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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 plaintiff's 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 2339(b). If it had wanted to create
23 such liability for supporting international
24 terrorism 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 we -- it's -- thank
14 you, 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 this
4 statute, you also had to -- you also have to
5 have a general awareness that you are assisting
6 in 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 -- 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 a --

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

1 of questions piled up there.

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

4 JUSTICE KAGAN: Yeah. 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 SOTOMAYOR: Just --

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

8 JUSTICE SOTOMAYOR: -- 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
17 of the criminal enterprise and aiding and
18 abetting 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 abettor
10 was, to quote the -- the D.C. Circuit, "a
11 willing participant" and, therefore, aided and
12 abetted 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
4 a statutory status as a result of the preamble
5 to 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. I
6 won't --

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

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

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

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

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

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

17 MR. WAXMAN: Right.

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

25 MR. WAXMAN: Correct.

1 JUSTICE ALITO: -- to support aiding
2 and abetting. So that's a difficult -- that's a
3 line-drawing problem.

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

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

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

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

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

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

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

24 JUSTICE ALITO: Right.

25 MR. WAXMAN: And the -- the statute

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

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

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

1 MR. WAXMAN: Okay. Thank you.

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

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

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

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

1 And -- and our state of mind was the
2 opposite. This is negative intent. We are
3 opposed to this. I think --

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

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

11 JUSTICE ALITO: Let me allow my --

12 MR. WAXMAN: Okay.

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

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

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

22 I'm a little afraid of going on the
23 knowing standard because willful blindness is
24 something we have said can constitute knowledge.
25 And their allegation is that there were similar

1 names to the ones you took off the platform and
2 that you did no work to find those similarly
3 named entities and determine whether they were
4 ISIS or not.

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

8 MR. WAXMAN: I think you are.

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

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

1 coming to you and you can't find them ahead of
2 time, that that doesn't constitute substantial
3 aid.

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

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

22 MR. WAXMAN: As a --

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

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

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

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

1 platforms will be liable in treble damages and
2 so will the telephone companies that provided
3 telephone service, the bus company or the taxi
4 company that allowed the terrorists to move
5 about freely.

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

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

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

1 encourage someone to do" --

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

4 MR. WAXMAN: I'm sorry.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

19 MR. WAXMAN: Right.

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

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

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

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

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

1 And in a case combining silence or
2 inaction with affirmative assistance, the degree
3 of knowledge --

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

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

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

23 MR. WAXMAN: Again, you know, the --
24 the outcome in this case doesn't turn on it, but
25 I think, as a matter of principle, the -- the

1 hornbook principle is that you are not "helping
2 or encouraging" someone to do something wrong or
3 illegal --

4 JUSTICE KAGAN: You're helping by --

5 MR. WAXMAN: -- by failing --

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

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

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

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

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

24 MR. WAXMAN: Correct.

25 JUSTICE KAGAN: -- and I'm not liable

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

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

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

18 MR. WAXMAN: No.

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

21 MR. WAXMAN: But you have -- the
22 plaintiff has to demonstrate that they provided
23 substantial assistance in some proximate way
24 that their provision of a general service, open
25 to everybody, consistent with a policy which

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

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

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

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

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

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

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

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

1 And, here, the complaint alleges three
2 people involved in the attack and doesn't link
3 up your conduct, your client's conduct,
4 necessarily in any very clear way to those three
5 persons. What am I missing?

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

11 JUSTICE GORSUCH: Are you sure you
12 want to do that?

13 (Laughter.)

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

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

23 JUSTICE GORSUCH: Oh, I -- I didn't --
24 I -- I -- I was fearful. Maybe we ought to just
25 stop, Mr. Waxman, and maybe -- maybe I ought to

1 let my colleagues proceed.

2 MR. WAXMAN: Okay. Did I answer your
3 question?

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

6 MR. WAXMAN: I --

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

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

16 It is not coherent. It is not --

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

24 MR. WAXMAN: I think the -- I support
25 reading the statute for what it says. The

1 statute says abetting, and --

2 JUSTICE GORSUCH: No, it says who aid
3 -- who aids and abets -- and then I'm going to
4 put in some ellipses because it then goes on to
5 conspiracy -- the person who committed such act
6 of international terrorism.

7 Any objection to that?

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

15 JUSTICE GORSUCH: Of course. I take
16 that as given.

17 MR. WAXMAN: Okay.

18 JUSTICE GORSUCH: Thank you.

19 MR. WAXMAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Just want to make
23 sure I understand your position.

24 So I think you're trying to translate
25 the elusive words of the statute into some kind

1 of general rule, and I just want to make sure I
2 have the general rule or general principle that
3 you're trying to articulate down, which I think
4 is that a -- when there's a legitimate business
5 that provides services on a widely available
6 basis in an arm's length manner, it's not going
7 to be liable under this statute even if it knows
8 bad people use its services for bad things.

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

16 JUSTICE KAVANAUGH: Mm-hmm.

17 MR. WAXMAN: That's our rule.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: Okay. So I'm having
22 a little bit of difficulty isolating exactly
23 your argument, so let me -- let me put it to you
24 this way.

25 So it seems to me that the flaws in

1 the Ninth Circuit opinion that you see are one,
2 in the unit of analysis --

3 MR. WAXMAN: Correct.

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

11 Second is the substantial assistance,
12 and third is the knowledge requirement.

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

22 MR. WAXMAN: Mm-hmm.

23 JUSTICE BARRETT: -- specific
24 accounts, I guess, why -- if you know ISIS is
25 using it, you know ISIS is going to be doing bad

1 things. You know ISIS is going to be committing
2 acts of terrorism.

3 So what work does ISIS -- training
4 your focus on the specific act do in that case?
5 Because aiding ISIS is aiding the commission of
6 particular acts in the future. How specific
7 must the knowledge be?

8 There must be a range between aiding
9 the enterprise and knowing the time, date, and
10 location of the particular act, right?

11 MR. WAXMAN: So I -- I am -- I'm not
12 resisting as a categorical matter the use of the
13 word and Halberstam's use of the word
14 "enterprise."

15 My position is that where the court
16 below erred was in substituting as the object of
17 -- whereas the statute clearly said the object
18 is either the act of international terrorism
19 that you're abetting or the person who committed
20 that act and commit -- you abetted that person
21 in committing the act, Halberstam points out
22 that, look, if you have a situation in which,
23 you know, you -- you have a partner, you have a
24 symbiotic relationship with a partner in which
25 every week there's a property crime and he

1 brings home the jewels and you smelt it down
2 and -- you know, and sell it, that you can be
3 deemed to have knowingly provided substantial
4 assistance to the act where, ultimately, he gets
5 caught, the Halberstam burglary. The fact that
6 you were part of this series of discrete acts
7 establishes Step 3 of Halberstam.

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

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

23 JUSTICE BARRETT: Okay.

24 MR. WAXMAN: Now --

25 JUSTICE BARRETT: So it's a level of

1 generality. I -- I -- I -- you were kind of
2 going back and forth with Justice Kagan about
3 this same issue. It's a level of generality.

4 You might know -- I -- I guess I'm
5 trying to figure out if the Ninth Circuit's
6 error matters because you might know that you're
7 aiding ISIS and, as I said, aiding ISIS is going
8 to result in aiding some terrorist attacks.

9 But you're saying that the plaintiff
10 would have to allege facts sufficient to show
11 that Twitter was being used to plan this attack,
12 put --

13 MR. WAXMAN: And that --

14 JUSTICE BARRETT: -- putting aside
15 right now the knowledge and substantial
16 assistance part, but that's the level of
17 inquiry?

18 MR. WAXMAN: -- you have to be -- the
19 plaintiff has to plausibly allege that
20 substantial assistance was provided to the act
21 of international terrorism that injured the
22 plaintiff in the case.

23 JUSTICE BARRETT: So that these
24 particular terrorists were communicating via
25 Twitter for the Reina attack, putting aside what

1 Twitter knew about it, would need to be looking
2 at tweets or accounts going back and forth to
3 share the details or recruit people to help
4 participate in this bombing?

5 MR. WAXMAN: No. I -- I mean, the --
6 Twitter would have to know there are accounts.
7 We know of these --

8 JUSTICE BARRETT: I'm not talking
9 about Twitter's knowledge.

10 MR. WAXMAN: Okay.

11 JUSTICE BARRETT: I'm just talking
12 about the unit of analysis.

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

19 JUSTICE BARRETT: Bombing. So not the
20 general recruiting.

21 MR. WAXMAN: Not general recruiting.

22 JUSTICE BARRETT: Okay. All right.
23 I -- I think I understand you.

24 On -- on substantial assistance, you
25 kind of conceded to Justice Kagan in her

1 hypothetical that it would be substantial
2 assistance if Twitter knew that these accounts
3 were being used and didn't do anything to take
4 them down.

5 MR. WAXMAN: The -- yes, the
6 particular accounts.

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

14 MR. WAXMAN: I mean, it -- again, it
15 would depend on what was going -- what it turned
16 out was going on in those accounts that Twitter
17 actually knew about.

18 And if Twitter knows about -- and this
19 goes to -- to -- to Justice Sotomayor's question
20 about willful blindness, willful -- if -- if --
21 if in my hypothetical the Turkish police, the
22 Istanbul police come and say there are 10
23 accounts, 10 Twitter accounts that appear to be
24 involved in planning some sort of terrorist
25 attack here, and Twitter basically says, not our

1 problem, that is the level of knowledge.

2 And -- and, if, in fact --

3 JUSTICE BARRETT: But that's
4 knowledge. I was asking you about substantial
5 assistance.

6 MR. WAXMAN: I see. If -- if what was
7 in those posts, in fact, were the planning and
8 preparation and commission of the attack that
9 happened to occur at the Reina nightclub, that
10 would be substantial assistance.

11 JUSTICE BARRETT: Okay. So, to
12 clarify, you're not saying that merely using the
13 platform is enough, but it would depend on how
14 significant the communications on the platform
15 were to the attack?

16 MR. WAXMAN: Correct.

17 JUSTICE BARRETT: Okay. And last
18 question. What daylight, if any, do you see
19 between your position and the government's
20 position?

21 MR. WAXMAN: Very little. I think
22 what the government says -- I mean, with respect
23 to the relevant object, we agree. It's the act
24 of international terrorism, not ISIS generally.

25 With respect to knowledge, I think

1 they also agree, the particularity in a context
2 in which there's this remote general arm's
3 length provision of services.

4 If we disagree, it's on the -- how one
5 calculates, I guess, or characterizes
6 substantiality. The government says that there
7 has to be a substantial causal link between the
8 assistance provided and the act that occurred.
9 And we -- I -- I don't -- in principle, I don't
10 disagree with that.

11 JUSTICE BARRETT: So no daylight
12 really?

13 MR. WAXMAN: I -- I -- can I --

14 JUSTICE BARRETT: Okay.

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

17 JUSTICE BARRETT: Okay. You started
18 out saying very little and then you said in
19 principle.

20 MR. WAXMAN: I --

21 JUSTICE BARRETT: But that's -- that's
22 okay, I'll let Justice Jackson have a shot.

23 MR. WAXMAN: It -- it's -- I -- I --

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

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

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: Yes, good morning,
5 Mr. Waxman.

6 MR. WAXMAN: Good morning.

7 JUSTICE JACKSON: I -- I had thought
8 that knowledge and substantial assistance were
9 two different elements or two different
10 criteria. Am I right that that's the case or
11 no?

12 MR. WAXMAN: I think you are --

13 JUSTICE JACKSON: You're looking --

14 MR. WAXMAN: -- you -- you --

15 JUSTICE JACKSON: Go ahead.

16 MR. WAXMAN: Yes, you are right. What
17 the -- the operative text says that aiding and
18 abetting by knowingly providing substantial
19 assistance.

20 JUSTICE JACKSON: All right. So two
21 different things.

22 MR. WAXMAN: So there are two
23 elements.

24 JUSTICE JACKSON: They are two
25 elements. But then the -- the -- your statement

1 of the rule that you explored with Justice
2 Kavanaugh seemed to have them both working in a
3 way that I was confused about, so --

4 MR. WAXMAN: Then let me -- yeah. I
5 can see --

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

7 MR. WAXMAN: -- I can see how it's --
8 it's confusing. So you have -- your -- what's
9 alleged to be -- your culpable conduct has to
10 have, in fact, substantially assisted the act of
11 international terrorism that injured the
12 plaintiffs.

13 JUSTICE JACKSON: Independent of your
14 knowledge, it has to have --

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

16 JUSTICE JACKSON: -- factually
17 substantially --

18 MR. WAXMAN: -- it has to have done
19 that.

20 JUSTICE JACKSON: Okay.

21 MR. WAXMAN: But the statute goes
22 further and says that you have to knowingly
23 provide that assistance, which we think must
24 mean that you must know, A, that you're
25 providing assistance and know that the

1 assistance you're providing is substantial.

