No. 23-18

IN THE

Supreme Court of the United States

DANA MARIE BERNHARDT, PERSONALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF JEREMY WISE, *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 DC CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. Respondents Ignore this Court's Analysis in *Twitter*, Downplay their Own Culpability, and Ask the Court to Reject the Petition based on a Discredited Pre-*Twitter* Analysis.

In their Brief in Opposition, Respondents cling to a pre-*Twitter* analysis designed to keep the spotlight from falling on their own highly culpable conduct. Their argument—that this Court should reject Petitioner's request for plenary review—is premised on a rigid adherence to the "precise three-element and six-factor test" of *Halberstam*, an approach explicitly rejected by this Court. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 488 (2023) (noting that "JASTA itself points only to Halberstam's 'framework,' not its facts or its exact phrasings and formulations"). Ironically, Respondents' approach actually demonstrates the very real need for plenary review by highlighting that there is no Supreme Court case applying JASTA in the banking context, the primary arena in which such cases arise. As a result, Respondents feel empowered to ignore the effect of their extensive and intentional sanctions-evading conduct, arguing that this case was properly dismissed because one of *Halberstam*'s three "elements" is allegedly missing. While that element—"a general awareness of an illegal or tortious scheme of which it was a part"—is not missing, as explained below, the mere articulation of the argument demonstrates that Respondents do not believe this Court's *Twitter* opinion changed the landscape in the banking context.

This is Respondents' primary argument, and it should be rejected for each of the reasons below.

A. Respondents' argument misconstrues this Court's *Twitter* analysis.

Citing three supposedly "required elements" from *Halberstam*,[1] Respondents argue that this Court in *Twitter* addressed "only the 'knowingly and substantially assistance'" element, and not the "general awareness" element. Resp. Br. at 3. According to Respondents: "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." Resp. Br. at 13.

Respondents' argument in opposition does exactly what this Court warned against in *Twitter*—treating the *Halberstam* elements as "immutable components," *see Twitter*, 598 U.S. at 487, a concern that echoes all the way from the text of *Halberstam* itself, 705 F.2d 472, 489 (D.C. Cir. 1983) (the elements are neither "perfect guides" nor "immutable components"). Respondents fail to grasp the holistic approach of *Twitter* as it merged the common law and *Halberstam* and applied these longstanding aiding and abetting principles in the terrorism context.

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1. As this Court noted in *Twitter*, Congress provided additional context when enacting JASTA "by pointing to *Halberstam v. Welch*, 705 F.2d 472" as setting forth the "proper legal framework" for "civil aiding and abetting and conspiracy liability." 598 U.S. at 485.

In *Twitter*, this Court began with the language of JASTA, traced the common law origins of aiding and abetting in both the criminal and civil context, and then analyzed *Halberstam* "in context of the common-law tradition from which it arose." *Twitter*, 598 U.S. at 485. In doing so, this Court noted that *Halberstam* dictated that its "elements and factors . . . could 'be merged or articulated somewhat differently without affecting their basic thrust.'" *Id.* at 487 (quoting *Halberstam*, 705 F.2d at 478, n.8). In fact, according to *Twitter*, "any approach that too rigidly focuses on *Halberstam*'s facts or its exact phraseology risks missing the mark." *Id.* at 493.

In line with those concerns, this Court approached its task in *Twitter* as a mandate to "ascertain the 'basic thrust' of *Halberstam*'s elements and determine how to 'adap[t]' its framework to the facts before us today." *Id.* at 488. In doing so, the Court articulated a sliding-scale approach focused on "twin requirements" that "work[ed] in tandem"—the culpability of the defendant and the nexus between the assistance and the tort. *Id.* at 491–92. This approach set up a *comprehensive* framework for addressing the aiding and abetting aspects of JASTA in light of both the common law and *Halberstam.* The *Twitter* ruling is not, therefore, as Respondents broadly suggest, merely limited to the third element of *Halberstam*. Thus, Petitioners did not ignore an element of *Halberstam*, but on the contrary, ask this Court to reverse the D.C. Circuit Court's opinion under the comprehensive principles first articulated by this Court in *Twitter*, but not yet addressed in the context of a highly culpable banking defendant.

Stated differently, this Court's analysis in *Twitter* subsumed both "general awareness" and the

"knowingly providing assistance" elements into the more comprehensive category of "blameworthiness" or "scienter." *Id.* at 489. "[C]ourts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct." *Id.* This is particularly true in bank cases where "'culpability of some sort is necessary to justify punishment of a secondary actor,' lest mostly-passive actors like banks become liable for all of their customers' crimes by virtue of carrying out routine transactions." *Id.* at 491.

Here, there is no doubt about HSBC's high level of culpability. Throughout the case at the lower court level, Respondents charitably (and wrongly) characterized their own conduct as "arms-length banking services to commercial banks," *see e.g.*, ECF No. 32 at 27, but there was nothing "arms-length" about the alleged transactions nor traditionally "commercial" about its banking partners. Yet even Respondents' sanitized description cannot gloss over the culpable conduct alleged in the Amended Complaint.

