No. 21-1496

IN THE
Supreme Court of the United States

TWITTER, INC.,
Petitioner,
v.

MEHIER TAAMNEH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER STATE DEPARTMENT LEGAL ADVISERS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

Amici have substantial experience in the areas of international and foreign relations law, including as Legal Adviser to the U.S. Department of State.[1]

Davis R. Robinson served as the Legal Adviser to the Department of State from May 31, 1981, to May 1, 1985. He served on the Members Consultative Group for the Restatement (Fourth), Foreign Relations Law of the United States (2018).

Abraham D. Sofaer served as the Legal Adviser to the Department of State from June 10, 1985, to June 15, 1990. A former U.S. District Judge of the United States District Court for the Southern District of New York, he is the George P. Shultz Senior Fellow (emeritus) in Foreign Policy and National Security Affairs at the Hoover Institution, Stanford University.

Edwin Williamson served as the Legal Adviser to the Department of State from September 20, 1990, to January 20, 1993. He served on the Members Consultative Group for the Restatement (Fourth), Foreign Relations of the United States (2018).

Amici express no views on the ultimate merits of Respondents' claims against Petitioner but submit this brief

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[1] No counsel for any party authored this brief in whole or in part, nor did any person or entity other than *amici* or their counsel make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

in support of neither party to highlight the important foreign-policy implications that flow from this Court's interpretation of aiding-and-abetting claims under the Anti-Terrorism Act.

SUMMARY OF ARGUMENT

The scope of aiding-and-abetting liability under the Anti-Terrorism Act (ATA) has important implications for United States foreign policy. Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA) in 2016 to expand the exception to foreign sovereign immunity for civil ATA claims arising from acts of international terrorism within the United States to all foreign-state actors, not just designated state sponsors of terrorism. In that same enactment, Congress established aiding-and-abetting liability for all civil ATA claims and specified *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983), as the proper framework to determine such liability. Thus, although this case concerns the application of ATA aiding-and-abetting liability to a private party, that same standard will be used to judge allegations raised against foreign nations in American courts.

Subjecting foreign sovereigns to lawsuits and liability in the United States raises important foreign-policy concerns, including strains on international relationships and reciprocal legislation and litigation against the United States. Because the expansion of aiding-and-abetting liability suggests an expansion of foreign-sovereign liability, those foreign-policy concerns are implicated. To avoid upsetting the balance set by Congress, courts must faithfully apply the text of the ATA and the *Halberstam* framework to filter out claims Congress did not authorize.

In this case, the Ninth Circuit made two missteps in applying *Halberstam* to the ATA. *First*, the panel approved the generalized allegation that an aider-and-abettor can be liable for providing assistance to a "broader campaign of terrorism" distinct from an individual act that causes harm. *Second,* the panel deemed as sufficient aiding-and-abetting allegations that suggest a violation of the criminal material-support statute, which does not require the causal connection needed to impose civil liability under the ATA.

Because these errors lower the threshold for asserting a civil aiding-and-abetting claim under the ATA, they also countenance the expansion of liability for foreign sovereigns beyond what Congress specified in JASTA. *Amici* respectfully submit that, if the Court proceeds to the merits of the statutory issue, it should clarify the application of *Halberstam* to ATA claims and vacate the Ninth Circuit's judgment.

ARGUMENT

I. The scope of aiding-and-abetting liability under the Anti-Terrorism Act raises foreign-policy implications.

Section 2333 of the Anti-Terrorism Act (ATA) allows Americans injured by an act of international terrorism to sue those responsible for treble damages, costs, and attorney's fees. *See* 18 U.S.C. § 2333(a). Although the plaintiffs here raise § 2333(a) to sue private companies, the same cause of action may be used against foreign-state actors. Any ruling affecting the scope of aiding-and-abetting liability under the ATA will necessarily apply to such claims against foreign nations. And the scope of foreign nations'

tort liability under U.S. law has important implications for the United States' foreign relations.