2 That's --

3 JUSTICE JACKSON: But let me ask you,
4 does it have to run to the particular act?
5 Because, at the very beginning, in your
6 conversations with, I think, Justice Sotomayor,
7 we were trying to get to this point of
8 understanding your view that the particular
9 tortious act is what we're focusing on, not just
10 general assistance to the -- the terrorist
11 organization. I get that.

12 But, if we're looking at the
13 particular act, then you said at one point that
14 you can have general awareness that you're
15 assisting the particular act. And I don't
16 really understand what that means.

17 MR. WAXMAN: I misspoke if I said
18 that.

19 JUSTICE JACKSON: Okay.

20 MR. WAXMAN: So I -- I think I was
21 trying to explain that under Step 2 of
22 Halberstam -- the Halberstam framework, you have
23 to "be generally aware of your role as part of
24 the overall illegal tortious activity at the
25 time you provide the assistance." But this --

1 JUSTICE JACKSON: And you conceded
2 that in this case?

3 MR. WAXMAN: I conceded --

4 JUSTICE JACKSON: Okay.

5 MR. WAXMAN: -- for purposes of this
6 case --

7 JUSTICE JACKSON: Okay.

8 MR. WAXMAN: -- that that's establish
9 -- that's fairly pled in the complaint.

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

12 MR. WAXMAN: Right. You have to know
13 that you are providing substantial assistance to
14 an act of international terrorism and the
15 substant- -- and an act of international
16 terrorism that happened to be a terrorist attack
17 that injured the plaintiff.

18 JUSTICE JACKSON: But it doesn't have
19 to be the Reina attack; you just have to know
20 that you're assisting ISIS, that ISIS
21 participates in --

22 MR. WAXMAN: It's not just the --
23 there's a wide gulf between knowing that the --
24 that the location of the attack will be the
25 Reina nightclub and knowing that you're somehow

1 generally assisting ISIS in some way.

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

4 MR. WAXMAN: Right.

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

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

11 JUSTICE JACKSON: In 3, in Step 3,
12 when you say -- we -- we -- we --

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

14 JUSTICE JACKSON: -- we've disposed of
15 2, which is the general knowledge of your role.
16 You know you have a platform and people are
17 using it and some of those people are bad
18 people.

19 MR. WAXMAN: Got it.

20 JUSTICE JACKSON: Three, you say home
21 in on the act, it has to be act of -- of
22 terrorism. And I guess I'm just trying -- that
23 -- that you substantially assist in that.

24 MR. WAXMAN: Correct, right.

25 JUSTICE JACKSON: But then what's

1 "knowing" doing there?

2 MR. WAXMAN: You have to know that
3 your action would substantially assist an act of
4 international terrorism. That's the independent
5 work that "knowing" -- that the know -- that you
6 knowingly provide substantial assistance does.

7 JUSTICE JACKSON: So they don't have
8 to allege or they do have to allege that you
9 knew something about the fact that this group
10 was going to do an act of international
11 terrorism that turned into the Reina attack?

12 MR. WAXMAN: You have -- that is
13 exactly what you have -- you have to -- they
14 have to plausibly allege and ultimately prove
15 not only that our actions substantially assisted
16 the Reina attack but that we knew that we were
17 providing substantial assistance to some act of
18 international terrorism, period.

19 JUSTICE JACKSON: But not enough to
20 know that -- that you're providing substantial
21 assistance to a group that does this kind of
22 thing?

23 MR. WAXMAN: Of course not.

24 JUSTICE JACKSON: I don't know that I
25 see that clearly, the distinction, but let me

1 ask you just a quick question about Halberstam.

2 So I guess I'm a little concerned
3 about framing this as the defendant is offering
4 generally available services. What if in
5 Halberstam itself, instead of Linda Hamilton
6 providing bookkeeping services, we had an
7 accounting firm, and their usual course of
8 business was to provide the bookkeeping
9 services, they did exactly what she did with
10 exactly the same level of knowledge in the sense
11 that they knew that these were pretty -- you
12 know, the -- the -- they knew this guy didn't
13 have a job and suddenly he was showing up with,
14 you know --

15 MR. WAXMAN: Jewels, right.

16 JUSTICE JACKSON: -- thousands of
17 dollars in jewels and whatnot and asking them
18 for bookkeeping services. Are they -- are they
19 on the hook or not?

20 MR. WAXMAN: I think they probably
21 would be on the hook. I mean, it's different
22 than Hamilton, where she had no other job. She
23 didn't do anything other than have this
24 symbiotic criminal relationship.

25 But, if you had an accounting firm

1 that somebody comes and basically says, you
2 know, I'd like you to help me with the
3 following, I'd like you to help me, you know,
4 smelt down jewelry and then sell it --

5 JUSTICE JACKSON: No, no, they're
6 doing their usual bookkeeping services. They
7 have a lot of clients. They have very, you
8 know, well-to-do regular clients who do have
9 jobs and are bringing them money, and then they
10 have this guy who starts coming and saying,
11 please, I'd like to do bookkeeping, and they're
12 a little suspicious, but they don't do anything
13 other than the regular bookkeeping services that
14 they ordinarily would provide to their other
15 clients.

16 MR. WAXMAN: I mean, if the
17 circumstances of the services that's being
18 requested and that they provided would not
19 permit a fair inference that they were
20 "generally aware" of the role they were playing
21 as part of overall illegal or tortious activity,
22 they wouldn't be libel for aiding and abetting.

23 I -- I do want to just --

24 CHIEF JUSTICE ROBERTS: Thank you.
25 You can finish your sentence.

1 (Laughter.)

2 MR. WAXMAN: Sadly, I'm afraid I did
3 finish my sentence.

4 (Laughter.)

5 JUSTICE JACKSON: Thank you.

6 MR. WAXMAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

8 ORAL ARGUMENT OF EDWIN S. KNEEDLER
9 FOR THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING REVERSAL

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

13 The United States condemns in the
14 strongest terms the terrorist act that caused
15 Mr. Alassaf's death and sympathizes with the
16 profound loss that the plaintiffs in this case
17 have experienced.

18 We submit, however, that the
19 allegations in this complaint do not state a
20 claim that the defendants aided and abetted,
21 that is, that they assumed a culpable role in
22 the commission of that murder.

23 JASTA requires more than allegations
24 that a terrorist organization availed itself of
25 interactive computer services that were remote

1 from the act of terrorism, were widely and
2 routinely available to hundreds of millions, if
3 not billions, of persons through the automatic
4 features of those services, and did not single
5 out ISIS for favorable treatment.

6 JASTA permits recovery against persons
7 who become complicit by rendering substantial
8 assistance that encourages the commission of
9 terrorist acts, but by JASTA's express terms and
10 its incorporation of Halberstam's common law
11 standards, Congress ensured that JASTA does not
12 reach so broadly as to inhibit legitimate and
13 important activities by businesses, charities,
14 and others, both in the United States and in
15 other parts of the world that may be unstable or
16 underdeveloped.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Kneedler, I -- I
19 think I'd just like to get a finer point on your
20 position. When we talk about Twitter or YouTube
21 or Facebook, it's because of the algorithms and
22 how broadly these -- these businesses are. It's
23 complicated.

24 But I'd like to simplify it just a bit
25 and see where you come out. You recall PageNet,

1 don't you, when pagers were ubiquitous?

2 MR. KNEEDLER: Yes.

3 JUSTICE THOMAS: And --

4 MR. KNEEDLER: I don't recall PageNet,
5 but --

6 JUSTICE THOMAS: Okay. Well, let's
7 just --

8 MR. KNEEDLER: -- I -- I'm not an
9 expert in --

10 JUSTICE THOMAS: Well, yeah. Well,
11 just pagers were ubiquitous at one point, right?

12 MR. KNEEDLER: Right.

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

21 Would that constitute aiding and
22 abetting if they did nothing and permitted them
23 to use it and engage in terrorist activity?

24 MR. KNEEDLER: By application of the
25 Halberstam standards --

1 JUSTICE THOMAS: Yes, yes.

2 MR. KNEEDLER: -- that may be -- that
3 may be unclear, but I think it would probably
4 not be substantial assistance or knowing
5 substantial assistance.

6 JUSTICE THOMAS: Okay. So if you
7 would just pause that for me.

8 MR. KNEEDLER: Right.

9 JUSTICE THOMAS: You know -- you know
10 they're using it, and you know it's probably
11 central to what they're doing. So what's --
12 where does it fail the Halberstam test?

13 MR. KNEEDLER: I think there's one
14 distinction between this and -- between your
15 hypo and this case, which is the distance
16 between the aid and -- and the -- and the
17 commission of the act. In your example, it's
18 much more proximate, I think, if I understand
19 the hypothetical.

20 The -- using the pager will be
21 alerting somebody to the immediate commission of
22 the crime. That's not what we have here. Here,
23 we have something that's much more remote, the
24 use of an automatic service that the claim is
25 that that enhances ISIS, which, in turn, maybe

1 in combination with a number of other factors,
2 might ultimately --

3 JUSTICE THOMAS: Well, that's why I
4 went to pagers, because I wanted it to be
5 closer.

6 MR. KNEEDLER: Right.

7 JUSTICE THOMAS: And I wanted to put a
8 finer point on it, because, you know, of course,
9 a billion people or hundreds of millions of
10 people are using these services and so you get
11 lost in that. I understand you say that's
12 too -- too amorphous or it's too attenuated.

13 But, if you tighten it somewhat and
14 use pagers, it would seem that you would be able
15 to answer that with, you know, more clarity.

16 MR. KNEEDLER: Yes, but I -- I think,
17 frankly, it's somewhat in between. And -- and
18 the -- the hypothetical that you're describing,
19 I think, if you -- if you look at the Halberstam
20 factors --

21 JUSTICE THOMAS: Mm-hmm.

22 MR. KNEEDLER: -- which is an
23 important part of the Halberstam test in
24 deciding what's substantial assistance -- and,
25 by the way, that's not just a factual question.

1 In Halberstam itself, the Court first
2 affirmed the district court's factual findings
3 and then applied its legal test, and by
4 application of the legal test, which was those
5 six factors, the Court was able to find
6 liability.

7 In a number of the other cases,
8 they've been dismissed because the allegations
9 don't make out a legal standard. It's not so
10 much a question of fact. But, in your -- in
11 your hypothetical, the three most important
12 factors we think in this case, I think, bear on
13 your -- on your question.

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

22 Here, we think it's not proximate
23 either in the legal proximate cause sense or in
24 the factual, the way the Internet works sense.
25 In your example, it's more proximate both, I

1 think, in a factual and maybe in a legal sense,
2 that the use of the -- of the pager would have,
3 depending on -- you know, there may be other
4 facts, and -- and the level of knowledge would
5 be -- would be an important element of that.

6 And another very important factor, I
7 think, in Halberstam that would be relevant in
8 the -- in the case that you're describing but I
9 think is very relevant here is what is the state
10 of mind of the person -- of the defendant in the
11 case. And, here, the court of appeals said it's
12 undisputed that Twitter and the other defendants
13 here did not have an intent to further ISIS
14 activities or the particular terrorist act here.

15 JUSTICE KAGAN: So can I --

16 CHIEF JUSTICE ROBERTS: How --

17 JUSTICE KAGAN: I'm sorry.

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

1 say.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: You say, "In
4 some circumstances -- such as the direct
5 channeling of substantial funds or other
6 fungible resources to a foreign terrorist
7 organization or its close affiliates with a
8 knowing acquiescence in their potential use -- a
9 secondary defendant's contributions may have a
10 sufficient nexus to a terrorist act, even if the
11 defendant has no advance knowledge of, and does
12 not provide support specifically directed to,
13 the particular act."

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

24 You know, each -- each one of these
25 situations that will come along will have

1 different of these facts prominent and different
2 ones not there, and, I mean, is there any way to
3 articulate how to approach these cases without
4 having a 6- or 12-, I guess, or maybe 36-factor
5 test?

6 MR. KNEEDLER: Well, several things.

7 First of all, what -- what you quoted
8 from page 36 was not intended --

9 CHIEF JUSTICE ROBERTS: Thirty-four.

10 MR. KNEEDLER: Thirty-four, sorry, was
11 not intended to be a legal test. It was an
12 example of what might make out a case of knowing
13 substantial assistance under the Halberstam
14 test.

15 But I think, because of the
16 incorporation, express incorporation of
17 Halberstam into the act, it is necessary to look
18 to Halberstam. And Halberstam did not come out
19 of nowhere. It was based on the Restatement of
20 -- of Torts.

