No. 23-9

In the Supreme Court of the United States

ASTRAZENECA UK LIMITED, ET AL., PETITIONERS

v.

JOSHUA ATCHLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.*, authorizes United States nationals "injured * * * by reason of an act of international terrorism" to recover treble damages for their injuries. 18 U.S.C. 2333(a). The Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852, amended the ATA to provide that in an action for "injury arising from an act of international terrorism committed, planned, or authorized by" a U.S.-designated foreign terrorist organization, "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. 2333(d)(2).

Respondents are U.S. nationals who were victims of terrorist attacks in Iraq, and their families. They assert direct-liability and aiding-and-abetting claims against petitioners, pharmaceutical and medical device companies that respondents allege supplied goods and payments to the Iraqi Ministry of Health, which were diverted to fund the attacks that injured respondents. The district court dismissed the complaint, but the court of appeals reversed. This Court then decided *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471 (2023), in which the Court considered for the first time the requirements for aiding-and-abetting liability under the ATA. The questions presented are:

1. Whether the Court should grant certiorari, vacate the decision of the court of appeals, and remand for further proceedings in light of *Taamneh*.

2. Whether respondents adequately pleaded proximate causation for direct liability under the ATA.

3. Whether respondents adequately pleaded that a U.S.-designated foreign terrorist organization "committed, planned, or authorized" the attacks at issue.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471 (2023).

STATEMENT

A. Legal Framework

1. The Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.*, authorizes United States nationals "injured * * * by reason of an act of international terrorism" to bring a civil action for treble damages in federal district court. 18 U.S.C. 2333(a). The ATA defines "'international terrorism'" to mean criminal activities that occur

primarily abroad or transcend national boundaries and that "appear to be intended" to "intimidate or coerce a civilian population," to "influence the policy of a government by intimidation or coercion," or to "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. 2331(1).

2. Following the ATA's enactment, courts considered whether the statute made persons who aid and abet terrorists civilly liable. Compare *Rothstein* v. *UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013), with *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 712 (7th Cir. 2008) (en banc), cert. denied, 558 U.S. 981 (2009). The United States expressed the view that the ATA imposes secondary liability on defendants who "knowingly provide[] substantial assistance to a terrorist organization." Gov't C.A. Amicus Br. at 26-27, *Boim*, *supra* (No. 05-1815) (*Boim* Br.); see U.S. Amicus Br. at 8, *O'Neill* v. *Al Raji Bank*, 573 U.S. 954 (2014) (No. 13-318) (*O'Neill* Br.).

The United States further stated that ATA aiding-and-abetting claims should be evaluated under tort-law principles, as "summarized in the seminal D.C. Circuit opinion in *Halberstam* v. *Welch*, 705 F.2d 472 (D. C. Cir. 1983)." *Boim* Br. at 15-16; accord *O'Neill* Br. at 7-8. In addition, the United States explained that while "liability can be imposed under Section 2333(a) if common law tort standards are met even in the absence of a specific intent by the defendant to assist in acts of international terrorism[,] * * * the defendant's intent will normally be a substantial factor in the analysis." *Boim* Br. at 2. And the United States stated that "[i]n certain factual situations," conduct that would violate 18 U.S.C. 2339B—which makes it a crime to "knowingly provide[] material support to a designated organization"—"would

not support civil tort liability" under the ATA, "such as where the connection between a defendant's actions and the act of international terrorism that harms the victim is insubstantial." *Boim* Br. at 3; see *id.* at 23, 31.

3. In 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852. JASTA amended the ATA to expressly provide for aiding-and-abetting liability. The ATA now states that in an action based on "an injury arising from an act of international terrorism committed, planned, or authorized by an organization" that the Secretary of State has designated as a foreign terrorist organization under 8 U.S.C. 1189, "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. 2333(d)(2). JASTA further states that *Halberstam*, "which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by [this] Court * * * , provides the proper legal framework for how such liability should function in th[is] context." § 2(a)(5), 130 Stat. 852 (18 U.S.C. 2333 note).

B. Factual and Procedural Background

This case arises from terrorist attacks that occurred in Iraq between 2005 and 2011. Pet. App. 67a. Respondents are "American service members [and] civilians" who were injured in those attacks, as well as their families. *Ibid.* Respondents sued petitioners—numerous pharmaceutical and medical equipment companies—alleging that petitioners' interactions with the Iraqi Ministry of Health (Ministry) and the Ministry's state-owned import subsidiary, Kimadia, made petitioners both directly and secondarily liable for the attacks

under the ATA. See *id.* at 67a-69a & nn.1-2 (listing defendants). The district court dismissed the Third Amended Complaint (TAC), and the court of appeals reversed. *Id.* at 66a, 99a.

