No. 21-381

In The Supreme Court of the United States

TZVI WEISS, ET AL.,
Petitioners,

v.

NATIONAL WESTMINSTER BANK PLC,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL WESTMINSTER BANK PLC

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, National Westminster Bank, plc certifies that it is wholly owned by NatWest Holdings Limited which is wholly owned by NatWest Group, plc. Only NatWest Group, plc is a publicly held company.

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INTRODUCTION

Respondent National Westminster Bank, plc ("NatWest") is one of the largest retail banks in the United Kingdom. Petitioners sued NatWest for processing routine, ordinary-course wire transfers by its former customer, Interpal, a lawful charity registered (to this day) under the laws of the United Kingdom that provides humanitarian relief in the Palestinian Territories and Lebanon. Petitioners, who are victims of terrorist attacks in Israel between 2001 and 2004 allegedly committed by Hamas, a designated Foreign Terrorist Organization ("FTO"), alleged below that NatWest's routine banking services for Interpal in the United Kingdom subjected NatWest to civil liability for these attacks (including treble damages and attorneys' fees) under the Anti-Terrorism Act, 18 U.S.C. § 2333(a) (the "ATA"), and the Justice Against Sponsors of Terrorism Act, *id.* § 2333(d) ("JASTA").

Petitioners originally claimed that NatWest was liable as a principal under the ATA because, on Interpal's instructions, the bank transferred funds from Interpal's sterling and dollar accounts in the United Kingdom to charities in the Palestinian Territories that petitioners allege the bank knew or should have known were affiliated with Hamas, although none of these charities—which petitioners concede performed charitable services and did not cause or play any role in any of the attacks at issue—publicized having any relationship with Hamas or had been designated by the U.S. or UK governments as being affiliated with Hamas. Petitioners later

sought leave to add an alternative claim that NatWest is secondarily liable for their injuries as an aider and abettor of Hamas under JASTA.

Based on their review of the voluminous evidentiary record developed in this case through a near-decade of discovery on three continents, the district court and Second Circuit both concluded that there is no triable issue concerning NatWest's factual or legal responsibility for the attacks on either petitioners' original ATA primary liability claim or on their alternative JASTA secondary liability claim. Petitioners here only seek review of the JASTA ruling.

Such review is not warranted. Notwithstanding petitioners' efforts to engineer a purely legal question from the decision below, their real quarrel is with the lower courts' fact-bound application of the multi-factor test for aiding and abetting liability set out in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress explicitly instructed provides the governing legal standard for JASTA claims in the Findings and Purpose section of the statute. Specifically, petitioners contend that the lower courts incorrectly applied *Halberstam* in ruling that no reasonable juror could find NatWest was "generally aware of [its] role as part of an overall illegal or tortious activity" or that it "knowingly and substantially assist[ed] the principal violation," *i.e.*, the terrorist attacks by which petitioners were injured. Pet. 10-11, 30-31. Notably, the Petition identifies no circuit split nor important legal question implicated by this case-specific analysis.

Presumably recognizing that their quarrel with the rulings below is not one that warrants *certiorari*, petitioners (and their *amici*) instead focus on a separate criminal statute enacted two decades before JASTA, 18 U.S.C. § 2339B ("Section 2339B"), which criminalizes the provision of "material support" to an FTO. In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29-31 (2010), this Court held that a person violates Section 2339B by knowingly providing any form of material support to an FTO, regardless of whether such support is shown to play any role (whether substantial or insubstantial) in facilitating the FTO's terrorist activities, and regardless of the awareness or intent of the provider of such material support, so long as that person knows of the FTO's designation as such or of its connection to terrorism.[1]

JASTA, however, is a different statute. In JASTA, Congress created a new civil claim for victims of terrorist attacks to sue a class of aiders and abettors who are generally aware of their role in terrorist activity and knowingly provide substantial assistance to the act of international terrorism by which a JASTA plaintiff was injured. 18 U.S.C. § 2333(d); Pet. App. 33a-37a. Congress did not cite

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[1] While the Second Circuit in an earlier opinion found a triable question whether NatWest's routine banking activity violated Section 2339B—as a predicate criminal violation constituting one of the elements of the primary ATA claim that petitioners are no longer pursuing—the U.S. government, which has been aware of this case since it was filed in 2005, has never prosecuted NatWest for violating Section 2339B.

Holder as providing the governing framework for JASTA claims; instead—as made sense in creating a new civil claim—it cited *Halberstam*, a well-known non-statutory aiding and abetting case.

