Nos. 21-381 and 21-382

In the Supreme Court of the United States

TZVI WEISS, ET AL., PETITIONERS

v.

NATIONAL WESTMINSTER BANK, PLC

MOSES STRAUSS, ET AL., PETITIONERS

v.

CREDIT LYONNAIS, S.A.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
SHARON SWINGLE
CATHERINE M. PADHI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.*, authorizes American nationals "injured * * * by reason of an act of international terrorism" to recover treble damages for their injuries. 18 U.S.C. 2333(a). The Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852, amended the ATA to provide that "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. 2333(d)(2). JASTA further states that the decision in *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983)—which sets forth a three-element test for aiding-and-abetting liability, including one element that itself has six factors—"provides the proper legal framework for how such liability should function" under the statute. JASTA § 2(a)(5), 130 Stat. 852 (18 U.S.C. 2333 note). The question presented is:

Whether evidence that a defendant knowingly provided financial services to an entity with ties to a designated foreign terrorist organization necessarily creates a jury question as to whether the defendant aided and abetted acts of international terrorism, in violation of 18 U.S.C. 2333(d)(2).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

A. Legal Framework

1. The Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.*, authorizes American nationals "injured

* * * by reason of an act of international terrorism" to bring a civil action for treble damages in federal court. 18 U.S.C. 2333(a); see 18 U.S.C. 2331(1) (defining "international terrorism").

In 1996, Congress enacted 18 U.S.C. 2339B, which makes it a crime to "knowingly provide[] material support or resources to a foreign terrorist organization [FTO]." 18 U.S.C. 2339B(a)(1); see 8 U.S.C. 1189. A person violates Section 2339B by providing material support with "knowledge that the organization is a designated terrorist organization," "has engaged or engages in terrorist activity," or "has engaged or engages in terrorism." 18 U.S.C. 2339B(a)(1). In *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), this Court held that Section 2339B violations require "knowledge about the organization's connection to terrorism," but "not specific intent to further the organization's terrorist activities." *Id.* at 16-17. The Court further rejected a First Amendment challenge to Section 2339B brought by plaintiffs who sought "to facilitate only the lawful, nonviolent purposes" of certain FTOs. *Id.* at 8. The Court explained that Congress "was justified" in determining that FTOs "'are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.'" *Id.* at 29 (citation and emphasis omitted); see *id.* at 30-31.

2. Following the ATA's enactment, courts considered whether the statute made persons who provided substantial assistance to terrorists civilly liable. Compare *Rothstein* v. *UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013), with *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (en banc), cert. denied, 558 U.S. 981 (2009). The United States expressed the

view that the ATA imposes secondary liability on defendants who "knowingly provide[] substantial assistance to a terrorist organization." U.S. C.A. Amicus Br. at 26, *Boim*, *supra* (No. 05-1815) (*Boim* Br.); see U.S. Amicus Br. at 8, *O'Neill* v. *Al Raji Bank*, 573 U.S. 954 (2014) (No. 13-318) (*O'Neill* Br.). The United States further stated that ATA aiding-and-abetting claims should be evaluated under tort-law principles, as "summarized in the seminal D.C. Circuit opinion in [*Halberstam* v. *Welch*, 705 F.2d 472 (1983)]." *Boim* Br. at 15-16; accord *O'Neill* Br. at 7-8 (citing *Halberstam*, 705 F.2d at 477).

Halberstam identified three elements of civil aiding-and-abetting liability:

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

705 F.2d at 477. *Halberstam* further identified six factors relevant to the substantial-assistance element. *Id.* at 483-484.

The United States also explained that while "liability can be imposed under Section 2333(a) if common law tort standards are met even in the absence of a specific intent by the defendant to assist in international terrorism[,] * * * the defendant's intent will normally be a substantial factor in the analysis." *Boim* Br. at 2. And the United States stated that a violation of Section 2339B does not "automatically constitute[] an act of international terrorism giving rise to liability under Sec-

tion 2333(a)." *Id.* at 3. Rather, "[i]n certain factual situations, criminal conduct would not support civil tort liability under Section 2333(a), such as where the connection between a defendant's actions and the act of international terrorism that harms the victim is insubstantial." *Ibid.*; see *id.* at 23, 31; *O'Neill* Br. at 8, 15 n.6.