1. During Saddam Hussein's regime, the Ministry and Kimadia operated a government-run healthcare system. Pet. App. 69a. According to respondents' complaint, the Ministry and Kimadia were openly plagued by corruption and profiteering. *Ibid.* Respondents allege that Kimadia exploited a humanitarian exception to sanctions against Iraq that allowed the country to sell some of its oil in order to purchase essential food and medical supplies for its people. *Id.* at 9a. In particular, respondents allege that Kimadia required medical goods purveyors to provide cash kickbacks or supply free goods—typically ten percent in excess of the underlying contract quantities—which were then diverted to the black market and appropriated by corrupt Kimadia employees. *Ibid.*; see TAC ¶¶ 44-53.

In March 2003, the United States and a coalition of armed forces invaded Iraq and removed Saddam Hussein from power. Pet. App. 9a, 68a. After the fall of the regime, the United States, other coalition members, and Iraqi military forces worked to rebuild Iraq while also engaging in years of armed conflict against various insurgent forces. *Id.* at 68a. During that time, the United States invested billions of dollars to ensure political and security conditions conducive to establishing a healthy democracy, including by rebuilding Iraq's healthcare system. See, *e.g.*, C.A. App. 661-664, 666-668, 674, 699. The United States also encouraged private investment in those reconstruction efforts. *E.g.*, *Financial Reconstruction in Iraq: Hearings Before the Senate Banking Subcomm. on International Trade and Finance of the*

Senate Comm. on Banking, Housing, and Urban Affairs (2004) (Statement of Earl Anthony Wayne, Ass't Sec'y, Bureau of Econ. & Bus. Affairs, U.S. Dep't of State).

2. a. Before the resumption of full sovereign authority by the Iraqis, the United States tried unsuccessfully to abolish Kimadia and replace it with a market-based procurement system for the Ministry. Pet. App. 10a; TAC ¶ 48. Instead, in early 2004, the Sadrist Trend—a political party aligned with Muqtada al-Sadr, a Shiite religious leader who opposed U.S. involvement in Iraq—began assuming key positions throughout the Ministry bureaucracy and purging employees disloyal to the group. Pet. App. 10a-11a; TAC ¶¶ 59, 63, 66. After Iraq's first post-Saddam parliamentary election in January 2005, the Sadrists officially assumed control over several ministries, including the Ministry of Health. Pet. App. 11a; TAC ¶¶ 68-71.

According to respondents' complaint, even before the U.S. invasion of Iraq, Muqtada al-Sadr worked with Hezbollah's "chief terrorist mastermind, Imad Mugniyeh," to establish, train, and arm the insurgent group Jaysh al-Mahdi, which acted as a militia for the Sadrists. Pet. App. 9a (citation omitted); see TAC ¶ 56. Hezbollah has been a designated foreign terrorist organization since 1997. TAC ¶ 363; see Bureau of Counterterrorism, U.S. Dep't of State, *Foreign Terrorist Organizations*, https://www.state.gov/foreign-terrorist-organizations/ (listing "Hizballah"). Jaysh al-Mahdi has never been so designated.

Respondents allege that Jaysh al-Mahdi exploited the Sadrists' electoral success and co-opted the Ministry for Jaysh al-Mahdi's operations. Pet. App. 11a. Among other things, respondents allege that Jaysh al-

Mahdi used Ministry hospitals as terrorist bases, used Ministry ambulances to transport Jaysh al-Mahdi "death squads" across Baghdad, and used the Ministry's Facilities Protection Service to torture and kill Muqtada al-Sadr's enemies. *Ibid.* (citation omitted); see TAC ¶¶ 3, 85-89, 103.

b. As noted above, petitioners are pharmaceutical and medical equipment companies. Pet. App. 67a. Respondents allege that between 2004 and 2013, "[i]n an effort to grow their market share in Iraq," TAC ¶ 115, petitioners engaged in corrupt transactions with the Ministry that indirectly provided financial support to Jaysh al-Mahdi. See Pet. App. 11a-12a. First, petitioners allegedly "made cash bribes (called 'commissions')" to Ministry officials to obtain Kimadia contracts. *Id.* at 12a; see TAC ¶ 142. These bribes were "standard practice for companies dealing" with the Ministry, TAC ¶ 142, and they were "typically 20% of any contract price," Pet. App. 12a. Respondents allege that Jaysh al-Mahdi benefited from these payments because Ministry officials "themselves had to kick back a percentage of their earnings to Sadr and Jaysh al-Mahdi as the price of keeping their lucrative positions in government." TAC ¶ 144.

