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 PETITIONER

ALEX W. MILLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
PATRICK J. CAROME
ARI HOLTZBLATT
CLAIRE H. CHUNG
AMY LISHINSKI
ANDRES C. SALINAS
NATHANIEL W. REISINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
seth.waxman@wilmerhale.com

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INTRODUCTION

The Ninth Circuit recognized, and Plaintiffs' brief nowhere disputes, that Twitter, Facebook, and Google had no "intent to further or aid ISIS's terrorist activities" and enforced "policies prohibit[ing] … content that promotes terrorist activity," including by "regularly remov[ing]" ISIS accounts and content. Pet.App.64a-65a. Plaintiffs likewise do not dispute that no Defendant knew of, yet failed to remove, any account or post used to plan, prepare for, or commit the Reina attack or any other terrorist attack. What Plaintiffs allege instead—that Defendants were generally aware that their billions of users included ISIS adherents who were misusing their routine services and that

Defendants should have done more to find and prevent that misuse—does not constitute aiding and abetting an act of international terrorism, under the statutory text, common law principles, or any commonsense notion of what it means to "abet" a criminal act.

Plaintiffs offer no persuasive response to the fundamental defects in their case. First, Section 2333(d) requires a defendant to have substantially assisted a discrete "act of international terrorism," which Plaintiffs here have "unambiguously conceded … is the Reina Attack itself," Pet.App.64a. Plaintiffs do not contend that they can satisfy this requirement, nor does their brief even acknowledge their concession. Instead, they argue that Defendants can be held liable for substantially assisting ISIS's "wrongful enterprise"—even where Defendants "did not directly assist the particular tort which injured the plaintiff, *or assist any tort at all*." Taamneh.Br.22 (emphasis added). That remarkable proposition contravenes the well-established requirement that the defendant have substantially assisted the principal violation—here, the Reina attack.

Second, Section 2333(d) also requires the defendant to have "knowingly provid[ed] substantial assistance." Plaintiffs do not dispute that Defendants prohibited terrorist content and regularly removed ISIS accounts and content they knew about. But Plaintiffs argue Defendants are nevertheless liable because Defendants allegedly were generally aware that other ISIS adherents were misusing their routine services. Such a theory, at most, sounds in recklessness, not the knowing provision of substantial assistance. And accepting it here would conflict with the common law principles demanding a more robust showing of knowledge to

justify aiding-and-abetting liability for failing to prevent misuse of widely available, routine services.

Ultimately, Plaintiffs fall back on a policy argument that Defendants' reading of Section 2333(d) would expose only terrorists to liability. Not so. Properly construing Section 2333(d) still permits, for example, victims of the September 11 attacks to assert secondary claims against a Saudi-Arabia-controlled charity that allegedly "funneled millions of dollars to al Qaeda" and had, among other things, "photos of the World Trade Center" and "photos and maps of Washington, D.C. (with prominent government buildings marked)." *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 76 (2d Cir. 2008). This construction reaches entities genuinely responsible for plaintiffs' injuries while avoiding making ordinary businesses, like Defendants, indemnitors for every terrorist attack ISIS commits, merely because they allegedly failed to do more to prevent terrorists from misusing their services.

ARGUMENT

I. SECTION 2333(d) REQUIRES SUBSTANTIAL ASSISTANCE TO THE "ACT OF INTERNATIONAL TERRORISM" FROM WHICH THE CLAIM ARISES

A. The Statute's Text And Structure Require Substantial Assistance To The "Act Of International Terrorism"

1. Section 2333(d) provides that, "[i]n an action under subsection (a) for an injury *arising from an act of international terrorism*," liability may be asserted against a defendant "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed *such an act of international terrorism*." 18 U.S.C. §2333(d)(2) (emphases added).

As Twitter explained, this means the defendant must have substantially assisted in committing the underlying "act of international terrorism." Pet.Br.22-26. *Halberstam*'s framework likewise requires the defendant to have substantially assisted the primary tort—*i.e.*, the "principal violation." *Halberstam* v. *Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). Plaintiffs' claim fails under this standard because Defendants are not alleged to have assisted commission of the Reina attack in any way, much less substantially. Plaintiffs do not even allege that Masharipov, Shuhada, or any ISIS operative ever used Defendants' services in plotting or committing the Reina attack.

