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 10 MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Congressional Record

INTERESTS OF *AMICI CURIAE* [1]

Amici curiae include the following ten U.S. Senators:

Senator Joni K. Ernst

Senator Sheldon Whitehouse

Senate Majority Leader Charles E. Schumer

Senator Marco Rubio

Senator Robert Menendez

Senator Rob Portman

Senator Richard Blumenthal

Senator James M. Inhofe

Senator Benjamin L. Cardin

Senator Kirsten Gillibrand

Amici are members of both political parties but are united by a commitment to disrupting terrorist financing and to ensuring justice for victims of terrorism. As members of the Senate Armed Services Committee, the Committee on Foreign Relations, and the Judiciary Committee, *amici* have responsibility for, and experience shaping, U.S. counter-terrorism policy. *Amici* therefore have significant expertise in the critical role civil liability plays in deterring third

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[1] Counsel of record for all parties received timely notice of and consented in writing to this filing. *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

parties from providing terrorist organizations essential services, including access to financing.

Amici include supporters of the Anti-Terrorism Act of 1992 (ATA), as well as multiple amendments to the ATA required by court decisions—including by the Second Circuit—that erroneously restricted the ATA's scope. These amendments include the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat 852 (2016), which the Second Circuit improperly circumscribed in the decision below. *Amici* also include Senators who have co-sponsored the Anti-Terrorism Clarification Act of 2018 (ATCA), and the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), both of which also strengthened the ATA in response to lower court rulings restricting its scope.

As Senators, *amici* have a vital interest in ensuring that courts fulfill their constitutional duty to apply the text of these statutes as *amici* and their colleagues wrote them. This interest is particularly pressing because Congress, with the leadership of many *amici*, has repeatedly had to amend the ATA and other terrorism-related statutes in response to the failure of courts to faithfully apply their text as it was written and as Congress intended.

Amici therefore file this brief to defend the separation of powers and to underscore this Court's role in ensuring that courts do not substitute judicial preferences for legislative mandate, as the panel did below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Combatting international terrorism directed at the United States, its nationals, and its allies is "an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). This case concerns Congress's directive, embedded in statute, that "civil litigants"—terrorism victims and their families such as the petitioners here—are afforded "the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons [and] entities … that have provided material support … to foreign organizations or persons that engage in terrorist activities against the United States," whether "directly or indirectly." Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 2(b), 130 Stat. at 852.

The decision below marks the latest in an unfortunate tug-of-war between Congress and the lower courts, which have repeatedly refused to give Congress's anti-terrorism statutes their plain, intended meaning. This Court's review is needed to vindicate Congress's prerogative, within constitutional bounds, to create private rights of action that support national security and counterterrorism policy. U.S. Const. art. I, § 1; *Hernandez Mesa v. United States*, 140 S. Ct. 735, 744 (2020) (foreign affairs are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

Decades ago, Congress responded to increasing terrorist threats to U.S. nationals abroad by adding a private right of action for victims of terrorist attacks

to the Nation's counterterrorism arsenal. This ATA provision, which enjoyed strong bipartisan support, reflected Congress's determination that the deterrence created by criminal penalties for international terrorism, while important, was not enough. Instead, imposing civil liability for terrorists and their enablers was needed to "put[] terrorists' assets at risk." *The Antiterrorism Act of 1991: Hearing Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 13 (Sept. 18, 1992). And congressional action became necessary because of "reluctant courts and numerous jurisdictional hurdles" under then-existing law. 136 Cong. Rec. S7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley).

Unfortunately, some courts have consistently resisted Congress's instructions, interposing jurisdictional obstacles or atextual pleading requirements, and thereby avoiding adjudication of ATA claims. As a result, Congress has been compelled to repeatedly amend the ATA and related statutes to achieve its purposes of disrupting terrorist financing—indeed, the frequency with which Congress has been forced to expend legislative time and resources to address this problem is extraordinary. Congress has enacted overwhelmingly bipartisan legislation three times over the past five years—not a period known for political harmony—to correct judicial interpretations of the ATA that contravene Congress's intent and improperly shut courthouse doors to terrorism victims.

