No. 21-381

IN THE

Supreme Court of the United States

TZVI WEISS, ET AL.,
Petitioners,

v.

NATIONAL WESTMINSTER BANK, PLC
Respondent.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are 17 law professors who write about, research, and teach civil procedure, counterterrorism law, federal courts, and/or statutory interpretation. *Amici* come together here in opposition to a trend of lower-court rulings dismissing claims that allege secondary liability under the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, as amended by the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)).

As *amici* explain, the rulings at issue here[2] are part of a broader pattern of Second Circuit decisions that have sought to limit the scope of secondary liability under the ATA without justification. Those decisions cannot be reconciled with JASTA's plain text or with Congress's unambiguous purpose in enacting that statute—which was to adopt the framework for secondary liability articulated in *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983). In the process, the Second Circuit has closed courthouse doors that Congress expressly intended to open—flouting this Court's clear and well-settled approach to statutory interpretation.

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1. All parties received timely notice—and have consented to the filing—of this brief. No counsel for a party to this appeal authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

2. The arguments advanced in this brief also bear upon the companion petition in *Strauss* v. *Crédit Lyonnais, S.A.*, No. 21-382, in which the parties have likewise consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Second Circuit's opinion is based upon its erroneous imposition of additional prerequisites for secondary liability that are anathema to the actual language (and the spirit) of JASTA. Congress enacted JASTA "to provide civil litigants with the *broadest possible basis*, consistent with the Constitution of the United States, to seek relief against [any person or entity that] provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b), 130 Stat. at 853 (emphases added); *see Siegel* v. *HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 223 n.5 (2d Cir. 2019) (discussing this language). Notably, JASTA *itself* was a reaction to lower-court rulings that had narrowly interpreted the ATA—and was thus the culmination of a 15-year interbranch conversation over the appropriate scope of civil liability for acts of international terrorism.

To that end, JASTA expressly authorized civil claims based upon theories of "secondary" liability—against anyone who conspired to violate the ATA or aided and abetted violations thereof. JASTA § 4(a), 130 Stat. at 854 (codified at 18 U.S.C. § 2333(d)(2)). And to avoid the potential uncertainty that might result from subjecting defendants to divergent state law secondary liability rules, Congress in JASTA expressly directed that courts analyzing claims for secondary liability under the ATA were to follow *Halberstam*—in which Judges Wald, Bork, and Scalia carefully and comprehensively outlined the contours of such secondary civil liability at common law. JASTA § 2(a)(5), 130 Stat. at 853; *see also Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1991) (describing *Halberstam*

as "a comprehensive opinion on the subject"). Simply put, Congress codified *Halberstam* as the standard of secondary liability for ATA claims.

Notwithstanding JASTA's (and *Halberstam*'s) clarity on these points, lower courts over the past five years have muddied the waters—yielding, in the words of one of those courts, "a decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy." *Freeman* v. *HSBC Holdings PLC*, 413 F. Supp. 3d 67, 73 n.2 (E.D.N.Y. 2019). Although some of these lower-court rulings have come from other jurisdictions, *see, e.g.*, *Atchley* v. *AstraZeneca UK Ltd.*, 474 F. Supp. 3d 194, 212 (D.D.C. 2020) (citing *Crosby* v. *Twitter, Inc.*, 921 F.3d 617, 627 n.6 (6th Cir. 2019)), the Second Circuit has led the way in construing JASTA narrowly.

More generally, this Court's intervention is warranted to reassert the impropriety of judicial analyses that come at the expense of the text Congress wrote. A court's interpretation that is unmoored from the text of a statute tends to produce "tortured judicial legislation." *Branch* v. *Smith*, 538 U.S. 254, 292 (2003) (Stevens, J., concurring in part and concurring in the judgment); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("When one does not have a solid textual anchor or an established social norm from which to derive a general rule, its pronouncement appears uncomfortably like legislation.").

Similarly, as Justice Kavanaugh has explained, "[w]hen courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power." Brett M.

Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (book review). Or, as Justice Alito wrote for the Court in 2006, "When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). Thus, when interpreting statutes,

> [t]his Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue. Even if the proper interpretation of a statute upholds a "very bad policy," it "is not within our province to second-guess" the "wisdom of Congress' action" by picking and choosing our preferred interpretation from among a range of potentially plausible, but likely inaccurate, interpretations of a statute.

