No. 23-18

# In the Supreme Court of the United States

DANA MARIE BERNHARDT, 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 District of Columbia Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION


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## QUESTIONS PRESENTED

Petitioners allege an aiding-and-abetting claim under the Justice Against Sponsors of Terrorism Act (JASTA), which provides that "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 questions presented are:

1. Whether Petitioners plausibly alleged that HSBC entities aided and abetted al-Qaeda's 2009 terrorist attack on a CIA base in Afghanistan by providing banking services to three commercial banks that allegedly have customers with ties to terror financing.

2. Whether non-U.S. Respondents HSBC Holdings plc and HSBC Bank plc are subject to personal jurisdiction in connection with a JASTA aiding-and-abetting claim arising from a 2009 terrorist attack in Afghanistan perpetrated by al-Qaeda, where these Respondents generally are alleged to have engaged in transactions with other commercial banks in violation of U.S. economic sanctions on Iran.

## 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 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 North America Holdings Inc. is not a publicly held company and is indirectly owned by HSBC Holdings plc. 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.

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# BRIEF FOR RESPONDENTS IN OPPOSITION

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 47 F.4th 856. The memorandum and order of the district court as to Iran (Pet. App. 49a-98a), dated March 22, 2023, is unreported. The memorandum and order of the district court as to the HSBC defendants (Pet. App. 99a-121a), dated November 16, 2020, is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on September 6, 2022, and a petition for rehearing was denied on February 2, 2023. On April 25, 2023, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including July 2, 2023, and the petition was filed on July 3, 2023 (July 2 was a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Petitioners are the estates and relatives of two U.S. contractors killed in a 2009 suicide bombing at a secret CIA base in Afghanistan by an individual with ties to the terrorist group al-Qaeda. Respondents are four affiliated HSBC entities: (1) a U.S. bank, HSBC Bank USA N.A. (HSBC Bank USA); (2) its U.S. corporate parent, HSBC North America Holdings Inc. (HSBC North America); (3) a U.K. affiliate, HSBC Bank plc (HSBC Europe); and (4) the entities' U.K.

ultimate corporate parent, HSBC Holdings plc (HSBC Holdings).[1]

Petitioners do not allege that Respondents took part in the terrorist attack in Afghanistan. Nor do they allege that Respondents provided services of any kind to al-Qaeda or to the suicide bomber. Rather, Petitioners allege that Respondents provided or facilitated bank-to-bank services to three other commercial banks, sometimes in contravention of a U.S. economic sanctions regime, with "reckless indifference" to the fact that some customers of those three other banks had ties to terrorist financing and provided support, generally, to terrorist organizations, including al-Qaeda.

On the basis of these allegations, Petitioners sued Respondents, asserting an aiding-and-abetting claim under the secondary liability provision of the Anti-Terrorism Act (ATA), 18 U.S.C. 2333(d)(2).[2]

Respondents strongly condemn all acts of terrorism and believe that those who commit such horrific acts, and those who participate in them, should be brought to justice and required to compensate their victims. Here, the D.C. Circuit, like the district court before it, concluded that the complaint does not plausibly support the inferences required to state an aiding-and-abetting claim. That conclusion is correct, does not conflict with the decision of any other court of appeals, and does not otherwise warrant review.

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[1] Petitioners asserted separate claims against the Islamic Republic of Iran under the Foreign Sovereign Immunities Act, but Iran has never appeared in these proceedings.

[2] Petitioners also asserted an ATA conspiracy claim, but they have not sought review of the dismissal of that claim.

Petitioners' principal argument is that this Court's decision in *Twitter* v. *Taamneh*, 598 U.S. 471 (2023), warrants a grant of plenary review here, so this Court can apply its *Twitter* holding to the allegations in this case. But that makes no sense—this Court does not grant review in order to apply settled legal principles, especially when those principles were addressed in a merits decision issued less than four months ago.

Neither is there any basis for requiring the D.C. Circuit to reconsider its decision in light of *Twitter*, for multiple reasons.

The D.C. Circuit held that Petitioners failed to plausibly allege two required elements of an aiding-and-abetting claim—that "'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 that "'the defendant must knowingly and substantially assist the principal violation.'" *Twitter*, 598 U.S. at 486 (quoting *Halberstam* v. *Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

This Court in *Twitter* addressed only the "knowingly and substantially assist" element, and Petitioners provide no reason why this Court should require reconsideration of the D.C. Circuit's separate holding that Petitioners failed to satisfy the "general awareness" element. Because Petitioners' failure to plausibly plead "general awareness" is, by itself, fatal to their aiding-and-abetting claim, there is no basis for requiring the D.C. Circuit to revisit its aiding-and-abetting holding. Nothing in *Twitter* requires, or even remotely supports, reconsideration of that determination.

Moreover, with respect to the separate "knowingly and substantially assist" element, *Twitter* articulated a pleading standard more demanding than the one applied by the D.C. Circuit, concluding that the Ninth Circuit had erred by upholding the aiding-and-abetting claim asserted in that case. Under such circumstances, the Court leaves in place rulings—like the D.C. Circuit's here—finding complaints *insufficient* to state a claim even under the more permissive standard.

