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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-1496, Twitter versus Taamneh.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

JASTA permits any U.S. national injured by reason of an act of international terrorism to recover treble damages from a person who aids and abets by knowingly providing substantial assistance or who conspires with a person who committed such an act of international terrorism.

The foundational points here are not in dispute. First, the conceded and obvious act of international terrorism is the Reina attack, and the complaint includes no allegation that the defendants provided substantial assistance, much less knowing substantial assistance, to that attack or, for that matter, to any other attack.

1           Second, as the complaint concedes, the  
2 defendants "had no intent to aid ISIS's  
3 terrorist activities." Quite to the contrary,  
4 they maintained and regularly enforced policies  
5 prohibiting content that promotes terrorist  
6 activity.

7           The plaintiffs claim that because  
8 defendants were generally aware that among their  
9 billions of users were ISIS adherents who  
10 violated their policies and, therefore,  
11 defendants should have done more to enforce  
12 those policies does not constitute aiding and  
13 abetting an act of international terrorism under  
14 the operative terms of the text, the  
15 constitutional principles articulated in  
16 Halberstam, or any recognized understanding of  
17 what it means to abet a criminal act.

18           If Congress had wanted to impose  
19 treble damage liability for existing --  
20 assisting a terrorist organization, it had a  
21 ready model in the material support statute,  
22 Section 2339B. If it had wanted to create such  
23 liability for supporting international terrorism  
24 writ large, it likewise had a model in  
25 Section 2331(1).

1                   Instead, it provided a remedy against  
2 those who conspire with terrorists or -- or who  
3 knowingly aid and abet acts of terrorism. It  
4 did not impose treble damage liability on  
5 companies whose services were exploited by  
6 terrorists in contravention of the company's  
7 enforced antiterrorism policies.

8                   I welcome the Court's questions.

9                   JUSTICE THOMAS: Mr. Waxman, it seems  
10 that you tie your analysis to knowledge of the  
11 Reina attacks rather than just general knowledge  
12 of terrorism.

13                   MR. WAXMAN: So it's -- thank you,  
14 Justice Thomas. Let me clarify.

15                   We do not contend that there is no  
16 liability if these companies didn't know that  
17 the Reina nightclub would be attacked. What  
18 they had to have known to satisfy the operative  
19 language of the statute was that they were, in  
20 fact, providing substantial assistance to the  
21 act of international terrorism that injured the  
22 plaintiff and that they knew that their action  
23 would substantially assist an act of  
24 international terrorism.

25                   The -- the flight trainers who provide

1 -- who taught the al-Qaeda terrorists how to fly  
2 planes so they could fly them into the World  
3 Trade Center and the Pentagon didn't need to  
4 know that those were the targets, but he needed  
5 to know that he was, in fact, providing  
6 substantial assistance to people who aimed to  
7 use that knowledge in order to commit a  
8 terrorist attack.

9 JUSTICE THOMAS: So the -- and I may  
10 have misunderstood your brief, but -- so you  
11 would -- I assume you would agree that if I had  
12 a friend who was a mugger, a murderer, and a  
13 burglar --

14 MR. WAXMAN: Hard to imagine that.

15 JUSTICE THOMAS: -- but, other than  
16 that, he was a good guy --

17 (Laughter.)

18 JUSTICE THOMAS: -- and I loaned him a  
19 gun but not knowing and not wanting to know what  
20 he was going to do with it, that he -- that that  
21 possibly could be aiding and abetting?

22 MR. WAXMAN: So I think it wouldn't  
23 be.

24 JUSTICE THOMAS: Why?

25 MR. WAXMAN: Because it would -- while

1 it would satisfy Steps 1 and 3 of the Halberstam  
2 legal framework that is -- is meant to be the  
3 model for -- interpretive model for the statute,  
4 you also had to -- you also have to have a  
5 general awareness that you are assisting in  
6 overall illegal or tortious activity.

7           So, for example, if I have a farm and  
8 I -- I have a gate with my next-door neighbor's  
9 pasture and it's got a padlock and I don't -- I  
10 can't open the padlock, and I go to you, you're  
11 my neighbor on the other side, and say, Justice  
12 Thomas, I'm trying to open this gate, but I  
13 can't get the padlock open, can I -- do you have  
14 any bolt cutters that could do this, and you  
15 say, yes, I do, and, in fact, I'll cut the bolt  
16 for you, and I then use the open gate to steal  
17 my neighbor's sheep, you know that you provided  
18 substantial assistance to me in entering the  
19 property, but you don't have -- you're not  
20 culpable within the meaning of the common  
21 understanding of the word "aiding and abetting"  
22 or under Step 2 of the Halberstam doctrine  
23 because you're not generally aware of your role  
24 as part of an overall illegal or tortious  
25 activity.



1 JUSTICE THOMAS: But I think you've  
2 changed somewhat my -- you know, my example.

3 MR. WAXMAN: Oh. Well, I apologize.

4 JUSTICE THOMAS: My friend is a  
5 burglar, he's a murderer, and he is a mugger,  
6 and he says he has some business to conduct, and  
7 I loan him a gun.

8 Now that's quite different from  
9 opening the gate because you can open the gate  
10 for quite a number of legal reasons and  
11 legitimate reasons. But, if I know to a moral  
12 certainty the kind of person my friend is, would  
13 I have to be more specific than that in order to  
14 aid -- be aiding and abetting his criminal  
15 conduct?

16 MR. WAXMAN: So I think, in that  
17 instance, you would ask the question under the  
18 operative language of the statute were you --  
19 did you knowingly provide substantial  
20 assistance.

21 Assume that -- assume that he -- your  
22 friend then committed a crime with the gun.  
23 That would be substantial assistance in the  
24 commission of that crime, but whether you know  
25 -- whether you knew you were substantially

1 assisting the crime would involve a  
2 determination, under the circumstances, whether  
3 it was fair as a matter of law to permit an  
4 inference that you knew that although your  
5 friend was otherwise a good guy, he was, in  
6 fact, going to use it to commit some crime.

7 Now even that hypothetical is quite  
8 removed from the circumstances of this case  
9 because that involved an active provision from  
10 one person to another of something that was, in  
11 fact, of substantial assistance.

12 What we have here --

13 CHIEF JUSTICE ROBERTS: Well, if I  
14 could just --

15 MR. WAXMAN: I'm sorry, can I just  
16 finish my sentence?

17 CHIEF JUSTICE ROBERTS: Okay.

18 MR. WAXMAN: Okay. What we have here  
19 is an alleged failure to do more to ferret out  
20 violations of a clear and enforced policy  
21 against assisting or allowing any postings  
22 supporting terrorist organizations or  
23 activities.

24 I'm sorry, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: You gave a

1 variety of considerations to take into account  
2 in response to Justice Thomas's hypothetical,  
3 but it seems to me that given the facts, you  
4 ought to be able to give us a bottom line or  
5 not. Would that be covered by the statute or  
6 not?

7 MR. WAXMAN: Well, I -- in his  
8 hypothetical?

9 CHIEF JUSTICE ROBERTS: Right. The  
10 facts he gave, the friend who he knew was  
11 committing all these crimes and all that, and he  
12 gave him a gun. Now is that covered or not?

13 MR. WAXMAN: It would be covered if  
14 the finder of fact concluded that under all the  
15 facts and circumstances it was fair to infer  
16 that he knew that it was going to be used for  
17 this purpose.

18 CHIEF JUSTICE ROBERTS: Well, I'm just  
19 trying to get you to answer. It seems a pretty  
20 direct case. Would it be fair to infer that he  
21 intended to use it for that -- for that purpose  
22 if the facts were as posed by Justice Thomas?

23 MR. WAXMAN: And I -- I -- I -- I -- I  
24 can't -- I don't think the facts posed by  
25 Justice Thomas, which are that on the one hand

1 he's a good guy, but on the other hand he has  
2 engaged in criminal acts before, would be  
3 enough.

4 I would tend to think that that would  
5 be sufficient to -- for a finder of fact to  
6 infer knowledge that you were substantially  
7 assisting a crime. It probably would survive --  
8 it therefore would survive a motion to dismiss.

9 But, again, I'm -- I don't mean to --  
10 I'm not evading the question at all. In every  
11 one of these instances, you would ask with  
12 respect to all of the many difficult  
13 hypotheticals that could be arrayed in this  
14 case, is this -- is what you did -- did what you  
15 did amount to substantial assistance to the  
16 operative tort, or, here, the act of  
17 international terrorism, and did you know that  
18 in providing that assistance you would be  
19 substantially assisting an act of international  
20 terrorism or a crime that Justice Thomas's  
21 friend might commit?

22 JUSTICE BARRETT: But you agree that  
23 we don't need to know where Justice Thomas's  
24 friend is heading, right? Like, here --

25 MR. WAXMAN: Right.

1 JUSTICE BARRETT: -- Twitter didn't  
2 need -- could conceivably have been liable even  
3 if it didn't know about the Reina attacks --

4 MR. WAXMAN: Correct.

5 JUSTICE BARRETT: -- so long as it --  
6 okay.

7 MR. WAXMAN: Correct. I mean --

8 JUSTICE SOTOMAYOR: But I -- I guess  
9 I'm a little confused from your brief because it  
10 need -- from your brief, I thought you needed a  
11 direct connection between the assistance given  
12 and the actual act.

13 So I came away from your brief  
14 thinking that what you were arguing was that  
15 they had to provide something specifically for  
16 this bombing. They had to provide either the  
17 platform for the people to get together or for  
18 the actual people doing the bombing to get  
19 together or a text message or something that  
20 tied them to the crime.

21 Are you moving away from that?

22 MR. WAXMAN: No. I apologize for any  
23 unclarity, and I appreciate the opportunity,  
24 therefore, to clarify it.

25 You have to have known -- well, number

1 one, you have to have provided -- the cause of  
2 action in this remedial statute derives from the  
3 act of international terrorism that injured the  
4 plaintiff. You had to have provided substantial  
5 assistance to an act of international terrorism  
6 that happened to be the one that injured the  
7 plaintiff. Otherwise, there's no connection  
8 between your assistance and the cause of action.

9 What you don't have to know in advance  
10 is that the target would be the Reina Nightclub  
11 as opposed to Taksim Square or the Paris metro.

12 JUSTICE SOTOMAYOR: So I -- I guess  
13 I'm a little bit confused because, as I read  
14 your brief -- I remain confused, Mr. Waxman --  
15 you want a very direct tie between the form of  
16 assistance and the actual act.

17 Am I correct?

18 MR. WAXMAN: I -- there must be --

19 JUSTICE SOTOMAYOR: With or without  
20 knowledge that this will be the act.

21 MR. WAXMAN: Yes, yes.

22 JUSTICE SOTOMAYOR: Okay. So is there  
23 a difference between providing the gun or just  
24 providing money? Meaning we have cases in the  
25 Second Circuit -- and I'm sure you're familiar

1 with them --

2 MR. WAXMAN: I am.

3 JUSTICE SOTOMAYOR: -- the Atchley  
4 case and the Kaplan case, in which they didn't  
5 provide a platform or a gun, but they provided  
6 money to people, and a fair inference from the  
7 evidence in both cases, people they knew were  
8 using that money for terrorist acts.

9 And both circuits in this case  
10 sustained the claims of action here. So why was  
11 -- why was the indirect assistance, fungible  
12 money, make those defendants liable, but you're  
13 not liable for providing a platform that you  
14 knew they were using to recruit people and to  
15 help arrange other terrorist acts, perhaps not  
16 this one, but to help the enterprise?

17 MR. WAXMAN: So --

18 JUSTICE SOTOMAYOR: Just in the same  
19 way, in the case that JASTA talks about,  
20 Halberstam. In Halberstam, the woman didn't  
21 know which burglary, where. She didn't even  
22 know he was committing burglaries necessarily.  
23 She knew he was committing a property crime.  
24 She was just assisting his enterprise generally.

25 So --

1 MR. WAXMAN: I hear a lot --

2 JUSTICE SOTOMAYOR: -- talk to me  
3 about what direct means.

4 MR. WAXMAN: -- I hear a lot of -- a  
5 lot of questions, and I hope that I remember  
6 them all.

7 JUSTICE SOTOMAYOR: Okay.

8 MR. WAXMAN: If I haven't answered  
9 them all --

10 JUSTICE SOTOMAYOR: Don't worry. I'll  
11 come back to you.

12 MR. WAXMAN: Okay, thank you.

13 (Laughter.)

14 MR. WAXMAN: First of all, the -- the  
15 banking case -- the banking case is in the  
16 Second Circuit and the pharmaceutical case in  
17 the D.C. Circuit, are both -- I mean, they --  
18 the -- the salient distinction there is that the  
19 culpable conduct was, in fact, the active  
20 provision of something of assistance to the  
21 tortfeasor, whereas, here, the actionable  
22 conduct is a failure to better ferret out  
23 violations of --

24 JUSTICE KAGAN: I don't think that  
25 that's right, Mister -- I realize you have a lot



1 of questions piled up up there.

2 JUSTICE SOTOMAYOR: I -- I -- I do  
3 want him to come back to them, though.

4 JUSTICE KAGAN: Can I just --

5 MR. WAXMAN: I -- I --

6 JUSTICE KAGAN: I mean, the -- the  
7 conduct is the provision of a platform by which  
8 to communicate with each other and other members  
9 of ISIS and by which to recruit. So you can,  
10 you know, say it's the failure to better police  
11 the platform, but it's the provision of a  
12 platform.

13 MR. WAXMAN: The -- the -- the  
14 distinction that the cases make between action  
15 and inaction -- and the -- the -- the plaintiffs  
16 in this case have repeatedly characterized the  
17 gravamen here as inaction, failure to do better  
18 to prevent more violations of an established  
19 policy. The -- the distinction between --

20 JUSTICE KAGAN: Well --

21 MR. WAXMAN: I'm --

22 JUSTICE KAGAN: -- maybe that's right.  
23 I'm going to rewrite their complaint for them.

24 MR. WAXMAN: Okay.

25 JUSTICE KAGAN: It's the provision of

1 a platform.

2 MR. WAXMAN: Okay. The distinction  
3 that all of the cases, the aiding-and-abetting  
4 cases draw between action and inaction is  
5 culpability, and, therefore -- and what is  
6 alleged to be culpable in this case is not the  
7 provision to billions of users of a  
8 communications platform subject to established  
9 policies which are enforced.

10 What's -- what's alleged to be  
11 culpable is that we knew from government reports  
12 and from -- from newspaper reporting that  
13 there -- notwithstanding whatever efforts we  
14 were making to enforce our policies,  
15 nonetheless, there were lots of terrorist  
16 organizations or terrorist adherents that were  
17 still doing it. That's the culpability.

18 And that's why the Restatement, for  
19 example, when it talks about -- and I'm -- I'm  
20 referring here to Restatement (Third) --  
21 substantially assisting a wrongdoer means  
22 affirmatively helping with the commission of the  
23 tort. It does not mean -- it means "something  
24 more than routine professional services provided  
25 to the primary" --

1 JUSTICE KAGAN: I feel guilty that  
2 you're not answering Justice Sotomayor's  
3 questions, but I'm just going to pile on a  
4 little bit if you'll forgive me.

5 MR. WAXMAN: I -- I -- I have --

6 JUSTICE KAGAN: And just --

7 MR. WAXMAN: -- I have them in mind --

8 JUSTICE KAGAN: -- just don't --

9 MR. WAXMAN: -- and I will come back  
10 to them.

11 JUSTICE KAGAN: Yeah, the same thing  
12 could have been said about banking. It was --  
13 you know, we just provided the same banking  
14 services to the terrorists as we did to  
15 everybody else. But, in fact, that -- the  
16 provision of that service materially supported  
17 and the bank knew that it was going to  
18 materially support terrorist operations.

19 MR. WAXMAN: So that may or may not be  
20 the case. The -- we -- the Second Circuit and  
21 the D.C. Circuit erred in, we think,  
22 notwithstanding the distinction that I'm having  
23 a hard time convincing you of, because they  
24 collapsed the mental state required under Step 2  
25 and Step 3 of Halberstam.

1           What they said is these -- the  
2           pharmaceutical company was providing money and  
3           kickbacks to a known terrorist organization. It  
4           was generally aware that this was a terrorist  
5           organization. And that satisfies Step 3, which  
6           is the knowing provision of substantial  
7           assistance to an act of international terrorism.

8           Likewise, the Second Circuit has said  
9           expressly that the only knowledge required to  
10          establish the requisite mental state for  
11          abetting a crime is general awareness of -- that  
12          you are aiding an enterprise.

13          Now the word "enterprise" -- maybe I  
14          can shuffle back to -- to -- or march back to  
15          Justice Sotomayor's question. You referred to  
16          the -- the Halberstam's opinion's discussion of  
17          the criminal enterprise and aiding and abetting  
18          the criminal enterprise.

19          We are here -- I have three points to  
20          make. One, we are here parsing the language of  
21          a statute. The word "enterprise" does not  
22          appear in this statute. The word that appears  
23          over and over and over again is "the act of  
24          international terrorism" that injured the  
25          plaintiff.

1                   Number two, Congress in its findings  
2                   said that it intended to import the legal  
3                   framework set forth in a section of Halberstam  
4                   conveniently called "legal framework." Again,  
5                   there is nothing in the legal framework set out  
6                   there that talks about aiding and abetting or  
7                   substantially assisting an enterprise. In any  
8                   event, we don't in any way contest that the  
9                   court, in applying the facts in Halberstam to  
10                  the legal framework, referred over and over  
11                  again to the substantial assistance that she was  
12                  providing to the enterprise.

13                  Now the word "enterprise," if you look  
14                  in the dictionary, has a variety of different  
15                  meanings, but the two first meanings are, number  
16                  one, it can refer to an entity that is typically  
17                  a "unit of economic organization," or, quite  
18                  distinctly, it can refer to an undertaking,  
19                  systemic, purposeful activity.

20                  What Halberstam was using the term to  
21                  do was to characterize a factual  
22                  characterization of a series of property crimes  
23                  in which it held that Bernard Welch and Linda  
24                  Hamilton played "symbiotic roles." It was not  
25                  announcing a legal standard that encompasses a

1 broad entity that provides general services to  
2 billions of people subject to an unequivocal  
3 enforced policy against terrorism.

4 So even if I agree with you that you  
5 can establish substantial assistance to the  
6 principal tort by showing that there was a  
7 course of -- you know, a series of like acts of  
8 international terrorism or burglaries or  
9 property crimes in which the aider and abetter  
10 was, to quote the -- the D.C. Circuit, a willing  
11 participant and, therefore, aided and abetted  
12 the -- the principal tort, which was the  
13 burglary of the Halberstam home, I don't have a  
14 problem with that.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 Mr. Waxman.