Enough is enough. This case concerns JASTA, passed unanimously by both Houses of Congress and

enacted in 2016 over President Obama's veto. JASTA expressly provides for secondary liability. Court decisions, including by the Second Circuit, had erroneously refused to recognize ATA claims against actors, such as financial institutions, that "directly or indirectly" facilitate, but do not themselves commit, acts of international terrorism. JASTA, Pub. L. No. 114-222, § 2(b). JASTA expressly provides that victims of international terrorism committed by designated foreign terrorist organizations on or after September 11, 2001 may bring secondary-liability claims, including in pending litigation. *Id*. § 7. And to prevent courts from subjecting ATA aiding-and-abetting claims to stricter scrutiny than other forms of secondary tort liability, JASTA expressly instructs courts to apply the traditional common-law standard distilled in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which focuses on the foreseeability of harm. JASTA, Pub. L. No. 114-222, § 2(a)(5).

The court below disregarded JASTA's clear statutory instructions and instead created a dangerous charitable-activity loophole in the anti-terrorism scheme legislated by Congress. The Second Circuit barred plaintiffs from pleading JASTA claims because of evidence that the Hamas-controlled organizations to which the defendant transferred funds on behalf of its customer—itself a Specially Designated Global Terrorist—performed some charitable work, and because the transfers did not expressly indicate they were for a "terroristic purpose." This reasoning defies decades of congressional findings—including during the legislative process leading to the enactment of ATA

civil liability—that the financial operations of international terrorist organizations often involve intermediaries that may also perform legitimate or charitable work. *Holder*, 561 U.S. at 31 ("[T]here is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.").

The Second Circuit's holding threatens to upend JASTA in the venue where nearly all ATA and JASTA claims are brought, given New York's importance in dollar-clearing and U.S. correspondent banking for financial institutions around the world. It is now up to this Court to vindicate the separation of powers in this critical area of national security. The petition should be granted.

ARGUMENT

I. Congress Has Repeatedly Amended The ATA To Achieve Its Counterterrorism Purposes And Confirm Its Far-Reaching Scope

The ATA's civil remedy, in addition to providing justice and compensation to individual victims and their families, forms a critical component of Congress's broader counterterrorism framework, which draws on both public authorities and private-sector incentives to cut off terrorist entities from financial services. See H.R. Rep. No. 115-858 (2018) ("The ATA's civil liability provision is aimed at deterring support for terrorism, buttressing the

country's counter-terrorism initiatives, and providing justice for victims of terrorist attacks.").

A. Congress Enacted The ATA To Deter Terrorists, Disrupt Their Support Networks, And Provide Readily Accessible Relief To Victims

Three decades ago, Congress enacted the ATA's civil cause of action in response to a series of horrific terrorist attacks on U.S. nationals abroad. In 1983, 241 Americans were murdered in a terrorist bombing of Marine barracks in Beirut. In 1985, Palestinian Liberation Organization (PLO) terrorists hijacked a cruise ship in the Mediterranean and murdered a wheelchair-bound American passenger, Leon Klinghoffer, by shooting him in the head and throwing his body in the sea. And just days before Christmas in 1988, Libyan terrorist operatives planted bombs on Pan Am Flight 103, which exploded over Lockerbie, Scotland, killing hundreds of passengers (including 190 American citizens) and 11 individuals on the ground. See 136 Cong. Rec. S7593–94 (daily ed. Apr. 19, 1990) (statement of Sen. Heflin).

