19-3970

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLOTTE FREEMAN, FOR THE ESTATE OF BRIAN S. FREEMAN, *ET. AL.*,

Plaintiffs-Appellants,

v.

HSBC HOLDINGS PLC, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York
Case No. 1:14-cv-06601 (Hon. Pamela K. Chen)

BRIEF OF *AMICI CURIAE*
EIGHT UNITED STATES SENATORS
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTERESTS OF *AMICI CURIAE*[1]

This brief is respectfully submitted by the following Eight United Senators as *amici curiae*:

Joni K. Ernst
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Amici believe that the civil provisions of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, are not only an important tool to provide redress to American victims of terrorism and their families, but are also an integral component of our nation's broader strategy to combat the financing of international terrorism and advance vital American national security and foreign policy interests. In fact, Congress expanded and strengthened the ATA by enacting the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. 114-222, 130 Stat. 582 (2016), which

[1] *Amici* make the following disclosure pursuant to Fed. R. App. P. 29(a)(4)(E): no party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person contributed any money to fund the preparation or submission of this brief.

created an express cause of action for civil conspiracy and aiding and abetting, codified in 18 U.S.C. § 2333(d).

Amici submit this brief due to their concern that a growing body of recent cases, including the decision below, profoundly misconstrue and misapply the plain language of 18 U.S.C. § 2333(d) and Congress's express intent—incorporated in JASTA's Findings and Purpose, § 2—by incorrectly applying far more stringent pleading requirements than in analogous conspiracy and aiding-and-abetting contexts. *Amici* believe that Congress intended for those same, bedrock tort principles to apply in ATA and JASTA cases. Furthermore, *amici* strongly believe that federal courts should not diminish or dilute Congress's express, bipartisan efforts to empower United States victims of international terrorism to pursue claims against secondary actors, who aid and abet or conspire with Foreign Terrorist Organizations ("FTOs") or their agents, alter egos, or proxies.

Although *amici* take no position on the ultimate merits of Plaintiffs' claims or their ability to marshal evidence to support the facts alleged, *amici* strongly believe the District Court applied erroneous legal standards to Plaintiffs' § 2333(d)(2) conspiracy and

aiding-and-abetting claims. *Amici* therefore urge reversal of the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court's decision is contrary to JASTA's text and its express Findings and Purpose. Through both the ATA and JASTA, Congress has empowered United States nationals, injured by acts of international terrorism, to sue those who committed such acts of international terrorism or who aided and abetted or conspired with FTOs. Congress established this civil cause of action—not through any novel legal innovation—but by simply providing that common law tort principles, routinely applied by federal courts across the country, should *also* apply to suits by U.S. terror victims seeking redress for harms related to terrorist acts.

Congress was not only concerned, however, with providing terror victims (and their close family members) with a means to seek compensation. Through the ATA (and later JASTA), Congress added to its broad counterterrorism framework for disrupting the financial support of terrorist entities. For example, Congress has legislated to deprive designated FTOs, such as the Islamic Revolutionary Guard

Corps ("IRGC") and Hezbollah, from accessing the U.S. financial system. *See* International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq*. Similarly, the ATA's civil provision, § 2333, imposes liability "at *any* point along the causal chain of terrorism" and "interrupt[s], or at least imperil[s], the flow of money" to terrorist entities. S. Rep. 102-342, 102d Cong., 2d Sess. at 28 (1992).

Although Congress contemplated liability that would track the commonsense principles developed in "the law of torts," *id.* at 48, a growing body of cases nonetheless rejected secondary liability under the ATA in light of the Supreme Court's ruling in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994). *See Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 689-92 (7th Cir. 2008) (*en banc*) ("*Boim III*"); *Rothstein v. UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013); *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 277-80 (D.C. Cir. 2018) (applying prior version of ATA). As Judge Posner held, "statutory silence on the subject of secondary liability means there is none; and section 2333(a) ... does not mention aiders and abettors or other secondary actors." *Boim III*, 549 F.3d at 689.

Accordingly, in 2016, Congress further expanded liability under the ATA by enacting JASTA, which creates an express statutory cause of action for secondary liability. JASTA § 4 (codified at 18 U.S.C. § 2333(d)). Once again, Congress relied on common law tort principles to address the myriad factual scenarios presented by 21st century terrorism. In JASTA, Congress expressly adopted the landmark D.C. Circuit case, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), as "the proper legal framework for how such liability should function in the context of [the ATA and JASTA]," and Congress expressly held that *Halberstam* "has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability." JASTA § 2(a)(5). Congress also stressed the importance of a broad definition of culpable states of mind in imposing civil liability by providing that "[p]ersons, entities, or countries" that "knowingly or recklessly contribute material support" to terrorist entities should be held accountable both criminally and civilly. *Id.* § 2(a)(6).