According to Plaintiffs, Defendants need not have assisted the "act of international terrorism" that injured them. Instead, they argue (Taamneh.Br.22-33) that it is enough to allege that Defendants assisted ISIS's terrorism "enterprise" or "campaign." Section 2333(d), however, does not mention any "enterprise" or "campaign." It requires assistance to "an act" of international terrorism—a discrete unit—not a terrorism enterprise that Plaintiffs say encompasses everything ISIS does, whether connected to the injury-causing attack or not, *see* Taamneh.Br.22.[1]

Plaintiffs try a different tack, arguing (Taamneh.Br.34) that "[t]he object of the verbs 'aids and abets' is 'person who committed such an act of international terrorism,'" rather than the act, and thus

[1] Plaintiffs passingly argue (Taamneh.Br.47-48) that under the Dictionary Act, "the singular includes the plural." *See* 1 U.S.C. §1. But that only means a defendant may be liable under Section 2333(d) for aiding and abetting multiple acts of international terrorism, not some amorphous and all-encompassing concept like a terrorism "enterprise."

Defendants need only have assisted the "person" who committed the Reina attack, without regard to the attack at all. At times, Plaintiffs suggest that person is ISIS. *See* Taamneh.Br.51. Not even the Ninth Circuit adopted this construction, Pet.App.52a, and there are good reasons to reject it, *see* Facebook & Google Br.24-25; U.S.Br.31-32.

Nor does Plaintiffs' focus on the word "person" help them. "Aid and abet" means "[t]o facilitate the *commission* of a crime, or to promote its *accomplishment*." Aid and abet, *Black's Law Dictionary* (11th ed. 2019) (emphases added); *see Rosemond* v. *United States*, 572 U.S. 65, 70 (2014) (a secondary actor may be held "responsible for a crime … if he helps another to complete its commission"). The Restatement (Third) of Torts likewise explains that "substantial assistance"—which Section 2333(d) specifies as the means of aiding and abetting—requires "affirmatively helping with the commission of a tort." *Restatement (Third) of Torts: Liab. for Econ. Harm* §28 cmt.d (2020). There is simply no way to evaluate whether assistance is "substantial" without reference to the act being assisted.

Contrary to Plaintiffs' argument (Taamneh.Br.34, 40-41), there was no reason for Section 2333(d) to refer to aiding and abetting the "commission of" or a "person in committing," because the ordinary meaning of "aid and abet" already demands assistance to the commission of the primary tort. A defendant thus cannot be liable for aiding and abetting ISIS in some general way, without substantially assisting it to commit the act that injured the plaintiff—here, the Reina attack.[2]

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[2] That other laws proscribe aiding and abetting "the commission of" or "committing" the primary tort is immaterial. *See* Taamneh.Br.40-41 & nn.61-62. Section 2333(d)(2)'s particular

This reading is further reinforced by the stark contrast between Section 2333(d) and Section 2339B. While a defendant can "aid[] and abet[]" "an act of international terrorism" under Section 2333(d) only if its assistance knowingly and substantially furthered commission of the particular "act" that injured the plaintiff, a defendant can violate the criminal prohibition in Section 2339B by knowingly "provid[ing]" material support or resources "to a foreign terrorist organization," without regard to whether the resources support terrorist attacks, 18 U.S.C. §2339B(a)(1). That textual difference must be given effect. As the district court explained, had Congress wanted to attach aiding-and-abetting liability to any assistance in carrying out "*all* of ISIS's terrorist operations," it "could easily have used language similar" to Section 2339B. Pet.App.173a Plaintiffs' attempt (Taamneh.Br.48-50) to downplay this contrast by arguing there were reasons "why Congress did not simply create a cause of action for violations of §2339B" is misguided. No one here is puzzling over *why* Congress did not create civil liability equivalent to Section 2339B. The significance of Section 2339B is that, having enacted Section 2339B in the same chapter, Congress knew how to draft language establishing liability for general assistance to a terrorist enterprise but decided not to. Pet.Br.25-26; U.S.Br.32.[3]

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phrasing reflects Congress's pairing of aiding-and-abetting and conspiracy liability in a single clause, which Plaintiffs' cited laws do not do.

[3] Plaintiffs' amici ignore this textual difference. The ATA scholars argue, for example, that foreign terrorist organizations are "'so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.'" ATA Scholars' Br.21-22 (quoting 18 U.S.C. §2339B note). But they quote a statutory note accompanying Section 2339B. Plaintiffs' other amici also

2. Plaintiffs' remaining arguments regarding the statutory text and context lack merit. First, Plaintiffs contend (Taamneh.Br.34-35) that Section 2333(d) requires the defendant to have "'knowingly provid[ed] substantial assistance'" without specifying "to whom that assistance might be provided" or what "form … the 'substantial assistance'" must take. Though unclear what Plaintiffs are trying to suggest, this assertion contradicts their other argument that "the person who committed" the act of international terrorism is the object of "aiding and abetting." At any rate, the phrase "by knowingly providing substantial assistance" does not support Plaintiffs' reading because it describes *how* aiding and abetting must be performed but does not change the object of the transitive verbs "aids and abets." If the object is the "act of international terrorism," the defendant must "knowingly provide substantial assistance" to that act. If the object is (as Plaintiffs argue) "the person who committed such an act of international terrorism," the defendant must "knowingly provide substantial assistance" to that person in committing that act. Either way, generalized assistance to an organization's terrorism campaign is insufficient.