On top of their grief, victims and their families struggled to hold accountable the perpetrators of these attacks and their enablers because of "reluctant courts and numerous jurisdictional hurdles." 136 Cong. Rec. S7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley on the introduction of the ATA). For instance, in the *Klinghoffer* litigation, the PLO raised jurisdictional defenses that the plaintiffs managed to overcome, as Congress noted, "[o]nly by virtue of the fact that the attack violated certain Admiralty laws

and that the [PLO] had assets and carried on activities in New York." *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts & Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. at 2-3 (July 25, 1990). Even then, Leon Klinghoffer's family had to endure over a decade of protracted litigation before the PLO agreed to settle.

To confront the growing terrorist threat and provide a forum for victims to have their day in court, Congress undertook a careful examination of terrorist financing networks to understand how best to disrupt terrorist activity while providing justice and compensation to victims. The result was the ATA's civil liability provision, which "fill[ed] [a] gap" in U.S. counterterrorism strategy by "establishing a civil counterpart" to existing criminal penalties for international terrorism. 136 Cong. Rec. at S14283 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley); see 137 Cong. Rec. S8143 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley) ("The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation."). When the ATA was reported out to the Senate floor, Senator Grassley, its champion and author, made clear that civil liability would hold terrorists "accountable where it hurts them most, at their lifeline, their funds. With the Grassley-Heflin [ATA] bill, we put terrorists on notice: To keep their hands off Americans and their eyes on their assets." 136 Cong. Rec. at S14284 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley).

Creating civil liability for terrorists and their sponsors was no symbolic move. Rather, it reflected

Congress's recognition that to stop terrorist activity, the United States must also cut perpetrators off from "the resource that keeps them in business—their money." 138 Cong. Rec. S33629 (daily ed. Oct. 7, 1992) (statement of Sen. Grassley). Thus, the ATA's civil liability provisions were intended to deter the provision of assistance by those who may or may not share a terrorist's murderous purpose, but whose contributions or services facilitate terrorist activity. As Congress explained in enacting criminal penalties for material support for terrorism, liability for those who facilitate terrorism reflects "the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups, that draw significant funding from the main organization's treasury, helps defray the costs to the terrorist organization of running the ostensibly legitimate activities." H.R. Rep. No. 104-383, 81 (1995); *see also* Tr. of Oral Arg. 39, Nos. 08-1498, 09-89, *Holder v. Humanitarian Law Project* (Feb. 23, 2010) ("Congress reasonably decided that when you help a … foreign terrorist organization's legal activities, you are also helping the foreign terrorist organization's illegal activities") (statement of then-Gen. Kagan). As Senator Schumer noted in support of JASTA when it was introduced in 2014, terrorists "need a great deal of money and material support to carry out attacks such as what occurred on 9/11." 160 Cong. Rec. S6657-01, S6659 (daily ed. Dec. 11, 2014) (statement of Sen. Schumer).

To deny terrorists access to funds— and, importantly, to the financial services that enable

terrorists to make use of those funds—the Senate Report accompanying the ATA expressly stated that the statute imposed broad "liability at *any point* along the causal chain of terrorism," to "interrupt, or at least imperil, the flow of money." S. Rep. No. 102-342, at 22 (1992) (emphasis added).

Finally, Congress also crafted a broad remedy to provide justice to individual victims. As Senator Grassley explained when introducing the ATA, "our civil justice system provides little civil relief to the victims of terrorism," because "victims who turn to the common law of tort or Federal statutes, find it virtually impossible to pursue their claims because of reluctant courts and numerous jurisdictional hurdles." 136 Cong. Rec. S7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley) Congress therefore sought to "codify" the principles that allowed Leon Klinghoffer's family to recover and "make the rights of American victims definitive," including for victims who, without the ATA, would find jurisdictional hurdles insurmountable. *See* 137 Cong. Rec. S8143 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley). By enacting a broad remedy, Congress understood that the bill would "open[] the courthouse door to victims of international terrorism." S. Rep. No. 102-342, at 45 (1992).