Second, petitioners' contracts with Kimadia to import prescription drugs and medical devices often included an obligation to donate "[f]ree goods" in addition to those provided by the contract. Pet. App. 12a; see TAC ¶¶ 116-141. Respondents allege that petitioners knew or recklessly disregarded that, as during the Saddam regime, those goods did not "serve any legitimate charitable or medicinal purpose." TAC ¶ 137. Instead, the free goods "were structurally designed to disappear from inventory" and be resold on the "black market."

TAC ¶¶ 137-138. Respondents further allege that petitioners knew or recklessly disregarded that the payments and free goods helped fund Jaysh al-Mahdi's terrorist attacks, including against Americans. See, *e.g.*, Pet. App. 13a; TAC ¶¶ 10, 180.

3. In October 2017, respondents sued petitioners under the ATA, alleging that petitioners are directly and secondarily liable for more than 300 Jaysh al-Mahdi attacks that caused respondents' injuries. See Pet. App. 90a; TAC ¶¶ 3181-3221. Respondents also assert state-law claims based on the same conduct. TAC ¶¶ 3222-3254.

The district court dismissed the complaint. Pet. App. 68a-96a. On direct liability, the court explained that the "ATA's 'by reason of' language demands a showing of proximate causation." *Id.* at 85a (citation omitted). The court determined that even if petitioners "were aware" that their bribes to the Ministry would be appropriated by Jaysh al-Mahdi, the Ministry's involvement defeats a finding of proximate causation because the Ministry is a sovereign government agency that "did not 'exist solely to perform terrorist attacks.'" *Id.* at 87a-88a, 95a (quoting *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 392 (7th Cir. 2018)).

The district court next held that respondents' aiding-and-abetting claims should also be dismissed. Pet. App. 89a-96a. The court first focused on the requirement that a designated foreign terrorist organization "committed, planned, or authorized" the attacks in question. *Id.* at 89a-90a (quoting 18 U.S.C. 2333(d)(2)). The court explained that Jaysh al-Mahdi—which has never been so designated—"carried out" the attacks. *Id.* at 90a. And while "Hezbollah-affiliated individuals were [directly] involved in 22 out of the 300-plus attacks at

issue," the court found that for more than 300 other attacks, respondents' allegations suggest that Hezbollah offered only "general support," not that it "'planned' or 'authorized'" the attacks. *Id.* at 90a-91a (citation omitted).

The district court further determined that "[e]ven if" respondents adequately alleged the involvement of a designated foreign terrorist organization, their allegations still would not suffice for aiding-and-abetting liability. Pet. App. 93a. The court concluded that petitioners' alleged provision of "general [financial] support" to Jaysh al-Mahdi "through their contracts with the Ministry"—actions petitioners took without any "desire" to help Jaysh al-Mahdi commit terrorist attacks—could not be considered the knowing provision of substantial assistance to the attacks that injured respondents. *Id.* at 94a-95a.

4. The court of appeals reversed. Pet. App. 1a-66a.

On direct liability, the court of appeals held that respondents adequately pleaded proximate causation by alleging that petitioners' alleged support to Jaysh al-Mahdi was a "substantial factor" in causing respondents' injuries and that those injuries were "reasonably foreseeable or anticipated natural consequences of [petitioners'] assistance." Pet. App. 43a, 45a (citation and internal quotation marks omitted). In the court's view, petitioners' efforts to frame the Ministry as an independent intermediary that breaks the causal chain "rest on an untenably skeptical reading of the complaint," which alleges that the Ministry "had been overtaken by terrorists." *Id.* at 44a-45a.

With respect to secondary liability, the court of appeals held that respondents "plausibly allege that Hezbollah both planned and authorized the attacks." Pet.

App. 23a. The court determined that the complaint's "detail[ed]" allegations that Hezbollah provided "weaponry, training, and knowledge to Jaysh al-Mahdi with the intent of harming Americans in Iraq constitute a 'plan.'" *Id.* at 25a. And "allegations that Hezbollah exerted religious, personal, and operational authority over Jaysh al-Mahdi show that it 'authorized' the attacks as well." *Id.* at 26a.