A. Congress enacted the current ATA statutory scheme with foreign-state actors in mind.

For more than two decades, § 2333(a) provided a civil cause of action for injuries caused by an act of international terrorism. But Congress excluded such claims against U.S. or foreign government officials. *See* 18 U.S.C. § 2337. That restriction was eased initially only as to claims against countries designated by the Secretary of State as state sponsors of terrorism.[2] Currently four countries are so designated: Cuba, Iran, North Korea, and Syria.[3]

Litigation following the September 11, 2001 terrorist attacks highlighted shortcomings of the ATA vis-à-vis foreign-state actors. Relevant here, the Second Circuit affirmed the dismissal of ATA claims brought by affected victims of 9/11 against the Kingdom of Saudi Arabia and other

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[2] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241–43 (1996) (enacted as 28 U.S.C. § 1605(a)(7)); *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, § 1083, 122 Stat. 3, 338 (2008) (consolidating 28 U.S.C. § 1605(a)(7) with corollary private right of action under 28 U.S.C. § 1605A).

[3] *See* U.S. Dep't of State, State Sponsors of Terrorism, https://www.state.gov/state-sponsors-of-terrorism (last visited Dec. 5, 2022). Only four other countries have previously been designated state sponsors of terrorism: Iraq, Libya, South Yemen, and Sudan. *See* Dianne E. Rennack, Congressional Research Service, R43835, State Sponsors of Acts of International Terrorism—Legislative Parameters: In Brief 8–10 (2021).

official entities "because the Kingdom has not been designated a state sponsor of terrorism by the United States," and thus remained immune from suit under the Foreign Sovereign Immunities Act (FSIA). *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008). The Second Circuit later concluded that the ATA did not provide "an aiding-and-abetting theory of liability," leading it to affirm dismissal of secondary-liability claims against other defendants who allegedly supported al Qaeda. *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 123 (2d Cir. 2013).[4]

The barriers faced by 9/11 victims led Congress to enact—over the President's veto—the Justice Against Sponsors of Terrorism Act of 2016 (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016).[5] In JASTA Congress created an exception to the FSIA for *any* foreign-state official who,

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[4] In an unrelated case, the en banc Seventh Circuit also concluded Congress did not provide for aiding-and-abetting liability under the ATA. *See Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc).

[5] *See, e.g.*, 162 Cong. Rec. S6169 (daily ed. Sept. 28, 2016) (statement of Sen. Cornyn) ("The families of the 9/11 terrorist attacks that occurred in the United States have waited a long time, and I am hopeful they will not have to wait any longer for the opportunity to pursue justice."); *id.* (statement of Sen. Cardin) ("The 9/11 victims and their families deserve meaningful relief, and I cannot support putting obstacles in the way of victims of terrorism seeking justice."); *id.* at S6170 (statement of Sen. Grassley) ("But, it is my hope and expectation that the Senate—and the House—will stand with the 9/11 victims and their families, and stand up to the President, the Saudis, and their army of lobbyists."); *id.* at S6172 (statement of Sen. Schumer) ("The bill … would allow the victims of 9/11 to pursue some small measure of justice, finally giving them the legal avenue to pursue the foreign sponsors

through an act beyond mere negligence, tortiously contributed to a terrorist organization's attack on American soil. *See* JASTA, § 3(a) (codified as 28 U.S.C. § 1605B). Congress also expressly adopted aiding-and-abetting liability for ATA claims, *see id.* § 4 (codified as 18 U.S.C. § 2333(d)(2)), and specified that the D.C. Circuit's decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), provided "the proper legal framework" for such claims, *id.* § 2(a)(5). Thus, Congress enabled ATA claims against all foreign sovereigns and created secondary liability for all ATA claims.

B. Because any foreign state could be sued under the ATA, the scope of such claims has ramifications for U.S. foreign policy.

Although this case concerns an ATA dispute between private parties, the Court's resolution of the questions presented will likely determine the scope of Congress's abrogation of foreign-sovereign immunity under JASTA. And those claims will bring with them implications for the United States' foreign relations.

For one, requiring foreign nations to defend suits can be costly. Indeed, the FSIA was designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003). Because JASTA expanded the terror-

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of a terrorist attack that took the lives of their loved ones."). The Senate overrode the President's veto by a vote of 97 to 1. *Id.* at S6173. The House of Representatives voted to override by a vote of 348 to 77. 162 Cong. Rec. H6032 (daily ed. Sept. 28, 2016).

ism-related exception to the FSIA to *all* nations, the expansion of liability exposes America's allies and state sponsors of terrorism alike to the costs and risks of litigation.