In addition, *Twitter* confirms the correctness of the D.C. Circuit's ruling on the "knowingly and substantially assist" element. This Court held that "knowingly providing substantial assistance" requires proof that the "defendants gave substantial assistance * * * with respect to the * * * attack" that injured the plaintiff, 598 U.S. at 503, and that the defendant must have engaged in "truly culpable conduct" to be liable as an aider and abettor, *id.* at 489. Petitioners' complaint fails to allege facts supporting a plausible inference satisfying either requirement.

Finally, although hardly relevant given this Court's intervening decision in *Twitter*, Petitioners are wrong in claiming a pre-*Twitter* conflict between the decision below and rulings by other courts of appeals. For all of these reasons, review of the aiding-and-abetting determination should be denied.

The court of appeals also correctly applied this Court's decision in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), in holding that Petitioners failed to plausibly allege that their injuries "arose out of or related to" the non-U.S. Respondents' alleged contacts with the United States. Petitioners do not assert a conflict with any other appellate decision, but argue only that the lower court

erred based on the allegations here. Moreover, the personal jurisdiction ruling lacks independent significance: the court of appeals' determination that Petitioners failed to state an aiding-and-abetting claim disposes of that claim with respect to all Respondents.

For all of these reasons, the petition should be denied.

### A. Statutory Background.

Congress enacted the ATA in 1992, creating a private cause of action for injuries to U.S. citizens proximately 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 and aiding and abetting. See *Twitter*, 598 U.S. at 483 (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 aids and abets, by knowingly providing substantial assistance" to "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*, 598 U.S. at 485.

To state a JASTA aiding-and-abetting claim under the common-law framework endorsed by *Halberstam*, the plaintiff must allege that (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.'" *Twitter*, 598 U.S. at 486 (quoting *Halberstam*, 705 F.2d at 477).

**B. Petitioners' Claim.**

This action arises from the 2009 suicide bombing by an al-Qaeda operative of a secret CIA base in Afghanistan known as "Camp Chapman." C.A. App. 15, 17 (First Amended Complaint (FAC) ¶¶ 1-10, 22). Petitioners are the estates, relatives, and friends of Jeremy Wise and Dane Paresi—two security contractors killed in the attack.

Respondents are four affiliated, yet separate, financial services entities. Petitioners largely lump these entities together, but each is a distinct corporate entity with a different identity and function.

HSBC Holdings is a United Kingdom bank holding company with its principal place of business in London. Pet. App. 101a. HSBC Holdings is not

incorporated in any U.S. state and has no U.S. representative offices, direct subsidiaries, or branches. Pet. App. 106a. HSBC Holdings is the indirect corporate parent of the other Respondents. Pet. App. 101a.

HSBC Europe is a financial institution organized under the laws of England and Wales and headquartered in London. Pet. App. 101a. Like HSBC Holdings, HSBC Europe is not incorporated in any U.S. state and has no U.S. representative offices, direct subsidiaries, or branches. Pet. App. 106a.

HSBC North America, principally located in New York City, is a holding company for Respondents' U.S.-based operations. Pet. App. 101a. HSBC North America is the indirect corporate parent of HSBC Bank USA, which is a nationally chartered bank headquartered in New York City. *Ibid.*; C.A. App. 16 (FAC ¶¶ 14-15).

Petitioners allege that the 2009 Camp Chapman bombing was committed by an individual named Humam Khalil al-Balawi. C.A. App. 17 (FAC ¶ 22). According to the complaint, the U.S. Central Intelligence Agency and Jordanian intelligence thought Balawi was working with them as a double agent, having infiltrated al-Qaeda's leadership in Northern Pakistan. C.A. App. 18 (FAC ¶ 24). Unbeknownst to the CIA, Balawi was in fact a triple agent—with actual loyalty to al-Qaeda—who, according to Petitioners, conspired with al-Qaeda to carry out the mission to bomb Camp Chapman. C.A. App. 18 (FAC ¶ 25).

Petitioners do not allege that Respondents provided financial services to Balawi or to al-Qaeda, or even to the government of Iran. Instead, they base their claims on allegations that Respondents provided banking services to three commercial banks: two

Iranian banks (Bank Melli and Bank Saderat) and one Saudi Arabian bank (Al Rajhi Bank).

With respect to Bank Melli and Bank Saderat, Petitioners allege generally that Respondents engaged in the practice of payment "stripping"—the removal of references to a sanctioned country or entity from a payment message to avoid regulatory scrutiny and resulting delay. C.A. App. 19 (FAC ¶ 32). Petitioners rely on a 2012 Deferred Prosecution Agreement that HSBC Holdings and HSBC Bank USA entered with the U.S. Department of Justice detailing various regulatory and compliance shortfalls within the relevant entities, including the stripping of payment messages involving Iranian transaction parties. C.A. App. 20-21 (FAC ¶ 37).

Petitioners separately allege that Respondents provided banking services to Al Rajhi Bank, a large Saudi Arabian bank. Petitioners do not allege that Respondents "stripped" any of that bank's transactions, or even that the bank was a sanctioned entity. Rather, they allege that the Saudi bank was "known to be connected with the same terrorist financing network" as the other intermediary banks. C.A. App. 20 (FAC ¶ 35).