Harbison v. *Bell*, 556 U.S. 180, 197 (2009) (Thomas, J., concurring in the judgment) (quoting *Eldred* v. *Ashcroft*, 537 U.S. 186, 222 (2003)).

The Second Circuit's interpretations of JASTA in this case and in *Strauss* are emblematic of "the bad old days" of statutory interpretation from which this Court has conclusively retreated. Transcript of Oral Argument at 46, *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442 (2008) (No. 06-1431). Here, specifically, the Court of Appeals invented a rule (not found in the statute) that a defendant's knowing provision of material support to a designated foreign terrorist organization (FTO) does *not* present a triable issue of fact as to whether the defendant was generally aware of its role in illegal activities from which the terrorist

attacks at issue were a foreseeable risk. But when a statute's language is plain, the judicial "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (internal quotation marks omitted). Because *Halberstam* requires no such showing, JASTA doesn't, either.

The Court of Appeals' decisions in these cases are just the latest in a long line of rulings adopting implausibly restrictive constructions of JASTA—in which Congress made clear that it was imposing secondary liability on "the broadest possible basis." The result has been jurisprudence that cannot be reconciled with the statute's plain text and Congress's unambiguous intent; and it has led to decisions that effectively create a loophole that would all but swallow JASTA whole.

ARGUMENT

I. JASTA WAS ENACTED FOR THE EXPRESS PURPOSE OF CODIFYING BROAD THEORIES OF SECONDARY LIABILITY UNDER THE ANTI-TERRORISM ACT

As the text and history of both JASTA and the ATA make clear, Congress knew exactly what it was doing in 2016 when it authorized secondary civil liability—on "the broadest possible basis"—against those who conspired in or aided and abetted certain acts of international terrorism. JASTA § 2(b), 130 Stat. at 853. The problem that these cases underscore is the Second Circuit's refusal to give effect to Congress's clear text and its unambiguous purpose.

A. As Initially Enacted, the ATA Did Not Expressly Provide for Secondary Liability

First enacted in 1990,[3] the core of the current ATA has been on the books since 1992. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003(a)(4), 106 Stat. 4506, 4522 (codified as amended at 18 U.S.C. §§ 2331–2339D (2018)). As the House Judiciary Committee explained, the ATA was designed to provide "a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals." H.R. REP. No. 102-1040, at 1 (1992).

Congress had first provided for extraterritorial *criminal* jurisdiction over terrorist acts in 1986, and the ATA was designed to provide a complementary civil remedy for the victims of such acts. *See id*. To that end, the ATA "would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed." S. REP. No. 102-342, at 22 (1992); *see also id*. ("By its provisions for compensatory damages, tremble [*sic*] damages, and the imposition of liability *at any point* along the causal

3. The same language Congress enacted in 1992 was initially enacted as part of the Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250 (1990), and known as the "Anti-Terrorism Act of 1990." *Id*. Because of an enrolling error, it was repealed five months later—and promptly reenacted. *See Almog* v. *Arab Bank*, *PLC*, 471 F. Supp. 2d 257, 265–66 (E.D.N.Y. 2007) (retracing this history).

chain of terrorism, it would interrupt, or at least imperil, the flow of money." (emphasis added)).

As relevant here, the ATA added 18 U.S.C. § 2333(a), which provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

The ATA further defines "international terrorism" as activities that meet three related but distinct requirements. First, they must "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1)(A). Second, they must "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination, or kidnapping." *Id.* § 2331(1)(B). Finally, they must "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or

coerce, or the locale in which their perpetrators operate or seek asylum." *Id.* § 2331(1)(C).[4]

In enacting the ATA, Congress explained that its purpose was to close "gap[s] in our efforts to develop a comprehensive legal response to international terrorism," H.R. REP. No. 102-1040, *supra*, at 5, and to thereby impose liability "*at any point* along the causal chain of terrorism," S. REP. No. 102-342, *supra*, at 22 (emphasis added). Nevertheless, other than barring actions against the U.S. government, foreign governments, and agents or employees thereof, *see* 18 U.S.C. § 2337, the text of the ATA said nothing whatsoever about who could be held liable for violating the statute, or under what theory of liability.

