[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-7077

JOSHUA ATCHLEY, *et al.*,
Plaintiffs-Appellants,

v.

ASTRAZENECA UK LIMITED, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia No. 1:17-cv-02136-RJL, Hon. Richard J. Leon

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), *amici curiae* certify as follows:

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing in the district court and before this Court thus far are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review

The rulings under review are listed in the Brief for Plaintiffs-Appellants.

C. Related Cases

Amici curiae are not aware of this case having been previously before this Court or any other court, or of any pending related cases.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF AUTHORITIES iii

RULE 29(D) CERTIFICATION vi

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. JASTA EXPRESSLY PROVIDES THAT ATA CLAIMS CAN BE PREDICATED ON THEORIES OF SECONDARY LIABILITY 4

A. As Initially Enacted, the ATA Did Not Expressly Provide for Secondary Liability 5

B. JASTA Expressly Provides that Secondary Liability Is Available Under the ATA — and Expressly Articulates the Standards Governing Such Claims 10

II. SOME LOWER COURTS HAVE RESPONDED TO JASTA BY IMPOSING INDEFENSIBLY HIGH BURDENS ON PLAINTIFFS TO ALLEGE SECONDARY LIABILITY CLAIMS UNDER THE ATA 14

A. Courts Have Required Plaintiffs Raising Aiding-and-Abetting Claims Under the ATA to Plausibly Allege Far More Than *Halberstam* Requires 15

B. These Interpretations Cannot Be Reconciled with JASTA's Plain Text or Congress's Clear Purpose 19

III. THE DISTRICT COURT'S AIDING-AND-ABETTING ANALYSIS SUFFERS FROM THE SAME FLAWS, AND SHOULD BE REVERSED 23

CONCLUSION 31

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Almog v. *Arab Bank*, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007)............5

Atchley v. *AstraZeneca UK Ltd.*,
474 F. Supp. 3d 194 (D.D.C. 2020) 3, 23, 24, 25, 26, 27, 28, 29

Bank Markazi v. *Peterson*, 136 S. Ct. 1310 (2016)..................................22

Bartlett v. *Société Générale de Banque au Liban SAL*,
No. 19-cv-7, 2020 WL 7089448 (E.D.N.Y. Nov. 25, 2020)....................19

BCS Servs., Inc. v. *Heartwood 88, LLC*, 637 F.3d 750 (7th Cir. 2011)..17

BedRoc Ltd., LLC v. *United States*, 541 U.S. 176 (2004) 22

Bernhardt v. *Islamic Rep. of Iran*,
No. 18-2739, 2020 WL 6743066 (D.D.C. Nov. 16, 2020).......................16

Boim v. *Holy Land Foundation for Relief and Development* ("*Boim III*"),
549 F.3d 685 (7th Cir. 2008) (en banc)...................................8, 9, 10, 19

Cent. Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*,
511 U.S. 164 (1994) 8

Crosby v. *Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019)..........................3, 24

Eldred v. *Ashcroft*, 537 U.S. 186 (2003) 30

Estate of Henkin v. *Kuveyt Turk Katilim Bankasi, A.S.*,
No. 19-cv-5394, 2020 WL 6143654 (E.D.N.Y. Oct. 20, 2020) 19

Food Mktg. Inst. v. *Argus Leader Media*,
139 S. Ct. 2356 (2019) 21, 23

Freeman v. *HSBC Holdings PLC*,
413 F. Supp. 3d 67 (E.D.N.Y. 2019)..3, 20

Gundy v. *United States*, 139 S. Ct. 2116 (2019).....................................21

Halberstam v. *Welch*,
705 F.2d 472 (D.C. Cir. 1983) 1, 15, 16, 17, 18, 25, 26, 27, 28

Harbison v. *Bell*, 556 U.S. 180, 197 (2009)..30

Kloeckner v. *Solis*, 568 U.S. 41 (2012) 20

Linde v. *Arab Bank, PLC*,
882 F.3d 314 (2d Cir. 2018)... 15, 16, 18, 19, 24

TABLE OF AUTHORITIES (CONTINUED)

Nat'l Ass'n of Mfrs. v. *Dep't of Defense*, 138 S. Ct. 617 (2018) 4, 22

O'Sullivan v. *Deutsche Bank AG*,
No. 17 CV 8709, 2020 WL 906153 (S.D.N.Y. Feb. 25, 2020) 16, 20