B. JASTA Specifically Responded To The Second Circuit's Erroneous Interpretations Of The ATA And Was Enacted In A Bipartisan Veto Override

Although the ATA was a critical step towards providing justice to victims and undermining terrorist

networks, subsequent court decisions that unduly narrowed its text forced Congress to amend the law further to clarify its reach. Congress drafted the ATA's civil remedy to create liability that would track "the law of torts," including common-law principles of vicarious and secondary liability. S. Rep. No. 102-342 at 45 (1992). But a number of courts, including the Second Circuit, refused to apply these basic common-law principles. Instead, these decisions asserted that "statutory silence on the subject of secondary liability means there is none; and section 2333(a) … does not mention aiders and abettors or other secondary actors." *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (quoting *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689-92 (7th Cir. 2008) (en banc)).

Congress responded to these decisions with JASTA, which expressly provides a cause of action for secondary liability against individuals or entities that aid and abet, or conspire with, designated foreign terrorist organizations. *See* 18 U.S.C. § 2333(d). JASTA clarifies, for the avoidance of any doubt, that the ATA is intended to provide U.S. victims of terrorism "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."

To prevent courts from undermining this purpose with atextual pleading standards, JASTA takes the unusual step of directing courts to apply the framework of a specific judicial opinion, *Halberstam v. Welch*, which had "been widely recognized as the leading case regarding Federal civil aiding and abetting liability." JASTA, Pub. L. No. 114-222,

§ 2(a)(5). *Halberstam* sets forth a comprehensive analysis of longstanding common-law tort principles, confirming that Congress intended courts not to treat ATA claims with special scrutiny, but to provide the same access to justice for ATA plaintiffs—and the same deterrence to ATA secondary tortfeasors—as they would in non-terrorism cases. Thus, by clarifying that the ATA encompasses "traditional aiding and abetting liability," 162 Cong. Rec. S2846 (daily ed. May 17, 2016) (statement of Sen. Schumer), JASTA "help[ed] fulfill the promise of the original Anti-Terrorism Act, which was intended to 'interrupt, or at least imperil, the flow of money' to terrorist groups." *Id.* (statement of Sen. Cornyn).

Lamentably, some courts continued to spurn Congress's clear instructions, even after JASTA was enacted. Thus, in 2018 and 2019—a time not known for legislative bipartisanship—Congress enacted the Anti-Terrorism Clarification Act of 2018 (ATCA), Pub. L. No. 115-253, 132 Stat 3183 (2018), as well as the Promoting Security and Justice for Victims of Terrorism Act of 2019 (PSJVTA), Pub. L. No. 116-94, 133 Stat 2534 (2019). Both statutes expanded the reach of the ATA in response to decisions by the Second Circuit and D.C. Circuit that dismissed, for lack of personal jurisdiction, ATA claims brought against the Palestinian Authority and the PLO. See H.R. Rep. No. 115-858, at 6-8 (2018) (discussing *Waldman v. PLO*, 835 F.3d 317 (2d Cir. 2016) and *Livnat v. Palestinian Auth.*, 851 F.3d 45 (D.C. Cir. 2017)). As the House Report on ACTA explained, it responded to the denial of certiorari to review the "flawed Second Circuit decision" and others that "have

allowed entities that sponsor terrorist activity against U.S. nationals overseas to avoid the jurisdiction of U.S. courts," undermining the ATA's purpose to "halt, deter, and disrupt international terrorism." H.R. Rep. No. 115-858, at 3, 6–7.

In JASTA, Congress amended the ATA yet again to clarify that secondary liability is available under the ATA pursuant to normal common-law tort principles, including for claims retroactive to 9/11. Congress has "supplement[ed] its statutory directions," repeatedly, by amending the ATA and related statutes, including in response to this Court's denial of certiorari in ATA cases. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020). Congress's intent could not be plainer. It is now the Judiciary's duty to heed Congress's clear statutory instructions, which the Second Circuit failed to do in the decision below. This Court should grant review to make clear to lower courts that they must follow, not bypass, Congress's instructions in the ATA.