Amici believe that the District Court misapplied JASTA, by making three reversible errors that, if allowed to stand, would effectively nullify JASTA's "broad" civil relief and national security role in deterring support for FTOs, their agents, and proxies.

First, the District Court erred in holding that both aiding and abetting and conspiracy under JASTA "require intent ... to further the act of terrorism that harmed the plaintiffs here." Oct. 28, 2019 Tr. 49:10-15. As explained below, aiding-and-abetting claims under § 2333(d)(2) require only that a defendant be "generally aware of [a] role in a continuing criminal enterprise" from which terrorist attacks were a natural and foreseeable consequence. *Halberstam*, 705 F.2d at 488. JASTA does *not* require Plaintiffs to show "specific intent"—which this Court has described as "intent to participate in a criminal scheme as 'something that he wishes to bring about and seek by his action to make it succeed'" or that a defendant "knew of the specific attacks at issue when it provided financial services for [an FTO]." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018).

Second, the District Court held that Plaintiffs' claims failed because the agents and proxies of the IRGC—that Defendants allegedly assisted—did not "exist solely for terrorist purposes." *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 94 (E.D.N.Y. 2019). This ruling reflects a fundamental misunderstanding of the nature of terrorist organizations and how they raise funds. The fact that a Treasury-

designated agent of an FTO like Iran's National Iranian Oil Company ("NIOC") "is a vast agency" with "billions of dollars or millions of dollars that are used for all sorts of purposes," Tr. 41:2-17, does not preclude JASTA liability. Nearly *all* terrorist organizations have some function that is not strictly the commission of violent acts. Here, the IRGC and Hezbollah committed the attacks at issue and some of the funds allegedly provided by Defendants, as the District Court recognized, "according to the U.S. Government[,] are used to support [the] IRGC ...." *Id.* This is more than sufficient to state a claim under JASTA.

Finally, the District Court misapplied JASTA's conspiracy and aiding-and-abetting liability provisions in an additional manner. The District Court correctly identified Congress's intent: JASTA's explicit purpose is to "provide[] civil litigants" with a cause of action "against persons, entities, and foreign countries … that have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b) (emphasis added). But the District Court then held that, "[n]otwithstanding Congress's apparent intent" to reach those who "indirectly assist" acts of terrorism, "the plain text of JASTA's

conspiracy liability provision requires that a defendant conspire *directly* with the person or entity that committed the act of international terrorism that injured the plaintiff." *Freeman*, 413 F. Supp. 3d at 98 (second emphasis added). This holding ignores the plain text of § 2333(d)(2), which does *not* contain the word "directly" and contains no language that contradicts the law's expressly stated purpose.

ARGUMENT

I. Congress Enacted The ATA (And JASTA) To Provide U.S. Terror Victims With A Civil Remedy Based On Common Law Tort Principles And To Disrupt Terror Financing.

A. ATA: Section 2333(a)

In April 1990, Senator Chuck Grassley introduced S.2465, the "Anti-Terrorism Act of 1990." *See* 136 Cong. Rec. S4568-01 (1990), which received strong bipartisan support in Congress. Senator Grassley's bill provided in relevant part that "[a]ny national of the United States injured in his person, property, or business by reason of an act of international terrorism may sue therefor in any appropriate district court of the United States ...."

From the beginning, it was clear that the legislation aimed not merely to address the issue of victim compensation but also to harness

the initiative and resources of the private sector in pursuit of the larger aims of U.S. counterterrorism policy. In the course of introducing the bill, Senator Grassley explained that it "will serve as a further incentive to those with the deep pockets, such as the airline industry, to spend resources and go after terrorists: This bill establishes an express cause of action to gain compensation as fruit of their efforts."

In the summer of 1990, the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held a hearing on the subject of S.2465. Witnesses included Alan J. Kreczko (Deputy Legal Adviser, Department of State) and Steven R. Valentine (Deputy Assistant Attorney General, Civil Division, Department of Justice), as well as several family members of persons killed in terrorist attacks and a handful of outside experts. Participants repeatedly took the opportunity to underscore their understanding that § 2333(a) was to be more than just a mechanism for victim compensation; it was also to be a mechanism for deterring terrorists and disrupting their financial foundations, and thus formed an integral part of U.S. counterterrorism policy.