Second, Plaintiffs err in arguing (Taamneh.Br.44) that, because the statutory scheme is purportedly concerned with "the problem of multiple terrorist attacks by a foreign terrorist organization," assistance to "terrorist enterprises" should not be excluded from Section 2333(d)'s scope. Twitter does not argue that Section 2333(d) precludes liability for aiding and abetting "multiple terrorist attacks"; such liability may well attach

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conflate the requirements of Sections 2339B and Section 2333(d). *See* Former National Security Officials Br.19-21; Grassley Br.18-23.

where the defendant knowingly and substantially assisted in committing each of those attacks. But that in no way suggests a defendant may be liable for assisting an ill-defined terrorism "enterprise."

Similarly, although Plaintiffs emphasize (Taamneh.Br.42-44) that Section 2333(d) imposes liability based on acts "committed, planned, or authorized" by designated foreign terrorist organizations, and they posit that such designations reflect "an extensive history of terrorist activity," the plain text of Section 2333(d) does not create liability for substantially assisting a "foreign terrorist organization." Nor does Section 2333(d) impose liability for assisting "international terrorism," another term Plaintiffs argue contemplates commission of multiple terrorist attacks. TaamnehBr.44. Instead, the text requires the defendant to have aided and abetted a discrete "*act* of international terrorism."

B. Plaintiffs' Reliance On JASTA's Preamble Is Misguided

Plaintiffs' focus (Taamneh.Br.11, 21) on what they call JASTA's "textual instructions" or "directives" is likewise unsound. Primarily, Plaintiffs exaggerate the significance of the preambular findings and statement of purpose saying that Congress aimed to provide civil litigants "the broadest possible basis to seek relief," Pub. L. No. 114-222, §2(b), 130 Stat. 852, 853 (2016), and that those who "contribute material support, directly or indirectly" to certain terrorist organizations should reasonably anticipate suit, *id.* at 852 (§2(a)(6)). Although Plaintiffs try to tie those statements to aiding-and-abetting liability, *see* Taamneh.Br.41-42, "statements of purpose … by their nature 'cannot override a statute's operative language,'" *Sturgeon* v. *Frost*, 139 S.

Ct. 1066, 1087 (2019). That is especially true when the stated purpose is broad because "no legislation … pursues its stated purposes at *all* costs," and "an expansive purpose in the preamble cannot add to the specific dispositions of the operative text." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 219-220 (2012). Here, Section 2333(d)'s text resoundingly rejects Plaintiffs' attempt to impose aiding-and-abetting liability based on alleged assistance to ISIS without any connection to the Reina attack.

Moreover, as the United States has explained, "[n]othing suggests" that the statement of purpose "was specifically targeted at Section 2333(d)(2)'s standard for aiding-and-abetting liability." U.S.Br.21, *Weiss* v. *National Westminster Bank, PLC*, No. 21-381 (U.S.). The statement never even mentions aiding and abetting. And both the President's veto statement and the legislative history indicate that a principal focus in enacting JASTA was to abrogate foreign sovereign immunity and overrule *Terrorist Attacks on September 11, 2001*, 538 F.3d 71, which had held that U.S. courts lacked jurisdiction over Saudi Arabia and its instrumentalities.[4] It is more likely, therefore, that the statement concerns a different provision of JASTA (§3), which created an exception to foreign sovereign

[4] *See* 162 Cong. Rec. 13908, 13909 (2016) (Veto Message of Pres. Obama) ("JASTA departs from longstanding standards and practice under our Foreign Sovereign Immunities Act"); *id.* at 13915 (Statement of Rep. Smith) ("JASTA corrects" the Second Circuit's 2008 jurisdictional dismissal of action against Saudi Arabia and other defendants); 162 Cong. Rec. 6092, 6093 (2016) (Statement of Sen. Schumer) (criticizing a "nonsensical reading of the Foreign Sovereign Immunities Act" that led courts to dismiss claims against "foreign entities alleged to have helped fund the 9/11 attacks").

immunity in cases involving certain "act[s] of international terrorism in the United States," and established a cause of action "against a foreign state in accordance with section 2333." 28 U.S.C. §1605B(b)-(c).[5]