21 And what -- what -- in other
22 circumstances, this Court has held that Congress
23 should not be understood to displace the common
24 law. Here, it incorporated the common law, as
25 set forth in the Restatement of Torts, which

1 Halberstam relied upon, and then this -- and
2 then Congress incorporated it.

3 And the six factors are really guides
4 or guideposts to getting at whether what the
5 defendant's conduct was, is it culpable enough?
6 And -- and you can't come up with a -- with a
7 test that will answer every case, and that's why
8 Halberstam looked to factors, but that's not --

9 CHIEF JUSTICE ROBERTS: Well, but each
10 factor, I mean, one, substantial assistance,
11 okay. Well, that -- I mean, if you only give a
12 hundred bucks to assist the terrorist act that's
13 going to result in the murder of different
14 people, you say, well, that's not real
15 substantial --

16 MR. KNEEDLER: Well --

17 CHIEF JUSTICE ROBERTS: -- but, if you
18 give 10,000, it is? That seems like a very odd
19 factor.

20 MR. KNEEDLER: Well, I -- I think it's
21 not so odd if you think about the different ways
22 in which it might arise. If somebody is about
23 to commit a terrorist act and -- and you know
24 it, and -- and -- and the terrorist said, you
25 know, could you give me \$10 to buy a knife, and

1 you give him the \$10, and he commits the
2 terrorist act with that knife, I think that that
3 would count as substantial assistance both --
4 because it was -- it was an essential element in
5 allowing the -- the act to occur.

6 CHIEF JUSTICE ROBERTS: Okay. Thank
7 -- thank you.

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

10 CHIEF JUSTICE ROBERTS: No, with
11 respect to the act.

12 MR. KNEEDLER: Oh, with -- anything
13 that is -- that is specifically with respect to
14 the act, I -- I think your example, the \$100, in
15 any way that says I'm writing this check to
16 commit this particular terrorist act, that would
17 count. So it's not -- it's not just the amount
18 that is a factor, but the amount matters in
19 terms of the overall context or what the
20 defendant --

21 CHIEF JUSTICE ROBERTS: Okay. I think
22 I have your point.

23 JUSTICE KAGAN: Mr. -- Mr. -- Mr.
24 Kneedler, let's say a known terrorist walks into
25 a bank and avails himself -- opens up an

1 account, avails himself of various banking
2 services. The bank knows who this person is.
3 The bank knows that terrorists need banking
4 services to conduct their terrorist activities.
5 The bank provides him with those banking
6 services.

7 They provide a hundred other clients
8 who are not terrorists with the same banking
9 services, but they provide this known terrorist
10 with these banking services that are very
11 important to its terrorist activities.

12 Can you go after that person under
13 this statute?

14 MR. KNEEDLER: I -- I -- I think you
15 probably could, but when you say known
16 terrorist, I -- I -- I'm not -- if it's just
17 somebody who is affiliated with ISIS, you might
18 have the connect -- the proximate connection,
19 but --

20 JUSTICE KAGAN: Yeah. No, this is
21 like Osama bin Laden.

22 MR. KNEEDLER: Yeah. Yes. Some --
23 somebody who is a leader or somebody who you
24 know has committed or is about to commit a
25 terrorist act --

1 JUSTICE KAGAN: Okay.

2 MR. KNEEDLER: -- yes, I think you
3 can. And the -- the --

4 JUSTICE KAGAN: Because I would be
5 shocked if the government gave that one away,
6 right?

7 MR. KNEEDLER: Right. No. And -- and
8 I think that's the -- really, all this Court
9 needs to decide in this case is --

10 JUSTICE KAGAN: Well, but I guess what
11 I'm trying to -- to focus on is, like, what's
12 the difference? You know, I mean, we're --
13 we're used to thinking about banks as providing
14 very important services to terrorists.

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

24 MR. KNEEDLER: I -- I -- I think there
25 is a very large difference in terms of the

1 nature of the interaction. And, again, one of
2 the Halberstam factors is, what is the
3 relationship between the defendant and the
4 person who committed the act?

5 And in -- in Halberstam, you know, she
6 was daily engaged in --

7 JUSTICE KAGAN: The bank doesn't know
8 anything about any particular acts.

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

20 JUSTICE KAGAN: So it has to be like
21 personal banking? I mean, suppose the banking
22 were less personal than that, but, you know,
23 they were providing, you know, very important
24 financial services to a terrorist organization.

25 MR. KNEEDLER: But I -- but

1 substantial assistance, again, is -- is partly a
2 question -- I mean, it goes to the ultimate
3 question of culpability and proximate causation.

4 And the -- and the -- the ultimate
5 issue is, is society prepared to hold the -- the
6 person alleged to be an aider and abettor
7 culpable, essentially, equally with a person who
8 committed --

9 JUSTICE ALITO: Mr. Kneedler, take --
10 take -- had you finished?

11 JUSTICE KAGAN: Go.

12 JUSTICE ALITO: Take Justice Kagan's
13 hypothetical and substitute going back even
14 further than the days of pagers to the days of
15 -- of landline phones and phone booths. And so
16 the telephone company -- the telephone company
17 knows that a particular person is -- has a
18 criminal background and is probably engaging in
19 criminal activity and is using the phone to
20 communicate with other members of that person's
21 gang. Is that aiding and abetting the crimes
22 that they commit?

23 MR. KNEEDLER: No. No, that would not
24 be. And I -- so I think the availing oneself of
25 a -- of a service that is universally open, that

1 is furnished automatically by the features of
2 the system, that is mostly, you know, helping
3 lawful businesses, that is not -- I think one of
4 the hypos yesterday mentioned --

5 JUSTICE KAGAN: Why doesn't that apply
6 to my bank too?

7 MR. KNEEDLER: Well, the bank cases
8 actually that have been decided in the lower
9 courts go both ways. And -- and they -- I think
10 they turn on the level of knowledge. They turn
11 on -- ultimately, on the culpability.

12 Several of the cases, Siegel for one,
13 turn on the fact that the -- that the -- the --
14 the bank took steps to ensure the bank was not
15 intending to -- to further the services. It was
16 not -- it -- it didn't have a culpable intent.

17 But we're -- in the example that
18 you're describing, I think it's a lot easier to
19 make a judgment, basically, a societal or -- or
20 -- judgment, are we prepared to hold that person
21 liable? And if --

22 JUSTICE JACKSON: Suppose we have
23 Justice Alito's scenario with the providing to
24 the gangsters or whatnot, and you say, no,
25 that's not going to be covered, but what if that

1 same company gets specific information about
2 these people, and now we're not talking about
3 generally provided services that, you know, they
4 sign up for somewhere and the company thinks --
5 it doesn't have any information about them. But
6 we know suddenly, the company knows, that these
7 individual people are in a gang and generally
8 using the cell phones that they have acquired
9 from the company for criminal activity.

10 Does that change the scenario?

11 MR. KNEEDLER: Yes, it changes it
12 dramatically, I think. And I think that that's
13 the difference between, I think, the two
14 examples that Mr. Waxman was offering.

15 The -- the making available the
16 general services that you would make available
17 to anyone is -- is ordinary, not face-to-face
18 business. But, if you know facts that -- that
19 zero in on a -- a known act or a known actor who
20 you know is committing those acts, and --

21 JUSTICE JACKSON: But wait. What
22 about the --

23 CHIEF JUSTICE ROBERTS: Thank -- thank
24 you -- thank you.

25 Wrap up?

1 JUSTICE JACKSON: I just wanted to say
2 what about the difference between actor and act?
3 If you know -- do you have to know that the --
4 that the gangster is going to commit a
5 particular act, or is it just -- is it enough to
6 know that he's a gangster and, therefore, is
7 likely to do so?

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

11 That's very different from an
12 organization like -- like one of these platforms
13 that is not acting on a transaction-by-
14 transaction basis to know whether this account
15 or this person is -- is furthering an act.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Kneedler.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: I mean, Bell Telephone
21 -- J. Edgar Hoover tells Bell Telephone that
22 Dutch Schultz is a gangster and he's using his
23 phone to carry out mob activities that -- and
24 the phone company says, well, we don't pull --
25 we don't deprive people of service based on

1 that. That makes them an aider and abettor?

2 MR. KNEEDLER: Perhaps not.

3 Probably not. I mean, it depends. But -- but

4 --

5 JUSTICE ALITO: Wow. That's a
6 perhaps?

7 MR. KNEEDLER: No, no, no. I -- I --
8 I think that even with that knowledge, there --
9 the Halberstam factors require an -- an intent
10 or -- to move the -- to move the crime forward.

11 JUSTICE ALITO: The problem -- the
12 problem is Halberstam, and we're stuck with
13 Halberstam because those three factors are met
14 in -- in my telephone example. They're arguably
15 met in the telephone example, are they not?

16 MR. KNEEDLER: Perhaps, but -- but,
17 again, it's a judgment call. It's the nature of
18 the act, the nature of the defendant's
19 contribution. So I don't think -- I don't think
20 the hypotheticals lend themselves to one basic
21 rule. It's a judgment call as to whether the
22 defendant is culpable, has become complicit, in
23 the way a conspirator would.

24 I mean, this statute equates or -- or
25 puts on -- pairs together conspiracy and aiding

1 and abetting, requiring, again, some culpable --
2 becoming a willing participant in -- in the act.
3 And, here, the furnishing of services as a
4 general matter, which is all the Court needs to
5 decide in this case, we do not think rises to
6 that level.

7 JUSTICE ALITO: Would it be consistent
8 with Halberstam to read "knowingly" to mean, oh,
9 just a shade short of "purposefully"? That
10 would give some substance to this.

11 MR. KNEEDLER: Yeah, I -- I -- again,
12 I -- I think there is some overlap between the
13 knowing and the substantial. For example, you
14 -- you may know as a general matter that ISIS-
15 affiliated persons are using your system, but
16 you may not know by how much. You may not know
17 for how long. You may not know which accounts.
18 And so it's very generalized information.

19 And any -- any -- that assistance with
20 the idea that it might encourage recruiting is
21 far removed from a specific act of terrorism.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Mr. Stewart, would

1 you answer the question that Justice Barrett
2 placed to Mr. Waxman, which is what's the
3 daylight between you and the Petitioners? And
4 how would you write the bottom line of this
5 opinion? They're not liable because?

6 MR. KNEEDLER: On -- on the first -- I
7 think one place where we might have a difference
8 is to use the -- the actually-in-Kaplan
9 examples, not necessarily saying whether those
10 were right or wrong, but the general proposition
11 is those were banks -- or banks or companies
12 engaged in interpersonal, direct communications
13 with the client. They had knowledge that the
14 client was either a front for or closely aligned
15 with Hamas -- I think it was Hamas in both cases
16 -- that was actively committing terrorist acts,
17 including against Americans, in the -- you know,
18 in the proximate area. And so that --

19 JUSTICE SOTOMAYOR: And -- and --

20 MR. KNEEDLER: -- there's a degree of
21 culpability there.

22 JUSTICE SOTOMAYOR: -- because they
23 were doing something outside the ordinary course
24 of business?

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

1 --

2 JUSTICE SOTOMAYOR: Okay. So that
3 sort of prong --

4 MR. KNEEDLER: -- they bent the rules,
5 which there's no allegation here that -- that
6 these defendants treated ISIS any -- ISIS
7 content any differently than they did anything
8 else in the -- in the -- in their usual course
9 of business. We think that's a critical fact,
10 and it's --

11 JUSTICE SOTOMAYOR: But what does that
12 go to, knowledge or substantiality? And so to
13 which factor does it go to?

14 MR. KNEEDLER: I -- I -- I think it --
15 it goes somewhat to both, but I think it -- I
16 think it's really substantiality, and I think
17 that's an objective test. And, frankly, I think
18 that would be a useful way for the Court to
19 think about it here in terms of being able --
20 for courts to be able to dismiss these cases at
21 the outset, without having to go through
22 extensive discovery that would require analysis
23 of all the -- all the accounts and everything
24 over a period of time, because I -- I think it's
25 a judgment that a company engaged in this sort

1 of activity which is overall very helpful to
2 society should not be held responsible,
3 culpable, a willing participant --

4 JUSTICE SOTOMAYOR: Unless what?
5 Write the bottom line for me. Okay?

6 MR. KNEEDLER: I -- I think we're --

7 JUSTICE SOTOMAYOR: I -- I -- I go as
8 far as you go, but -- so what -- what does
9 substantiality mean or not mean?

10 MR. KNEEDLER: In -- in -- in the case
11 of the Internet service providers, we think it
12 means that they are not -- that the regular
13 course of business, as alleged here, does not
14 constitute knowing, substantial assistance. The
15 situation in which it might is if -- if specific
16 accounts are called to the defendant's attention
17 saying this -- this account is about to be used
18 for the -- the -- to facilitate the commission
19 of -- of an account that was --

20 JUSTICE SOTOMAYOR: So what do I do
21 with -- we know what ISIS does. I think, if I
22 read the complaint or something, they even know
23 that ISIS has certain accounts. But they
24 haven't taken off all the ISIS accounts. No?
25 And Mr. Waxman is --

1 MR. KNEEDLER: Well, no, I -- I --

2 JUSTICE SOTOMAYOR: I can ask the
3 other side.

4 MR. KNEEDLER: The court -- the court
5 of -- the court of appeals stated that on page
6 63A and 64 --

7 JUSTICE SOTOMAYOR: Okay.

8 MR. KNEEDLER: -- where we think it
9 addressed the -- the -- the most important
10 factors, that ISIS regularly -- or ISIS -- that
11 the defendants regularly take down the accounts,
12 but -- at least when they're called to their
13 attention.