There is thus no basis whatsoever for the assumption embedded in petitioners' "question presented" that a bank's violation of Section 2339B should equate to secondary civil liability under JASTA. *See* Pet. i (asking "[w]hether a person who knowingly transfers substantial funds to a designated FTO aids and abets that organization's terrorist acts for purposes of civil liability under JASTA"). There is equally no basis for petitioners' repeated canard that the Second Circuit's decision in this and other JASTA cases somehow creates a "humanitarian charity exception" to material support liability, contrary to *Holder* and other lower court decisions, *see, e.g.*, Pet. 2; *Holder* and the other decisions petitioners cite construed Section 2339B, which remains unaffected by decisions like those below construing JASTA, which has very different requirements.

Even if the Court were inclined to consider whether potential liability under Section 2339B is sufficient to give rise to secondary civil liability under JASTA, it would be premature to do so in this case, as there is no relevant circuit split. Petitioners fail to cite a *single case* in the lower courts that has ever equated the requirements for Section 2339B criminal liability with the congressionally-mandated elements of civil liability under JASTA, because there is none. Likewise, petitioners fail to even mention the numerous cases that have decided

JASTA claims in multiple circuits that have *not* so held. *See, e.g., Colon v. Twitter, Inc.*, No. 20-11283, 2021 WL 4395246, at *6 (11th Cir. Sept. 27, 2021) (performing JASTA liability analysis without considering Section 2339B requirements); *Gonzalez v. Google LLC*, 2 F.4th 871, 911 (9th Cir. 2021) (same); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019) (same); *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 389-90 (7th Cir. 2018) (same). The only authorities petitioners point to in support of their phantom circuit split did not construe JASTA at all. *See* Pet. 25-27.

Finally, there is no need to call for the views of the Solicitor General because the United States has already expressed its opposition to imposing civil liability for terrorism-related injuries on foreign defendants who merely provided routine banking services to charities with alleged terrorist ties, where (as here) there is no demonstrated connection between such banking services and any terrorist activities.

The Petition should be denied.

STATEMENT OF THE CASE

I. NatWest's Legitimate Banking Relationship With The UK Charity Interpal

In 1994, Interpal, "a London-based nonprofit entity founded in 1994 and registered with the United Kingdom's Charity Commission for England & Wales," opened bank accounts at a NatWest branch. Pet. App. 9a. During the relevant period, NatWest processed wire transfers from Interpal's

accounts to several other charities, including 13 charities in the Palestinian Territories that petitioners contend were affiliated with Hamas (the "13 Charities"). The wire transfers that NatWest processed to the 13 Charities on behalf of Interpal were designated for charitable purposes, including "programs for orphans, a maternity clinic, student aid, emergency medical aid, food parcels, winter clothes, and other community projects." Pet. App. 15a-16a.

There is no evidence in the extensive record that the wire transfers NatWest processed on behalf of Interpal were used to finance terrorism of any type, including the attacks by which petitioners were injured. Indeed, the extensive evidentiary record developed below demonstrates that NatWest "had no tolerance for the funding of terrorism, did not want to be related in any way to such activities, and would have taken quick action to terminate its relationship with Interpal if the bank believed that Interpal was funding terrorism." Pet. App. 17a. Petitioners' experts did not purport to opine, and indeed conceded there is no evidence that: (1) "any funds transferred by Interpal through its NatWest accounts was [sic.] used to perpetrate the [relevant] attacks;" (2) any of the 13 Charities "participated in any of the [relevant] attacks;" (3) any of the 13 Charities "planned the [relevant] attacks;" (4) any of the 13 Charities "requested that someone carry out any of the [relevant] attacks);" or (5) any of the 13 Charities "was the cause of any of the [relevant] attacks." *Id.*; A-

2678, A-2681.[2] And crucially, petitioners conceded that the 13 Charities in fact provided the charitable services they claimed to provide, were in several instances also funded by the United States government, and none had been designated as terrorist organizations by the United States, the European Union or the United Kingdom when these transfers occurred. *See* A-2687-88, A-2703-05.[3]

At times, NatWest suspected Interpal might be raising funds for Hamas, as Interpal had been publicly accused of doing as early as 1996. On each occasion when NatWest had such suspicions, it disclosed them to UK law enforcement agencies and regulators, in conformity with NatWest's obligations under UK law. In each instance, the UK government concluded and informed NatWest that there was no evidence Interpal was involved in financing Hamas's violent or political activities, and the UK government informed NatWest it could lawfully continue providing its banking services to Interpal. *See*

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[2] Citations to A-____ are to the joint appendix in the Second Circuit.