Petitioners assert that "[b]y knowingly and intentionally providing material support and resources to enable and assist al-Qaeda * * * in carrying out international acts of terror, including the Camp Chapman attack, Iran is liable for the deaths of Jeremy Wise and Dane Paresi." C.A. App. 21 (FAC ¶ 40). Petitioners further allege that Respondents aided and abetted the Camp Chapman attack by providing banking services to Bank Melli and Bank Saderat (and thus, allegedly, to Iran) and to Al Rajhi Bank, which in turn provided support to al-Qaeda, which in turn provided

support to the actual attacker, Balawi. C.A. App. 21-22 (FAC ¶ 41-43).

### C. Proceedings Below.

Petitioners instituted this action in 2018, first suing only Iran, pursuant to the terrorism exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A(c), alleging that Iran provided support and resources to al-Qaeda. Almost a year later, Petitioners amended their complaint to assert JASTA claims against Respondents. Respondents moved to dismiss the complaint for (1) lack of personal jurisdiction over the two non-U.S. Respondents; and (2) failure to state a claim as to any of the Respondents.

1. The district court granted the motion to dismiss in its entirety. Pet. App. 99a-121a. As to personal jurisdiction, the court applied Federal Rule of Civil Procedure 4(k)(2) and determined that the non-U.S. Respondents lacked "sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction." Pet. App. 106a. It explained that "even if [the two non-U.S. Respondents] purposefully directed their activities at the United States, [Petitioners] have not shown that their injuries arise out of or relate to those activities." *Ibid.*

In so holding, the court rejected as insufficient Petitioners' allegations that the two non-U.S. Respondents communicated with HSBC Bank USA about the alleged financial conspiracy and pressured or directed HSBC Bank USA to continue business with Al Rajhi Bank. Pet. App. 107a-108a. The court explained that Petitioners "simply do not explain how these alleged activities link up to al-Qaeda's suicide attack on Camp Chapman," Pet. App. 108a, and they therefore "failed to plead that their injuries caused by the suicide

attack * * * 'arose out of' or 'relate to' [the non-U.S. Respondents'] contacts with the United States," Pet. App. 110a.

With respect to aiding and abetting, the district court determined that Petitioners failed to allege two essential elements required to state that claim: (1) that Respondents were "generally aware" of their supposed role in al-Qaeda's terrorist activities; and (2) that Respondents "knowingly and substantially" assisted the bombing of Camp Chapman. Pet. App. 118a-119a.

2. The court of appeals affirmed. Pet. App. 1a-48a. Turning first to personal jurisdiction, the court recognized that the specific jurisdiction inquiry is governed by this Court's decision in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021).

Applying the standard set forth in *Ford*, the court concluded that Petitioners' allegations "do not * * * support an inference that the injuries from the Camp Chapman bombing arose out of or related to the [non-U.S. Respondents'] sanctions evasion." Pet. App. 11a. The court of appeals expressly acknowledged this Court's holding that "[b]ecause it is sufficient for the injuries to 'relate to' the defendant's activities, 'some relationships will support jurisdiction without a causal showing'" (Pet. App. 11a (quoting *Ford Motor Co.*, 141 S. Ct. at 1026)), but explained that Petitioners were "required to allege *some* relation between the sanctions evasion by the foreign defendants and the injuries suffered in the terrorist attack." Pet. App. 14a (emphasis added). Not requiring such an inference, the court reasoned, "would collapse the core distinction between general and specific personal jurisdiction." *Ibid.*

The court concluded that the complaint did not support a plausible inference of any sufficient relationship. Pet. App. 11a-15a.

The court of appeals also affirmed the district court's holding that Petitioners failed to state a JASTA aiding-and-abetting claim.

First, the court determined that Petitioners had failed to allege "a plausible inference of general awareness." Pet. App. 17a. It emphasized that Petitioners alleged "neither that [Respondents were] aware of [Bank Melli's and Bank Saderat's] connections to al-Qaeda nor that these banks were so closely intertwined with al-Qaeda to infer [Respondents'] general awareness." Pet. App. 19a.

Petitioners similarly failed to allege that Respondents were aware of Al Rajhi Bank's connections to al-Qaeda. Pet. App. 20a. Even if Respondents did have that knowledge, moreover, Petitioners did not "allege that those connections were so close that [Respondents] had to be aware [that they were] assuming a role in al-Qaeda's terrorist activities" because of Al Rajhi Bank's extensive legitimate operations. Pet. App. 21a.

Second, the court held that the aiding-and-abetting claim failed for the independent reason that Petitioners did not plausibly allege the "knowingly and substantially assist" element. The court began by observing that because Petitioners failed to allege general awareness, their "complaint also fails to allege knowing assistance," as "[a] defendant who lacks general awareness cannot be said to have knowingly assisted a foreign terrorist organization." Pet. App. 24a.

The court then addressed the six factors that *Halberstam* identified as relevant to determining

"substantial assistance." It concluded (among other things) that Petitioners had failed to "allege a connection between the [intermediary] banks and al-Qaeda sufficient to infer any relationship, much less a close one"; that it was unable to infer that Respondents had any "involvement with al-Qaeda before and leading up to the Camp Chapman bombing"; and that it could not infer that any alleged aid was substantial, given that the intermediary banks "are global financial institutions with legitimate operations and uncertain ties to al-Qaeda." Pet. App. 27a, 29a. The court of appeals ultimately held that "on balance" Petitioners had failed to "adequately plead that [Respondents] substantially assisted al-Qaeda's terrorist acts." Pet. App. 29a.

