No. 22-1117

In the Supreme Court of the United States

CHARLOTTE FREEMAN, ET AL.,

Petitioners,

v.

HSBC HOLDINGS PLC, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners allege a conspiracy claim under the Justice Against Sponsors of Terrorism Act (JASTA), which provides that "liability may be asserted as to any person who * * * conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2).

The questions presented are:

1. Whether a JASTA conspiracy claim requires a plaintiff to plausibly allege that the defendant shared a common object with the perpetrator of the terrorist attack that injured the plaintiff.

2. Whether a JASTA conspiracy claim requires a plaintiff to plausibly allege that the plaintiff's injury resulted from an overt act that furthered the conspiracy that the defendant allegedly joined.

CORPORATE DISCLOSURE STATEMENT

HSBC Holdings plc states that it has no parent corporation and no public company owns 10% of the shares in HSBC Holdings plc. HSBC Bank USA N.A. states that it is a national banking association, organized and existing under the laws of the United States of America and is not a publicly held company. HSBC Bank USA N.A. is wholly owned by HSBC USA Inc., which is directly owned by HSBC North America Holdings Inc., which is indirectly owned by HSBC Holdings plc. HSBC Bank plc, a company incorporated with limited liability in England, is not a publicly held company. HSBC Bank plc is wholly owned by HSBC Holdings plc. HSBC Bank Middle East Limited, a company incorporated in the Dubai International Financial Centre (DIFC), Dubai, UAE, is not a publicly held company. HSBC Bank Middle East Limited is 100% owned by HSBC Middle East Holdings B.V. HSBC Middle East Holdings B.V. is, in turn, wholly owned by HSBC Holdings plc.

Barclays Bank PLC states that it is a wholly-owned subsidiary of Barclays PLC, which is a publicly held company, and no other publicly held corporation owns 10% or more of Barclays PLC's stock.

Commerzbank AG states that it is a publicly traded company organized under the laws of Germany and has no parent corporation. The government of the Federal Republic of Germany, through its SoFFin (Sonderfonds Finanzmarktstabilisierung) agency, indirectly owns above 10% of Commerzbank AG.

Standard Chartered Bank states that it is wholly owned by Standard Chartered Holdings Limited, which, in turn, is wholly owned by Standard Chartered PLC, a publicly held company. No publicly held

corporation owns 10% or more of Standard Chartered PLC's shares.

Credit Suisse AG states that it is a wholly-owned subsidiary of UBS Group AG. UBS Group AG has no parent company and no publicly held company owns 10% or more of UBS Group AG's stock.

The Royal Bank of Scotland N.V. (now known as NatWest Markets N.V.) states that it is wholly owned by NatWest Markets Plc, which is wholly owned by NatWest Group plc. NatWest Group plc is a publicly held company, and no other publicly held company owns 10% or more of NatWest Group plc's stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 57 F.4th 66. The memorandum and order of the district court (Pet. App. 38a-93a) is reported at 413 F. Supp. 3d 67.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2023, and the petition for rehearing was denied on February 7, 2023. The petition for a writ of certiorari was filed on May 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners are U.S. military personnel who served in Iraq and were killed or injured there, as well as their families and estates. The operative complaint alleges horrific harm suffered by Petitioners at the hands of Iraqi Shia militias, which in turn were supported by terrorist organizations. The militias and terrorist organizations should be held liable for their crimes.

But Petitioners instead instituted this action against Respondents—six international financial institutions and their affiliates.[1] Petitioners allege that Respondents are liable under the Anti-Terrorism Act (ATA), as amended by the Justice Against Sponsors of Terrorism Act (JASTA), for "conspir[ing] with the

[1] This brief in opposition is filed on behalf of all Respondents other than Bank Saderat PLC, which was not represented and was deemed in default in the appeal to the Second Circuit. Pet. App. 12a n.3.

person[s] who committed" the "act[s] of international terrorism" that injured them. 18 U.S.C. § 2333(d)(2).

The Second Circuit's decision affirming the district court's dismissal of the complaint is correct, does not conflict with the decision of any other court of appeals, and does not otherwise warrant review.

This Court recently explained that the gravamen of a JASTA conspiracy claim, like that of common law conspiracy, is "an agreement with the primary wrongdoer to commit wrongful acts." *Twitter, Inc.* v. *Taamneh*, 143 S. Ct. 1206, 1221 (2023). The requirement of an agreement with the primary actor is a "significant limiting principle" ensuring that the alleged coconspirator actually is culpable for the alleged injury. *Ibid.*

Consistent with that requirement, every court of appeals to address the questions presented has reached the same conclusion as the court below, holding that a plaintiff asserting a JASTA conspiracy claim must plausibly allege: (1) that the defendant and the terrorist attacker shared a common object; and (2) that the overt act injuring the plaintiff was in furtherance of the conspiracy between the defendant and the terrorist attacker. See *Bernhardt* v. *Islamic Republic of Iran*, 47 F.4th 856 (D.C. Cir. 2022); *Gonzalez* v. *Google LLC*, 2 F.4th 871 (9th Cir. 2021), vacated on other grounds, 143 S. Ct. 1191 (2023).

Faced with the lack of a conflict regarding the proper interpretation of JASTA, Petitioners attempt to change the subject by asserting a conflict with *Halberstam* v. *Welch,* 705 F.2d 472 (D.C. Cir. 1983)—the decision that JASTA cites as providing "the proper legal framework" for how conspiracy liability should function. See 18 U.S.C. § 2333 note. But the court

below—and the D.C. and Ninth Circuits—expressly tied their analyses to the principles recognized in *Halberstam*.

Petitioners' contrary arguments are wrong on the merits. And they also suffer from the very flaw cited by this Court in its recent decision interpreting JASTA—they "too rigidly focus on *Halberstam*'s facts [and] its exact phraseology," and therefore "miss[] the mark." *Twitter*, 143 S. Ct. at 1223.