While dealing directly with two nationalized Iranian banks sanctioned for funding terrorists, HSBC intentionally and knowingly instructed them to use a clandestine process designed to evade U.S. regulators and hide the true nature of the banking transactions. Respondents admitted this conduct in a Deferred Prosecution Agreement. *See, e.g.*, CA JA 54 ¶ 200. Those criminal actions facilitated more than $19 billion in banking transactions which "undermined U.S. national security, foreign policy, and other objectives of U.S. sanctions programs." CA JA 47 ¶ 162. For a third bank, HSBC plowed ahead with providing billions of dollars in

banknotes (hard currency) despite its own know-your-customer software flagging the bank for its ties to al-Qaeda, *see, e.g.*, CA JA 68–69 ¶ 275, including advertising the existence of accounts it maintained for al-Qaeda front charities and providing a mechanism for supporters to fund those accounts, CA JA 37 ¶ 120.

Despite this conduct, Respondents have the temerity in their Opposition before this Court to suggest that the Amended Complaint "fails to allege facts supporting a plausible inference" that defendants engaged in "truly culpable conduct." Resp. Br. at 18. One wonders what banking activities might qualify as "truly culpable" in Respondents' book as they seek support from this Court for a standard that would essentially inoculate large international banks from any secondary liability under JASTA whatsoever.

It is this culpable conduct that separates this case from "routine" banking cases where the defendant bank has terrorist supporters as customers—a distinction implied by this Court in *Twitter*. 598 U.S. at 491 ("lest mostly passive actors like banks become liable for all of their customers' crimes by virtue of carrying out *routine transactions*") (emphasis added). The Second Circuit applied this distinction in *Kaplan v. Lebanese Canadian Bank, SAL,* 999 F.3d 864 (2d Cir. 2021), a pre-*Twitter* case that nevertheless focused on the culpability of the defendant bank whose wire transactions had violated regional banking rules designed to thwart terrorist organizations. By contrast, the D.C. Circuit, in the opinion below, did not give weight to this culpability factor, thus creating a split in the circuits and an opinion at odds with this Court's subsequent ruling in *Twitter*.

Despite Respondents' protestations of purity, the conduct here is not the passive banking activity requiring protection that is alluded to in *Twitter*. This case alleges culpable conduct of the highest order, and it clearly fulfills the first prong of this Court's "twin requirements." Respondents' fact-based argument, with its mechanical reliance on the *Halberstam* phraseology, should be rejected.

B. Even if Respondents' mechanical reliance on the three *Halberstam* elements is followed, the record shows a "general awareness" by HSBC that it was "part of an overall illegal or tortious activity at the time it provided the assistance."

However, even using the mechanical application of the *Halberstam* factors for which Respondents advocate, Petitioners' Amended Complaint cites facts sufficient to satisfy the general awareness requirement as it was articulated before *Twitter*. Certainly, Petitioners have alleged facts sufficient to demonstrate that Respondents were "generally aware of [their] role as part of an overall illegal or tortious activity at the time" they provided assistance. *See Halberstam*, 705 F. 2d at 477.

Two of the Iranian banks in question had been sanctioned for financing terrorist activities, and yet HSBC did business with them, willfully and fraudulently hiding the origin of the transactions from American regulators. A third bank, Al Rajhi, had extensive, documented ties to al-Qaeda, including channeling money to members of al-Qaeda that committed prior terrorist attacks. Despite being aware of these connections, Respondents still

provided Al Rajhi with extraordinary amounts of hard currency, even knowing that these banknotes were exactly the tool needed for the funding of terrorist attacks. *See* CA JA 51 ¶ 183.

This Court was clear that providing routine services in an unusual way or providing dangerous wares may satisfy the general awareness requirement and give rise to JASTA liability. *Twitter*, 598 at 502. Allegations of Respondents' atypical activities in violation of their own policies and U.S. sanctions, and its transactional partner banks' long-standing and notorious support of al-Qaeda, are sufficient to satisfy JASTA's and *Halberstam*'s general awareness requirement. Should this Court wish to grant a writ of certiorari for the reasons expressed in the Petition, the "general awareness" issue need not prevent such a review. And moreover, contrary to Respondents' claims in their Opposition, Petitioners reference the general awareness concept multiple times in the Petition. *See* Pet. at 17, 22.

II. Given HSBC's Culpable Conduct, this Case Presents a Sufficient Nexus between that Conduct and the Terrorist Acts Using this Court's "Subset Liability" Analysis.