C. Plaintiffs Fail To Address The Common Law Jurisprudence And Misread *Halberstam*

1. Longstanding common law principles—on which *Halberstam* drew—reject Plaintiffs' extraordinary contention (Taamneh.Br.22) that a defendant may be liable for assisting "a wrongful enterprise," even without "directly assist[ing] the particular tort which injured the plaintiff" or "assist[ing] any tort at all." The Restatement (Second) of Torts, for example, requires "the act encouraged … to be tortious" for aiding-and-abetting liability to attach. *Restatement (Second) of Torts* §876 cmt.d (1965). Every state-court case discussed in *Halberstam* that found aiding-and-abetting liability likewise involved "actual participation" in a tort,[6] "direct encouragement by word or deed at the scene of the

[5] The initial draft of JASTA included a subsection authorizing personal jurisdiction "to the maximum extent permissible under the 5th Amendment to the Constitution of the United States." S. 2040, 114th Cong. §5 (as introduced, Sept. 16, 2015); *see also* H.R. 3143, 113th Cong. §5 (as introduced, Sept. 19, 2013). The enacted version deleted that long-arm provision but retained the clause "broadest possible basis, consistent with the Constitution of the United States," in the preamble. 130 Stat. at 853. This suggests "the broadest possible basis" may also be a vestige of the abandoned long-arm provision, further limiting its import.

[6] *Halberstam*, 705 F.2d at 482-483 (describing *American Fam. Mut. Ins. Co.* v. *Grim*, 440 P.2d 621 (Kan. 1968)).

tort,"[7] or the knowing provision of "an indispensable prerequisite to the" particular tort itself.[8] None of these authorities supports Plaintiffs' bizarre notion that a defendant can be secondarily liable without substantially assisting the primary tort.

Plaintiffs fail to grapple with this jurisprudence. Their claim (Taamneh.Br.32) that *Halberstam* "did not endorse" the "legal standards" in these authorities makes little sense, as *Halberstam* plainly relied on the Restatement (Second) of Torts and the common law cases. *See* 705 F.2d at 481-486. Of course, even without such reliance, "when a statute covers an issue previously governed by the common law, [this Court] interpret[s] the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010). Section 2333(d) is rooted in common law aiding-and-abetting liability, as is *Halberstam*, and thus incorporates the longstanding principle that the defendant must have aided and abetted the principal tort, not general wrongdoing without regard to its connection to the principal tort.

2. Ultimately, Plaintiffs' reading of Section 2333(d) depends on ascribing talismanic significance to *Halberstam*'s description of Hamilton as assisting Welch's "burglary enterprise," 705 F.2d at 488. *See* Taamneh.Br.22-33. Plaintiffs' hyper focus on the word "enterprise" is questionable, as "[t]his Court has long

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[7] *Id.* at 481-482 (describing *Rael* v. *Cadena*, 604 P.2d 822 (N.M. Ct. App. 1979); *Cobb* v. *Indian Springs, Inc.*, 522 S.W.2d 383 (Ark. 1975); *Keel* v. *Hainline*, 331 P.2d 397 (Okla. 1958)).

[8] *Id.* at 482 (describing *Russell* v. *Marboro Books*, 183 N.Y.S.2d 8 (Sup. Ct. 1959)).

stressed that 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.'" *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022). That is especially so here because Congress borrowed from *Halberstam*'s "legal framework," not its facts, to guide application of Section 2333(d). 130 Stat. at 852 (§2(a)(5)). And *Halberstam* used "enterprise" merely in the factual sense—to describe Welch's "innumerable burglaries," 705 F.2d at 474—not to set out a distinct legal element. Pet.Br.32-34.

In any event, Plaintiffs blink reality—and *Halberstam*'s own analysis—in contending that Hamilton assisted only "Welch's overall wrongful enterprise," not "in the commission of even a single one of Welch's burglaries," because the burglaries "were all completed before she played any relevant role." Taamneh.Br.24-26. Hamilton was undeniably "'a willing partner in [Welch's] criminal activities,'" including the one that led to the murder. 705 F.2d at 486. As the court explained, Welch's crimes were "heavily dependent on" Hamilton's role as the "banker, bookkeeper, recordkeeper, and secretary." *Id.* at 487-488. Indeed, Hamilton "performed these services in an unusual way under unusual circumstances for a long period of time and thereby helped launder the loot and divert attention from Welch." *Id.* at 487. Each time Welch committed a burglary—including the one at issue—he did so emboldened and enabled by the fact that Hamilton would dispose of whatever he stole. The United States agrees that *Halberstam* held Hamilton liable for "each of Welch's burglaries." U.S.Br.33. Plaintiffs are thus wrong that *Halberstam* permits liability for aiding and abetting an illicit enterprise, independent of whether

that aid substantially assisted any particular injury-causing tort.

II. SECTION 2333(d) REQUIRES "KNOWINGLY" PROVIDING SUBSTANTIAL ASSISTANCE

A. Plaintiffs Do Not Allege The Requisite Knowledge Regardless Of Whom Or What Defendants Must Have Substantially Assisted

Section 2333(d) imposes secondary liability only on a defendant who "aids and abets, by *knowingly* providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. §2333(d)(2) (emphasis added). Plaintiffs have failed to allege the requisite knowledge, regardless of whether Defendants must have substantially assisted the conceded "act of international terrorism"—the Reina attack—or, as Plaintiffs maintain, ISIS's general terrorism enterprise.