Judge Wilkins dissented from the court of appeals' personal jurisdiction and aiding-and-abetting holdings. As to personal jurisdiction, he would have held that Petitioners' "factual allegations are entitled to a reasonable inference that there is a sufficient relatedness between the [non-U.S. Respondents'] contacts with the United States and the Camp Chapman terrorist attack." Pet. App. 38a (Wilkins, J., dissenting). With respect to the aiding-and-abetting claim, Judge Wilkins relied on *Atchley* v. *AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), pet. for cert. pending, No. 23-9 (filed June 30, 2023), to conclude that Petitioners had satisfied the "general awareness" and "knowing and substantial assistance" elements of aiding and abetting. Pet. App. 39a-47a.

Petitioners sought rehearing *en banc* focusing on a claimed conflict with *Atchley*, and their petition was denied without dissent.

## REASONS FOR DENYING THE PETITION

Petitioners seek review of (1) the D.C. Circuit's conclusion that they failed to state a JASTA aiding-and-abetting claim; and (2) the court of appeals' holding that the non-U.S. Respondents are not subject to specific personal jurisdiction. Neither question warrants this Court's attention, and the petition should be denied.

### I. There Is No Reason For This Court To Review The Aiding-And-Abetting Holding.

The court of appeals held that Petitioners' aiding-and-abetting claim suffers from two independent defects. First, Petitioners failed to plausibly allege the "general awareness" element; second, they failed to plausibly allege the "knowingly and substantially assist" element.

Petitioners do not seriously challenge the "general awareness" determination. They do not argue that this Court's *Twitter* decision affects that determination—nor could they, because *Twitter* did not address the issue. 598 U.S. at 497-498. And they do not assert a lower-court conflict with respect to the proper standard for general awareness. Indeed, they barely mention the issue at all.

The D.C. Circuit's holding that Petitioners failed to plausibly allege the "general awareness" element is by itself fatal to their aiding-and-abetting claim. Because Petitioners provide no reason that the Court should review that aspect of the court of appeals' decision, the Court should deny review on that basis alone. Any decision by this Court addressing the separate "knowingly and substantially assist" element would not alter the D.C. Circuit's judgment—the aiding-and-abetting claim would still be deficient

because of Petitioners' failure to allege "general awareness."

Moreover, Petitioners' effort to obtain review of the lower court's ruling with respect to the aiding-and-abetting claim's "knowingly and substantially assist" element suffers from additional flaws.

The Court just addressed that standard comprehensively in its *Twitter* decision. There is no reason for the Court to grant plenary review with respect to the same substantive issue.

And there is no basis for remanding that aspect of the case for reconsideration by the D.C. Circuit in light of *Twitter*. The D.C. Circuit's judgment could not change given its holding that Petitioners failed to plausibly allege the "general awareness" element. In addition, *Twitter* set forth a more demanding standard for pleading the "knowingly and substantially assist" element than the test applied by the D.C. Circuit—Petitioners' allegations are even more clearly insufficient under *Twitter*'s standard. Finally, to the extent relevant, the ruling below does not conflict with any pre-*Twitter* decision of a court of appeals.

### A. The Court Of Appeals' Holding That The Complaint Fails To Adequately Allege General Awareness Independently Required Dismissal Of The Aiding-And-Abetting Claim.

This Court did not address the general awareness element of a JASTA aiding-and-abetting claim in *Twitter*, nothing in *Twitter* casts doubt on the D.C. Circuit's holding with respect to that issue, and Petitioners offer no reason why this Court should address the general awareness standard. Because the lower court's general awareness holding by itself requires

dismissal of Petitioners' aiding-and-abetting claim, review of that issue is not warranted.

This Court in *Twitter* recognized that a plaintiff must plausibly plead three elements to state a JASTA aiding-and-abetting claim:

> First, "the party whom the defendant aids must perform a wrongful act that causes an injury." Second, "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, third, "the defendant must knowingly and substantially assist the principal violation."

598 U.S. at 486 (quoting *Halberstam*, 705 F.2d at 477).

The court below held that in the context alleged here—a claim that the alleged aider and abettor provided services to intermediary entities alleged to have customers with ties to a terrorist group—general awareness turns on whether the complaint plausibly alleges that "(1) the defendant was aware of the intermediary's connection to the terrorist organization, and (2) the intermediary is 'so closely intertwined' with the terrorist organization's illegal activities as to give rise to an inference that the defendant was generally aware of its role in the organization's terrorist activities." Pet. App. 18a (quoting *Honickman* v. *BLOM Bank SAL*, 6 F.4th 487, 501 (2d Cir. 2021)).

Petitioners do not dispute the correctness of that legal standard. Nor do they argue that there is a conflict among the lower courts with respect to that standard—indeed, the court below expressly adopted the test applied by the Second Circuit.

Applying this standard, the D.C. Circuit carefully assessed Petitioners' allegations in holding that they failed to plausibly support the necessary inferences. Pet. App. 18a-23a.

