No. 21-382

In The Supreme Court of the United States

MOSES STRAUSS, ET AL.,
Petitioners,

v.

CRÉDIT LYONNAIS, S.A.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CRÉDIT LYONNAIS, S.A.

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Crédit Lyonnais, S.A. certifies that it is wholly owned by Crédit Agricole, S.A., which is a publicly held company.

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INTRODUCTION

Respondent Crédit Lyonnais, S.A. ("Crédit Lyonnais") is one of the largest retail banks in France. Petitioners sued Crédit Lyonnais for processing routine, ordinary-course wire transfers by its former customer, CBSP, an acronym for Le Comité de Bienfaisance et de Secours aux Palestiniens, or "Committee for Palestinian Welfare and Relief." CBSP, which to this day continues to be a lawfully registered charity in France, explicitly described its mission in the by-laws it furnished to Crédit Lyonnais as providing "[a]ssistance to the poor, sick, orphaned, and needy among Palestinian populations." A-2179.[1] Petitioners, who are victims of terrorist attacks in Israel between 2001 and 2004 allegedly committed by Hamas, a designated Foreign Terrorist Organization ("FTO"), alleged below that Crédit Lyonnais's routine banking services for CBSP in France subjected Crédit Lyonnais to civil liability for these attacks (including treble damages and attorneys' fees) under the Anti-Terrorism Act, 18 U.S.C. § 2333(a) (the "ATA"), and the Justice Against Sponsors of Terrorism Act, *id.* § 2333(d) ("JASTA").

Petitioners originally claimed that Crédit Lyonnais was liable as a principal under the ATA because, on CBSP's instructions, the bank transferred funds from CBSP's accounts in France to

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[1] Citations to A-____ are to the joint appendix in the Second Circuit.

charities in the Palestinian Territories that petitioners allege the bank knew or should have known were affiliated with Hamas, although none of these charities—which petitioners concede performed charitable services and did not cause or play any role in any of the attacks at issue—publicized having any relationship with Hamas or had been designated by the U.S. or French governments as being affiliated with Hamas.[2] Petitioners later sought leave to add an alternative claim that Crédit Lyonnais is secondarily liable for their injuries as an aider and abettor of Hamas under JASTA.

Based on their review of the voluminous evidentiary record developed in this case through a near-decade of discovery on three continents, the district court and Second Circuit both concluded that there is no triable issue concerning Crédit Lyonnais's factual or legal responsibility for the attacks on either petitioners' original ATA primary liability

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[2] Petitioners repeat their claim, unsuccessful before the lower courts, that a Crédit Lyonnais employee's description of CBSP's transferees to the French police as "seemingly Islamist organizations" is evidence that Crédit Lyonnais knew or suspected CBSP was funding terrorism. Pet. 1; Pet. App. 143a-144a. In fact, the employee in question, Robert Audren, testified without contradiction that, at the time of his statement to the police in September 2002, he understood "Islamist" to be "practically synonymous with Muslim." A-2096. Audren added that it was only when he was deposed in these lawsuits, *seven years later*, that he had come to understand that "Islamist" refers to an adherent to "a radical form of Islam," only "certain branches" of which use violence. *See* A-2096-97.

claim or on their alternative JASTA secondary liability claim. Petitioners here only seek review of the JASTA ruling.

Such review is not warranted. Notwithstanding petitioners' efforts to engineer a purely legal question from the decision below, their real quarrel is with the lower courts' fact-bound application of the multi-factor test for aiding and abetting liability set out in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress explicitly instructed provides the governing legal standard for JASTA claims in the Findings and Purpose section of the statute. Specifically, petitioners contend that the lower courts incorrectly applied *Halberstam* in ruling that no reasonable juror could find Crédit Lyonnais was "generally aware of [its] role as part of an overall illegal or tortious activity" or that it "knowingly and substantially assist[ed] the principal violation," *i.e.*, the terrorist attacks by which petitioners were injured. Pet. 10-11, 21-22. Notably, the Petition identifies no circuit split nor important legal question implicated by this case-specific analysis.

Presumably recognizing that their quarrel with the rulings below is not one that warrants *certiorari*, petitioners instead focus on a separate criminal statute enacted two decades before JASTA, 18 U.S.C. § 2339B ("Section 2339B"), which criminalizes the provision of "material support" to an FTO. In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29-31 (2010), this Court held that a person violates Section 2339B by knowingly providing any form of material support to an FTO, regardless of whether

such support is shown to play any role (whether substantial or insubstantial) in facilitating the FTO's terrorist activities, and regardless of the awareness or intent of the provider of such material support, so long as that person knows of the FTO's designation as such or of its connection to terrorism.[3] Petitioners claim to derive a "fundamental axiom" for *all* anti-terrorism laws from this ruling. Pet. 1.