The court of appeals further held that respondents adequately alleged that petitioners "'aid[ed] and abet[ted], by knowingly providing substantial assistance' to 'act[s] of international terrorism.'" Pet. App. 27a (quoting 18 U.S.C. 2333(d)(2)) (brackets in original). The court applied the three-part test described in *Halberstam*. *Ibid.*; see 705 F.2d at 477. The court explained that there was no dispute as to the first element—that wrongful acts caused respondents' injuries. Pet. App. 28a. As to the second element—whether respondents were "generally aware" of their role "as part of an overall illegal or tortious activity," *Halberstam*, 705 F.2d at 477—the court determined that "the corrupt provision of free goods and cash bribes to" Jaysh al-Mahdi, a known terrorist group, "supports the inference that [petitioners] were generally aware of their role in activity foreseeably lending support to acts of international terrorism." Pet. App. 31a.

Turning to the third element of knowing and substantial assistance, the court of appeals stated that because petitioners did not "argue that their provision of cash and free goods was in any way accidental, * * * the assistance was given knowingly." Pet. App. 32a. The court then addressed the "six 'substantial assistance' factors" identified in *Halberstam*. *Ibid.* The court determined that, on balance, those factors supported a

finding of substantial assistance. The court found that the "nature of the act assisted," the "'amount and kind of assistance,'" petitioners' "state of mind," and the "duration" of their assistance supported a finding of substantial assistance; that petitioners' lack of "'presence at the time of the tortious conduct'" counseled against such a finding; and that the relationship between petitioners and "the principal tortfeasors" supported neither party. *Id.* at 32a-37a (capitalization, citation, and emphasis omitted).

C. This Court's Decision In *Taamneh*

More than two months after the D.C. Circuit denied petitioners' petition for rehearing en banc, see Pet. App. 1a, this Court decided *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471 (2023). In *Taamneh*, victims of a terrorist attack carried out by ISIS sued Facebook, Twitter, and Google (which owns YouTube), alleging that the social-media companies knew that ISIS used their services to recruit new terrorists and raise funds for terrorism but failed to take sufficient actions to stop ISIS from doing so. See *id.* at 478-482. Considering the scope of ATA liability for the first time, this Court held that the plaintiffs' allegations failed to state a claim that the companies aided and abetted the relevant terrorist attack. *Id.* at 478, 497-507. In so holding, *Taamneh* provided significant guidance on how the common-law factors articulated in *Halberstam* apply under the ATA.

DISCUSSION

The United States condemns in the strongest terms the terrorist acts that caused respondents' injuries and sympathizes with the profound loss respondents have suffered. The court of appeals' decision, however, was rendered without the benefit of this Court's guidance in

Twitter, Inc. v. *Taamneh*, 598 U.S. 471 (2023). That intervening decision clarified the standard for aiding-and-abetting liability under the ATA in ways that may bear on the court of appeals' analysis. Consistent with its usual practice, this Court should therefore grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings in light of *Taamneh*. In the view of the United States, the other questions presented in the petition for a writ of certiorari do not warrant this Court's plenary review at this time.

A. THIS COURT SHOULD GRANT, VACATE, AND REMAND IN LIGHT OF *TAAMNEH*

1. This Court routinely grants certiorari, vacates the decision below, and remands (GVRs) the case when "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam); see *Stutson* v. *United States*, 516 U.S. 193, 196 (1996) (per curiam). Most relevant here, a GVR is appropriate when this Court issues a decision "after the decision under review" that "change[s] or clarifie[s] the governing legal principles in a way that could possibly alter the [lower court's] decision." *Flowers* v. *Mississippi*, 579 U.S. 913, 913 (2016) (Alito J., dissenting). The Court need not be certain that the court of appeals will reach a different result on remand. Rather, "[i]t is precisely because of uncertainty" regarding the effect of a legal development "that [this Court] GVR[s]." *Lawrence*, 516 U.S. at 172; see *id.* at 174.

2. This case satisfies the criteria for a GVR in light of *Taamneh*. While *Taamneh* reaffirmed the general

common-law principles that have long governed aiding-and-abetting claims, see 598 U.S. at 493-494, it clarified those principles' application to ATA claims in ways that could affect the court of appeals' view of this case.

a. *Taamneh* emphasized the common law's recognition of "the need to cabin aiding-and-abetting liability to cases of truly culpable conduct," 598 U.S. at 489, and thus to avoid "sweep[ing] in innocent bystanders as well as those who gave only tangential assistance," *id.* at 488. The Court explained that the ATA's requirement that a secondary defendant "knowingly provide[] substantial assistance" to an act of international terrorism "rest[s] on the same conceptual core that has animated aiding-and-abetting liability" under the common law: that secondary liability is appropriate where a defendant "consciously and culpably 'participate[d]' in a wrongful act so as to help 'make it succeed.'" *Id.* at 493, 506 (citation omitted; second set of brackets in original) (quoting 18 U.S.C. 2333(d)(2) and *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949)).