Ross v. *Blake*, 136 S. Ct. 1850 (2016) 21

Rothstein v. *UBS AG*, 708 F.3d 82 (2d Cir. 2013) 8, 9, 10

Rubin v. *Islamic Rep. of Iran*, 830 F.3d 470 (7th Cir. 2016) 21

Schindler Elev. Corp. v. *United States ex rel. Kirk*,
563 U.S. 401 (2011) 21

Siegel v. *HSBC N. Am. Holdings, Inc.*,
933 F.3d 217 (2d Cir. 2019) 2

Wultz v. *Islamic Republic of Iran*,
755 F. Supp. 2d 1 (D.D.C. 2010) 9

STATUTES

Anti-Terrorism Act (ATA), 18 U.S.C. §§ 1, 2, 4, 11
§ 2331 13
§ 2331(1)(A) 6
§ 2331(1)(B) 7
§ 2331(1)(C) 7
§ 2333 .... 11, 13
§ 2333(a) 6, 8, 12
§ 2333(d) 1, 2, 12, 21
§ 2334 13
§ 2335 13
§ 2337 7

Anti-Terrorism Clarification Act of 2018,
Pub. L. No. 115-253, 132 Stat. 3183 13

Federal Courts Administration Act of 1992,
Pub. L. No. 102-572, 106 Stat. 4506 5

Justice Against Sponsors of Terrorism Act (JASTA),
Pub. L. No. 114-222, 130 Stat. 852 (2016) 1, 2, 4, 11, 12, 13, 20, 24

Military Construction Appropriations Act, 1991,
Pub. L. No. 101-519, 104 Stat. 2240 (1990) 5

TABLE OF AUTHORITIES (CONTINUED)

National Defense Authorization Act for Fiscal Year 2013,
Pub. L. No. 112-239, 126 Stat. 1632 13

USA PATRIOT Act of 2001,
Pub. L. No. 107-56, 115 Stat. 272 7

OTHER AUTHORITIES

STEPHEN DYCUS ET AL.,
COUNTERTERRORISM LAW (3d ed. 2016) 9

H.R. REP. No. 102-1040 (1992) 5, 7

Restatement (Second) of Torts § 876 (1979) 26

Restatement (Third) of Torts § 28 (2020) 28

S. REP. No. 102-342 (1992) 6, 7

ANTONIN SCALIA & BRYAN GARNER,
READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) 21

Steve Vladeck,
The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA), JUST SECURITY, Apr. 18, 2016 11

Veto Message from the President — S. 2040, Sept. 23, 2016 11

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RULE 29(d) CERTIFICATION

Pursuant to D.C. Cir. R. 29(d), *amici curiae* certify that this separate brief was necessary. *Amici* are scholarly experts on the relevant legal questions presented in this appeal, and come at those questions from the perspective of having researched, written about, and taught these issues (and the history of the relevant statutes and case law) in detail. To that end, *amici* believe that theirs is a unique perspective that offers a disinterested assessment of the scope of the Anti-Terrorism Act (ATA), 18 U.S.C. §§ 2331–2339D (2018), as amended by the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016). Between their unique expertise on those questions, and the extent to which their expertise on other issues presented in this appeal varies, *amici* concluded that a separate brief focusing on their areas of expertise was called for.

Stephen I. Vladeck
Counsel for *Amici Curiae*

Date: January 19, 2021

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are 17 law professors who write about, research, and teach civil procedure, counterterrorism law, federal courts, and/or statutory interpretation. *Amici* come together in this case in response to a troubling trend among some lower-court rulings dismissing claims for secondary liability under the Anti-Terrorism Act (ATA), 18 U.S.C. § 2331–2339D, as amended by the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)). As *amici* explain in this brief, a number of lower courts, including the district court here, have limited secondary liability under the ATA in a manner that cannot be reconciled with either JASTA's plain text or Congress's unambiguous purpose in enacting that statute, which was to adopt the framework articulated by this Court in *Halberstam* v. *Welch*, 705 F.2d 472 (D.C. Cir. 1983). Simply put, if *Halberstam* is applied properly to Plaintiffs-Appellants' plausible allegations, then the decision below cannot stand.