[3] Petitioners now seek to backtrack from these concessions and claim that some of the 13 Charities made payments to the families of suicide bombers or had employees who were in some way involved with certain attacks. Pet. 20 n.5; *see also* Br. for Amicus Curiae Foundation for Defense of Democracies ("Defense of Democracies Br.") 5. Petitioners, however, do not contend, nor is there any evidence in the record, that any such payment is connected to the wire transfers that NatWest processed at the request of Interpal, was known to NatWest at the time, or relates to the attacks by which petitioners were injured.

Pet. App. 149a-150a. This record is summarized below.

1. *The UK Charity Commission's First Investigation.* In 1996, the UK Charity Commission conducted an investigation into alleged links between Interpal and Hamas militants and temporarily froze Interpal's NatWest accounts. A-3440. NatWest complied with the freeze and cooperated fully with the investigation, which ultimately concluded that Interpal did not have links to "Hamas militants" and was "fulfilling charitable purposes." A-3440-42.

2. *NatWest's Disclosures to NCIS.* NatWest additionally reported any potential suspicious activity to the UK National Criminal Intelligence Service ("NCIS"), the agency charged with processing reports of suspicions of terror financing. For instance, in September 2001, Michael Hoseason, the head of NatWest's Fraud Office, reported in a letter to NCIS an internet post he saw on "cryptome.org" attributed to "Anonymous," about a purported "briefing document … prepared for the South African [president]" which asserted that Interpal provided funding to Hamas. A-3442. While petitioners attempt to characterize this as evidence that NatWest should have known its banking services for Interpal were providing material support to Hamas, Pet. 15, the UK authorities never made any follow-up requests about it, and there is no evidence the UK authorities believed the post to be authentic, A-3443.

NatWest submitted several other reports to NCIS regarding Interpal transferees between 2001 and 2003, and in each instance likewise received no

follow up requests from law enforcement agencies or direction to take any further action. A-3442-46.

3. *OFAC Designation of Interpal and Second Charity Commission Investigation.* When the U.S. Treasury Department Office of Foreign Assets Control ("OFAC") publicly designated Interpal as a Specially Designated Global Terrorist ("SDGT") on August 22, 2003, the UK Charity Commission again froze Interpal's accounts and commenced a second investigation into alleged Hamas funding, and NatWest "initiated its own review of Interpal's accounts, rather than simply wait[ing] for the results of the law enforcement investigations."[4] A-3450.

NatWest did not resume its banking relationship with Interpal until after the UK Charity Commission and NCIS concluded that there were no links between Interpal and "Hamas's political or violent military activities," A-3449, and that there were no impediments to NatWest continuing to provide banking services to Interpal unless NatWest learned that Interpal was in fact making payments to Hamas, A-3449-50.

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4 The U.S. Treasury's contemporaneous press release notably did not accuse Interpal of involvement in Hamas's violent activities, but described Interpal's role as "supervising activities of charities, developing new charities in targeted areas, instructing how funds should be transferred from one charity to another, and even determining public relations policy." A-1036.

It is further undisputed that NatWest's banking relationship with Interpal did not violate any applicable laws or regulations, including—unlike in other JASTA cases in the lower courts—U.S. sanctions. The only connection between NatWest's conduct in this case and the United States was a series of legal wire transfers that NatWest processed through correspondent banking accounts in New York on behalf of Interpal prior to OFAC's designation of Interpal. At the time of that designation, 14 of the 16 attacks by which petitioners were injured had already occurred, and NatWest made no further transfers involving the United States.

II. Proceedings Below

Prior to the enactment of JASTA, this case proceeded for over a decade on petitioners' theory that NatWest was primarily liable under the ATA for the wire transfers it processed to the 13 Charities on behalf of Interpal. Petitioners claimed that NatWest's conduct constituted "material support" to an FTO under Section 2339B, and that this in turn constituted an "act of international terrorism" for the purpose of ATA civil liability. *See* 18 U.S.C. § 2333(a); *id.* § 2331(1) (defining "international terrorism").

In 2014, in reversing an earlier district court grant of summary judgment to NatWest, the Second Circuit ruled that there was a triable issue as to whether NatWest violated Section 2339B, but expressly declined to decide whether such a violation also would satisfy the separate prongs of the ATA's

act of "international terrorism" definition. Pet. App. 153a n.6.

In 2016, Congress enacted JASTA, which for the first time created a private cause of action for aiding and abetting and conspiracy under the ATA in certain circumstances. Specifically, as to aiding and abetting liability, JASTA states:

> (2) Liability. In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, 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).