II. The Decision Below Contradicts Both The Statutory Text And Congress's Express Purpose In Enacting The ATA And JASTA

Despite Congress's express instructions and clear intent to provide a broad civil remedy that will deter financial institutions from facilitating terrorist activity, the Second Circuit has again refused to apply the ATA as Congress wrote it. Congress made at least two things clear in JASTA. *First*, the ATA encompasses secondary liability in the form of tort claims against those that aid and abet or conspire with those that commit acts of international

terrorism. *Second*, this secondary liability must be assessed under run-of-the-mill, longstanding tort principles as described in *Halberstam*—without adding heightened standards for victims of international terrorism. The decision below flies in the face of both of these congressional directives.

A. The Second Circuit Failed To Faithfully Apply Congress's Clear Instructions In JASTA To Allow Litigants In Plaintiffs' Circumstances To Plead Aiding-And-Abetting Claims Against Financial Institutions

In the decisions below, both the Second Circuit and the district court held that adding secondary-liability claims to plaintiffs' complaint—which JASTA clarified are available under the ATA—would be futile. This flouted Congress's clear direction. As discussed, Congress enacted JASTA following repeated decisions of the Second Circuit holding that well-established common-law tort principles of secondary liability were not within the ATA's scope. In JASTA, Congress clarified that aiding-and-abetting claims under the ATA "shall apply to *any* civil action *pending on* … the date of enactment of this Act, and arising out of an injury to a person, property, or business *on or after* September 11, 2001." JASTA, Pub. L. No. 114-222, § 7 (emphasis added).

In a mere paragraph of analysis, the Second Circuit in the decision below asserted that "[t]he district court appropriately assessed plaintiffs' request to add JASTA claims, given the undisputed evidence adduced, in connection with the summary

judgment motions [on the primary-liability claims], as to the state of NatWest's knowledge." *Weiss v. Nat'l Westminster Bank, PLC.*, 993 F.3d 144, 166 (2d Cir. 2021). In waving away the possibility of amending the pleadings as futile because of the failure of the primary-liability claims, the Second Circuit and the district court effectively read JASTA out of the U.S. Code. Congress's express objective was to prevent the dismissal of ATA civil claims against secondary actors due to a plaintiff's inability to "prove that the [defendant's] own acts constitute[d] international terrorism" under § 2331(1). *Linde v. Arab Bank, PLC*, 882 F.3d 314, 328 (2d Cir. 2018). And Congress made JASTA, enacted in September 2016, retroactive to then-pending litigation for claims arising on or after September 11, 2001. The statute therefore expressly contemplates that new secondary-liability claims may be added in litigation that had been pending.

The core holding of the decision below—that any amendment would be futile because the Hamas "charitable" committees here performed *some* charitable work (alongside recruiting and subsidizing Hamas operatives, paying the families of Hamas "martyrs" and prisoners, and other terrorism activities), see *infra* II.B—directly contravenes the text of JASTA and Congress's findings that motivated the enactment of that text. Thus, Section 2 of JASTA allows civil litigants to "seek relief against persons, entities, and foreign countries" that have supported terrorist activities "directly *or indirectly*." JASTA, Pub. L. No. 114-222, § 2(b) (emphasis added). That the "social wing" of a terrorist organization might also perform charitable or other purportedly legitimate

work is nowhere mentioned in the text as an exception to Section 2, and the Second Circuit was wrong to read one in by judicial fiat. Indeed, Section 2's broad imposition of secondary liability flows from specific congressional findings on precisely that issue. *See* H.R. Rep. No. 115-858, at 4 (2018) ("The Department of Justice has recognized that the civil liability provision is 'an effective weapon in the battle against international terrorism' because it 'discourage[s] those who would provide financing for this activity.'").

