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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The brief in opposition filed by respondent Crédit Lyonnais, S.A. (CL) repeats, almost verbatim, the arguments made by the respondent in No. 21-381, *Weiss v. National Westminster Bank PLC*. Because reply briefs are optional, petitioners do not mirror that redundancy here. Instead, we note that the arguments in the *Weiss* reply apply with equal force here, and add four observations specific to this case.

1. The way the Second Circuit decided this case—in a short unpublished decision that simply incorporates the reasoning in *Weiss* (Pet. App. 9a)—refutes respondent's assertion that the question presented is fact-bound. On the contrary, the Second Circuit determined that the legal rule adopted in *Weiss* was broad enough to also resolve a case against a different bank in a different country assisting a different Hamas fundraiser under different factual circumstances. The backhanded treatment this case received shows that the Second Circuit has created a generally applicable charity loophole to JASTA liability that applies whenever the recipients of funds "performed charitable work" and the banks' customers did not "indicate" that the transfers were for any "terroristic purpose." *Id.* at 51a (rule from *Weiss*). As the amici law professors explain (at 23), "the Second Circuit did not just get JASTA wrong in [one] case; it has gotten JASTA wrong again and again."*

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* The amici filed their briefs on the *Weiss* docket, explaining correctly that their reasoning applies with equal force here because they address the Second Circuit's common legal error, and not any case-specific facts. CL never disputes this contention.

The Second Circuit's rule is important because, as the government and anti-terrorism experts have long recognized, "terrorists have exploited the charitable sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and operations." U.S. Dep't of the Treasury, Protecting Charitable Organizations (last updated Aug. 24, 2016), https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-index.aspx. The government has designated dozens of ostensible charities as fundraisers for FTOs including Al-Qaeda, Hamas, Hizbollah, and others. *See* U.S. Dep't of the Treasury, Designated Charities and Potential Fundraising Front Organizations for FTOs (last updated May 11, 2017), https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-fto.aspx. Such organizations allow FTOs to raise "significant amounts of money, but, even more critically, are ideal vehicles for laundering and transferring those and other funds." Matthew Levitt, *Charitable Organizations and Terrorist Financing: A War on Terror Status-Check*, Wash. Inst. for Near E. Policy (Mar. 19, 2004), https://www.washingtoninstitute.org/policy-analysis/charitable-organizations-and-terrorist-financing-war-terror-status-check.

Importantly, it does not matter that FTOs' fundraising conduits also perform charitable work. "Terrorist organizations routinely use ostensibly 'charitable' entities to financially support their operatives who plan and commit terrorist attacks—such that funds provided to a terrorist 'charity,' even if used for nominally charitable purposes, support the terror group's violent mission." Found. for Def. of Democracies Amicus Br. 2.

For example, the government explained when it designated respondent's customer CBSP a Specially Designated Global Terrorist that when Hamas raises money for "legitimate charitable work, this work is a primary recruiting tool for the organization's militant causes." Press Release, U.S. Dep't of the Treasury, U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities (Aug. 22, 2003), https://www.treasury.gov/press-center/press-releases/Pages/js672.aspx. Multiple amici, including fourteen former national security officials and a bipartisan group of ten U.S. Senators, have made the same point. Former Nat'l Sec. Offs. Amicus Br. 19 ("[T]errorist organizations like Hamas, Hezbollah, and others use social welfare institutions to fill a genuine need and exploit that need to gain adherents, recruit operatives, and radicalize local populations."); Senators Amicus Br. 21 (explaining that it was "hardly surprising" that "Hamas's 'social wing' . . . performed some charitable work . . . given the ubiquity of terrorists financing their activity via intermediaries and the common need for terrorist actors to provide social services, of which Congress was well aware when enacting and amending the ATA"); Jewish Orgs. Amicus Br. 16-17 (summarizing the ways Hamas uses charities).

In sum, there is nothing fact-bound about the question presented. All around the world, FTOs use charities (that also perform charitable work) to raise funds, launder money, and build up good will—which enables terrorist violence. Congress has sought to curb all such transactions, but the Second Circuit has undermined that prohibition by exempting complicit banks from civil liability. This Court's intervention is essential to stopping those flows.

2. Even CL's own recitation of the facts illustrates how far the Second Circuit has deviated from JASTA and from the rule of *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which JASTA incorporates. In cases involving violence (like *Halberstam* itself), *Halberstam*'s scienter requirement is satisfied if the defendant was "generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance," as long as "violence and killing is a foreseeable risk" of that illegal activity. *Id*. at 487-88. The defendant need not intend violence, nor even know "specifically" what illegal activity he is assisting, to be held liable. *Ibid*. That much is clear from the facts of *Halberstam* itself: the defendant there was liable for aiding and abetting a murder committed by her burglar accomplice because she knew that the primary tortfeasor was involved in some kind of nighttime property crime, and violence was a "foreseeable risk" of that activity. *Id*. at 488. She did not intend or know about the murder, may not have even known about the burglaries, and provided back-office banking and bookkeeping support (acts the court described as "neutral standing alone")—but she was liable anyway. *Ibid*.

