Nos. 21-381 and 21-382

IN THE

Supreme Court of the United States

TZVI WEISS, ET AL., *Petitioners*,
v.
NATIONAL WESTMINSTER BANK PLC, *Respondent.*

MOSES STRAUSS, ET AL., *Petitioners*,
v.
CREDIT LYONNAIS, S.A., *Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

Peter Raven-Hansen
Gary M. Osen
Michael Radine
Ari Ungar
OSEN LLC
190 Moore Street
Suite 272
Hackensack, NJ 07601

Thomas C. Goldstein
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

James P. Bonner
FLEISCHMAN BONNER &
ROCCO LLP
81 Main Street, Suite 515
White Plains, NY 10601

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully respond to the United States' brief filed May 24, 2022.*

There is a gulf between the premises the government acknowledges and the conclusion it asks the Court to tolerate. The government acknowledges that "the ATA imposes secondary liability on defendants who knowingly provide[] substantial assistance to a terrorist organization." U.S. Br. 3 (quotation marks omitted; brackets in original). It accepts "Congress's judgment that grave harm can result from even well-intentioned humanitarian aid to terrorist organizations." *Id*. at 22. And it concedes that "the provision of banking services to Hamas fundraisers is an essential part of the global terrorist financing scheme." *Id*. at 17.

On that last point, the government has been emphatic. Concurrently with events underlying this case, the government argued that "[t]he social and charitable elements of Hamas are inexorably intertwined with the terrorist elements in the organization's overall mission" because "Hamas' charitable network helps it maintain popular support" and recruit individuals for "its deadly terrorist attacks," and Hamas's charitable fundraising "free[s] other resources for use in terrorist operations." U.S. Br., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (No. 02-5307), 2003 WL 25586055 (citations omitted).

Similarly, when the Treasury Department named respondents' customers SDGTs in 2003, it observed

---

* Defined terms and abbreviations carry the meaning given in previous briefs.

that Hamas's "charitable work . . . is a primary recruiting tool for the organization's militant causes," and respondents' customers raised funds that were "often diverted or siphoned to support terrorism." *Weiss* A-1035.

Now, however, the government urges the Court to deny certiorari, arguing that the Second Circuit reasonably concluded that no jury could find that respondents aided and abetted Hamas's terrorism, U.S. Br. 13—even though respondents accept for this appeal that a reasonable jury could find that they "knowingly provided material support to" Hamas, *Weiss* App. 55a; *Strauss* App. 65a. Deeming the Second Circuit's conclusion "reasonable" conflicts with "the considered judgment of Congress and the Executive," embraced by this Court, "that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010).

Because the Second Circuit's reasoning is irreconcilable with *Holder*, the government posits that the scienter standard for civil aiding and abetting may be more demanding than the *mens rea* standard for criminal material support. U.S. Br. 20. Even if that were so, the Court should grant certiorari because other circuits hold that knowingly providing material support to an FTO is enough to at least create a triable scienter issue in a civil case. That split warrants certiorari independent of the merits.

On the merits, the decisions below are wrong. JASTA "provide[s] civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief" against persons and

entities "that have provided material support, directly or indirectly," to terrorists. JASTA § 2(b). Any interpretation of JASTA that denies relief when a bank knowingly transferred millions of dollars to Hamas ignores that congressional directive.

As explained in the petitions, replies, and five supporting amicus briefs—from a bipartisan group of ten Senators, fourteen former national security officials, seventeen law professors, the Foundation for Defense of Democracies, and prominent Jewish advocacy organizations—the Second Circuit's decision warrants immediate review.

I. The Split Is Clear and Outcome-Determinative

As this Court recognized in *Holder*, material support to FTOs "in any form" "furthers terrorism." 561 U.S. at 32. That proposition has been codified in our laws since 1996, when Congress determined that FTOs "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," AEDPA § 301(a)(7), and therefore made knowingly providing material support to FTOs a felony, 18 U.S.C. § 2339B.

These fundamental characteristics of terror funding do not magically stop being true in civil cases. Whether a case is criminal or civil, the underlying reality—*i.e.*, that any material support to FTOs furthers terrorism—remains true. Thus, when a sophisticated entity *knowingly* provides such support, it is reasonable to conclude that the entity was generally aware that it was playing a role in unlawful activity that foreseeably risks terrorism.