The first witness, Alan Kreczko, told the Committee that S.2465 would "add to the arsenal of legal tools that can be used against those who commit acts of terrorism against U.S. citizens abroad." *Antiterrorism Act of 1990: Hearing on S.2465*, Testimony before Senate Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong. 11 (1990) ("Senate Hearing"). He explained that the State Department endorsed the bill "as a useful addition to our efforts to strengthen the rule of law against terrorists." *Id*. at 11, 12.

Following Mr. Kreczko, Steven Valentine offered the views of the Justice Department regarding S.2465. Echoing the State Department's position, Mr. Valentine offered a robust endorsement of § 2333(a):

> The department strongly supports the fundamental objectives of Senate bill 2465. They are of great importance to the United States. The enactment of Senate bill 2465 would bring to bear a significant new weapon against terrorists *by providing a means of civil redress for those who have been harmed by terrorist acts* …. Senate bill 2465 would supplement our criminal law enforcement efforts by creating [such a remedy].

Senate Hearing at 25 (emphasis added).

In similar fashion, Joseph A. Morris, the President and General Counsel of the Lincoln Legal Foundation, testified that "by its provisions for compensatory damages, treble damages, and the

imposition of liability at any point along the causal chain of terrorism, [§ 2333(a)] would interrupt, or at least imperil, the flow of terrorism's lifeblood: money." *Id.* at 85.

In the wake of this hearing, in late September 1990, the Subcommittee on Courts and Administrative Practice favorably reported the Antiterrorism Act bill. *See* Statement of Senator Grassley, Oct. 1, 1990, 136 Cong. Rec. S. 14279, 14284 (Amendment No. 2921). In the course of introducing the amendment, Senator Grassley explained that the bill would "strengthen our ability to both deter and punish acts of terrorism." *Id.* He concluded by emphasizing the connection between § 2333 and the overall goal of suppressing terror financing:

> We must make it clear that terrorists' assets are not welcome in our country. And if they are found, terrorists will be held accountable where it hurts them most: at their lifeline, their funds. With the Grassley-Heflin bill, we put terrorists on notice: To keep their hands off Americans and their eyes on their assets.

Id. The Senate agreed to the amendment without further debate, and the amended bill went on to be enacted as Pub. L. No. 101-519, 104 Stat. 2250. The Antiterrorism Act of 1990 thus became law in November 1990. *See id.* § 132(b)(4), 104 Stat. 2250, 2251.

Congress's express reference to tort principles dovetailed with its commitment to impose "liability at any point along the causal chain of terrorism" and "interrupt, or at least imperil, the flow of money." S. Rep. 102-342, at 28. That approach was intended to preserve the statute's flexibility in addressing terrorism's varying forms. The legislative history of the ATA makes clear that rigid limits and narrow parsing of legal elements were antithetical to Congress's intent. As a key report explains, "the substance of … an action [under the ATA] is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courthouse door to victims of international terrorism." S. Rep. 102-342, at 48.

B. JASTA: Section 2333(d)

JASTA was enacted in 2016 to accomplish two goals: First, to address congressional concerns about asserted claims of sovereign immunity relating to the September 11, 2001 attacks, *see* 28 U.S.C. § 1605B; and second, to expand the ATA by enacting an express cause of action for secondary liability, *see* § 2333(d). This new section, which was limited to claims predicated on injuries resulting from attacks

committed, planned or authorized by a designated FTO, was intended to codify the substantive common law tort analysis set forth in *Boim III*, which cited and relied upon the D.C. Circuit's *Halberstam v. Welch* decision. *Boim III*, 549 F.3d at 691.

Thus, § 2333(d) codified common law secondary liability, finding it "necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under the Anti-Terrorism Act of 1987 (22 U.S.C. 5201 et seq.)." It did so in light of and in response to *Boim III*'s holding that "statutory silence on the subject of secondary liability means there is none; and section 2333(a) authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors." *Accord Rothstein,* 708 F.3d at 97-98.

As the Second Circuit correctly noted in *Linde*, under § 2333(d), a plaintiff need not prove that a defendant's conduct itself constituted an act of international terrorism. *Linde v. Arab Bank, PLC*, 882 F.3d 314, 332 (2d Cir. 2018). It was in this broader context that Congress expressly adopted a series of findings and a legislative purpose statement to accompany JASTA's enactment. As the District Court acknowledged, "Congress has expressed an intent to create a broad

form of liability through JASTA and provided an expansive definition of the term 'person.'" *Freeman*, 413 F. Supp. 3d at 97. *See also Linde*, 882 F.3d at 320 ("Congress enacted JASTA, which expands ATA civil liability").