Authorizing claims against foreign sovereigns also implicates the "reciprocal self-interest" of the United States in its foreign relations. *Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955). Under the principal of reciprocity, it should be anticipated that whatever rule the United States adopts for subjecting foreign nations to suits, other countries will enact similar measures against the United States. Indeed, "some foreign states base their sovereign immunity decisions on reciprocity." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). For example, the United Kingdom may restrict or extend immunities to other states to accord with those states' conferral of immunity on the United Kingdom. *See* State Immunity Act 1978, c.33, § 15(1) (United Kingdom). Many nations have similar laws. *See, e.g.*, Foreign States Immunities Act 1984, s.42(1) (Australia); State Immunity Act, R.S.C. 1985, c. S-18, s. 15 (Canada); The State Immunity Ordinance, No. 6 of 1981, s. 16 (Pakistan); State Immunity Act, 1979, s. 17 (Singapore).

If foreign officials can be subjected to suits in American courts on the basis of an overbroad reading or application of "aiding and abetting" an act of international terrorism within the United States, American officials are likely to face similar exposure in foreign courts. Those results would prove costly, and even the possibility of frivolous lawsuits could chill Americans' willingness to serve overseas in diplomatic or military capacities.

II. Given the foreign-policy implications, the Court should provide clear guidance for applying *Halberstam* under the ATA.

By enacting JASTA's terrorism-related exception to the FSIA, Congress has deliberately exposed the United States to adverse foreign-policy consequences. But in doing so Congress limited that exposure with regard to aiding-and-abetting liability by adopting the standard outlined in *Halberstam*. *See* JASTA, § 2(a)(5).

A. Text and context show the "principal violation" under § 2333(d)(2) is "an act of international terrorism."

Under the *Halberstam* standard, the plaintiff must establish three prerequisites: *first*, that "the party whom the defendant aids … perform[ed] a wrongful act that cause[d] an injury"; *second*, that the defendant was "generally aware of his role as part of an overall illegal or tortious activity at the time that he provide[d] the assistance"; *and third*, that the defendant "knowingly and substantially assist[ed] the *principal violation*." 705 F.2d at 477 (emphasis added). The *Halberstam* court explained that, in large part, aiding-and-abetting liability will hinge on the application of the third factor, *i.e.*, "how much encouragement or assistance is substantial enough." *Id.* at 478.[6]

[6] The *Halberstam* court outlined six additional considerations that elucidate "how much" substantial assistance is "enough" under the third factor: (a) "the nature of the act encouraged"; (b) "the amount of assistance given by the defendant"; (c) "the defendant's absence or presence at the time of the tort"; (d) the defendant's "relation to the

This case highlights a threshold question within the critical third factor: what is the "principal violation" the defendant must be alleged to have aided-and-abetted to be liable under § 2333(d)(2)? On this point, the district court focused on individual terrorist attacks and concluded that the complaint failed to allege a connection between the use of a social-media platform and any specified ISIS attack. *See* Pet. App. 177a–178a. By contrast, the Ninth Circuit concluded that it was sufficient for plaintiffs to allege and prove "ISIS's broader campaign of terrorism" of which the specific terrorist attacks that caused Respondents' injuries "were a foreseeable result." *Id.* at 54a.

The district court took the course intended by Congress and with less risk to U.S. foreign policy concerns. The statute that creates both the cause of action and the theory of liability refers to singular acts, not a broad campaign. The ATA gives recourse to those injured by "*an act* of international terrorism." 18 U.S.C. § 2333(a) (emphasis added). Likewise, through JASTA, Congress extended liability to "any person who aids and abets … the person who commited such *an act* of international terrorism." *Id.* § 2333(d)(2) (emphasis added).

Moreover, construing *Halberstam*'s "principal violation" as an individual act of international terrorism aligns with the traditionally "restrictive theory of sovereign immunity" embodied by the FSIA. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). As one of the "discrete and limited exceptions," *Schermerhorn* v. *State of Israel*, 876

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tortious actor"; (e) "the defendant's state of mind"; and (f) the "duration of the assistance provided." 705 F.2d at 483–84 (emphasis omitted).

F.3d 351, 358 (D.C. Cir. 2017) (internal quotation marks omitted), the FSIA's terrorism-related exception applies only to claims "against a foreign state *in accordance with section 2333*." 28 U.S.C. § 1605B(c) (emphasis added). That discrete limitation makes adherence to the ATA's language even more appropriate.