17 Justice Thomas, anything further?

18 Justice Alito?

19 JUSTICE ALITO: A few questions. If  
20 this were a criminal case, I think it's clear  
21 that there would not be aiding and abetting  
22 liability. The element in our -- and we've  
23 addressed aiding and abetting in criminal cases  
24 directly, and it requires the intention of  
25 causing the crime to be committed. And that's

1 not alleged here.

2 But we have to decide this case  
3 presumably under Halberstam, which has sort of a  
4 statutory status as a result of the preamble to  
5 this statute, and that makes it somewhat  
6 difficult.

7 So the second -- there's no dispute, I  
8 take it, that the first Halberstam factor is  
9 satisfied, right?

10 MR. WAXMAN: Correct.

11 JUSTICE ALITO: Okay. The second one  
12 to me is -- has very little meaning. Maybe you  
13 can explain how we can read some meaning into  
14 it. A defendant must be generally aware of his  
15 role as part of an illegal or tortious activity.

16 Well, you know, if Twitter knows that  
17 ISIS is a terrorist organization and ISIS  
18 members are communicating for the purpose of  
19 furthering their terrorist activity, then  
20 Twitter is aware of its role. The second factor  
21 doesn't even require that it be an important  
22 role, a major role. It's just a role.

23 So what substance is there to that?

24 MR. WAXMAN: So, for purposes of this  
25 case, we're not disputing that the second step

1 of Halberstam is satisfied.

2 JUSTICE ALITO: Okay. So then we go  
3 on to the third --

4 MR. WAXMAN: Right.

5 JUSTICE ALITO: And I'm sorry.

6 MR. WAXMAN: No, no, no. I was going  
7 to say I could, in the fullness of time, which I  
8 appreciate the Court may not permit me, I could  
9 make an argument about what it means to actually  
10 be playing a role, but let's move on.

11 The -- where the rubber meets the road  
12 here is in what is Step 3 of Halberstam, but,  
13 more significantly, the operative language of  
14 the statute, which means that even if -- of  
15 course, Twitter and -- and Meta and Google,  
16 YouTube knew from all these reports that,  
17 notwithstanding their efforts, there continued  
18 to be posted on their communication services  
19 messages, videos, whatever, that violated their  
20 policies.

21 The question is, is a failure to do  
22 more to prevent misuse of widely used services,  
23 offered at arm's length and subject to an  
24 enforced policy against terrorist content, the  
25 knowing provision of substantial assistance, at



1 least absent specific knowledge of particular  
2 accounts or posts that are or may be being used  
3 to plan, commit, or support in some proximate  
4 way a particular -- the particular act of  
5 international terrorism that injured the  
6 parties?

7 JUSTICE ALITO: Okay. So I see two  
8 potential arguments that could win for you under  
9 the third prong, and one is that -- one has to  
10 do with knowingly, one has to do with  
11 substantiality.

12 So "knowingly," I think you're --  
13 you're right to concede that it wasn't  
14 necessary. It's not necessary that they know  
15 that there's going --

16 MR. WAXMAN: Right.

17 JUSTICE ALITO: -- to be attack on the  
18 Reina nightclub, would it matter if it was a  
19 different nightclub, would it matter if it was a  
20 bombing at some facility in Istanbul during a  
21 particular period of time when people would be  
22 present and people would be killed. But, at a  
23 certain point, it becomes too attenuated --

24 MR. WAXMAN: Correct.

25 JUSTICE ALITO: -- to support aiding

1 and abetting. So that's a difficult -- that's a  
2 line-drawing problem.

3 Substantiality is also a line-drawing  
4 problem. So what is substantial assistance?  
5 What's the difference between substantial and  
6 insubstantial assistance?

7 So why aren't these fact questions?  
8 How can they be -- were they properly decided on  
9 a motion to dismiss?

10 MR. WAXMAN: We think that they --  
11 they are properly decided on a motion to  
12 dismiss. You know, all cases present fact  
13 questions. The question is whether the facts  
14 asserted, the facts -- whether there are  
15 plausibly pled facts that would permit a trier  
16 of fact to conclude that what we have here  
17 amounted to aiding an international crime --  
18 aiding and abetting an international crime.

19 And we're -- what we're saying is,  
20 Justice Alito, as a matter of law, a court  
21 should conclude, consistent with the -- the  
22 teachings of the common law cases that  
23 Halberstam expressly used to extract its  
24 three-part framework and that the Restatement  
25 makes very, very clear that the failure to do

1 more to remove content in the context of a  
2 service that is generally and widely provided to  
3 anybody who complies with the policies, the  
4 failure to do more or even a lot more to enforce  
5 those policies does not amount to the knowing  
6 provision of substantial assistance.

7           And the -- look, if the -- if the --  
8 if the police chief in Istanbul came to Twitter  
9 and said, look, we've been following three  
10 accounts and these people -- these -- these  
11 people appear to be planning some sort of  
12 terrorist act, and Twitter basically said, you  
13 know, people do lots of things, we're not going  
14 to take these things down, we're not going to  
15 look into it, there, we would have fairly  
16 assumed culpable knowledge that there were, in  
17 fact, accounts that they knew about that were  
18 assertedly, plausibly being used to do this.

19           I mean, your -- your original point, I  
20 think, is absolutely right. If this were a  
21 criminal case, obviously, it requires specific  
22 intent.

23           JUSTICE ALITO: Right.

24           MR. WAXMAN: And the -- the statute  
25 here says knowingly provides substantial

1 assistance, but insofar as, as you say, we're to  
2 -- although we parse the statute, not  
3 Halberstam, we should interpret the statute in  
4 light of Halberstam's legal framework, there are  
5 three separate -- and my friend agrees with me  
6 -- there are three separate questions of  
7 scienter that are posed in the Halberstam  
8 framework.

9           And together, you know, if you're  
10 generally aware that you're playing a role in  
11 illegal activity and you know that you are  
12 providing substantial assistance to some act of  
13 international terrorism and, therefore, you look  
14 at substantiality where -- where scienter and  
15 intent, as it did in Halberstam, played a major  
16 role, I'm not sure there's a huge distinction  
17 between the level of intent that's required in  
18 this context in which what's alleged is a broad  
19 provision of a commercial service and a failure  
20 to do anything, you can't infer intent unless  
21 you can allege we knew about some accounts that,  
22 in fact --

23           JUSTICE ALITO: All right. I -- I --  
24 I understand, Mr. Waxman.

25           MR. WAXMAN: Okay. Thank you.

1                   JUSTICE ALITO: I don't want to take  
2 up too much of my colleagues' time.

3                   One more -- one more question, and  
4 that has to do with the status of these six  
5 factors that Halberstam says are to be  
6 considered in assessing the third factor in its  
7 test for a civil conspiracy.

8                   Do you think the Ninth Circuit went  
9 astray by regarding this as sort of a checklist,  
10 so, you know, it's checking how many of these  
11 boxes are checked, and if enough boxes are  
12 checked, then that means that the third factor  
13 is satisfied, or is what is required the  
14 consideration of those insofar as they have a  
15 bearing on the third factor?

16                   MR. WAXMAN: It's definitely the  
17 latter. And I -- I -- I think even the Ninth  
18 Circuit -- although we think the Ninth Circuit  
19 was utterly wrong in a way that I'll explain,  
20 the Ninth Circuit conceded that three of the  
21 factors plainly favor no liability because we  
22 weren't present, these platforms weren't present  
23 at the time of the attack. We had no  
24 relationship with the attackers.

25                   And -- and our state of mind was the

1 opposite. This is negative intent. We are  
2 opposed to this. I think --

3 JUSTICE ALITO: Okay. I understand.  
4 Let me --

5 MR. WAXMAN: Where they went wrong was  
6 in mixing up what the object of aids and abets  
7 is. The object of aids and abets is either the  
8 act of international terrorism or the person who  
9 commits it in the commission of that.

10 JUSTICE ALITO: Let me allow my --

11 MR. WAXMAN: Okay.

12 JUSTICE ALITO: -- colleagues to ask  
13 some questions.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

16 JUSTICE SOTOMAYOR: I think, as often  
17 we do, that Justice Alito has touched on what I  
18 think is the center of the issue, which is --  
19 and you've conceded it's Item Number 3, is the  
20 aid knowingly and substantial.

21 I'm a little afraid of going on the  
22 knowing standard because willful blindness is  
23 something we have said can constitute knowledge.  
24 And their allegation is that there were similar  
25 names to the ones you took off the platform and

1 that you did no work to find those similarly  
2 named entities and determine whether they were  
3 ISIS or not.

4 So there is an allegation of willful  
5 blindness here. But I'd like to concentrate --  
6 maybe I'm wrong about that, but that's what I --

7 MR. WAXMAN: I think you are.

8 JUSTICE SOTOMAYOR: All right. At any  
9 rate, if I'm wrong about that, that's fine, but  
10 not wrong about that you knew that ISIS was  
11 using your platform.

12 But, on substantiality, there is a  
13 focus on how much your platform helped ISIS and  
14 less on how much you actually helped them. And  
15 that -- there is a difference between the two  
16 things, and I think that that's the difference  
17 that you're trying to point to, which is, in a  
18 neutral business setting, using something that  
19 is otherwise not criminal, a platform, to  
20 communicate with people and you're doing it not  
21 by, as in the bank situation or in the  
22 pharmaceutical situation, to help this  
23 particular person commit a crime, but in a  
24 general business situation, that others are  
25 coming to you and you can't find them ahead of

1 time, that that doesn't constitute substantial  
2 aid.

3 MR. WAXMAN: That's correct, it  
4 doesn't -- it doesn't -- the -- the -- you know,  
5 the case law and the Restatements, you know,  
6 make -- and -- and Halberstam itself makes clear  
7 that the culpable -- the culpable conduct has to  
8 be, to quote Halberstam, "knowing action,"  
9 knowing action that substantially aids tortious  
10 conduct or, as the Restatement (Third) says,  
11 active participation doesn't constitute --  
12 active participation is what substantial  
13 assistance means in the absence of an external,  
14 legal, or fiduciary duty to act, which is not  
15 alleged here. And we know it's -- it's a  
16 fundamental principle of --

17 JUSTICE SOTOMAYOR: So how do you  
18 answer Justice Alito's question? How do we  
19 decide that as a matter of law on this  
20 complaint? Write it for me --

21 MR. WAXMAN: As a --

22 JUSTICE SOTOMAYOR: -- if you were  
23 going to write it, that this is not substantial  
24 assistance because?

25 MR. WAXMAN: Where the culpable --



1 where the alleged culpable conduct is the  
2 failure to do more to prevent misuse of widely  
3 available services offered to the world at arm's  
4 length subject to enforced policies against  
5 terrorist content, it is not as a matter of law  
6 the knowing provision of substantial assistance  
7 to an act of international terrorism, absent  
8 specific knowledge of particular accounts or  
9 posts that were used to plan, commit, or  
10 proximately support the act of international  
11 terrorism that injured the plaintiff.

12 JUSTICE SOTOMAYOR: This is -- this is  
13 a one-case disposition?

14 MR. WAXMAN: I -- I -- I don't think  
15 so. The -- the rule that the Ninth Circuit has  
16 posited and that the plaintiffs embrace, which  
17 is essentially derived from the substitution of  
18 ISIS as an entity, ISIS as some criminal  
19 enterprise for the statutory trigger, which is  
20 an act of international terrorism, means that as  
21 a matter of course, every time somebody is  
22 injured by an act of international terrorism  
23 committed, planned, or supported by a foreign  
24 terrorist organization, each one of these  
25 platforms will be liable in treble damages and

1 so will the telephone companies that provided  
2 telephone service, the bus company or the taxi  
3 company that allowed the terrorists to move  
4 about freely.

5           That is -- if Congress had wanted to  
6 -- again, it's hard to imagine in the context of  
7 a remedy to an injured person, but if Congress  
8 had wanted to make actionable the provision of  
9 substantial assistance to ISIS or a foreign  
10 terrorist organization, it just had to change a  
11 few words in 2339.

12           And even if you say, well, ISIS is a  
13 whole terrorist enterprise and engages in lots  
14 of terrorist activities, if they wanted to say  
15 if you aid and abet by provide -- knowingly  
16 providing substantial assistance to terrorist  
17 activities, that's a defined term in 2333(1).  
18 They could easily have said that.

19           Because this is a remedial statute  
20 that requires treble damage liability against an  
21 entity that actively, culpably is helping a --  
22 the commission of a crime -- I mean, the word --  
23 the definition of the word "abet" in both the  
24 civil and criminal context is to "help or  
25 encourage someone to do" --

1 JUSTICE SOTOMAYOR: I -- I think  
2 you're going far beyond my question.

3 MR. WAXMAN: I'm sorry.

4 JUSTICE SOTOMAYOR: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: Mr. Waxman, suppose  
7 this set of facts: That many terrorist  
8 organizations use the social media services  
9 provided by your client, that they do so to  
10 recruit other members for -- you know, for --  
11 for purposes of enhancing their terrorist  
12 activities, that your client knows this because  
13 government officials, journalists, other people  
14 have pointed it out.

15 Now I'm going to change one fact. I  
16 think so far we're actually pretty much in the  
17 real world.

18 MR. WAXMAN: Right.

19 JUSTICE KAGAN: I'm going to change  
20 one fact, which is that instead of having a  
21 policy against this and trying to remove this --  
22 this various terrorist content, that Twitter had  
23 just said let a thousand flowers bloom, we're  
24 not going to touch a thing.

25 But, you know, it knows that all of

1 this is happening, but it just -- it -- it -- it  
2 does not have a policy of trying to remove.  
3 Then do you fall within the language of the  
4 statute?

5 MR. WAXMAN: I don't think so. I  
6 don't think -- I mean, that -- that's very far  
7 from what the facts of the case are even as pled  
8 and as the Ninth Circuit found, but I don't  
9 think so.

10 If they said, look, we don't want our  
11 platforms to be used to support terrorist groups  
12 or to support terrorist acts, but they don't do  
13 anything to enforce it, I think it falls within  
14 the hornbook aiding-and-abetting rule that was  
15 established in the -- the cases that Halberstam  
16 relied on to define the rule.

17 I mean, in -- in Woodward, the Fifth  
18 Circuit's decision, which is -- is really sort  
19 of the case that the -- that Judge Wald's  
20 opinion most relies on, it says, when it is  
21 impossible to find any duty of disclosure, an  
22 alleged aider and abettor should be found liable  
23 only if scienter of the high conscious intent  
24 can be proved.

25 And in a case combining silence or

1 inaction with affirmative assistance, the degree  
2 of knowledge --

3 JUSTICE KAGAN: I mean, I -- I -- I  
4 guess it just strikes me as quite -- your answer  
5 strikes me as quite something actually. It's  
6 like, what part of Halberstam or of the statute  
7 do you think at that point that there's not at  
8 least a jury question on?

9 You know, Twitter, in my hypothetical,  
10 is basically saying, you know, we know that  
11 there's a ton of terrorist use of our platform  
12 that's going directly to enhance terrorist  
13 activity worldwide, and we're not going to do a  
14 thing about it.

15 So not like did you do too much, did  
16 you do -- you know, could you have done a little  
17 bit more, but we wipe our hands of it, such that  
18 you know -- I mean, just -- I mean, you know  
19 that that's going -- your platform is providing  
20 substantial assistance to terrorist activity.  
21 How can it be otherwise?

22 MR. WAXMAN: Again, you know, the --  
23 the outcome in this case doesn't turn on it, but  
24 I think, as a matter of principle, the -- the  
25 hornbook principle is that you are not "helping

1 or encouraging" someone to do something wrong or  
2 illegal --

3 JUSTICE KAGAN: You're helping by --

4 MR. WAXMAN: -- by failing --

5 JUSTICE KAGAN: -- you're helping by  
6 providing your service to those people --

7 MR. WAXMAN: And, again, I would  
8 just --

9 JUSTICE KAGAN: -- with the explicit  
10 knowledge that those people are using it to  
11 advance terrorism.

12 MR. WAXMAN: Justice -- ISIS is an  
13 abhorrent institution, and it does sponsor acts  
14 of international terrorism, but not everything  
15 that ISIS does is terrorist activity within the  
16 defined meaning of that term, which is crime --

17 JUSTICE KAGAN: Well, I take that  
18 point, and I think that that is the difference  
19 between the material support statute and this  
20 statute, that the material support statute is,  
21 if I help Hamas build hospitals, I'm still  
22 liable under the material support statute --

23 MR. WAXMAN: Correct.

24 JUSTICE KAGAN: -- and I'm not liable  
25 under this. But I don't see how it is, given

1 the set of facts that, you know, with the  
2 exception of one, are the facts of this case,  
3 which is a set of facts that's saying ISIS is  
4 using these for terrorist activities, to advance  
5 terrorist goals, and -- and if Twitter knew all  
6 of that and did nothing to it, how could Twitter  
7 be said not to have been knowingly providing  
8 substantial assistance?

9 MR. WAXMAN: Knowing -- knowingly  
10 providing substantial assistance to the act of  
11 international terrorism that injured the  
12 plaintiff. And I think the proposition is --

13 JUSTICE KAGAN: Well, now you're going  
14 back to what I thought you dropped at the very  
15 beginning of this -- of this argument, which is  
16 they don't have to know --

17 MR. WAXMAN: No.

18 JUSTICE KAGAN: -- that it's the Reina  
19 nightclub act.

20 MR. WAXMAN: But you have -- the  
21 plaintiff has to demonstrate that they provided  
22 substantial assistance in some proximate way  
23 that their provision of a general service, open  
24 to everybody, consistent with a policy which  
25 maybe they don't enforce at all, at arm's length

1 to everybody in the world, does not amount to  
2 the knowing provision of -- it doesn't amount --  
3 you had -- if the plaintiff could say there  
4 were, in fact, posts and accounts that were used  
5 to plan this attack or proximately support this  
6 attack, that would be something.

7           It wouldn't be enough unless we knew  
8 about it because, as the cases all establish,  
9 there has to be "an affirmative help with the  
10 commission of the tort that forms the basis for  
11 the cause of action."

12           JUSTICE KAGAN: Thank you.

13           CHIEF JUSTICE ROBERTS: Justice  
14 Gorsuch?

15           JUSTICE GORSUCH: Mr. Waxman, I can't  
16 help but wonder whether some of the struggle  
17 you've had this morning with my colleagues about  
18 the scope of the aiding-and-abetting statute  
19 comes from your reading of the text.

20           And turning to 2333(d)(2), as I  
21 understand it, you read the aiding-and-abetting  
22 clause as taking as its object the act of  
23 international terrorism rather than the person  
24 who committed the act. And that -- that seems a  
25 pretty abstract way to read the statute. Aiding



1 an action or an explosion or some -- something  
2 like that in the world, it's very different than  
3 how we normally read aiding-and-abetting  
4 statutes, sort of the common -- understanding of  
5 the common law where you have to aid and abet a  
6 person. And you read the conspiracy clause to  
7 take as its object a person, the person.