Consistent with that understanding, the Seventh Circuit holds that "[a]nyone who knowingly

contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities," and "that is the only knowledge that can reasonably be required as a premise for [civil] liability." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc). Indeed, most of the *Boim* defendants "directed their support *exclusively to*" Hamas's "health, educational, and other social welfare services." *Ibid*. (emphasis added). That earmarking did not get those defendants "off the liability hook" because of "the fungibility of money" and because "Hamas's social welfare activities reinforce its terrorist activities." *Ibid*.

In the Ninth Circuit, alleging that a defendant "knowingly gave fungible dollars to a terrorist organization plausibly alleges that [the defendant] was aware of the role it played." *Gonzalez v. Google LLC*, 2 F.4th 871, 903 (9th Cir. 2021) (quotation marks omitted), *petition for cert. pending*, No. 21-1333 (docketed Apr. 6, 2022). The defendants there have filed a conditional cross-petition asserting a conflict between the Ninth Circuit's rule and "the knowledge standard applied by the Second Circuit in *Weiss* and *Strauss*." Pet. at 5, *Twitter, Inc. v. Taamneh*, No. 21-1496 (docketed May 31, 2022). The instant cases are plainly superior vehicles to address the circuit conflict because review here is not conditioned on the Court first deciding unrelated issues regarding the Communications Decency Act.

Recently, the D.C. Circuit affirmed the empirical fact recognized in *Holder* and *Boim* that "[p]roviding fungible resources to a terrorist organization allows it to grow, recruit and pay members, and obtain weapons

and other equipment," and so it is "reasonably foreseeable that financially fortifying" an FTO "would lead to [terrorist] attacks," even if the aid is "directed to beneficial or legitimate-seeming operations." *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 227-28 (D.C. Cir. 2022).

The government does not argue that petitioners could have lost in the Seventh, Ninth, or D.C. Circuits. Instead, it attempts to justify the Second Circuit's position by pointing to a subsequent decision correctly rejecting "the suggestion that 'knowingly providing material support to an FTO is never sufficient to establish JASTA aiding-and-abetting liability.'" U.S. Br. 23 (quoting *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 861 (2d Cir. 2021)).

As petitioners explained (*Weiss* Pet. 27-28), *Kaplan* is a better statement of the law than the decisions below, but it does not eliminate the circuit conflict because the Second Circuit still rejects the proposition that because money is fungible, knowingly providing material support to an FTO's charitable wing creates a foreseeable risk of terrorism. *See Honickman v. BLOM Bank SAL*, 6 F.4th 487, 498-99 (2d Cir. 2021) (holding that circuit precedent forecloses any "attempt to equate the *Halberstam* [*v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)] foreseeability standard with the 'fungibility' theory in *Holder*"); *see also* 6 F.4th at 499 n.14 (holding that "any persuasive value [*Boim*] might have is insufficient to overcome the binding effects of *Linde* [*v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018),] and *Kaplan* on us").

As a result of its persistent error, the Second Circuit alone recognizes a charity loophole to JASTA because it alone holds that a defendant can knowingly

and illegally provide substantial funding to an FTO without creating a triable issue as to whether that assistance foreseeably furthers terrorism. Certiorari is warranted to resolve the disagreement.

II. The Decisions Below Are Wrong

The government cannot bring itself to say that the results below were correct. Instead, it says that the lower courts "reasonably applied the *Halberstam* framework." U.S. Br. 16. Even that tepid endorsement is wrong because it is unreasonable to hold, as a matter of law, that defendants who knowingly transferred millions of dollars to Hamas during the Second Intifada did not aid and abet terrorism.

1. Regarding the legal standard, the government argues that "Congress's determination in Section 2339B that any [knowing] material support to an FTO enables terrorism does not mean that every JASTA defendant who provides such support is generally aware that it is playing a role in unlawful activity from which acts of international terrorism are a foreseeable risk." U.S. Br. 20. But knowingly providing support to an FTO in violation of Section 2339B is "unlawful activity"—and it is unlawful precisely because "any contribution" to FTOs "facilitates [terrorist] conduct," *Holder*, 561 U.S. at 38 (quotation marks omitted). The government's statement is accordingly wrong.

The government suggests that the texts of Section 2339B and JASTA differ, and so the knowledge standards must be different. The texts themselves show otherwise. Section 2339B reaches "[w]hoever knowingly provides material support or resources." 18 U.S.C. § 2339B(a)(1). JASTA reaches any person who "knowingly provid[es] substantial assistance." *Id.*

§ 2333(d)(2). The state-of-mind element ("knowingly") is common to both.