3. In 2016, Congress amended the ATA to expressly provide for aiding-and-abetting liability. The Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852, states that in an ATA action based on "an injury arising from an act of international terrorism committed, planned, or authorized by" an FTO, "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" the act. 18 U.S.C. 2333(d)(2). JASTA further states that *Halberstam* "provides the proper legal framework for how [aiding-and-abetting] liability should function in th[is] context." § 2(a)(5), 130 Stat. 852 (18 U.S.C. 2333 note). JASTA applies retroactively to pending actions based on injuries on or after September 11, 2001. § 7, 130 Stat. 855 (18 U.S.C. 2333 note).

B. Facts And Procedural History

These cases concern ATA claims brought by overlapping plaintiffs (now petitioners), who are American nationals (or their representatives) injured or killed in terrorist attacks committed by Hamas, a designated FTO, between 2001 and 2004. *Weiss* Pet. App. 7a; *Weiss* Pet. 21; *Strauss* Pet. App. 7a; *Strauss* Pet. 2. Although the cases involve different facts, "the actions proceeded largely along parallel lines," *Strauss* Pet. App. 9a, and petitioners have urged the Court to consider them together, *e.g.*, *Weiss* Pet. 21; *Strauss* Pet. Reply Br. 11-12.

1. Weiss*, No. 21-381*

a. In 2005 and 2007, the *Weiss* petitioners sued respondent National Westminster Bank (NatWest), an entity incorporated and headquartered in the United Kingdom. *Weiss* Pet. App. 9a. Petitioners alleged that NatWest provided banking services to Interpal, a nonprofit organization registered with the U.K.'s Charity Commission for England & Wales (Charity Commission). *Ibid.* According to petitioners, between 1996 and 2003, NatWest processed hundreds of wire transfers of funds "from Interpal to 13 charities that NatWest allegedly knew, or willfully ignored, were controlled by, or were alter egos of, Hamas." *Id.* at 9a-10a. Petitioners do not contend that any of the transferred funds were put toward violent ends.

During its relationship with Interpal, NatWest repeatedly investigated suspicious activity on Interpal's accounts and disclosed its suspicions to the U.K. government. See *Weiss* Pet. App. 15a-17a, 149a-150a. In August 2003, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) designated Interpal a Specially Designated Global Terrorist based on its role in fundraising for Hamas. *Id.* at 9a-10a. The Charity Commission then froze Interpal's accounts and commenced an investigation. *Id.* at 149a. In September 2003, the Commission found no "clear evidence" that Interpal "had links to Hamas' political or violent militant activities" and concluded that its bank accounts "should be unfrozen and the [i]nquiry closed." *Ibid.* (citation omitted).

Following the OFAC designation, NatWest sought guidance from the Financial Sanctions Unit of the Bank of England. *Weiss* Pet. App. 150a. The Bank explained

that there were "presently no plans to list" Interpal under the U.K.'s "Terrorism Order," and that there was "no need [for NatWest] to take any further action." *Ibid.* (citation omitted). The Bank reminded NatWest that "payments to, or for the benefit of, Hamas are prohibited," and directed NatWest to report suspicions of such payments to governmental entities. *Ibid.* (citation omitted). NatWest began reviewing Interpal's accounts every six months, and it closed the last of those accounts in March 2007. *Id.* at 150a-151a.

b. As relevant here, the *Weiss* petitioners alleged that NatWest was liable as a principal under the ATA, on the theory that it provided material support to a terrorist organization in violation of Section 2339B(a)(1), which constituted an "act of international terrorism" under Section 2333(a). *Weiss* Pet. App. 10a (citation omitted). Petitioners also alleged that NatWest aided and abetted Hamas's principal violations. *Ibid.* The district court dismissed the aiding-and-abetting claim, reasoning that even if the (pre-JASTA) ATA encompassed such liability, petitioners had "not sufficiently alleged facts" to support an aiding-and-abetting claim. 453 F. Supp. 2d 609, 621. The court stated that "mere maintenance of a bank account and the receipt or transfer of funds do not * * * constitute [the] substantial assistance" required for aiding-and-abetting liability. *Ibid.*

Following years of discovery, the district court granted NatWest's motion for summary judgment on petitioners' primary-liability claims. 936 F. Supp. 2d 100. The court held that petitioners could not show that NatWest had "actual knowledge" or "exhibited deliberate indifference to [Interpal's] links [to] terrorism." *Id.* at 114; see *id.* at 114-118.