Applying that standard, this Court unanimously held that the complaint in *Taamneh* fell "far short" of plausibly alleging an aiding-and-abetting claim under the ATA. 598 U.S. at 505. The Ninth Circuit had held that the plaintiffs plausibly stated an aiding-and-abetting claim because the social-media companies were generally aware that ISIS made use of their platforms to aid in its recruitment and expansion and the companies did not take sufficient steps to prevent that use. *Ibid.* But this Court observed that the plaintiffs had not alleged that the defendants' social-media platforms were used to plan the specific act of international terrorism on which the plaintiffs based their claims of injury. And the Court further explained that the defendants'

general awareness that members of ISIS relied upon those platforms for recruitment and fundraising, in much the same way millions of other people used the platforms, did not establish that the social-media companies "consciously, voluntarily, [or] culpably participate[d]" in the attack. *Ibid.*; *id.* at 498 ("None of [plaintiffs'] allegations suggest that defendants culpably 'assoc[iated themselves] with' the Reina attack, 'participate[d] in it as something that [they] wishe[d] to bring about,' or sought 'by [their] action to make it succeed.'") (quoting *Nye & Nissen*, 336 U.S. at 619) (first alteration added); see generally *id.* at 497-505.

b. In so holding, this Court explained that the Ninth Circuit's contrary determination rested on several errors regarding the knowing-and-substantial-assistance analysis. *Taamneh*, 598 U.S. at 503-506. Although the conduct alleged in this case, and the court of appeals' analysis, differ in a number of respects from *Taamneh*, this Court's guidance could affect the outcome of respondents' aiding-and-abetting claims in several ways.

i. *Taamneh* explained that the Ninth Circuit erred in "fram[ing] the issue of substantial assistance as turning on [the social-media platforms'] assistance to ISIS's activities in general," rather than the specific attack that injured the plaintiffs. 598 U.S. at 503. Aiding-and-abetting liability requires some nexus between the alleged assistance and the specific tort in question. *Id.* at 494-496; see, *e.g.*, *Metge* v. *Baehler*, 762 F.2d 621, 624 (8th Cir. 1985), cert. denied, 474 U.S. 1057, and 474 U.S. 1072 (1986); *Aetna Cas. & Sur. Co.* v. *Leahey Const. Co.*, 219 F.3d 519, 537 (6th Cir. 2000); Restatement (Second) of Torts § 876 cmt. d (1970). And because the "twin requirements" of knowing and substantial assistance "work[] in tandem, with a lesser showing of one

demanding a greater showing of the other," *Taamneh*, 598 U.S. at 491-492, the "plaintiffs' failure to allege any definable nexus" between the social-media companies' "assistance" and the relevant attack, "at minimum[,] drastically increase[d] their burden to show that defendants somehow consciously and culpably assisted the attack." *Id.* at 503; see *id.* at 506.

Like the Ninth Circuit's decision in *Taamneh*, the decision below at times focuses on petitioners' alleged assistance to Jaysh al-Mahdi in general, rather than the terrorist attacks that injured respondents. See, *e.g.*, Pet. App. 32a, 33a, 39a-40a. To be sure, the D.C. Circuit stated that knowingly providing "[s]ubstantial assistance to the ultimate deed" suffices for liability. *id.* at 39a; see Br. in Opp. 17. But the court did not undertake to trace a "definable nexus" between the funds and medical goods petitioners supplied to the Ministry, on the one hand, and the attacks that injured respondents, on the other. *Taamneh*, 598 U.S. at 503. As this Court noted in *Taamneh*, that does not necessarily defeat secondary liability: "more remote support can still constitute aiding and abetting in the right case." *Id.* at 496. But to the extent respondents have not alleged a close nexus between petitioners' aid and any particular attack, *Taamneh* requires a greater showing of "culpable participation through intentional aid that substantially furthered the tort." *Id.* at 506. Ruling before *Taamneh*, the court of appeals did not expressly apply a standard that assessed whether petitioners' actions entailed "culpable participation." *Ibid.*