Here, CL maintained accounts and moved money for CBSP, which was Hamas's principal fundraiser in France. The petition explains (at 7), and CL acknowledges (Opp. 8), that CL was suspicious about CBSP's activities since at least 1997. CL concedes that it "suspected CBSP might be engaged in money laundering." *Ibid.* As the petition argues (at 22-23, which CL does not address directly), such awareness is enough to satisfy *Halberstam*'s scienter requirement in light of the evidence that CL was told by its regulators in 2001

that money laundering carries terrorism financing risk—a point that should have been obvious to a major international bank after the September 11 attacks. Indeed, as the district court acknowledged, "there is no serious dispute that money laundering and terrorism are not mutually exclusive. It has been widely acknowledged that they can go hand in hand, as one certainly can be used to fund the other." Pet. App. 160a-61a. Thus, CL was at least generally aware that by processing transactions for CBSP, it was playing a role in illegal activity (money laundering) that went "hand in hand" with terrorist violence—especially since the transactions involved large transfers to the Middle East against the backdrop of escalating terrorist violence there.

As CL acknowledges, its complicity with money laundering does not stand alone: CL also extended special accommodations to CBSP despite its suspicions, and even cut checks for the equivalent of hundreds of thousands of dollars to CBSP *after* the U.S. government identified CBSP as a Hamas fundraiser and sanctioned it. Specifically, CL was so suspicious that it decided in December 2001 to close CBSP's accounts. *See* Opp. 10. But rather than freeze CBSP's assets, the bank deferred to CBSP's request to delay the account closure for more than a year (to December 21, 2002), so that CBSP could more easily move its money elsewhere. *Id*. at 10-11. Even after that year had run, however, CL did not close CBSP's accounts. *Id*. at 11. Instead, the accounts were still open and receiving deposits eight months later, when the U.S. government designated CBSP a Specially Designated Global Terrorist. That notice stated that CBSP raises funds for Hamas, and also stated that "[c]haritable donations to

non-governmental organizations are commingled, moved between charities in ways that hide the money trail, and then often diverted or siphoned to support terrorism," and that "[t]he funds pouring into Hamas coffers directly undermine the Middle East peace process," and allow Hamas "to continue to foment violence, strengthen its terrorist infrastructure, and undermine responsible leadership." U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities, *supra* (capitalization altered).

CL knew the reason for the designation, and eight days later informed CBSP that it was finally closing the accounts. Opp. 11. But even then, CL did not attempt to block or restrain CBSP's assets. Instead, it delivered CBSP's balances to it in the form of checks. *Ibid*. CL avoids saying the amounts, but those payments totaled hundreds of thousands of dollars. Pet. 23 n.3 (citing Pet. App. 147a). Thus, CL knowingly provided hundreds of thousands of dollars to a Specially Designated Global Terrorist, with full knowledge of the designation notice directly linking CBSP's charitable fundraising activities to Hamas's terrorism.

What is particularly striking is that the foregoing recitation of facts *comes from CL's own brief in opposition*. Thus, even under CL's gloss on the record, the *Halberstam* test is satisfied. That conclusion becomes even more inescapable if the Court considers the entire summary judgment record, as well as the lower courts' previous rulings in this case, which held that a reasonable jury could find that CL knew "that, by sending money to the 13 Charities, it was facilitating Hamas' ability to carry out terrorist attacks," Pet. App. 157a, and that "Hamas' increased ability to carry out

deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas," *id*. at 164a.

The Second Circuit never reversed or disagreed with those findings, but nevertheless let CL off the liability hook because CBSP's counterparties (the Hamas-controlled charities) used some of their assets to perform charitable work, and CBSP did not earmark its transfers for terrorist purposes. By doing so, the Second Circuit contravened the scienter requirement set forth in *Halberstam*, which stands plainly for the proposition that even if a defendant's support is not earmarked or identified for violent purposes, the defendant can be liable if it has the requisite awareness. For the reasons explained in *Weiss* and the petition in this case, the decision below implicates a clear circuit split about the scope of aiding and abetting liability, and falls plainly on the wrong side of that split.

3. Arguing against a CVSG, CL contends that most of the transactions at issue occurred abroad, and that "permitting petitioners to extend civil liability to the circumstances here may negatively impact foreign affairs." Opp. 29-30. For support, CL cites the United States' cert.-stage amicus brief in *O'Neill v. Al Rajhi Bank*, which argued that extending ATA liability to "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," could "adversely affect the United States' relationships with foreign Nations." U.S. Amicus Br. 14-15, *O'Neill*, 573 U.S. 954 (2014) (No. 13-318). CL argues that there is no "reason why the government's position should be different now than it was just seven years ago." Opp. 28.

Actually, there has been a significant intervening event, which is that Congress enacted JASTA in 2016. JASTA specifically tries to address the problem that "foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States." JASTA § 2(a)(3). Thus, Congress wanted JASTA to reach anybody "that knowingly or recklessly contribute[s] material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States." *Id*. § 2(a)(6). Indeed, Congress determined that those who provide such support "necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities." *Ibid*. That is why Congress sought "to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against" such persons, "wherever acting and wherever they may be found." *Id*. § 2(b). The government has never given this Court its views about JASTA's proper scope, and the Court may wish to hear them.