c. The court of appeals vacated that judgment. *Weiss* Pet. App. 145a-164a. It determined that for a Section 2333(a) primary-liability claim predicated on a violation of Section 2339B(a)(1), Section 2333(a) "incorporates" Section 2339B(a)(1)'s knowledge requirement. *Id.* at 154a. The district court thus had erred in "focusing on whether NatWest had knowledge that, or exhibited deliberate indifference to whether, Interpal funded terrorist *activities*." *Id.* at 147a. Instead, the question was whether a jury could find that NatWest knowingly provided support to a *terrorist organization*, "regardless of the character of the activities being financed." *Id.* at 158a. Petitioners could meet that burden by "demonstrating either that NatWest had actual knowledge that" or "exhibited deliberate indifference to whether Interpal provided material support to Hamas." *Id.* at 148a. Petitioners had "presented sufficient evidence to create a triable issue of fact" on that question, particularly given "the 'lenient' standard" applicable to "the sufficiency of evidence of scienter issues." *Id.* at 161a (citation omitted).

d. Following JASTA's enactment, the Second Circuit determined in another case that a violation of Section 2339B(a)(1) does *not* necessarily constitute "an act of international terrorism" supporting primary liability under Section 2333(a). *Linde* v. *Arab Bank, PLC*, 882 F.3d 314, 326 (2018). *Linde* explained that "acts of international terrorism" must "involve violence or endanger human life" and "appear to be intended to intimidate or coerce a civilian population or to influence or affect a government." *Ibid.* (citing 18 U.S.C. 2331(1)). While the provision of material support to a terrorist organization in violation of Section 2339B(a)(1) might

satisfy those requirements, it does not "invariably" do so. *Id.* at 326-327.

The plaintiffs in *Linde* had argued that the instructional error on primary liability was harmless because they had also demonstrated aiding-and-abetting liability. 882 F.3d at 328. The court of appeals declined to hold that, as a matter of law, the knowing provision of material support in *Linde* sufficed for secondary liability. *Id.* at 328-331. The court explained that "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*." *Id.* at 329. Specifically, aiding-and-abetting liability "requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Ibid.* (quoting *Halberstam*, 705 F.2d at 477).

e. Following *Linde*, the district court granted NatWest's renewed motion for summary judgment regarding petitioners' claim that NatWest was liable as a principal because its alleged violations of Section 2339B(a)(1) constituted "acts of terrorism" under Section 2331(1). *Weiss* Pet. App. 11a-12a; see *id.* at 43a-72a. The court explained that petitioners had not raised a triable issue of fact as to whether NatWest's acts "involved violent acts or acts dangerous to human life": there was no evidence that "the 13 Charities participated in, planned, trained the perpetrators of, requested that someone carry out, or were the cause of the attacks giving rise to [petitioners'] claims," and petitioners had not identified any transfers "from Interpal to the 13 Charities as payments meant to involve a violent act or an act dangerous to human life." *Id.* at 62a. The court further reasoned that petitioners could not

show that NatWest's actions satisfied the statutory "appear to be intended" requirement for primary liability. *Id.* at 63a-64a (quoting 18 U.S.C. 2331(1)(B)).

In response to NatWest's motion for summary judgment, petitioners asserted that they could proceed on an aiding-and-abetting theory under JASTA. The district court construed that response as a cross-motion for leave to amend the complaint to add an aiding-and-abetting claim, which it could consider on the summary-judgment record. *Weiss* Pet. App. 70a-71a. The court held that amendment would be futile because the aiding-and-abetting claim would "fail[] as a matter of law." *Id.* at 71a. Based on the record before it, the court determined that petitioners could not "demonstrate that [NatWest] had the requisite knowledge required by JASTA," as they had presented "no evidence that creates a jury question as to whether [NatWest] generally was aware that it played a role in any of Hamas's or even Interpal's * * * violent or life-endangering activities." *Id.* at 71a-72a.

f. The court of appeals affirmed. Regarding primary liability, the court held that petitioners had not provided "any * * * evidence that the transfers by NatWest involved violence, or danger to human life," or satisfied the statutory "appear to be intended" requirement. *Weiss* Pet. App. 32a; 18 U.S.C. 2331(1)(B).

Turning to the JASTA claim, the court of appeals held that the district court did not err in denying leave to amend. *Weiss* Pet. App. 33a-42a. The court explained that "the second and third *Halberstam* elements require proof that at the time the defendant (directly or indirectly) aided the principal, the defendant was 'generally aware' of the overall wrongful activity and was 'knowingly' assisting the principal violation."