Similarly, *Taamneh* acknowledged that a secondary defendant could be liable for all of a group's terrorist attacks, but only where—as in *Halberstam*—the secondary defendant's participation in an overall course of

conduct was so "pervasive, systemic, and culpable" as to form a "near-common enterprise." 598 U.S. at 502. To the extent respondents' theory would hold petitioners liable for all or a broad swath of Jaysh al-Mahdi's acts of international terrorism during the relevant period, the court of appeals did not address whether respondents' allegations meet the demanding standard that *Taamneh* subsequently articulated.[1]

ii. *Taamneh* also faulted the Ninth Circuit for "separat[ing] the 'knowing and 'substantial [assistance]' subelements" and "analyz[ing] the 'knowing' subelement as a carbon copy" of general awareness. 598 U.S. at 503-504 (citation omitted). Instead, the knowing and substantial assistance components "'should be considered relative to one another' as part of a single inquiry designed to capture conscious and culpable conduct." *Id.* at 504 (citation omitted). The "'knowing'" requirement is "designed to capture the defendants' state of mind with respect to their actions and the tortious conduct (even if not always the particular terrorist act), not

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[1] Respondents suggest (Br. in Opp. 17-18) that the court of appeals applied the correct nexus standard because "Jaysh al-Mahdi's attacks on respondents were the foreseeable result of petitioners' funding." That misunderstands the role of foreseeability under the common law and the ATA, as explained in *Taamneh*. "As *Halberstam* makes clear, people who aid and abet a tort can be held liable for *other* torts that were 'a foreseeable risk' of the intended tort." *Taamneh*, 598 U.S. at 496 (emphasis added; citation omitted). Thus, in *Halberstam*, the defendant could be held liable for her partner's killing of a burglary victim, which was a foreseeable consequence of the series of burglaries she aided and abetted. *Id.* at 487, 495-496. The foreseeability of an attack is not a substitute for finding that the secondary defendant aided and abetted that attack (or a number of attacks) by providing knowing and substantial assistance.

the same general awareness that defines *Halberstam*'s second element." *Ibid.*

The court of appeals here made similar errors. The court stated that if petitioners "'knowingly—and not innocently or inadvertently—gave assistance, directly or indirectly, and if that assistance was substantial,' then the 'knowing and substantial assistance' element of aiding and abetting is sufficiently established." Pet. App. 32a (quoting *Kaplan* v. *Lebanese Canadian Bank, SAL*, 999 F.3d 842, 864 (D.C. Cir. 2021)). And because petitioners did not "argue that their provision of cash and free goods was in any way accidental," the court determined that "the assistance was given knowingly." *Ibid.*

The court of appeals addressed knowledge a second time, when it turned to "weigh[ing] [*Halberstam*'s] six 'substantial assistance' factors." Pet. App. 32a. One of those factors is the defendant's "state of mind"; the court determined that "[t]his factor favors aiding-and-abetting liability because [petitioners'] assistance was knowingly provided with a general awareness that it supported the terrorist acts of a notoriously violent terrorist organization that had overrun the Ministry of Health." *Id.* at 34a (capitalization and emphasis omitted). That determination rested on the court's conclusion that respondents adequately alleged that petitioners "would have been aware" of news reports of Jaysh al-Mahdi's infiltration of the Ministry, which made it plausible that petitioners were "generally aware" that the "free goods and cash bribes" they gave to Ministry officials could be put to terrorist ends. *Id.* at 30a-31a.

Taamneh makes clear that this approach—which focuses on petitioners' general awareness of the relationship between their actions and a terrorist organization's overall scheme, and not specifically on the central

question whether petitioners consciously, voluntarily, and culpably participated in that scheme—is "incorrect." 598 U.S. at 504. Instead, the appropriate inquiry is whether petitioners' payments to the Ministry were "significant and culpable enough to justify attributing" to them several hundred terrorist attacks committed after Jaysh al-Mahdi appropriated those funds. *Ibid.* Again, it is unclear to what extent the court of appeals' analysis and conclusion are consistent with that standard.

iii. Finally, *Taamneh* explained that the Ninth Circuit focused too intensely on comparing the facts alleged in that case to the components of *Halberstam*'s legal framework. *Taamneh*, 598 U.S. at 503-504. The Court observed that the ATA cites *Halberstam* approvingly as an informative example of how to analyze claims that a defendant aided and abetted an act of terrorism. *Id.* at 485-486. But that general approval does not require courts to "hew tightly to the precise formulations that *Halberstam* used." *Id.* at 493. Instead, *Halberstam* is "by its own terms a common-law case and provided its elements and factors as a way to synthesize the common-law approach to aiding and abetting." *Ibid.* The "point" of the *Halberstam* "factors is to help courts capture the essence of aiding and abetting: participation in another's wrongdoing that is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor." *Id.* at 504.