8           And I just wonder whether the better  
9 reading of the statute is that both of those  
10 "who" clauses, both -- both the aiding and  
11 abetting and the conspiracy clause, take as  
12 their object the person who committed the act of  
13 international terrorism.

14           And I wonder why you haven't pressed  
15 that argument a little bit further, because it  
16 seems to me it helps you. The plaintiff would  
17 have to plead and prove that the defendant  
18 helped, aided and abetted or conspired with, a  
19 person who committed an act of international  
20 terrorism. And the Dictionary Act defines  
21 "persons" as real persons and juridical  
22 entities, not an explosion or some other action  
23 in the world.

24           And, here, the complaint alleges three  
25 people involved in the attack and doesn't link

1 up your conduct, your client's conduct,  
2 necessarily and I think in any very clear way to  
3 those three persons. What am I missing?

4 MR. WAXMAN: I don't -- I don't think  
5 you're missing anything with -- with respect,  
6 but let me make clear what our position is with  
7 respect to the object of the couplet "aids and  
8 abets." Our brief doesn't --

9 JUSTICE GORSUCH: Are you sure you  
10 want to do that?

11 (Laughter.)

12 MR. WAXMAN: I want to be -- I want my  
13 position to be as pellucid as it -- as I can  
14 make it to the Court for the Court's  
15 consideration.

16 We think that the better reading of  
17 the object of "abets" is -- as the government  
18 and the Respondents supporting the Petitioner  
19 argue at length, is, in fact, the act of  
20 international terrorism. It is not --

21 JUSTICE GORSUCH: Oh, I -- I didn't --  
22 I -- I -- I was fearful. Maybe we ought to just  
23 stop, Mr. Waxman, and maybe -- maybe I ought to  
24 let my colleagues proceed.

25 MR. WAXMAN: Okay. Did I answer your

1 question?

2 JUSTICE GORSUCH: Yeah. I -- I -- I  
3 -- I don't know why you're resisting, however --

4 MR. WAXMAN: I --

5 JUSTICE GORSUCH: -- that both of  
6 those clauses take as their object the person.

7 MR. WAXMAN: I am not. I think it is  
8 perfectly fine to read the object as the person  
9 who committed the act of international  
10 terrorism, but it is in the nature of abetting  
11 criminal activity that it is assisting and  
12 aiding and abetting the person in the commission  
13 of the act of international terrorism.

14 It is not coherent. It is not --

15 JUSTICE GORSUCH: How about -- how  
16 about this? How about reading the statute for  
17 just what exactly it says, a person who aids and  
18 abets, dot, dot, dot, the person who committed  
19 such an act of international terrorism? Would  
20 you support reading the statute for what it  
21 says?

22 MR. WAXMAN: I think the -- I support  
23 reading the statute for what it says. The  
24 statute says abetting. And --

25 JUSTICE GORSUCH: No, it says who aid

1 -- who aids and abets -- and then I'm going to  
2 put in some ellipses because it then goes on to  
3 conspiracy -- the person who committed such act  
4 of international terrorism.

5 Any objection to that?

6 MR. WAXMAN: No, with the  
7 understanding that the use of the verb "abets"  
8 means assisting the person in committing the  
9 act. And as the government -- as -- as the  
10 Facebook and Google brief points out, every time  
11 a statute uses "person" as the object of aiding  
12 and abetting, it goes on to make that clear.

13 JUSTICE GORSUCH: Of course. I take  
14 that as given.

15 MR. WAXMAN: Okay.

16 JUSTICE GORSUCH: Thank you.

17 MR. WAXMAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Just want to make  
21 sure I understand your position.

22 So I think you're trying to translate  
23 the elusive words of the statute into some kind  
24 of general rule, and I just want to make sure I  
25 have the general rule or general principle that

1 you're trying to articulate down, which I think  
2 is that a -- when there's a legitimate business  
3 that provides services on a widely available  
4 basis in an arm's-length manner, it's not going  
5 to be liable under this statute even if it knows  
6 bad people use its services for bad things.

7 MR. WAXMAN: Correct, unless it knows  
8 of specific, in this case, it would be accounts  
9 or posts, that are, in fact, being used to plan  
10 or commit a terrorist act, including an attack  
11 like the one that injured the plaintiff. That  
12 is, there has to be particular knowledge in that  
13 context. That's our rule.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 JUSTICE BARRETT: Okay. So I'm having  
18 a little bit of difficulty isolating exactly  
19 your argument. So let me -- let me put it to  
20 you this way.

21 So it seems to me that the flaws in  
22 the Ninth Circuit opinion that you see are one  
23 in the unit of analysis --

24 MR. WAXMAN: Correct.

25 JUSTICE BARRETT: -- because they're

1 focusing on the enterprise rather than the act  
2 or -- or, as Justice Gorsuch said, the person  
3 who committed an act, but, in any event, you're  
4 saying that we need to specifically focus on the  
5 act here, the Reina bombing, didn't have to know  
6 it was going to be there, okay.

7 Second is the substantial assistance,  
8 and third is the knowledge requirement.

9 So I just want to make sure I  
10 understand the difference between aiding the  
11 enterprise writ large and aiding in an act  
12 because you've said in response to a few of my  
13 colleagues, including just now Justice  
14 Kavanaugh, that if you know bad people are using  
15 the platform and you don't do anything about it  
16 -- and I -- I'm pressing you now on what you  
17 said about specific knowledge of the --

18 MR. WAXMAN: Mm-hmm.

19 JUSTICE BARRETT: -- specific  
20 accounts, I guess, why -- if you know ISIS is  
21 using it, you know ISIS is going to be doing bad  
22 things. You know ISIS is going to be committing  
23 acts of terrorism.

24 So what work does ISIS -- training  
25 your focus on the specific act do in that case?

1 Because aiding ISIS is aiding the commission of  
2 particular acts in the future. How specific  
3 must the knowledge be?

4 There must be a range between aiding  
5 the enterprise and knowing the time, date, and  
6 location of the particular act, right?

7 MR. WAXMAN: So I -- I am -- I'm not  
8 resisting as a categorical matter the use of the  
9 word and Halberstam's use of the word  
10 "enterprise."

11 My position is that where the court  
12 below erred was in substituting as the object of  
13 -- whereas the statute clearly said the object  
14 is either the act of international terrorism  
15 that you're abetting or the person who committed  
16 that act and commit -- you abetted that person  
17 in committing the act, Halberstam points out  
18 that, look, if you have a situation in which,  
19 you know, you -- you have a partner, you have a  
20 symbiotic relationship with a partner in which  
21 every week there's a property crime and he  
22 brings home the jewels and you smelt it down  
23 and -- you know, and sell it, that you can be  
24 deemed to have knowingly provided substantial  
25 assistance to the act where, ultimately, he gets

1 caught, the Halberstam burglary. The fact that  
2 you were part of this series of discrete acts  
3 establishes Step 3 of Halberstam.

4 That's very different from basically  
5 saying that all you have to do is aid and abet  
6 ISIS generally. And the clarity with which the  
7 Ninth Circuit made that error is -- is actually  
8 revealed. I don't have the page number, but  
9 it's in the -- the discussion of the facts of --  
10 of Gonzalez before it gets to Taamneh.

11 The -- the Ninth -- the -- the Ninth  
12 Circuit says, "The parties dispute whether the  
13 relevant," quote, "principal violation is ISIS's  
14 broader campaign of terrorism or the Paris  
15 attacks." It chooses the former and therefore  
16 says anything that ISIS does -- that you assist  
17 anything that ISIS does is assisting an act of  
18 international terrorism.

19 JUSTICE BARRETT: Okay.

20 MR. WAXMAN: Now --

21 JUSTICE BARRETT: So it's a level of  
22 generality. I -- I -- I -- you were kind of  
23 going back and forth with Justice Kagan about  
24 this same issue. It's a level of generality.

25 You might know -- I -- I guess I'm



1 trying to figure out if the Ninth Circuit's  
2 error matters because you might know that you're  
3 aiding ISIS and, as I said, aiding ISIS is going  
4 to result in aiding some terrorist attacks.

5 But you're saying that the plaintiff  
6 would have to allege facts sufficient to show  
7 that Twitter was being used to plan this attack,  
8 put --

9 MR. WAXMAN: And that --

10 JUSTICE BARRETT: -- putting aside  
11 right now the knowledge and substantial  
12 assistance part, but that's the level of  
13 inquiry?

14 MR. WAXMAN: -- you have to be -- the  
15 plaintiff has to plausibly allege that  
16 substantial assistance was provided to the act  
17 of international terrorism that injured the  
18 plaintiff in the case.

19 JUSTICE BARRETT: So that these  
20 particular terrorists were communicating via  
21 Twitter for the Reina attack, putting aside what  
22 Twitter knew about it, would need to be looking  
23 at tweets or accounts going back and forth to  
24 share the details or recruit people to help  
25 participate in this bombing?

1                   MR. WAXMAN: No. I -- I mean, the --  
2                   Twitter would have to know there are accounts.  
3                   We know of these --

4                   JUSTICE BARRETT: I'm not talking  
5                   about Twitter's knowledge.

6                   MR. WAXMAN: Okay.

7                   JUSTICE BARRETT: I'm just talking  
8                   about the unit of analysis.

9                   MR. WAXMAN: Okay. The unit of  
10                  analysis is that there is a -- there is a --  
11                  there is a -- there are allegations in a  
12                  complaint that there were Twitter accounts or  
13                  Twitter posts that Twitter -- that, in fact,  
14                  substantially assisted this terrorist attack.

15                  JUSTICE BARRETT: Bombing. So not the  
16                  general recruiting.

17                  MR. WAXMAN: Not general recruiting.

18                  JUSTICE BARRETT: Okay. All right.  
19                  I -- I think I understand you. On -- on  
20                  substantial assistance, you kind of conceded to  
21                  Justice Kagan in her hypothetical that it would  
22                  be substantial assistance if Twitter knew that  
23                  these accounts were being used and didn't do  
24                  anything to take them down.

25                  MR. WAXMAN: The -- yes, the

1 particular accounts.

2 JUSTICE BARRETT: So that's -- that  
3 would be -- because I'm just wondering what the  
4 test for substantial assistance is, right? I  
5 mean, there's -- there's a lot that goes into,  
6 presumably, pulling off a terrorist attack. So  
7 is providing the means of communication -- you  
8 concede that would be substantial assistance?

9 MR. WAXMAN: I mean, it -- again, it  
10 would depend on what was going -- what it turned  
11 out was going on in those accounts that Twitter  
12 actually knew about.

13 And if Twitter knows about -- and this  
14 goes to -- to -- to Justice Sotomayor's question  
15 about willful blindness, willful -- if -- if --  
16 if in my hypothetical the Turkish police, the  
17 Istanbul police come and say there are 10  
18 accounts, 10 Twitter accounts that appear to be  
19 involved in planning some sort of terrorist  
20 attack here, and Twitter basically says, not our  
21 problem, that is the level of knowledge.

22 And -- and, if, in fact --

23 JUSTICE BARRETT: But that's  
24 knowledge. I was asking you about substantial  
25 assistance.

1           MR. WAXMAN: I see. If -- if what was  
2 in those posts, in fact, were -- were the  
3 planning and preparation and commission of the  
4 attack that happened to occur at the Reina  
5 nightclub, that would be substantial assistance.

6           JUSTICE BARRETT: Okay. So, to  
7 clarify, you're not saying that merely using the  
8 platform is enough, but it would depend on how  
9 significant the communications on the platform  
10 were to the attack?

11          MR. WAXMAN: Correct.

12          JUSTICE BARRETT: Okay. And last  
13 question. What daylight, if any, do you see  
14 between your position and the government's  
15 position?

16          MR. WAXMAN: Very little. I think  
17 what the government says, I mean, with respect  
18 to the relevant object, we agree. It's the act  
19 of international terrorism, not ISIS generally.

20                 With respect to knowledge, I think  
21 they also agree, the particularity in a context  
22 in which there's this remote general  
23 arm's-length provision of services.

24                 If we disagree, it's on the -- how one  
25 calculates, I guess, or characterizes

1 substantiality. The government says that there  
2 has to be a substantial causal link between the  
3 assistance provided and the act that occurred.  
4 And we -- I -- I don't -- in principle, I don't  
5 disagree with that.

6 JUSTICE BARRETT: So no daylight  
7 really?

8 MR. WAXMAN: I -- I -- can I --

9 JUSTICE BARRETT: Okay.

10 MR. WAXMAN: -- can I reserve judgment  
11 until I hear Mr. Kneedler's answer?

12 JUSTICE BARRETT: Okay. You started  
13 out saying very little and then you said in  
14 principle. But that's -- that's okay, I'll let  
15 Justice Jackson have a shot.

16 MR. WAXMAN: I -- I --

17 CHIEF JUSTICE ROBERTS: Justice  
18 Jackson?

19 MR. WAXMAN: -- I'm not sure.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Jackson?

22 JUSTICE JACKSON: Yes, good morning,  
23 Mr. Waxman.

24 MR. WAXMAN: Good morning.

25 JUSTICE JACKSON: I -- I had thought

1 that knowledge and substantial assistance were  
2 two different elements or two different  
3 criteria. Am I right that that's the case or  
4 no?

5 MR. WAXMAN: I think you are --

6 JUSTICE JACKSON: You're looking --

7 MR. WAXMAN: -- you -- you --

8 JUSTICE JACKSON: Go ahead.

9 MR. WAXMAN: Yes, you are right. What  
10 the -- the operative text says that aiding and  
11 abetting by knowingly providing substantial  
12 assistance.

13 JUSTICE JACKSON: All right. So two  
14 different things.

15 MR. WAXMAN: So there are two  
16 elements.

17 JUSTICE JACKSON: They are two  
18 elements. But then the -- the -- your statement  
19 of the rule that you explored with Justice  
20 Kavanaugh seemed to have them both working in a  
21 way that I was confused about, so --

22 MR. WAXMAN: Then let me -- yeah. I  
23 can see --

24 JUSTICE JACKSON: Yeah. So -- so --

25 MR. WAXMAN: -- I can see how it's --

1 it's confusing. So you have -- your -- what's  
2 alleged to be -- your culpable conduct has to  
3 have, in fact, substantially assisted the act of  
4 international terrorism that injured the  
5 plaintiffs.

6 JUSTICE JACKSON: Independent of your  
7 knowledge, it has to have --

8 MR. WAXMAN: It has to have done --

9 JUSTICE JACKSON: -- factually  
10 substantially --

11 MR. WAXMAN: -- it has to have done  
12 that.

13 JUSTICE JACKSON: Okay.

14 MR. WAXMAN: But the statute goes  
15 further and says that you have to knowingly  
16 provide that assistance, which we think must  
17 mean that you must know, A, that you're  
18 providing assistance and know that the  
19 assistance you're providing is substantial.  
20 That's --

21 JUSTICE JACKSON: But let me ask you,  
22 does it have to run to the particular act?  
23 Because, at the very beginning, in your  
24 conversations with, I think, Justice Sotomayor,  
25 we were trying to get to this point of

1 understanding your view that the particular  
2 tortious act is what we're focusing on, not just  
3 general assistance to the -- the terrorist  
4 organization. I get that.

5 But, if we're looking at the  
6 particular act, then you said at one point that  
7 you can have general awareness that you're  
8 assisting the particular act. And I don't  
9 really understand what that means.

10 MR. WAXMAN: I misspoke if I said  
11 that.

12 JUSTICE JACKSON: Okay.

13 MR. WAXMAN: So I -- I think I was  
14 trying to explain that under Step 2 of  
15 Halberstam -- the Halberstam framework, you have  
16 to "be generally aware of your role as part of  
17 the overall illegal tortious activity at the  
18 time you provide the assistance." But this --

19 JUSTICE JACKSON: And you conceded  
20 that in this case?

21 MR. WAXMAN: I conceded --

22 JUSTICE JACKSON: Okay.

23 MR. WAXMAN: -- for purposes of this  
24 case --

25 JUSTICE JACKSON: Okay.



1           MR. WAXMAN: -- that that's establish  
2 -- that's fairly pled in the complaint.

3           JUSTICE JACKSON: So then what's the  
4 knowledge that's working at Step 3?

5           MR. WAXMAN: Right. You have to know  
6 that you are providing substantial assistance to  
7 an act of international terrorism and the  
8 substant- -- and an act of international  
9 terrorism that happened to be a terrorist attack  
10 that injured the plaintiff.

11          JUSTICE JACKSON: But it doesn't have  
12 to be the Reina attack; you just have to know  
13 that you're assisting ISIS, that ISIS  
14 participates in --

15          MR. WAXMAN: It's not just the --  
16 there's a wide gulf between knowing that the --  
17 that the location of the attack will be the  
18 Reina nightclub and knowing that you're somehow  
19 generally assisting ISIS in some way.

20          JUSTICE JACKSON: Yes, and it's the  
21 gulf I'm trying to explore, so what --

22          MR. WAXMAN: Right.

23          JUSTICE JACKSON: I -- I want to chart  
24 it. What do you have to know in 3 that is  
25 sufficient under your view?

1           MR. WAXMAN: Yes. You have to know  
2 that you, in fact -- well, I'm sorry, was it --  
3 what did you have to know?

4           JUSTICE JACKSON: In 3, in Step 3,  
5 when you say -- we -- we -- we --

6           MR. WAXMAN: The -- the knowledge --

7           JUSTICE JACKSON: -- we've disposed of  
8 2, which is the general knowledge of your role.  
9 You know you have a platform and people are  
10 using it and some of those people are bad  
11 people.

12          MR. WAXMAN: Got it.

13          JUSTICE JACKSON: Three, you say home  
14 in on the act, it has to be act of -- of  
15 terrorism. And I guess I'm just trying -- that  
16 -- that you substantially assist in that.

17          MR. WAXMAN: Correct, right.

18          JUSTICE JACKSON: But then what's  
19 "knowing" doing there?

20          MR. WAXMAN: You have to know that  
21 your action would substantially assist an act of  
22 international terrorism. That's the independent  
23 work that "knowing" -- that the know -- that you  
24 knowingly provide substantial assistance does.

25          JUSTICE JACKSON: So they don't have

1 to allege or they do have to allege that you  
2 knew something about the fact that this group  
3 was going to do an act of international  
4 terrorism that turned into the Reina attack?

5 MR. WAXMAN: You have -- that is  
6 exactly what you have -- you have to -- they  
7 have to plausibly allege and ultimately prove  
8 not only that our actions substantially assisted  
9 the Reina attack but that we knew that we were  
10 providing substantial assistance to some act of  
11 international terrorism, period.