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1. All parties participating in this appeal have consented to the filing of this brief. No counsel for a party to this appeal authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Congress enacted JASTA "to provide civil litigants with the **broadest possible basis**, consistent with the Constitution of the United States, to seek relief against [any person or entity that] provided material support, **directly or indirectly**, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA § 2(b), 130 Stat. at 853 (emphases added); *see Siegel* v. *HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 223 n.5 (2d Cir. 2019) (highlighting this language). To that end, JASTA expressly authorized civil claims based on theories of "secondary" liability — against anyone who conspired to violate the ATA or aided and abetted violations thereof. JASTA § 4(a), 130 Stat. at 854 (codified at 18 U.S.C. § 2333(d)(2)). And to avoid the potential uncertainty that might result from subjecting defendants to divergent state law liability rules, JASTA made clear that courts analyzing conspiracy and aiding-and-abetting claims under the ATA were to follow *Halberstam* — in which Judges Wald, Bork, and Scalia carefully and comprehensively outlined the contours of such secondary civil liability under common law. JASTA § 2(a)(5), 130 Stat. at 853.

Notwithstanding JASTA's (and *Halberstam*'s) clarity on these points, many lower courts over the past four years have muddied the waters — yielding, in the words of one of those courts, "a decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy." *Freeman* v. *HSBC Holdings PLC*, 413 F. Supp. 3d 67, 73 n.2 (E.D.N.Y. 2019). In his decision in this case, Judge Leon specifically alluded to this trend. *See Atchley* v. *AstraZeneca UK Ltd.*, 474 F. Supp. 3d 194, 212 (D.D.C. 2020) (citing *Crosby* v. *Twitter, Inc.*, 921 F.3d 617, 627 n.6 (6th Cir. 2019)).

Not only have these courts misapplied *Halberstam* (thereby flouting JASTA's plain text and unambiguous purpose), but the trend has increasingly become its **own** justification for such skepticism. *See, e.g.*, *Freeman*, 413 F. Supp. 3d at 73 n.2 ("It is this consistent trend . . . that informs the Court's decision not to adopt the well-considered recommendations of Judge Pollak's R&R and to dismiss this matter."). In other words, some courts' hostility to JASTA — and inaccurate readings of *Halberstam* — have become justifications for other courts to show hostility to JASTA and embrace inaccurate readings of *Halberstam*.

The decision below is emblematic of this self-fulfilling prophecy. In rejecting Plaintiffs-Appellants' aiding-and-abetting claims, the district court required Plaintiffs-Appellants to plausibly allege a far more direct connection between Defendants-Appellees and the underlying acts of international terrorism than what *Halberstam* (and, thus, JASTA) requires. But because JASTA's plain language is unambiguous, this Court's "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs*. v. *Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (internal quotation marks omitted). Insofar as the district court failed to heed JASTA's plain text and its incorporation of this Court's decision in *Halberstam*, *amici* respectfully submit that its decision should be reversed — and that this broader "trend" should be repudiated.

ARGUMENT

I. JASTA EXPRESSLY PROVIDES THAT ATA CLAIMS CAN BE PREDICATED ON THEORIES OF SECONDARY LIABILITY

To illustrate why lower-court rulings like the district court's decision in this case are so fundamentally inconsistent with JASTA, this Part introduces both JASTA itself and the statute it amended — the ATA. As the text and history of these statutes make clear, Congress knew exactly what it was doing in 2016 when it authorized secondary civil

liability — on "the **broadest possible basis**" — against those who conspired in or aided and abetted certain acts of international terrorism. JASTA § 2(b), 130 Stat. at 853 (emphasis added).

A. As Initially Enacted, the ATA Did Not Expressly Provide for Secondary Liability

First enacted in 1990,[2] the core of the current ATA has been on the books since 1992. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003(a)(4), 106 Stat. 4506, 4522 (codified as amended at 18 U.S.C. §§ 2331–2339D). As the House Judiciary Committee explained, the ATA was designed to provide "a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals." H.R. REP. No. 102-1040, at 1 (1992).

Congress had first provided for extraterritorial criminal jurisdiction over terrorist acts in 1986, and the ATA was designed to

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2. The same language Congress enacted in 1992 was initially enacted as part of the Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250 (1990), and known as the "Anti-Terrorism Act of 1990." *Id.* But because of an enrolling error, it was repealed five months later — and then promptly reenacted. *See Almog* v. *Arab Bank*, *PLC*, 471 F. Supp. 2d 257, 265–66 (E.D.N.Y. 2007) (retracing this history).

provide a complementary civil remedy for the victims of such acts. *See id.*

To that end, the ATA:

> would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By its provisions for compensatory damages, tremble [*sic*] damages, and **the imposition of liability at any point along the causal chain of terrorism**, it would interrupt, or at least imperil, the flow of money.