There was never any question as to whether the direct perpetrators of the qualifying acts of international terrorism could be sued. But those individuals often (1) died in the attack; (2) could not be subject to personal jurisdiction in the United States even if they survived; or (3) were judgment-proof even if they could be subject to the jurisdiction of U.S. courts. Thus, one of the dominant questions the ATA raised was whether any species of secondary liability would be available under the statute.

Perhaps the most important and widely cited decision addressing that question was *Boim* v. *Holy Land Foundation for Relief and Development* ("*Boim III*"), 549 F.3d 685 (7th Cir. 2008) (en banc). Writing for a majority of the en banc court, Judge Posner held that "statutory silence on the subject of secondary liability means there is none; and section 2333(a)

4. This definition has been amended once in three decades—to add "mass destruction" to § 2331(1)(B)(iii). USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 802(a)(1), 115 Stat. 272, 376.

authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors." *Id*. at 689 (citing *Cent. Bank of Denver, N.A.*, 511 U.S. at 200). Quoting this exact analysis, the Second Circuit reached a similar conclusion in *Rothstein* v. *UBS AG*, 708 F.3d 82, 97–98 (2d Cir. 2013). *But see Wultz* v. *Islamic Republic of Iran*, 755 F. Supp. 2d 1, 54–57 (D.D.C. 2010) (recognizing common-law aiding-and-abetting liability under the ATA, and citing other district courts that had held the same).

The *Boim III* court did not end its analysis with its foreclosure of common-law secondary liability, however. Instead, as Judge Posner explained, the *primary* liability imposed by the ATA includes circumstances in which the predicate federal criminal violation is nothing more than the provision of material support to terrorists—which is, itself, a form of secondary liability. *See, e.g.*, 18 U.S.C. §§ 2339A–2339B. In his words, "[p]rimary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Boim III*, 549 F.3d at 691–92.

This reasoning, which has been usefully described as "statutory secondary liability," *see* STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 937 (3d ed. 2016), reflected an overt, if awkward, compromise—between the common-law secondary liability that Congress seems to have intended, *see id*. at 705–19 (Rovner, J., concurring in part and dissenting in part), and the silence of the statute's text on that specific point. *See Rothstein*, 708 F.3d at 97–98.

Under *Boim III*, establishing "statutory secondary liability" of a defendant other than the perpetrator of the underlying act of international terrorism requires demonstrating not only that the defendant aided or abetted (or conspired to commit) an act of international terrorism; it also requires showing that the defendant's *primary* conduct meets the definition of "international terrorism" in § 2331(1). *Boim III* is thus significant in two respects. First, it underscores the debate over the availability of secondary liability under the ATA prior to JASTA. Second, it provides a baseline against which to compare the post-JASTA ATA, as well.

B. JASTA Expressly Provided That Secondary Liability Is Available Under the ATA, and Expressly Articulated the Standards Governing Such Claims

Following *Boim III*, the Second Circuit rejected common-law secondary liability under the original ATA in *Rothstein*, albeit without taking an explicit position on Judge Posner's theory of "statutory secondary liability." *See* 708 F.3d at 98. But as Judge Kearse presciently noted, "[i]t of course remains within the prerogative of Congress to create civil liability on an aiding-and-abetting basis." *Id*.

Enter, JASTA. Enacted in 2016 over President Obama's veto, JASTA garnered headlines primarily for its amendments to the Foreign Sovereign Immunities Act (FSIA). Far more quietly (and far less controversially, at least at the time), JASTA also amended the ATA to clarify the rules governing suits against non-governmental defendants. As Congress explained in the text of the statute, "[i]t is necessary to recognize the substantive causes of action for aiding

and abetting and conspiracy liability under [the ATA]." JASTA § 2(a)(4), 130 Stat. at 852 (codified at 18 U.S.C. § 2333 note).

Thus, JASTA sought to make explicit that the ATA provides a civil damages remedy against "persons or entities" "that knowingly or recklessly contribute material support or resources, *directly or indirectly*, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States." *Id.* § 2(a)(6) (emphasis added). Indeed, Congress could hardly have been clearer as to its purpose:

> The purpose of this Act is to provide civil litigants with *the broadest possible basis*, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, *that have provided material support, directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States.