The court of appeals correctly found the complaint here insufficient for two independent reasons: It fails to plausibly allege that Respondents and the terrorist attackers shared a common goal and that Petitioners' injuries resulted from an overt act in furtherance of a conspiracy that included Respondents.

The complaint alleges two distinct conspiracies with different goals. Petitioners allege that Respondents conspired with certain Iranian banks and commercial entities to evade U.S. economic sanctions on Iran. Separately, Petitioners allege a conspiracy by terrorist organizations and their backers to commit acts of international terrorism against U.S. service members in Iraq. Petitioners' core theory of liability is that Respondents, who are alleged to have entered into only the former conspiracy, can be held liable for harms resulting from the latter.

The Second Circuit first recognized that, to plausibly allege an agreement among coconspirators, a complaint must allege that the conspirators shared a common object. Here, the court explained, Respondents allegedly joined a conspiracy to evade economic sanctions, not to commit acts of terrorism—and the terrorist attackers joined a conspiracy to commit acts of terrorism, not one to evade economic sanctions.

Petitioners have therefore failed to plausibly allege the requisite common intent between Respondents and the terrorist attackers who caused Petitioners' injury.

Second, the Second Circuit correctly held that the overt acts that caused Petitioners' injuries—*i.e.*, the acts of international terrorism—are not alleged to have furthered the sanctions-evading conspiracy.

Given the absence of a conflict and the correctness of the lower court's decision, the petition should be denied.

A. Statutory Background

Congress enacted the ATA in 1992, creating a private cause of action for harm caused by "an act of international terrorism." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521 (codified at 18 U.S.C. § 2333). As initially enacted, the ATA limited liability to primary violators and did not authorize claims for secondary liability such as conspiracy. See *Twitter*, 143 S. Ct. at 1218 (citing *Rothstein* v. *UBS AG*, 708 F.3d 82, 98 (2d Cir. 2013)).

Then, in 2016, Congress enacted JASTA, which created new causes of action for aiding and abetting and conspiracy. Pub. L. No. 114-222, 130 Stat. 852. In pertinent part, JASTA authorizes a person injured by an act of international terrorism to recover damages from "any person who * * * conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2).

Congress stated in JASTA's "[f]indings" section that "[t]he decision of the United States Court of Appeals for the District of Columbia in *Halberstam* v.

Welch, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, * * * provides the proper legal framework for how such liability should function in the context of" JASTA. See 18 U.S.C. § 2333 note. That reference means that the standards governing JASTA's secondary-liability causes of action should be grounded in the "context of the common-law tradition" of civil conspiracy and aiding-and-abetting liability. *Twitter*, 143 S. Ct. at 1218.

B. Petitioners' Claims

Petitioners filed the operative complaint before Congress enacted JASTA. The complaint asserts seven claims for relief under 18 U.S.C. § 2333(a)—the ATA's primary liability provision. After JASTA's enactment, Petitioners did not amend their complaint to allege new secondary liability claims. They instead argued that JASTA's conspiracy provision offered an alternative ground for relief.

The complaint alleges that, beginning in 1987, Respondents entered into a conspiracy with various Iranian banks to evade U.S. sanctions. C.A. App. 335-36, 339 (Second Amended Complaint (SAC) ¶¶ 7, 22). Petitioners define that alleged "Conspiracy" as "an illegal agreement * * * between Iran, its banking and various international institutions by and through which Defendants * * * agreed to alter, falsify, or omit information from bank-to-bank payment orders * * * that involved Iran or Iranian parties." *Id.* at 339 (SAC ¶ 22). The object of the conspiracy, as alleged by Petitioners, was "to alter, falsify, or omit information from bank-to-bank payment orders" involving Iran. *Ibid.*

Respondents allegedly advanced the object of this conspiracy in two ways: through wire stripping and trade finance transactions.

The first, "wire stripping," relates to wire transfers of funds from one party to another. It is the omission or removal from transfers to and from Iranian counterparties of details describing the parties to the transaction.

Until 2008, the United States had permitted U.S. banks to process transfers to and from Iran under the so-called "U-turn exemption." C.A. App. 363-64, 368 (SAC ¶¶ 140-42, 171). This exemption, which the U.S. Treasury Department implemented to avoid crippling the Iranian economy, allowed transactions to and from Iran so long as (i) non-U.S., non-Iranian banks (such as Respondents, with the exception of HSBC Bank USA) acted as intermediaries, and therefore U.S. banks would not have a direct connection to Iranian banks; and (ii) none of the parties to the transaction was separately sanctioned. See *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 387 (7th Cir. 2018).

According to Petitioners, Respondents' agreement to strip information from these transactions made Iran's transactions "eas[ier]" to process. C.A. App. 346 (SAC ¶ 46). As Petitioners expressly recognized in their original complaint (and do not deny in the operative complaint (see *id.* at 363, 399 (SAC ¶¶ 141, 347)), "most" of the transactions Respondents processed pursuant to the wire stripping scheme "could have been processed legally" under the U-turn exemption. D. Ct. Dkt. 1 ¶ 775.

The complaint alleges that this practice made it possible for Iran to transfer millions of dollars to terrorist organizations without detection. The complaint

does not, however, identify a single banking transaction involving any Respondent that allegedly was used by the Government of Iran to transfer funds to any terrorist organization.

The trade finance allegations involve letters of credit allegedly provided or facilitated by certain Respondents for various Iranian entities. C.A. App. 461-89 (SAC ¶¶ 673-838). A letter of credit is often used to facilitate international transactions. The financial institution promises to provide for payment between distant counterparties upon the completion of a commercial contract. *Id.* at 369 (SAC ¶ 173). In addition to providing for the payments, the financial institutions can provide other services, including confirming delivery of goods and forwarding and examining appropriate documentation. *Id.* at 370-71 (SAC ¶¶ 178-88). The complaint alleges that certain Respondents removed information from payment orders to allow certain Iranian entities to evade U.S. sanctions and acquire prohibited components, equipment, and other "dual-use" material. *Id.* at 371-73 (SAC ¶ 189-96).