12 JUSTICE JACKSON: But not enough to  
13 know that -- that you're providing substantial  
14 assistance to a group that does this kind of  
15 thing?

16 MR. WAXMAN: Of course not.

17 JUSTICE JACKSON: I don't know that I  
18 see that clearly the distinction, but let me ask  
19 you just a quick question about Halberstam.

20 So I guess I'm a little concerned  
21 about framing this as the defendant is offering  
22 generally available services. What if in  
23 Halberstam itself, instead of Linda Hamilton  
24 providing bookkeeping services, we had an  
25 accounting firm, and their usual course of

1 business was to provide the bookkeeping  
2 services, they did exactly what she did with  
3 exactly the same level of knowledge in the sense  
4 that they knew that these were pretty -- you  
5 know, the -- the -- they knew this guy didn't  
6 have a job and suddenly he was showing up with,  
7 you know --

8 MR. WAXMAN: Jewels, right.

9 JUSTICE JACKSON: -- thousands of  
10 dollars in jewels and whatnot and asking them  
11 for bookkeeping services. Are they -- are they  
12 on the hook or not?

13 MR. WAXMAN: I think they probably  
14 would be on the hook. I mean, it's different  
15 than Hamilton, where she had no other job. She  
16 didn't do anything other than have this  
17 symbiotic criminal relationship.

18 But, if you had an accounting firm  
19 that somebody comes and basically says, you  
20 know, I'd like you to help me with the  
21 following, I'd like you to help me, you know,  
22 smelt down jewelry and then sell it --

23 JUSTICE JACKSON: No, no, they're  
24 doing their usual bookkeeping services. They  
25 have a lot of clients. They have very, you

1 know, well-to-do regular clients who do have  
2 jobs and are bringing them money, and then they  
3 have this guy who starts coming and saying,  
4 please, I'd like to do bookkeeping, and they're  
5 a little suspicious, but they don't do anything  
6 other than the regular bookkeeping services that  
7 they ordinarily would provide to their other  
8 clients.

9 MR. WAXMAN: I mean, if the  
10 circumstances of the services that's being  
11 requested and that they provided would not  
12 permit a fair inference that they were  
13 "generally aware" of the role they were playing  
14 as part of overall illegal or tortious activity,  
15 they wouldn't be liable for aiding and abetting.

16 I -- I do want to just --

17 CHIEF JUSTICE ROBERTS: Thank you.  
18 You can finish your sentence.

19 (Laughter.)

20 MR. WAXMAN: Sadly, I'm afraid I did  
21 finish my sentence.

22 (Laughter.)

23 JUSTICE JACKSON: Thank you.

24 MR. WAXMAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

1                   ORAL ARGUMENT OF EDWIN S. KNEEDLER  
2                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                   SUPPORTING REVERSAL

4                   MR. KNEEDLER: Mr. Chief -- excuse me.  
5                   Mr. Chief Justice, and may it please the Court:

6                   The United States condemns in the  
7                   strongest terms the terrorist act that caused  
8                   Mr. Alassaf's death and sympathizes with the  
9                   profound loss that the plaintiffs in this case  
10                  have experienced.

11                  We submit, however, that the  
12                  allegations in this complaint do not state a  
13                  claim that the defendants aided and abetted,  
14                  that is, that they assumed a culpable role in  
15                  the commission of that murder.

16                  JASTA requires more than allegations  
17                  that a terrorist organization availed itself of  
18                  interactive computer services that were remote  
19                  from the act of terrorism, were widely and  
20                  routinely available to hundreds of millions, if  
21                  not billions, of persons through the automatic  
22                  features of those services, and did not single  
23                  out ISIS for favorable treatment.

24                  JASTA permits recovery against persons  
25                  who become complicit by rendering substantial

1 assistance that encourages the commission of  
2 terrorist acts, but by JASTA's express terms and  
3 its incorporation of Halberstam's common law  
4 standards, Congress ensured that JASTA does not  
5 reach so broadly as to inhibit legitimate and  
6 important activities by businesses, charities,  
7 and others, both in the United States and in  
8 other parts of the world that may be unstable or  
9 underdeveloped.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Mr. Kneedler, I -- I  
12 think I'd just like to get a finer point on your  
13 position. When we talk about Twitter or YouTube  
14 or Facebook, it's because of the algorithms and  
15 how broadly these -- these businesses are. It's  
16 complicated.

17 But I'd like to simplify it just a bit  
18 and see where you come out. You recall PageNet,  
19 don't you, when pagers were ubiquitous?

20 MR. KNEEDLER: Yes.

21 JUSTICE THOMAS: And --

22 MR. KNEEDLER: I don't recall PageNet,  
23 but --

24 JUSTICE THOMAS: Okay. Well, let's  
25 just --

1                   MR. KNEEDLER:  -- I -- I'm not an  
2 expert in --

3                   JUSTICE THOMAS:  Well, yeah.  Well,  
4 just that pagers were ubiquitous at one point,  
5 right?

6                   MR. KNEEDLER:  Right.

7                   JUSTICE THOMAS:  And we ought -- let's  
8 assume that, as with certain criminal elements  
9 who used pagers back then, you had terrorists  
10 who had an affinity for these and that the --  
11 PageNet -- let's assume there was a company,  
12 PageNet -- understood that they used their  
13 services, as did doctors, as did other people,  
14 businesspeople.

15                   Would that constitute aiding and  
16 abetting if they did nothing and permitted them  
17 to use it and engage in terrorist activity?

18                   MR. KNEEDLER:  By application of the  
19 Halberstam standards --

20                   JUSTICE THOMAS:  Yes, yes.

21                   MR. KNEEDLER:  -- that may be -- that  
22 may be unclear, but I think it would probably  
23 not be substantial assistance or knowing  
24 substantial assistance.

25                   JUSTICE THOMAS:  Okay.  So if you



1 would just pause that for me.

2 MR. KNEEDLER: Right.

3 JUSTICE THOMAS: You know -- you know  
4 they're using it, and you know it's probably  
5 central to what they're doing. So what's --  
6 where does it fail the Halberstam test?

7 MR. KNEEDLER: I think there's one  
8 distinction between this and -- between your  
9 hypo and this case, which is the distance  
10 between the aid and -- and the -- and the  
11 commission of the act. In your example, it's  
12 much more proximate, I think, if I understand  
13 the hypothetical.

14 The -- using the pager will be  
15 alerting somebody to the immediate commission of  
16 the crime. That's not what we have here. Here,  
17 we have something that's much more remote, the  
18 use of an automatic service that the claim is  
19 that that enhances ISIS, which, in turn, maybe  
20 in combination with a number of other factors,  
21 might ultimately --

22 JUSTICE THOMAS: Well, that's why I  
23 went to pagers, because I wanted it to be  
24 closer.

25 MR. KNEEDLER: Right.

1 JUSTICE THOMAS: And I wanted to put a  
2 finer point on it, because, you know, of course,  
3 a billion people or hundreds of millions of  
4 people are using these services and so you get  
5 lost in that. I understand you say that's  
6 too -- too amorphous or it's too attenuated.

7 But, if you tighten it somewhat and  
8 use pagers, it would seem that you would be able  
9 to answer that with, you know, more clarity.

10 MR. KNEEDLER: Yes, but I -- I think,  
11 frankly, it's somewhat in between. And -- and  
12 the -- the hypothetical that you're describing,  
13 I think, if you -- if you look at the Halberstam  
14 factors --

15 JUSTICE THOMAS: Mm-hmm.

16 MR. KNEEDLER: -- which is an  
17 important part of the Halberstam test in  
18 deciding what's substantial assistance -- and,  
19 by the way, that's not just a factual question.

20 In Halberstam itself, the Court first  
21 affirmed the district court's factual findings  
22 and then applied its legal test, and by  
23 application of the legal test, which was those  
24 six factors, the Court was able to find  
25 liability.

1                   In a number of the other cases,  
2 they've been dismissed because the allegations  
3 don't make out a legal standard. It's not so  
4 much a question of fact. But, in your -- in  
5 your hypothetical, the three most important  
6 factors we think in this case, I think, bear on  
7 your -- on your question.

8                   And -- and one of those is, Halberstam  
9 puts it in terms of, was the person present at  
10 the commission of the offense? I think that's  
11 maybe a proxy or a window into the question of  
12 how proximate was the -- was the person, the --  
13 the defendant's action to the ultimate act.  
14 And, in Halberstam, obviously, the Court said  
15 she was integrally related.

16                   Here, we think it's not proximate  
17 either in the legal proximate cause sense or in  
18 the factual, the way the Internet works sense.  
19 In your example, it's more proximate both, I  
20 think, in a factual and maybe in a legal sense,  
21 that the use of the -- of the pager would have,  
22 depending on -- you know, there may be other  
23 facts, and -- and the level of knowledge would  
24 be -- would be an important element of that.

25                   And another very important factor, I

1 think, in Halberstam that would be relevant in  
2 the -- in the case that you're describing but I  
3 think is very relevant here is what is the state  
4 of mind of the person -- of the defendant in the  
5 case. And, here, the court of appeals said it's  
6 undisputed that Twitter and the other defendants  
7 here did not have an intent to further ISIS  
8 activities or the particular terrorist act here.

9 JUSTICE KAGAN: So can I --

10 CHIEF JUSTICE ROBERTS: How --

11 JUSTICE KAGAN: I'm sorry.

12 CHIEF JUSTICE ROBERTS: I was just  
13 going to say, Mr. Kneeder, I think the  
14 discussion this morning has really taken on a  
15 very academic tone. You -- you say both of the  
16 tests, the plaintiffs and Twitter's, they're --  
17 they're wrong, and you come up with your own  
18 test on page 34 of your 34-page brief, the  
19 suspense was killing me, and this is what you  
20 say.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: You say, "In  
23 some circumstances, such as the direct  
24 channeling of substantial funds or other  
25 fungible resources to a foreign terrorist

1 organization or its close affiliates with  
2 knowing acquiescence in their potential use, a  
3 secondary defendant's contributions may have a  
4 sufficient nexus to a terrorist act, even if the  
5 defendant has no advance knowledge of or does  
6 not provide support specifically directed to the  
7 particular act."

8           And I counted six different factors in  
9 there, and that's added on top of the six-factor  
10 Halberstam test. I guess that's six squared.  
11 And it -- it seems to me that I don't know how  
12 helpful it is to parse each of those different  
13 requirements or try to decide if there should be  
14 five or six into -- in trying to draw a line  
15 between, you know, assistance with respect to a  
16 particular terrorist act and assistance to a  
17 terrorist organization.

18           You know, each -- each one of these  
19 situations that will come along will have  
20 different of these facts prominent and different  
21 ones not there and, I mean, is there any way to  
22 articulate how to approach these cases without  
23 having a 6- or 12-, I guess, or maybe 36-factor  
24 test?

25           MR. KNEEDLER: Well, several things.

1 First of all, what -- what you quoted from page  
2 36 was not intended --

3 CHIEF JUSTICE ROBERTS: Thirty-four.

4 MR. KNEEDLER: Thirty-four, sorry, was  
5 not intended to be a legal test. It was an  
6 example of what might make out a case of knowing  
7 substantial assistance under the Halberstam  
8 test.

9 But I think, because of the  
10 incorporation, express incorporation of  
11 Halberstam into the act, it is necessary to look  
12 to Halberstam. And Halberstam did not come out  
13 of nowhere. It was based on the Restatement of  
14 -- of Torts.

15 And what -- what -- in other  
16 circumstances, this Court has held that Congress  
17 should not be understood to displace the common  
18 law. Here, it incorporated the common law as  
19 set forth in the Restatement of Torts, which  
20 Halberstam relied upon, and then this -- and  
21 then Congress incorporated it.

22 And the six factors are really guides  
23 or guideposts to getting at whether what the  
24 defendant's conduct was, is it culpable enough?  
25 And -- and you can't come up with a -- with a

1 test that will answer every case, and that's why  
2 Halberstam looked to factors, but that's not --

3 CHIEF JUSTICE ROBERTS: Well, but each  
4 factor, I mean, one, substantial assistance,  
5 okay. Well, that -- I mean, if you only give a  
6 hundred bucks to assist the terrorist act that's  
7 going to result in the murder of different  
8 people, you say, well, that's not real  
9 substantial --

10 MR. KNEEDLER: Well --

11 CHIEF JUSTICE ROBERTS: -- but, if you  
12 give 10,000, it is? That seems like a very odd  
13 factor.

14 MR. KNEEDLER: Well, I -- I think it's  
15 not so odd if you think about the different ways  
16 in which it might arise. If somebody is about  
17 to commit a terrorist act and -- and you know  
18 it, and -- and -- and the terrorist said, you  
19 know, could you give me \$10 to buy a knife, and  
20 you give him the \$10, and he commits the  
21 terrorist act with that knife, I think that that  
22 would count as substantial assistance both --  
23 because it was -- it was an essential element in  
24 allowing the -- the act to occur.

25 CHIEF JUSTICE ROBERTS: Okay. Thank

1 -- thank you.

2 MR. KNEEDLER: If you gave a hundred  
3 dollars to ISIS and just wrote a check --

4 CHIEF JUSTICE ROBERTS: No, with  
5 respect to the act.

6 MR. KNEEDLER: Oh, with -- anything  
7 that is -- that is specifically with respect to  
8 the act, I -- I think your example, the \$100, in  
9 any way that says I'm writing this check to  
10 commit this particular terrorist act, that would  
11 count.

12 So it's not -- it's not just the  
13 amount that is a factor, but the amount matters  
14 in terms of the overall context or what the  
15 defendant --

16 CHIEF JUSTICE ROBERTS: Okay. I think  
17 I have your point.

18 JUSTICE KAGAN: Mr. -- Mr. -- Mr.  
19 Kneedler, let's say a known terrorist walks into  
20 a bank and avails himself -- opens up an  
21 account, avails himself of various banking  
22 services. The bank knows who this person is.  
23 The bank knows that terrorists need banking  
24 services to conduct their terrorist activities.  
25 The bank provides him with those banking



1 services.

2 They provide a hundred other clients  
3 who are not terrorists with the same banking  
4 services, but they provide this known terrorist  
5 with these banking services that are very  
6 important to its terrorist activities.

7 Can you go after that person under  
8 this statute?

9 MR. KNEEDLER: I -- I -- I think you  
10 probably could, but when you say known  
11 terrorist, I -- I -- I'm not -- if it's just  
12 somebody who is affiliated with ISIS, you might  
13 have the proximate connection, but --

14 JUSTICE KAGAN: Yeah. No, this is  
15 like Osama bin Laden.

16 MR. KNEEDLER: Yeah. Yes. Some --  
17 somebody who is a leader or somebody who you  
18 know has committed or is about to commit a  
19 terrorist act --

20 JUSTICE KAGAN: Okay.

21 MR. KNEEDLER: -- yes, I think you  
22 can. And the -- the --

23 JUSTICE KAGAN: Because I would be  
24 shocked if the government gave that one away,  
25 right?

1                   MR. KNEEDLER: Right. No. And -- and  
2 I think that's the -- really all this Court  
3 needs to decide in this case is --

4                   JUSTICE KAGAN: Well, but I guess what  
5 I'm trying to -- to focus on is, like, what's  
6 the difference? You know, I mean, we're --  
7 we're used to thinking about banks as providing  
8 very important services to terrorists.

9                   Maybe we're not so used to, but it  
10 seems to be true that various kinds of social  
11 media platforms also provide very important  
12 services to terrorists. And if you know that  
13 you're providing a very important service to  
14 terrorists, why isn't -- why aren't you  
15 providing substantial assistance and just doing  
16 it knowingly? What's the difference between the  
17 banking case and this case?

18                   MR. KNEEDLER: I -- I -- I think there  
19 is a very large difference in terms of the  
20 nature of the interaction. And, again, one of  
21 the Halberstam factors is, what is the  
22 relationship between the defendant and the  
23 person who committed the act?

24                   And in -- in Halberstam, you know, she  
25 was daily engaged in --

1 JUSTICE KAGAN: The bank doesn't know  
2 anything about any particular acts.

3 MR. KNEEDLER: No, I'm -- I'm not  
4 saying the particular act, but -- but the -- the  
5 two -- the -- the two banking cases or the  
6 banking case, Kaplan, and the drug kickback  
7 case, Atchley, that are discussed in the briefs,  
8 there was personal interaction. There was a --  
9 there were transactions specific, knowing  
10 interactions between the bank or -- or the -- or  
11 the drug companies and the entity that was known  
12 to be a terrorist act -- actor engaged actively  
13 in terrorist acts, Hamas and --

14 JUSTICE KAGAN: So it has to be like  
15 personal banking? I mean, suppose the banking  
16 were less personal than that but, you know, they  
17 were providing, you know, very important  
18 financial services to a terrorist organization.

19 MR. KNEEDLER: But I -- but  
20 substantial assistance, again, is -- is partly a  
21 question -- I mean, it goes to the ultimate  
22 question of culpability and proximate causation.

23 And the -- and the -- the ultimate  
24 issue is, is society prepared to hold the -- the  
25 person alleged to be an aider and abetter

1 culpable, essentially equally with a person who  
2 committed --

3 JUSTICE ALITO: Mr. Kneedler, take --  
4 take -- had you finished?

5 JUSTICE KAGAN: Go ahead.

6 JUSTICE ALITO: Take Justice Kagan's  
7 hypothetical and substitute going back even  
8 further than the days of pagers to the days of  
9 -- of land-line phones and phone booths. And so  
10 the telephone company, the telephone company,  
11 knows that a particular person is -- has a  
12 criminal background and is probably engaging in  
13 criminal activity and is using the phone to  
14 communicate with other members of that person's  
15 gang. Is that aiding and abetting the crimes  
16 that they commit?

17 MR. KNEEDLER: No. No, that would not  
18 be. And I -- so I think the availing oneself of  
19 a -- of a service that is universally open, that  
20 is furnished automatically by the features of  
21 the system, that is mostly, you know, helping  
22 lawful businesses, that is not -- I think one of  
23 the hypos yesterday was --

24 JUSTICE KAGAN: Why doesn't that apply  
25 to my bank too?

1           MR. KNEEDLER: Well, the bank cases  
2 actually that have been decided in the lower  
3 courts go both ways. And -- and they -- I think  
4 they turn on the level of knowledge. They turn  
5 on -- ultimately on the culpability.

6           Several of the cases, Siegel for one,  
7 turn on the fact that the -- that the -- the --  
8 the bank took steps to ensure the bank was not  
9 intending to -- to further the services. It was  
10 not -- it -- it didn't have a culpable intent.