Id. § 2(b), 130 Stat. at 853 (emphases added). To that end, JASTA created 18 U.S.C. § 2333(d)(2):

> In an action under [§ 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as [an FTO] as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to *any person who aids and abets*,

> by knowingly providing substantial assistance, *or who conspires with the person who committed such an act of international terrorism*.

Id. § 4(a), 130 Stat. at 854 (emphases added).

But Congress went even further. JASTA also expressly identified the standards it intended courts to apply in considering secondary liability claims under the ATA. As the statute provided, the D.C. Circuit's canonical decision in *Halberstam*, "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 [the ATA]." *Id.* § 2(a)(5), 130 Stat. at 852. Finally, JASTA provided that its amendments to the FSIA and the ATA applied to any civil action arising out of injuries on or after September 11, 2001, pending as of, or commenced after, its date of enactment—September 28, 2016. *Id.* § 7, 130 Stat. at 855.

In JASTA, Congress therefore (1) expressly authorized ATA claims based upon conspiracy and aiding-and-abetting liability; (2) expressly identified the standards courts should apply in reviewing ATA conspiracy and aiding-and-abetting claims; (3) emphasized that its purpose was to "to provide civil litigants with the broadest possible basis to seek relief against [those] that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States"; and (4) made those amendments applicable retroactively to any claim arising on or after September 11, 2001.

II. THE SECOND CIRCUIT (AND DISTRICT COURTS WITHIN IT) HAVE IMPOSED INDEFENSIBLY HIGH BURDENS ON POST-JASTA SECONDARY LIABILITY CLAIMS

JASTA expressly authorized aiding-and-abetting and conspiracy liability under the ATA, and it did so with the express purpose of creating the "broadest possible basis" for liability against *any* party that provides even "indirect[]" material support to those engaging in terrorist activities against the United States. Notwithstanding these unambiguous provisos, certain courts over the past five years have adopted a series of narrow interpretations of JASTA that are irreconcilable with *Halberstam*—and, thus, with the standard Congress expressly adopted.

A. Courts Have Required Plaintiffs Raising Aiding-and-Abetting ATA Claims to Allege Far More Than JASTA Requires

In *Linde* v. *Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), the Second Circuit refused to affirm a theory of secondary liability on which the jury had never been instructed, holding that "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*. Aiding and abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Id.* at 329 (citing *Halberstam*, 705 F.2d at 477). Although it came in the specific context of reviewing a jury verdict, even before the decision at issue here, the Second Circuit's statement had repeatedly been taken out of its procedural context and relied upon by lower courts to impose an unduly

high burden for *pleading* aiding-and-abetting claims under JASTA.

For instance, in *O'Sullivan* v. *Deutsche Bank AG*, No. 17 CV 8709, 2020 WL 906153 (S.D.N.Y. Feb. 25, 2020), the court denied plaintiffs' motion for leave to amend their aiding-and-abetting claims because "allegations that Defendants knowingly violated laws that were designed principally to prevent terrorist activity do not allege plausibly a general awareness that Defendants had assumed a role in a foreign terrorist organization's act of international terrorism." *Id.* at *6 (citing *Linde*, 882 F.3d at 329). Thus, *O'Sullivan* required that a plaintiff plausibly allege that the defendant was generally aware of its role in the actual terrorist attack—as opposed to its role in supporting criminal activities from which terrorist attacks were a reasonably foreseeable risk. *See also Bernhardt* v. *Islamic Rep. of Iran*, No. 18-2739, 2020 WL 6743066, at *5 (D.D.C. Nov. 16, 2020) (similarly reading *Linde*).

Posture aside, *Linde*'s discussion of *Halberstam* cannot be reconciled with *Halberstam* itself. In *Halberstam*, the D.C. Circuit held that Linda Hamilton aided and abetted Bernard Welch's unplanned murder of Dr. Michael Halberstam—even though she neither planned nor knew about the murder—because she had agreed with Welch to undertake *an* illegal enterprise to assist some sort of "personal property crimes at night" (by acting as a "banker, bookkeeper, recordkeeper, and secretary" for her boyfriend), from which violence was a foreseeable risk. *See Halberstam*, 705 F.2d at 487–88.