The court concluded, first, that the complaint did not plausibly allege that Respondents were aware of connections between Bank Melli, Bank Saderat, and al-Qaeda. Rather, the "complaint focuses on the fact that these banks were on OFAC's list of sanctioned entities" as part of the U.S. sanctions on the government of Iran, and "are nationalized Iranian banks," but neither allegation "support[s] an inference that [Respondents] had general awareness it was playing a role in *al-Qaeda*'s terrorist acts." Pet. App. 19a.

With respect to Al Rajhi Bank, the D.C. Circuit held that the complaint alleges "only the possibility of a terrorist connection, say[s] nothing about al-Qaeda specifically, and focus[es] on conduct occurring years before the bombing." Pet. App. 20a-21a. And as to the "closely intertwined" requirement, the court observed that "Al Rajhi Bank has substantial operations and 'is one of the largest banks in Saudi Arabia, with more than 8,400 employees, 500 branches and assets totaling $59 billion.'" *Id.* at 21a (quoting C.A. App. 35 (FAC ¶ 111)). "Given the extensive legitimate operations of Al Rajhi Bank * * * and the absence of any allegation that a substantial part of these operations involved al-Qaeda," the court held that Petitioners had failed to allege that Respondents were "assuming a role in al-Qaeda's terrorist activities simply by doing business with Al Rajhi Bank." Pet. App. 21a-22a.

In his dissent, Judge Wilkins did not disagree with the legal standard applied by the majority. See Pet. App. 39a. Rather, he disagreed with the

majority's assessment of the complaint's allegations—whether the complaint plausibly alleged Respondents' awareness that the intermediary banks were connected to al-Qaeda and "so closely intertwined" with its terroristic activities that Respondents were generally aware of their own role in those activities. Pet. App. 39a-42a. That fact-bound issue does not warrant this Court's review and, in addition, the majority correctly held the allegations insufficient.

Petitioners' failure to plausibly allege the general awareness element by itself requires dismissal of the aiding-and-abetting claim. Their arguments about this Court's analysis in *Twitter*—which relate solely to the separate "knowingly and substantially assist" element—would not change the lower court's judgment even if they were correct (which they are not). For that reason alone, review of the aiding-and-abetting issue should be denied.

### B. *Twitter* Confirms The Correctness Of The Court Of Appeals' Holding That Petitioners Failed To Plausibly Allege The Knowing And Substantial Assistance Element—And Makes Clear That There is No Basis For Further Review.

*Twitter* comprehensively addressed the "knowingly and substantially assist" element. The Court set forth a detailed explanation of the standard that a plaintiff must satisfy to plausibly allege that element, and then applied that standard to the allegations in the *Twitter* complaint.

Given that decision less than four months ago, there is no basis for a grant of plenary review to address the very same issue here. This Court does not

sit to apply a settled standard to the allegations in particular cases.

Petitioners do not request that the Court grant the petition, vacate the judgment, and remand the case to the D.C. Circuit for reconsideration in light of *Twitter*—and for good reason.

To begin with, as just discussed, the D.C. Circuit's judgment independently rests on its holding that Petitioners failed to plausibly allege the general awareness element. Nothing in *Twitter* requires, or even remotely supports, reconsideration of that determination.

*Second*, *Twitter* recognized a pleading standard with respect to the "knowingly and substantially assists" element that is more demanding than the one applied by the D.C. Circuit, holding that the Ninth Circuit erred by upholding the aiding-and-abetting claim. In that situation, the Court vacates lower court rulings upholding complaints under the less demanding standard but leaves in place rulings holding complaints insufficient. Cf. *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010).

*Third*, *Twitter* confirms the correctness of the D.C. Circuit's holding. This Court held that "knowingly providing substantial assistance" requires proof that the "defendants gave substantial assistance * * * with respect to the * * * attack" that injured the plaintiff. 598 U.S. at 503. And that the defendant must have engaged in "truly culpable conduct." *Id*. at 489. Petitioners' complaint fails to allege facts supporting a plausible inference satisfying either requirement.

*Fourth*, although hardly relevant given this Court's intervening decision in *Twitter*, Petitioners are wrong in claiming any pre-*Twitter* conflict

between the decision below and rulings by other courts of appeals. For all of these reasons, the petition should be denied.[3]

*1. The allegations do not support a plausible inference of a nexus between the alleged assistance and the terrorist act.*

Addressing "what precisely must the defendant have 'aided and abetted,'" 598 U.S. at 484, this Court held in *Twitter* that the defendant must "have aided and abetted the act of international terrorism that injured the plaintiff[]," *id.* at 497. That requires a "nexus between the alleged assistance and the terrorist act." *Ibid.* "The focus must remain on assistance to the tort for which the plaintiffs seek to impose liability." *Id.* at 506.

Petitioners' complaint contains no allegations supporting a plausible inference of any connection

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[3] This case is fundamentally different from *Atchley v. AstraZeneca UK, Ltd.*, 22 F.4th 204 (D.C. Cir. 2022), pet. for cert. pending, No. 23-9 (filed June 30, 2023). There, the D.C. Circuit upheld the complaint—and its conclusion that the plaintiffs there satisfied the "knowingly providing substantial assistance" element was essential to the court's ruling. Here, by contrast, the complaint's dismissal can rest entirely on the court of appeals' independent conclusion that the allegations failed to satisfy the separate general awareness element. In addition, as discussed below (at 19-25), *Twitter* announced a more demanding standard for the knowing and substantial assistance element than the test applied by the court below, and this Court's decision therefore provides no basis for disturbing the D.C. Circuit's holding that the complaint failed under its less demanding test. Because *Atchley*—applying the pre-*Twitter* standard—held that the complaint there *did* plausibly allege knowing and substantial assistance, it is appropriate to require the court of appeals to reconsider that decision under *Twitter*'s more demanding test.

between the alleged assistance—the provision of banking services to other commercial banks (see Pet. 14-19)—and the Camp Chapman attack. Indeed, there are no allegations at all regarding any such connection.