14 Now they may have missed some, but
15 that's inherent in a system that -- that
16 services hundreds of millions of customers. So,
17 in this case, it would require something more
18 specific about a particular act because of the
19 nature of the services they're offering.

20 That doesn't mean in every case, like
21 in the Atchley case or -- or the bank cases,
22 that the bank has to know of the specific act,
23 because it was -- they were -- they were aware
24 of proximate --

25 JUSTICE SOTOMAYOR: Is it fair --

1 MR. KNEEDLER: -- nefarious activity.

2 JUSTICE SOTOMAYOR: -- is it fair for
3 me to summarize in a way that Justice Alito did
4 that substantiality in your view has to have
5 some purpose to it?

6 MR. KNEEDLER: The state of mind is --

7 JUSTICE SOTOMAYOR: Instead of
8 knowledge, purpose?

9 MR. KNEEDLER: The state of mind is
10 one of -- is one of the factors. And the state
11 of mind is -- is how -- it does not require
12 specific intent, which, as Justice Alito pointed
13 out, is required, but what it -- but -- what is
14 required in -- in the criminal context.

15 What is required in the civil context
16 is encouragement, something that -- something
17 that the --

18 JUSTICE SOTOMAYOR: Some purposeful
19 act on it.

20 MR. KNEEDLER: -- defendant knowingly
21 does, encourages in -- in a -- in a -- in a
22 meaningful way because proximate cause is about
23 -- is about deciding how far responsibility
24 should go.

25 And, you know, the -- the -- this

1 statute, and I -- I think we're concerned about
2 not extending it so far that legitimate business
3 activities could be inhibited. The banks, for
4 example, in -- in underdeveloped parts of the
5 world and charities that may depend on those
6 banks, concerns about how they may -- they may
7 pull back as a result of legitimate businesses,
8 so that -- that is a concern that should enter
9 into the analysis, and including here the type
10 of the service and how remote that service is
11 from the commission of any particular act.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Sotomayor?

14 Justice Kagan?

15 JUSTICE KAGAN: Mr. Kneedler, a -- a
16 few times, in talking about differences among
17 hypothetical cases and real cases, you said this
18 is really a societal judgment about who counts
19 as complicit, who counts as culpable, and that
20 seems right to me. But it seems to suggest that
21 this should be a jury question, shouldn't it?

22 MR. KNEEDLER: No, I think there's a
23 very -- there's a big difference. Juries decide
24 facts. The law decides what -- what
25 consequences to attach to the facts that are

1 found or alleged.

2 And -- and we think this is
3 essentially a question of -- question of law.
4 Now, to be sure, it's a question of law that
5 turns on looking at the particular factors in
6 Halberstam, but that's exactly what Halberstam
7 itself did. As I said, after making the factual
8 findings, it went on to apply the -- the
9 standards in the nature of the common law,
10 drawing on the -- on the Restatement of -- of --
11 of Torts.

12 And I think there's a -- a practical,
13 common-sense judgment that most people would
14 understand that when you are running a -- a
15 business that is open to all comers, that it's
16 not face-to-face. You're not singling out one
17 person for favorable treatment. It's an
18 important service that we all benefit from that
19 you would -- you would look at that conduct
20 quite differently than you would somebody who is
21 engaged in a face-to-face encounter, asked to
22 lend money or give money or -- or give services
23 that are specific to that person that you know
24 is about to commit or is a member of a group
25 that all around you is committing terrorist

1 acts, as -- as in -- as in Atchley and -- and --
2 and -- and Kaplan.

3 So there -- that's a -- that's a
4 judgment that the law makes about whether the
5 conduct is culpable, whether the person has --
6 has become a willing partner. I mean, there are
7 a lot of expressions trying to get at the
8 question of whether the person is sufficiently
9 complicit --

10 JUSTICE KAGAN: Thank you.

11 MR. KNEEDLER: -- in the actual
12 murder.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: Mr. Kneedler, I -- I
16 appreciate that Congress approved the Halberstam
17 decision, but do we really have to wade through
18 its three elements where the third element has
19 two prongs and the second prong is made up of
20 six factors, some of which you tell us don't
21 apparently count for very much? Is there some
22 way to cut through that kudzu and -- and decide
23 this case on the statutory terms? Please say
24 yes.

25 (Laughter.)

1 MR. KNEEDLER: Yes.

2 (Laughter.)

3 MR. KNEEDLER: There is. And I -- and
4 I think that the -- you can look at the overall
5 context of this statute. JASTA was passed
6 largely in -- you know, almost entirely in
7 response to decisions that -- that came out of
8 the Second Circuit concerning responsibility for
9 the 9/11 attacks and -- and specifically where
10 plaintiffs were trying to hold responsible the
11 Saudi government, Saudi officials, Saudi
12 charities, but the courts had said, no, there's
13 no personal jurisdiction over some of them.

14 The -- the -- the Saudi state wasn't
15 liable or couldn't be sued under the Foreign
16 Sovereign Immunities Act because of limitations
17 on the Foreign Sovereign Immunities Act --

18 JUSTICE GORSUCH: Mr. -- Mr. Kneedler,
19 I'm -- I'm sorry to interrupt, but I was hoping
20 for an answer -- answer having something to do
21 with the statutory text.

22 And -- and let me just again offer one
23 possibility, that the -- the -- the two clauses,
24 the two "who" clauses in -- in this statute
25 might modify the person who committed such an

1 act, rather than the act itself, would -- an
2 event in the world.

3 And -- and it seems to me that that's
4 a pretty important limitation on aiding and
5 abetting liability and conspiracy liability,
6 both secondary forms of liability, in our law
7 generally, that you have to aid an actual
8 person. It's not just a pedantic point. It has
9 to do with the idea that -- that you're singling
10 somebody out and that that is different than
11 just doing your own business normally and that
12 that does help limit the scope of the act.

13 But what am I missing?

14 MR. KNEEDLER: Well, I -- I think that
15 the act in our view overall does not require
16 that the assistance be zeroed in on the
17 individual who committed the act. I mean, it's
18 liability --

19 JUSTICE GORSUCH: Why -- why not?

20 MR. KNEEDLER: -- may be asserted
21 against any --

22 JUSTICE GORSUCH: Why not? Because
23 that's normally how secondary liability works.
24 And it's an important limitation that -- that --
25 that cabins in the scope and prevents secondary

1 liability from becoming liability for just doing
2 business.

3 MR. KNEEDLER: Yeah. Well, I -- I
4 think -- I -- I think the sense that you have is
5 correct in the sense that an act -- an act is
6 actually committed by a human being, a natural
7 person, or at least in -- in most instances.

8 JUSTICE GORSUCH: Or -- or -- or a
9 corporate person. The Dictionary Act, which
10 defines person, includes those kinds of
11 juridical entities.

12 MR. KNEEDLER: Yes. Now --

13 JUSTICE GORSUCH: And we -- and we
14 have two "who" clauses, "who aids and abets" or
15 "who conspires." And -- and the language then
16 says "with the person."

17 MR. KNEEDLER: Right. So the -- the
18 point I was about to make was that even if you
19 regard the person as the individual, if the
20 assistance -- in this case, for example, ISIS
21 would commit the terrorist act through the act
22 of an individual.

23 JUSTICE GORSUCH: Right.

24 MR. KNEEDLER: So I'm not sure the
25 distinction is --

1 JUSTICE GORSUCH: And, here -- and,
2 here, the point would be that, okay, the
3 defendant, Twitter, was -- was -- Facebook,
4 Google, whatever, was -- was -- was doing its
5 business, but there are very few points in this
6 complaint that allege that they aided the
7 persons who actually engaged in the terrorist
8 act.

9 I mean, with all -- we all appreciate
10 how horrible the attack was, but there's very
11 little linking the defendants in this complaint
12 to those persons.

13 MR. KNEEDLER: Yes, I -- I agree with
14 that, and -- but I think -- I think that also
15 means there's very little, next to nothing, that
16 links it with the act that the person committed.
17 So --

18 JUSTICE GORSUCH: Well, in a very
19 abstract way in the world, everything's
20 connected to everything else. And what the
21 defendant did may have in some abstract way
22 helped advance ISIS. And ISIS helped conduct
23 the attack.

24 And so, in -- in a -- in a world in
25 which we're all and everything is

1 interconnected, all acts touch on one another,
2 there's some butterfly effect anywhere, but what
3 helps limit secondary liability, it -- it -- one
4 thing that helps limit secondary liability is
5 that you're intentionally or knowingly in this
6 case helping a person do something in the world.

7 MR. KNEEDLER: I -- I -- I think
8 that's right. I think that's right. I think
9 that principle --

10 JUSTICE GORSUCH: Perhaps we should
11 stop there.

12 (Laughter.)

13 MR. KNEEDLER: Well, yes.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: I just want to
17 make sure I understand how you think this is
18 different from a material support statute, so if
19 you have a communications business or a
20 financial business or a food business or a
21 travel business and you serve lots of customers,
22 but you knowingly provide your services to a
23 terrorist organization that you know is a
24 terrorist organization.

25 MR. KNEEDLER: Yes, that would be

1 criminal liability. That's a very important
2 distinction.

3 JUSTICE KAVANAUGH: Is that liability
4 under this?

5 MR. KNEEDLER: Not -- not under -- not
6 under -- I mean, again --

7 JUSTICE KAVANAUGH: That's what I --

8 MR. KNEEDLER: -- again, I would --

9 JUSTICE KAVANAUGH: I just want to --

10 MR. KNEEDLER: -- you know, I'd want
11 -- I'd want -- I would maybe want to know more.
12 But what I -- but basic --

13 JUSTICE KAVANAUGH: That's what we
14 have. What we have is you know they're
15 terrorists, picking up on Justice Kagan's
16 hypothetical. You provide services,
17 communications, food, travel to lots of people,
18 and this one comes in -- you know, I know this
19 person is a terrorist, but I'm going to provide
20 the same service, no favorable treatment, the
21 same service to that person as to everyone else.

22 Congress has passed statutes to get at
23 that kind of situation. The question is, is
24 this statute getting at that situation?

25 MR. KNEEDLER: I think ordinarily not,

1 but it --

2 JUSTICE KAVANAUGH: And why not?

3 MR. KNEEDLER: Because it is --

4 JUSTICE KAVANAUGH: It's the phrase
5 "act," right?

6 MR. KNEEDLER: It's the phrase "act,"
7 and --

8 JUSTICE KAVANAUGH: Or the word "act."

9 MR. KNEEDLER: It's the word "act,"
10 but it's also application of the, frankly,
11 common-sense factors or way of looking at it.
12 In Halberstam, it has to be substantial
13 assistance to the act. Now it --

14 JUSTICE KAVANAUGH: Now why is your
15 answer to Justice Kagan's hypothetical that may
16 be liability in that case? Is it because you
17 could prove some suspicion that that terrorist
18 was going to commit a particular act?

19 MR. KNEEDLER: Yeah, and I --

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

22 MR. KNEEDLER: No, no.

23 JUSTICE KAVANAUGH: -- to Justice
24 Kagan.

25 MR. KNEEDLER: I took that to be --

1 maybe I misunderstood -- I took that to be an
2 important part of the -- of her question when --
3 when I said, do you have an awareness or
4 knowledge that that person has committed or is
5 about to commit or -- or something, so there's
6 that --

7 JUSTICE KAVANAUGH: Well, you know
8 they're a terrorist, though. Let's go back to
9 what I said. You know they're a terrorist. So,
10 by that -- they're a member of ISIS. They've
11 been involved in past activities. But you're
12 like, well, I'm still going to give them food.

13 MR. KNEEDLER: Well --

14 JUSTICE KAVANAUGH: I'm still going to
15 have a cell phone. I'm still going to rent a
16 car.

17 MR. KNEEDLER: There may be
18 differences in the services. I mean, a
19 restaurant serving somebody, I -- I don't think
20 you would regard that as substantial.

21 JUSTICE KAVANAUGH: Well, a rental
22 car?

23 MR. KNEEDLER: Well, if he says, I --
24 I need -- I need a car to get to the airport
25 quick so that I can get to Istanbul --

1 JUSTICE KAVANAUGH: I mean, that's --
2 well, okay.

3 MR. KNEEDLER: But -- but -- but,
4 again, the question is, how much has the
5 defendant willingly associated himself or become
6 a willing partner and been complicit in what
7 that person is doing?