Indeed, this lawsuit presents exactly the kind of claims to which Congress wanted to open the courthouse doors when it enacted JASTA. The approximately 200 plaintiffs here are U.S. nationals who are victims, or the representatives of victims, of over a dozen terrorist attacks perpetrated by Hamas between 2001 and 2004. *See Weiss v. Nat'l Westminster Bank PLC*, 936 F. Supp. 2d 100, 103 (E.D.N.Y. 2013). The first complaint in this consolidated action was filed in 2005, over 16 years ago. Because of overly narrow interpretations of the ATA, plaintiffs have been through multiple rounds of dispositive motions and trips to the Second Circuit seeking justice for themselves and their loved ones. Further, as the district court acknowledged, "Plaintiffs could not have included their JASTA claims in the amended complaints" because JASTA was enacted after the court-imposed deadline for filing amended complaints. *See Weiss v. Nat'l Westminster Bank PLC*, 381 F. Supp. 3d 223, 237 (E.D.N.Y. 2019). It is hard to imagine a case that better exemplifies the hurdles that Congress intended to help terrorist victims overcome.

The Second Circuit's refusal to permit plaintiffs to bring secondary-liability claims under JASTA effectively reinstated the Circuit's overly stringent pre-JASTA case law. But a court's disagreement with Congress's legislative choices is no excuse to treat a statute as if it had never been enacted.

B. The Second Circuit Has Misapplied The *Halberstam* Standard That Congress Specifically Enacted To Constrain Judicial Discretion In ATA Cases

The panel below not only sidestepped Congress's correction of Second Circuit decisions denying secondary liability under the ATA. It also decided—as a matter of law—that terrorist activity is not a foreseeable risk for a financial institution when it knowingly transfers substantial funds to the "charity" wings of terrorist organizations. The creation of this remarkable loophole—in the very venue where most every ATA and JASTA claim is brought (given New York's centrality to the financial system)—gainsays Congress's specific directives and holdings of this Court.

1. In enacting JASTA, Congress sought to make clear, once and for all, that ATA plaintiffs were not to be held to stricter standards than other litigants.

To leave no room for judicial preferences or doubt on this score, Congress specifically instructed courts to apply the *Halberstam* foreseeability standard, which itself distills decades of tort common law. 705 F.2d 472 (D.C. Cir. 1983). In *Halberstam*, the defendant was held liable for a murder her boyfriend committed during a botched burglary, even though

she did not know about the unplanned murder or even the burglary. She only acted as his "banker, bookkeeper, recordkeeper, and secretary" for his property crimes enterprise: "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." *Halberstam*, 705 F.2d at 487-88. Thus, she was "generally aware" that her services were playing a role in some kind of "overall illegal or tortious activity" from which violence was "a foreseeable risk." *Id.*

As the *Halberstam* court explained, under traditional tort principles "foreseeability" does not require certainty or even probability that an injurious act will result from the activity in which a defendant is "generally aware" of its role. *Halberstam*, 705 F.2d at 483. Nor does foreseeability require that the acts by the primary violator be "specifically contemplated by the defendant at the time he offered aid." *Id.* Thus, a defendant need not engage in the risky behavior themselves "or even expect" it to occur to be civilly liable as an aider and abettor. *Id.*

2. Congress specifically invoked the common law tort foreseeability standard of *Halberstam* for good reason. The ATA and its amendments are intended to disrupt terrorist financing. To escape sanctions and other efforts to cut off terrorists' participation in the international financial system, terrorist actors will often use intermediaries (particularly nominal

charities) to access services of traditional financial institutions. Congress therefore made the policy determination that entities such as banks must be discouraged from knowingly providing services to customers serving as such intermediaries. *See* H.R. Rep. No. 115-858, at 4 (2018) ("The Department of Justice has recognized that the civil liability provision is 'an effective weapon in the battle against international terrorism' because it 'discourage[s] those who would provide financing for this activity.'"). JASTA's invocation of common-law tort foreseeability standards encourages banks to avoid transactions and customers where the bank is "generally aware" that the customer is involved in an unlawful activity from which terrorism is a foreseeable risk.