If the Court agrees that Section 2333(d) requires substantially assisting the act of international terrorism that injured the plaintiff, then Plaintiffs must allege, at a minimum, that Defendants knew both of the specific ISIS accounts that substantially assisted the Reina attack and that not blocking those accounts would substantially assist such an attack. Plaintiffs' claim fails this standard because, as they appear to concede, they allege neither "knowledge of accounts or postings connected to the Reina attack" nor "knowledge of accounts or postings used for [any] particular attacks," Taamneh.Br.65-66 (capitalization omitted). As the United States puts it, Plaintiffs "do not allege that specific accounts on [Defendants'] platforms were being used to plot or prepare for the Reina attack

or for attacks that included Reina, or that [D]efendants knew of any such accounts." U.S.Br.23.

Even were the Court to conclude that a defendant could be liable for aiding and abetting not the conceded "act of international terrorism," but rather the ISIS terrorism "enterprise," Plaintiffs would still need plausibly to allege that Defendants knew both of the specific ISIS accounts that substantially assisted ISIS's terrorism enterprise and that not blocking those accounts would substantially assist that enterprise. That is because under the plain language of Section 2333(d), the defendant must have "knowingly" undertaken the conduct that "provided" substantial assistance, and the defendant must have known that its conduct would assist "substantial[ly]." Pet.Br.37-38. Common law principles likewise demand such knowledge—especially where, as here, Defendants are accused merely of failing to prevent misuse of widely available, ordinary services. Pet.Br.39-42. The Amended Complaint, however, does not allege that Defendants knew of but failed to remove any particular accounts or posts that substantially assisted ISIS's terrorism enterprise. Instead, Plaintiffs seek to hold Defendants liable for merely continuing to operate their services, while prohibiting and regularly removing ISIS accounts and content, on the theory that third parties had reported that among the billions using the services were ISIS adherents.[9]

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[9] Plaintiffs cannot satisfy their burden with stray examples of accounts or posts that allegedly remained on Defendants' platforms. Section 2333(d) requires a defendant to knowingly provide *substantial* assistance, so even under Plaintiffs' erroneous equation of the ISIS "enterprise" with the "act" that injured them, Plaintiffs must at least identify accounts or posts that Defendants knew would significantly aid ISIS's terrorism. Plaintiffs, who have

Accepting such a theory would nonsensically transform an ordinary business's purported failure to root out misuse of its services into "knowingly providing substantial assistance," 18 U.S.C. §2333(d)(2). That would defy the longstanding common law principle that knowledge is "critical" to aiding-and-abetting liability precisely to prevent ensnaring "parties involved in nothing more than routine business transactions." *Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991). It would also lower the bar far below the basis for liability in *Halberstam*, where Hamilton knowingly performed unusual services that turned stolen goods into personal wealth, thereby "evidenc[ing] a deliberate long-term intention to participate in" Welch's criminal activities. 705 F.2d at 487-488. And it would disregard the foundational tort-law principle that just because an "actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Restatement (Second) of Torts* §314. As the United States emphasizes, treating an alleged failure to remove more ISIS content as "proof of the requisite knowledge" would improperly impose "an affirmative duty to monitor" on Defendants. U.S.Br.25. Plaintiffs simply cannot ascribe the requisite knowledge to Defendants in these circumstances.

B. Plaintiffs Wrongly Seek To Replace Section 2333(d)'s Knowledge Requirement With Recklessness

While Plaintiffs purport to apply a knowledge standard, their own account of their case tracks at most

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conceded that Defendants "rarely knew about 'specific' terrorism accounts or posts," Opp.17, do not plausibly allege that.

this Court's formula for recklessness, which encompasses "action[s] entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Safeco Insurance Co. of Am.* v. *Burr*, 551 U.S. 47, 68 (2007). They imply, for example, that Defendants "could have obtained … specific information" about terrorist use of its services by sifting through the enormous volumes of data stored within their computers, Taamneh.Br.79, or could have "scrutinize[ed] potential terrorist posts" even when there was not "an outside complaint," Taamneh.Br.64. And they contend that Defendants had "the technical capacity … to write software that would identify … terrorist material" but "chose not to do so." Taamneh.Br.15, 82-83.