A. Respondents failed to address this Court's formulation of potential subset liability.

Respondents argue that this Court's *Twitter* opinion requires allegations of a direct nexus between the alleged assistance and the act of terrorism that injured the plaintiff. Resp. Br. at 19. According to Respondents, since Petitioners made no allegations directly linking the

sanctions-evading activity of HSBC to the bombing of Camp Chapman, their Amended Complaint was properly dismissed. In addition, Respondents argue, for a plaintiff's theory to hold a defendant liable for all the torts of an enterprise, it is required to show that the defendants actually aided and abetted each tort of that enterprise, and that was not pled here. Resp. Br. at 21.

Though it lifts quotes from this Court's *Twitter* opinion to buttress these arguments, *Twitter* nowhere even remotely mandated such a robotic approach. On the contrary, this Court held that aiding and abetting "does not always demand a strict nexus between the alleged assistance and the terrorist act." *Twitter*, 598 at 497. Instead, the "twin requirements" of culpability and nexus "work [] in tandem, with a lesser showing of one demanding a greater showing of the other." *Id.* at 491–92 (citing *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 97 (5th Cir. 1975)). "In other words, less substantial assistance requires more scienter before a court could infer conscious and culpable assistance." *Id. (*citing *Woodward*, 522 F.2d at 97). Or, stated conversely, the more culpable the conduct, the less strict the required nexus.

By laying out this standard, this Court recognized the possibility that a secondary defendant might be liable for "some definable subset" of a terrorist group's activities. *Id.* at 502. Given HSBC's egregious conduct over a substantial period of time (in excess of ten years preceding the attack) and the alleged nexus between aid to Iran's national banks and Al Rahji bank and the capability-boosting financial support of al-Qaeda, Petitioners suggested in their request for certiorari that only those attacks of al-Qaeda that required large amounts of funding, were concomitant with

the period of time during or immediately after HSBC's illegal conduct, and required a level of sophistication and planning that distinguished the attacks from those that can be carried out by a small group of individuals on relatively little funding, should be actionable. Pet. at 24. The Camp Chapman bombing would qualify on all counts.

In their Brief in Opposition, Respondents said not a word about this subset liability theory, choosing instead to argue that they did not so systemically and pervasively assist al-Qaeda that they should be liable for every terrorist attack, an argument that Petitioners never made. But this subset argument that Respondents ignored lies at the heart of why this case merits review.

Cases involving bank defendants are the most common JASTA cases. In those cases, the circuits have split on how heavily culpable conduct should factor into the equation and what type of nexus is required. On the heels of *Twitter*, this case presents an opportunity for the Court to clarify the bounds of a statute that impacts thousands of terrorist victims in the context of a case where, unlike *Twitter* and *Google*, truly culpable conduct is alleged, and a close nexus has already been proven in the district court between Iran (whose national banks were illegally serviced by HSBC) and this particular attack.

B. The court below found that Iran, through its funding and support of al-Qaeda, proximately caused the Camp Chapman attack.

Two of the banks illegally facilitated by Respondents were national banks of Iran, sanctioned because of their support of terrorists. Bank Saderat is controlled by the

Iranian government and has been censured by the United States as a Specially Designated Global Terrorist for transferring hundreds of millions of dollars to terrorist organizations. CA JA 34 ¶¶ 103–104. Bank Melli is a nationalized agency of the Iranian Government and has been designated as a Specially Designated National and Blocked Person for its support of Iranian-based terrorist organizations. CA JA 35 ¶ 109. HSBC illegally facilitated more than 23,000 transactions with these two Iranian banks, totaling more than $19 billion.

As the District Court noted below, Iran provided al-Qaeda with "the ability to move funds internationally . . . and the funding necessary to establish and maintain the communications and execution of the [Camp Chapman] attack." ECF No. 52 at 4. The Court further held that Iran's channels of support were "crucial ingredients of the Camp Chapman attack," because Balawi's mission "relied on extensive financial, material and logistical assistance from Iran." *Id.* at 3–4.

These rulings of the District Court—which include finding that "Iran's assistance bore a definite connection to the attack on Camp Chapman" and was "a legally sufficient cause of the Camp Chapman attack" —were made based on extensive evidence provided by Petitioners on their motion for default judgment. The district court's findings support the nexus between HSBC's illegal conduct and the attack at issue, not based on mere allegations in a complaint but on evidence dutifully weighed by the court below. Al-Qaeda needed the ability to move funds internationally to facilitate the communication and execution needed for the sophisticated Camp Chapman attack. *Id.* at 4. HSBC helped provide that ability to Iran's

national banks. In addition, HSBC provided extensive volumes of hard currency "banknotes" to another bank with close known ties to al-Qaeda.

These connections, when viewed in light of HSBC's pervasive and blatant culpable conduct, should more than suffice for a JASTA claim to be decided by the trier of fact. Accordingly, this Court should grant plenary review to articulate the type of nexus required in cases involving intentional, longstanding, and capability-enhancing culpable conduct by banks known to illegally deal with terrorist supporters.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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