JASTA, however, is a different statute. In JASTA, Congress created a new civil claim for victims of terrorist attacks to sue a class of aiders and abettors who are generally aware of their role in terrorist activity and knowingly provide substantial assistance to the act of international terrorism by which a JASTA plaintiff was injured. 18 U.S.C. § 2333(d). Congress did not cite *Holder* as providing the governing framework for JASTA claims; instead—as made sense in creating a new civil claim—it cited *Halberstam*, a well-known non-statutory civil aiding and abetting case in which the aider and abettor was closely associated with (indeed was the live-in companion of) the primary violator.

There is thus no basis whatsoever for the assumption embedded in petitioners' "question presented" that a bank's violation of Section 2339B

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[3] While the district court found a triable question as to whether Crédit Lyonnais's routine banking activity violated Section 2339B—as a predicate criminal violation constituting one of the elements of the primary ATA claim that petitioners are no longer pursuing—the U.S. government, which has been aware of this case since it was filed in 2006, has never prosecuted Crédit Lyonnais for violating Section 2339B.

should equate to secondary civil liability under JASTA. *See* Pet. i (asking "[w]hether a person who knowingly transfers substantial funds to a designated FTO aids and abets that organization's terrorist acts for purposes of civil liability under JASTA"). There is equally no basis for petitioners' repeated canard that the Second Circuit's decision in this and other JASTA cases somehow creates a "charity loophole" to material support liability, contrary to *Holder* and other lower court decisions. *See, e.g.*, Pet. 2. *Holder* and the other decisions petitioners cite construed Section 2339B, which remains unaffected by decisions like those below applying JASTA, which has very different requirements.

Even if the Court were inclined to consider whether potential liability under Section 2339B is sufficient to give rise to secondary civil liability under JASTA, it would be premature to do so in this case, as there is no relevant circuit split. Petitioners fail to cite a *single case* in the lower courts that has ever equated the requirements for Section 2339B criminal liability with the congressionally-mandated elements of civil liability under JASTA, because there is none. Likewise, petitioners fail to even mention the numerous cases that have decided JASTA claims in multiple circuits that have *not* so held. *See, e.g., Colon v. Twitter, Inc.*, No. 20-11283, 2021 WL 4395246, at *6 (11th Cir. Sept. 27, 2021) (performing JASTA liability analysis without considering Section 2339B requirements); *Gonzalez v. Google LLC*, 2 F.4th 871, 911 (9th Cir. 2021) (same); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019) (same); *Kemper v. Deutsche Bank AG*, 911

F.3d 383, 389-90 (7th Cir. 2018) (same). The only authority petitioners point to in support of their phantom circuit split did not construe JASTA at all. *See* Pet. 15-19.

There is no need to call for the views of the Solicitor General here. The United States has already expressed its opposition to imposing civil liability for terrorism-related injuries on foreign defendants who merely provided routine banking services to charities with alleged terrorist ties, where (as here) there is no demonstrated connection between such banking services and any terrorist activities.

Finally, petitioners seek to piggyback this Petition onto the different certiorari petition in *Weiss v. National Westminster Bank* (No. 21-381), which was decided in parallel with the unpublished decision below, by asking the Court to hold this case pending the outcome of *Weiss* and then grant, vacate and remand ("GVR") if the petitioners in *Weiss* prevail. Petitioners' tactical choice not to request that the two petitions be decided together only highlights that these are fundamentally fact-bound decisions. While the Second Circuit properly concluded that neither case presents a triable issue under JASTA, the underlying facts informing the lower courts' analysis of the *Halberstam* factors in each case are distinct. The Court should reject petitioners' invitation and deny this petition.

STATEMENT OF THE CASE

I. Crédit Lyonnais's Legitimate Banking Relationship With The French Charity CBSP

In 1990, CBSP, a "non-profit organization registered in France," first opened an account with Crédit Lyonnais. Pet. App. 135a. During the relevant period, Crédit Lyonnais processed wire transfers from CBSP's accounts to several other charities, including 13 charities in the Palestinian Territories that petitioners contend were affiliated with Hamas (the "13 Charities"). The wire transfers that Crédit Lyonnais processed to the 13 Charities on behalf of CBSP were designated for charitable purposes, including "Family & Orphan Aid," "Children's Aid Gifts," "Family & Student Aid" and "School Construction." A-2170.

There is no evidence in the extensive record that the wire transfers Crédit Lyonnais processed on behalf of CBSP were used to finance terrorism of any type, including the attacks by which petitioners were injured. Petitioners' own experts did not purport to opine, and indeed conceded there is no evidence that: (1) "any funds transferred by CBSP through its [Crédit Lyonnais's] account were used to perpetrate the [relevant] attacks"; or (2) any of the "Charities participated in, planned, trained the perpetrators of, requested that someone carry out, or was the cause of any of the [relevant] attacks." Pet. App. 67a-68a. And crucially, petitioners conceded that the 13 Charities in fact provided the charitable services they claimed to provide, were in several in-

stances also funded by the United States government, and none had been designated as terrorist organizations by the United States, the European Union or France when these transfers occurred. *See id.* 67a; A-3420-21, A-3438-39.