The government suggests that because JASTA incorporates *Halberstam*, its scienter requirement is different from Section 2339B's. *Halberstam*'s broad holding belies this characterization. Under *Halberstam*, knowingly providing nonviolent back-office support to an unlawful enterprise was enough to make the supporter liable for a murder because violence was "a foreseeable risk in . . . the[] enterprise[]." 705 F.2d at 488. That standard closely parallels Section 2339B, which requires the defendant to know that the enterprise is an FTO—but does not require any intent to support violence.

Indeed, the government itself previously analogized *Halberstam*'s standard to Section 2339B, arguing that "[t]here is no textual or structural justification for construing the civil-liability provision in Section 2333(a) to sweep far more *narrowly* in this regard than its criminal counterparts," including Section 2339B, "and it would be strange to impute such an unusual intent to Congress." U.S. Amicus Br., *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000 (7th Cir. 2002) (No. 01-1969 et al.), 2001 WL 34108081, at *19. The government subsequently reaffirmed that "the anti-terrorism policies embodied in Section 2339B in particular reflect a complementary legislative scheme that should influence cases involving claims arising out of the provision of funds to entities designated as terrorist organizations." U.S. Amicus Br., *Boim*, 549 F.3d 685 (No. 05-1815 et al.), 2008 WL 3993242, at *23-25.

JASTA's other provisions confirm that Congress reads *Halberstam* to be *at least* as broad as Section

2339B. Immediately after incorporating *Halberstam* in JASTA § 2(a)(5), Congress made clear that the statute reaches those who "knowingly or recklessly contribute material support or resources, directly or indirectly," to terrorists. JASTA § 2(a)(6). This is *broader* than Section 2339B because it expressly includes recklessness. Tellingly, the government ignores it.

Congress also emphasized that "[t]he purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly," to terrorists. JASTA § 2(b). This plain text instructs courts to impose civil liability on entities, like respondents, that knowingly provided material support to FTOs.

The government speculates—without authority—that perhaps JASTA's purpose section is not "targeted at Section 2333(d)(2)'s standard for aiding-and-abetting liability," but instead relates only to JASTA's "exception to foreign sovereign immunity." U.S. Br. 21. Neither respondents nor any court has ever urged this strained reading, and the text forecloses it. By its plain terms, JASTA's purpose informs the entire "Act," and no language limits it to the sovereign immunity provision. JASTA § 2(b). Moreover, the text specifically calls out—in addition to foreign countries—"persons" and "entities," "wherever they may be found." *Ibid*.

2. The government also argues that the lower courts' decisions regarding general awareness were reasonable because even though the United States designated respondents' customers SDGTs, British

and French authorities tacitly permitted respondents to continue assisting them. U.S. Br. 16, 18.

Contrary to the government's suggestion, the challenged decisions below placed no weight on European governments' positions. In fact, the Second Circuit previously rejected this argument, holding that "[e]ven if the British authorities had . . . concluded that Interpal had no links to Hamas at all, the British authorities' conclusion would not be inconsistent with liability under the United States statutes and could not justify summary judgment in the face of contrary evidence." *Weiss* App. 159a-60a. And in *Strauss*, the French authorities never condoned CL's relationship with CBSP; instead, they merely "decided not to bring any charges." *Strauss* App. 143a.

Elsewhere, the government has rebuked European indulgence of Hamas fundraising. After respondents' customers were designated, the Treasury General Counsel observed that European governments "view the political/charitable wing of HAMAS differently from its so-called military wing." U.S. Dep't of the Treasury, Press Release, Written Testimony of David D. Aufhauser, General Counsel (Sept. 24, 2003), https://home.treasury.gov/news/press-releases/js758. He decried this as "pure sophistry," and "nothing short of complicity" with terrorism. *Ibid*.

Other senior officials described European inaction against designated Hamas fundraisers as "extremely troubling." U.S. Dep't of the Treasury, Press Release, Testimony of Stuart A. Levey, Under Secretary Terrorism and Financial Intelligence U.S. Department of the Treasury Before the Senate Committee on Banking, and Urban Affairs (Sept. 29, 2004), https://home.treasury.gov/news/press-releases/js1965.

These criticisms persisted across administrations. *See, e.g.*, U.S. Dep't of the Treasury, Press Release, Written Testimony of Treasury Assistant Secretary Daniel L. Glaser Before the House Financial Services Subcommittee on Oversight and Investigations (Sept. 6, 2011), https://home.treasury.gov/news/press-releases/tg1287.