Separately, the complaint alleges a different conspiracy among the Iranian Revolutionary Guard Corps (IRGC), the Lebanese Hezbollah, and Iraqi Shia Militias to commit "acts of international terrorism" against U.S. service members in Iraq. C.A. App. 340 (SAC ¶ 23(f)). Petitioners allege that the Iraqi Shia militias were trained and armed by Hezbollah. *Id.* at 378-79, 541, 614, 621, 627, 635 (SAC ¶¶ 229, 237-40, 1162, 1898, 1963, 2028, 2106). In turn, Hezbollah was supported by the IRGC, a wing of the Iranian armed forces, which provided money, logistical support, and weapons. *Id.* at 232, 380 (SAC ¶¶ 232, 248). The complaint also alleges that a branch of the IRGC trained

various revolutionary groups across the Middle East. *Id.* at 335-36, 388-89, 394 (SAC ¶¶ 7, 289, 326).

Petitioners are U.S. service members injured in Iraq between 2004 and 2011, and the families and/or estates of U.S. service members injured or killed in Iraq. They identify 92 different attacks committed by Iraqi Shia militias as the basis of their complaint. C.A. App. 528-642 (SAC ¶¶ 1041-2178). And they allege that the IRGC, Hezbollah, and the Iraqi Shia militias worked together to commit acts of terrorism in Iraq, including those that caused their injuries. Importantly, however, the complaint contains no allegation that Respondents had any interactions or dealings with the IRGC, Hezbollah, or the Iraqi Shia militias, let alone that Respondents knowingly agreed to support or assist any acts of international terrorism.

C. Proceedings Below

The district court dismissed the JASTA conspiracy claim. Pet. App. 86a n.36.[2] It determined that the complaint alleged only that Respondents entered into a conspiracy "to help Iranian financial and commercial entities evade American sanctions." Pet. App. 70a; see also *id.* at 69a n.28 ("at most, the [complaint] alleges that [Respondents] agreed to join a conspiracy with the sole purpose of evading U.S. sanctions"). They did not join the "separate and distinct conspiracy to provide material support to Hezbollah." *Ibid.*

The court went on to hold that the conspiracy claim failed for the additional, independent reason that Petitioners did not plausibly allege that the overt

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[2] The district court dismissed Petitioners' primary liability claims and Petitioners abandoned those claims on appeal. Pet. App. 15a n.5.

acts that injured them were in furtherance of the sanctions-evading conspiracy. "[A]ny acts of promoting terrorism engaged in by the Iranian entities * * * would not be an act 'in furtherance of' that much more limited conspiracy." Pet. App. 69a-70a n.28.[3]

The Second Circuit unanimously affirmed. Pet. App. 1a-34a. After analyzing *Halberstam*, it concluded that "to assert a conspiracy claim under JASTA, a plaintiff must plead 'an *agreement* between two or more persons . . . to participate in an unlawful act,' and an 'injury caused by an unlawful overt act performed by one of the parties to the *agreement*.'" Pet. App. 25a (quoting *Halberstam*, 705 F.2d at 477 (emphasis added by Second Circuit)).

Addressing the first requirement, the court explained that "[w]hile courts may 'infer an agreement from indirect evidence in most civil conspiracy cases,' a complaint must nonetheless allege that the coconspirators were 'pursuing the same object.'" Pet. App. 25a-26a (quoting *Halberstam*, 705 F.2d at 487 (citation omitted)).

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[3] The district court dismissed the secondary liability claims on the additional ground that Petitioners did not allege that Respondents conspired directly with the persons who committed the acts of international terrorism. Noting that JASTA requires that the defendant "conspires *with* the person who committed" the terrorist act, 18 U.S.C. § 2333(d)(2), the court reasoned that "there is not a single allegation in the" complaint that Respondents "*directly* conspired with Hezbollah or IRGC," Pet. App. 91a.

The court of appeals rejected that conclusion. Pet. App. 21a-24a. Judge Jacobs disagreed, stating that JASTA's "use of 'with' is particular, and unusual," and "requires a direct link between a defendant bank and a terrorist." Pet. App. 35a (Jacobs, J., concurring).

"Here," the court stated, "the Complaint fails to allege that the [Respondent] Banks and the terrorist groups shared any 'common intent.'" Pet. App. 26a (quoting *Halberstam*, 705 F.2d at 480). "As to the [Respondent] Banks, the Complaint states that they 'shared the common goal of . . . providing Iran and the Iranian [b]ank[s] . . . the ability to illegally transfer billions of dollars (undetected) through the United States.'" Pet. App. 26a (quoting C.A. App. 398 ¶ 344). "With respect to the terrorist groups, the Complaint asserts that they 'actively engaged in planning and perpetrating the murder and maiming of hundreds of Americans in Iraq.'" Pet. App. 26a (quoting C.A. App. 403 ¶ 359).

Thus, the complaint did not allege "that the Banks intended to kill or injure U.S. service members in Iraq, or that the terrorist groups agreed to help the Banks and Iranian entities evade U.S. sanctions." Pet. App. 26a. "In the absence of any allegation that the [Respondent] Banks and the terrorist groups 'engaged in a common pursuit,'" the court could not "identify 'an[y] agreement' that could form the basis of a JASTA conspiracy between the Banks and the terrorist groups." *Ibid.* (quoting *Halberstam*, 705 F.2d at 477, 481).