11           But we're -- in the example that  
12 you're describing, I think it's a lot easier to  
13 make a judgment, basically a societal or --  
14 judgment, are we prepared to hold that person  
15 liable? And --

16           JUSTICE JACKSON: Suppose we have  
17 Justice Alito's scenario with the providing to  
18 the gangsters or whatnot, and you say no, that's  
19 not going to be covered, but what if that same  
20 company gets specific information about these  
21 people? And now we're not talking about  
22 generally provided services that, you know, they  
23 sign up for somewhere and the company thinks --  
24 it doesn't have any information about them. But  
25 we know suddenly, the company knows, that these

1 individual people are in a gang and generally  
2 using the cell phones that they have acquired  
3 from the company for criminal activity.

4 Does that change the scenario?

5 MR. KNEEDLER: Yes, it changes it  
6 dramatically, I think. And I think that's the  
7 difference between, I think, the two examples  
8 that Mr. Waxman was offering.

9 The -- the making available the  
10 general services that you would make available  
11 to anyone is -- is ordinary, not face-to-face,  
12 business. But if you know facts that zero in on  
13 a -- a known act or a known actor who you know  
14 is committing those acts, and --

15 JUSTICE JACKSON: But wait. What  
16 about --

17 CHIEF JUSTICE ROBERTS: Thank you --  
18 thank you.

19 Wrap up?

20 JUSTICE JACKSON: I just wanted to say  
21 what about the difference between actor and act?  
22 If you -- do you have to know that the -- that  
23 the gangster is going to commit a particular act  
24 or is it just -- is it enough to know that he's  
25 a gangster and, therefore, is likely to do so?

1           MR. KNEEDLER: I -- I think, because  
2 you're talking about a specific person who you  
3 know is likely to, I think that would be enough.

4           That's very different from an  
5 organization like -- like one of these platforms  
6 that is not dealing on a transaction-by-  
7 transaction basis to know whether this account  
8 or this person is -- is furthering an act.

9           CHIEF JUSTICE ROBERTS: Thank you,  
10 Mr. Kneedler.

11           Justice Thomas as?

12           Justice Alito?

13           JUSTICE ALITO: I mean, Bell Telephone  
14 -- J. Edgar Hoover tells Bell Telephone that  
15 Dutch Schultz is a gangster and he's using his  
16 phone to carry out mob activities that -- and  
17 the phone company says, well, we don't pull --  
18 we don't deprive people of service based on  
19 that. That makes them an aider and abetter?

20           MR. KNEEDLER: Perhaps not.  
21 Probably -- I mean, it depends. But -- but --

22           JUSTICE ALITO: Wow. That's a  
23 perhaps?

24           MR. KNEEDLER: No, no, no. I -- I --  
25 I think that even with that knowledge, there --

1 the Halberstam factors require an -- an intent  
2 or -- to move -- to move --

3 JUSTICE ALITO: The problem -- the  
4 problem is Halbertsam. And we're stuck with  
5 Halberstam because those three factors are met  
6 in -- in my telephone example. They're arguably  
7 met in the telephone example. Are they not?

8 MR. KNEEDLER: Perhaps, but -- but  
9 again, it's a judgment call. It's the nature of  
10 the act, the nature of the defendant's  
11 contribution. So I don't think it -- I don't  
12 think the hypotheticals lend themselves to one  
13 basic rule. It's a judgment call as to whether  
14 the defendant is culpable, has become complicit,  
15 in the way a conspirator would.

16 I mean, this statute equates or puts  
17 -- pairs together conspiracy and aiding and  
18 abetting, requiring, again, some culpable --  
19 becoming a willing participant in -- in the act.  
20 And here the furnishing of services as a general  
21 matter, which is all the Court needs to decide  
22 in this case, we do not think rises to that  
23 level.

24 JUSTICE ALITO: Would it be consistent  
25 with Halberstam to read "knowingly" to mean, oh,



1 just a shade short of "purposefully"? That  
2 would give some substance to this.

3 MR. KNEEDLER: Yeah, I -- I -- again,  
4 I -- I think there is some overlap between the  
5 knowing and the substantial. For example, you  
6 -- you may know, as a general matter, that ISIS-  
7 affiliated persons are using your system, but  
8 you may not know by how much. You may not know  
9 for how long. You may not know which accounts.  
10 And so it's very generalized information.

11 And any -- any -- that assistance with  
12 the idea that it might encourage recruiting is  
13 far removed from a specific act of terrorism.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor?

17 JUSTICE SOTOMAYOR: Mr. Stewart, would  
18 you answer the question that Justice Barrett  
19 placed to Mr. Waxman, which is what's the  
20 daylight between you and the Petitioners? And  
21 how would you write the bottom line of this  
22 opinion? They are not liable because...

23 MR. KNEEDLER: On -- on the first -- I  
24 think one place where we might have a difference  
25 is to use the the actually-in-Kaplan examples,

1 not necessarily saying whether those are right  
2 or wrong, but the general proposition is those  
3 were banks -- or banks or companies engaged in  
4 interpersonal, direct communications with the  
5 client. They had knowledge that the client was  
6 either a front for or closely aligned with Hamas  
7 -- I think it was Hamas in both cases -- that  
8 was actively committing terrorist acts,  
9 including against Americans, in the -- you know,  
10 in the proximate area.

11 And so that --

12 JUSTICE SOTOMAYOR: And -- and --

13 MR. KNEEDLER: -- there's a degree of  
14 culpability there.

15 JUSTICE SOTOMAYOR: Because they were  
16 doing something outside the ordinary course of  
17 business?

18 MR. KNEEDLER: Yes. Yes, they --

19 JUSTICE SOTOMAYOR: Okay. So that's  
20 sort of the prong.

21 MR. KNEEDLER: They bent the rules,  
22 which there's no allegation here that -- that  
23 these defendants treated ISIS any -- ISIS  
24 content any differently than they did anything  
25 else in -- in the -- in their usual course of

1 business. We think that's a critical fact. And  
2 --

3 JUSTICE SOTOMAYOR: But what does that  
4 go to, knowledge or substantiality? And so to  
5 which factor does it go to?

6 MR. KNEEDLER: I -- I think it -- it  
7 goes somewhat to both, but I think it -- I think  
8 it's really substantiality. And I think that's  
9 an objective test. And, frankly, I think that  
10 would be a useful way for the Court to think  
11 about it here in terms of being able for courts  
12 to be able to dismiss these cases at the outset,  
13 without having to go through extensive discovery  
14 that would require analysis of all the -- all  
15 the accounts and everything over a period of  
16 time, because I -- I think it's a judgment that  
17 a company engaged in this sort of activity which  
18 is overall very helpful to society should not be  
19 held responsible, culpable, a willing  
20 participant --

21 JUSTICE SOTOMAYOR: Unless what?  
22 Write the bottom line for me. Okay?

23 MR. KNEEDLER: I -- I --

24 JUSTICE SOTOMAYOR: I think -- I go as  
25 far as you go but -- so what -- what does

1 substantiality mean or not mean?

2 MR. KNEEDLER: In -- in -- in the case  
3 of the Internet service providers, we think it  
4 means that they are not -- the regular course of  
5 business, as alleged here, does not constitute  
6 knowing, substantial assistance. The situation  
7 in which it might is if -- if specific accounts  
8 are called to the defendant's attention saying  
9 this -- this account is about to be used for the  
10 -- to facilitate the commission of -- of an  
11 account --

12 JUSTICE SOTOMAYOR: So how do you deal  
13 with -- we know what ISIS does. I think, if I  
14 read the complaint or something, they even know  
15 that ISIS has certain accounts. But they  
16 haven't taken off all the ISIS accounts. No?  
17 And Mr. Waxman is --

18 MR. KNEEDLER: Well, I --

19 JUSTICE SOTOMAYOR: I can ask the  
20 other side.

21 MR. KNEEDLER: The court of -- the  
22 court of appeals stated that, on page 63A and  
23 64 --

24 JUSTICE SOTOMAYOR: Okay.

25 MR. KNEEDLER: -- where we think

1 addressed the most important factors, that ISIS  
2 regularly -- not ISIS -- that the defendants  
3 regularly take down the accounts, but -- at  
4 least when they're called to their attention.

5 Now, they may have missed some, but  
6 that's inherent in a system that -- that  
7 services hundreds of millions of customers. So  
8 in this case it would require something more  
9 specific about a particular act because of the  
10 nature of the services they're offering.

11 That doesn't mean in every case, like  
12 in the Atchley case or -- or the bank cases that  
13 the bank has to know of the specific act,  
14 because it was -- they were -- they were aware  
15 of proximate --

16 JUSTICE SOTOMAYOR: Is it fair --

17 MR. KNEEDLER: -- activity.

18 JUSTICE SOTOMAYOR: Is it fair for me  
19 to summarize in a way that Justice Alito did,  
20 that substantiality in our view -- in your view  
21 has to have some purpose to it?

22 MR. KNEEDLER: The state of mind --

23 JUSTICE SOTOMAYOR: Instead of  
24 knowledge, purpose?

25 MR. KNEEDLER: The state of mind is

1 one of the factors. And the state of mind is --  
2 is how -- it does not require specific intent,  
3 which as Justice Alito pointed out, is required,  
4 but what it -- but -- what is required in -- in  
5 the criminal context.

6 What is required in the civil context  
7 is encouragement, something that -- something  
8 that the --

9 JUSTICE SOTOMAYOR: Some purposeful --

10 MR. KNEEDLER: -- defendant knowingly  
11 does, encourages in a -- in a -- in a meaningful  
12 way because proximate cause is about -- is about  
13 deciding how far responsibility should go.

14 And, you know, the -- the -- this  
15 statute, and I -- I think we're concerned about  
16 not extending it so far that legitimate business  
17 activities could be inhibited. The banks, for  
18 example, in -- in underdeveloped parts of the  
19 world and charities that may depend on those  
20 banks, concerns about how they may -- they may  
21 pull back as a result of legitimate businesses,  
22 so that -- that is a concern that should enter  
23 into the analysis, and -- and including here,  
24 the type of the service and how remote that  
25 service is from the commission of any particular

1 act.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Sotomayor?

4 Justice Kagan?

5 JUSTICE KAGAN: Mr. Kneedler, a -- a  
6 few times in talking about differences among  
7 hypothetical cases and real cases, you said this  
8 is really a societal judgment about who counts  
9 as complicit, who counts as culpable, and that  
10 seems right to me.

11 But it seems to suggest that this  
12 should be a jury question, shouldn't it?

13 MR. KNEEDLER: No, I think there's a  
14 very -- there's a big difference. Juries decide  
15 facts. The law decides what -- what  
16 consequences to attach to the facts that are  
17 found or alleged.

18 And -- and we think this is  
19 essentially a question of -- question of law.  
20 Now, to be sure, it's a question of law that  
21 turns on looking at the particular factors in  
22 Halberstam, but that's exactly what Halberstam  
23 itself did. As I said, after making the factual  
24 findings, it went on to apply the -- the  
25 standards in the nature of the common law,

1 drawing on the -- on the restatement of -- of --  
2 of torts.

3           And I think there's a practical,  
4 common sense judgment that most people would  
5 understand that when you are running a -- a  
6 business that is open to all comers, that it's  
7 not face-to-face. You're not singling out one  
8 person for favorable treatment. It's an  
9 important service that we all benefit from that  
10 you would -- you would look at that conduct  
11 quite differently than you would somebody who is  
12 engaged in a face-to-face encounter, asked to  
13 lend money or give money or -- or give services  
14 that are specific to that person that you know  
15 is about to commit or is a -- a member of a  
16 group that all around you is committing  
17 terrorist acts, as -- as in -- as in Atchley  
18 and -- and -- and -- and Kaplan.

19           So there -- that's a -- that's a  
20 judgment that the law makes about whether the  
21 conduct is culpable, whether the person has --  
22 has become a willing partner. I mean, there are  
23 a lot of expressions trying to get at the  
24 question of whether the person is sufficiently  
25 complicit --



1 JUSTICE KAGAN: Thank you.

2 MR. KNEEDLER: -- in the actual  
3 murder.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 JUSTICE GORSUCH: Mr. Kneedler, I -- I  
7 appreciate that Congress approved the Halberstam  
8 decision, but do we really have to wade through  
9 its three elements or the third element has two  
10 prongs and the second prong is made up of six  
11 factors, some of which you tell us don't  
12 apparently count for very much, is there some  
13 way to cut through that kudzu and -- and decide  
14 this case on the statutory terms? Please say  
15 yes.

16 (Laughter.)

17 MR. KNEEDLER: Yes.

18 (Laughter.)

19 MR. KNEEDLER: There is. And I -- and  
20 I think that the -- you can look at the overall  
21 context of this statute. JASTA was passed  
22 largely in -- you know, almost entirely in  
23 response to decisions that -- that came out of  
24 the Second Circuit concerning responsibility for  
25 the 9/11 attacks, and -- and specifically where

1 plaintiffs were tried to hold responsible the  
2 Saudi government, Saudi officials, Saudi  
3 charities, but the courts had said no, there's  
4 no personal jurisdiction over some of them.

5 The -- the -- the Saudi state wasn't  
6 liable or couldn't be sued under the Foreign  
7 Sovereign Immunities Act because of limitations  
8 on the Foreign Sovereign Immunities Act --

9 JUSTICE GORSUCH: Mr. -- Mr. Kneedler,  
10 I'm -- I'm sorry to interrupt, but I was hoping  
11 for an answer -- answer having something to do  
12 with the statutory text.

13 And -- and let me just again offer one  
14 possibility, that the -- the -- the two clauses,  
15 the two who clauses in -- in this statute might  
16 modify the person who committed such an act,  
17 rather than the act itself, would -- an event in  
18 the world.

19 And -- and it seems to me that that's  
20 a pretty important limitation on aiding and  
21 abetting liability and conspiracy liability,  
22 both secondary forms of liability, in our law  
23 generally, that you have to aid an actual  
24 person. It's not just a pedantic point. It has  
25 to do with the idea that -- that you're singling

1 somebody out.

2           And that -- and that is different than  
3 just doing your own business normally and that  
4 that does help limit the scope of the act, but  
5 what am I missing?

6           MR. KNEEDLER: Well, I -- I think that  
7 the act in our view overall does not require  
8 that the assistance be zeroed in on the  
9 individual who committed the act. Its liability  
10 --

11           JUSTICE GORSUCH: Why -- why --

12           MR. KNEEDLER: -- may be asserted  
13 against any --

14           JUSTICE GORSUCH: Why not? Because  
15 that's normally how secondary liability works.  
16 And it's an important limitation that -- that --  
17 that cabins in the scope and prevents secondary  
18 liability from becoming liability for just doing  
19 business.

20           MR. KNEEDLER: Yeah, well, I -- I  
21 think -- I -- I think the sense that you have is  
22 correct in the sense that an act -- an act is  
23 actually committed by a human being, a natural  
24 person, or at least in -- in most instances.

25           JUSTICE GORSUCH: Or -- or -- or a

1 corporate person. The dictionary act, which  
2 defines person, includes those kinds of  
3 juridical entities.

4 MR. KNEEDLER: Yes. Now and --

5 JUSTICE GORSUCH: And we -- and we  
6 have two who clauses, who aids and abets or who  
7 conspires. And the language then says with the  
8 person.

9 MR. KNEEDLER: Right. So the -- the  
10 point I was about to make was that even if you  
11 regard the person as the individual, if the  
12 assistance -- in this case, for example, ISIS  
13 would commit the terrorist act through the act  
14 of an individual --

15 JUSTICE GORSUCH: Right.

16 MR. KNEEDLER: So I'm not sure --

17 JUSTICE GORSUCH: And here -- and here  
18 the point would be that, okay, the Defendant,  
19 Twitter, was -- was -- Facebook, Google,  
20 whatever, was -- was -- was doing its business,  
21 but there are very few points in this complaint  
22 that allege that they aided the persons who  
23 actually engaged in the terrorist act.

24 I mean, with all -- we all appreciate  
25 how horrible the attack was, but there's very

1 little linking the defendants in this complaint  
2 to those persons.

3 MR. KNEEDLER: Yes, but I -- I agree  
4 with that. And -- but I think -- I think that  
5 also means there's very little, next to nothing,  
6 that links it with the act that the person  
7 committed. So --

8 JUSTICE GORSUCH: In a very abstract  
9 way in the world, everything is connected to  
10 everything else. And what the defendant did may  
11 have in some abstract way helped advance ISIS.  
12 And ISIS helped conduct the attack.

13 And so in a -- in a world in which  
14 we're all and everything is interconnected, all  
15 acts touch on one another, there's some  
16 butterfly effect anywhere, but what helps limit  
17 secondary liability, it -- it -- it one thing  
18 that helps limit secondary liability is that  
19 you're intentionally or knowingly in this case  
20 helping a person do something in the world.

21 MR. KNEEDLER: I -- I -- I think  
22 that's right. I think that's right. I think  
23 that principle --

24 JUSTICE GORSUCH: Perhaps we should  
25 stop there.

1 (Laughter.)

2 MR. KNEEDLER: Well, yes.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Kavanaugh?

5 JUSTICE KAVANAUGH: I just want to  
6 make sure I understand how you think this is  
7 different from a material support statute, so if  
8 you have a communications business or financial  
9 business or a food business or a travel  
10 business, and you serve lots of customers, but  
11 you knowingly provide your services to a  
12 terrorist organization, that you know is a  
13 terrorist organization.

14 MR. KNEEDLER: Yes, I -- that would be  
15 criminal liability. That's a very important  
16 distinction.

17 JUSTICE KAVANAUGH: Is that liability  
18 under this?

19 MR. KNEEDLER: Not -- not under -- not  
20 under -- I mean, again --

21 JUSTICE KAVANAUGH: That's what I --

22 MR. KNEEDLER: Again, I would --  
23 would --

24 JUSTICE KAVANAUGH: I just want to --

25 MR. KNEEDLER: -- you know, I'd maybe

1 want to know more.

2 JUSTICE KAVANAUGH: That's what we  
3 have. What we have is you know they're  
4 terrorists, picking up on Justice Kagan's  
5 hypothetical. You provide services,  
6 communications, food, travel to lots of people,  
7 and this one comes in -- you know, I know this  
8 person is a terrorist, but I'm going to provide  
9 the same service, no favorable treatment, the  
10 same service to that person as to everyone else.

11 Congress has passed statutes to get at  
12 that kind of situation. The question is, is  
13 this statute getting at that situation?

14 MR. KNEEDLER: I think ordinarily not,  
15 but it --

16 JUSTICE KAVANAUGH: And why not?

17 MR. KNEEDLER: Because it is --

18 JUSTICE KAVANAUGH: It's the phrase  
19 "act," right?

20 MR. KNEEDLER: It's the phrase "act,"  
21 and --

22 JUSTICE KAVANAUGH: Or the word "act."

23 MR. KNEEDLER: It's the word "act,"  
24 but it's also application of the, frankly,  
25 common-sense factors or way of looking at it.