S. REP. No. 102-342, at 22 (1992) (emphasis added).

As relevant here, the ATA added 18 U.S.C. § 2333(a), which provides that:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

The ATA further defines "international terrorism" as activities that meet three related but distinct requirements. First, they must "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1)(A). Second, they must "appear

to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination, or kidnapping." *Id.* § 2331(1)(B). Finally, they must "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum." *Id.* § 2331(1)(C).[3]

In enacting the ATA, Congress explained that its purpose was to close "gap[s] in our efforts to develop a comprehensive legal response to international terrorism," H.R. REP. No. 102-1040, *supra*, at 5, and to thereby impose liability "**at any point** along the causal chain of terrorism," S. REP. No. 102-342, *supra*, at 22 (emphasis added). Nevertheless, other than barring actions against the U.S. government, foreign governments, and agents or employees thereof, *see* 18 U.S.C. § 2337, the text of the ATA said nothing whatsoever about **who** could be held liable for violating the statute.

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3. This definition has been amended only once in three decades — to add "mass destruction" to § 2331(1)(B)(iii). USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 802(a)(1), 115 Stat. 272, 376.

There was never any question as to whether the direct perpetrators of the qualifying acts of international terrorism were proper defendants. But those individuals often (1) died in the attack; (2) could not be subject to personal jurisdiction in the United States even if they survived; or (3) were judgment-proof even if they could be subject to the jurisdiction of U.S. courts. Thus, one of the dominant questions the ATA raised — but did not answer — was whether any species of **secondary** liability would be available under the statute.

Perhaps the most important decision addressing that question was the en banc Seventh Circuit's ruling in *Boim* v. *Holy Land Foundation for Relief and Development* ("*Boim III*"), 549 F.3d 685 (7th Cir. 2008) (en banc). Writing for a majority of the full court, Judge Posner held 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." *Id*. at 689 (citing *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 200 (1994)). Quoting this exact analysis, the Second Circuit reached a similar conclusion in *Rothstein* v. *UBS AG*, 708 F.3d 82, 97–98 (2d Cir. 2013). *But see Wultz* v. *Islamic*

Republic of Iran, 755 F. Supp. 2d 1, 54–57 (D.D.C. 2010) (recognizing common-law aiding-and-abetting liability under the ATA, and citing other district courts that had held the same).

The *Boim III* court did not end its analysis with its foreclosure of common-law secondary liability. Instead, as Judge Posner explained, the **primary** liability imposed by the ATA includes circumstances in which the predicate federal criminal violation is nothing more than the provision of material support to terrorists — which is, itself, a form of secondary liability. In his words, "[p]rimary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Boim III*, 549 F.3d at 691–92.

This reasoning, which has been described as "statutory secondary liability," *see* STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 937 (3d ed. 2016), reflected an overt, if awkward, compromise — between the common-law secondary liability that Congress seems to have intended, *see id.* at 705–19 (Rovner, J., concurring in part and dissenting in part), and the silence of the statute on that specific point. *See Rothstein*, 708

F.3d at 97–98. Under *Boim III*, proceeding against a defendant other than the perpetrator of the underlying act of international terrorism requires demonstrating not only that the defendant aided or abetted (or conspired to commit) an act of international terrorism; it also requires showing that the defendant's **primary** conduct meets the definition of "international terrorism" in § 2331(1). *Boim III* is thus significant in two respects. First, it underscores the debate over the availability of secondary liability under the ATA prior to JASTA. Second, it provides a baseline against which to compare the post-JASTA ATA, as well.

B. JASTA Expressly Provides that Secondary Liability Is Available Under the ATA — and Expressly Articulates the Standards Governing Such Claims

Following *Boim III*, the Second Circuit rejected common-law secondary liability under the original ATA in *Rothstein*, albeit without taking a position on Judge Posner's theory of "statutory secondary liability." *See* 708 F.3d at 98. But as the Court of Appeals presciently noted, "[i]t of course remains within the prerogative of Congress to create civil liability on an aiding-and-abetting basis." *Id.*

Enter, JASTA. Enacted over President Obama's veto, JASTA garnered headlines primarily for its amendments to the Foreign

Sovereign Immunities Act (FSIA) — which, in response to decisions from the Second Circuit and the U.S. District Court for the Southern District of New York, were ostensibly intended to make it easier for victims of the September 11 attacks and their families to sue Saudi Arabia over its alleged role in providing financial support for the attacks. *See* Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SECURITY, Apr. 18, 2016, https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta/. Indeed, President Obama's veto message focused exclusively on **that** aspect of JASTA. Veto Message from the President—S. 2040, Sept. 23, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040.