At times, Crédit Lyonnais suspected CBSP might be engaged in money laundering, and Crédit Lyonnais complied with its obligations under French law to report those suspicions to the agency of the French government responsible for investigating suspected money laundering—something the bank obviously would not have done if it were knowingly engaged in helping CBSP to finance terrorism. *See* A-3309-10, A-3321-22. In each instance, the French government investigated and declined to bring any charges against CBSP. This record is summarized below.

In 1997, Crédit Lyonnais employee Robert Audren, who worked in the bank's Financial Security Unit, reviewed documentation related to CBSP's transfers and concluded that the recipients of those transfers were "perfectly coherent with the stated purpose of [CBSP] which was, in fact, welfare and solidarity with Palestine." Pet. App. 66a; A-2170. In late 2000, however, "Audren became aware of what he perceived to be large and unexplained increases in the number and amounts of *deposits* into CBSP's main account coming from sources he was unable to identify." A-2110-11 (emphasis added). Audren drafted a notification to the bank's Committee for the Prevention of Money Laundering and Fraud ("CPML"), describing the increased amounts of the

deposits as a potentially suspicious activity while also noting that the well-publicized humanitarian crisis in the Palestinian Territories at the time could potentially explain the increase in support for CBSP. A-2111. At a meeting on January 9, 2001, the Committee decided to report CBSP's activities to the French government agency known as TRACFIN. A-2112. French law enforcement agencies thereafter "investigated CBSP, but, on July 19, 2001 . . . issued a decision to end the investigation and not bring charges, due to an 'absence of offense.'" *Id.*

In late 2001, Audren again brought CBSP to the CPML's attention based on increased movements of funds through CBSP's accounts and its depositing of funds through an intermediary French bank, rather than directly from the original donors, making it impossible to identify the original sources of those funds. A-2113. CPML considered this at a meeting on December 6, 2001 and filed an updated declaration with TRACFIN. French authorities reinvestigated CBSP and took a sworn statement from Audren in the process. A-2114. Audren explained in his statement, by way of background, that he became aware of CBSP at some point in 1998 "following an increase in the movements received in the accounts and the fact that transfers to banks located in Palestine or Jordan were operated for the benefit of seemingly Islamist organizations without visibility on our part." *Id.* Audren testified without contradiction that, at the time he made this statement, he used the word "Islamist" with the understanding that it was synonymous with "Muslim." A-2096.

French law enforcement ultimately ended their investigation on October 28, 2002, once again concluding there was "insufficient evidence of offense." A-2114. The French National Police also investigated CBSP from January 2003 through April 2008, but the prosecutor directing the investigation decided not to bring any charges. *Id.* CBSP continues to be a lawfully registered charity in France.

In October 2001, Crédit Lyonnais's New York branch's OFAC[4] filtering technology froze a dollar-denominated transfer by CBSP to the El Wafa Charitable Society-Gaza because the name of the beneficiary was similar—but not identical—to an entirely different entity named "Wafa Humanitarian Organization" that had been designated by OFAC for funding Al Qaeda in Pakistan. A-2127. Petitioners misleadingly cite the Suspicious Activity Report filed in connection with this transaction as evidence of Crédit Lyonnais's purported knowledge of CBSP's terrorist ties, Pet. 7, notwithstanding that it is undisputed that this was a "*false hit*."

At the December 6, 2001 meeting at which CPML decided to report CBSP to TRACFIN for a second time, it also decided to close CBSP's accounts. CBSP's accounts were originally set to be closed on May 9, 2002, but CBSP's president requested a postponement of the closing to December 21, 2002 so that

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[4] OFAC, the U.S. Office of Foreign Assets Control, is the agency in the U.S. Department of Treasury responsible, *inter alia*, for designating and freezing property in the United States of persons suspected of various illegal activities, including terrorism.

CBSP could establish a new account and inform donors of that new account. A-2115. CBSP's last transfer from its accounts with Crédit Lyonnais to another entity—including any of the 13 Charities—was made on February 11, 2002, but the account remained open until summer 2003. A-2117.

When on August 21, 2003, OFAC designated CBSP as a Specially Designated Global Terrorist ("SDGT"), the bank was surprised to learn that, as a result of a series of delays, CBSP's accounts had not already been closed, although no transfers out of the accounts had been made since February 2002. A-2116-17. On August 29, 2003, Crédit Lyonnais wrote to CBSP that the bank was closing its accounts and that, because CBSP had not provided information on where the account balances should be wired, Crédit Lyonnais was delivering to CBSP four checks reflecting those balances. *Id.* There is no evidence of what, if anything, CBSP did with those funds.

The press release accompanying OFAC's announcement did not accuse CBSP of any involvement in Hamas's violent activities, but rather stated that the designation was based on "credible evidence" that CBSP "collected large amounts of money from mosques and Islamic centers, which it then transfers to sub-organizations of HAMAS." A-1055.