1 In Halberstam, it has to be substantial  
2 assistance to the act. Now it --

3 JUSTICE KAVANAUGH: Now why is your  
4 answer to Justice Kagan's hypothetical that may  
5 be liability in that case? Is it because you  
6 could prove some suspicion that that terrorist  
7 was going to commit a particular act?

8 MR. KNEEDLER: Yeah, and I --

9 JUSTICE KAVANAUGH: If you don't have  
10 that, then I don't understand your answer --

11 MR. KNEEDLER: No, no.

12 JUSTICE KAVANAUGH: -- to Justice  
13 Kagan.

14 MR. KNEEDLER: I took that to be --  
15 maybe I misunderstood -- I took that to be an  
16 important part of the -- of her question when --  
17 when I said, do you have an awareness or  
18 knowledge that that person has committed or is  
19 about to commit or -- or something, so there's  
20 that --

21 JUSTICE KAVANAUGH: Well, you know  
22 they're a terrorist, though. Let's go back to  
23 what I said. You know they're a terrorist. So,  
24 by that -- they're a member of ISIS. They've  
25 been involved in past activities. But you're



1 like, well, I'm still going to give them food.

2 MR. KNEEDLER: Well --

3 JUSTICE KAVANAUGH: I'm still going to  
4 have a cell phone. I'm still going to rent a  
5 car.

6 MR. KNEEDLER: There may be  
7 differences in the services. I mean, a  
8 restaurant serving somebody, I -- I don't think  
9 you would regard that as substantial.

10 JUSTICE KAVANAUGH: Well, a rental  
11 car?

12 MR. KNEEDLER: Well, if he says I -- I  
13 need -- I need a car to get to the airport quick  
14 so that I can get to Istanbul --

15 JUSTICE KAVANAUGH: I mean, that's --  
16 well, okay.

17 MR. KNEEDLER: But -- but -- but,  
18 again, the question is, how much has the  
19 defendant willingly associated himself or become  
20 a willing partner and been complicit in what  
21 that person is doing?

22 And I think it depends on both the  
23 nature of the assistance, what intent or state  
24 of -- of mind you have. I think a restaurant is  
25 very different from offering somebody, you know,

1 here's my cell phone so you can call your  
2 compatriot. I think those -- those are -- those  
3 are, in -- in common-sense terms, very different  
4 acts. But, in your --

5 JUSTICE KAVANAUGH: I think that's --  
6 under this statute, that has to be your  
7 position, but I've seen -- you've got to  
8 maintain a hard line there, and in response to  
9 some of the hypotheticals, I'm not sure you've  
10 maintained a hard line --

11 MR. KNEEDLER: Well, I --

12 JUSTICE KAVANAUGH: -- which then  
13 swallows the whole principle.

14 MR. KNEEDLER: No, no, I tried to  
15 maintain a hard -- a hard -- a hard line with  
16 respect to this service in particular, which is  
17 all the Court has to decide. It's generally  
18 available, no favorable treatment. It's not  
19 face-to-face, which, in your example, is another  
20 very important distinguishing characteristic.  
21 It's an individualized transaction where you --  
22 you know who that person is by your --

23 JUSTICE KAVANAUGH: That's -- I -- I  
24 don't want to prolong this, but that's very  
25 elusive. You know ISIS is using the

1 organization -- some human being in the -- in  
2 the defendant company knows that ISIS, a group  
3 of individuals, is using this service to help  
4 recruit others to kill people.

5 MR. KNEEDLER: But that --

6 JUSTICE KAVANAUGH: You know that. I  
7 don't know why the face-to-face really changes  
8 that.

9 MR. KNEEDLER: Oh, I think it changes  
10 it a lot. And, again, Halberstam -- Halberstam  
11 talks about was the person present, which, as I  
12 said, I think, in this context, really means  
13 what is -- how remote or how proximate was the  
14 defendant's association with it.

15 And if you -- if you aid in something  
16 as generalized as -- as recruiting, that would  
17 render these defendants culpable, responsible,  
18 complicit in every terrorist act affecting --

19 JUSTICE KAVANAUGH: Okay.

20 MR. KNEEDLER: -- affecting a -- a  
21 U.S. national --

22 JUSTICE KAVANAUGH: Thank -- thank  
23 you.

24 MR. KNEEDLER: -- in the country.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Mr. Kneedler, taking  
3 Justice Gorsuch's point about aid to the person  
4 in the statute, Justice Gorsuch was pointing out  
5 that the Dictionary Act treats juridical  
6 entities as persons. Would the government  
7 consider ISIS a juridical entity? Or, if we're  
8 focusing on the person, would we have to be  
9 focusing on the people who actually carried out  
10 the attack?

11 MR. KNEEDLER: I don't know if we  
12 would consider it to be a juridical person. I  
13 -- I think ISIS is -- is an identifiable if  
14 somewhat amorphous entity --

15 JUSTICE BARRETT: Entity?

16 MR. KNEEDLER: -- entity. But it's  
17 important -- I think this is really a  
18 misunderstanding a lot of the -- of the -- that  
19 -- that Respondent has and some of the amici on  
20 that side. The -- the notion of an enterprise  
21 in Halberstam was not like some distinct entity.  
22 That -- sometimes "enterprise" is used that way.  
23 It was used there. The enterprise was a series  
24 of discrete acts.

25 JUSTICE BARRETT: I -- I -- I

1 understand, and I -- I agree with that reading  
2 of Halberstam actually.

3 All right. Looking -- if we rule in  
4 favor of Twitter and I'm thinking about ways in  
5 which to do that if that's what we do, it seems  
6 to me -- well, tell me if you agree with this:  
7 One thing to say would be to say that because  
8 you have to assist a person who commits the  
9 particular act of terrorism, whether that person  
10 is ISIS or the particular individuals that  
11 carried out the attack, there would have to be  
12 allegations in the complaint showing the use of  
13 the defendant's service, of Twitter's service,  
14 to the end of the Paris attack and not just  
15 general recruitment or radicalizing people and  
16 that this complaint lacks those allegations,  
17 like using DMs or using comment threads on  
18 Twitter to actually coordinate the activities  
19 for the act. Would that be one way to do it?

20 MR. KNEEDLER: Yes. I -- I think that  
21 is the distinction in this case. I mean, again,  
22 if they knew about -- if they knew about a  
23 specific account --

24 JUSTICE BARRETT: But -- but -- but --  
25 but I'm -- knowledge is a different thing.

1 That's not what I'm -- I'm asking. If --

2 MR. KNEEDLER: But just the -- yes?

3 JUSTICE BARRETT: Before you even get  
4 to knowledge, you have to say that there was the  
5 use of the service in the particular attack on  
6 the -- on the government's view, right?

7 MR. KNEEDLER: Yes.

8 JUSTICE BARRETT: You have to link it  
9 up to the attack?

10 MR. KNEEDLER: If you can do that, but  
11 for -- in this context, yes, for the use of  
12 these services, because of the nature of these  
13 -- of these services.

14 JUSTICE BARRETT: But in the attack --  
15 I mean, I -- I took the whole point to be, and  
16 the point of agreement between you and Mr.  
17 Waxman, that the statute refers not just  
18 generally to helping, as you were just saying,  
19 the enterprise but to aiding and abetting the  
20 act of terrorism that injured the plaintiff.

21 MR. KNEEDLER: That's correct.

22 JUSTICE BARRETT: So, here, in order  
23 to state a claim, we would need to see in the  
24 complaint some allegations that Twitter was used  
25 to carry out this specific attack, not just

1 generally used to build up ISIS and recruit?

2 MR. KNEEDLER: Yes.

3 JUSTICE BARRETT: Okay. Another  
4 things it seems like we could say, it's kind of  
5 to the colloquy you were having with both  
6 Justices Kavanaugh and Kagan, which is about a  
7 business that operates and it's open to all  
8 comers. That seems to go to knowledge. Am I  
9 right?

10 MR. KNEEDLER: I think it goes to  
11 knowledge but also the -- the --

12 JUSTICE BARRETT: Substantial  
13 assistance?

14 MR. KNEEDLER: -- substantial  
15 assistance, because it goes to how remote is it.  
16 Is it face-to-face? Some -- some companies open  
17 to all business are face-to-face. Some are not  
18 like this is automatic.

19 JUSTICE BARRETT: So it could be a  
20 little bit trickier, but an opinion to that  
21 effect might have to say something like, if the  
22 defendant is a business that's open to all  
23 comers, a page company, PageNet, or the phone  
24 service or a bank or Twitter, social media  
25 company, there has to be some allegation of,

1 what, specific knowledge?

2 MR. KNEEDLER: Of specific knowledge,  
3 some specific action with respect to that  
4 particular person or that particular act. I  
5 want to be clear, I don't -- I don't want to be  
6 taken to be saying absolute rules for every  
7 situation. The points I'm making here about --

8 JUSTICE BARRETT: But I thought you  
9 said it would be helpful to give lower courts  
10 some way to dismiss these cases without wading  
11 into the facts. And it seems like the first  
12 thing I said, which was about linking up  
13 attacks, wouldn't serve that end because it  
14 sounds like you were saying that you thought it  
15 would be helpful to have a holding that related  
16 to generally open businesses. Am I right?

17 MR. KNEEDLER: Again, because of the  
18 banking example, a bank may hold itself out to  
19 be open to all comers, but, in the -- in the  
20 context of conducting that business, they may  
21 have an individualized encounter.

22 Some -- you don't just open an account  
23 in most banks online or get a loan online.  
24 There's going to be some back and forth by which  
25 the bank will get to know something about the



1 person it's doing business with or know that  
2 that person is affiliated --

3 JUSTICE BARRETT: Sure. But that goes  
4 to the point of knowledge, right? You know --

5 MR. KNEEDLER: Well, it also goes to  
6 the nature of the -- of the --

7 JUSTICE BARRETT: The nature of the  
8 assistance?

9 MR. KNEEDLER: Yes.

10 JUSTICE BARRETT: Yes.

11 MR. KNEEDLER: Yes.

12 JUSTICE BARRETT: Yes.

13 MR. KNEEDLER: So -- so, here, the  
14 primary point I'm making here is about these  
15 businesses which are open to the public on an  
16 automated way, without -- without any occasion  
17 or ability for an individualized determination  
18 about --

19 JUSTICE BARRETT: Sure. So I wasn't  
20 suggesting that you were asking us to say any  
21 business that's generally open to the public can  
22 never be liable. But any business that's  
23 generally open to all comers, absent some  
24 allegation of more specific knowledge or  
25 specific interaction, cannot be liable under

1 JASTA?

2 MR. KNEEDLER: Yes. And one other  
3 point I'd like to make, it -- I -- I -- I think  
4 it is possible, and as I think Atchley and  
5 Kaplan show, in that situation, it doesn't  
6 necessarily require that you know that a  
7 particular person is going to commit a  
8 particular act. If you know because of the  
9 proximate relationship with the person you're --  
10 you're assisting that there -- that they --  
11 there are a group of acts that they are about to  
12 commit or that they are -- that they have an  
13 ongoing practice of committing, you don't have  
14 to know of the specific act in that -- in that  
15 situation. That's why I think it is -- it is  
16 context-specific.

17 But this is open --

18 JUSTICE BARRETT: And banks are what  
19 you're worried about? Banks is what the  
20 government is worried about in that?

21 MR. KNEEDLER: We are worried about --

22 JUSTICE BARRETT: Banks is what you're  
23 worried about.

24 MR. KNEEDLER: -- and the -- and the  
25 cases, some of them have been dismissed and we

1 think it's important for them to be able to be  
2 dismissed, where you don't have that -- the sort  
3 of knowledge or intent, the state of mind,  
4 the -- the things that go to whether this --

5 JUSTICE BARRETT: You want to make  
6 sure the banks aren't automatically dismissed.  
7 Like, you're trying to make sure whatever we  
8 said about social media companies wouldn't get  
9 banks off the hook when they have those kinds of  
10 special relationships that you're talking about?

11 MR. KNEEDLER: Yes.

12 JUSTICE BARRETT: Yes.

13 MR. KNEEDLER: Special relationships  
14 and knowledge. It's not just banks. There  
15 could be other institutions. Charities are  
16 another one, charities both in their own right,  
17 in -- operating --

18 CHIEF JUSTICE ROBERTS: Justice  
19 Jackson?

20 JUSTICE JACKSON: So I've been kind of  
21 going back in my mind to what I started with Mr.  
22 Waxman in terms of separating out knowledge and  
23 substantial. And it -- in listening to you, it  
24 was very clear that you are putting a lot of  
25 stock in substantial. And I was trying to

1 figure out why that is.

2           And I went back to Halberstam, and I'm  
3 looking at the opinion, and I'm -- I'm noting  
4 now for the first time that after the court in  
5 aiding -- in the aiding and abetting section  
6 lists the three elements, it very quickly  
7 disposes of them and, in particular, with  
8 respect to the third element it just says "the  
9 district court also justifiably inferred that  
10 Hamilton assisted Welch with knowledge that he  
11 had engaged in an illegal acquisition of goods."

12           Then it goes on to say the only  
13 remaining issue then is whether her assistance  
14 was substantial. So all the factors and all the  
15 things you've been talking about are  
16 insubstantial, so it seems as though, at least  
17 per this person, the only real knowledge is of  
18 the kind you're talking about with these banks  
19 if they have a personal relationship and they  
20 know that this, you know, person or somebody  
21 who's using their services has engaged in  
22 illegal activity.

23           Is that the government's position?

24           MR. KNEEDLER: Yeah. I -- I -- I  
25 don't think -- I think in Halberstam that was an

1 easy line to draw because she was obviously  
2 intimately integrally related, as the Court  
3 said, in what -- in what he did.

4 I think there are situations -- but I  
5 don't think the Court needs to reach it other  
6 here because I think this case could be decided  
7 on the basis of substantial assistance, applying  
8 the objective factors.

9 JUSTICE JACKSON: But it seems like  
10 substantial is harder. Substantial is where all  
11 the six factors come in. I'm trying to say, if  
12 we have a third that's knowledge and according  
13 to Halberstam, you know, if you don't even have  
14 a knowledge that he -- it was, you know, engaged  
15 in the illegal acquisition or was a gangster or  
16 was a terrorist in a way, that should be enough,  
17 right?

18 MR. KNEEDLER: Oh, yeah, no, no, I'm  
19 sorry, I was taking the question to be about  
20 Halberstam itself. Yes, if you don't have  
21 knowledge that the -- or that would -- that  
22 would even go into prong 2, if you don't have a  
23 general awareness.

24 JUSTICE JACKSON: No, you have -- you  
25 might have a general awareness that Twitter or

1 your services are being used in terrorist  
2 activities.

3 MR. KNEEDLER: Right.

4 JUSTICE JACKSON: What you may not  
5 have, according to this, is knowledge that with  
6 respect to the attacks that the person is now  
7 accusing you of assisting, you were helping  
8 those people who were involved in that act.

9 Is that enough to get you out?

10 MR. KNEEDLER: I -- I -- I think you  
11 could look at it that way, yes, because of the  
12 attenuation. Knowledge -- I -- I think  
13 knowledge would ordinarily --

14 JUSTICE JACKSON: Yeah.

15 MR. KNEEDLER: -- entail some concrete  
16 or some immediate perception that --

17 JUSTICE JACKSON: All right. But one  
18 final question, is just with respect to this  
19 notion that Justice Gorsuch brings up about the  
20 person.

21 I'm wondering whether the concern  
22 about that I hear from both you and Mr. Waxman  
23 is that if you're focusing on the person who  
24 committed such an act of international  
25 terrorism, which is what the statute says, that

1 it seems to make the focus -- take the focus  
2 away from the act itself.

3 So that could conceivably, if you  
4 separated out the clauses, aiding and abetting  
5 the person who committed such an act, it's  
6 almost like Justice Kavanaugh's materiality  
7 statute in the sense that you could, I guess,  
8 aid and abet a person who committed the act even  
9 if it's not with respect to that act, because  
10 that's not what the statute seems to say.

11 And so the reluctance, I think, is in  
12 focusing on the person in that way.

13 MR. KNEEDLER: Yes, I -- the --

14 JUSTICE JACKSON: Yeah.

15 MR. KNEEDLER: -- think that's -- that  
16 is fair to say. And even focusing on the  
17 organization, the organization is acting through  
18 an individual in -- in the commission of the  
19 act.

20 And the -- the -- the criminal aiding  
21 and abetting statute refers -- says that  
22 somebody who commits a criminal act or aids and  
23 abets its commission, referring to a specific  
24 criminal act. And here the definition of -- of  
25 terrorist -- terrorist activity, I think it,

1 says it's activities that involve violent or  
2 dangerous acts --

3 JUSTICE JACKSON: Acts.

4 MR. KNEEDLER: -- that are criminal.

5 JUSTICE JACKSON: If we don't stay --  
6 if we don't stay focused on the acts, then we  
7 get worried about Justice Alito's hypotheticals,  
8 where you might be aiding and abetting a person  
9 who is engaging in certain things but you aren't  
10 really assisting in those things with knowledge?

11 MR. KNEEDLER: Right. It has to be --  
12 the act itself has to be culpable, which is why  
13 the definition of terrorism refers to acts that  
14 are punishable by the criminal law.

15 And so whether you -- whether you  
16 focus on is it the person who committed the act  
17 or the commission of the act, I think in that  
18 sense it all comes to the same thing.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
20 Kneedler.

21 Mr. Schnapper.

22 ORAL ARGUMENT OF ERIC SCHNAPPER

23 ON BEHALF OF THE RESPONDENTS

24 MR. SCHNAPPER: Mr. Chief Justice and  
25 may it please the Court:



1 I'm would like to waive my two minutes  
2 of silence to move the process forward.

3 CHIEF JUSTICE ROBERTS: Granted.

4 (Laughter.)

5 MR. SCHNAPPER: I hope you won't make  
6 me regret that. And I'd like to -- I'd like to  
7 respond to some of the questions that were asked  
8 earlier. I will try to do this in seniority  
9 order.

10 So I'd like to start with the question  
11 that you asked about trying to understand what  
12 the government's position was in the multiple  
13 factors that were there. I -- I think that  
14 question really went to the heart of the  
15 difficulty with the government's position.

16 The -- the Halberstam factors, there  
17 are six of them. It's complicated. The  
18 government's standard is much harder to  
19 understand.

20 And that was brought home by the  
21 question from Justice Kagan about banking  
22 services. It seemed clear as I read the magical  
23 few words on page 34 that banking services  
24 weren't covered, but then it turned out that  
25 they were. It's difficult to understand how we

1 got there.

