose services were exploited by terrorists in contravention of the companies' robust anti-terrorism policies.

II. Plaintiffs Failed To Allege That Defendants "Knowingly Provided Substantial Assistance" As §2333(d) Requires.

Because plaintiffs failed to allege that defendants' services played any role in Abdulkadir Masharipov's attack on the Reina nightclub, they necessarily failed to allege that any defendant "knowingly provid[ed] substantial assistance" to that "act of international terrorism." 18 U.S.C. §2333(d)(2). But even accepting plaintiffs' view that the proper focus is ISIS writ large, rather than an "act of international terrorism," plaintiffs fail to allege that defendants "knowingly provid[ed] substantial assistance" to ISIS. *Id.*

Plaintiffs try to duck the "knowingly" question, accusing defendants and the United States of asking the Court to adopt new "per se legal rules" that are "not fairly encompassed within the questions presented." Taamneh.Br.61-62. But the second

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[2] Plaintiffs originally brought conspiracy claims against defendants, but they wisely abandoned them on appeal. Pet.App.60a.

question presented—*viz.*, whether defendants "'knowingly' provided substantial assistance under Section 2333," Pet.i—plainly encompasses what a defendant must "know" to be liable under §2333(d)(2). *Contra* Taamneh.Br.63. And while whether a defendant actually *had* the requisite knowledge is a question of fact, Taamneh.Br.70-71, what kind of knowledge is requisite is a question of law that must be resolved to answer the second question presented.[3]

In addressing that question, plaintiffs once again focus on *Halberstam* in lieu of the text of §2333(d)(2). They insist that *Halberstam* requires only "knowledge that a defendant is assisting wrongful conduct" and (perhaps) "general awareness of the role a defendant's assistance is playing in that conduct." Taamneh.Br.63-64. In their view, then, §2333(d)(2) does not even require a defendant to have known that the assistance it was providing was substantial, let alone that it was substantially assisting the act of terrorism that caused the plaintiff's injuries.[4] That toothless standard finds no support in either the statutory text or *Halberstam*.

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[3] Plaintiffs vaguely accuse defendants of forfeiting some or all of their "knowingly" arguments. Taamneh.Br.62-63. In fact, defendants argued below that, even setting aside the "act of international terrorism" requirement, plaintiffs had to show that "Defendants 'knowingly' provided substantial assistance to ISIS's terrorist activities" and failed to do so. C.A.Br.35.

[4] While plaintiffs at one point at least concede that the defendant must have "actual (not constructive) knowledge" that it is assisting wrongful conduct, Taamneh.Br.77, they elsewhere seem to dispute even that, *id.* at 65, 70.

As for the former, the text could not be clearer: To be liable for aiding and abetting, a defendant must "knowingly provide substantial assistance" to the underlying "act of terrorism." 18 U.S.C. §2333(d)(2). That is a far cry from mere "general awareness" that one's operations may lend some aid to terrorism or that policies designed to keep terrorists from using one's services were not foolproof. A "general awareness" standard smacks of recklessness or negligence, and "knowingly" demands more. *See* Facebook-Google.Br.37; *Borden v. United States*, 141 S.Ct. 1817, 1823-24 (2021). At a minimum, §2333(d)(2) makes clear that the defendant must know that the assistance it is providing is substantial, as "knowingly" modifies the phrase "provide substantial assistance." *See, e.g.*, *Ruan v. United States*, 142 S.Ct. 2370, 2376-78 (2022); *Rehaif v. United States*, 139 S.Ct. 2191, 2195-97 (2019).

Far from undermining those conclusions, *Halberstam* reinforces them. *Halberstam*'s aiding-and-abetting test requires *both* that the alleged accomplice was "generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance," *and* that he "knowingly and substantially assist[ed] the principal violation." 705 F.2d at 477. A defendant's general awareness of his part in the scheme thus is necessary for aiding-and-abetting liability, but it is not sufficient. Facebook-Google.Br.39-40. By requiring *both* general awareness *and* knowledge, *Halberstam* underscores that the defendant must "knowingly provide substantial assistance." And by laying out factors for assessing substantiality that focus repeatedly on the relationship between the assistance and the wrongful

act, *see id.* at 483-85; *supra* p.10-11, *Halberstam* further underscores that the defendant must "knowingly provide substantial assistance" to the specific "act" of terrorism at issue.