Turning to the second, independent requirement for pleading a JASTA conspiracy, the court of appeals explained that "a plaintiff * * * must adequately plead that their injuries were caused by 'an unlawful overt act' done 'in furtherance of the [coconspirators'] common scheme.'" Pet. App. 27a (quoting *Halberstam*, 705 F.2d at 477). It concluded that Petitioners failed to satisfy that requirement because the complaint does not plausibly allege that any of the terrorist attacks that harmed them "furthered a conspiracy in

which [Respondents] were participants." Pet. App. 27a.

The court observed that the complaint defined "'the Conspiracy' as 'six Western international banks . . . knowingly conspir[ing] with Iran and its banking agents . . . to evade U.S. economic sanctions, conduct illicit trade-finance transactions, and disguise financial payments to and from U.S. dollar-denominated accounts.'" Pet. App. 27a (quoting C.A. App. 335 (SAC ¶ 6)). But "[n]otably absent from the Complaint * * * are allegations of ways by which the 'acts of international terrorism' furthered 'the Conspiracy.'" *Ibid.* Because the terrorist acts that injured Petitioners did not "further[] the [Respondent] Banks' conspiracy with Iranian entities to circumvent U.S. sanctions," the conspiracy claim failed. Pet. App. 32a.

Before the Second Circuit, Petitioners argued that, even if the terrorist attacks did not further the sanctions-evasion conspiracy, Respondents could be held liable on the theory that the attacks were a "foreseeabl[e] result" of that conspiracy. Pet. App. 28a. The court of appeals rejected that argument as an impermissible expansion of conspiracy liability.

Petitioners' argument rested on the facts of one of the cases discussed in *Halberstam—American Family Mutual Insurance Co.* v. *Grim*, 201 Kan. 340 (1968). But the court of appeals explained that *Halberstam* "identified *Grim* as an example of 'judicial merger' of civil conspiracy and aiding and abetting, without distinguish[ing]" between the two types of claims—and "found 'it important to keep the distinctions * * * in mind.'" Pet. App. 29a (quoting *Halberstam*, 705 F.2d at 478).

The court of appeals explained that "*Halberstam*'s requirement of an overt act to further the '*overall object*' is grounded in the very core of conspiracy liability, which is 'an *agreement* between the defendant and the primary wrongdoer to commit a wrong.'" Pet. App. 30a (quoting *Halberstam*, 705 F.2d at 487 and Restatement (Third) of Torts: Liability for Economic Harm § 27 (Am. L. Inst. 2020)).

The court therefore rejected Petitioners' foreseeability argument. "To hold a defendant liable for a co-conspirator's actions merely because they are foreseeable – even though wholly detached from the shared conspiratorial plan – would stretch the concept of civil conspiracy too far beyond its origin." Pet. App. 31a.

REASONS FOR DENYING THE PETITION

The Second Circuit's holdings accord with those of every court of appeals that has addressed the questions presented. And those holdings are fully consistent with the common-law framework set forth in *Halberstam*. Finally, the court of appeals correctly affirmed dismissal here because the complaint does not plausibly allege that Respondents shared a common intent with the terrorist attackers who caused their injuries or that Petitioners were injured by an overt act in furtherance of the conspiracy that Respondents joined.

This Court would have to grant review on both issues, and reverse the court of appeals' determinations on both, to alter the judgment below. The petition should be denied.

I. There Is No Circuit Conflict On Either Question.

Every court of appeals that has addressed the questions presented—the D.C. Circuit, the Ninth Circuit, and the court below—has reached the same conclusion, holding that JASTA requires that a defendant share a common object with alleged coconspirators in order to establish a conspiracy and that the plaintiff's injury result from an overt act in furtherance of that conspiracy.

Petitioners ignore those decisions. Their argument that this construction of JASTA conflicts with particular language in *Halberstam* is wrong. It also is irrelevant, given this Court's decision in *Twitter*, which rejected arguments that "too rigidly focuses on *Halberstam*'s facts or its exact phraseology," and instead focused on the "common-law principles" recognized and applied in *Halberstam*. The unanimous view of the courts of appeals is wholly consistent with those principles.

A. The Courts of Appeals Require Plaintiffs To Allege That The Coconspirators Shared A Common Object.

Two other courts of appeals have addressed whether, to establish that a defendant joined a JASTA conspiracy, the plaintiff must plausibly allege, and then prove, that the defendant and the other conspirators shared a common object. Both courts reached the same conclusion as the court below.

Bernhardt v. *Islamic Republic of Iran*, 47 F.4th 856 (D.C. Cir. 2022), involved allegations similar to the present case. The plaintiff alleged that HSBC "implemented procedures to help sanctioned entities access and benefit from U.S. financial services"—by

"manually scrub[bing] all references to Iran or a sanctioned entity"; *i.e.*, by engaging in wire stripping. *Id.* at 862. The plaintiffs, victims of an al-Qaeda terrorist attack in Afghanistan and their families, alleged "that HSBC was trying to make 'substantial profits' by evading sanctions," while al-Qaeda sought to commit acts of terrorism against the United States. *Id.* at 873.

The D.C. Circuit found these allegations insufficient to plead a conspiracy claim under JASTA. To establish the requisite agreement, "Bernhardt had to allege that HSBC was 'pursuing the same object' as al-Qaeda." *Bernhardt*, 47 F.4th at 873 (quoting *Halberstam*, 705 F.2d at 487). But "Bernhardt allege[d] no common objective between HSBC and al-Qaeda." *Ibid.* Rather, HSBC's sanctions-evading objective and al-Qaeda's terroristic objective were "wholly orthogonal to one another." *Ibid.* Accordingly, "[i]n the absence of any alleged concordance between HSBC's and al-Qaeda's objectives," *ibid.*, the court affirmed dismissal of the conspiracy claim.