On Plaintiffs' telling, therefore, Defendants had the requisite scienter *not* because they affirmatively provided an account to any individual they knew was an ISIS adherent or even that Defendants failed to terminate service to a significant number of such individuals upon learning those individuals were promoting ISIS, but rather because Defendants continued to provide ordinary services notwithstanding third-party reporting about ISIS's general misuse. This theory that Defendants disregarded the risks of not doing more to detect and block terrorist users sounds in negligence or, at most, recklessness—not actual knowledge.[10]

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[10] Plaintiffs also assert that Defendants "recommend[ed]" ISIS materials. *E.g.*, Taamneh.Br.5-7, 73. But Plaintiffs have forfeited that argument because their theory below was that Defendants aided and abetted "by allowing ISIS to use their social media platforms," Pet.App.11a. Further, the sparse allegations of affirmative conduct turn on automated processes, which do not suggest Defendants had the requisite knowledge. *See* U.S.Br.26.

In passing, Plaintiffs suggest (Taamneh.Br.64) they could instead establish knowledge based on purported "deliberate ignorance" of "what was in [Defendants'] own computers." But deliberate ignorance (or "willful blindness") must be *deliberate—i.e.*, ignorance resulting from "deliberate actions to avoid learning of [a] fact." *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 769 (2011). Plaintiffs do not allege that Defendants took any affirmative actions to avoid learning of terrorist content on their platforms. To the contrary, Defendants "regularly removed" ISIS accounts and content. Pet.App.64a. To use Plaintiffs' "simple hypothetical," their allegations do not suggest that a fictional Twitter president received "an envelope marked 'ISIS Accounts at Twitter Today'" but "refused to open the envelope," Taamneh.Br.79. The allegations instead acknowledge that Twitter received numerous "envelopes" from users reporting terrorist content, opened each of them, and removed the offending material. That is not deliberate ignorance.

C. Plaintiffs' Criticisms Of The Statutory Knowledge Standard Are Incorrect

As Twitter and the United States explained, the common law, including the jurisprudence on which *Halberstam* relied, demands a particularly robust showing of knowledge to impose liability where, as here, a defendant is accused of failing to prevent misuse of its widely available, routine services. Pet.Br.39-42; U.S.Br.18-20. In *Camp*, for example, the Eighth Circuit explained that "a party whose actions are routine and part of normal everyday business practices would need a higher degree of knowledge for liability as an aider and abettor to attach." 948 F.2d at 459. In *Woodward* v. *Metro Bank of Dallas*, 522 F.2d 84, 95

(5th Cir. 1975), the Fifth Circuit similarly noted that the "scienter requirement scales upward when activity is more remote." *See also Restatement (Third) of Torts: Liab. for Econ. Harm* §28 cmt.d ("Substantially assisting a wrongdoer … ordinarily means something more than routine professional services provided to the primary wrongdoer."). These authorities confirm what Section 2333(d)'s text requires: the defendant must have actually known it was providing substantial assistance, which in this case requires knowing that failing to remove particular ISIS accounts would provide substantial assistance.

Plaintiffs' responses are unavailing. They first dispute whether these cases actually require any stronger showing of knowledge for a defendant accused only of inaction or providing routine services. They speculate (Taamneh.Br.69), for example, that the "higher degree" of knowledge in *Camp* is "just ordinary evidence of ordinary knowledge." But *Camp* not only expressly referenced "a higher degree of knowledge," but also explained that "the exact level [of knowledge] necessary for liability … must be decided on a case-by-case basis." 948 F.2d at 459. Likewise, while Plaintiffs contend (Taamneh.Br.69-70) that remoteness in *Woodward* concerned a party's "location," that case tied remoteness to "silence and inaction," and explained that "[i]f the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find … liability without clear proof of intent to violate the securities laws," 522 F.2d at 96-97.[11]

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[11] Contrary to Plaintiffs' assertion (Taamneh.Br.67), Twitter has never "proposed" an intent "rule." Twitter cited *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F.2d 793 (3d Cir. 1978), to explain that courts have declined to impose secondary liability for

Second, Plaintiffs contend *Halberstam* requires only that a defendant generally "know it is assisting wrongdoing" with "some understanding of the role of its assistance," even if the defendant does not "hav[e] any idea how that [assistance] is occurring." *E.g.*, Taamneh.Br.63-64. But *Halberstam* requires both that the defendant "be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance," and that "the defendant must knowingly and substantially assist the principal violation." 705 F.2d at 487-488. The latter requirement demands knowledge of the specific conduct that constitutes substantial assistance, as does the text of Section 2333(d). Yet Plaintiffs' reading effectively eliminates this requirement. There is no way a defendant can "knowingly provid[e] substantial assistance" under Section 2333(d) while "having [no] idea how that [assistance] is occurring," Taamneh.Br.63-64.