2 Our view is that -- and the government  
3 says there's a special nexus requirement. Our  
4 view is that once the statutory elements have  
5 been met on the Halberstam factors, the nexus is  
6 foreseeability. These other rules -- other  
7 rules aren't there.

8 It's not as simple as you might have  
9 hoped. We still have the six factors, but it  
10 stops there.

11 Now, Justice Alito made the point  
12 earlier on, and we think this is very important,  
13 that Halberstam has, as you put it, and I wish I  
14 thought to say it as well, essentially statutory  
15 status. The courts are directed to use  
16 Halberstam.

17 And that's been particularly important  
18 with regard to a number of the questions here.  
19 One of them being whether the assistance has to  
20 go to assisting the particular act that -- that  
21 harmed the plaintiff.

22 The Halberstam facts fail that  
23 standard. And -- and you may want to hold  
24 that -- that in general aiding and abetting  
25 requires assisting a particular act, and -- and

1 you may want to overrule Halberstam when it gets  
2 here, but Halberstam is the standard, and it  
3 says aiding and abetting an enterprise.

4 And a number of the times, as my  
5 friends articulated the standard, they were  
6 asking the Court to adopt, they would articulate  
7 a standard that would be -- that would require  
8 you to conclude that Halberstam was wrongly  
9 decided.

10 Justice Kagan, you asked and you  
11 framed this as a hypothetical, and I want to  
12 respond it is not. You asked what would happen  
13 in a case far afield from this, in which a  
14 defendant said they really weren't going to do  
15 much of anything at all, even though they know  
16 that there were assisting terrorists.

17 There's a factual dispute about this,  
18 but the contention in the complaint is that that  
19 was really going on, that this policy was just  
20 window dressing.

21 The complaint specifically alleges  
22 that unless someone came to one of the  
23 defendants and identified a particular post that  
24 was from ISIS, they would not do anything. They  
25 wouldn't look for posts on their own.

1 JUSTICE JACKSON: Mr. Schnapper,  
2 you -- you -- you want to cut to the chase and I  
3 appreciate that, so let me ask you this: With  
4 respect to your claims --

5 MR. SCHNAPPER: Yes.

6 JUSTICE JACKSON: -- that Twitter knew  
7 about these things and it didn't do anything,  
8 how -- how do you survive Section 230?

9 I mean, you were here yesterday and we  
10 sort of had a preview of your thoughts on this  
11 case, but also I thought a concession that  
12 that's sort of the heartland of a 230 issue in  
13 terms of immunity, that the claim that here is  
14 this Internet platform and they have these  
15 terrorist videos and things on their website,  
16 and they don't take them down.

17 MR. SCHNAPPER: Well, I -- I framed my  
18 comment somewhat too generally. Our position is  
19 that they continue to recommend things apace.

20 JUSTICE JACKSON: All right. So we're  
21 on recommendations.

22 MR. SCHNAPPER: Yes. And that they  
23 continued to do that apace, knowing more about  
24 what's happening.

25 JUSTICE JACKSON: So why is the

1 recommendation aiding and abetting? Why does it  
2 fit -- so we're only looking at recommendations,  
3 not Twitter's --

4 MR. SCHNAPPER: Yes. Yes.

5 JUSTICE JACKSON: -- you know, take --  
6 not taking down things because you concede that  
7 that --

8 MR. SCHNAPPER: Right.

9 JUSTICE JACKSON: -- would be a  
10 heartland immunity issue. So the claims are  
11 recommendations related to various terrorist  
12 activities, and with respect to that, can you  
13 just walk us through why you think that  
14 qualifies under Halberstam as aiding and  
15 abetting?

16 MR. SCHNAPPER: Well, the -- the  
17 aiding and abetting -- the recommendation  
18 function is at issue here potentially more  
19 broadly because we have three different  
20 defendants in this case. There's only one  
21 Petitioner. And so their practices would be  
22 varied.

23 But insofar as the recommendations  
24 were affirmatively calling the attention of --  
25 of users to ISIS materials, that would -- that

1 would be extremely valuable to ISIS in  
2 recruiting more fighters, which was, of course,  
3 a --

4 JUSTICE JACKSON: That has nothing to  
5 do with the attack. So you say the -- this  
6 particular attack, they didn't have to have any  
7 knowledge or awareness or assistance with  
8 respect to the particular attack?

9 MR. SCHNAPPER: That is precisely our  
10 position.

11 JUSTICE BARRETT: Mr. Schnapper, does  
12 your complaint contain any specific allegations  
13 about ways in which Twitter was used to  
14 perpetrate this attack? Or is it -- it's all --  
15 as I read it, it's all about recruiting  
16 generally, the ways in which Twitter was used --

17 MR. SCHNAPPER: That -- that's  
18 correct.

19 JUSTICE BARRETT: -- to recruit  
20 generally?

21 MR. SCHNAPPER: It's recruiting and  
22 fundraising.

23 JUSTICE BARRETT: Okay.

24 MR. SCHNAPPER: That -- that's my --

25 JUSTICE BARRETT: So nothing about the

1 Paris attack in particular?

2 MR. SCHNAPPER: No.

3 JUSTICE BARRETT: Okay.

4 MR. SCHNAPPER: No. That -- that's  
5 the -- that's where we part company.

6 JUSTICE KAVANAUGH: Suppose that --  
7 well, go back to 1997, CNN did an interview of  
8 Osama bin Laden, a very famous interview of him.  
9 Could, under your theory -- and that -- that  
10 interview became where he first time declared  
11 war against the United States to a western  
12 audience, and that interview became famous, tool  
13 for recruiting, notoriety. Could, under your  
14 theory, CNN have been sued for aiding and  
15 abetting the September 11th attacks?

16 MR. SCHNAPPER: I -- I -- it would  
17 probably fail several elements, I think, general  
18 --

19 JUSTICE KAVANAUGH: Which -- which  
20 ones?

21 MR. SCHNAPPER: I think general  
22 awareness of his role. It --

23 JUSTICE KAVANAUGH: General or what --  
24 you don't think they were generally aware of his  
25 role when he declared war against the United

1 States and said --

2 MS. SCHNAPPER: No, I --

3 JUSTICE KAVANAUGH: That seems -- and  
4 that was known beforehand. That was the first  
5 time he did it to a western audience.

6 MR. SCHNAPPER: Well, the standard is  
7 whether they would have necessarily understood  
8 the role that the -- that the interview would  
9 play. Look, the First Amendment is going to --

10 JUSTICE KAVANAUGH: Well --

11 MR. SCHNAPPER: -- solve that -- I'm  
12 sorry.

13 JUSTICE KAVANAUGH: The First  
14 Amendment's going to solve that? And does it?

15 MR. SCHNAPPER: I think the First  
16 Amendment would solve that problem.

17 JUSTICE KAVANAUGH: Mm-hmm.

18 MR. SCHNAPPER: And --

19 JUSTICE KAVANAUGH: But the liability  
20 under this statute. But for that, there would  
21 be liability under this statute?

22 MR. SCHNAPPER: It's -- it's difficult  
23 to see how it would get through the six elements  
24 of substantiality in terms of duration, it's one  
25 interview; in terms of nature of the assistance,



1 which is just a television interview.

2 The -- there would -- I -- I think --  
3 I think it usually would not, but -- but I think  
4 the First Amendment would -- would be a --

5 JUSTICE KAVANAUGH: Different --

6 MR. SCHNAPPER: -- explain that.

7 JUSTICE KAVANAUGH: -- different tack.

8 Just more generally, I think you've heard Mr.  
9 Waxman and Mr. Kneedler talk about businesses  
10 that provide services on an arm's length basis  
11 to a variety -- all comers and not on a  
12 favorable basis.

13 So how does that involve aiding and  
14 abetting a particular act when, even though you  
15 know, okay, this person is a bank robber, this  
16 person is a terrorist, they use my communication  
17 services or whatever else it may be, you don't  
18 know they're going to use it for particular  
19 acts? So how do you -- how do you get around  
20 that?

21 And then the implications of that, I  
22 think, that they raise are this would put a  
23 heavy burden on a wide variety of businesses to  
24 try to ferret out more information about their  
25 customers to prevent liability under this kind

1 of statute.

2 MR. SCHNAPPER: That's a lot of  
3 questions I'm going to get to -- I -- I -- I do  
4 --

5 JUSTICE KAVANAUGH: Well, try to start  
6 with the --

7 MR. SCHNAPPER: No, no, I don't mean  
8 to cut you off. I'll do the best I can. If --  
9 if it's not responsive, just tell me.

10 JUSTICE KAVANAUGH: Yeah. The general  
11 business --

12 MR. SCHNAPPER: Yes.

13 JUSTICE KAVANAUGH: -- it's not  
14 connected to a specific act.

15 MR. SCHNAPPER: Right.

16 JUSTICE KAVANAUGH: Why liability?

17 MR. SCHNAPPER: Okay. So, first of  
18 all, it's our position, as I've said, that the  
19 assistance doesn't have to be connected to a  
20 specific act. Nothing that Hamilton did in  
21 Halberstam assisted any particular act. It was  
22 all after the fact.

23 With regard to it being a general --

24 JUSTICE KAVANAUGH: That wasn't the --  
25 I'm sorry to interrupt, but that wasn't a

1 business of the kind that I was hypothesizing.

2 MR. SCHNAPPER: Yes. I understand  
3 that. I'm sorry if that wasn't responsive.

4 The fact that a defendant is a general  
5 business open to all comers could be very  
6 relevant to knowledge if someone just shows up  
7 and -- and wants to rent a pager or buy a pager  
8 or whatever the technology. It's unlikely that  
9 the defendant's going to know that they're  
10 dealing with a terrorist.

11 But there was a hypothetical that, you  
12 know, Osama bin Laden walks in and says, I'd  
13 like to buy a laptop with -- with the capacity  
14 to -- maybe a -- a -- a cell -- a satellite cell  
15 phone. And I think they would -- they would  
16 know that this was going to be used for  
17 terrorist purposes. They wouldn't know the  
18 specific act. Our view is they don't have to  
19 know that.

20 JUSTICE KAVANAUGH: And how's it  
21 different from a material support statute, which  
22 are distinct language?

23 MR. SCHNAPPER: The material support  
24 statute is both broader and narrower than aiding  
25 and abetting. First, the material support

1 statute doesn't require a showing of general  
2 awareness of a role -- of the role that the  
3 support may be playing.

4 Secondly, the aiding and abetting  
5 statute requires you to work your way through  
6 the six factors that we've been talking about,  
7 and that's not required under material support.

8 Conversely, aiding and abetting can  
9 include encouragement, and that would not be  
10 materially -- material support.

11 So they're -- they're just different.  
12 And I think Congress chose to use aiding and  
13 abetting rather than just strict liability for  
14 material support that causes harm because it  
15 wanted to use that more nuanced set of rules for  
16 aiding and abetting.

17 JUSTICE KAGAN: I mean, I -- I would  
18 have thought that there is a simpler answer to  
19 how is the material support statute different,  
20 because the material support statute says, when  
21 Osama bin Laden walks in, you can't give him the  
22 money to buy a hospital either, right? It has  
23 just nothing -- in other words, it says there  
24 are some people that even when you know it  
25 doesn't have anything to do with their terrorist

1 activities, you can't support their  
2 non-terrorist activities.

3 And that's what the whole theory of  
4 the material support statute was. It was to  
5 prevent people from giving money to Hamas to  
6 build houses.

7 MR. SCHNAPPER: I amend my answer to  
8 include that point.

9 (Laughter.)

10 JUSTICE JACKSON: What about this --  
11 what about this point -- what about this point  
12 --

13 MR. SCHNAPPER: Yes.

14 JUSTICE JACKSON: -- because I'm still  
15 a little confused about your disclaiming that  
16 the support that is being given has to run to  
17 the act.

18 So we have Osama bin Laden coming in  
19 to rent a satellite cell phone. You say the  
20 sellers don't need to know that he will use the  
21 phone to commit a terrorist act, but I take it  
22 that you're also saying that he doesn't actually  
23 have to use the phone to commit the terrorist  
24 act. He could still -- they could still be on  
25 the hook for assisting him, even if he doesn't

1 actually use the thing that they have provided  
2 in the act that injures your client, right?

3 MR. SCHNAPPER: No.

4 JUSTICE JACKSON: I'm sorry, that was  
5 very long-winded.

6 MR. SCHNAPPER: No, I think there were  
7 -- there were several questions there. So we --

8 JUSTICE JACKSON: The -- the point is  
9 that in the hypo --

10 MR. SCHNAPPER: Yes, yes.

11 JUSTICE JACKSON: -- does the cell  
12 phone that is sold to --

13 MR. SCHNAPPER: Yes. Yes.

14 JUSTICE JACKSON: -- Osama bin Laden  
15 actually have to be used to commit the terrorist  
16 act?

17 MR. SCHNAPPER: No.

18 JUSTICE JACKSON: Why not?

19 MR. SCHNAPPER: Because providing him  
20 the cell phone aids -- I mean, is a -- is a  
21 piece of the answer. There are other elements.  
22 It counts because it -- it aids the terrorist  
23 enterprise. That's the -- that's the formula  
24 that we're --

25 JUSTICE JACKSON: But what --

1 JUSTICE BARRETT: Because he uses it  
2 to make calls to other associates and to -- to  
3 fundraise and that sort of thing, so he uses the  
4 phone for other things that are unconnected to  
5 the act, and you're saying that's enough?

6 MR. SCHNAPPER: Yes, and -- and --

7 JUSTICE JACKSON: But would you have  
8 to allege that, or could you just say you -- I  
9 mean, does the complaint have to show -- so  
10 let's say the complaint doesn't say he used it  
11 in the particular act. Would you have to have  
12 allegations that the phone was used to call  
13 associates and other things, or is it just  
14 enough that we -- that you know Osama bin Laden  
15 is a terrorist and you allege that this phone  
16 was sold to him?

17 MR. SCHNAPPER: In terms of -- in  
18 terms of what you need to prove, you need it,  
19 but to answer it in terms of pleading -- in  
20 terms of pleading --

21 JUSTICE JACKSON: Mm-hmm.

22 MR. SCHNAPPER: -- Rule 9 requires  
23 pleading with particularity about fraud, not  
24 other things. The general -- the courts have  
25 handed down a number of decisions, in Letterman

1 and Swierkiewicz, disclaiming the notion that  
2 additional rules of particularity of pleading  
3 should be required. There are other procedural  
4 methods for -- for -- for bringing all of that  
5 out.

6 But the general trend in pleadings  
7 since the abolition of the Field Code is not to  
8 require specific allegations of that sort.

9 It might be deficient given the  
10 overall context.

11 JUSTICE BARRETT: But wouldn't you  
12 still have to allege, in Justice Jackson's  
13 hypothetical, that he used the phone in  
14 furtherance of terrorist activities? You  
15 couldn't just say he sold him a cell phone and  
16 have that be enough.

17 MR. SCHNAPPER: You -- you would  
18 probably need to say that, although it would be  
19 fairly implicit in his name, but, yes, true, I  
20 think that would be the -- that would be the  
21 better way to -- to plead it.

22 But, if I could follow up on a  
23 question that you asked, one of the points the  
24 government officials have made in testimony,  
25 some of which we've quoted, is that of the



1 overall cost of running a terrorist  
2 organization. The cost of a particular attack  
3 is a very small part. Running terrorist  
4 organizations is very expensive. It involves  
5 fundraising. There are lots of salaries.  
6 There's travel. There's bribery. There's  
7 forging documents.

8           That's why it's so important that the  
9 Court hold that the entire enterprise being  
10 aided matters. If you -- if you -- if you limit  
11 the aid that matters to the tip of the sphere,  
12 you've -- you've written out of the statute  
13 almost all the assistance that matters, and you  
14 shouldn't do that in our view.

15           CHIEF JUSTICE ROBERTS: Counsel, I  
16 understand you to have abandoned the claim  
17 against Google based on its failure to remove  
18 ISIS material, but you haven't done that in this  
19 case with respect to Twitter?

20           MR. SCHNAPPER: We -- we're not  
21 advancing that view. That's because of the  
22 procedural posture of the case, which is it  
23 wasn't decided on 230 grounds, it was decided on  
24 aiding-and-abetting grounds. The 230 issue was  
25 then remanded. We just never got there. So it

1 just hasn't come up.

2 But -- but we would not be advancing  
3 that argument on remand, to be clear.

4 CHIEF JUSTICE ROBERTS: Okay.

5 JUSTICE SOTOMAYOR: So what argument  
6 -- what argument are you advancing? Meaning  
7 what's the aiding and abetting if it's not the  
8 failure to remove?

9 MR. SCHNAPPER: The aiding and  
10 abetting would be the various recommendation  
11 functions that we talked about yesterday.  
12 They're different for different entities. But  
13 -- but the distinction between affirmatively  
14 recommending as opposed to just posting, we  
15 think that's the distinction that the statute  
16 draws.

17 I -- I think I owe you a few more  
18 answers. Justice Gorsuch, you asked whether  
19 the -- the answer to the case could be found in  
20 treating the word "person" as referring only to  
21 the individuals. And -- and we think the answer  
22 to that is no.

23 The purpose of, you know, invoking the  
24 Dictionary Act was to make it clear that a  
25 terrorist organization could be the person who

1 would be covered by the statute. And I should  
2 note that the statute itself, before we get to  
3 those last words, talks about one of the -- one  
4 of the premise acts that has to have occurred is  
5 authorization, planning, or committing the act  
6 by a terrorist group.

7           This is an act that was committed by  
8 the terrorist group. They didn't have a passing  
9 role. They selected Masher Ivpal. They sent  
10 him to Istanbul. They told him to wait as a  
11 sleeper agent. They apparently supported him  
12 while he was there. Somebody brought him a gun  
13 and stun grenades. And then the -- the evening  
14 of the attack, a few days before the attack, he  
15 was told the attack's going to be on New Year's  
16 Eve, and there was communication back and forth.  
17 They were --

18           JUSTICE GORSUCH: Mr. Schnapper, if I  
19 might --

20           MR. SCHNAPPER: Yes.

21           JUSTICE GORSUCH: -- since you raised  
22 that point, you know, the statute, again, I do  
23 think focuses our attention on who aids and  
24 abets the person who committed such an act of  
25 international terrorism, but it doesn't -- it

1 doesn't just focus us on the person, though  
2 that's helpful and it narrows things. It also  
3 says you must knowingly provide substantial  
4 assistance.

5           So it -- it does two things. It  
6 focuses on the person and it focuses on the mens  
7 rea and then it focuses on the actus reus about  
8 substantial assistance.

9           So I see all three of those things,  
10 not just the person, but all three of those  
11 things in the statute. And, again, I'm just  
12 struggling with how -- how your -- your  
13 complaint lines up with those three requirements  
14 in the statute.