Far more quietly (and far less controversially, at least at the time), JASTA also amended the ATA. As Congress explained in the text of the statute, "[i]t is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code." JASTA § 2(a)(4), 130 Stat. at 852 (codified at 18 U.S.C. § 2333 note).[4] Thus, JASTA sought to make explicit that the ATA

4. Chapter 113B is the ATA. *See* 18 U.S.C. §§ 2331–2339D.

provides a civil damages remedy against "persons or entities" "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 that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States." *Id.* § 2(a)(6) (emphasis added). Indeed, Congress could hardly have been clearer as to its purpose:

> The purpose of this Act is to provide civil litigants with **the broadest possible basis**, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, **that have provided material support, directly or indirectly**, to foreign organizations or persons that engage in terrorist activities against the United States.

Id. § 2(b), 130 Stat. at 853 (emphases added). To that end, JASTA created 18 U.S.C. § 2333(d)(2):

> 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 [an FTO] 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**.

Id. § 4(a), 130 Stat. at 854 (emphases added).

Congress went even further, and expressly identified the standards it intended courts to apply in considering secondary liability claims under the ATA. As the statute provided, this Court's canonical decision in *Halberstam*, "which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, . . . provides the proper legal framework for how such liability should function in the context of [the ATA]." *Id.* § 2(a)(5), 130 Stat. at 852. Finally, JASTA provided that its amendments to the FSIA and the ATA applied to any civil action arising out of injuries on or after September 11, 2001 that was pending as of, or commenced after, its date of enactment — September 28, 2016. *Id.* § 7, 130 Stat. at 855.[5]

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5. JASTA was one of three different statutes in a five-year period in which Congress expressly broadened liability under the ATA. In 2013, Congress expanded the statute of limitations for ATA claims from four years to 10 years. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1251(a), 126 Stat. 1632, 2017 (codified at 18 U.S.C. § 2335). And in the Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183, Congress (1) clarified that the exemption from the ATA for "acts of war" did not extend to acts by designated FTOs; (2) expanded the class of blocked assets that could be used to satisfy successful ATA judgments; and (3) identified certain conduct as providing consent to personal jurisdiction in ATA cases. *Id.* §§ 2–4, 132 Stat. at 3183–85 (codified at 18 U.S.C. §§ 2331, 2333, 2334).

Congress therefore (1) expressly authorized ATA claims based upon conspiracy and aiding-and-abetting liability; (2) expressly identified the standards courts should apply in reviewing ATA conspiracy and aiding-and-abetting claims; (3) emphasized that its purpose was to "to provide civil litigants with the broadest possible basis to seek relief against [those] that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States"; and (4) made those amendments applicable retroactively to any claim arising on or after September 11, 2001.

II. Some Lower Courts Have Responded to JASTA By Imposing Indefensibly High Burdens on Plaintiffs to Allege Secondary Liability Claims Under the ATA

JASTA expressly authorized aiding-and-abetting and conspiracy liability under the ATA, and it did so with the express purpose of creating the "broadest possible basis" for liability against *any* party that provides even "indirect[]" material support to those engaging in terrorist activities against the United States. Notwithstanding these unambiguous provisos, certain courts over the past four years have adopted a series of

narrow interpretations of JASTA that are irreconcilable with *Halberstam* — and, thus, with JASTA's plain and unambiguous text.[6]

A. Courts Have Required Plaintiffs Raising Aiding-and-Abetting Claims Under the ATA to Plausibly Allege Far More Than *Halberstam* Requires

In *Linde* v. *Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), the Second Circuit refused to affirm a theory of secondary liability on which the jury had never been instructed, holding that "aiding and abetting an **act** of international terrorism requires more than the provision of material support to a designated terrorist **organization**. Aiding and abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Id.* at 329 (citing *Halberstam*, 705 F.2d at 477). Although it came in the specific context of reviewing a jury verdict, the Second Circuit's statement has repeatedly been ripped from its specific procedural context and relied upon by lower courts to impose an unduly high burden for **pleading** aiding-and-abetting claims under JASTA.

6. Because Plaintiffs-Appellants did not allege any conspiracy claims, *amici* do not address the case law adopting an unduly restrictive reading of conspiracy liability under JASTA. Suffice it to say, though, that many of the errors that courts have made in aiding-and-abetting cases have also surfaced in judicial analyses of conspiracy claims under JASTA.