The Findings and Purpose section of JASTA (the "Findings"), Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, further provides that the applicable legal principles for aiding and abetting liability under the statute derive from *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

In 2018, the Second Circuit ruled in *Linde v. Arab Bank, PLC* that a bank's violation of Section

2339B by providing material support to an FTO does not "invariably equate to an act of international terrorism" sufficient to state a civil primary liability claim under the ATA. 882 F.3d 314, 326-27 (2d Cir. 2018). The petitioners here were also plaintiffs in *Linde*, a case brought against a Jordanian bank arising from the same attacks.

Linde also was the first time the Second Circuit construed JASTA. Faithfully following Congress's instructions to adhere to the legal framework set out in *Halberstam*, the court ruled that, in order to be liable as an aider and abettor under that statute, (1) "the party whom the defendant aids must perform a wrongful act that causes an injury;" (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;" and (3) "the defendant must knowingly and substantially assist the principal violation." *Linde*, 882 F.3d at 329 (quoting *Halberstam*, 705 F.2d at 487). Reviewing the post-trial record in that case (where the jury was not instructed on the JASTA elements), the court held that a properly instructed jury reasonably could, but need not, have found Arab Bank secondarily liable under JASTA in light of evidence that the bank was generally aware of its role in Hamas's terrorist activities, and knowingly provided substantial assistance to Hamas's terrorism, including by processing payments for suicide bombings and maintaining customer accounts for Hamas militants. *Id.* at 329-31.

Following *Linde*, NatWest moved again for summary judgment. The district court applied the legal framework from *Linde* to the extensive evidentiary record developed in this case, granted summary judgment to NatWest on the primary liability claims, and ruled that permitting petitioners to amend their complaints to add JASTA aiding and abetting claims (which they had not previously sought to do) would be futile based on the evidentiary record. The Second Circuit affirmed on both grounds. Petitioners only seek review of the ruling on the JASTA aiding and abetting claims.

On the aiding and abetting claims, the Second Circuit confirmed the distinction drawn in *Linde* between the "*mens rea* required to establish material support in violation of 18 U.S.C. Section 2339B, which requires proof only of the defendant's knowledge of the organization's connection to terrorism," and the showing required under the second *Halberstam* element of aiding and abetting, which is "the defendant's general awareness of his role *as part of an overall illegal tortious activity at the time that he provides the assistance*." Pet. App. 37a (emphasis in the original) (internal quotation marks omitted). The Second Circuit explained that the latter showing, which is required by Congress's JASTA Findings, "requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Id.* (quoting *Linde* at 329).

Based on the framework set out under JASTA and *Halberstam*, the Second Circuit agreed with the

district court that, given the undisputed evidence adduced in this case, "plaintiffs could not show that NatWest was knowingly providing substantial assistance to Hamas, or that NatWest was generally aware that it was playing a role in Hamas's acts of terrorism." *Id.* at 41a-42a. The Second Circuit did not reach NatWest's conditional cross-appeal asserting that the district court erred in concluding that the dollar-denominated legal wire transfers NatWest processed through New York sufficed to meet petitioners' burden to demonstrate that the district court could assert personal jurisdiction over NatWest when it was undisputed that NatWest's processing of those wire transfers was not even a but-for, let alone a substantial, cause of the attacks by which petitioners were injured.

REASONS FOR DENYING THE PETITION

I. The Question Presented Does Not Warrant Review

Petitioners' attempt to cast their disagreement with the decision below as a pure question of law fails. At bottom, petitioners ask the Court to engage in mere "error correction" on inherently factual issues that are unique to the factual record in this case, developed over many years of extensive discovery.

1. Petitioners and their *amici* misstate or ignore the actual elements of a JASTA claim and instead fault the Second Circuit for not relying on a legal standard from a separate criminal statute that is not referenced in JASTA. Under petitioners' legal theory, courts should dispense with the *Halberstam*

analysis required by JASTA because the various criminal prohibitions on the provision of material support to terrorism—here, Section 2339B—should provide the governing legal standard. *See* Pet 1-2; *see also* Br. of 10 Members of the United States Senate as Amici Curiae ("U.S. Senators' Br.") 20; Br. of Law Professors as Amici Curiae ("Law Professors' Br.") 20; Br. on Behalf of Jewish Organizations and Allies as Amici Curiae 24. Thus, they fault the Second Circuit for purportedly recognizing "a humanitarian charity exception to aiding and abetting liability," by relying on the knowledge requirement articulated in *Halberstam* instead of the *mens rea* requirement in Section 2339B. Pet. 2; *see also* Pet. 30, 32 (asserting that "knowing provision of material support to FTOs" should be sufficient "to establish aiding and abetting" liability under JASTA so long as the support provided is "substantial"); U.S. Senators' Br. 5-6, 15-16, 19-21, 23; Br. of Amici Curiae Former National Security Officials ("Nat'l Security Officials' Br.") 27. In essence, petitioners contend that JASTA effectively creates a private right of action under Section 2339B.[5]