Rather, the complaint alleges only indirect and generalized assistance to al-Qaeda. That is precisely what this Court held insufficient in *Twitter*, expressly rejecting the Ninth Circuit's "fram[ing of] the issue of substantial assistance as turning on defendants' assistance to ISIS' activities in general." 598 U.S. at 503.

The D.C. Circuit did not address the nexus issue expressly—because its decision pre-dated *Twitter*. But the court of appeals' discussion of *Halberstam*'s substantiality factors confirms the complaint's failure to allege any nexus between the alleged assistance and the attack that injured Petitioners.

For example, in considering "the amount and kind of assistance given," the court of appeals observed that although Petitioners allege that Respondents "facilitated over $19 billion in transactions with Iranian institutions and provided almost $1 billion in currency sales to Al Rajhi Bank," the complaint is otherwise devoid of any allegation about "how much (if any) of that money indirectly flowed to al-Qaeda." Pet. App. 26a. Petitioners therefore failed to allege a sufficiently close nexus between Respondent's conduct and the terrorist attack to permit a "reasonabl[e] infer[ence] that [Respondents] provided any aid to al-Qaeda." *Ibid.*

And with respect to the third substantiality factor (the defendant's presence or absence at the time of the tort), the court of appeals held that it was "unable to infer from [Petitioners'] complaint any [Respondent's]

involvement with al-Qaeda before and leading up to the Camp Chapman bombing." Pet. App. 27a.

For the same reasons, the complaint's allegations do not come anywhere close to supporting a plausible inference "that defendants so systemically and pervasively assisted [a terrorist group] that defendants could be said to aid and abet every single * * * attack." 598 U.S. at 501. "[I]f a plaintiff's theory would hold a defendant liable for all the torts of an enterprise, then a showing of pervasive and systemic aid is required to ensure that defendants actually aided and abetted each tort of that enterprise." *Id.* at 506. That would require allegations supporting an elevated level of culpability, akin to the agreement required to establish conspiracy liability. *Id.* at 496; see also *id.* at 502 (claims failed where plaintiffs failed to allege that "defendants and ISIS formed a near-common enterprise" or "intentionally associated themselves with ISIS' operations"); *id.* at 505.

Indeed, the court of appeals concluded that the complaint "does not allege a connection between the foreign banks and al-Qaeda sufficient to infer any relationship, much less a close one, between HSBC and al-Qaeda." Pet. App. 27a.

In sum, the complaint fails completely to satisfy the nexus requirement specified in *Twitter*.

*2. The allegations do not support a plausible inference that Respondents "consciously, voluntarily, and culpably participate[d] in" the terrorist attack that injured Petitioners.*

*Twitter* held, unanimously, that JASTA requires a plaintiff asserting an aiding-and-abetting claim to plausibly allege that the defendant "consciously,

voluntarily, and culpably participate[d] in" the terrorist attack at issue in the case "so as to help 'make it succeed,'" rejecting the Ninth Circuit's significantly more lenient pleading standard. 598 U.S. at 493, 505 (citation omitted); see also *id.* at 1221 ("[C]ourts have long recognized the need to cabin aiding-and-abetting liability to *truly culpable conduct")* (emphasis added).

That demanding standard requires the defendant's actions to "'have been calculated and intended to produce'" the tort, or alternatively, allegations supporting a plausible inference of "some 'culpable conduct' and 'some degree of knowledge that [the defendant's] actions are aiding the primary violator.'" 598 U.S. at 491 (citations omitted).

Here, the court below concluded that the complaint failed to "plausibly allege HSBC was generally aware that its financial dealings with intermediary banks supported al-Qaeda's terrorist acts." Pet. App. 18a; see generally Pet. App. 19a-23a. There accordingly is no basis for finding plausible allegations of the "truly culpable conduct" that *Twitter* requires.

The D.C. Circuit's pre-*Twitter* analysis of the *Halberstam* substantiality factors further confirms that the complaint lacks plausible allegations that Respondents consciously, voluntarily, and culpably participated in the 2009 Camp Chapman bombing, so as to help make it succeed.

With respect to the fourth substantiality factor (the defendant's relationship to the tortious actor), the court held that Petitioners "do[] not allege a connection between the [intermediary] banks and al-Qaeda sufficient to infer any relationship, much less a close

one, between [Respondents] and al-Qaeda." Pet. App. 27a.

The court of appeals went on to explain that the fifth substantiality factor (defendant's state of mind) "more powerfully supports aiding-and-abetting liability of defendants who share the same goals as the principal or specifically intend the principal's tort." Pet. App. 28a (quoting *Atchley* v. *AstraZeneca UK Ltd.*, 22 F.4th 204, 223 (D.C. Cir. 2022)). But, the court explained, the complaint does not allege that Respondents intended to assist the Camp Chapman bombing or had any interest in al-Qaeda's terrorist ventures succeeding. Instead, as the court of appeals concluded, Petitioners failed even "to allege that HSBC provided knowing assistance or was generally aware that acts of terrorism were the foreseeable result of its actions." Pet. App. 28a.