Id. at 37a (quoting *Halberstam*, 705 F.2d at 477); see *id.* at 35a-37a. The court then discussed in detail *Siegel* v. *HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019), which held that victims of terrorist attacks had not adequately pleaded either the second (general-awareness) or third (substantial-assistance) *Halberstam* elements by alleging that HSBC had provided financial services to a Saudi bank alleged to have ties to the terrorist organization that carried out those attacks. *Weiss* Pet. App. 38a-41a. Considering the facts of *Weiss*, the court determined that a jury could not find that NatWest "was knowingly providing substantial assistance to Hamas, or that NatWest was generally aware that it was playing a role in Hamas's acts of terrorism." *Id.* at 41a-42a.

2. Strauss, *No. 21-382*

a. In 2006 and 2007, the *Strauss* petitioners sued respondent Crédit Lyonnais, S.A., an entity incorporated and headquartered in France. *Strauss* Pet. App. 84a, 147a. Petitioners alleged that Crédit Lyonnais provided banking services to the Comité de Bienfaisance et de Secours aux Palestiniens (CBSP), a nonprofit organization registered in France. *Id.* at 85a. According to petitioners, Crédit Lyonnais "directed at least 270 funds transfers, valued at approximately $2.5 million," to the same 13 charities on behalf of CBSP. *Strauss* Pet. 4, 17; see *Strauss* Pet. App. 173a. As in *Weiss*, petitioners do not contend that any of the funds transferred by CBSP were put toward violent ends.

At times, Crédit Lyonnais "suspected CBSP might be engaged in money laundering." *Strauss* Br. in Opp. 8. The bank's Financial Security Unit (FSU) began monitoring CBSP's accounts in 1997, and it determined after an investigation that the accounts' operation

"seemed normal." *Strauss* Pet. App. 137a-138a. In 2000, however, Crédit Lyonnais twice noticed large and unexplained increases in CBSP's banking activity. *Id.* at 138a, 141a-142a. The bank suspected that this activity was evidence of money laundering, and it reported its suspicions to the French government. *Id.* at 141a-142a. The bank also placed CBSP's accounts under "heightened surveillance." *Id.* at 141a. French law enforcement investigated each report, but closed the investigations based on insufficient evidence of wrongdoing. *Ibid.*; see *id.* at 143a.

In December 2001, Crédit Lyonnais decided to close CBSP's accounts. *Strauss* Pet. App. 144a. But at CBSP's request, Crédit Lyonnais delayed the action until the end of 2002 so that CBSP could find another bank. *Ibid.* The accounts ultimately remained open through most of 2003, apparently unbeknownst to Crédit Lyonnais's FSU. See 936 F. Supp. 2d at 119.

The FSU learned that CBSP's accounts remained open after OFAC designated CBSP a Specially Designated Global Terrorist on August 21, 2003. *Strauss* Pet. App. 145a-146a. Officials decided to close the accounts as planned. *Id.* at 147a & n.6. On August 29, Crédit Lyonnais informed CBSP of that action, enclosing checks for the remaining balance of over €250,000. *Ibid.* CBSP's accounts continued to receive donations through early September, and Crédit Lyonnais sent CBSP additional checks for that money. *Id.* at 147a.

b. As in *Weiss*, the *Strauss* petitioners alleged that Crédit Lyonnais was both primarily and secondarily liable under the ATA. 2006 WL 2862704, at *1. The district court dismissed the aiding-and-abetting claim without prejudice, relying on the same logic it had employed in *Weiss*. *Id.* at *9.

After years of discovery, Crédit Lyonnais moved for summary judgment on the primary-liability claims. As relevant here, it asserted that "no reasonable jury could find that it acted with the scienter required" to state a claim under Section 2333(a) for a violation of Section 2339B(a)(1). *Strauss* Pet. App. 152a. The district court disagreed, finding a "genuine issue of material fact" as to whether Crédit Lyonnais "knew of or was deliberately indifferent to its support of terrorism through its dealings with CBSP." *Id.* at 159a, 162a.

c. Following *Linde*, see pp. 7-8, *supra*, Crédit Lyonnais filed a renewed motion for summary judgment on the primary-liability claims. As in *Weiss*, the district court granted the motion. *Strauss* Pet. App. 71a-72a.

Like the *Weiss* petitioners, the *Strauss* petitioners responded to the summary-judgment motion by seeking to add a JASTA aiding-and-abetting claim. *Strauss* Pet. App. 77a. The district court denied that request, holding that amendment would be futile because petitioners could not demonstrate that Crédit Lyonnais had the requisite scienter, *i.e.*, general awareness that "it played a role in any of Hamas' or even CBSP's violent or life-endangering activities." *Id.* at 80a-81a.

d. The court of appeals affirmed in a summary order, relying on its reasoning in *Weiss*. *Strauss* Pet. App. 9a.