Petitioners cite irrelevant and misleading sources, already considered by the courts below, alleging that Islamic charities generally could be involved in terrorist activity and that some of the 13 Charities were alleged by others to have connections

to Hamas. Pet. 4-5. But there is no evidence that Crédit Lyonnais ever saw these reports, and petitioners' own experts did not opine that there is any evidence the funds transferred by CBSP were used to perpetrate the relevant attacks or that the 13 Charities were involved in the relevant attacks.[5]

It is further undisputed that Crédit Lyonnais's banking relationship with CBSP did not violate any applicable laws or regulations, including—unlike in other JASTA cases in the lower courts—U.S. sanctions. The only connection between Crédit Lyonnais's conduct in this case and the United States was *five* legal wire transfers that Crédit Lyonnais processed through correspondent banking accounts in New York on behalf of CBSP *prior* to OFAC's designation of CBSP. At the time of that designation, 16 of the 18 attacks by which petitioners were injured had already occurred, and shortly afterwards, as noted, CBSP's account at Crédit Lyonnais was closed.

II. Proceedings Below

Prior to the enactment of JASTA, this case proceeded for over a decade on petitioners' theory that Crédit Lyonnais was primarily liable under the ATA for the wire transfers it processed to the 13 Charities on behalf of CBSP. Petitioners claimed that Crédit Lyonnais's conduct constituted "material

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[5] Petitioners also rely on a general statement by the French Banking Commission that money laundering *can* involve "activities aimed at committing acts of terrorism," Pet. 7-8 (citing A-625), but that statement has no connection to CBSP.

support" to an FTO under Section 2339B, and that this in turn constituted an "act of international terrorism" for the purpose of ATA civil liability. *See* 18 U.S.C. § 2333(a); *id.* § 2331(1) (defining "international terrorism").

In 2013, the district court ruled that this record presented a triable issue as to whether Crédit Lyonnais knew or was willfully blind to the fact that, by processing wire transfers from CBSP to the 13 Charities in the Palestinian Territories which petitioners allege were associated with Hamas, Crédit Lyonnais knowingly provided material support to Hamas in violation of Section 2339B. Pet. App. 161a. Although the district court acknowledged that there was no evidence that any of the funds that Crédit Lyonnais transferred were used in any terrorist attacks (much less that Crédit Lyonnais was aware of any such connection between the funds and any terrorist attacks), it concluded that there was a triable issue as to whether the scienter standard of Section 2339B was satisfied. *Id.* 167a-168a.

In 2016, Congress enacted JASTA, which for the first time created a private cause of action for aiding and abetting and conspiracy under the ATA in certain circumstances. Specifically, as to aiding and abetting liability, JASTA states:

> (2) Liability. In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization

> under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

18 U.S.C. § 2333(d)(2).

The Findings and Purpose section of JASTA (the "Findings"), Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, further provides that the applicable legal principles for aiding and abetting liability under the statute derive from *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

In 2018, the Second Circuit ruled in *Linde v. Arab Bank, PLC* that a bank's violation of Section 2339B by providing material support to an FTO does not "invariably equate to an act of international terrorism" sufficient to state a civil primary liability claim under the ATA. 882 F.3d 314, 326-27 (2d Cir. 2018). The petitioners here were also plaintiffs in *Linde*, a case brought against a Jordanian bank arising from the same attacks.

Linde also was the first time the Second Circuit construed JASTA. Faithfully following Congress's instructions to adhere to the legal framework set out in *Halberstam*, the court ruled that, in order

to be liable as an aider and abettor under that statute, (1) "the party whom the defendant aids must perform a wrongful act that causes an injury;" (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;" and (3) "the defendant must knowingly and substantially assist the principal violation." *Linde*, 882 F.3d at 329 (quoting *Halberstam*, 705 F.2d at 487). Reviewing the post-trial record in that case (where the jury was not instructed on the JASTA elements), the court held that a properly instructed jury reasonably could, but need not, have found Arab Bank secondarily liable under JASTA in light of evidence that the bank was generally aware of its role in Hamas's terrorist activities, and knowingly provided substantial assistance to Hamas's terrorism, including by processing payments for suicide bombings and maintaining customer accounts for Hamas militants. *Id.* at 329-31.

Following *Linde*, Crédit Lyonnais moved again for summary judgment. The district court applied the legal framework from *Linde* to the extensive evidentiary record developed in this case, granted summary judgment to Crédit Lyonnais on the primary liability claims, and ruled that permitting petitioners to amend their complaints to add JASTA aiding and abetting claims (which they had not previously sought to do) would be futile based on the evidentiary record. The Second Circuit affirmed on both grounds in a summary order, referring to its detailed reasoning on the scope of the ATA and JASTA in *Weiss*, which was argued in tandem with

the present case. Pet. App. 9a. Petitioners only seek review of the ruling on the JASTA aiding and abetting claims.