It is bizarre for the government to suggest that the Second Circuit could have accepted positions that both the court and the government so harshly rejected. At most, these might have been arguments for a jury; they cannot compel judgment as a matter of law.

3. The government also argues that the lower courts reasonably determined that respondents' assistance to Hamas was not "substantial." U.S. Br. 17-19. They made no such determination. The district court concededly did not reach this element. *Id*. at 17 n.1. Nor did the Second Circuit in *Strauss*. *Id*. at 19 n.2.

The government argues that the Second Circuit affirmed in *Weiss* on this element as an alternate ground. U.S. Br. 17 n.1. But the court did not apply the six *Halberstam* "substantial" assistance factors. Instead, it said:

> On this record, the district court did not err in denying leave to amend the complaints as futile on the ground that plaintiffs could not show that NatWest was knowingly providing substantial assistance to Hamas, or that NatWest was generally aware that it was playing a role in Hamas's acts of terrorism.

Weiss App. 41a-42a. The statement that "the district court did not err" (when the district court concededly only reached the scienter element), coupled with the lack of analysis of the *Halberstam* factors, or indeed

any mention of alternative grounds, makes it clear that the Second Circuit was not holding in the first instance that the millions of dollars NatWest provided to Hamas were insubstantial as a matter of law.

Even if the court had deemed NatWest's assistance insubstantial, that would not be a reason to deny certiorari, let alone affirm, because any such holding would have been wrong, and in conflict with decisions in other circuits. *See, e.g.*, *Gonzalez*, 2 F.4th at 909-10. Put simply, if the *Halberstam* defendant's back-office services for a burglary enterprise were substantial enough to make her liable for a murder that she did not know about, let alone cause, 705 F.2d at 487-88, a reasonable jury could have deemed NatWest's knowing provision of millions of dollars to Hamas during a high-profile terror campaign substantial. Indeed, the government recognizes that multiple facts—including the nature of the act assisted ("terrorist attacks"), the fact that "the provision of banking services to Hamas fundraisers is an essential part of the global terrorist financing scheme," and "NatWest's 13-year relationship with Interpal . . . despite indications that Interpal was involved in Hamas fundraising"—support liability. *See* U.S. Br. 17-18. If other factors arguably weigh against liability, the balancing is for a jury.

In *Strauss*, the Second Circuit never mentioned substantial assistance, instead referencing the "reasons discussed in *Weiss*," even though the *Strauss* record of assistance is significantly different. *Strauss* App. 9a. That is not an alternative holding. Again, the government inappropriately omits petitioners' best evidence in favor of a pro-defense narrative—and even then remains agnostic as to whether summary judgment was appropriate: It argues that CL's conduct

"likely" does not justify liability, and that the factors supporting liability "do[] not necessarily outweigh the other factors." U.S Br. 19. These lukewarm contentions effectively concede that reasonable jurors could find otherwise—which means that the "substantial" inquiry provides no basis to deny certiorari in *Strauss*.

III. These Cases Are Suitable Vehicles to Address the Question Presented

The government asserts two perfunctory vehicle arguments. First, it suggests that the issue is clouded by whether respondents' assistance was substantial. U.S. Br. 24. As explained above, this is wrong. The lower courts did not rule for respondents on this element. Had they done so, the issue would be certworthy, and the decisions reversible error.

The government also speculates that percolation would be helpful. U.S. Br. 24. This ignores JASTA's context. American victims have been seeking justice against enablers of terrorist violence for *decades*. Congress enacted JASTA as a forceful response to courts that had construed civil liability too narrowly. As petitioners' *amici* make clear, the time to heed Congress's command is overdue. That is especially true because nearly every JASTA case against foreign financial institutions is currently pending in the Second Circuit, and future cases against similar entities will overwhelmingly be brought or moved there. *Weiss* Pet. 33-35. As long as the Second Circuit is applying the wrong rule, percolation will accomplish nothing except denying justice for victims and emboldening the financial enablers of terrorism.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

Peter Raven-Hansen
Gary M. Osen
Michael Radine
Ari Ungar
OSEN LLC
190 Moore Street
Suite 272
Hackensack, NJ 07601

Thomas C. Goldstein
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

James P. Bonner
FLEISCHMAN BONNER &
ROCCO LLP
81 Main Street, Suite 515
White Plains, NY 10601

June 7, 2022