Finally, construing the "principal violation" to be an "act of international terrorism" also makes sense from a foreign-policy perspective. Congress accepted the foreign-policy consequences of allowing U.S. nationals harmed by an "act of international terrorism" to sue those actors whose conduct caused such terrorist acts, including foreign actors otherwise shielded by immunity. It did not, however, use language that requires courts to permit suits based on a foreign state's more generic support of a terrorist organization, thus allowing this Court to minimize the foreign-affairs consequences by adhering to the law's actual text.

B. Victims can pursue claims against those who provide general support to terrorist organizations under the material-support statute.

This construction of "aiding and abetting" under JASTA will not enable foreign-state actors who provide generic support for an organization to evade liability for terrorist attacks that injure U.S. nationals. To the contrary, plaintiffs suing under § 2333 can assert a direct-liability claim based on violations of the criminal material-support statute, 18 U.S.C. § 2339B. Indeed, the Respondents here asserted such a claim. *See* J.A. 162–63 (1st Am. Compl. ¶¶ 520–26).

Under § 2339B, an individual can be prosecuted for "knowingly provid[ing] material support or resources" to an organization he knows to be "a foreign terrorist organization" or an "organization [that] has engaged or engages in terrorist activity" or "terrorism." 18 U.S.C. § 2339B(a)(1). The statute requires only knowledge of "the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 16–17 (2010). It is thus irrelevant under § 2339B whether the defendant intended to enable terrorism-related conduct.

This overall result is sound, since the elements for criminal material support under § 2339B do not automatically give rise to civil liability under the ATA. The ATA's civil-action provision specifies that a plaintiff's injury must have occurred "by reason of" the criminal violation. 18 U.S.C. § 2333(a). Courts have interpreted that language to require a "direct relationship" between the defendant's crime and the plaintiff's injury. *See, e.g.*, *Fields* v. *Twitter, Inc.*, 881 F.3d 739, 744 (9th Cir. 2018). Thus, for example, a well-intentioned philanthropist who knowingly gives money to a terrorist organization could be prosecuted under § 2339B, but his civil liability for the same conduct under § 2333 requires the additional allegation that the support had a direct connection to the act of international terrorism causing the plaintiff's injury.

The district court rejected Respondents' civil § 2339B claim given their inability to allege a plausible causal connection between ISIS's use of social media and the terror attack that killed Respondents' family member. *See* Pet. App. 171a. Respondents did not appeal that determination.

Nonetheless, in the course of deeming sufficient Respondents' separate § 2333 aiding-and-abetting claim, the Ninth Circuit framed the "principal violation" as support for "ISIS's broader campaign of terrorism" and did not require allegations linking ISIS's use of social media to any particular terror attack. The panel thus effectively revived Respondents' civil § 2339B claim without requiring causation.

If Congress had intended aiding-and-abetting liability under the ATA to align with material support, it could have imported § 2339B's language into JASTA's relevant revisions. Instead, Congress required application of the *Halberstam* standard.

C. The Ninth Circuit's application of *Halberstam* could lead to reciprocal claims against the United States.

The Ninth Circuit found plausible the allegation of aiding-and-abetting liability where a defendant provided widely available services to the public, knowing that members of a terrorist organization generally benefited from those services. Under that standard, a foreign state's social welfare programs, humanitarian relief, or military aid could become the basis for an ATA claim in an American court against that state—even if the foreign sovereign genuinely attempted to stop the flow of services to the terrorists, and even if that aid did not directly contribute to the terrorist attack at issue.

Nor would it be difficult, when viewed through the lens of "reciprocal self-interest," *Nat'l City Bank*, 348 U.S. at 362, to imagine a foreign lawsuit applying the same fact

pattern to the United States or its own government officials, diplomats, or military.

CONCLUSION

Through the ATA and JASTA, Congress created an avenue for victims of international terrorism to obtain justice, but it also circumscribed the availability of aiding-and-abetting claims by invoking the *Halberstam* standard. Considering the foreign-policy implications of expanding that terrorism-related liability, *Amici* respectfully submit that the Court should clarify the application of *Halberstam* to ATA claims and vacate the Ninth Circuit's judgment.

Respectfully submitted,

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