In reviewing the dismissal of the aiding and abetting claims in *Weiss*, the Second Circuit confirmed the distinction drawn in *Linde* between the "*mens rea* required to establish material support in violation of 18 U.S.C. Section 2339B, which requires proof only of the defendant's knowledge of the organization's connection to terrorism," and the showing required under the second *Halberstam* element of aiding and abetting, which is "the defendant's general awareness of his role *as part of an overall illegal or tortious activity at the time that he provides the assistance*." *Id.* 47a (emphasis in the original) (quoting *Linde*, 882 F.3d at 329). The Second Circuit explained that the latter showing, which is required by Congress's JASTA Findings, "requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Id.* 48a (quoting *Linde*, 882 F.3d at 329).

Based on the framework set out under JASTA and *Halberstam* and analyzed by the Second Circuit in *Weiss*, the Second Circuit in the present case "considered all of plaintiffs' arguments on appeal and . . . found them to be without merit." Pet. App. 9a. The Second Circuit did not reach Crédit Lyonnais's conditional cross-appeal asserting that the district court erred in concluding that the five dollar-denominated legal wire transfers Crédit Lyonnais processed through New York sufficed to meet petitioners' bur-

den to demonstrate that the district court could assert personal jurisdiction over Crédit Lyonnais when it was undisputed that Crédit Lyonnais's processing of those wire transfers was not even a but-for, let alone a substantial, cause of the attacks by which petitioners were injured.

REASONS FOR DENYING THE PETITION

I. The Question Presented Does Not Warrant Review

Petitioners' attempt to cast their disagreement with the decision below as a pure question of law fails. At bottom, petitioners ask the Court to engage in mere "error correction" on inherently factual issues that are unique to the factual record in this case, developed over many years of extensive discovery.

1. Petitioners and their *amici*[6] misstate or ignore the actual elements of a JASTA claim and instead fault the Second Circuit for not relying on a legal standard from a separate criminal statute that is not referenced in JASTA. Under petitioners' legal theory, courts should dispense with the *Halberstam* analysis required by JASTA because the various criminal prohibitions on the provision of material support to terrorism—here, Section 2339B—should provide the governing legal standard. *See* Pet. 1-2; *see also* Br. of Law Professors as Amici Curiae 20;

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6 Although no amicus briefs have been filed in support of the Petition here, the *amici* in *Weiss* stated that their arguments are intended to apply equally to this case. Crédit Lyonnais accordingly responds to the *Weiss amici* also, where appropriate.

Br. on Behalf of Jewish Organizations and Allies as Amici Curiae 24. Thus, they fault the Second Circuit for purportedly recognizing a "charity loophole," by relying on the knowledge requirement articulated in *Halberstam* instead of the *mens rea* requirement in Section 2339B. Pet. 2; *see also id.* 23-24 ("when a defendant knowingly provides substantial funds to an FTO, it should at least be a jury question whether the defendant aided and abetted the FTO's terrorist activities"); Br. of Amici Curiae Former National Security Officials ("Nat'l Security Officials' Br.") 27. In essence, petitioners contend that JASTA effectively creates a private right of action under Section 2339B.

Petitioners' legal theory is inconsistent with the plain text of JASTA. If Congress had wished to authorize strict civil liability for any violation of Section 2339B in JASTA, it could have done so—but it did not. Similarly, if Congress had intended JASTA liability to extend as far as the criminal liability this Court recognized in *Holder*, 561 U.S. at 31, it could have said so—but it did not. Instead, in providing the "broadest possible basis" for relief under U.S. tort law, Congress specifically instructed that *Halberstam* "provides the proper legal framework for how such liability should function." Findings § 2(a)(5). To conclude that a Section 2339B violation is sufficient to give rise to JASTA aiding and abetting liability would short-circuit the fact-specific framework articulated in *Halberstam*. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[I]t is quite mistaken to assume, as pe-

titioners would have us, that 'whatever' might appear to 'further[ ] the statute's primary objective must be the law' . . . [the] legislature says . . . what it means and means . . . what it says." (internal citations omitted) (alterations in original)).[7]

2. Notwithstanding petitioners' attempts to confect a purely legal question from the decision below, the Second Circuit merely affirmed the district court's proper application of the legal standard in *Halberstam* to the facts of the case, as Congress instructed. *See* Pet. App. 41a-42a. The Second Circuit did not conclude that a Section 2339B violation could never create a triable issue on a JASTA aiding and abetting claim; instead it concluded that, on the facts of this case, even assuming Crédit Lyonnais's conduct satisfied the separate requirements of Section 2339B, "the district court appropriately assessed" the evidence in the record in concluding there is no triable issue on whether Crédit Lyonnais's conduct satisfied the *Halberstam* factors for civil aiding and abetting liability. Pet. App. 51a. As the Second Circuit recognized in *Weiss* and *Linde*, the standard for Section 2339B liability has no bearing on the standard for a JASTA aiding and abetting