Like the Ninth Circuit in *Taamneh*, the court of appeals here largely analyzed the substantial-assistance factors "as a sequence of disparate, unrelated considerations." *Taamneh*, 598 U.S. at 504. And, as in *Taamneh*, the court's analysis focused "primarily on the value of" petitioners' alleged aid to Jaysh al-Mahdi, "rather than

whether [petitioners] culpably associated themselves with" Jaysh al-Mahdi's (or Hezbollah's) actions. *Ibid.*; see Pet. App. 37a (focusing on the importance of petitioners' alleged support to Jaysh al-Mahdi's development). A GVR is thus appropriate to ensure that the court of appeals has not "elided the fundamental question of aiding-and-abetting liability: Did [petitioners] consciously, voluntarily, and culpably participate in or support the relevant wrongdoing?" *Taamneh*, 598 U.S. at 505.

3. Respondents' remaining arguments against a GVR are unpersuasive.

a. Respondents contend (Br. in Opp. 13-14) that a GVR is not warranted because *Taamneh* "all-but-expressly endorsed liability" under the circumstances here. Specifically, respondents point out that this Court distinguished between a secondary defendant's "passive nonfeasance" and "active malfeasance," *id.* at 13 (citation omitted), and the Court acknowledged that, in an appropriate case, conscious and culpable participation in terrorist activities could be inferred when a business provided routine services in an "unusual" way, *Taamneh*, 598 U.S. at 502; see U.S. Amicus Br. at 22-23 n.1, *Taamneh*, *supra* (No. 21-1496) (stating that "atypical business transactions" are relevant to whether a court may infer knowing and substantial assistance). *Taamneh* observed that where defendants offer unusual assistance that is "more direct, active, and substantial," plaintiffs "might be able to establish liability with a lesser showing of scienter." 598 U.S. at 502.

To be sure, respondents allege affirmative, atypical transactions that, they maintain, distinguish this case from *Taamneh*. Critically, however, *Taamneh* did not approve imposing liability whenever a plaintiff can

identify an atypical transaction with an organization that affiliates with terrorists. See 598 U.S. at 502 (declining to "consider every iteration on this theme"). And additional aspects of respondents' theory of liability may complicate the question whether it is appropriate to draw an inference of conscious and culpable participation from the transactions at issue here.

Most notably, respondents do not allege that petitioners "direct[ly] channel[ed]" resources to a designated foreign terrorist organization. U.S. Amicus Br. at 34, *Tammneh*, *supra* (No. 21-1496); see Br. in Opp. 18 (relying on this portion of the government's brief). Rather, petitioners allegedly provided cash bribes and excess goods to Ministry officials, generally pursuant to standard conditions and express contracts with the Ministry in the service of the Ministry's legitimate programs. See, *e.g.*, Pet. App. 88a; TAC ¶¶ 120, 142. Respondents allege that a portion of the bribes was then paid to Jaysh al-Mahdi as part of a religious tax, TAC ¶ 144, and that the free goods were misappropriated by Jaysh al-Mahdi agents within the Ministry who sold the goods on the black market to fund Jaysh al-Mahdi's operations, TAC ¶¶ 107, 128.

Assuming, as the court of appeals did, that petitioners were aware that the Ministry operated as a proxy for Jaysh al-Mahdi and that Jaysh al-Mahdi regularly misappropriated Ministry funds to violent ends, Jaysh al-Mahdi is not—and has never been—designated as a foreign terrorist organization under 8 U.S.C. 1189.[2]

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[2] The Secretary of State's decision whether to designate a group as a foreign terrorist organization has significant consequences, including criminal penalties for those who provide "material support or resources" to that organization. 18 U.S.C. 2339B(a)(1). The U.S. government generally does not comment on the reasoning under-

Respondents' theory of liability therefore depends upon allegations that Hezbollah planned or authorized the relevant attacks. Under respondents' theory, petitioners are secondarily liable because they transacted with the Ministry, which served as a proxy for Jaysh al-Mahdi, which in turn served as a proxy for Hezbollah. *Taamneh* provides that the ultimate question is whether the totality of these circumstances—including the extent of petitioners' alleged knowledge about Hezbollah's reliance on Jaysh al-Mahdi's use of Ministry resources to engage in acts of international terrorism jointly committed, planned, or authorized by Hezbollah—is sufficient to show that respondents consciously, voluntarily, and culpably participated in such attacks. A GVR is appropriate to determine whether respondents' pleading meets that standard.[3]

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pinning any decision whether to designate a particular group, but a variety of policy considerations can inform that determination, including diplomatic considerations about broader regional relationships and the need to engage diplomatically with a group, as well as concerns that a designation will inhibit private investment in regions experiencing humanitarian crises. Cf. Press Statement, Anthony J. Blinken, Secretary of State, U.S. Dep't of State, *Revocation of the Terrorist Designations of Ansarallah* (Feb. 12, 2021), https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah/. The ATA's imposition of secondary liability only for acts of international terrorism that are "committed, planned, or authorized" by a designated foreign terrorist organization, 18 U.S.C. 2333(d)(2), preserves the federal government's ability to effectively promote these foreign policy priorities.