The D.C. Circuit's conclusion is thus consistent with, and indeed required by, *Twitter*'s teachings as to the knowing and substantial assistance element, and the "conceptual core that has animated aiding-and-abetting liability for centuries: that the defendant consciously and culpably 'participate[d]' in the wrongful act so as to help 'make it succeed.'" 598 U.S. at 493 (quoting *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949)).

Petitioners acknowledge *Twitter*'s holding that to state an aiding-and-abetting claim, a plaintiff must plausibly allege that the defendant engaged in culpable conduct. See Pet. 12. But they ignore the court of appeals' determinations regarding the inadequacy of the complaint here, as well as this Court's instruction that cases (like this one) involving "remote support" for the primary violator require a heightened degree

of scienter "before a court could infer conscious and culpable assistance." 598 U.S. at 492, 496.

Holding Respondents liable here would mean that "virtually any bank that violates U.S. sanctions against an entity with some ties to terrorism will be liable . . . for any subsequent acts of terrorism." Pet. App. 23a. *Twitter* squarely rejects such "boundless" liability. 598 U.S. at 488.

Indeed, courts of appeals have unanimously rejected claims, like the one here, that seek to impose secondary liability based on sanctions violations in connection with bank defendants' provision of services to other banks. *Siegel* v. *HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 224 (2d Cir. 2019); *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 395 (7th Cir. 2018); see also *Freeman* v. *HSBC Holdings PLC*, 57 F.4th 66, 80 (2d Cir. 2023) (JASTA conspiracy claim); *Ofisi* v. *BNP Paribas, S.A.*, No. 22-7083, 2023 WL 4378213, at *3 (D.C. Cir. July 7, 2023) (common law conspiracy claim).[4]

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[4] Petitioners assert (at 22) that Respondents' "know your customer" (KYC) obligations conferred the requisite scienter to state an aiding-and-abetting claim. But courts consistently refuse to infer knowledge of customers' wrongdoing based on allegations relying on KYC standards. *E.g., Berman* v. *Morgan Keegan & Co.,* 455 F. App'x 92, 95-96 (2d Cir. 2012) (broker's "'Know Your Customer' obligations are, standing alone, far from sufficient to support a strong inference that it had actual knowledge of * * * fraud" where plaintiffs failed to "identify any particular monitoring obligation"); *PLB Invs. LLC* v. *Heartland Bank & Tr. Co.*, No. 20 C 1023, 2021 WL 492901, at *5, *9 (N.D. Ill. Feb. 9, 2021) (holding that defendant banks' "discharge of their know your customer, BSA, and due diligence duties . . . do[es] not allow the Court to infer that PNC and Heartland had actual knowledge of the fraud.").

In sum, the complaint is devoid of any allegation that Respondents "culpably 'associate[d themselves] with'" the Camp Chapman attack, "'participate[d] in it as something that [they] wishe[d] to bring about,' or sought 'by [their] action to make it succeed.'" *Twitter*, 598 U.S. at 498 (quoting *Nye & Nissen*, 336 U.S. at 619).

*3. There was no pre-*Twitter *circuit conflict.*

Petitioners assert (at 18-19) that certiorari is warranted because the D.C. Circuit's decision conflicts with the Second Circuit's pre-*Twitter* decision in *Kaplan* v. *Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021). Even if a pre-*Twitter* lower court conflict were relevant, and it is not, the facts presented in *Kaplan* are entirely unlike Petitioners' allegations here.

In *Kaplan*, the plaintiffs asserted that the defendant bank aided and abetted Hezbollah, an international terrorist organization, in carrying out rocket attacks on civilians. The complaint alleged that the bank provided services to customers that it knew were

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More fundamentally, a defendant's knowledge of a customer's connections to a terrorist group, whether learned from KYC standards or otherwise, is insufficient—as this Court made clear in *Twitter*. There, the Court credited allegations that the social-media defendants knew that ISIS users were on their platforms, "knew that ISIS was uploading [terrorist] content" to those platforms, and "knew they were playing some sort of role in ISIS' enterprise." 598 U.S. at 497-498. But that was not enough to plausibly allege that the defendants consciously, voluntarily, and culpably participated in the terrorist attack that injured the plaintiffs. What is required—as already discussed (at 22)—are allegations supporting a plausible inference that the defendant knew that *its* actions were supporting the terrorist attack that injured the plaintiff.

Hezbollah affiliates because Hezbollah itself had publicized that information—and because the bank had publicly attacked (and therefore was aware of) a U.N. report stating that one of the customers was laundering money for Hezbollah. 999 F.3d at 849-50, 860, 862, 865-66.

Additionally, the complaint alleged that the bank's "provision of banking services" to the Hezbollah affiliates was not "routine" and that the bank had "disregarded its own internal policies in order to grant its known Hezbollah-affiliated Customers 'special exceptions' that permitted those Customers to deposit hundreds of thousands of dollars a day without complying with the requirement that the source of funds be disclosed." *Id.* at 858. The court therefore held that the bank "knowingly gave the Customers assistance that both aided Hezbollah and was qualitatively and quantitatively substantial." *Id.* at 866.