Consistent with this approach, Congress specifically identified *Halberstam*, "which has been widely recognized as the leading case regarding Federal civil aiding-and-abetting and conspiracy liability, including by the Supreme Court of the United States," as providing "the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code [*i.e.*, the ATA's civil and criminal provisions]." JASTA § 2(a)(5).

Taken together, the expansive definition of "person" and the reliance on *Halberstam* create a "broad" liability statute. The reasons for Congress's approach are set forth in the statute's Findings. These include the fact that:

- Some FTOs act through affiliated groups or individuals and raise significant funds outside of the United States.
- Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism necessarily direct their conduct at the United States.

JASTA §§ 2(a)(3) and 2(a)(6), respectively.

C. The *Halberstam v. Welch* Framework

Congress's identification of *Halberstam* as the proper framework for civil aiding-and-abetting and conspiracy liability under the ATA was deliberate. The decision squares with the ATA's purpose to cut off the support to FTOs regardless of the accessorial tortfeasor's motivation[2] because it clarifies that civil secondary liability reaches not just those who intend to cause violence, or who choose to facilitate that violence, but also those who choose to support criminal or tortious enterprises that *foreseeably* lead to violence.

For more than sixty years, federal courts have recognized the important distinction between criminal and civil aiding-and-abetting liability. As Judge Learned Hand explained in *United States v. Peoni*, the intent standard in the civil aiding-and-abetting context is that the wrongful conduct be the natural consequence of the defendant's

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[2] The criminal provision of the ATA provides only two, explicitly defined, exceptions: "medicine or religious materials," 18 U.S.C. § 2339A(b)(1). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) ("Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support. The definition of material support, for example, excludes medicine and religious materials.").

original act, while *criminal* intent to aid and abet requires that the defendant have a "purposive attitude" toward the commission of the offense. 100 F.2d 401, 402 (2d Cir. 1938). While, as Judge Posner correctly noted in *Boim III*, "terrorism is *sui generis"* and analogies to other types of torts will necessarily be imperfect, 549 F.3d at 698, *Halberstam* provides the leading discussion and example of secondary liability for conduct that is not *intended* or even expected to result in violence—but that knowingly supports illicit conduct, the foreseeable consequences of which include violence.

In *Halberstam*, the defendant, Linda Hamilton, was found civilly liable for aiding and abetting the murder of Dr. Michael Halberstam by her boyfriend, Bernard Welch, during a burglary. *See* 705 F.2d at 474 ("[Ms. Hamilton is] civilly liable, as a joint venturer ... for the killing of Michael Halberstam"). However, Hamilton, who assisted what she claimed was her boyfriend's antiques business, did not know about the murder—or even the burglary:

> It was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—because

> violence and killing is a foreseeable risk in any of these enterprises.

Id. at 488. Hamilton acted as her boyfriend's "banker, bookkeeper, recordkeeper, and secretary," and denied knowing of the criminal nature of his "evening forays." *Id.* at 486-87. The court acknowledged that Hamilton's actions were "neutral standing alone," but nevertheless found that "it defies credulity that Hamilton did not know that something illegal was afoot." *Id.* at 486, 488. Thus, the court concluded that because she "knew about and acted to support Welch's illicit enterprise," she "had a general awareness of her role in a continuing criminal enterprise." *Id.* at 488. The court concluded that although she did not intend to facilitate violence, the murder was "a natural and foreseeable consequence of the activity Hamilton helped Welch to undertake." *Id.* at 488.

D. The *Halberstam* Framework Applied

1. Substantial Assistance to Foreign Terrorist Organizations

In most JASTA cases, *Halberstam* is actually broader than necessary. There, the murder was committed in furtherance of a criminal enterprise whose object was to profit from the sale of stolen goods. In JASTA cases, violence *is* the predominant object of a terrorist

organization's criminal enterprise, and its other illegal conduct supports that primary object. Because the defining feature of terrorist organizations is politically motivated violence, acts of terrorism are not only a foreseeable consequence of providing them with substantial assistance, but an almost certain outcome. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. Law No. 104-132, § 301(a)(7) ("foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct"); *see also Holder*, 561 U.S. at 33 (recognizing same).

2. Substantial Assistance to State Sponsors of Terrorism and Their Agents or Instrumentalities

While violence is a readily foreseeable consequence of supporting an FTO, the question is less certain when the enterprise supported involves a sovereign state—even a leading state sponsor of terrorism, like Iran, that has been so-designated by the Secretary of Defense. [3] As

[3] Iran is one of a small handful of states that have been designated a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. § App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371), or § 40 of the Arms Export Control Act (22 U.S.C. § 2780).