As Judge Wald explained for the *Halberstam* court, Hamilton was liable *not* because she was generally

aware that Welch intended commit burglaries, let alone to murder Halberstam, but because she "had a general awareness of her role in a *continuing criminal enterprise*." *Id.* at 488 (emphasis added). Indeed, had Hamilton been aware that Welch intended to murder Halberstam and facilitated the burglary anyway, she could potentially have been sued—and charged—as a principal.

The D.C. Circuit in *Halberstam* further concluded that Hamilton had provided "substantial assistance" to Welch because, even though she was not present at the time of the murder (or of any of the individual burglaries), she was heavily involved in part of the "business"—quickly disposing of the burgled goods without suspicion—on which "the success of the tortious enterprise" rested. *Id.* As Judge Wald wrote for the panel:

> It was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—*because violence and killing is a foreseeable risk in any of these enterprises*.

Id. (emphasis added).

As in *Halberstam*, for a party alleged to have knowingly provided substantial assistance to an FTO, "violence and killing is a foreseeable risk" of that enterprise *by definition*. *Id.*; *see also* 8 U.S.C. § 1189(a)(1)(B) (conditioning designation of FTOs on their involvement in "terrorist activity"). And as in *Halberstam*, a party can aid and abet such an act even

if its role is a purely bureaucratic one—financial machinations on which "the success of the tortious enterprise" rested. 705 F.2d at 488. By *Halberstam*'s logic, then (which, again, Congress expressly adopted in JASTA), a third party aids and abets a violation of the ATA if it is generally aware of the nature of the criminal activities that its conduct is facilitating, and if it provides substantial assistance to the criminal *enterprise* from which acts of international terrorism are a foreseeable risk—not assistance to specific acts of international terrorism themselves. *Linde* thus misread *Halberstam*—a misreading that the Second Circuit compounded shortly thereafter in *Siegel*. *See* 933 F.3d at 225–26 ("[P]laintiffs have failed to allege that [Defendant] knowingly assumed a role in [an FTO's] *terrorist activities* or substantially assisted [the FTO] in *those activities*." (emphases added)).

The Second Circuit subsequently attempted to repair its error by asserting that "nothing in *Linde* repudiates the *Halberstam* standard that a defendant may be liable for aiding and abetting an act of terrorism if it was generally aware of its role in an 'overall illegal activity' from which an 'act of international terrorism' was a foreseeable risk." *Kaplan v. Lebanese Canadian Bank SAL*, 999 F.3d 842, 860 (2d Cir. 2021). But it then substituted yet *another* requirement not found in the text of the statute—holding that JASTA's general awareness requirement is only satisfied when the party assisted by a defendant is "so closely intertwined with [the FTO's] violent terrorist activities that one can reasonably infer that [the defendant] was generally aware while it was providing banking services to those entities that it was playing a role in unlawful activities from which the [terror] attacks were

foreseeable." *Id.* at 860–61. Once again, this analysis erroneously suggests that there are parts of an FTO that are *not* sufficiently "intertwined" with its violent activities such that terrorist attacks are *not* a foreseeable risk of providing the FTO with substantial assistance. But this Court rejected just such a distinction in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010).

B. These Narrow Interpretations of JASTA Cannot Be Reconciled with Its Plain Text or Congress's Explicit Purpose

Between them, *Linde*, *Siegel*, *Kaplan*, and the district court decisions discussed above have had the effect of converting the "broadest possible basis" for secondary liability that Congress intended to confer under JASTA into requirements that secondary actors have effectively committed *primary* violations of criminal counterterrorism laws. In the process, these rulings hold plaintiffs to a standard that is even more demanding than the already narrow "statutory secondary liability" that the Seventh Circuit read into the ATA in *Boim III* (and that Congress deliberately expanded in JASTA).

Moreover, other than *Linde* itself, these decisions are often coming at the motion-to-dismiss stage of these cases, on the ground that plaintiffs' complaints have failed to plausibly allege facts that, if proven, would establish the defendants' secondary liability under the ATA. In other words, district courts are adopting these interpretations of JASTA in the face of plausible allegations that more than adequately state claims for secondary liability under *Halberstam*, so that JASTA claims are foreclosed even if every single one of the plaintiffs' allegations is, in fact, true.