Plaintiffs insist that it would be impractical to expect a defendant "to be familiar with the six-part test" *Halberstam* set forth for assessing substantiality and to know how to "balance" those factors "in the legally appropriate manner." Taamneh.Br.66-67. But it would be even more impractical to expect a defendant to synthesize a legal test from the facts of *Halberstam* as plaintiffs would prefer. In all events, that is ultimately just an argument for keeping the focus on the operative text and erring on the side of a reading that does not impose treble damages or revoke sovereign immunity without the requisite clarity. It is, after all, hard enough for the governed to master the manifold requirements of the U.S. Code. Asking them to distill rules for their primary conduct from a decision cited in the legislative findings is surely a bridge too far. In all events, the fact that the *Halberstam* factors assess knowing and substantial assistance in conjunction with the specific act of the principal that injured the plaintiff just reinforces the artificiality of plaintiffs' effort to divorce secondary liability from the primary act that caused the plaintiffs' injury.

Plaintiffs' desire to divorce the "knowingly" scienter requirement from the "provide substantial assistance" words it modifies is understandable. They do not argue that *any* of the six *Halberstam* substantial-assistance factors cuts in their favor. Indeed, the only factor they address is the "defendant's

state of mind." Taamneh.Br.78.[5] And even as to that, plaintiffs do not argue that defendants acted with the "intent and desire to make" the Reina attack (or even ISIS) "succeed." *Halberstam*, 705 F.2d at 488; *see* Pet.App.65a. They instead try again to lower the standard, arguing (with conspicuous citation to nothing) that "[r]eckless disregard of the fact that a defendant is assisting terrorism would be highly culpable, and could weigh heavily in the assessment of whether the assistance was substantial." Taamneh.Br.78.

By plaintiffs' telling, then, *no* part of the statute requires a defendant to have intended to help further an act of terrorism. It is enough that a defendant "knowingly" did (or did not do) something that it knew (or should have known) may be useful to a terrorist organization. To the extent there were any doubt about that, their own characterization of their allegations lays it to rest. According to plaintiffs, their claims that three major online-services companies aided and abetted a horrific terrorist act of mass murder may go forward simply because they alleged that defendants knew that (1) some terrorist content made it onto their sites in contravention of their policies, (2) their anti-terrorism measures did not catch it all, (3) ISIS used such content "to recruit and incite supporters, to raise funds, and to intimidate

[5] Plaintiffs mention in passing that "a defendant's presence or absence at the time of the tort, while relevant, is only one of the six factors to be considered." Taamneh.Br.68. Fair enough, but that factor not only concededly cuts against plaintiffs, but again gives the lie to the argument that substantial assistance can be divorced from the specific act of terrorism that the defendant must substantially assist.

members of the public," and (4) "the resulting assistance to ISIS was not de minimis." Taamneh.Br.74.[6] By that logic, plaintiffs could try to impose aiding-and-abetting liability on defendants for virtually any act of terrorism ISIS ever commits.

That is not a plausible reading of a statute that imposes treble damages on those who aid and abet terrorist attacks or conspire with its perpetrators (let alone one that abrogates sovereign immunity for some specific acts). If that were the rule, it would create a bizarre chasm between the two alternative avenues for treble-damages liability. The same punitive liability would be imposed on those who enter an actual conspiratorial agreement with terrorists and those who affirmatively bar terrorists from using their services but cannot prevent every unauthorized use. While Congress theoretically *could* treat two courses of conduct with wildly different culpability exactly the same, the far more logical inference is that Congress wanted to punish both actual conspirators and actual aiders and abettors, as those terms have traditionally been understood.

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[6] Plaintiffs try to smuggle "recommendations" into their brief, Tammneh.Br.5-6, 72-75, 77-78, presumably in hopes of salvaging their claims should this Court hold in *Gonzalez v. Google*, No. 21-1333, that "recommendations" are not protected by §230. But plaintiffs never mentioned recommendations in the Ninth Circuit. Their sole theory below was that defendants "allowed ISIS to utilize their services," Taamneh.C.A.Br.5—a theory that the *Gonzalez* plaintiffs (represented by the same counsel) concede §230 bars, *Gonzalez* Pet.11 n.2.

III. The Ninth Circuit's Stark Departures From Traditional Aiding-And-Abetting Principles Produce Untenable Consequences.

Defendants offer the Court a reading of the ATA that is consistent with text, context, and common-law aiding-and-abetting principles and that imposes sensible limits on liability. Plaintiffs' reading, by contrast, produces results that Congress cannot plausibly have intended. Plaintiffs would apparently permit any provider of widely available services to be held trebly liable for aiding and abetting under the ATA so long as it is aware that terrorists sometimes exploit its services, even if the provider prohibits terrorists from using its services and undertakes extensive (though not foolproof) efforts to prevent them from doing so. All manner of services could be swept up in ATA litigation, from commercial air travel, taxis, and financial services providers, to technology, pharmaceutical, and oil companies, and more. PhRMA.Br.17-21; Chamber.Br.8-11, 30-33; International.Bankers.Br.7-9; Interaction.Br.12-23. Making matters worse, foreign sovereigns could be haled into U.S. courts on equally extravagant theories of liability. Facebook-Google.Br.44-50. Revoking foreign sovereign immunity is strong medicine properly reserved for highly culpable conduct; revoking it based on plaintiffs' capacious understanding of aiding and abetting would have serious consequences indeed. Legal.Advisers.Br.6-7.