Halberstam noted, "[f]oreseeability is surely an elusive concept and does not lend itself to abstract line-drawing." 705 F.2d at 485. At the initial pleading stage, however, factual allegations need only "be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). For pleading purposes, therefore, it is clear that violence *may* be a foreseeable consequence of knowingly providing substantial assistance to a state sponsor of terrorism in a variety of fact-specific circumstances (*i.e.*, in contravention of U.S. counter-terror financing laws) which rise above the "speculative level."

The District Court, and other decisions in this Circuit, appear to express an unease with applying the concept of foreseeability to civil cases in the terrorism context. But the same limitations that apply in those more familiar civil contexts similarly apply in the JASTA context. For example, merely purchasing a ticket on Iran Air would not subject the purchaser to aiding-and-abetting liability because—aside from arguably not being a "substantial" contribution—violence is not a natural and foreseeable consequence from purchasing an airline ticket.

In the same way, customers of Halberstam's antique business would not be liable for Welch's murder.

Criminal law provides a useful analog. There, the law considers whether an accessory's assistance has "inherent capacity for harm" and whether providing the assistance is itself illegal or "neutral, standing alone" as in *Halberstam*. *Compare Direct Sales Co. v. United States*, 319 U.S. 703, 710-11 (1943) (nature of the assistance "makes a difference in the quantity of proof required to show knowledge") *and United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (the legal sale of dry goods useful for distilling alcohol to known bootleggers, although perhaps sufficient for civil secondary liability, is insufficient for criminal secondary liability).

Particularly at the pleading stage, where assistance to a sovereign state is concerned, plausibility rests in part on either the nature of the conduct alleged (whether it is itself unusual or overtly illegal) or whether the assistance is rendered to facially "legitimate agencies, operations, and programs" or to persons or entities engaged in unlawful or violent activities. The more unusual or self-evidently criminal the assistance, the more plausible the allegation that violence

is a foreseeable consequence of such conduct. Similarly, the more closely linked an entity or person is to terrorism or support for other violent activities, the more plausible the allegation that violence is a foreseeable consequence of the assistance given to that entity or person.

II. The District Court Committed Three Reversible Errors.

Against this legal backdrop, the District Court's decision contains three fundamental errors. First, the District Court misapplied the state of mind requirement for both conspiracy and aiding and abetting, by holding that the JASTA defendant must intend the act of terrorism that harmed the Plaintiffs here. Second, the District Court mistakenly held that entities with non-terrorist—and terrorist—functions cannot be liable under the ATA (and JASTA) unless Plaintiffs plead (and prove at trial) that the fungible financing provided specifically went to finance terrorism. Finally, the District Court held that a JASTA defendant must conspire *directly* with the person who committed the terrorist act. All three errors warrant reversal.

A. The District Court Misapplied The Scienter Standard For Conspiracy And For Aiding And Abetting Under § 2333(d)(2).

1. The State of Mind Required for Civil Conspiracy

Most of the District Court's scienter analysis is devoted to the requisite state of mind to establish a defendant's participation in a criminal conspiracy. *See Freeman,* 413 F. Supp. 3d at 87 (*citing In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 113 (2d Cir. 2008) (quoting *United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998)). The District Court characterizes the Second Amended Complaint's allegations as describing "a conspiracy to help Iranian financial and commercial entities evade American sanctions." It then proceeds to hold that:

> Even assuming Defendants knew of Iran's myriad ties to, and history of, supporting terrorist organizations, including Hezbollah, the Court cannot infer from this fact that Defendants agreed to provide illegal financial services to Iranian financial and commercial entities, which have many legitimate interests and functions, *with the intent that those services would ultimately benefit a terrorist organization*.

Id. at 88 (emphasis added) (citing *Salameh*, 152 F.3d at 151). At oral argument on Plaintiffs' motion for partial reconsideration, the District Court restated that JASTA conspiracies "require intent to further the act of terrorism that harmed the plaintiffs here." Tr. 49:10-15.

This level of intent *may* be appropriate for a *criminal* conspiracy, but applying the legal standards for *criminal* conspiracy to *civil* claims brought under JASTA would be clear error. *See Halberstam,* 705 F.2d 477 ("the agreement in a civil conspiracy does not assume the same importance it does in a criminal action"). Section 2333(d) does not speak of an "intent to further acts of terrorism," or that terrorism even be an object of the conspiracy at all. Section 2333(d) instead holds liable anyone who "conspires *with* the person who committed such an act of international terrorism"—not anyone who "conspires *to* commit such an act of international terrorism."