8 And I think it depends on both the
9 nature of the assistance, what intent or state
10 of -- of mind you have. I think a restaurant is
11 very different from offering somebody, you know,
12 here's my cell phone so you can call your
13 compatriot. I think those -- those are -- those
14 are, in -- in common-sense terms, very different
15 acts. But, in your --

16 JUSTICE KAVANAUGH: I think that's --
17 under this statute, that has to be your
18 position, but I've seen -- you've got to
19 maintain a hard line there, and in response to
20 some of the hypotheticals, I'm not sure you've
21 maintained a hard line --

22 MR. KNEEDLER: Well, I --

23 JUSTICE KAVANAUGH: -- which then
24 swallows the whole principle.

25 MR. KNEEDLER: No, no, I tried to

1 maintain a hard -- a hard -- a hard line with
2 respect to this service in particular, which is
3 all the Court has to decide. It's generally
4 available, no favorable treatment. It's not
5 face-to-face, which, in your example, is another
6 very important distinguishing characteristic.
7 It's an individualized transaction where you --
8 you know who that person is by your --

9 JUSTICE KAVANAUGH: That's -- I -- I
10 don't want to prolong this, but that's very
11 elusive. You know ISIS is using the
12 organization -- some human being in the -- in
13 the defendant company knows that ISIS, a group
14 of individuals, is using this service to help
15 recruit others to kill people.

16 MR. KNEEDLER: But that --

17 JUSTICE KAVANAUGH: You know that. I
18 don't know why the face-to-face really changes
19 that.

20 MR. KNEEDLER: Oh, I think it changes
21 it a lot. And, again, Halberstam -- Halberstam
22 talks about was the person present, which, as I
23 said, I think, in this context, really means
24 what is -- how remote or how proximate was the
25 defendant's association with it.

1 And if you -- if you aid in something
2 as generalized as -- as recruiting, that would
3 render these defendants culpable, responsible,
4 complicit in every terrorist act affecting --

5 JUSTICE KAVANAUGH: Okay.

6 MR. KNEEDLER: -- affecting a -- a
7 U.S. national --

8 JUSTICE KAVANAUGH: Thank -- thank
9 you.

10 MR. KNEEDLER: -- in the country.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Mr. Kneedler, taking
14 Justice Gorsuch's point about aid to the person
15 in the statute, Justice Gorsuch was pointing out
16 that the Dictionary Act treats juridical
17 entities as persons. Would the government
18 consider ISIS a juridical entity? Or, if we're
19 focusing on the person, would we have to be
20 focusing on the people who actually carried out
21 the attack?

22 MR. KNEEDLER: I don't know if we
23 would consider it to be a juridical person. I
24 -- I think ISIS is -- is an identifiable if
25 somewhat amorphous entity --

1 JUSTICE BARRETT: Entity?

2 MR. KNEEDLER: -- entity. But it's
3 important -- I think this is really a
4 misunderstanding a lot of the -- of the -- that
5 -- that Respondent has and some of the amici on
6 that side. The -- the notion of an enterprise
7 in Halberstam was not like some distinct entity.
8 That -- sometimes "enterprise" is used that way.
9 It was used there. The enterprise was a series
10 of discrete acts.

11 JUSTICE BARRETT: I -- I -- I
12 understand, and I -- I agree with that reading
13 of Halberstam actually.

14 All right. Looking -- if we rule in
15 favor of Twitter and I'm thinking about ways in
16 which to do that if that's what we do, it seems
17 to me -- well, tell me if you agree with this:
18 One thing to say would be to say that because
19 you have to assist a person who commits the
20 particular act of terrorism, whether that person
21 is ISIS or the particular individuals that
22 carried out the attack, there would have to be
23 allegations in the complaint showing the use of
24 the defendant's service, of Twitter's service,
25 to the end of the Paris attack and not just

1 general recruitment or radicalizing people and
2 that this complaint lacks those allegations,
3 like using DMs or using comment threads on
4 Twitter to actually coordinate the activities
5 for the act. Would that be one way to do it?

6 MR. KNEEDLER: Yes. I -- I think that
7 is the distinction in this case. I mean, again,
8 if they knew about -- if they knew about a
9 specific account --

10 JUSTICE BARRETT: But -- but -- but --
11 but I'm -- knowledge is a different thing.
12 That's not what I'm -- I'm asking. If --

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

14 JUSTICE BARRETT: Before you even get
15 to knowledge, you have to say that there was the
16 use of the service in the particular attack on
17 the -- on the government's view, right?

18 MR. KNEEDLER: Yes.

19 JUSTICE BARRETT: You have to link it
20 up to the attack?

21 MR. KNEEDLER: If you can do that, but
22 for -- in this context, yes, for the use of
23 these services, because of the nature of these
24 -- of these services.

25 JUSTICE BARRETT: But in the attack --

1 I mean, I -- I took the whole point to be, and
2 the point of agreement between you and Mr.
3 Waxman, that the statute refers not just
4 generally to helping, as you were just saying,
5 the enterprise but to aiding and abetting the
6 act of terrorism that injured the plaintiff.

7 MR. KNEEDLER: That's correct.

8 JUSTICE BARRETT: So, here, in order
9 to state a claim, we would need to see in the
10 complaint some allegations that Twitter was used
11 to carry out this specific attack, not just
12 generally used to build up ISIS and recruit?

13 MR. KNEEDLER: Yes.

14 JUSTICE BARRETT: Okay. Another thing
15 it seems like we could say, it's kind of to the
16 colloquy you were having with both Justices
17 Kavanaugh and Kagan, which is about a business
18 that operates and it's open to all comers. That
19 seems to go to knowledge. Am I right?

20 MR. KNEEDLER: I think it goes to
21 knowledge but also the -- the --

22 JUSTICE BARRETT: Substantial
23 assistance?

24 MR. KNEEDLER: -- substantial
25 assistance, because it goes to how remote is it.

1 Is it face-to-face? Some -- some companies open
2 to all business are face-to-face. Some are not.
3 Like, this is automatic.

4 JUSTICE BARRETT: So it could be a
5 little bit trickier, but an opinion to that
6 effect might have to say something like, if the
7 defendant is a business that's open to all
8 comers, a page company, PageNet, or the phone
9 service or a bank or Twitter, social media
10 company, there has to be some allegation of,
11 what, specific knowledge?

12 MR. KNEEDLER: Of specific knowledge,
13 some specific action with respect to that
14 particular person or that particular act. I
15 want to be clear, I don't -- I don't want to be
16 taken to be saying absolute rules for every
17 situation. The points I'm making here about --

18 JUSTICE BARRETT: But I thought you
19 said it would be helpful to give lower courts
20 some way to dismiss these cases without wading
21 into the facts. And it seems like the first
22 thing I said, which was about linking up
23 attacks, wouldn't serve that end because it
24 sounds like you were saying that you thought it
25 would be helpful to have a holding that related

1 to generally open businesses. Am I right?

2 MR. KNEEDLER: Again, because of the
3 banking example, a bank may hold itself out to
4 be open to all comers, but, in the -- in the
5 context of conducting that business, they may
6 have an individualized encounter.

7 Some -- you don't just open an account
8 in most banks online or get a loan online.
9 There's going to be some back and forth by which
10 the bank will get to know something about the
11 person it's doing business with or know that
12 that person is affiliated --

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

15 MR. KNEEDLER: Well, it also goes to
16 the nature of the -- of the --

17 JUSTICE BARRETT: The nature of the
18 assistance?

19 MR. KNEEDLER: Yes.

20 JUSTICE BARRETT: Yes.

21 MR. KNEEDLER: Yes.

22 JUSTICE BARRETT: Yes.

23 MR. KNEEDLER: So -- so, here, the
24 primary point I'm making here is about these
25 businesses which are open to the public on an

1 automated way, without -- without any occasion
2 or ability for an individualized determination
3 about --

4 JUSTICE BARRETT: Sure. So I wasn't
5 suggesting that you were asking us to say any
6 business that's generally open to the public can
7 never be liable. But any business that's
8 generally open to all comers, absent some
9 allegation of more specific knowledge or
10 specific interaction, cannot be liable under
11 JASTA?

12 MR. KNEEDLER: Yes. And one other
13 point I'd like to make, it -- I -- I -- I think
14 it is possible, as I think Atchley and Kaplan
15 show, in that situation, it doesn't necessarily
16 require that you know that a particular person
17 is going to commit a particular act. If you
18 know because of the proximate relationship with
19 the person you're -- you're assisting that there
20 -- that they -- there are a group of acts that
21 they are about to commit or that they are --
22 that they have an ongoing practice of
23 committing, you don't have to know of the
24 specific act in that -- in that situation.
25 That's why I think it is -- it is

1 context-specific.

2 But this is open --

3 JUSTICE BARRETT: And banks are what
4 you're worried about? Banks is what the
5 government is --

6 MR. KNEEDLER: We are worried about --

7 JUSTICE BARRETT: -- worried about in
8 that?

9 MR. KNEEDLER: -- and the -- and the
10 cases, some of them have been dismissed and we
11 think it's important for them to be able to be
12 dismissed, where you don't have that -- the sort
13 of knowledge or intent, the state of mind, the
14 -- the -- the things that go to whether this --

15 JUSTICE BARRETT: You want to make
16 sure the banks aren't automatically dismissed.
17 Like, you're trying to make sure that whatever
18 we said about social media companies wouldn't
19 get banks off the hook when they have those
20 kinds of special relationships that you're
21 talking about?

22 MR. KNEEDLER: Yes.

23 JUSTICE BARRETT: Yes.

24 MR. KNEEDLER: Special relationships
25 and knowledge. It's not just banks. There

1 could be other institutions. Charities are
2 another one, charities both in their own right,
3 in operating --

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So I've been kind of
7 going back in my mind to where I started with
8 Mr. Waxman in terms of separating out knowledge
9 and substantial, and it -- in listening to you,
10 it was very clear that you are putting a lot of
11 stock in substantial, and I was trying to figure
12 out why that is.

13 And I went back to Halberstam, and I'm
14 looking at the opinion, and I am noting now for
15 the first time that after the Court in aiding --
16 in the aiding-and-abetting section lists the
17 three elements, it very quickly disposes of them
18 and, in particular, with respect to the third
19 element, it just says, "The district court also
20 justifiably inferred that Hamilton assisted
21 Welch with knowledge that he had engaged in
22 illegal acquisition of goods."

23 Then it goes on to say, "The only
24 remaining issue, then, is whether her assistance
25 was 'substantial.'" So all the factors and all

1 the things you've been talking about are
2 insubstantial, so it seems as though, at least
3 per this opinion, the only real knowledge is of
4 the kind that you're talking about with these
5 banks if they have a personal relationship and
6 they know that this, you know, person or
7 somebody who's using their services has engaged
8 in illegal activity.

9 Is that the government's position?

10 MR. KNEEDLER: Yeah. I -- I -- I
11 don't think -- I think, in Halberstam, that was
12 an easy line to draw because she was obviously
13 intimately integrally related, as the Court
14 said, in his -- in what he did.

15 I think there are situations -- but I
16 don't think the Court needs to reach it here
17 because I think this case could be decided on
18 the basis of substantial assistance, applying
19 the objective factors.

20 JUSTICE JACKSON: But it seems like
21 substantial is harder. Substantial is where all
22 the six factors come in. I'm trying to say, if
23 we have a third that's knowledge and according
24 to Halberstam, you know, if you don't even have
25 a knowledge that he was, you know, engaged in

1 the illegal acquisition or was a gangster or was
2 a terrorist in a way, that should be enough,
3 right?

4 MR. KNEEDLER: Oh, yeah, no. Yeah,
5 no, no, I'm sorry, I was taking the question to
6 be about Halberstam itself. Yes, if you don't
7 have knowledge that the -- or that would -- that
8 would even go into Prong 2, if you don't have a
9 general awareness.

10 JUSTICE JACKSON: No, you have -- you
11 might have a general awareness that Twitter or
12 your services are being used in terrorist
13 activities.

14 MR. KNEEDLER: Right.

15 JUSTICE JACKSON: What you may not
16 have according to this is knowledge that with
17 respect to the attacks that the person is now
18 accusing you of assisting, you were helping
19 those people who were involved in that act.

20 Is that enough to get you out?

21 MR. KNEEDLER: I -- I -- I think you
22 could look at it that way, yes, because of the
23 attenuation. Knowledge -- I -- I think
24 knowledge would ordinarily --

25 JUSTICE JACKSON: Yeah.

1 MR. KNEEDLER: -- entail some concrete
2 or some immediate perception that what they're
3 doing --

4 JUSTICE JACKSON: All right. But one
5 final question is just with respect to this
6 notion that Justice Gorsuch brings up about the
7 person. I'm wondering whether the concern about
8 that that I hear from both you and Mr. Waxman is
9 that if you're focusing on the person who
10 committed such an act of international
11 terrorism, which is what the statute says, that
12 it seems to make the focus -- take the focus
13 away from the act itself.