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[7] For the same reason, contrary to the assertions of petitioners and their *amici*, *see* Pet. 9; U.S. Senators' Br. 5-6, 15-16, 19-21, 23; Nat'l Security Officials' Br. 27; *see also generally* Defense of Democracies Br., reliance on the so-called "fungibility" principle articulated in *Holder* and other criminal cases in the context of Section 2339B cannot be sufficient to give rise to civil liability here, as it concerns a criminal statute with no causation requirement, not the civil requirements of JASTA as provided by *Halberstam*.

claim, because Section 2339B and JASTA are different statutes with different texts and purposes. *See* Pet. App. 47a ("In contrast to what is needed to show a violation of § 2339B, the second *Halberstam* element of aiding and abetting requires a plaintiff to show the defendant's 'general[] aware[ness] of his role as part of an overall illegal or tortious activity at the time that he provides the assistance.'" (quoting *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018)).

Given the fact-intensive nature of the *Halberstam* analysis underlying the decision below, review is not warranted here. *See* U.S. Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings"); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (The Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (citation omitted)).

II. The Decision Below Does Not Create Any Conflict Of Authority Among The Circuit Courts (Nor Does It Conflict With Any Decision Of This Court)

Likely recognizing the weakness of their position in the face of what JASTA actually provides and what the lower courts actually decided, petitioners attempt to manufacture a circuit split where none exists by invoking cases decided years before the applicable statute in this case, JASTA, was enacted. Contrary to petitioners' assertions, Pet. 15, no court

has ruled that a violation of Section 2339B is sufficient to create civil liability under JASTA. Instead, the handful of circuit-level cases that have construed JASTA (all of which petitioners conspicuously ignore) are consistent with the Second Circuit's application of the *Halberstam* test below.

1. Remarkably, despite claiming that the Court should grant *certiorari* in this JASTA case in order to resolve a circuit split, Pet. 19, petitioners fail to cite *any* of the numerous JASTA decisions that have been issued by courts outside of the Second Circuit. The reason for this omission is that all of the circuit-level cases that have construed JASTA are consistent with the decision below; there is no circuit split. *See Gonzalez v. Google LLC*, 2 F.4th 871, 910-11 (9th Cir. 2021) (applying *Halberstam* factors to multiple JASTA aiding and abetting appeals and concluding that certain plaintiffs stated aiding and abetting claims while others did not); *Retana v. Twitter, Inc.*, 1 F.4th 378, 383-84 (5th Cir. 2021) (affirming dismissal of JASTA aiding and abetting claims for failure to satisfy the *Halberstam* factors); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 n.6 (6th Cir. 2019) (affirming dismissal of JASTA aiding and abetting claims for failure to allege, *inter alia*, that defendants knowingly and substantially assisted the primary violation, as required by *Halberstam*).[8]

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[8] *See also Brill v. Chevron Corp.*, 804 F. App'x 630, 632 (9th Cir. 2020) (affirming dismissal of JASTA aiding and abetting claim for failure to satisfy substantial assistance and

2. Not only do petitioners ignore these consistent JASTA decisions; the decisions on which they do rely simply do not involve JASTA. Accordingly, none of these decisions creates any conflict.

The Seventh Circuit decided *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008), eight years before JASTA created secondary liability under the ATA. JASTA did not, as petitioners assert, "effectively codif[y]" *Boim*'s interpretation of primary ATA liability as a secondary liability cause of action. Pet. 15 n.2. If Congress had intended for *Boim* to define the scope of liability under JASTA, it would have cited that case instead of *Halberstam* in the Findings. Indeed, the Seventh Circuit itself already rejected this argument when it first construed JASTA in *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 391 (7th Cir. 2018). *Kemper* concerned the conspiracy liability provision of JASTA, but the Seventh Circuit itself recognized that applying the standard articulated in its prior *Boim* decision to a JASTA claim would render the "more limited" secondary liability authorized by the express text of JASTA superfluous. *Id.* at 396.

Moreover, even *Boim* does not support petitioners' argument that a violation of Section 2339B

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knowledge elements); *Colon v. Twitter, Inc.*, No. 20-11283, 2021 WL 4395246, at *7 (11th Cir. Sept. 27, 2021) (JASTA aiding and abetting claims failed to satisfy JASTA's requirement that attack at issue be committed, planned or authorized by a designated foreign terrorist organization).

is sufficient to give rise to civil liability under the ATA. In *Kemper*, the Seventh Circuit took the "opportunity to clarify some language in *Boim III* that might be read to suggest that something less than proximate cause might suffice to prove ATA liability," 911 F.3d at 391, and also rejected the argument that a Section 2339B violation invariably constitutes an act of international terrorism, *id.* at 389.