Independently, CL is wrong to suggest that the government has opposed liability in cases like this one. The language CL cites from the government's *O'Neill* brief was about the ATA's primary liability proximate causation requirement—which is not an element of aiding and abetting liability under *Halberstam*, and so is not at issue here. To the extent similar considerations are relevant, the hypothetical factual situation the government described in *O'Neill* bears little resemblance to this case. Here, the "charities" at issue did not just have "terrorist ties"; they were controlled by

Hamas. Pet. 5 (citing Pet. App. 168a, 172a, which evaluated petitioners' expert evidence to conclude that sending money to the charities here was "no different from sending the money directly to Hamas"). Moreover, the transfers did not happen "considerably before" the attacks; instead, CL transferred money "'to "Islamist" organizations in Palestine during the Second Intifada,'" an intense period of terrorist violence that included the attacks in this case. Pet. 22 (quoting Pet. App. 160a). And, as noted above, CL cut substantial checks to CBSP *after* the government identified CBSP as a Specially Designated Global Terrorist.

Accordingly, this case and *Weiss* much more closely align with other statements the government has made, including the explanations cited *supra* about how terrorists use charities to raise substantial funds, and the government's amicus briefs explaining that liability is appropriate when terrorist acts are a reasonably foreseeable consequence of providing support to an FTO. *See O'Neill* U.S. Amicus Br. 8 (arguing that "the ATA imposes secondary liability on defendants who provide substantial assistance to terrorist organizations (or their front groups) by contributing funds, knowing that the entities have been so designated or that they engage in terrorism as part of their broader activities," as long as the attack "was a reasonably foreseeable consequence of the defendant's contribution"); U.S. Amicus Br., *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (No. 05-1815 et al.), 2008 WL 3993242, at *23-25 ("[T]he 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 by the United States" because of "the fungibility of financial resources" as well as the fact that "even if a donor could somehow ensure that his donation would be used only for legal purposes," such support would still allow "terrorist entities to gain goodwill that can be used for terrorist recruitment or other assistance, or to gain political legitimacy for those who carry out deadly terrorist acts.") (quotation marks omitted). The parties' disparate views regarding the government's positions on these weighty issues supports a CVSG.

Moreover, CL's speculation that liability will negatively affect foreign affairs also shows why a CVSG is appropriate—because the government has signaled otherwise. The State Department—which oversees U.S. diplomacy—has opined that all charitable support to FTOs furthers terrorism. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010). And this Court recognized that "[p]roviding foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks." *Id*. at 32. Staunch U.S. allies like Israel likely take a dim view of the Second Circuit's rule allowing banks to transfer tremendous sums of money to Hamas without any accountability to the victims of Hamas terror attacks—especially as Hamas launched "thousands of unguided rockets towards Israeli cities" this year, killing civilians in flagrant violation of norms against "indiscriminate attacks." Hum. Rts. Watch, Palestinian Rockets in May Killed Civilians in Israel, Gaza (Aug. 12, 2021), https://www.hrw.org/news/2021/08/12/palestinian-rockets-may-killed-civilians-israel-gaza#.

Knowing the government's position could only be helpful to the Court's decision-making.

4. Finally, CL chides petitioners for suggesting that this case be held pending the outcome of *Weiss*, and then vacated and remanded if the petitioners in *Weiss* are successful. Opp. 6, 30-31. Specifically, CL argues that petitioners made a "tactical choice not to request that the two petitions be decided together." *Id*. at 6. This is wrong. The petitions were filed on the same day. And twice, including on the first page of the petition, petitioners recommended "that this Court consider the two petitions together." Pet. i, 14.

CL's contention that petitioners are somehow engaged in "gamesmanship" is particularly puzzling. Opp. 30. Petitioners are not attempting to take two bites at the apple, or otherwise manipulate the Court's processes. We requested vacatur and remand in this case *only* "[i]f the *Weiss* petitioners prevail." Pet. 25. Thus, petitioners have acknowledged that for present purposes, these two cases rise and fall together.

The reason petitioners recommended that the Court grant plenary review in *Weiss* is that *Weiss* is a detailed, published decision, whereas this case is an unpublished follow-on. *Weiss* is accordingly the natural vehicle to resolve the question. Moreover, because the legal issue is the same in both cases, the result in either one will control the other. The Court will either decide that the Second Circuit's charity loophole to JASTA is correct, or not. Reviewing the two cases separately would accomplish nothing other than producing redundant briefing about the same question presented.

Most importantly for present purposes, CL does not identify a single reason why certiorari should be denied in this case if the Court grants certiorari in *Weiss*. It does not argue, for example, that even if *Weiss* were resolved in petitioners' favor, CL could somehow escape liability as a matter of law. Accordingly, the best course is for the Court to consider the two petitions together, choose the best vehicle to decide the question, grant certiorari in that case, and hold the other one pending the outcome.

CONCLUSION

Certiorari should be granted in *Weiss*. This case should be held pending the result, and vacated and remanded if appropriate after the disposition of *Weiss*.

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