Third, Plaintiffs mistakenly suggest that *Halberstam* forecloses consideration of whether the alleged assistance is in the form of inaction or typical services. *E.g.*, Taamneh.Br.67-68. *Halberstam* had no occasion to decide such issues because Hamilton was a classic aider-abettor who affirmatively performed "unusual" services as "'a willing partner in [Welch's] criminal activities.'" 705 F.2d at 486-487; *see also* Pet.Br.39. Moreover, *Halberstam* was not silent about the relevance of inaction. The D.C. Circuit explicitly recognized that circumstances like the defendant's "inaction" "may well become important in future aiding-abetting cases involving physical harm or the loss of property."

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inaction absent conscious intent, which shows why, in this case, knowledge of particular ISIS accounts is required "at a minimum." Pet.Br.41-42.

705 F.2d at 485 n.14. The court even cited *Woodward* as a case discussing the relevance of silence and inaction. *Id.* Plaintiffs are wrong, therefore, that *Woodward*'s treatment of remoteness somehow "conflict[s] with *Halberstam* itself." Taamneh.Br.68.

Fourth, Plaintiffs mischaracterize Defendants' and the United States' arguments as "per se legal rules" and "special scienter requirement[s]," objecting principally to the requirement that defendants must have known of, yet failed to remove, particular accounts and posts that purportedly constituted substantial assistance. *See* Taamneh.Br.61, 65-69. What Plaintiffs call categorical rules, however, are merely applications of Section 2333(d)'s knowledge requirement that depend on the circumstances of each case. Defendants operate communications platforms that "billions of people around the world use," and they "regularly removed" ISIS accounts per their policies. Pet.App.64a. Plaintiffs cannot argue that Defendants actually knew their conduct would provide substantial assistance to ISIS, much less to any particular act of international terrorism, unless Defendants knew of but failed to block particular ISIS accounts or posts that they knew constituted substantial assistance.

In a different case, a defendant's specific knowledge may be self-evident from having affirmatively provided atypical or tailored assistance—as it was in *Halberstam*, or where a bank allegedly provided "special treatment" to specific individuals widely publicized to be "'integral constituent parts of Hizbollah,'" which allowed those customers to evade regulations "meant to hinder" terrorist attacks. *Kaplan* v. *Lebanese Canadian Bank*, 999 F.3d 842, 850, 865-866 (2d Cir. 2021). But this case is nothing like those cases. As the United States explains, Plaintiffs do not plausibly

allege that Defendants "knowingly ben[t] their normal policies to treat ISIS and its affiliates differently from" the billions of other users "to facilitate" the Reina attack or any other ISIS attacks. U.S.Br.23.

Finally, Plaintiffs erroneously contend that Twitter somehow waived its arguments regarding the statute's knowledge standard. Plaintiffs argue (Taamneh.Br.61) "Twitter's approach has evolved" because the petition focused on the insufficiency of the allegations, whereas (they say) Twitter "now urges the Court to adopt one or more per se legal rules or requirements." As explained, however, what Plaintiffs portray as "legal rules" are simply applications of Section 2333(d)'s knowledge requirement to the circumstances of this case—the same issue pressed and passed upon below. *See* Pet.App.62a-66a. And Twitter asked this Court to decide precisely this question: how Section 2333(d)'s knowledge requirement applies where the defendant "provides generic, widely available services to all its numerous users and 'regularly' works to detect and prevent terrorists from using those services." Pet.i.

III. TWITTER'S CONSTRUCTION CAPTURES GENUINE WRONGDOERS WITHOUT TRANSFORMING ORDINARY BUSINESSES INTO INDEMNITORS FOR TERRORISM

Plaintiffs ultimately fall back on policy arguments, erroneously contending that Defendants' interpretation would reach only terrorists and their immediate confederates. Taamneh.Br.50-55. To the contrary, interpreting the statute as Defendants urge captures wrongdoers genuinely responsible for a plaintiff's injuries. And it avoids transforming Internet platforms, ordinary companies, and humanitarian organizations into indemnitors for every act of terrorism ISIS commits, as Plaintiffs would have this Court do.

Plaintiffs are wrong that Twitter's reading limits Section 2333(d) liability to "judgment proof" "ISIS operatives." Taamneh.Br.51. Consider, for example, the Saudi-Arabia-controlled "charity" sued prior to JASTA by victims of the September 11 attacks for allegedly "funnel[ing] millions of dollars to al Qaeda." *Terrorist Attacks on Sept. 11, 2001*, 538 F.3d at 76. An October 2001 raid of the charity's offices allegedly discovered "photos of the World Trade Center, the U.S. embassies in Kenya and Tanzania, and the U.S.S. Cole (all targets of terrorist attacks); documents about pesticides and crop dusters; photos and maps of Washington, D.C. (with prominent government buildings marked); and instructions for fabricating U.S. State Department badges." *Id.* Such evidence would support plausible allegations that the "charity" had aided and abetted particular acts of international terrorism—the September 11 attacks—and that the charity had known it was substantially assisting such acts. This is the sort of entity JASTA was meant to reach. Plaintiffs are thus wrong that Twitter's construction reaches "only the terrorists themselves," or excludes assistance of "any practical importance" to terrorists. Taamneh.Br.52, 55.