United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011), as revised (Dec. 27, 2011), is a criminal case interpreting Section 2339B, a criminal statute under which Crédit Lyonnais was never prosecuted. *El-Mezain*'s reliance on this Court's guidance on the scope of that specific statute in *Holder* was appropriate. But Section 2339B has no bearing on the Second Circuit's application of the *Halberstam* factors for the reasons discussed above. Section 2339B was only relevant to the decision below to the extent petitioners relied upon Section 2339B as a predicate criminal violation, which is one of several required elements underlying petitioners' *primary* liability claims—claims petitioners asserted below but do not pursue here. *See* Pet. 16-17.[9]

Moreover, unlike *El-Mezain* and *Boim*, which involved direct, intentional donors to Hamas, Crédit Lyonnais *at most* provided routine banking services to a lawful French charity that in turn sent funds to other charities that allegedly form part of Hamas's

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[9] *Holder* likewise construed Section 2339B, not JASTA, and thus petitioners fail to point to any decision of this Court that conflicts with the decisions below.

"social wing." *See* Pet. 16. In *El-Mezain*, the evidence included proof that the defendants "encouraged and solicited" donations to Hamas and organized fundraisers that Hamas leaders also attended. 664 F.3d at 488. Similar evidence was also present in *Boim*, including because one of the *Boim* defendants was previously convicted in *El-Mezain*. *See Boim v. Quranic Literacy Inst.*, No. 00 C 2905, 2012 WL 13171764, at *3-4 (N.D. Ill. Aug. 31, 2012).

In contrast, the evidentiary record here demonstrates that, while Crédit Lyonnais was suspicious that CBSP might be engaged in money laundering, the bank repeatedly reported its suspicions to the French government. *See* A-3309-10, A-3321-22. Moreover, it is undisputed that the wire transfers that Crédit Lyonnais processed to the 13 Charities on behalf of CBSP that contained a stated purpose were each designated for charitable purposes. Pet. App. 66a. As noted above, petitioners conceded that the 13 Charities in fact provided the charitable services they claimed to provide, were at times also funded by the United States government, and none had been designated as terrorist organizations by the United States, the European Union or France when these transfers occurred. *See* Pet. App. 67a; A-3420-21, A-3438-39. Given these facts, the Second Circuit and the district court properly found no triable issue on the *Halberstam* factors. And all this simply underscores the factual nature of the lower courts' decisions here, which the citation of an irrelevant criminal statute does not make any more worthy of this Court's review.

III. There Is No Compelling Need To Grant Certiorari In A JASTA Case Now

Review of petitioners' question presented would be also premature. JASTA is a relatively young statute, and JASTA cases are currently being brought around the country and, like the decision below, being decided on their facts. Particularly where, as here, there is no conflict of authority at the circuit level, any applicable legal questions would benefit from "further percolation in the lower courts." *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, concurring in denial of certiorari); *see also Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Petitioners' hyperbolic assertion that JASTA is now a "dead letter" in the Second Circuit, Pet. 9, is nonsense. The Second Circuit has properly restricted civil liability under JASTA to defendants who actually satisfy the requirements of *Halberstam*, as Congress instructed. Indeed, the Second Circuit has twice allowed a JASTA claim to proceed against a bank.

First, in *Linde*, a case in which petitioners here were also plaintiffs, the Second Circuit would have remanded for a new trial with the proper instructions on aiding and abetting liability, but the

parties had already agreed to a "high-low" settlement (resulting, it can be presumed, in a significant recovery to petitioners here). *Id.* at 318-19.

Second, the Second Circuit also recently reversed a lower court's dismissal of JASTA aiding and abetting claims where, unlike here, the factual allegations satisfied the *Halberstam* requirements. *See Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 863 (2d Cir. 2021). In *Kaplan*, the bank's customers themselves were alleged to be parts of Hizbollah and the bank was "at least generally aware that through its money-laundering banking services to the Customers, [it] was playing a role in Hizbollah's terrorist activities," *id.* at 865, and indeed afforded its Hizbollah customers special treatment in allowing them to deposit large sums of money weekly without disclosing their source, despite evidence of their terrorist affiliations, *id.* at 866. The idea that the Second Circuit has made JASTA recovery impossible on facts that satisfy the statutory test is therefore demonstrably wrong.

IV. The Decision Below Is Correct

Review is also not warranted here because both courts below correctly applied the *Halberstam* factors. Crédit Lyonnais's routine financial services do not satisfy the multi-factor common law aiding and abetting test incorporated by reference into JASTA.

The Second Circuit and the district court correctly found there is no triable JASTA issue because there was no evidence in the specific and extensive

record in these proceedings supporting petitioners' claims that Crédit Lyonnais "generally was aware that it played a role in any of Hamas' or even CBSP's violent or life endangering activities." *See* Pet. App. 80a-81a. As the district court noted, petitioners did not even dispute the factual record but instead argued that the evidence that created a triable issue on whether Crédit Lyonnais violated Section 2339B should be sufficient to create a triable issue on the *Halberstam* general awareness element of a JASTA claim. *Id.* 81a. In effect, petitioners conceded that, absent such a conflation of the two statutes, they could not satisfy the JASTA standard taken from *Halberstam*.