Here, by contrast, Petitioners have failed to plausibly allege that Respondents provided services of any kind to al-Qaeda or knew of Bank Melli's, Bank Saderat's, and Al Rajhi Bank's alleged connections to al-Qaeda. Rather, as explained above, Respondents are alleged to have provided services to other banks, and "the complaint focuses on the fact that [two of] these banks were on OFAC's list of sanctioned entities"; that Iran had nationalized Bank Melli and Bank Saderat and had "historically supported terrorist groups, including al-Qaeda"; and that "Al Rajhi Bank maintained connections to al-Qaeda." Pet. App. 19a-20a.

This case is therefore wholly unlike *Kaplan*, where the plaintiffs plausibly alleged the defendant's knowledge of its customers' connections to the terrorist attacker. And, moreover, Respondents' alleged

conduct is entirely untethered from the Camp Chapman attack, rendering it deficient under *Twitter*.

In sum, Petitioners cannot identify any reason for this Court to grant plenary review or to require the D.C. Circuit to reconsider its decision. The petition should therefore be denied.

## II. The Personal Jurisdiction Holding Does Not Warrant Review.

Petitioners also seek review of the court of appeals' determination that the district court lacked personal jurisdiction over the non-U.S. Respondents, HSBC Holdings and HSBC Europe.

Petitioners acknowledge (Pet. 10) that the court of appeals "correctly identif[ied] the applicable framework" for personal jurisdiction under *Ford Motor Co.*, but misapplied that test by requiring Petitioners to plead some relationship between their damages and the alleged unlawful conduct. The court of appeals' holding is correct and does not warrant review for multiple reasons.

*First*, the court of appeals' determination that Petitioners failed to state a JASTA aiding-and-abetting claim applies to all Respondents. Addressing the personal jurisdiction question would therefore constitute an advisory opinion—with no real-world impact on the case—unless the Court were to first grant, and reverse, on the aiding-and-abetting issue.

*Second*, Petitioners do not even assert that the court of appeals' holding conflicts with the decision of another appellate court, nor do they attempt to explain why the ruling below otherwise is sufficiently important to warrant plenary review by this Court.

*Third*, Petitioners (and Judge Wilkins in dissent) recognize that the court of appeals applied the correct legal standard and dispute only the lower court's application of that standard to the allegations here. That fact-bound determination does not warrant this Court's review—and is correct.

Citing this Court's opinion in *Ford Motor Co.*, the court of appeals explained that a plaintiff invoking specific personal jurisdiction need not "demonstrate 'a strict causal relationship between the defendant's [in-forum] activity and the litigation.'" Pet. App. 11a (quoting *Ford Motor Co.*, 141 S. Ct. at 1026). The lower court recognized, again based on *Ford Motor Co.*, that "some relationships will support jurisdiction without a causal showing," but "[i]n the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." Pet. App. 11a, 13a n.8 (quoting *Ford Motor Co.*, 141 S. Ct. at 1026).

Applying this standard, the court of appeals correctly concluded that the complaint does not plausibly allege a sufficient relationship between the alleged actions of the non-U.S. Respondents and the claim here.

The court stated that, with respect to Bank Melli and Bank Saderat, Petitioners rely on those entities' "OFAC designations and affiliation with Iran" in order to "connect the Camp Chapman bombing to [Respondents'] sanctions evasion." Pet. App. 11a. Judge Wilkins in dissent likewise pointed to the U.S. State Department's designations of Bank Melli and Bank Saderat as supporters of terrorism. Pet. App. 34a. But the majority determined that, while those allegations show "possible connections" to "terrorism generally," they are insufficient to permit a plausible inference of a "connection to al-Qaeda specifically" or that these

Respondents' "conduct was related to [Petitioners'] injuries at al-Qaeda's hand." Pet. App. 12a.

The court further supported its conclusion by citing the Iranian government's legitimate functions—which mean that "aid to Iran could just as plausibly benefit its otherwise legitimate operations rather than al-Qaeda." Pet. App. 12a; see also *Rothstein* v. *UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (because "Iran is a government, and as such it has many legitimate agencies, operations, and programs to fund," the complaint "must plausibly show[] that the moneys UBS transferred to Iran were in fact sent to Hezbollah or Hamas or that Iran would have been unable to fund the attacks by Hezbollah and Hamas without the cash provided by UBS.").

With respect to Al Rajhi Bank, Petitioners and Judge Wilkins' dissent note that one of its founders was a "key financial contributor[]" to al-Qaeda and that the bank "maintained accounts for al-Qaeda's charity fronts." Pet. App. 13a. But even if true, Al Rajhi Bank's "vast and otherwise legitimate operations make it impossible to infer that [Respondents'] conduct was connected to al-Qaeda's attack on Camp Chapman through Al Rajhi Bank." Pet. App. 13a; see also *Siegel*, 933 F.3d at 225 ("[Al Rajhi Bank] is a large bank with vast operations, and the plaintiffs do not allege—even conclusorily—that most, or even many, of HSBC's services to [Al Rajhi Bank] assisted terrorism.").

The court of appeals thus properly applied the specific jurisdiction standard set forth in *Ford*. Petitioners simply failed to satisfy that test.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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