14 So that, conceivably, if you separated
15 out the clauses, aiding and abetting the person
16 who committed such an act, it's almost like
17 Justice Kavanaugh's materiality statute in the
18 sense that you could, I guess, aid and abet a
19 person who committed the act even if it's not
20 with respect to that act, because that's not
21 what the statute seems to say.

22 And so the reluctance, I think, is in
23 focusing on the person in that way.

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

25 JUSTICE JACKSON: Yeah.

1 MR. KNEEDLER: -- I think that's --
2 that is fair to say. And even focusing on the
3 organization, the organization is acting through
4 an individual in -- in the commission of the
5 act.

6 And the -- the -- the criminal
7 aiding-and-abetting statute refers -- says that
8 somebody who commits a criminal act or aids and
9 abets its commission, referring to a specific
10 criminal act. And, here, the definition of --
11 of terrorist -- terrorist activity, I think it
12 is, says it's activities that involve violent or
13 dangerous acts --

14 JUSTICE JACKSON: Acts. And if we
15 don't --

16 MR. KNEEDLER: -- that are criminal.

17 JUSTICE JACKSON: -- if we don't
18 stay -- if we don't stay focused on the acts,
19 then we get worried about Justice Alito's
20 hypotheticals, where you might be aiding and
21 abetting a person who is engaging in certain
22 things, but you aren't really assisting in those
23 things with knowledge?

24 MR. KNEEDLER: Right. It has to be --
25 the act itself has to be culpable, which is why

1 the definition of terrorism refers to acts that
2 are punishable by the criminal law.

3 And so whether you -- whether you
4 focus on is it the person who committed the act
5 or the commission of the act, I think, in that
6 sense, it all comes to the same thing.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Kneedler.

9 Mr. Schnapper.

10 ORAL ARGUMENT OF ERIC SCHNAPPER

11 ON BEHALF OF THE RESPONDENTS

12 MR. SCHNAPPER: Mr. Chief Justice, and
13 may it please the Court:

14 I'm going to -- I'd like to waive my
15 two minutes of silence to move the process
16 forward.

17 CHIEF JUSTICE ROBERTS: Granted.

18 (Laughter.)

19 MR. SCHNAPPER: I hope you won't make
20 me regret that. And I'd like to -- I'd like to
21 respond to some of the questions that were asked
22 earlier. I'll try to do this in seniority
23 order.

24 So I'd like to start with the question
25 that you asked about trying to understand what

1 the government's position was in the multiple
2 factors that were there. I -- I think that
3 question really went to the heart of the
4 difficulty with the government's position.

5 The -- the Halberstam factors, there
6 are six of them. It's complicated. The
7 government's standard is much harder to
8 understand, and that was brought home by the
9 question from Justice Kagan about banking
10 services. It seemed clear as I read the magical
11 few words on page 34 that banking services
12 weren't covered, but then it turned out that
13 they were. It's difficult to understand how we
14 got there.

15 Our view is that -- and the government
16 says there's a special nexus requirement. Our
17 view is that once the statutory elements have
18 been met on the Halberstam factors, the nexus is
19 foreseeability. This other rule -- these other
20 rules aren't there. It's not as simple as you
21 might have hoped. We still have the six
22 factors, but it stops there.

23 Now Justice Alito made the point
24 earlier on, and we think this is very important,
25 that Halberstam has, as you put it, and I wish I

1 had thought to say it as well, essentially
2 statutory status. The courts are directed to
3 use Halberstam.

4 And that's been particularly important
5 with regard to a number of the questions here,
6 one of them being whether the assistance has to
7 go to assisting the particular act that -- that
8 harmed the plaintiff.

9 The Halberstam facts fail that
10 standard. And -- and you may want to hold
11 that -- that in general aiding and abetting
12 requires assisting a particular act, and -- and
13 you may want to overrule Halberstam when it gets
14 here, but Halberstam is the standard, and it
15 says aiding and abetting an enterprise.

16 And a number of the times, as my
17 friends articulated the standard they were
18 asking the Court to adopt, they would articulate
19 a standard that would be -- that would -- that
20 would require you to conclude that Halberstam
21 was wrongly decided.

22 Justice Kagan, you asked and you
23 framed this as a hypothetical, and I want to
24 respond that it's not. You asked what would
25 happen in a case far afield from this in which a

1 defendant said they really weren't going to do
2 much of anything at all, even though they know
3 that they were assisting terrorists.

4 There's a factual dispute about this,
5 but the contention in the complaint is that that
6 was really going on, that this policy was just
7 window dressing.

8 The complaint specifically alleges
9 that unless someone came to one of the
10 defendants and identified a particular post that
11 was from ISIS, they would not do anything. They
12 wouldn't look for posts on their own.

13 JUSTICE JACKSON: Mr. Schnapper,
14 you -- you -- you want to cut to the chase, and
15 I appreciate that, so let me ask you this. With
16 respect to your claims --

17 MR. SCHNAPPER: Yes.

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

21 I mean, you were here yesterday and we
22 sort of had a preview of your thoughts on this
23 case but also I thought a concession that that's
24 sort of the heartland of a 230 issue in terms of
25 immunity, the -- the claim that here is this

1 Internet platform and they have these terrorist
2 videos and things on their website and they
3 don't take them down.

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

7 JUSTICE JACKSON: All right. So we're
8 on recommendations.

9 MR. SCHNAPPER: Yeah. And that they
10 continue to do that apace, knowing -- knowing
11 what's -- what's happening. And --

12 JUSTICE JACKSON: So why is the
13 recommendation aiding and abetting? Why does it
14 fit -- so we're only looking at recommendations,
15 not Twitter's --

16 MR. SCHNAPPER: Yes. Yes.

17 JUSTICE JACKSON: -- you know, take --
18 not taking down things because you concede that
19 that that --

20 MR. SCHNAPPER: Right.

21 JUSTICE JACKSON: -- would be a
22 heartland immunity issue. So the claims are
23 recommendations related to various terrorist
24 activities, and with respect to that, can you
25 just walk us through why you think that

1 qualifies under Halberstam as aiding and
2 abetting?

3 MR. SCHNAPPER: Well, the -- the
4 aiding and abetting -- the recommendation
5 function is at issue here potentially more
6 broadly because we have three different
7 defendants in this case. There's only one
8 Petitioner. And so their practices would be
9 varied.

10 But insofar as the recommendations
11 were affirmatively calling the attention of --
12 of users to ISIS materials, that would -- that
13 would be extremely valuable to ISIS in
14 recruiting more fighters, which was, of course,
15 a --

16 JUSTICE JACKSON: That has nothing to
17 do with the attack. So you say the -- this
18 particular attack, they didn't have to have any
19 knowledge or awareness or assistance with
20 respect to the particular attack?

21 MR. SCHNAPPER: That is precisely our
22 position.

23 JUSTICE BARRETT: Mr. Schnapper, does
24 your complaint contain any specific allegations
25 about ways in which Twitter was used to

1 perpetrate this attack? Or is it -- it's all --
2 as I read it, it's all about recruiting
3 generally, the ways in which Twitter was used --

4 MR. SCHNAPPER: That -- that's
5 correct.

6 JUSTICE BARRETT: -- to recruit
7 generally?

8 MR. SCHNAPPER: It's recruiting and
9 fundraising.

10 JUSTICE BARRETT: Okay.

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

12 JUSTICE BARRETT: So nothing about the
13 Paris attack in particular?

14 MR. SCHNAPPER: No.

15 JUSTICE BARRETT: Okay.

16 MR. SCHNAPPER: No. That -- that's
17 the -- that's where we part company.

18 JUSTICE KAVANAUGH: Suppose that --
19 well, go back to 1997, CNN did an interview of
20 Osama bin Laden, a very famous interview of him.
21 Could, under your theory -- and that -- that
22 interview became where he first time declared
23 war against the United States to a western
24 audience, and that interview became famous, tool
25 for recruiting, notoriety. Could, under your

1 theory, CNN have been sued for aiding and
2 abetting the September 11th attacks?

3 MR. SCHNAPPER: I -- I -- it would
4 probably fail several elements, I think, general
5 --

6 JUSTICE KAVANAUGH: Which -- which
7 ones?

8 MR. SCHNAPPER: I think general
9 awareness of his role. It --

10 JUSTICE KAVANAUGH: General or what --
11 you don't think they were generally aware of his
12 role when he declared war against the United
13 States and said --

14 MR. SCHNAPPER: No, I --

15 JUSTICE KAVANAUGH: That seems -- and
16 that was known beforehand. That was the first
17 time he did it to a western audience.

18 MR. SCHNAPPER: Well, the standard is
19 whether they would have necessarily understood
20 the role that the -- that the interview would
21 play. Look, the First Amendment is going to --

22 JUSTICE KAVANAUGH: Well --

23 MR. SCHNAPPER: -- solve that -- I'm
24 sorry.

25 JUSTICE KAVANAUGH: The First

1 Amendment's going to solve that? And does it?

2 MR. SCHNAPPER: I think the First
3 Amendment would solve that problem.

4 JUSTICE KAVANAUGH: Mm-hmm.

5 MR. SCHNAPPER: And --

6 JUSTICE KAVANAUGH: But the liability
7 under this statute. But for that, there would
8 be liability under this statute?

9 MR. SCHNAPPER: It's -- it's difficult
10 to see how it would get through the six elements
11 of substantiality in terms of duration, it's one
12 interview; in terms of nature of the assistance,
13 which is just a television interview.

14 The -- there would -- I -- I think --
15 I think it usually would not, but -- but I think
16 the First Amendment would -- would be a --

17 JUSTICE KAVANAUGH: Different --

18 MR. SCHNAPPER: -- explain that.

19 JUSTICE KAVANAUGH: -- different tack.

20 Just more generally, I think you've heard Mr.
21 Waxman and Mr. Kneedler talk about businesses
22 that provide services on an arm's length basis
23 to a variety -- all comers and not on a
24 favorable basis.

25 So how does that involve aiding and

1 abetting a particular act when, even though you
2 know, okay, this person is a bank robber, this
3 person is a terrorist, they use my communication
4 services or whatever else it may be, you don't
5 know they're going to use it for particular
6 acts? So how do you -- how do you get around
7 that?

8 And then the implications of that, I
9 think, that they raise are this would put a
10 heavy burden on a wide variety of businesses to
11 try to ferret out more information about their
12 customers to prevent liability under this kind
13 of statute.

14 MR. SCHNAPPER: That's a lot of
15 questions I'm going to get to -- I -- I -- I do
16 --

17 JUSTICE KAVANAUGH: Well, try to start
18 with the --

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

22 JUSTICE KAVANAUGH: Yeah. The general
23 business --

24 MR. SCHNAPPER: Yes.

25 JUSTICE KAVANAUGH: -- it's not

1 connected to a specific act.

2 MR. SCHNAPPER: Right.

3 JUSTICE KAVANAUGH: Why liability?

4 MR. SCHNAPPER: Okay. So, first of
5 all, it's our position, as I've said, that the
6 assistance doesn't have to be connected to a
7 specific act. Nothing that Hamilton did in
8 Halberstam assisted any particular act. It was
9 all after the fact.

10 With regard to it being a general --

11 JUSTICE KAVANAUGH: That wasn't the --
12 I'm sorry to interrupt, but that wasn't a
13 business of the kind that I was hypothesizing.

14 MR. SCHNAPPER: Yes. I understand
15 that. I'm sorry if that wasn't responsive.

16 The fact that a defendant is a general
17 business open to all comers could be very
18 relevant to knowledge if someone just shows up
19 and -- and wants to rent a pager or buy a pager
20 or whatever the technology. It's unlikely that
21 the defendant's going to know that they're
22 dealing with a terrorist.

23 But there was a hypothetical that, you
24 know, Osama bin Laden walks in and says, I'd
25 like to buy a laptop with -- with the capacity

1 to -- maybe a -- a -- a cell -- a satellite cell
2 phone. And I think they would -- they would
3 know that this was going to be used for
4 terrorist purposes. They wouldn't know the
5 specific act. Our view is they don't have to
6 know that.

7 JUSTICE KAVANAUGH: And how's it
8 different from a material support statute, which
9 are distinct language?

10 MR. SCHNAPPER: The material support
11 statute is both broader and narrower than aiding
12 and abetting. First, the material support
13 statute doesn't require a showing of general
14 awareness of a role -- of the role that the
15 support may be playing.