The court below ignored Congress's instructions and second-guessed its legislative judgment. The total of the analysis provided in the decision below is the assertion that the *Halberstam* foreseeability standard was not met since Plaintiffs conceded that the Hamas charities performed some charitable work and there was no express indication that the transfers were for terrorist attacks:

> The district court appropriately assessed plaintiffs' request to add JASTA claims, given the undisputed evidence adduced, in connection with the summary judgment motions, as to the state of NatWest's knowledge.… [T]he record included evidence that plaintiffs' expert 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.

NatWest, 993 F.3d at 166. To be blunt: So what? The undisputed record evidence showed that NatWest continued transferring funds for the intermediary (Interpal), including depositing funds from a Hamas fundraising organization, the Al Aqsa Foundation, into Interpal's account, *after the bank knew both entities were designated as SDGTs for their role as Hamas fundraisers*. As the Second Circuit itself previously held in this same case, there was thus a triable issue as to whether NatWest knew it was providing material support to a terrorist organization and knew the terrorist organization's "aims and activities." *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 204-05 (2d Cir. 2014). It should not matter that the Hamas entities to which NatWest transferred funds also performed some charitable work.

The upshot is that the decision below represents a striking departure from the *Halberstam* standard. Nothing in the D.C. Circuit's extensive discussion of longstanding foreseeability principles makes conduct causing a victim's injury categorically *unforeseeable* if the primary violator *also* engaged in non-tortious conduct.

To be sure, the Second Circuit has tried to cabin its holding in *Weiss* to the specific facts of that case. *See Kaplan*, 999 F.3d at 861. But this does nothing to remove the intolerable danger that the "charitable

exception" the Second Circuit fashioned will swallow the general foreseeability principle propounded by Congress and the Executive Branch and reflected in *Holder*, *Halberstam*, *Boim*, and *Kaplan*. In fact, the Second Circuit recently acknowledged, in rejecting an "attempt to equate the *Halberstam* foreseeability standard with the 'fungibility' theory in *Holder*," that "any persuasive value [*Boim*] might have is insufficient to overcome the binding effects of *Linde* and *Kaplan* on us." *Honickman v. BLOM Bank, SAL*, 2021 WL 3197188 (2d Cir. July 29, 2021) n. 14.[2]

What is more, in refusing to apply the *Halberstam* standard to knowing and substantial assistance to the "social wing" of terrorist organizations that do some charitable work, the decision below ignores Congress's longstanding findings about the nature of terrorist financing. That constituent elements of Hamas's "social wing" to which NatWest facilitated financing performed some charitable work is hardly surprising given the ubiquity of terrorists financing their activity via intermediaries and the common need for terrorist actors to provide social services, of which Congress was well aware when enacting and amending the ATA. Indeed, JASTA's enacted congressional findings make clear that "[s]ome foreign terrorist organizations, *acting through affiliated groups or*

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[2] In *Boim*, the Seventh Circuit held that § 2333(a) is satisfied when a defendant knowingly donates money to a terrorist organization because "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." 549 F.3d at 698.

individuals, raise significant funds outside of the United States." JASTA, Pub. L. No. 114-222, § 2(a)(3).

3. Nor should it matter, contrary to the Second Circuit's view, that "Interpal did not indicate to NatWest that the transfers were for any terroristic purpose" or were for a particular "terrorist attack." *NatWest*, 993 F.3d at 166. *Halberstam*'s foreseeability standard obviously does not require as much, and obviously Foreign Terrorist Organizations know better than to make a record of their nefarious purposes for fundraising.[3]

As this Court has recognized, "there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." *Holder*, 561 U.S. at 31. Thus, Congress has found that designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." *Id.* at 7 (quoting 18 U.S.C. § 2339B (Findings and Purpose)); see *United States v. El-Mezain*, 664 F.3d 467, 486 (5th Cir. 2011), *as revised* (Dec. 27, 2011) ("[A]id to Hamas's social wing critically assists Hamas's goals while also freeing