15           MR. SCHNAPPER: Thank you. Let me  
16 begin by responding to a point you made earlier  
17 because this is relevant here, where you  
18 expressed the hope that one could put aside the  
19 complicated formula in Halberstam and just use  
20 the text of the statute.

21           As we turn to the issue of what does  
22 knowing mean and what does substantial  
23 assistance mean, that's where we need to go to  
24 Halberstam. And it's a complicated assessment.

25           And so, in -- in terms of substantial

1 assistance, one would need to walk through each  
2 of the six elements on the Halberstam list and  
3 assess them individually.

4           And I could walk you through that in  
5 -- in this case in terms of what we think the  
6 facts are, but I think you're just asking about  
7 the methodology, and that's what -- what we  
8 believe the correct methodology to be.

9           JUSTICE KAVANAUGH: What -- what do  
10 you say to the argument about the charitable and  
11 humanitarian organizations? So I think one of  
12 the arguments that the -- as pointed out by Mr.  
13 Waxman and Mr. Kneedler and some of the amicus  
14 briefs, is that humanitarian and charitable  
15 organizations are going to be caught up in this.

16           And I think one of the background  
17 points about aiding-and-abetting liability is  
18 it's not -- moral complicity is different from  
19 legal liability. There might be moral  
20 complicity without necessarily legal liability,  
21 and we want to have fair notice for major  
22 sanctions, civil or criminal.

23           MR. SCHNAPPER: Right.

24           JUSTICE KAVANAUGH: And that fair  
25 notice for these humanitarian organizations is

1 not present under your theory and they could be  
2 swept up in that. That's at least the statement  
3 on the other side, which appears sincere to me  
4 from the amicus briefs.

5 So how do you respond to that?

6 MR. SCHNAPPER: First of all, let me  
7 just say I take all the representations of the  
8 amicus briefs to be sincere. The -- the  
9 specific elements of the statute will normally  
10 protect a charitable organization. So let's  
11 start with the requirement of knowledge. And --  
12 and look at the -- the type of knowledge alleged  
13 in this case.

14 If -- if -- let me just take a --  
15 let's assume hypothetical charitable  
16 organization, and, first, there are reports on  
17 four networks that they're providing assistance  
18 to ISIS, and then there are reports in all the  
19 major newspapers in the United States that  
20 that's happening. And then there comes a time,  
21 and the complaint alleges this happened, in  
22 which the attorney general, the director of the  
23 FBI, the director of national intelligence, and  
24 the White House chief of staff meet with the  
25 officials of the -- of the NGO and tell them

1 they're asserting ISIS -- they're assisting  
2 ISIS.

3 That would satisfy knowledge. And  
4 those are obviously extreme facts. And -- and  
5 it would be appropriate in -- in assessing these  
6 cases to consider the kinds of circumstances  
7 that NGOs would face.

8 And I think it's very relevant to --  
9 to -- to -- to the state of mind issue. The --  
10 the -- our view is that the state of mind here  
11 is highly culpable. And I would use the  
12 language, I've forgotten who used it earlier, of  
13 willful blindness, and, again, I say there's a  
14 factual dispute about what's happening.

15 But our contention is that the policy  
16 was not to look at all. And there's a -- in --  
17 in the brief of the Concerned Women for America,  
18 there's an extraordinary quote from Twitter, and  
19 it -- and it was made three months after two  
20 Americans were executed by ISIS. And when asked  
21 why Twitter wasn't taking down ISIS materials,  
22 the comment was: Well, one man's terrorist is  
23 another man's freedom fighter.

24 Now I think, if a -- if a charitable  
25 organization had that knowledge and had that

1 attitude, they should be held liable.

2 JUSTICE JACKSON: Can I just ask you,  
3 Mr. Schnapper, before we run out of time, I  
4 guess I don't know why Halberstam helps your  
5 argument that it's enough to support the  
6 enterprise.

7 I know that they use the word  
8 "enterprise," but when you look at the actual  
9 case, they're talking about the criminal  
10 enterprise. It wasn't as though she was  
11 assisting Welch or whatever the name of the guy  
12 was with, you know, laundry and children, you  
13 know, child support and she was helping him to  
14 raise money for some other thing. That would  
15 have been supporting the enterprise. But she  
16 was actually engaged in conduct that supported  
17 the criminal activity.

18 And yet you seem to be arguing that  
19 looking at that case, it would be enough for,  
20 you know, the cell phone to be sold to Osama bin  
21 Laden with some knowledge that it might be used  
22 generally by his -- himself or his compatriots  
23 as opposed to, you know, this is actually going  
24 to be involved in a terrorist attack, which is  
25 the kind of thing that was going on in



1 Halberstam.

2 So can you clear up?

3 MR. SCHNAPPER: Yes. So the -- the  
4 word Halberstam -- the word "enterprise" in  
5 Halberstam is used to refer to a -- a wrongful  
6 enterprise because it's proceeding as a tort  
7 case and -- but -- but not to refer to other  
8 kinds of assistance the court draws that  
9 distinction.

10 We -- we would make that distinction  
11 here, that is to say, if -- that insofar as  
12 social media -- bearing in mind the  
13 recommendation qualification here -- is  
14 assisting ISIS in its terrorist enterprise,  
15 that's what's covered, the -- and -- and --  
16 and -- and that's the -- that's the claim we're  
17 making here.

18 JUSTICE JACKSON: I don't understand.  
19 I -- I mean, wouldn't -- wouldn't, in the Welch  
20 case, you know, her taking care of his children  
21 be assisting him so that he doesn't have to be  
22 at home at night? He's actually out committing  
23 robberies. She would be assisting his, you  
24 know, illegal activities, but I understood that  
25 what made her liable in this situation is that

1 the assistance that she was providing was, you  
2 know, assistance that was directly aimed at the  
3 criminal activity.

4 It was not sort of this indirect  
5 supporting him so that he can actually engage in  
6 the criminal activity.

7 MR. SCHNAPPER: I'm not entirely sure  
8 where I'm disagreeing with you, but -- but let  
9 me see if this is helpful. I'm not sure it will  
10 be.

11 The -- the assistance she was playing  
12 was not in the commission of any of the  
13 burglaries. Her role was in helping to sell the  
14 loot and keeping the books. The books were  
15 apparently kept in a perfectly straightforward  
16 way. There was nothing unusual about it, except  
17 there were no expenses for --

18 JUSTICE JACKSON: Right. That's the  
19 -- that's the essence of aiding and abetting.

20 MR. SCHNAPPER: Right.

21 JUSTICE JACKSON: So we know she  
22 wasn't a principal. She wasn't actually --

23 MR. SCHNAPPER: Yes.

24 JUSTICE JACKSON: -- committing the  
25 robbers --

1 MR. SCHNAPPER: Right.

2 JUSTICE JACKSON: -- robberies. She  
3 was an aider and abetter. The question is what  
4 does your aid have to go to? And they seem to  
5 be saying your aid has to go to the act that is  
6 the thing that injures the plaintiff, right, the  
7 Reina attack.

8 You seem to be saying that the aid has  
9 to go to, or can go to, the larger set of  
10 activities, illegal --

11 MR. SCHNAPPER: Yes.

12 JUSTICE JACKSON: -- terrorist  
13 activities --

14 MR. SCHNAPPER: Yes.

15 JUSTICE JACKSON: -- but not  
16 necessarily the act. And I -- I don't know that  
17 Halberstam helps you as much as you may think  
18 because she was in that case aiding in the act  
19 of the burglaries that, you know, injured the  
20 people whose money and things were stolen.

21 MR. SCHNAPPER: I wouldn't  
22 characterize what happened that way, but I --  
23 I'm a little concerned that this is going to  
24 seem semantic. She was not -- she didn't do  
25 anything to assist the commission of a burglary.

1 Her role was only after the fact.

2 JUSTICE JACKSON: I think we may  
3 disagree. I mean, that's why she was an aider  
4 and abetter. She wasn't a principal. Right.  
5 She didn't -- she didn't assist the burglaries  
6 in that sense, but she assisted them insofar as  
7 she, as Mr. Waxman said, took the stuff, wrote  
8 up inventories -- I mean, she was assisting the  
9 burglaries, right?

10 MR. SCHNAPPER: Again, at the risk --  
11 I'm not feeling this is responsive. No -- no  
12 act that occurred by -- by Welch was aided by  
13 anything she did. He was not better able to do  
14 any of it.

15 And to go back to the issue of  
16 principal, I mean, the -- if -- if she had said  
17 I'll buy you some new burglary tools, or how  
18 about picking the Halberstam case -- house  
19 tomorrow, I think they've got a lot of money --

20 JUSTICE JACKSON: Or how about when  
21 you bring the loot home, I'll write down the --  
22 the things that you have and make sure that it's  
23 all recorded properly so that we know what you  
24 brought home?

25 MR. SCHNAPPER: It -- it's helpful to

1 the enterprise, but it doesn't -- it doesn't  
2 make him better able to commit the burglary.  
3 And I think that's the distinction we're trying  
4 to advance.

5 If the Court has no further questions?

6 CHIEF JUSTICE ROBERTS: Justice  
7 Thomas?

8 JUSTICE THOMAS: The -- in paragraph  
9 30 of your first amended complaint, you say  
10 "Plaintiffs' claims are based not upon the  
11 content of ISIS's social media postings, but  
12 upon Defendants' provision of the  
13 infrastructure, which provides material support  
14 to ISIS."

15 What does that mean?

16 MR. SCHNAPPER: Well, I don't think  
17 that this -- when this is written it's trying  
18 to parse out the distinction we're now making in  
19 terms of the role, but I think the -- the thrust  
20 of that -- of that was to be that insofar as an  
21 assertion was being made against the social  
22 media companies, is that they were helping to  
23 propagate that content. The argument is we're  
24 not trying to hold you liable merely because  
25 there's content there, but because you helped to

1 propagate it.

2           Now -- now we would draw a more fine  
3 distinction, but I think that's the -- the  
4 thrust of that paragraph.

5           JUSTICE THOMAS: So you're not  
6 pointing to -- the thrust that I understand is  
7 that you're not pointing to specific instances  
8 of this; you're -- just a general idea that  
9 they're using the service to their -- to their  
10 advantage, to ISIS's advantage?

11           MR. SCHNAPPER: Yes. Let me give you  
12 a more fulsome answer to that. One of the  
13 arguments that the Defendant makes is it's not  
14 enough to allege that there were 50- or 70- or  
15 90,000 ISIS accounts. You have to name some.  
16 We do not think that the Federal Rules of Civil  
17 Procedure require that.

18           Indeed, the whole gravamen of the  
19 problem here was that it was possible to  
20 identify tens of thousands of these, and they  
21 weren't doing -- but -- but they weren't used in  
22 that capacity. There was one instance in which  
23 the hacker group Anonymous took down several  
24 thousand ISIS accounts at Twitter.

25           Now, the -- the complaint doesn't name

1 -- doesn't give you the URLs of the account, but  
2 I don't think the federal rules require that.

3 JUSTICE THOMAS: You don't --

4 MR. SCHNAPPER: The allegation isn't  
5 any less plausible because it doesn't name URLs.

6 JUSTICE THOMAS: But on the -- but  
7 does it also mean -- the fact that you are  
8 focused on the infrastructure, rather than  
9 specific conduct or specific accounts, does that  
10 also mean that Twitter could be held liable --  
11 Twitter is the -- is an aider and abetter in  
12 every terrorist act -- terrorist act?

13 MR. SCHNAPPER: That's -- that's a --  
14 that's a somewhat different -- let me -- let me  
15 address that.

16 JUSTICE THOMAS: The reason I'm asking  
17 is if we're not pinpointing cause and effect or  
18 proximate cause for specific things, then -- and  
19 you're focused on infrastructure or just the  
20 availability of -- of -- of these platforms,  
21 then it would seem that every terrorist act that  
22 uses this platform would also mean that Twitter  
23 is a -- an aider and abetter in those instances?

24 MR. SCHNAPPER: I think, as you phrase  
25 it, the answer would probably be yes, and they

1 would agree the way you phrased it. Let me  
2 phrase it a little differently, because I  
3 understand the point you're trying to make.

4 I think their view is if -- as to any  
5 -- if -- if in every single instance in which  
6 you could point to, ISIS using Twitter to commit  
7 the act, would they be liable, I think my friend  
8 would say yes.

9 We're advancing a different argument,  
10 and I think this is the thrust of where your --  
11 your concern is -- is directed, which is that if  
12 our claim is based on providing a generalized  
13 assistance to the terrorist enterprise, where  
14 does that end?

15 And let me say that that's not a  
16 question that arises merely under our standard.  
17 It arises under the government's standard  
18 because the government's formula, on page 34,  
19 includes channeling, directly channeling,  
20 substantial amounts of money to ISIS, and the  
21 exact same problem would arise there.

22 We think that the appropriate way of  
23 addressing that situation is to understand the  
24 remoteness issue in -- standard in Halberstam to  
25 refer not merely to remoteness in -- in space



1 but to remoteness in time. And that would have  
2 been true in -- in the Halberstam case.

3 If -- if there came a point when  
4 Hamilton stopped doing the books, let's say,  
5 Quicken came along and Welch wasn't using her  
6 assistance anymore, there would come a point  
7 when it had been too long since she was playing  
8 much of a role and she would no longer be  
9 liable.

10 So we would -- we would suggest that  
11 the standard include remoteness in time, weighed  
12 together with the volume of activity, and -- and  
13 that -- that would address that problem.

14 And we would suggest, if you use some  
15 variant of the government's standard, you -- you  
16 include that there as well because it presents  
17 the same problem.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: Let's say that a  
20 particular person is known in a particular city  
21 to be a member of a gang that carries out --  
22 carries out crimes. Not charged, hasn't been --  
23 prosecution hasn't been able to amass enough  
24 proof for a criminal charge, but it's pretty  
25 well-known, it's suspected that that's what this

1 person is doing.

2           The chief of police from the town goes  
3 to the cell phone provider and says, look, this  
4 gang uses cell phones in carrying out their  
5 crimes; cut off their service. It goes to the  
6 Internet service provider and says that  
7 sometimes they use e-mails; cut off the e-mail.  
8 It goes to the car dealers and -- and repair  
9 shops and says they use cars; don't fix their  
10 cars. Goes to all the gas stations and says  
11 don't sell them gas. And on Wednesday evening,  
12 the gang gets together and they always order in  
13 meals from a particular place. They go there;  
14 they say don't feed them food.

15           Are they -- are they -- have they  
16 aided and abetted the crimes that this gang  
17 commits?

18           MR. SCHNAPPER: I -- I think it's  
19 probably -- the answer is probably going to  
20 depend on the nature of -- of materials. So,  
21 unfortunately, this is difficult, but let's say  
22 that the first person on the list is a gun  
23 dealer, and the gun dealer is told this person  
24 is -- is -- we -- we think this person is an  
25 assassin and he is looking for weapons.

1           And they -- and -- and they sell him a  
2 gun. They -- that -- that might be aiding and  
3 abetting. At the far end of things, take out  
4 Chinese food, no, it's not really connected  
5 particularly to the -- to the offense.

6           And I think it's a difficult question.  
7 But -- but clearly at one end of the spectrum if  
8 you sell guns -- and this goes back to Justice  
9 Thomas's question. If you provide a gun to  
10 someone who you know is a murderer, I think you  
11 could be held liable for aiding and abetting.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14           Justice Kagan?

15           Justice Gorsuch?

16           JUSTICE GORSUCH: No, thank you.

17           CHIEF JUSTICE ROBERTS: Justice  
18 Kavanaugh?

19           JUSTICE KAVANAUGH: No.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22           Justice Jackson?

23           Thank you, counsel.

24           MR. SCHNAPPER: Thank you very much.

25           CHIEF JUSTICE ROBERTS: Three minutes

1 for rebuttal, Mr. Waxman.

2 REBUTTAL ARGUMENT OF SETH P. WAXMAN

3 ON BEHALF OF THE PETITIONER

4 MR. WAXMAN: Thank you.

5 So guns and banks is what seems to be,  
6 you know, most of the hypotheticals here. And  
7 I -- I want to go to -- to Justice Kagan's  
8 question about the bank and know your customer  
9 and what your customer is doing, but I'm going  
10 to start, because there are special know your  
11 customer rules involving banks.

12 I want to start with guns and the --  
13 the -- the point that my friend just brought up  
14 about somebody walks into a gun store and says:  
15 I hate my wife, please sell me a Glock. I'm  
16 going to kill my wife, please sell me a Glock.

17 Obviously, he takes the Glock. If he  
18 buys the Glock and never kills his wife, there's  
19 no aiding and abetting any crime. If he buys  
20 the gun and kills his wife, there obviously is.

21 Walmart is the largest gun dealer, I  
22 believe, in the United States. They know for a  
23 certainty that some of the people that buy guns  
24 are criminals. Some of them are drug gangs.  
25 Some of them are terrorists. Nobody would say

1 -- but they don't know anybody in particular.

2           They know that they're there. There's  
3 been a newspaper report. The State Department  
4 has issued a pronouncement. Nobody would say  
5 that they are aiding and abetting particular  
6 crimes that happen to be committed by somebody  
7 who bought a gun at Walmart.

8           Now, in the bank example, I think the  
9 key point as I understood it, at -- at least,  
10 Justice Kagan, between your colloquy with my  
11 friend, Mr. Kneedler, was somebody comes into  
12 the bank and says -- and either comes in or  
13 comes in online or by Zoom and the banker knows  
14 this guy is a terrorist; that is, a terrorist in  
15 the sense that this person commits acts of  
16 international terrorism.

17           And the guy says: Love the checking  
18 account services you've provided me, I've got a  
19 cash flow issue with the thing that I do, please  
20 lend me a million dollars. Okay. That's a case  
21 in which certainly you would survive a motion to  
22 dismiss on the notion that you know this guy  
23 commits acts of international terrorism.

24           He has asked you for what he says he  
25 needs to "keep doing his thing." That is

1 materially different than a situation in which  
2 the bank has 100,000 customers, knows to a  
3 certainty that some of its customers are  
4 terrorists and they are making use of the  
5 general services that a bank provides. Maybe  
6 it's a bank that does business in the Middle  
7 East. They are not aiding and abetting an act  
8 of terrorism that that bank occurs.

9           Now, according to my friend today, he  
10 says, well, this case isn't about the failure to  
11 do better at taking things down. This is about  
12 recommendations.

13           There are 545 paragraphs in this  
14 complaint. And there are four that mention  
15 recommendations, each one of which is  
16 essentially the sort of neutral algorithm that  
17 was talked about before.

18           I see I've come to the end of my  
19 sentence.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel. The case is submitted.

22           (Whereupon, at 12:45 p.m., the case  
23 was submitted.)

24  
25

## Official - Subject to Final Review

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