16 Secondly, the aiding-and-abetting
17 statute requires you to work your way through
18 the six factors that we've been talking about,
19 and that's not required under material support.

20 Conversely, aiding and abetting can
21 include encouragement, and that would not be
22 materially -- material support.

23 So they're -- they're just different.
24 And I think Congress chose to use aiding and
25 abetting rather than just strict liability for

1 material support that causes harm because it
2 wanted to use that more nuanced set of rules for
3 aiding and abetting.

4 JUSTICE KAGAN: I mean, I -- I would
5 have thought that there is a simpler answer to
6 how is the material support statute different,
7 because the material support statute says, when
8 Osama bin Laden walks in, you can't give him the
9 money to buy a hospital either, right? It has
10 just nothing -- in other words, it says there
11 are some people that even when you know it
12 doesn't have anything to do with their terrorist
13 activities, you can't support their
14 non-terrorist activities.

15 And that's what the whole theory of
16 the material support statute was. It was to
17 prevent people from giving money to Hamas to
18 build houses.

19 MR. SCHNAPPER: I amend my answer to
20 include that point.

21 (Laughter.)

22 JUSTICE JACKSON: What about this --
23 what about this point -- what about this point
24 --

25 MR. SCHNAPPER: Yes.

1 JUSTICE JACKSON: -- because I'm still
2 a little confused about your disclaiming that
3 the support that is being given has to run to
4 the act.

5 So we have Osama bin Laden coming in
6 to rent a satellite cell phone. You say the
7 sellers don't need to know that he will use the
8 phone to commit a terrorist act, but I take it
9 that you're also saying that he doesn't actually
10 have to use the phone to commit the terrorist
11 act. He could still -- they could still be on
12 the hook for assisting him, even if he doesn't
13 actually use the thing that they have provided
14 in the act that injures your client, right?

15 MR. SCHNAPPER: No.

16 JUSTICE JACKSON: I'm sorry, that was
17 very long-winded.

18 MR. SCHNAPPER: No, I think there were
19 -- there were several questions there. So we --

20 JUSTICE JACKSON: The -- the point is
21 that in the hypo --

22 MR. SCHNAPPER: Yes, yes.

23 JUSTICE JACKSON: -- does the cell
24 phone that is sold to --

25 MR. SCHNAPPER: Yes. Yes.

1 JUSTICE JACKSON: -- Osama bin Laden
2 actually have to be used to commit the terrorist
3 act?

4 MR. SCHNAPPER: No.

5 JUSTICE JACKSON: Why not?

6 MR. SCHNAPPER: Because providing him
7 the cell phone aids -- I mean, is a -- is a
8 piece of the answer. There are other elements.
9 It counts because it -- it aids the terrorist
10 enterprise. That's the -- that's the formula
11 that we're advocating.

12 JUSTICE JACKSON: But what --

13 JUSTICE BARRETT: Because he uses it
14 to make calls to other associates and to -- to
15 fundraise and that sort of thing, so he uses the
16 phone for other things that are unconnected to
17 the act, and you're saying that's enough?

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

19 JUSTICE JACKSON: But would you have
20 to allege that, or could you just say you -- I
21 mean, does the complaint have to show -- so
22 let's say the complaint doesn't say he used it
23 in the particular act. Would you have to have
24 allegations that the phone was used to call
25 associates and other things, or is it just

1 enough that we -- that you know Osama bin Laden
2 is a terrorist and you allege that this phone
3 was sold to him?

4 MR. SCHNAPPER: In terms of -- in
5 terms of what you need to prove, you need it,
6 but to answer it in terms of pleading -- in
7 terms of pleading --

8 JUSTICE JACKSON: Mm-hmm.

9 MR. SCHNAPPER: -- Rule 9 requires
10 pleading with particularity about fraud, not
11 other things. The general -- the courts have
12 handed down a number of decisions, in Leatherman
13 and Swierkiewicz, disclaiming the notion that
14 additional rules of particularity of pleading
15 should be required. There are other procedural
16 methods for -- for -- for bringing all of that
17 out.

18 But the general trend in pleadings
19 since the abolition of the Field Code is not to
20 require specific allegations of that sort.

21 It might be deficient given the
22 overall context.

23 JUSTICE BARRETT: But wouldn't you
24 still have to allege, in Justice Jackson's
25 hypothetical, that he used the phone in

1 furtherance of terrorist activities? You
2 couldn't just say he sold him a cell phone and
3 have that be enough.

4 MR. SCHNAPPER: You -- you would
5 probably need to say that, although it would be
6 fairly implicit in his name, but, yes, true, I
7 think that would be the -- that would be the
8 better way to -- to plead it.

9 But, if I could follow up on a
10 question that you asked, one of the points the
11 government officials have made in testimony,
12 some of which we've quoted, is that of the
13 overall cost of running a terrorist
14 organization. The cost of a particular attack
15 is a very small part. Running terrorist
16 organizations is very expensive. It involves
17 fundraising. There are lots of salaries.
18 There's travel. There's bribery. There's
19 forging documents.

20 That's why it's so important that the
21 Court hold that the entire enterprise being
22 aided matters. If you -- if you -- if you limit
23 the aid that matters to the tip of the sphere,
24 you've -- you've written out of the statute
25 almost all the assistance that matters, and you

1 shouldn't do that in our view.

2 CHIEF JUSTICE ROBERTS: Counsel, I
3 understand you to have abandoned the claim
4 against Google based on its failure to remove
5 ISIS material, but you haven't done that in this
6 case with respect to Twitter?

7 MR. SCHNAPPER: We -- we're not
8 advancing that view. That's because of the
9 procedural posture of the case, which is it
10 wasn't decided on 230 grounds, it was decided on
11 aiding-and-abetting grounds. The 230 issue was
12 then remanded. We just never got there. So it
13 just hasn't come up.

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

16 CHIEF JUSTICE ROBERTS: Okay.

17 JUSTICE SOTOMAYOR: So what argument
18 -- what argument are you advancing? Meaning
19 what's the aiding and abetting if it's not the
20 failure to remove?

21 MR. SCHNAPPER: The aiding and
22 abetting would be the various recommendation
23 functions that we talked about yesterday.
24 They're different for different entities. But
25 -- but the distinction between affirmatively

1 recommending as opposed to just posting, we
2 think that's the distinction that the statute
3 draws.

4 I -- I think I owe you a few more
5 answers. Justice Gorsuch, you asked whether
6 the -- the answer to the case could be found in
7 treating the word "person" as referring only to
8 the individuals. And -- and we think the answer
9 to that is no.

10 The purpose of, you know, invoking the
11 Dictionary Act was to make it clear that a
12 terrorist organization could be the person who
13 would be covered by the statute. And I should
14 note that the statute itself, before we get to
15 those last words, talks about one of the -- one
16 of the premise acts that has to have occurred is
17 authorization, planning, or committing the act
18 by a terrorist group.

19 This is an act that was committed by
20 the terrorist group. They didn't have a passing
21 role. They selected Masharipov. They sent him
22 to Istanbul. They told him to wait as a sleeper
23 agent. They apparently supported him while he
24 was there. Somebody brought him a gun and stun
25 grenades. And then the -- the evening of the

1 attack, a few days before the attack, he was
2 told the attack's going to be on New Year's Eve,
3 and there was communication back and forth.

4 They were --

5 JUSTICE GORSUCH: Mr. Schnapper, if I
6 might --

7 MR. SCHNAPPER: Yes.

8 JUSTICE GORSUCH: -- since you raised
9 that point, you know, the statute, again, I do
10 think focuses our attention on who aids and
11 abets the person who committed such an act of
12 international terrorism, but it doesn't -- it
13 doesn't just focus us on the person, though
14 that's helpful and it narrows things. It also
15 says you must knowingly provide substantial
16 assistance.

17 So it -- it does two things. It
18 focuses on the person and it focuses on the mens
19 rea and then it focuses on the actus reus about
20 substantial assistance.

21 So I see all three of those things,
22 not just the person, but all three of those
23 things in the statute. And, again, I'm just
24 struggling with how -- how your -- your
25 complaint lines up with those three requirements

1 in the statute.

2 MR. SCHNAPPER: Thank you. Let me
3 begin by responding to a point you made earlier
4 because this is relevant here, where you
5 expressed the hope that one could put aside the
6 complicated formula in Halberstam and just use
7 the text of the statute.

8 As we turn to the issue of what does
9 knowing mean and what does substantial
10 assistance mean, that's where we need to go to
11 Halberstam. And it's a complicated assessment.

12 And so, in -- in terms of substantial
13 assistance, one would need to walk through each
14 of the six elements on the Halberstam list and
15 assess them individually.

16 And I could walk you through that in
17 -- in this case in terms of what we think the
18 facts are, but I think you're just asking about
19 the methodology, and that's what -- what we
20 believe the correct methodology to be.

21 JUSTICE KAVANAUGH: What -- what do
22 you say to the argument about the charitable and
23 humanitarian organizations? So I think one of
24 the arguments that the -- as pointed out by Mr.
25 Waxman and Mr. Kneedler and some of the amicus

1 briefs, is that humanitarian and charitable
2 organizations are going to be caught up in this.

3 And I think one of the background
4 points about aiding-and-abetting liability is
5 it's not -- moral complicity is different from
6 legal liability. There might be moral
7 complicity without necessarily legal liability,
8 and we want to have fair notice for major
9 sanctions, civil or criminal.

10 MR. SCHNAPPER: Right.

11 JUSTICE KAVANAUGH: And that fair
12 notice for these humanitarian organizations is
13 not present under your theory and they could be
14 swept up in that. That's at least the statement
15 on the other side, which appears sincere to me
16 from the amicus briefs.

17 So how do you respond to that?

18 MR. SCHNAPPER: First of all, let me
19 just say I take all the representations of the
20 amicus briefs to be sincere. The -- the
21 specific elements of the statute will normally
22 protect a charitable organization. So let's
23 start with the requirement of knowledge and --
24 and look at the -- the type of knowledge alleged
25 in this case.

1 If -- if -- let me just take a --
2 let's assume a hypothetical charitable
3 organization, and, first, there are reports on
4 four networks that they're providing assistance
5 to ISIS, and then there are reports in all the
6 major newspapers in the United States that
7 that's happening.

8 And then there comes a time, and the
9 complaint alleges this happened, in which the
10 attorney general, the director of the FBI, the
11 director of national intelligence, and the White
12 House chief of staff meet with the officials of
13 the -- of the NGO and tell them they're
14 asserting ISIS -- they're assisting ISIS.

15 That would satisfy knowledge. And
16 those are obviously extreme facts. And -- and
17 it would be appropriate in -- in assessing these
18 cases to consider the kinds of circumstances
19 that NGOs would face.

20 And I think it's very relevant to --
21 to -- to the state of mind issue. The -- the --
22 our view is that the state of mind here is
23 highly culpable. And I would use the language,
24 I've forgotten who used it earlier, of willful
25 blindness, and, again, I say there's a factual

1 dispute about what's happening.

2 But our contention is that the policy
3 was not to look at all. And there's a -- in --
4 in the brief of the Concerned Women for America,
5 there's an extraordinary quote from Twitter, and
6 it -- and it was made three months after two
7 Americans were executed by ISIS. And when asked
8 why Twitter wasn't taking down ISIS materials,
9 the comment was: Well, one man's terrorist is
10 another man's freedom fighter.

11 Now I think, if a -- if a charitable
12 organization had that knowledge and had that
13 attitude, they should be held liable.

14 JUSTICE JACKSON: Can I just ask you,
15 Mr. Schnapper, before we run out of time, I
16 guess I don't know why Halberstam helps your
17 argument that it's enough to support the
18 enterprise.

19 I know that they use the word
20 "enterprise," but when you look at the actual
21 case, they're talking about the criminal
22 enterprise. It wasn't as though she was
23 assisting Welch or whatever the name of the guy
24 was with, you know, laundry and children, you
25 know, child support and she was helping him to

1 raise money for some other thing. That would
2 have been supporting the enterprise. But she
3 was actually engaged in conduct that supported
4 the criminal activity.

5 And yet you seem to be arguing that
6 looking at that case, it would be enough for,
7 you know, the cell phone to be sold to Osama bin
8 Laden with some knowledge that it might be used
9 generally by his -- himself or his compatriots,
10 as opposed to, you know, this is actually going
11 to be involved in a terrorist attack, which is
12 the kind of thing that was going on in
13 Halberstam.

14 So can you clear up?

15 MR. SCHNAPPER: Yes. So the -- the
16 word Halberstam -- the word "enterprise" in
17 Halberstam is used to refer to a -- a wrongful
18 enterprise because it's proceeding as a tort
19 case and -- but -- but not to refer to other
20 kinds of assistance the court draws that
21 distinction.