The conspiracy claims in this case closely resemble those rejected in *Bernhardt*. Petitioners and the *Bernhardt* plaintiffs both alleged that the defendants conspired to evade U.S. sanctions, while alleging a separate conspiracy by terrorists to attack U.S. service members. And the D.C. Circuit, like the Second Circuit in the present case, upheld dismissal because the plaintiffs failed to allege a common object shared by the defendant bank and the terrorist actors.

The plaintiffs in *Gonzalez* v. *Google LLC*, 2 F.4th 871, 907 (9th Cir. 2021), vacated on other grounds, 143 S. Ct. 1191 (2023), alleged that their allegations regarding Google's sharing of ad revenues with ISIS members were sufficient to allege a JASTA conspiracy. The Ninth Circuit rejected this argument. It

explained that the alleged revenue sharing "does not, by itself, support the inference that Google tacitly agreed to commit homicidal terrorist acts with ISIS." *Ibid.* Because the plaintiffs failed to allege that the defendants shared a common object with the terrorist actors, the conspiracy claim failed.

The Second Circuit reached the same conclusion, holding that "a complaint must * * * allege that the coconspirators were 'pursuing the same object.'" Pet. App. 25a-26a (quoting *Halberstam*, 705 F.2d at 487). And it determined that, as in *Bernhardt* and *Gonzalez*, "the Complaint fails to allege that the [Respondent] Banks and the terrorist groups shared any 'common intent.'" Pet. App. 26a (quoting *Halberstam*, 705 F.2d at 480).

The Second Circuit's analysis also accords with a decision dismissing a pre-JASTA conspiracy claim. In *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383 (7th Cir. 2018), the plaintiff alleged that Deutsche Bank violated the ATA by engaging in wire stripping to evade economic sanctions on Iran. *Id.* at 387. The plaintiff was the mother of a U.S. service member who was killed by Iraqi militias, allegedly backed by Hezbollah and the IRGC. *Id.* at 386. She sued, alleging that Deutsche Bank "was part of a much larger ongoing conspiracy to further Iran's terroristic goals." *Id.* at 388.

The court stated that "[t]he crux of any conspiracy is an agreement between the co-conspirators," which requires allegations, and eventually proof, of an agreement on "the conspiratorial goal." *Kemper*, 911 F.3d at 395. The conspiracy claim failed because the plaintiff did not "allege[] facts that give rise to a plausible inference that Deutsche Bank agreed to provide material support *for terrorism*." *Ibid.* Rather, the

court concluded, the complaint alleged "at most, that Deutsche Bank joined a conspiracy to evade sanctions." *Ibid.*

In sum, the courts of appeals agree that to state a JASTA conspiracy claim, the plaintiff must adequately plead that the defendant and the terrorist attacker shared a common object.

B. The Courts of Appeals Require Plaintiffs To Allege That Their Injuries Were Caused By An Overt Act In Furtherance Of The Conspiracy.

The other courts of appeals that have considered the issue also agree with the Second Circuit that an additional requirement for establishing a JASTA conspiracy is that the plaintiff must show that his or her injuries resulted from an overt act in furtherance of the conspiracy that the defendant joined.

In *Bernhardt*, the D.C. Circuit held the JASTA conspiracy claim insufficient for the additional, independent reason that the plaintiff failed to allege that her injury resulted from an overt act in furtherance of a conspiracy that included the defendant.

The court recognized that "Bernhardt had to allege the bombing was the overt act that furthered a conspiracy between HSBC and al-Qaeda." *Bernhardt*, 47 F.4th at 873. But "Bernhardt ma[de] no such allegation," and it was not "plausible to infer that the attack * * * would further HSBC's alleged objective of maximizing profits through the evasion of U.S. sanctions." *Ibid.* The court therefore concluded that the plaintiff "fail[ed] to allege an overt act in furtherance of a conspiracy" and affirmed dismissal. *Ibid.*

The Ninth Circuit reached the same conclusion in *Gonzalez*. It held that "the overt act causing plaintiffs' injury must be 'done pursuant to and in furtherance of the common scheme.'" *Gonzalez*, 2 F.4th at 907 (quoting *Halberstam*, 705 F.2d at 477). The *Gonzalez* plaintiffs failed to satisfy this element. The complaint included only a "conclusory allegation" that "Google conspired with ISIS, its members, and affiliates to promote, plan, and carry out the acts of international terrorism that injured the plaintiffs." *Id.* at 907 n.19 (internal quotation marks and alterations omitted). It failed to allege that their family member's "murder was an overt act perpetrated pursuant to, and in furtherance of, that common scheme." *Id.* at 907. The Ninth Circuit accordingly affirmed the dismissal of the JASTA conspiracy claims. *Ibid.*

The Second Circuit applied the same reasoning as *Bernhardt* and *Gonzalez*. It held that JASTA conspiracy plaintiffs "must adequately plead that their injuries were caused by 'an unlawful overt act' done 'in furtherance of the [coconspirators'] common scheme.'" Pet. App. 27a (quoting *Halberstam*, 705 F.2d at 477). And it found "[n]otably absent from the Complaint" any "allegations of ways by which the 'acts of international terrorism' furthered 'the Conspiracy'" to evade sanctions. Pet. App. 27a.

There accordingly is no conflict among the courts of appeals with respect to the Second Circuit's second, independent basis for dismissing the complaint.

C. The Second Circuit's Decision Does Not Conflict With *Halberstam*.

Petitioners ignore the decisions of other courts of appeals construing JASTA's conspiracy cause of action and instead seek review by this Court based on a

claim that the decision below conflicts with *Halberstam*. They assert that *Halberstam* held that liability for civil conspiracy extends to "foreseeable" injuries resulting from the conspiracy. Pet. 21-22, 24-26. That argument is flawed for multiple reasons.