Petitioners' legal theory is inconsistent with the plain text of JASTA. If Congress had wished to

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[5] Petitioners acknowledge they cannot credibly contend that the Court must "hold that every act that violates 18 U.S.C. § 2339B(a)(1) also gives rise to aiding and abetting liability under JASTA," but they nonetheless contend that the *mens rea* requirement in Section 2339B must govern JASTA claims and gloss over the fact-intensive "substantial assistance" standard set forth in *Halberstam*. Pet. 32.

authorize strict civil liability for any violation of Section 2339B in JASTA, it could have done so—but it did not. Similarly, if Congress had "intended JASTA liability to extend at least as far as the [criminal] liability this Court recognized in *Holder* [*v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010)]," Pet. 29, it could have said so—but it did not. Instead, in providing the "broadest possible basis" for relief under U.S. tort law, Congress specifically instructed that *Halberstam* "provides the proper legal framework for how such liability should function." Findings § 2(a)(5). To conclude that a Section 2339B violation is sufficient to give rise to JASTA aiding and abetting liability would short-circuit the fact-specific framework articulated in *Halberstam*. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[I]t is quite mistaken to assume, as petitioners would have us, that 'whatever' might appear to 'further[ ] the statute's primary objective must be the law' . . . [the] legislature says . . . what it means and means . . . what it says." (internal citations omitted) (alterations in original)).[6]

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6 For the same reason, contrary to the assertions of petitioners and their *amici*, *see* Pet. 27-29; U.S. Senators' Br. 5-6, 15-16, 19-21, 23; Nat'l Security Officials' Br. 27; *see also generally* Defense of Democracies Br., reliance on the so-called "fungibility" principle articulated in *Holder* and other criminal cases in the context of Section 2339B cannot be sufficient to give rise to civil liability here, as it concerns a criminal statute with no causation requirement, not the civil requirements of JASTA as provided by *Halberstam*.

2. Notwithstanding petitioners' attempts to confect a purely legal question from the decision below, the Second Circuit merely affirmed the district court's proper application of the legal standard in *Halberstam* to the facts of the case, as Congress instructed. *See* Pet. App. 41a-42a. The Second Circuit did not conclude that a Section 2339B violation could *never* create a triable issue on a JASTA aiding and abetting claim; instead it concluded that, on the facts of this case, even assuming NatWest's conduct satisfied the separate requirements of Section 2339B, "the district court appropriately assessed" the evidence in the record in concluding there is no triable issue on whether NatWest's conduct satisfied the *Halberstam* factors for civil aiding and abetting liability. Pet. App. 51a. As the Second Circuit recognized, the standard for Section 2339B liability has no bearing on the standard for a JASTA aiding and abetting claim, because Section 2339B and JASTA are different statutes with different texts and purposes. *See* Pet. App. 37a ("In contrast to what is needed to show a violation of § 2339B, the second *Halberstam* element of aiding and abetting requires a plaintiff to show the defendant's 'general[] aware[ness] of his role as part of an overall illegal or tortious activity at the time that he provides the assistance.'" (quoting *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018)).

Given the fact-intensive nature of the *Halberstam* analysis underlying the decision below, review is not warranted here. *See* U.S. Sup. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings"); *Exxon Co.,*

U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996) (The Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (citation omitted)).

II. The Decision Below Does Not Create Any Conflict of Authority Among The Circuit Courts (Nor Does It Conflict With Any Decision Of This Court)

Likely recognizing the weakness of their position in the face of what JASTA actually provides and what the lower courts actually decided, petitioners attempt to manufacture a circuit split where none exists by invoking cases decided years before the applicable statute in this case, JASTA, was enacted. Contrary to petitioners' assertions, Pet. 21, no court has ruled that a violation of Section 2339B is sufficient to create civil liability under JASTA. Instead, the handful of circuit-level cases that have construed JASTA (all of which petitioners conspicuously ignore) are consistent with the Second Circuit's application of the *Halberstam* test below.