This distinction is central to Congress's choice of *Halberstam* as the governing framework. There, Hamilton conspired *with* the murderer, but did not conspire *to murder*. *Halberstam* thus underscores the fact that a defendant can be liable for civil conspiracy under § 2333(d)(2) without knowing, let alone intending, that violence (here, terrorism) will occur:

> Hamilton and Welch agreed to undertake an illegal enterprise to acquire stolen property. The only remaining issue, then, is whether Welch's killing of Halberstam during a burglary was an overt act in furtherance of the agreement. We believe it was.

Halberstam, 705 F.2d at 487. The conspiracy in *Halberstam* was to "acquire stolen property," not to commit murders. The court reasoned that the use of violence to escape apprehension was not outside the scope of a conspiracy to obtain stolen goods "through regular nighttime forays and then to dispose of them." *Haberstam* thus concluded that the defendant "agreed to participate in an unlawful course of action and that Welch's murder of Halberstam was a reasonably foreseeable consequence of the scheme." *Id.*

Accordingly, liability for civil conspiracy under § 2333(d)(2) requires a plaintiff to plausibly allege (1) an agreement to do an unlawful act or a lawful act in an unlawful manner; (2) an overt act in furtherance of the agreement by someone participating in it; and (3) injury caused by the act. *Id.* at 487. The *agreement* to do an unlawful act need not involve terrorism or violence of any kind, provided that terrorism was not outside the foreseeable scope of the conspiracy.

While analyzing the elements of conspiracy under § 2333(a), the District Court incorrectly held that allegations of Defendants' knowledge of, or deliberate indifference to, their Iranian co-

conspirators' involvement in funding terrorism was insufficient as a matter of law. It reasoned that to hold otherwise "would allow for civil liability to be imposed on defendants who did not actually agree to participate in the predicate material support conspiracy, but were, at most, deliberately indifferent to that possibility." *Freeman*, 413 F. Supp. 3d at 87 n.28.

The District Court applied far too stringent a standard. Even in criminal conspiracy cases, courts do not require each co-conspirator to share the same motivation. Courts instead focus on evidence of agreement and whether that agreement furthered the primary criminal conduct being charged. *See, e.g.*, *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) ("The goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes."); *United States v. Garcia*, 509 F. App'x 40, 42 (2d Cir. 2013) (upholding conviction for conspiracy to rob of defendant whose only role was purchasing a tool useful in burglaries, and had no "'stake in the success' of the conspiracy"). Other Circuit Courts of Appeals have consistently upheld convictions for service providers who neither intended nor even cared how their

assistance was used for the crimes that the conspirators committed. *See, e.g.*, *United States v. Martin*, 618 F.3d 705, 736-37 (7th Cir. 2010) ("each co-conspirator's financial motivation for joining the conspiracy is essentially irrelevant."); *United States v. Morse*, 851 F.2d 1317, 1319-20 (11th Cir. 1988) (defendant's only role was to sell a small, unregistered plane "particularly suited for smuggling" under suspicious circumstances to others who used it for drug smuggling).

The Court should reverse and remand this case so that the District Court can apply the Congressionally mandated *Halberstam* standard.

2. The State of Mind Required for Civil Aiding and Abetting

The District Court addressed Plaintiffs' dismissed aiding-and-abetting claims solely at oral argument for Plaintiffs' motion for partial reconsideration. At that hearing, the District Court appeared to agree with Defendants' counsel that § 2333(d)(2) requires a *higher* mental state than *Halberstam* requires. Tr. 49:10-15 (describing the required state of mind as "intent, knowledge by the defendant … to further the act of terrorism that harmed the plaintiffs here"). Whatever standard was applied, the District Court denied the motion for reconsideration

and dismissed Plaintiffs' aiding-and-abetting claims. Because the District Court's analysis is limited, and is therefore difficult to assess on appeal, *amici* set forth what they believe to be the correct adding-and-abetting standard.