First, Petitioners' arguments are based on parsing the text of the *Halberstam* decision—the precise analysis that this Court rejected in *Twitter*—or yanking out of context the decision's text or cited authority. The *Twitter* Court explained that Congress did not intend for litigants "to hew tightly to the precise formulations that *Halberstam* used." *Twitter*, 143 S. Ct. at 1223. *Halberstam* rather "reflect[s] and distill[s] * * * common-law principles," and its "common-law 'framework'" should serve "as the primary guidepost for understanding the scope of § 2333(d)(2)." *Id.* at 1222-23. By "too rigidly focus[ing] on *Halberstam*'s facts [and] its exact phraseology," Petitioners' arguments "miss[] the mark." *Id.* at 1223.

Second, Petitioners' invocation of *Halberstam* is a transparent effort to paper over the reality that every court of appeals to address the questions presented has reached the same conclusion. This case involves interpretations of JASTA. Petitioners' arguments based on *Halberstam* cannot be used to create a circuit conflict regarding the correct interpretation of a law enacted thirty years after *Halberstam* was decided.

Third, the D.C. Circuit in *Bernhardt* recognized Congress's directive that *Halberstam* "'provid[es] the proper legal framework for how such liability should function.'" 47 F.4th at 867. It analyzed its own prior decision and, as just discussed (at 13-14, 16-17), reached the same conclusion as the Second Circuit. See also 47 F.4th at 873 (applying *Halberstam*'s framework to JASTA conspiracy claim). If there were

any basis for Petitioners' skewed view of a circuit conflict, the D.C. Circuit's interpretation of its own decision surely undermines that claim.

Indeed, the D.C. Circuit recently confirmed that *Bernhardt* is consistent with *Halberstam*. *Ofisi* v. *BNP Paribas, S.A.*, No. 22-7083, 2023 WL 4378213 (D.C. Cir. July 7, 2023), involved a common-law conspiracy claim. Citing *Halberstam* and *Bernhardt*, the D.C. Circuit affirmed dismissal of claims against BNP Paribas because the bank conspired to violate U.S. sanctions on Sudan but did not conspire with the Sudanese government or al-Qaeda to commit the terrorist attacks that injured the plaintiffs. *Id.* at *3.

Finally, Petitioners are wrong on the merits. As we explain in detail below (at 20-25, 25-29), the Second Circuit's holdings are fully consistent with *Halberstam*.

In sum, Petitioners have failed to identify any conflict with the Second Circuit's decision warranting this Court's review. The Court should deny the petition on this basis alone.[4]

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[4] Petitioners suggest that the Second Circuit has "a near," but admittedly "not perfect," "monopoly on the interpretation and use of" JASTA, and claim that the Court should grant review now because a circuit conflict is unlikely to develop. Pet. 29. *Bernhardt* and *Gonzalez* make clear that JASTA claims are filed in, and decided by, other circuits. Petitioners' problem is not that other courts lack opportunities to construe JASTA but rather that the Second Circuit's interpretation accords with that of other courts of appeals. Petitioners' reference to claims under the Patent Act (Pet. 29 n.15) is therefore wholly inapposite: All patent appeals are adjudicated by the Federal Circuit, but JASTA claims can be, and are, resolved by many courts of appeals.

II. The Decision Below Is Correct.

The Second Circuit correctly rejected Petitioners' attempt to expand conspiracy liability beyond the limits Congress specified in JASTA. And the court of appeals correctly concluded that Petitioners' claims suffer from two independent flaws. This Court would have to overturn both of the court of appeals' determinations in order to reverse the judgment below.

A. Petitioners Fail To Allege A Conspiracy That Includes Respondents And The Terrorist Attackers.

Conspiracy requires an "agreement with the primary wrongdoer to commit wrongful acts." *Twitter*, 143 S. Ct. at 1221. Longstanding common law principles—principles expressly recognized in *Halberstam*—hold that, to allege the requisite agreement, a plaintiff must, among other things, plausibly allege that the claimed conspirators agreed upon a common object. Because Petitioners do not allege that Respondents and the terrorist attackers had *any* common goal, Respondents and the attackers could not be coconspirators, and Respondents therefore cannot be held liable for acts of international terrorism committed by members of a terrorist conspiracy that they did not agree to join.

1. Legal Standard. *Halberstam* states that conspiracy liability requires "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner." *Halberstam*, 705 F.2d at 477. To establish an agreement, a plaintiff must plausibly allege that coconspirators share a "common scheme"—agree to "pursue[] the same object." *Id.* at 477, 480; see also *id.* at 481 (explaining that courts "must initially look to

see if the alleged joint tortfeasors are pursuing the same goal"). The common, agreed-upon object also must be "unlawful." *Id.* at 477.

Applying *Halberstam*, the Second Circuit correctly stated the standard for conspiracy liability: "[U]nless at least two persons have a *shared* purpose or stake in the promotion of an illegal objective, there is no conspiracy." Pet. App. 26a (internal quotation marks omitted). And the Second Circuit supported its conclusion with citations to *Halberstam* and to other civil conspiracy cases. See Pet. App. 25a-26a (citing cases).

Petitioners attempt to avoid this straightforward conclusion with several arguments that either misconstrue JASTA's statutory text or misread *Halberstam*. None has any merit.

First, Petitioners are wrong in asserting (Pet. 19) that the court of appeals required allegations that Respondents intended to commit terrorist acts. Like *Halberstam*, and the common law generally, the court required allegations plausibly supporting an inference that Respondents and the terrorist attackers shared a common object—it did not require allegations that Respondents themselves intended to commit those acts. Pet. App. 26a-27a.

Second, Petitioners argue that JASTA's plain text does not require a common intent among the coconspirators to commit an act of terrorism. Pet. 19-20. That is wrong: The statutory text provides that the defendant must "conspire[] with the person who committed" the underlying act of international terrorism, 18 U.S.C. § 2333(d)(2), and it points to the common law principles recognized in *Halberstam* as

the "legal framework" for the cause of action, 18 U.S.C. § 2333 note.