1. Remarkably, despite claiming that the Court should grant *certiorari* in this JASTA case in order to resolve a circuit split, Pet. 29, petitioners fail to cite *any* of the numerous JASTA decisions that have been issued by courts outside of the Second Circuit. The reason for this omission is that all of the circuit-level cases that have construed JASTA are consistent with the decision below; there is no

circuit split. *See Gonzalez v. Google LLC*, 2 F.4th 871, 910-11 (9th Cir. 2021) (applying *Halberstam* factors to multiple JASTA aiding and abetting appeals and concluding that certain plaintiffs stated aiding and abetting claims while others did not); *Retana v. Twitter, Inc.*, 1 F.4th 378, 383-84 (5th Cir. 2021) (affirming dismissal of JASTA aiding and abetting claims for failure to satisfy the *Halberstam* factors); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 n.6 (6th Cir. 2019) (affirming dismissal of JASTA aiding and abetting claims for failure to allege, *inter alia*, that defendants knowingly and substantially assisted the primary violation, as required by *Halberstam*).[7]

2. Not only do petitioners ignore these consistent JASTA decisions; the decisions on which they do rely simply do not involve JASTA. Accordingly, none of these decisions creates any conflict.

The Seventh Circuit decided *Boim v. Holy Land Foundation for Relief & Development.*, 549 F.3d 685 (7th Cir. 2008), eight years before JASTA created secondary liability under the ATA. JASTA did not, as petitioners assert, "essentially codif[y]"

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[7] *See also Brill v. Chevron Corp.*, 804 F. App'x 630, 632 (9th Cir. 2020) (affirming dismissal of JASTA aiding and abetting claim for failure to satisfy substantial assistance and knowledge elements); *Colon v. Twitter, Inc.*, 2021 WL 4395246, at *7 (JASTA aiding and abetting claims failed to satisfy JASTA's requirement that attack at issue be committed, planned or authorized by a designated foreign terrorist organization).

Boim's interpretation of primary ATA liability "as a secondary liability cause of action." Pet. 22. If Congress had intended for *Boim* to define the scope of liability under JASTA, it would have cited that case instead of *Halberstam* in the Findings. Indeed, the Seventh Circuit itself already rejected this argument when it first construed JASTA in *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 391 (7th Cir. 2018). *Kemper* concerned the conspiracy liability provision of JASTA, but the Seventh Circuit itself recognized that applying the standard articulated in its prior *Boim* decision to a JASTA claim would render the "more limited" secondary liability authorized by the express text of JASTA superfluous. *Id.* at 396.

Petitioners' attempt to create a conflict between *Boim* and the Second Circuit JASTA opinion in *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021), also misses the mark. *See* Pet. 28. *Honickman*, like *Kemper*, recognized that "*Boim* is inapposite" because "[i]t was decided before Congress assigned *Halberstam* as the appropriate framework for JASTA aiding-and-abetting liability claims and therefore lacks the requisite analysis." 6 F.4th at 499 n.14.

Moreover, even *Boim* does not support petitioners' argument that a violation of Section 2339B is sufficient to give rise to civil liability under the ATA. In *Kemper*, the Seventh Circuit took the "opportunity to clarify some language in *Boim III* that might be read to suggest that something less than proximate cause might suffice to prove ATA liability," 911 F.3d at 391, and also rejected the argument

that a Section 2339B violation invariably constitutes an act of international terrorism, *id.* at 389.

United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011), as revised (Dec. 27, 2011), is a criminal case interpreting Section 2339B, a criminal statute under which NatWest was never prosecuted. *El-Mezain*'s reliance on this Court's guidance on the scope of that specific statute in *Holder* was appropriate. But Section 2339B has no bearing on the Second Circuit's application of the *Halberstam* factors for the reasons discussed above. Section 2339B was only relevant to the decision below and the Second Circuit's prior ruling in this case to the extent petitioners relied upon Section 2339B as a predicate criminal violation, which is one of several required elements underlying petitioners' *primary* liability claims—claims petitioners asserted below but do not pursue here. *See* Pet. 20-21.[8]

Moreover, unlike *El-Mezain* and *Boim*, which involved direct, intentional donors to Hamas, NatWest *at most* provided routine banking services to a lawful UK charity that in turn sent funds to other charities that allegedly form part of Hamas's "social wing." *See* Pet. 26 (quoting *El-Mezain*). In *El-Mezain*, the evidence included proof that the defendants "encouraged and solicited" donations to Hamas and organized fundraisers that Hamas leaders also attended. 664 F.3d at 488. Similar evidence was

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[8] *Holder* likewise construed Section 2339B, not JASTA, and thus petitioners fail to point to any decision of this Court that conflicts with the decisions below.

also present in *Boim*, including because one of the *Boim* defendants was previously convicted in *El-Mezain*. *See Boim v. Quranic Literacy Inst.*, No. 00 C 2905, 2012 WL 13171764, at *3-4 (N.D. Ill. Aug. 31, 2012).