DISCUSSION

The United States has an interest in enabling American nationals injured or killed in terrorist attacks to seek compensation from those who aid and abet terrorists. Such actions can afford a measure of justice to victims. In addition, they can encourage private financial institutions and others to be diligent in guarding

against actions that support the global terrorist financing network. To achieve these goals, Congress fashioned the ATA's civil liability provisions to permit recovery against actors who are culpable for enabling terrorist attacks, without reaching so broadly as to inhibit legitimate activities, including in unstable or underdeveloped regions.

The lower courts in these cases applied the correct legal framework under the ATA. Petitioners primarily challenge (*Weiss* Pet. 21-32; *Strauss* Pet. 15-24) the lower courts' determinations that the evidence developed after years of discovery would not permit a jury to find that respondents acted with the requisite scienter for aiding-and-abetting liability under JASTA. Those fact-intensive determinations do not conflict with any decision of this Court or another court of appeals. And even if the question presented warranted this Court's review, these cases would present unsuitable vehicles. Further review is not warranted.

A. The Lower Courts Applied The Correct Legal Framework

1. Section 2333(d) imposes secondary liability for aiding and abetting acts of international terrorism committed by designated FTOs. Congress expressly provided that a defendant's liability under Section 2333(d) should be determined under *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983). JASTA § 2(5), 130 Stat. 852.

The *Halberstam* court considered whether Linda Hamilton could be held liable for aiding and abetting an unplanned murder that her live-in partner, Michael Welch, committed during a burglary. The court of appeals credited the district court's factual findings and inferences, including that although Hamilton did not intend the murder, she "knew full well the purpose of

[Welch's] evening forays" and "was a willing partner in" Welch's burglary enterprise. *Halberstam*, 705 F.2d at 486 (citation omitted; brackets in original); see *id.* at 488. Welch committed "innumerable burglaries" over the course of five years, and Hamilton served as "banker, bookkeeper, recordkeeper, and secretary" for the burglary enterprise, helping to launder the "fortune" she and Welch acquired by selling his stolen goods. *Id.* at 474, 487. The buyers "made their checks payable to [Hamilton]," and Hamilton deposited them into her own bank accounts. *Id.* at 475. She also kept records of these "asymmetrical transactions—which included payments coming in from buyers, but no money going out to the sellers from whom Welch had supposedly bought the goods." *Ibid.* Hamilton further knew that Welch "installed a smelting furnace in the garage and used it to melt gold and silver into bars." *Ibid.*

To determine whether those facts sufficed for aiding-and-abetting liability, the *Halberstam* court canvassed the common-law jurisprudence. See 705 F.2d at 489. The court identified three elements of a civil aiding-and-abetting claim: First, "the party whom the defendant aids must perform a wrongful act that causes an injury." *Id.* at 477. Second, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance." *Ibid.* Third, "the defendant must knowingly and substantially assist the principal violation." *Ibid.*

The *Halberstam* court found all three elements met. First, Welch performed a wrongful act that caused an injury by killing Halberstam during a burglary. 705 F.2d at 488. Second, the district court's "conclusions that Hamilton knew about and acted to support Welch's illicit enterprise" were sufficient to "establish that

Hamilton had a general awareness of her role in a continuing criminal enterprise." *Ibid.*

The third element required a more extensive analysis. *Halberstam*, 705 F.2d at 488. The court of appeals held that the district court had "justifiably inferred that Hamilton assisted Welch with knowledge that he had engaged in illegal acquisition of goods," and thus "[t]he only remaining issue * * * [wa]s whether her assistance was 'substantial.'" *Ibid.* The court explained that "many variables enter[] into" that analysis, including: (i) the nature of the act assisted, (ii) the amount and kind of assistance, (iii) the defendant's presence at the time of the tort, (iv) the defendant's relationship to the tortious actor, (v) the defendant's state of mind, and (vi) the duration of assistance. *Id.* at 483-484.