As this Court recently explained, because the statute does not define this critical term, courts must "generally presume that such common-law terms 'brin[g] the old soil' with them." *Twitter*, 143 S. Ct. at 1218 (quoting *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (alterations in original)). And *Halberstam* and the Second Circuit amply explain that the common law required proof of a common object to find a conspiratorial agreement.[5]

Third, Petitioners invoke JASTA's purpose declaration, which states that the statute is aimed at those who provide "direct[] or indirect[]" support to terrorists. Pet. 20. However, a statutory "purpose" cannot expand secondary liability beyond the statutory text. See *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1086 (2019) (statements of purpose "by their nature 'cannot override [a statute's] operative language") (quoting Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)); *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1635 n.2 (2017) (same). In addition, to the extent Congress meant this language to refer to the scope of relief—which is far from clear[6]—any objective of providing "direct[] or

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[5] Petitioners assert (Pet. 22-23) that conspirators need not share all of the same goals. But here the Second Circuit correctly found, based on the complaint's allegations, that Respondents and the terrorist attackers did not share *any* goals. See pp. 24-25, *infra*.

[6] The "directly or indirectly" language in JASTA's "purpose" provision is immediately preceded by statutory findings regarding U.S. courts' exercise of personal jurisdiction, which similarly refer to the provision of "material support or resources, directly or indirectly" (see Pub. L. No. 114-222, § 2(a)(6) & (7),

indirect[]" relief is achieved through JASTA's creation of secondary liability. JASTA supplemented the already-existing "direct" ATA liability for those who themselves commit acts of international terrorism, with "indirect" liability based on conspiracy and aiding and abetting, under circumstances that do not apply here, for those who do not themselves commit acts of international terrorism.

Fourth, Petitioners attempt to analogize their claim to statutes criminalizing the provision of material support to terrorists, and contend that neither statute requires any intent to commit acts of terrorism. Pet. 20-21 (citing 18 U.S.C. §§ 2339A, 2339B). Those statutes do not aid Petitioners. To begin with, a conspiracy claim based on the material support laws requires plausible allegations of an agreement, which in turn requires that the alleged conspirators had a common object. That is what the complaint here lacks.

In addition, the material support statutes create liability for a broader scope of conduct than JASTA—namely, conspiring to provide support to terrorists or foreign terrorist organizations. *United States* v. *Hassan*, 742 F.3d 104, 140 (4th Cir. 2014) (listing

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130 Stat. at 852-53)—making clear that the phrase refers not to the scope of liability, but rather to U.S. courts' exercise of personal jurisdiction over foreign persons accused of terrorism. (Of course, Congress cannot override the due process limits on personal jurisdiction, and findings and purposes do not even have the force of law.) In addition, the separate finding addressing the scope of secondary liability references only the *Halberstam* decision (*id.* § (2)(a)(5), 130 Stat. at 852), and the subsequent statements regarding direct or indirect provision of material support (*id.* § (2)(a)(6)-(7), 130 Stat. at 852-53) cannot, and do not, displace the liability standards set forth in *Halberstam*.

elements for 18 U.S.C. § 2339A(a)); *United States* v. *Dhirane*, 896 F.3d 295, 303 (4th Cir. 2018) (listing elements for 18 U.S.C. § 2339B(a)(1)). If Congress had intended for anyone who helps a terrorist organization in any way to be civilly liable for conspiracy under JASTA—which in any event is not alleged here—it could have included text paralleling those criminal statutes. But Congress did not include that language in JASTA.

Fifth, Petitioners argue that, under *Halberstam*, defendants may be held liable under JASTA for agreeing to unlawful acts from which terrorist attacks are a "foreseeable risk." Pet. 21. But that contention (which is incorrect, as discussed below (at 26-29)), has nothing to do with the requirement of a common object, which is necessary to establish the agreement that justifies holding conspirators liable for each other's acts. That requirement was satisfied in *Halberstam* because the defendant and the principal (her cohabitating boyfriend) "agreed to undertake an illegal enterprise to acquire stolen property." 705 F.2d at 487.

2. Application To Petitioners' Allegations. The Second Circuit correctly concluded that Petitioners' complaint fails to satisfy the bedrock requirement for alleging a JASTA conspiracy claim: the common object necessary to establish an agreement.

The court determined that Petitioners had alleged two distinct conspiracies. "As to the [Respondent] Banks, the Complaint states that they 'shared the common goal of providing Iran and the Iranian banks the ability to illegally transfer billions of dollars (undetected) through the United States.'" Pet. App. 26a (quoting C.A. App. 398 (SAC ¶ 344)) (alterations omitted). But as "to the terrorist groups, the

Complaint asserts that they 'actively engaged in planning and perpetrating the murder and maiming of hundreds of Americans in Iraq.'" *Ibid.* (quoting C.A. App. 403 (SAC ¶ 359)). Put another way, "[n]owhere in the Complaint * * * do Plaintiffs plead that the Banks intended to kill or injure U.S. service members in Iraq, or that the terrorist groups agreed to help the Banks and Iranian entities evade U.S. sanctions." *Ibid.*

Because Petitioners failed to allege that Respondents and the terrorist attackers shared any "common pursuit," *Halberstam*, 705 F.2d at 481, the Second Circuit correctly held that there was no agreement that could give rise to conspiracy liability, Pet. App. 26a.

B. Petitioners Fail To Allege That Their Injuries Were Caused By An Overt Act In Furtherance Of A Conspiracy That Included Respondents.

The Second Circuit also correctly concluded that Petitioners' conspiracy claims fail because the overt acts that caused Petitioners' injuries—the "acts of international terrorism" committed by the Iraqi Shia militias—were not committed "in furtherance of" the banking conspiracy that the complaint alleges Respondents joined, and therefore cannot be imputed to Respondents.