Plaintiffs have no response to those concerns. Instead, they try to manufacture absurd consequences of their own, insisting that, under defendants' approach, assistance in the form of "cash, banking

services," and the means "to raise money, recruit terrorists, and terrorize the public" would somehow be "outside the scope of §2333(d)(2)" altogether, Taamneh.Br.54-55, leaving JASTA liability "limited to ISIS operatives" who are "all assuredly judgment proof" and indifferent to deterrence, *id.* at 51-52; *see also* Grassley.Br.14-15. But cash assistance and the like are still very much covered by the statute. A plaintiff just needs to prove that defendants knowingly provided such assistance to support the act of terrorism at issue or entered into an agreement to help facilitate the perpetrator's terrorist acts.

Moreover, even if some aid to terrorist organizations falls short of aiding and abetting and conspiracy, those who provide material support for terrorism would not get off scot-free. Someone who "hands a bag containing $1 million to" ISIS, 470.Victims.Br.2, would undoubtedly face potential prosecution, steep fines, and up to 20 years in prison under the material-support statute. 18 U.S.C. §2339B(a)(1); *see also* Grassley.Br.19-20. That presumably explains why the United States, which is duty-bound to prevent and prosecute material support of designated terrorist organizations, fully supports confining aiding-and-abetting liability under §2333(d)(2) to its traditional bounds. U.S.Br.13-14.

At bottom, plaintiffs' real complaint is that interpreting §2333(d)(2) in accordance with its text and the common-law principles it incorporates would make it harder to bring lawsuits *like this one*. Indeed, plaintiffs even go so far as to claim that it would be absurd to think Congress did not intend to treat "banks[] and social media companies" as aiders and

abettors of acts of international terrorism. Taamneh.Br.54-55. And they repeatedly urge the Court to reject any reading of §2333(d)(2) that would make it harder to impose aiding-and-abetting liability on a website for failing to take sufficiently aggressive steps to block or remove terrorist content, simply because it would have that effect. *See, e.g.*, Taamneh.Br.64-67. That is hardly a compelling argument when the question before this Court is whether such allegations suffice to state an aiding-and-abetting claim under §2333(d)(2). But more to the point, the fact that a textually and common-law grounded reading of the statute would foreclose efforts to impose the harsh remedy of treble-damages aiding-and-abetting liability on parties who not only have no intention of aiding acts of terrorism, but vehemently oppose them, is a virtue, not a vice.

Finally, concluding that allegations like plaintiffs' fail to state a claim under the ATA would obviate the need for this Court to decide the scope of §230 protection in the context of ATA suits that would no longer proliferate. Plaintiffs throughout the country have filed numerous ATA suits against Meta, Google, Twitter, and many other companies under capacious visions of aiding-and-abetting liability like those alleged here and in *Gonzalez v. Google*, No. 21-1333. *See, e.g.*, *Retana v. Twitter, Inc.*, 1 F.4th 378 (5th Cir. 2021); *Colon v. Twitter, Inc.*, 14 F.4th 1213 (11th Cir. 2021); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019); *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018). Some of those lawsuits have been dismissed for failure to state a claim under the ATA, while others have been dismissed under §230. If this Court

reverses here, then the debate over §230 will shift to other contexts. Rather than address §230 in the one legal context least likely to recur if this Court reverses here, this Court should reverse the decision below and dispose of *Gonzalez* in light of the decision here.[7]

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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[7] The United States notes that *Gonzalez*, unlike *Taamneh*, includes direct-liability claims. *Gonzalez* U.S.Br.32 n.5. But the Ninth Circuit already held, in a ruling that the *Gonzalez* petitioners do not challenge, that allegations that Google shared advertising revenue with ISIS did not state a direct-liability claim because plaintiffs did not allege that Google's actions were "intended to intimidate or coerce a civilian population, or to influence or affect a government as required by the ATA" to constitute an act of international terrorism. Pet.App.46a (citing 18 U.S.C. §2331(1)(B)). That holding necessarily forecloses any direct-liability claim in *Gonzalez*. Thus, regardless of the outcome here, the *Gonzalez* petitioners have no live, viable theory for direct liability.

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