[3] Respondents suggest (Br. in Opp. 14) that in *Taamneh*, the United States "explicitly support[ed] respondents' claims here." But the portion of the government's brief that respondents cite states only that "courts have found [the] knowing-and-substantial assistance requirement more easily met where defendants engaged in transactions outside the regular course of business." U.S. Amicus

b. Respondents briefly contend (Br. in Opp. 23) that a GVR will not change the outcome of the litigation because their complaint also includes direct-liability claims. But petitioners reasonably assert (Pet. 17) that if their actions lacked a sufficiently close nexus to support aiding-and-abetting liability, respondents necessarily will be unable to demonstrate the proximate causation required for direct liability. In any event, as petitioners point out (Reply Br. 6), this Court may in some circumstances GVR when an intervening decision affects fewer than all claims.

c. Finally, respondents suggest that the "equities of the case" counsel against a GVR, on the theory that "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration." Br. in Opp. 24 (quoting *Lawrence*, 516 U.S. at 168). But as already discussed, there is a reasonable possibility that a remand will affect the court of appeals' decision. And while further delay in this long-pending case is unfortunate, the court of appeals may seek to minimize any delay on remand.

B. PLENARY REVIEW IS NOT WARRANTED AT THIS TIME

Petitioners urge (Pet. 16) that "[i]f this Court does not [GVR]," it should grant certiorari on two other questions presented. No further review of those questions is warranted.

Br. at 22, *Taamneh*, *supra* (No. 21-1496); cf. Tr. of Oral Arg. at 81, *Taamneh*, *supra* (No. 21-1496) (government counsel acknowledging that the relevant allegations in this case suggest a "degree of culpability," without "necessarily saying" whether the decision below was "right or wrong"). In any event, the government's statements in *Taamneh* were made without the benefit of this Court's subsequent decision in that case.

1. Focusing on respondents' direct-liability claims, petitioners urge (Pet. i (Question 2), 17-20) this Court to decide whether respondents adequately allege that petitioners' dealings with Jaysh al-Mahdi proximately caused respondents' injuries. Specifically, petitioners contend that proximate causation requires "a direct link" between a defendant's actions and the attack that causes the plaintiff's injuries, and they assert that other courts of appeals have held that a defendant's transactions with foreign states—including state sponsors of terrorism—break the chain of causation. Pet. 17-18 (citing *Rothstein* v. *UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013); *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 393 (7th Cir. 2018)).

No further review of that issue is warranted at this time. The decision below articulates generally accepted legal principles governing causation in the context of the particular and unusual allegations in this case—namely, that the Ministry was controlled by Jaysh al-Mahdi. See Pet. App. 41a-48a. The court of appeals' fact-specific determination does not create a division with other courts of appeals.

2. With respect to aiding-and-abetting liability, petitioners urge (Pet. i (Question 3), 20-23) review of the question whether respondents plausibly allege that Hezbollah planned or authorized the attacks at issue. In support, petitioners rely on other courts' holdings that "[a] designated organization's general support or encouragement to the attackers does not suffice." Pet. 20; see Pet. 21-22 (citing cases).

Here, however, petitioners "acknowledge" that Hezbollah worked closely with Jaysh al-Mahdi to plan and commit 22 of the attacks at issue. Pet. App. 20a; see Reply Br. 10 n.1. And as to the other attacks, the court

of appeals determined that respondents' complaint "describes in detail" Hezbollah's alleged "deep and far reaching" coordination with and support for Jaysh al-Mahdi during the relevant period. Pet. App. 23a, 25a. The court's determination that those allegations are sufficient to plausibly allege that Hezbollah "planned" or "authorized" the attacks that injured respondents does not conflict with the decision of any other court of appeals: The allegations as pled could be taken to amount to more than a "designated organization's general support or encouragement to the attackers." Pet. 20. And the court's consideration, on remand, of the aiding-and-abetting claim in light of *Taamneh* could obviate the need for further review of this issue. The third question presented thus does not warrant this Court's plenary review at this time.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further consideration in light of *Taamneh*.

Respectfully submitted.

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