JASTA merely requires that a plaintiff allege that the defendant "knowingly provide[d] substantial assistance" to the person who committed the act of terrorism (in addition to plausibly alleging that a plaintiff was injured by an act of terrorism "committed, planned or authorized" by an FTO). 18 U.S.C. § 2333(a), (d). Under *Halberstam*, the *mens rea* requirement is "a general awareness of [one's] role in a continuing criminal enterprise" or "an overall illegal or tortious activity." 705 F.2d at 487-88. Furthermore, *Halberstam* holds that defendants liable for aiding and abetting are responsible for the "reasonably foreseeable acts done in connection with" the criminal or tortious activity. *Id.* at 484. Taken together, a JASTA aiding-and-abetting plaintiff must allege that a defendant was generally aware of his role as part of an overall illegal or tortious activity—*i.e.*, a criminal enterprise—whose foreseeable consequences include acts of international terrorism.

Courts in this Circuit have unfortunately misapplied this standard. The source of that misunderstanding appears to be language in this Court's decision in *Linde*. There, the Court held that the *mens rea* requirement in § 2333(d)(2) "is different from the *mens rea* required to establish material support in violation of 18 U.S.C. § 2339B." *Id.* at 329. Several district courts have unfortunately construed this statement to mean that § 2333(d)(2) is a *higher* standard. *See, e.g.*, *Honickman v. BLOM Bank SAL,* No. 19-cv-8 (KAM) (SMG), 2020 WL 224552, at *7 (E.D.N.Y. Jan. 14, 2020). Much of the confusion stems from the *Linde* Court's description of *Halberstam*'s "general awareness" standard as requiring the secondary actor "to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in ***terrorist activities***." 882 F.3d at 329-30 (emphasis added). To the extent district courts, including the District Court here, read *Linde* to require that secondary actors know their own conduct involves terrorist acts—*i.e.*, violence—that reading is incompatible with JASTA's text and Findings and Purpose and the application of *Halberstam* as the governing framework.

B. The District Court Incorrectly Constrained the ATA's Reach To Attacks Where The FTO Exists Solely For Terrorist Purposes.

The District Court held that Plaintiffs' claims "suffer from … causal gaps" because Plaintiffs "do not allege that these entities solely exist for terrorist purposes." *Freeman*, 413 F. Supp. 3d at 94. But JASTA does *not* require that a defendant substantially assist or conspire with FTOs or their agent who "exist solely for terrorist purposes." *Id.* Virtually *no* terrorist organization satisfies that legal standard. Even the most ardent terrorist organization, ISIS, sold oil to fund its "caliphate." The IRGC similarly sells oil and operates a large number of commercial enterprises, but knowingly providing material support to these commercial enterprises is prohibited by the criminal provisions of the ATA. JASTA was not intended to immunize that conduct simply because it involves agents or alter-egos of terrorist groups that also serve "non-terrorist purposes."

The District Court, and several district court cases in the Second Circuit, have unfortunately misapplied *Linde* by concluding that, as a matter of law, knowingly providing material support to an FTO cannot satisfy § 2333(d)(2)'s state of mind requirement if the support is

directed to facially non-violent organs or alter-egos of an FTO or is provided for purportedly non-violent purposes. *See, e.g.*, *Weiss v. Nat'l Westminster Bank PLC*, 381 F. Supp. 3d 223, 239 (E.D.N.Y. 2019); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 531 (S.D.N.Y. 2019); *Honickman,* 2020 WL 224552. The District Court's observation that the IRGC (an FTO) is one of "these [] very large agencies that have multiple functions, some of which are legitimate and some of which are not," Tr. 37:14-18, is contrary to the statute and the views of both Congress and the Executive Branch. *See generally Holder,* 561 U.S. at 33-34, 38 (observing that Congress's and the Executive Branch's views on contribution to FTOs are "entitled to deference").

C. The District Court Incorrectly Held That A Defendant May Only Be Held Liable Under § 2333(d)(2) For Aiding and Abetting Or Conspiring "Directly" With "The Person Who Committed" An Act Of Terrorism.

Twice in JASTA's findings, Congress expressly stated its intention that civil liability under § 2333(d) include contribution of material support or resources "directly or indirectly." JASTA §§ 2(a)(7), (2)(b). This is because terrorist organizations often use agents and alter egos to both raise funds for their activities and to perpetrate

terrorist attacks. *Id.* at § 2(a)(3) ("Some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States."). While the District Court acknowledged that "it would make little sense to relieve a financial institution of liability for conspiring with an FTO that happened to use agents or an alter ego to engage in acts of terrorism," *Freeman*, 413 F. Supp. 3d at 97, it appears to have read § 2333(d)(2) as precluding liability when a defendant knowingly aids and abets[4] or conspires with an agent, alter ego or proxy of a terrorist organization that did not itself commit the acts of terrorism at issue. This is incorrect.