1. Legal Standard. *Halberstam* states that a plaintiff must prove that the overt act causing the plaintiff's injury "was done pursuant to and in furtherance of the common scheme." 705 F.2d at 477. Thus,

> once the conspiracy has been formed, all its members are liable for injuries caused by acts *pursuant to or in furtherance of*

> *the conspiracy*. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action, * * * *so long as the purpose of the tortious action was to advance the overall object of the conspiracy.*

Id. at 481 (emphases added).

The essential nature of this inquiry is clear from *Halberstam*'s analysis. The question there was whether a murder committed by the principal was in furtherance of the parties' burglary conspiracy, so that the murder could be imputed to a coconspirator. 705 F.2d at 487. Because "Welch was trying to further the conspiracy by escaping after an attempted burglary, and he killed Halberstam in his attempt to do so," his coconspirator was subject to liability for the murder. *Ibid.*

Thus, the Second Circuit held that "[u]nder *Halberstam*, a plaintiff asserting a civil conspiracy claim must adequately plead that their injuries were caused by 'an unlawful overt act' done 'in furtherance of the [coconspirators'] common scheme.'" Pet. App. 27a (quoting *Halberstam*, 705 F.2d at 477). Further, the court explained that this requirement "is grounded in the very core of conspiracy liability, which is 'an *agreement* between the defendant and the primary wrongdoer to commit a wrong.'" Pet. App. 30a (quoting Restatement (Third) of Torts: Liability for Economic Harm § 27 (Am. L. Inst. 2020)).

Petitioners try to avoid this well-settled rule of conspiracy liability by pointing (Pet. 24-25) to the statement in *Halberstam* that a coconspirator may be

held "liable for acts pursuant to, in furtherance of, or within the scope of the conspiracy." 705 F.2d at 484. They argue (Pet. 25) that this standard subjects conspirators to liability for any foreseeable harm. That is wrong.

Petitioners pluck out of context a single reference to "foreseeability" in *Halberstam*'s discussion of aiding-and-abetting liability. See Pet. 25 (quoting 705 F.2d at 484-85). That statement has no bearing on the scope of conspiracy liability.

Moreover, in the section of the *Halberstam* opinion actually applying the relevant conspiracy principles to the facts of the case, the court expressly affirmed that the plaintiff must allege injury by an overt act in furtherance of the conspiracy that the defendant joined:

- "a conspiracy requires: an agreement to do an unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act," 705 F.2d at 487;
- "[t]he only remaining issue, then, is whether Welch's killing of Halberstam during a burglary was an overt act in furtherance of the agreement. We believe it was," *ibid.*;
- "a conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy," *ibid.*;
- "Welch was trying to further the conspiracy by escaping after an attempted burglary, and he killed Halberstam in his attempt to do so," *ibid.*

The court then summarized its conclusion by stating "[i]n sum, the district court's findings that Hamilton agreed to participate in an unlawful course of action and that Welch's murder of Halberstam was a reasonably foreseeable consequence of the scheme are a sufficient basis for imposing tort liability." 705 F.2d at 487.

Petitioners take the latter statement out of context and claim it supports their foreseeability argument. But the context makes clear that the court was not disclaiming all of its prior analysis and instead adopting a "foreseeability" test. It simply was summarizing its prior determinations, which rested entirely on the "overt act in furtherance standard," and holding that the totality of the conduct in *Halberstam* sufficed for liability. The court certainly did not rule that liability could be imposed based on "foreseeability" alone where the acts injuring the plaintiffs were not in furtherance of a common scheme that the defendants joined. As the Second Circuit concluded, "[t]o hold a defendant liable for a coconspirator's actions merely because they are foreseeable—even though wholly detached from the shared conspiratorial plan—would stretch the concept of civil conspiracy too far beyond its origin." Pet App. 31a.

Petitioners' foreseeability argument therefore rests entirely on the very analysis that this Court rejected in *Twitter*: "too rigidly focus[ing] on *Halberstam*'s facts or its exact phraseology." *Twitter*, 143 S. Ct. at 1223. That "miss[es] the mark" because the proper focus is the common-law principles that *Halberstam* applied, rather than "the precise formulations that *Halberstam* used." *Ibid.* And *Halberstam*'s whole discussion of the scope of conspiracy liability, as well as the analysis of the court below (Pet. App. 30a-

31a), make clear that the common law requires a plaintiff to show that the overt act injuring the plaintiff was in furtherance of the conspiracy including the defendant.

2. Application To Petitioners' Allegations. Both courts below correctly concluded that the complaint fails to allege that the overt acts that injured Petitioners were in furtherance of the conspiracy that Respondents allegedly joined.

As the Second Circuit recognized, "the Complaint defines 'the Conspiracy' as 'six Western international banks knowingly conspiring with Iran and its banking agents to evade U.S. economic sanctions, conduct illicit trade-finance transactions, and disguise financial payments to and from U.S. dollar-denominated accounts.'" Pet. App. 27a (quoting C.A. App. 335 (SAC ¶ 6)) (alterations omitted). Petitioners further allege that they were injured by 92 terrorist attacks carried out by Iraqi Shia militias. *Ibid.*

But Petitioners fail to allege any facts plausibly demonstrating that these terror attacks furthered Respondents' alleged sanctions-evasion conspiracy. Indeed, "the Complaint alleges only that 'the Conspiracy was a significant factor in the chain of events leading to Plaintiffs' deaths and injuries.'" Pet. App. 27a (quoting C.A. App. 402 (SAC ¶ 360)) (alterations omitted).

The Second Circuit therefore correctly affirmed the dismissal of Petitioners' conspiracy claims on this second, independent ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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