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[3] Criminal organizations and their enablers do not tend to order attacks or hits by overtly describing in chapter-and-verse how or when something is going to happen. *E.g.*, The Sopranos, Episode 43 ("Tony Soprano: Somebody should do something about it. Carmine Lupertazzi: I appreciate your thoughts. [pause] Soprano: Are you saying what I think you're saying? Lupertazzi: I didn't say nothing.").

resources for Hamas to devote to its military and political activities.").

The decision below—creating a charitable-exception carveout and imposing the requirement that a defendant receive overt "indications" of a "terroristic purpose"—threatens to render toothless JASTA's imposition of secondary-liability on those who assist terror financing. Terrorist organizations often wear multiple hats, but that fact cannot justify immunizing support to them under JASTA, which, at its core, "was intended to 'interrupt, or at least imperil, the flow of money' to terrorist groups." 162 Cong. Rec. S2846 (statement of Sen. Cornyn). Review of this case is therefore necessary to send a clear signal to the lower courts that Congress says what it means and means what it says.

III. This Court's Review Is Essential To Protecting The Separation Of Powers And Congress's Authority To Set National Security And Counterterrorism Policy

This Court should grant certiorari to vindicate the separation of powers and uphold Congress's constitutional authority to determine how best to protect U.S. nationals and interests from international terrorism. Separation-of-powers concerns are heightened "in the context of ... national defense," and "in no other area has the Court accorded Congress greater deference." *Rostker v. Goldberg*, 453 U.S. 57 64–65 (1981). As this Court has explained, "foreign affairs [is] a domain in which the controlling role of the political branches is both necessary and

proper." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016).

Respect for the separation of powers does not "warrant abdication of the judicial role," *Holder*, 561 U.S. at 34, but it does require deference both to Congress's fact-finding capacity and to its policy judgments on the role of civil liability in advancing national security and U.S. foreign-policy goals. "[W]hen it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked.'" *Id.* (quoting *Rostker*, 453 U.S. at 65). Thus, in considering the scope of JASTA, the Second Circuit had to carefully examine and give effect to the congressional findings on the importance of disrupting terrorist financing—"direct[] or indirect[]"—and Congress's policy judgment that civil claims against financial institutions providing material support through intermediaries are an effective and necessary tool for combatting terrorism. JASTA, Pub. L. No. 114-222, § 2(a)(6); *see also Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016) (Congress's "stance on a matter of foreign policy … warrants respectful review by courts.").

In addition, "there are many delicate and important considerations that Congress is in a better position to examine in determining whether and how best to impose corporate liability." *Jesner*, 138 S. Ct. at 1406. Thus, when "litigation implicates sensitive and weighty interests of national security and foreign

affairs," "Congress's assessment[] is entitled to deference." *Holder*, 561 U.S. at 33-34.

In enacting the ATA, Congress determined that civil liability was critical to deterring terrorist actors and the components of their support networks, including financial institutions, that enable terrorist activity. Because of the importance of the ATA to counterterrorism policy, Congress has repeatedly enacted legislation to respond to lower-court decisions, including by the Second Circuit, misinterpreting the statute.

A court's refusal to heed the text of a duly enacted statute is troubling in any case, but it has special significance for the separation of powers here, where JASTA was expressly enacted to overturn judicial decisions that misapplied the ATA. Notwithstanding Congress's clear instructions in JASTA, the court below refused to apply the law as its plain text requires. The need for this Court's review is therefore particularly acute here.

The Second Circuit has been (and will continue to be) the jurisdiction of choice for ATA and JASTA claims, as most every financial institution maintains headquarters or an active branch in New York. It is vital that the Court review this case and make clear that in our system of government, and especially in

the realm of national security, courts do not wield veto power over duly enacted, constitutional legislation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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