On the record before it, the *Halberstam* court concluded that four of the factors supported liability. The act assisted—a long-running burglary enterprise—was "heavily dependent" on Hamilton's activities. *Halberstam*, 705 F.2d at 488. "[A]lthough the amount of assistance" Hamilton provided may not have been "overwhelming as to any given burglary," it "added up over time to an essential part of the pattern." *Ibid.* Hamilton's state of mind "assume[d] a special importance," and the duration of the assistance also "strongly influenced" the court's conclusion: Hamilton's "continuous participation reflected her intent and desire to make the venture succeed; it was no passing fancy or impetuous act." *Ibid.* By contrast, the fact that Hamilton was not present at the time of the murder (or any burglary) weighed against liability. *Ibid.* And the court gave little weight to the relationship to the tortious actor because it was "wary of finding a housemate civilly liable on the basis of normal spousal support activities." *Ibid.*

The *Halberstam* court concluded that "Hamilton's assistance to Welch's illegal enterprise should make her liable for Welch's killing of Halberstam." 705 F.2d at 488. That was so even though Hamilton might not have "specifically" known that Welch was committing burglaries. *Ibid.* It was sufficient 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." *Ibid.*; see *id.* at 484-485; see also *Honickman* v. *BLOM Bank SAL*, 6 F.4th 487, 496-497 & nn.9-10 (2d Cir. 2021) (discussing role of foreseeability under *Halberstam* and JASTA).

2. The courts below reasonably applied the *Halberstam* framework.

a. *Weiss*. With regard to NatWest's "general awareness," NatWest conceded (19-863 C.A. Br. 12) that "at times, [it] suspected Interpal might be raising funds for Hamas, as Interpal had been publicly accused of doing as early as 1996." But unlike in *Halberstam*, where Hamilton was a "passive but compliant partner to [Welch's] rampage," 705 F.2d at 474, NatWest repeatedly investigated and disclosed its suspicions to the U.K. government. In response, "British authorities * * * condoned NatWest's relationship with Interpal" after finding insufficient evidence that Interpal funded Hamas's political or violent activities. *Weiss*, Pet. App. 158a; see *id.* at 158a-160a. Given these facts, and the lack of evidence that the transfers were for any terroristic purpose, the courts below reasonably determined that no triable issue existed as to whether NatWest was "generally aware" that it had willingly assumed a role in terrorist financing. *Id.* at 42a; see *id.* at 41a.

The court of appeals also reasonably determined that NatWest's provision of routine financial services to Interpal did not constitute assistance "substantial enough to justify liability on an aider-abettor theory," *Halberstam*, 705 F.2d at 488; see *Weiss* Pet. App. 41a-42a. Cf. *Weiss* Pet. 32 (acknowledging that even on petitioners' theory, "knowingly providing material support to an FTO might not equate to aiding and abetting the FTO's terrorist acts where the support was not 'substantial' under JASTA").[1] "In practice, liability for aiding-abetting often turns on how much * * * assistance is substantial enough." *Halberstam*, 705 F.2d at 478. Here, the *Halberstam* substantiality factors weigh against liability, even considering the "particularly * * * opprobrious" nature of terrorist attacks (the first factor). *Id.* at 484 n.13.

With regard to the amount and kind of assistance, the provision of banking services to Hamas fundraisers is an essential part of the global terrorist financing scheme. But the record indicates that the wire transfers that NatWest processed to the 13 charities on behalf of Interpal were designated for charitable purposes and that NatWest took affirmative steps to avoid assisting in the financing of terrorism. That evidence also

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[1] The *Weiss* petitioners state (Reply Br. 11) that the "lower courts did not reach" the substantial-assistance prong. Although the district court did not do so, see *Weiss* Pet. App. 70a-72a, the court of appeals was permitted to uphold the judgment on any basis supported by the record, see, *e.g.*, *Name.Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir. 2000), and it expressly determined that petitioners could not demonstrate "that NatWest was knowingly providing substantial assistance to Hamas," *Weiss* Pet. App. 42a. See *id.* at 40a-42a; see also 19-863 NatWest C.A. Br. 53-55 (making substantial-assistance argument).

bears on NatWest's relationship with Hamas and NatWest's state of mind. NatWest did not maintain any relationship with Hamas, and its banking relationship with Interpal did not prevent NatWest from reporting Interpal's activity to law enforcement and cooperating with investigations. NatWest also was not present at the time of the terrorist acts in question.

Finally, the duration of assistance does not weigh heavily in either direction. NatWest's 13-year relationship with Interpal, see *Weiss* Pet. App. 9a—despite indications that Interpal was involved in Hamas fundraising—weighs in favor of liability. But during that time, NatWest reported its concerns to law enforcement, froze Interpal's accounts during U.K. government investigations, and resumed its relationship with Interpal only after receiving governmental clearance to do so. Unlike in *Halberstam*, these facts do not indicate that NatWest had a "deliberate long-term intention to participate in an ongoing illicit enterprise." 705 F.2d 488.

b. *Strauss.* The courts below reasonably found the evidence insufficient to establish that Crédit Lyonnais was generally aware that it had willingly assumed a role in terrorist activities. Crédit Lyonnais was not a "partner" in Hamas's violent activities, *Halberstam*, 705 F.2d at 474; rather, it repeatedly investigated activity on CBSP's accounts and twice reported its suspicions to the French government. French authorities found insufficient evidence that CBSP committed any offense, but Crédit Lyonnais decided to close CBSP's accounts at the end of 2002. Although the accounts remained open through most of 2003, these delays were partially inadvertent and unknown to Crédit Lyonnais's FSU.