22 We -- we would make that distinction
23 here, that is to say, if -- that insofar as
24 social media -- bearing in mind the
25 recommendation qualification here -- is

1 assisting ISIS in its terrorist enterprise,
2 that's what's covered, the -- and -- and --
3 and -- and that's the -- that's the claim we're
4 making here. So I think that there's --

5 JUSTICE JACKSON: I don't understand.
6 I -- I mean, wouldn't -- wouldn't, in the Welch
7 case, you know, her taking care of his children
8 be assisting him so that he doesn't have to be
9 at home at night? He's actually out committing
10 robberies. She would be assisting his, you
11 know, illegal activities, but I understood that
12 what made her liable in this situation is that
13 the assistance that she was providing was, you
14 know, assistance that was directly aimed at the
15 criminal activity. It was not sort of this
16 indirect supporting him so that he can actually
17 engage in the criminal activity.

18 MR. SCHNAPPER: I'm not entirely sure
19 where I'm disagreeing with you, but -- but let
20 me see if this is helpful. I'm not sure it will
21 be.

22 The -- the assistance she was playing
23 was not in the commission of any of the
24 burglaries. Her role was in helping to sell the
25 loot and keeping the books. The books were

1 apparently kept in a perfectly straightforward
2 way. There was nothing unusual about it, except
3 there were no expenses for the --

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

6 MR. SCHNAPPER: Right.

7 JUSTICE JACKSON: All right. So we
8 know she wasn't a principal. She wasn't
9 actually --

10 MR. SCHNAPPER: Yes.

11 JUSTICE JACKSON: -- committing the
12 robbers --

13 MR. SCHNAPPER: Right.

14 JUSTICE JACKSON: -- robberies. She
15 was an aider and abettor. The question is, what
16 does your aid have to go to? And they seem to
17 be saying your aid has to go to the act that is
18 the thing that injures the plaintiff, right, the
19 Reina attack.

20 You seem to be saying that the aid has
21 to go to or can go to the larger set of
22 activities, illegal --

23 MR. SCHNAPPER: Yes.

24 JUSTICE JACKSON: -- terrorist
25 activities --

1 MR. SCHNAPPER: Yes.

2 JUSTICE JACKSON: -- but not
3 necessarily the act. And I -- I don't know that
4 Halberstam helps you as much as you may think
5 because she was in that case aiding in the act
6 of the burglaries that, you know, injured the
7 people whose money and things were stolen.

8 MR. SCHNAPPER: I wouldn't
9 characterize what happened that way, but I --
10 I'm a little concerned that this is going to
11 seem semantic. She was not -- she didn't do
12 anything to assist the commission of a burglary.
13 Her role was only after the fact.

14 JUSTICE JACKSON: I think we may
15 disagree. I mean, that's why she was an aider
16 and abettor. She wasn't a principal. Right.
17 She didn't -- she didn't assist the burglaries
18 in that sense, but she assisted them insofar as
19 she, as Mr. Waxman said, took the stuff, wrote
20 up inventories -- I mean, she was assisting the
21 burglaries, right?

22 MR. SCHNAPPER: Again, at the risk --
23 I'm not feeling this is responsive. No -- no
24 act that occurred by -- by Welch was aided by
25 anything she did. He was not better able to do

1 any of it.

2 And to go back to the issue of
3 principal, I mean, the -- if -- if she had said
4 I'll buy you some new burglary tools, or how
5 about picking the Halberstam case -- house
6 tomorrow, I think they've got a lot of money,
7 that may --

8 JUSTICE JACKSON: Or how about when
9 you bring the loot home, I'll write down the --
10 the things that you have and make sure that it's
11 all recorded properly so that we know what you
12 brought home?

13 MR. SCHNAPPER: It -- it's helpful to
14 the enterprise, but it doesn't -- it doesn't
15 make him better able to commit the burglary.
16 And I think that's the distinction they're
17 trying to advance.

18 If the Court has no further questions?

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas?

21 JUSTICE THOMAS: The -- in paragraph
22 30 of your first amended complaint, you say
23 "Plaintiff's claims are based not upon the
24 content of ISIS's social media postings but upon
25 Defendants' provision of the infrastructure

1 which provides material support to ISIS."

2 What does that mean?

3 MR. SCHNAPPER: Well, I don't think
4 that this -- when this was written, it's trying
5 to parse out the distinction we're now making in
6 terms of the role, but I think the -- the thrust
7 of that -- of that was to be that insofar as an
8 assertion was being made against the social
9 media companies, is that they were helping to
10 propagate that content. The argument is we're
11 not trying to hold you liable merely because
12 there's content there but because you helped to
13 propagate it.

14 Now -- now we would draw a more fine
15 distinction, but I think that's the -- the
16 thrust of that paragraph.

17 JUSTICE THOMAS: So you're not
18 pointing to -- the thrust that I understand is
19 that you're not pointing to specific instances
20 of this; you're -- just a general idea that
21 they're using the service to their -- to their
22 advantage, to ISIS's advantage?

23 MR. SCHNAPPER: Yes. Let me give you
24 a more fulsome answer to that. One of the
25 arguments that the defendant makes is it's not

1 enough to allege that there were 50- or 70- or
2 90,000 ISIS accounts. You have to name some.
3 We do not think that the Federal Rules of Civil
4 Procedure require that.

5 Indeed, the whole gravamen of the
6 problem here was that it was possible to
7 identify tens of thousands of these, and they
8 weren't doing -- but -- but they weren't used in
9 that capacity. There was one instance in which
10 the hacker group Anonymous took down several
11 thousand ISIS accounts at Twitter.

12 Now the -- the complaint doesn't name
13 -- doesn't give you the URLs of the accounts,
14 but I don't think the federal rules require
15 that.

16 JUSTICE THOMAS: So --

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

19 JUSTICE THOMAS: But on the -- but
20 does it also mean -- the fact that you are
21 focused on the infrastructure rather than
22 specific conduct or specific accounts, does that
23 also mean that Twitter could be held liable --
24 Twitter is the aid -- is an aider and abettor in
25 every terrorist act -- terrorist act?

1 MR. SCHNAPPER: That's -- that's a --
2 that's a somewhat different question, so let me
3 -- let me address that.

4 JUSTICE THOMAS: Well, I think the
5 reason I'm asking is, if we're not pinpointing
6 cause and effect or proximate cause for specific
7 things, then -- and you're focused on
8 infrastructure or just the availability of -- of
9 -- of -- of these platforms, then it would seem
10 that every terrorist act that uses this platform
11 would also mean that Twitter is a -- an aider
12 and abettor in those instances?

13 MR. SCHNAPPER: I think, as you phrase
14 it, the answer would probably be yes, and they
15 would agree the way you phrased it. Let me
16 phrase it a little differently, because I
17 understand the point you're trying to make.

18 I think their view is if -- as to any
19 -- if -- if in every single instance in which
20 you could point to, ISIS using Twitter to commit
21 the attack, would they be liable, I think my --
22 my friend would say yes.

23 We're advancing a different argument,
24 and I think this is the thrust of where your --
25 your concern is -- is directed, which is that if

1 our claim is based on providing generalized
2 assistance to the terrorist enterprise, where
3 does that end?

4 And let me say that that's not a
5 question that arises merely under our standard.
6 It arises under the government's standard
7 because the government's formula on page 34
8 includes channeling, directly channeling,
9 substantial amounts of money to ISIS, and the
10 exact same problem would arise there.

11 We think that the appropriate way of
12 addressing that situation is to understand the
13 remoteness issue in -- standard in Halberstam to
14 refer not merely to remoteness in -- in space
15 but to remoteness in time, and that would have
16 been true in -- in the Halberstam case.

17 If -- if there came a point when
18 Hamilton stopped doing the books, let's say,
19 Quicken came along and Welch wasn't using her
20 assistance anymore, there would come a point
21 when it had been too long since she was playing
22 much of a role and she would no longer be
23 liable.

24 So we -- we would -- we would suggest
25 that the standard include remoteness in time,

1 weighed together with the volume of activity,
2 and that -- that would address that problem.

3 And we would suggest, if you use some
4 variant of the government's standard, you -- you
5 include that there as well because it presents
6 the same problem.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: Let's say that a
9 particular person is known in a particular city
10 to be a member of a gang that carries out --
11 carries out crimes. Not charged, hasn't been --
12 prosecution hasn't been able to amass enough
13 proof for a criminal charge, but it's pretty
14 well-known, suspected that that's what this
15 person is doing.

16 The chief of police from the town goes
17 to the cell phone provider and says, look, this
18 gang uses cell phones in carrying out their
19 crimes, cut off their service, goes to the
20 Internet service provider and says that
21 sometimes they use e-mails, cut off the e-mail,
22 goes to the car dealers and -- and repair shops
23 and says they use cars, don't fix their cars,
24 goes to all the gas stations and says don't sell
25 them gas. On Wednesday evening, the gang gets

1 together and they always order in meals from a
2 particular place. They go there. They say
3 don't feed them food.

4 Are they -- are they -- have they
5 aided and abetted the crimes that this gang
6 commits?

7 MR. SCHNAPPER: I -- I think it's
8 probably -- the answer is probably going to
9 depend on the nature of -- of the materials.
10 So, unfortunately, this is difficult, but let's
11 say that the first person on their list is a gun
12 dealer, and the gun dealer is told this person
13 is -- is -- we -- we think this person is an
14 assassin and he's looking for weapons.

15 And they -- and -- and they sell him a
16 gun. They -- that -- that might be aiding and
17 abetting. At the far end of things, take-out
18 Chinese food, no, it's not really connected
19 particularly to the -- to the offense.

20 I think that's a difficult question.
21 But -- but, clearly, at one end of the spectrum,
22 if you sell guns -- and this goes back to
23 Justice Thomas's question. If you provide a gun
24 to someone who you know is a murderer, I think
25 you could be held liable for aiding and

1 abetting.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 Justice Kagan?

5 Justice Gorsuch?

6 JUSTICE GORSUCH: No, thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: No.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 Justice Jackson?

13 Thank you, counsel.

14 MR. SCHNAPPER: Thank you very much.

15 CHIEF JUSTICE ROBERTS: Three minutes
16 for rebuttal, Mr. Waxman.

17 REBUTTAL ARGUMENT OF SETH P. WAXMAN

18 ON BEHALF OF THE PETITIONER

19 MR. WAXMAN: Thank you.

20 So guns and banks is what seems to be,
21 you know, most of the hypotheticals here. And
22 I -- I want to go to -- to Justice Kagan's
23 question about the bank and know your customer
24 and what your customer is doing, but I'm going
25 to start -- because there are special know your

1 customer rules involving banks, I want to start
2 with guns and the -- the -- the point that my
3 friend just brought up about somebody walks into
4 a gun store and says: I hate my wife, please
5 sell me a Glock. I'm going to kill my wife,
6 please sell me a Glock.

7 Obviously, he takes the Glock. If he
8 buys the Glock and never kills his wife, there's
9 no aiding and abetting any crime. If he buys
10 the gun and kills his wife, there obviously is.

11 Walmart is the largest gun dealer, I
12 believe, in the United States. They know for a
13 certainty that some of the people that buy guns
14 are criminals. Some of them are drug gangs.
15 Some of them are terrorists. Nobody would say
16 -- but they don't know anybody in particular.

17 They know that they're there. There's
18 been a newspaper report. The State Department
19 has issued a pronouncement. Nobody would say
20 that they are aiding and abetting particular
21 crimes that happen to be committed by somebody
22 who bought a gun at Walmart.

23 Now, in the bank example, I think the
24 key point as I understood it at -- at least,
25 Justice Kagan, between your colloquy with --

1 with my friend, Mr. Kneedler, was somebody comes
2 into the bank and says -- and either comes in or
3 comes in online or by Zoom. The banker knows
4 this guy is a terrorist, that is, a terrorist in
5 the sense that this person commits acts of
6 international terrorism.

7 And the guy says, love the checking
8 account services you've provided me, I've got a
9 cash flow issue with the thing that I do, please
10 lend me a million dollars. Okay. That's a case
11 in which certainly you would survive a motion to
12 dismiss on the notion that you know this guy
13 commits acts of international terrorism.

14 He has asked you for what he says he
15 needs to "keep doing his thing." That is
16 materially different than a situation in which
17 the bank has 100,000 customers, it knows to a
18 certainty that some of its customers are
19 terrorists and they are making use of the
20 general services that a bank provides. Maybe
21 it's a bank that does business in the Middle
22 East. They are not aiding and abetting an act
23 of terrorism that that bank occurs.

24 Now, according to my friend today, he
25 says, well, this case isn't about the failure to

1 do better at taking things down. This is about
2 recommendations.

3 There are 545 paragraphs in this
4 complaint, and there are four that mention
5 recommendations, each one of which is
6 essentially the sort of neutral algorithm that
7 was talked about before.

8 I see I've come to the end of my
9 sentence.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

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

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Official - Subject to Final Review

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