In some cases, courts' skepticism of JASTA has been all-but overt. For instance, in *Freeman*, Judge Chen dismissed conspiracy liability under JASTA by discounting what she described as "Congress's *apparent* intent" in enacting that statute. 413 F. Supp. 3d at 98 n.41 (emphasis added); *see also id.* at 94 n.35 ("[A]lthough Congress enacted JASTA to provide 'the broadest possible basis [for civil litigants] . . . to seek relief against persons, entities, and foreign countries' that have provided direct or indirect material support to terrorism, the Act's amendments *themselves* do not alter the applicable causation standard." (emphasis added; second alteration in original)). But courts need not guess as to Congress's "apparent" intent in JASTA; it was expressly and unambiguously stated on the face of the statute. *See* JASTA § 2, 130 Stat. at 852–53. This is therefore not an instance in which there is tension between the statute's unwritten purposes and its text, *see, e.g.*, *Kloeckner* v. *Solis*, 568 U.S. 41, 55 n.4 (2012); it is, instead, an instance in which the statute's text makes its purposes inescapably plain.[5]

As this Court recently reiterated, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct.

5. Nor is it any response that Congress expressly articulated JASTA's purpose in provisions *other* than the operative amendments to the ATA. JASTA's express articulations of its purpose and the standard Congress meant to enact for secondary liability under the ATA only reinforce the meaning of the operative provision. *See, e.g.*, *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471 (1999).

2356, 2364 (2019) (citing *Schindler Elev. Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 407 (2011)); *see also Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016) ("Statutory interpretation, as we always say, begins with the text.").

Here, JASTA's text, findings, and structure provide clear answers as to the "proper legal framework for how such liability should function in the context of [the ATA]." Courts may not agree with Congress that *Halberstam* provides the most *normatively desirable* framework for aiding-and-abetting liability, but given Congress's clear directive, there can be no question as to whether it provides the "proper"—*i.e., governing*—framework for assessing aiding-and-abetting liability under the ATA. It does. *See Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631 ("Because the plain language of [the statute] is 'unambiguous,' 'our inquiry begins with the statutory text, and ends there as well.'" (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)); *see also Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016) ("[A]n exercise of congressional authority regarding foreign affairs [is] a domain in which the controlling role of the political branches is both necessary and proper.").

Insofar as courts have not followed *Halberstam* in their decisions cabining secondary liability under the ATA, they are engaging in the very "casual disregard of the rules of statutory interpretation" that the Supreme Court has repeatedly dismissed as a "relic from a bygone era of statutory construction." *Food Mktg. Inst.*, 139 S. Ct. at 2364 (internal quotation marks omitted).

III. THE SECOND CIRCUIT'S AIDING-AND-ABETTING ANALYSIS HERE SUFFERS FROM THE SAME FLAWS—AND SHOULD NOT BE LEFT INTACT

As the Petition ably demonstrates, the Second Circuit's analysis in this case, specifically, reinforces just how far that court's jurisprudence has departed from *Halberstam* — and, thus, from JASTA's text and legal framework. *See* Pet. 29–32. Relying on the court's prior rulings in *Linde* and *Siegel*, the *Weiss* court concluded that:

> the record included evidence that plaintiffs' experts said the charities to which NatWest transferred funds as instructed by Interpal performed charitable work and that, as plaintiffs admitted, Interpal did not indicate to NatWest that the transfers were *for any terroristic purpose*; and plaintiffs proffered no evidence that the charities funded terrorist attacks or recruited persons to carry out such attacks.

Weiss v. *Nat'l Westminster Bank, PLC*, 993 F.3d 144, 166 (2d Cir. 2021) (emphasis added). In essence, the Second Circuit read JASTA, and its own prior interpretations thereof, to require proof that Respondent knowingly assumed a role in Hamas's terroristic activities (as opposed to just some broader unlawful enterprise), *and* to require more than evidence that Respondent knowingly provided material support to Hamas to establish aiding-and-abetting liability under the ATA. *See also Strauss* v. *Crédit Lyonnais, S.A.*, 842 F. App'x 701, 704 (2d Cir. Apr. 7, 2021) (mem.) (adopting this analysis).