Crédit Lyonnais's provision of financial services to CBSP also likely did not constitute assistance "substantial enough to justify" aiding-and-abetting liability. *Halberstam*, 705 F.2d at 488.[2] Regarding the amount and kind of assistance, the defendant's relationship to the tortious actor, and the defendant's state of mind, it is significant that Crédit Lyonnais did not maintain a relationship with Hamas, and that its banking relationship with CBSP did not prevent it from reporting CBSP's activities or cooperating with law-enforcement investigations. And Crédit Lyonnais decided to close CBSP's accounts even after a government investigation cleared CBSP of wrongdoing. Regarding the duration of assistance, Crédit Lyonnais maintained accounts for CBSP from 1990 to 2003, *Strauss* Pet. App. 135a, 145a, and it first decided to close CBSP's accounts in 2001, after suspecting that CBSP was involved in an illegal financing scheme (and despite government assurances to the contrary). Although Crédit Lyonnais did not actually close the accounts until August 2003, that relatively brief additional period does not necessarily outweigh the other factors.

3. Petitioners primarily contend (*Weiss* Pet. 29-32; *Strauss* Pet. 19-24) that their proposed JASTA aiding-and-abetting claims should have survived summary judgment because, at an earlier stage of each case, they established a factual dispute about whether respondents violated Section 2339B(a)(1). That prohibition criminalizes "knowingly provid[ing] material support or

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[2] The court of appeals did not specifically address this element, but it relied on *Weiss*, which did so. See *Strauss* Pet. App. 9a; p. 17 n.1, *supra*. Crédit Lyonnais raised (19-865 C.A. Br. 51-53) the substantial-assistance argument in the court of appeals.

resources to" an FTO. 18 U.S.C. 2339B(a)(1). A defendant violates Section 2339B by providing any material support to an organization while "know[ing] about the organization's connection to terrorism," even if the support was "meant to 'promote peaceable, lawful conduct.'" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 16-17, 30 (2010) (brackets and citation omitted). Thus, with respect to scienter, Section 2339B(a)(1) does not distinguish between a terrorist financier and a well-intentioned (if misguided) aid organization hoping to promote peace and stability in a volatile region, if the organization knows that some of its ostensibly charitable aid goes to terrorist groups.

Petitioners' argument fails because, in JASTA, Congress deliberately selected a different approach. Instead of "mirror[ing]" Section 2339B's bright-line scienter rule, *Weiss* Pet. 2, Congress directed courts to evaluate each aiding-and-abetting defendant's culpability according to *Halberstam*'s common-law, multi-element framework, JASTA § 2(a)(5), 130 Stat. 852. It is thus unsurprising that facts establishing a jury question on Section 2339B liability will not always establish a jury question for a JASTA aiding-and-abetting claim. Congress's determination in Section 2339B that any material support to an FTO enables terrorism does not mean that every JASTA defendant who provides such support is generally aware that it is playing a role in unlawful activity from which acts of international terrorism are a foreseeable risk—or that the multi-factor substantial-assistance standard will always be satisfied.

Petitioners are incorrect in asserting (*Weiss* Pet. 29-30; *Strauss* Pet. 21) that the standards should be conflated because JASTA's stated "purpose" "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 * * * that have provided material support * * * to foreign organizations or persons that engage in terrorist activities against the United States." § 2(b), 130 Stat. 853 (18 U.S.C. 2333 note). In addition to Section 2333(d), JASTA enacted an exception to foreign sovereign immunity for actions against foreign states for certain "act[s] of international terrorism in the United States." § 3(a), 130 Stat. 853 (28 U.S.C. 1605B(b)(1)). Nothing suggests that JASTA's "purpose" provision was specifically targeted at Section 2333(d)(2)'s standard for aiding-and-abetting liability—much less that it should override Congress's clear invocation of the *Halberstam* framework.

B. This Court's Review Is Not Warranted

1. Even if the decisions below incorrectly applied the well-established *Halberstam* factors to the particular facts of these cases, but see pp. 16-19, *surpa*, those fact-intensive determinations would not warrant this Court's review.