In contrast, the evidentiary record here—which the Second Circuit properly evaluated in applying the *Halberstam* factors—demonstrates that, while NatWest "was aware of Interpal's 'alleged' links to Hamas," it repeatedly reported its suspicions to the UK government, which, after investigating Interpal on several occasions, determined them to be unfounded. In addition, it is undisputed that NatWest "had no tolerance for the funding of terrorism, did not want to be related in any way to such activities, and would have taken quick action to terminate its relationship with Interpal if the bank believed that Interpal was funding terrorism." Pet. App. 17a. Moreover, the wire transfers that NatWest processed to the 13 Charities on behalf of Interpal were explicitly designated for charitable purposes. Pet. App. 15a-16a. As noted above, petitioners conceded that the 13 Charities in fact provided the charitable services they claimed to provide, were at times also funded by the United States government, and none had been designated as terrorist organizations by the United States, the European Union or the United Kingdom when these transfers occurred. *See* A-2687-88, A-2703-05. Given these facts, the Second Circuit and the district court properly found no triable issue on the *Halberstam* factors. And all this simply underscores the factual nature of the lower courts' decisions here, which the

citation of an irrelevant criminal statute does not make any more worthy of this Court's review.

III. There Is No Compelling Need To Grant Certiorari In A JASTA Case Now

Review of petitioners' question presented would be also premature. JASTA is a relatively young statute, and JASTA cases are currently being brought around the country and, like the decision below, being decided on their facts. Particularly where, as here, there is no conflict of authority at the circuit level, any applicable legal questions would benefit from "further percolation in the lower courts." *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, concurring in denial of certiorari); *see also Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Petitioners' hyperbolic assertion that JASTA is now a "dead letter" in the Second Circuit, Pet. 32, is nonsense. The Second Circuit has properly restricted civil liability under JASTA to defendants who actually satisfy the requirements of *Halberstam*, as Congress instructed. Indeed, the Second Circuit has twice allowed a JASTA claim to proceed against a bank.

First, in *Linde*, a case in which petitioners here were also plaintiffs, the Second Circuit would

have remanded for a new trial with the proper instructions on aiding and abetting liability, but the parties had already agreed to a "high-low" settlement (resulting, it can be presumed, in a significant recovery to petitioners here). *Id.* at 318-19.

Second, the Second Circuit also recently reversed a lower court's dismissal of JASTA aiding and abetting claims where, unlike here, the factual allegations satisfied the *Halberstam* requirements. *See Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 863 (2d Cir. 2021). In *Kaplan*, the bank's customers themselves were alleged to be parts of Hizbollah and the bank was "at least generally aware that through its money-laundering banking services to the Customers, [it] was playing a role in Hizbollah's terrorist activities," *id.* at 865, and indeed afforded its Hizbollah customers special treatment in allowing them to deposit large sums of money weekly without disclosing their source, despite evidence of their terrorist affiliations, *id.* at 866. The idea that the Second Circuit has made JASTA recovery impossible on facts that satisfy the statutory test is therefore demonstrably wrong.

IV. The Decision Below Is Correct

Review is also not warranted here because both courts below correctly applied the *Halberstam* factors. As noted by the Second Circuit, the extensive 12-volume record in this matter reflects that "the charities to which NatWest transferred funds as instructed by Interpal performed charitable work

and that, as plaintiffs admitted, Interpal did not indicate to NatWest that the transfer were for any terroristic purposes; and plaintiffs proffered no evidence that the charities funded terrorist attacks or recruited persons to carry such attacks." Pet. App. 41a. Based on this record, NatWest's routine financial services do not satisfy the multi-factor common law aiding and abetting test incorporated by reference into JASTA.

As the lower courts correctly found, there is no triable issue regarding the general awareness element given the specific and extensive record in these proceedings showing that (i) the bank, at most, had suspicions that it reported to the appropriate UK authorities, which then gave the bank the green light to continue, and (ii) the bank never had suspicions (much less knowledge) that its financial services were being used for anything other than charity. *See* Pet. App. 13a-17a.[9] As to substantial assistance, there is no triable issue including because there is no evidence funds transferred through the bank in fact were used for terrorism, and petitioners conceded below that the bank's financial services were not a but-for (let alone substantial) cause of any attacks. *See id.* Accordingly, the Second Circuit was correct to find that "the district court did not err in denying leave to amend the complaints as futile on the ground that plaintiffs could not show that

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9 The Second Circuit did not, as the Law Professor *amici* contend, require evidence of a "specific intent" to aid Hamas. *See* Law Professors' Br. 22.