But JASTA's text expressly *eschews* any "direct link" requirement. *See* JASTA § 2(b), 130 Stat. at 853

(noting that JASTA's purpose is to impose liability upon those who support acts of international terrorism, whether "directly *or indirectly*" (emphasis added)). Indeed, the whole point of JASTA was to respond to lower-court decisions that had unduly circumscribed indirect liability under the ATA.

What's more, this analysis is directly contradicted by *Halberstam*, in which the D.C. Circuit affirmed Hamilton's civil liability for Welch's unplanned murder of Halberstam under an aiding-and-abetting theory even though Hamilton had *no* knowledge that, by assisting Welch, she was "assuming a 'role'" in the murder (or even the burglaries)—as opposed to a criminal enterprise more generally. *See* 705 F.2d at 488.

Indeed, *Halberstam*'s discussion of whether Hamilton's support for Welch was "substantial" did not turn on whether it was more than "general support" for Welch's illicit enterprise. It turned on the *nature* of that "general support," by reference to the five factors set out in the *Restatement (Second) of Torts* § 876 (1979). Again, there was no "direct link" between Hamilton's ability to dispose of the goods Welch illicitly acquired and Welch's unplanned murder of Halberstam.

In terrorist financing cases, the relevant comparator to Hamilton's ability to dispose of Welch's burgled goods is the *funding* of the illegal enterprise that is an FTO like Hamas. And here, Petitioners have, at the very least, adduced sufficient evidence to create genuine issues of material fact as to whether "the success of the tortious enterprise" rested on Hamas's ability to have access to the material support that Respondent *knowingly* provided.

At a more basic level, nothing in *Halberstam*, or in the common law cases on which it relied, requires that defendants who aid and abet a tort share the primary tortfeasor's specific intent or even their specific knowledge. Otherwise, they would themselves be subject to primary liability—defeating the need for (and purpose of) secondary liability. *See, e.g.*, *Restatement (Third) of Torts* § 28 cmt. c (2020) ("It need not be shown that the defendant desired the tortious outcome. Nor does the defendant need to have understood the full legal significance of the facts, or all the details of the primary wrongdoing. It is sufficient if the defendant was aware of facts that made the primary conduct wrongful.").

Put another way, Hamilton's state of mind was sufficient to support secondary liability in *Halberstam* *not* because of any evidence that she shared Welch's goals (whatever they may have been), but because they reflected *her* long-term intent to participate—and her participation—in *a* criminal enterprise that, for her own reasons, she wanted to succeed. *Halberstam*, 705 F.2d at 488 ("If . . . Hamilton's assistance was knowing, then it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise. Hamilton's continuous participation reflected her intent and desire to make the venture succeed; it was no passing fancy or impetuous act."). Moreover, Welch was a burglar not a professional killer, and Halberstam's death was a foreseeable byproduct of his criminal efforts, but not his primary objective; it was a burglary gone wrong. By contrast, FTOs are, by definition, devoted to terrorism—*i.e.*, violence and murder. Therefore, violence is a far more foreseeable risk of *any* assistance given to the illegal enterprise that is an FTO; it's FTO activity gone *right*.

Finally, the Second Circuit's conclusion that proof that Respondent knowingly provided material support to Hamas *still* does not satisfy JASTA takes this analysis yet another significant step past its breaking point. As Petitioners point out, this Court's decision in *Humanitarian Law Project* squarely repudiates the distinction on which the Second Circuit's interpretation relies—that there is a meaningful difference between providing material support to a designated foreign terrorist organization and providing material support to the terrorist acts it supports. 561 U.S. at 36 ("[T]he considered judgment of Congress and the Executive [is] "that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization.").

Between them, JASTA's express authorization of *indirect* liability and this Court's interpretation of the material support statute in *Humanitarian Law Project* make clear that "acts of international terrorism" *are* a foreseeable risk of knowingly providing material support to an FTO. The Second Circuit's approach, in contrast, would cut off virtually *any* lawsuit under the ATA that was *not* available prior to the enactment of JASTA—and quite possibly many that *were*, as well. There is just no plausible way to read JASTA's text to support such a bottom line.

* * *

As the above analysis suggests, the Second Circuit did not just get JASTA wrong in this case; it has gotten JASTA wrong again and again. The Petition provides the Court with an appropriate opportunity to reverse the Second Circuit's sustained errors in interpreting JASTA. *Amici* urge this Court to take it.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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