Halberstam confirms that a basic principle of conspiracy law is that a party need not conspire directly with another to perform the specific act that causes injury:

> As to the extent of liability, once the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action ... so long as the

[4] The District Court's holding is less clear with respect to aiding abetting claims. In any event, *amici* address the issue as to both claims.

> purpose of the tortious action was to advance the overall object of the conspiracy.

705 F.2d at 481.

This principle finds support in the criminal law as well. *See Pinkerton v. United States*, 328 U.S. 640 (1946). The same principle was affirmed in a case relied upon by the District Court, *United States v. Salameh*, 152 F.3d 88, 151 (2d. Cir. 1998) (a jury may find "a conspirator … responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if [the conspirator] did not himself participate in the substantive crimes."). *See also United States v. Romero*, 897 F.2d 47, 51 (2d Cir. 1990) ("Whether a particular crime is foreseeable and in furtherance of the conspiracy is a factual matter for the jury."). Indeed, this Court has held that the government need not prove that two conspirators "conspired directly with each other," or even knew each other's identities, so long as they were "aware of the participation of others in the scheme." *See United States v. Bicaksiz*, 194 F.3d 390, 399 (2d Cir. 1999) (internal quotation marks and citation omitted).

Thus, although the District Court recognized that "JASTA's inclusion of societies and associations within its definition of 'person' clearly indicates that the 'person' committing an act of terrorism need not be the literal triggerman, as Defendants appear to suggest," *Freeman*, 413 F. Supp. 3d at 97, it nevertheless created an artificial "directness" requirement unsupported by the statute's text and contradicted by the statute's Findings.

Congress's intent is also evident from its broad use of the term "person" in § 2333(d)(1) and (2). The District Court correctly observed that "[w]here Congress has expressed an intent to create a broad form of liability through JASTA and provided an expansive definition of the term 'person,' it would make little sense to relieve a financial institution of liability for conspiring with an FTO that happened to use agents or an alter ego to engage in acts of terrorism." *Id.* But it appears to have erroneously held that § 2333(d)(2) requires that the "person" who committed the attack in § 2333(d)(2)'s second clause be an agent or an alter ego of the FTO required in § 2333(d)(2)'s first clause. Congress *could* have drafted § 2333(d)(2) to read:

> In an action under [§ 2333(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 ... 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 **foreign terrorist organization** who committed such an act of international terrorism.

Congress's choice to use the word "person" and specifically define it "expansively" in § 2333(d)(1) was intended, as explained above, to deter FTOs that "act[] through affiliated groups ... [to] raise significant funds outside of the United States," and reflected an awareness that those who "knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism necessarily direct their conduct at the United States." JASTA §§ 2(a)(3) and 2(a)(6).

The District Court nonetheless held that "the plain text of JASTA's *conspiracy* liability provision requires that a defendant conspire directly with the person or entity that committed the act of international terrorism that injured the plaintiff." *Freeman*, 413 F. Supp. 3d at 98 n.41. The word "directly" does not appear in § 2333(d)(2), and this judicially crafted requirement flatly contradicts what the District Court acknowledged was "Congress's apparent intent

to provide liability for actions that indirectly assist in the commission of acts of terrorism." *Id.* It is also contrary to the Congressionally mandated *Halberstam* framework and to the principles of criminal conspiracy, as articulated in *Pinkerton*.

* * *

Congress is mindful that FTOs do not observe corporate formalities, fit into neat categories, or employ static tactics. The decades since the ATA's passage have unfortunately witnessed coordination between disparate terrorist groups as well as the development by terrorist groups of extremely lethal new weapons and tactics—as well as increasingly sophisticated money laundering methods. Accordingly, claims brought under the ATA, including JASTA's § 2333(d), should be construed liberally under Federal Rule of Civil Procedure 8—by applying well established common law principles for civil aiding-and-abetting and conspiracy claims.

Amici take no position on the ultimate merits of Plaintiffs' claims or their ability to marshal evidence to support the facts alleged. However, because the District Court applied erroneous legal standards to Plaintiffs' § 2333(d)(2) conspiracy and aiding-and-abetting claims

and made factual determinations about the scope and foreseeable consequences of Defendants' alleged conduct that should not be determined as a matter of law, *amici* urge reversal of the judgment below.

CONCLUSION

Amici respectfully submit that the Court should reverse the judgment of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Local Rules 29.1(c) and 32.1(a)(4)(A) and Fed. R. App. P. 32(a)(7)(B). This brief contains 6,901 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by the word-counting feature of Microsoft Word.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook.

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