Petitioners err in asserting (*Weiss* Pet. 21-29; *Strauss* Pet. 15-19) that the decisions below conflict with those of other courts of appeals. Specifically, petitioners argue (*Weiss* Pet. 29) that the courts disagree as to whether, "when a person knowingly provides funds to an FTO (or its fronts)"—*i.e.*, when plaintiffs have raised a factual dispute under Section 2339B—"a jury may find that the person aided and abetted the FTO's terrorist acts." Petitioners primarily rely on *United States* v. *El-Mezain*, 664 F.3d 467 (5th Cir. 2011), cert. denied, 568 U.S. 977 (2012), and *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685

(7th Cir. 2008) (en banc), cert. denied, 558 U.S. 981 (2009). But as petitioners acknowledge (*Weiss* Pet. 22; *Strauss* Pet. 15 n.2), *Boim* and *El-Mezain* were decided years before JASTA's enactment. They therefore do not address aiding-and-abetting liability under Section 2333(d)(2). Cf. *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 396 (7th Cir. 2018) (evaluating post-JASTA conspiracy claim under JASTA, rather than *Boim*).

Petitioners observe that in *El-Mezain*, the Fifth Circuit affirmed criminal liability under Section 2339B "for individuals and charities that sent funds to entities in Hamas's 'social wing,'" because support of such entities "facilitated Hamas's activity by furthering its popularity among Palestinians and by providing" fungible resources. *Weiss* Pet. 25-26 (quoting *El-Mezain*, 664 F.3d at 483-484). Petitioners state (*id.* at 27) that *El-Mezain* "stands clearly for the proposition that those who aid an FTO's peaceful arm necessarily enable terrorist violence." But the validity of that "empirical proposition," *ibid.*, is not at issue here. Section 2339B reflects Congress's judgment that grave harm can result from even well-intentioned humanitarian aid to terrorist organizations. That judgment does not indicate that Congress employed the same standards for liability under Sections 2333(d)(2) and 2339B—a proposition refuted by JASTA's text.

Petitioners' reliance on *Boim* is likewise misplaced. In *Boim*, the Seventh Circuit determined that through a "chain of [statutory] incorporations by reference," donating money to an FTO could amount to an "act of international terrorism" giving rise to ATA liability. 549 F.3d at 690. The court thus recognized a form of "[p]rimary liability in the form of material support to terrorism," which "has the character of secondary liability."

Id. at 691. In doing so, the court stated that "if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook." *Id.* at 698.

Contrary to petitioners' assertion (*Weiss* Pet. 25), the Second Circuit has not held that "earmark[ing] [transfers] for charitable purposes," will necessarily defeat liability. Instead, it has held that the *Halberstam* inquiry—including whether "material support to an FTO suffices to establish general awareness" under *Halberstam*'s second element—is "fact-intensive." *Kaplan* v. *Lebanese Canadian Bank, SAL*, 999 F.3d 842, 860 (2d Cir. 2021). The court has likewise rejected the suggestion that "knowingly providing material support to an FTO is never sufficient to establish JASTA aiding-and-abetting liability." *Id.* at 861; see *id.* at 863-865.[3]

2. Even if certiorari were otherwise warranted, these cases would present unsuitable vehicles for addressing the question presented.

As petitioners acknowledge, their argument focuses on the relationship between a potential violation of Section 2339B and "JASTA's 'general awareness' element." *Weiss* Pet. Reply Br. 9 (quoting *Halberstam*, 705 F.2d at 487-488); see *Weiss* Pet. 21. But as discussed above,

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[3] Petitioners briefly contend (*Weiss* Pet. Reply Br. 2-3) that the decisions below conflict with *Gonzalez* v. *Google LLC*, 2 F.4th 871 (9th Cir. 2021), petition for cert. pending, No. 21-1333 (filed Apr. 4, 2022). But the Ninth Circuit favorably discussed the Second Circuit's JASTA aiding-and-abetting decisions. *Id.* at 903. It simply found that the complaint in that case plausibly alleged that "Google understood it played a role in the violent and life-endangering activities undertaken by ISIS." *Ibid.*

petitioners also failed to adduce evidence sufficient to show substantial assistance. Petitioners do not suggest that certiorari is independently warranted on that distinct issue.

Moreover, JASTA is a relatively recent statute, and few circuits have addressed its application to the provision of routine financial services. To the extent the application of the *Halberstam* framework to such facts might warrant this Court's review, further percolation would be helpful as courts continue to refine their jurisprudence in this area.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
SHARON SWINGLE
CATHERINE M. PADHI
Attorneys

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