As to substantial assistance, there is no triable issue, including because there is no evidence funds transferred through the bank in fact were used for terrorism, and petitioners conceded below that the bank's financial services were not a but-for (let alone substantial) cause of any attacks. *See supra* Statement of the Case § II.[10] Accordingly, the Second Circuit was correct to find that "the district court did not err in . . . denying [petitioners'] request for leave to amend in order to bring claims under JASTA." Pet. App. 9a.

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[10] Because the district court concluded that petitioners' proposed JASTA claims fail to satisfy the general awareness element, it did not have occasion to address the knowing substantial assistance element. The Second Circuit considered all of petitioners' arguments on appeal, and rejected them. Pet. App. 9a.

V. There Is No Reason To Call For The Views Of The Solicitor General

There is no need to call for the views of the Solicitor General, *see* Pet. 24, because the United States has already consistently expressed its opposition to attempts to stretch the scope of civil liability for terrorism-related injuries beyond the bounds set by Congress, as petitioners seek to do here.

1. For instance, in the ATA case *O'Neill v. Al Rajhi Bank*, No. 13-318, the United States rejected the argument that it is appropriate to extend civil liability under the ATA "to individuals and entities whose activities have only an attenuated relationship to the plaintiff's injuries: for instance, entities that are only alleged to have provided routine banking services or other assistance to a charity with terrorist ties, considerably before the terrorists themselves carried out the attack in question." Br. for the United States as Amicus Curiae 14, *O'Neill v. Al Rajhi Bank*, 134 S. Ct. 2870 (2014). That is because "[p]ermitting liability to sweep so broadly could reach and inhibit routine activities and, given the ATA's extraterritorial reach, could adversely affect the United States' relationships with foreign Nations." *Id.* at 14-15. The same is true here, and neither petitioners nor their *amici* identify any reason why the government's position should be different now than it was just seven years ago.[11]

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[11] The United States also recommended against granting certiorari after a CVSG in an ATA case that was dismissed for

2. Petitioners also mischaracterize the position expressed by the United States in *Boim*. *See* Pet. 24. First, the United States only submitted an amicus brief at the circuit court level and did not submit a brief to this Court (which denied certiorari). *Boim v. Salah*, 558 U.S. 981 (2009). Second, in that case, the United States expressly rejected the view "that a violation of [Section 2339B] automatically . . . giv[es] rise to liability under [the ATA]." Br. for the United States as Amicus Curiae 3, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008). Instead, the United States argued, long before JASTA was enacted, that *Halberstam* should govern "the reach of secondary liability" under the ATA. *Id.* at 15-16. The United States also declined to take a position on whether the *Boim* plaintiffs had sufficient evidence to actually support civil liability under *Halberstam*. *Id.* at 3.

3. Petitioners invoke the Executive Branch's interest in national security and foreign affairs issues, Pet. 24, but as noted in *Al Rahji*, permitting petitioners to extend civil liability to the circumstances here may negatively impact foreign affairs. Likewise, the Executive Branch can vindicate its interest in national security and terrorism sanctions through enforcement of applicable criminal laws. In

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lack of personal jurisdiction, Br. for the United States as Amicus Curiae 7-8, *Sokolow v. Palestine Liberation Organization*, 138 S. Ct. 1438 (2018), and in connection with an ATA petition concerning a discovery sanctions order in *Linde* that undermined foreign relations with Jordan, Br. for the United States as Amicus Curiae 19, *Arab Bank, PLC v. Linde*, 134 S. Ct. 2869 (2014).

the 15-year history of this case, the Executive Branch has never expressed an interest in attempting to criminally prosecute Crédit Lyonnais for the actions for which petitioners seek to impose civil liability here, and it is undisputed that Crédit Lyonnais's banking relationship with CBSP did not violate any U.S. sanctions. The only connection this case has with the United States is the *five* lawful, dollar-denominated transfers processed by Crédit Lyonnais at CBSP's request that necessarily transited the United States—all *before* CBSP's OFAC designation. All relevant conduct otherwise occurred abroad: Crédit Lyonnais is a French bank that provided routine banking services for its French customer in France, which the French government has repeatedly concluded were appropriate under French law, including processing wire transfers to charities in the Palestinian Territories that petitioners allege (but cannot prove) were connected to terrorist attacks committed in Israel.

VI. There Is No Reason For A GVR

Petitioners engage in gamesmanship by asking the Court *not* to consider this Petition outright but instead to hold it and GVR if petitioners prevail in *Weiss.* The Court's GVR power "should be exercised sparingly" out of "[r]espect for lower courts, the public interest in finality of judgments, and concern about [the Court's] own expanding certiorari docket." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 173-74 (1996). If the Court does not find that this Petition warrants certiorari review in

the first instance (and it does not), it should simply deny it outright.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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