Plaintiffs are likewise incorrect that victims of terrorist attacks will never have the evidence needed to satisfy Section 2333(d)'s requirements under Twitter's reading. They complain (Taamneh.Br.46), for example, that "[i]t is unlikely that we will ever know" whether any content on Defendants' platforms even "persuaded" Masharipov to join ISIS. But terrorist attacks are extensively investigated. *E.g.*, National Counterterrorism Ctr., *What We Do*, https://tinyurl.com/58jwnwh2 (visited Feb. 9, 2023); U.S. Dep't of Treasury, *Terrorist Finance Tracking Program*, https://tinyurl.com/2p8un8mb (visited Feb. 9, 2023). The Amended

Complaint, for example, cites an article, *see* JA120 n.44, which reported that a few days before the Reina attack, Masharipov was directed by Shuhada via Telegram "to launch an attack on New Year's Eve in Istanbul" and that Masharipov used Telegram to communicate his willingness to do so.[12] The lack of comparable allegations against Defendants, combined with Plaintiffs' failure to allege the requisite knowledge, *see supra* Part II, reinforces why Plaintiffs' claim fails; it is not a reason to distort the statute.

Similarly, Plaintiffs err in suggesting (Taamneh.Br.53) that Twitter's reading might exclude someone making "multi-million-dollar contributions" to a terrorist organization "with the avowed intent of supporting terrorism." *See also* Grassley Br.10-11. Such a financier could, of course, be prosecuted for violating the material support provision in Section 2339B. *See supra* p.6. And donating money "with the avowed intent of supporting terrorism" would also likely support *conspiracy* liability under Section 2333(d). As *Halberstam* explained, conspiracy liability "may be based on a more attenuated relation with the principal violation … than in aiding-abetting," because conspiracy hinges on "an agreement to participate in a tortious line of conduct," whereas aiding and abetting requires a "knowing action that substantially aids tortious conduct." 705 F.2d at 478, 485 (emphases omitted). Section 2333(d) can reach those intentionally financing terrorism without also sweeping up defendants, like those here, who had no "intent to further or aid ISIS's terrorist activities," did not "share[] any of ISIS's objectives,"

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[12] Yayla, *The Reina Nightclub Attack and the Islamic State Threat to Turkey*, 10 CTC Sentinel 9, 10 (2017) (article cited at JA120 n.44), https://tinyurl.com/24v96rkf.

and "regularly removed" ISIS accounts and content. Pet.App.65a.

By contrast, Plaintiffs have no answer to the harmful consequences of their reading. *See* Pet.Br.47-51. Defendants' purported assistance to ISIS was making widely available their routine services, which were misused by ISIS to—in Plaintiffs' words—"grow and expand its ability to launch terror attacks," Taamneh.Br.45. Absent any connection to the Reina attack or Defendants' knowledge of particular accounts that substantially assisted the attack, Plaintiffs could sue Defendants for every attack ISIS ever directs or commits. After all, Plaintiffs' theory, as the district court summarized it, is that "anybody who lends any kind of assistance, does any kind of business with ISIS, knowing that [it] … solely exist[s] to conduct terrorist activities, would be liable for *any* activities thereafter conducted by ISIS[.]" Dist.Dkt.74 at 31 (emphasis added).

That shadow would extend far beyond Internet communications platforms. Because Section 2333(d)(2) requires an act of international terrorism "committed, planned, or authorized" by a designated foreign terrorist organization, 18 U.S.C. §2333(d)(2), every ATA aiding-and-abetting case may well involve a terrorism "enterprise," as Plaintiffs broadly use that term. If Plaintiffs were right that assistance to such an enterprise, accompanied by general awareness that the billions using Defendants' platforms included some adherents of a terrorist organization, could establish aiding-and-abetting liability, a wide swath of ordinary businesses would be on the hook for every terrorist attack the organization commits. *See* Chamber of Commerce Br.8-11; PhRMA Br.4-5, 20-21. Humanitarian groups likewise fear having to "cease operating in the world's most

impoverished and war-torn areas to avoid the risk of liability." InterAction Br.5. Nothing in Section 2333(d)'s text or the underlying common law principles suggests that Congress intended such outcomes.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

ALEX W. MILLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
PATRICK J. CAROME
ARI HOLTZBLATT
CLAIRE H. CHUNG
AMY LISHINSKI
ANDRES C. SALINAS
NATHANIEL W. REISINGER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
seth.waxman@wilmerhale.com

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