NatWest was knowingly providing substantial assistance to Hamas, or that NatWest was generally aware that it was playing a role in Hamas's acts of terrorism." Pet. App. 41a-42a.[10]

V. There Is No Reason To Call For The Views Of The Solicitor General

There is no need to call for the views of the Solicitor General, *see* Pet. 35-36, because the United States has already consistently expressed its opposition to attempts to stretch the scope of civil liability for terrorism-related injuries beyond the bounds set by Congress, as petitioners seek to do here.

1. Petitioners invoke the "CVSG" in *O'Neill v. Al Rajhi Bank*, No. 13-318, but fail to acknowledge that the Solicitor General recommended that the petition in that case be denied (which it was). In that case, the United States rejected the argument that it is appropriate to extend civil liability under the ATA "to individuals and entities whose activities have only an attenuated relationship to the plaintiff's injuries: for instance, entities that are only alleged to have provided routine banking services or other assistance to a charity with terrorist ties, considerably

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[10] Because the district court concluded that petitioners' proposed JASTA claims fail to satisfy the general awareness element, it did not have occasion to address the knowing substantial assistance element. The Second Circuit considered all of petitioners' arguments on appeal, and rejected them. Pet. App. 42a. Accordingly, the U.S. Senator *amici* are incorrect in asserting that the lower courts found no JASTA liability based solely on the conclusion that petitioners' primary liability claims failed. U.S. Senators' Br. 15.

before the terrorists themselves carried out the attack in question." Br. for the United States as Amicus Curiae 14, *O'Neill v. Al Rajhi Bank*, 134 S.Ct. 2870 (2014). That is because "[p]ermitting liability to sweep so broadly could reach and inhibit routine activities and, given the ATA's extraterritorial reach, could adversely affect the United States' relationships with foreign Nations." *Id.* at 14-15. The same is true here, and neither petitioners nor their *amici* identify any reason why the government's position should be different now than it was just seven years ago.[11]

2. Petitioners also mischaracterize the position expressed by the United States in *Boim*. First, the United States only submitted an amicus brief at the circuit court level and did not submit a brief to this Court (which denied certiorari). *Boim v. Salah*, 558 U.S. 981 (2009). Second, in that case, the United States expressly rejected the view "that a violation of [Section 2339B] automatically . . . giv[es] rise to liability under [the ATA]." Br. for the United States as Amicus Curiae 3, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008). Instead, the United States argued, long before JASTA was

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[11] The United States also recommended against granting certiorari after a CVSG in an ATA case that was dismissed for lack of personal jurisdiction, Br. for the United States as Amicus Curiae 7-8, *Sokolow v. Palestine Liberation Organization*, 138 S.Ct. 1438 (2018), and in connection with an ATA petition concerning a discovery sanctions order in *Linde* that undermined foreign relations with Jordan, Br. for the United States as Amicus Curiae 19, *Arab Bank, PLC v. Linde*, 134 S. Ct. 2869 (2014).

enacted, that *Halberstam* should govern "the reach of secondary liability" under the ATA. *Id.* at 15-16. The United States also declined to take a position on whether the *Boim* plaintiffs had sufficient evidence to actually support civil liability under *Halberstam*. *Id.* at 3.

3. Petitioners invoke the Executive Branch's interest in national security and foreign affairs issues, Pet. 35-36, but as noted in *Al Rahji*, permitting petitioners to extend civil liability to the circumstances here may negatively impact foreign affairs. Likewise, the Executive Branch can vindicate its interest in national security and terrorism sanctions through enforcement of applicable criminal laws. In the 16-year history of this case, the Executive Branch has never expressed an interest in attempting to criminally prosecute NatWest for the actions for which petitioners seek to impose civil liability here, and it is undisputed that NatWest's banking relationship with Interpal did not violate any U.S. sanctions. The only connection this case has with the United States is the lawful, dollar-denominated transfers processed by NatWest at Interpal's request that necessarily transited the United States—all *before* Interpal's OFAC designation. All relevant conduct otherwise occurred abroad: NatWest is a UK bank that provided routine banking services for its UK customer in the United Kingdom, which the UK government has repeatedly concluded were appropriate under UK law, including processing wire transfers to charities in the Palestinian Territories that petitioners allege (but cannot prove) were connected to terrorist attacks committed in Israel.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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