For instance, in *O'Sullivan* v. *Deutsche Bank AG*, No. 17 CV 8709, 2020 WL 906153 (S.D.N.Y. Feb. 25, 2020), the court denied plaintiffs' motion for leave to amend their aiding-and-abetting claims because "allegations that Defendants knowingly violated laws that were designed principally to prevent terrorist activity do not allege plausibly a general awareness that Defendants had assumed a role in a foreign terrorist organization's **act** of international terrorism." *Id*. at *6 (citing *Linde*, 882 F.3d at 329). Thus, *O'Sullivan* required that a plaintiff plausibly allege that the defendant was generally aware of its role in the actual terrorist attack — as opposed to its role in supporting criminal activities, including terrorism, more generally. *See also Bernhardt* v. *Islamic Rep. of Iran*, No. 18-2739, 2020 WL 6743066, at *5 (D.D.C. Nov. 16, 2020) (similarly reading *Linde*).

Posture aside, *Linde*'s discussion of *Halberstam* cannot be reconciled with *Halberstam* itself. In *Halberstam*, this Court held that Linda Hamilton aided and abetted Bernard Welch's murder of Dr. Michael Halberstam — even though she neither planned nor knew about the murder — because she had agreed with Welch to undertake an illegal

enterprise to acquire stolen property and had played a substantial role in the broader criminal enterprise.

As Judge Wald explained, Hamilton was liable **not** because she was generally aware that Welch intended to murder Halberstam, but because she "had a general awareness of her role in a **continuing criminal enterprise**." 705 F.2d at 488 (emphasis added); *see also BCS Servs., Inc.* v. *Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011) (Posner, J.) ("Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation."). Had Hamilton been aware that Welch intended to murder Halberstam and facilitated the burglary anyway, she could presumably have been sued — and charged — as a principal.

This Court in *Halberstam* further concluded that Hamilton had provided "substantial assistance" to Welch because, even though she was not present at the time of the murder (or of any of the individual burglaries), she was heavily involved in part of the "business" — quickly disposing of the burgled goods without suspicion — on which "the success of the tortious enterprise" rested. 705 F.2d at 488. As Judge Wald wrote:

> 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. (emphasis added).

As in *Halberstam*, for a party alleged to have aided and abetted an act of international terrorism under the ATA, "violence and killing is a foreseeable risk" of the enterprise. *Id.* And as in *Halberstam*, a party can aid and abet such an act even if its role is a purely bureaucratic one — financial machinations on which "the success of the tortious enterprise" rested. *Id.* By *Halberstam*'s logic, then (which Congress expressly adopted in JASTA), a third party aids and abets a violation of the ATA if they are generally aware of the nature of the criminal activities that their conduct is facilitating, and if they provide substantial assistance to the criminal **enterprise** from which acts of international terrorism result — not to the specific acts of international terrorism themselves. Lower courts have thus overread *Linde*; but *Linde* itself misread *Halberstam*.[7]

7. In recent months, two district courts have come out the other way, reading JASTA more in line with its text. *Bartlett* v. *Société Générale de Banque au Liban SAL*, No. 19-cv-7, 2020 WL 7089448 (E.D.N.Y. Nov. 25,

B. These Interpretations Cannot Be Reconciled with JASTA's Plain Text or Congress's Clear Purpose

The rulings discussed above, and others like them, have had the effect of converting the "broadest possible basis" for secondary liability that Congress intended to confer under JASTA into requirements that secondary actors have effectively committed **primary** violations of criminal counterterrorism laws — of holding plaintiffs to a standard that is even more demanding than the already narrow "statutory secondary liability" that the Seventh Circuit recognized in *Boim III*.

Moreover, other than *Linde* itself, these decisions are invariably coming at the motion-to-dismiss stage of these cases, on the ground that plaintiffs' complaints have failed to plausibly allege facts that, if proven, would establish the defendants' secondary liability under the ATA. In other words, district courts are adopting these interpretations of JASTA notwithstanding plausible allegations that more than adequately state claims for secondary liability under *Halberstam*, so that JASTA claims are foreclosed even if each of the plaintiffs' allegations is, in fact, true.

2020); *Estate of Henkin* v. *Kuveyt Turk Katilim Bankasi, A.S.*, No. 19-cv-5394, 2020 WL 6143654 (E.D.N.Y. Oct. 20, 2020). These rulings, however, are still in the distinct minority.

In some cases, courts' skepticism of JASTA has been all-but overt. For instance, in *Freeman*, Judge Chen justified adopting an *O'Sullivan*-like approach to conspiracy liability under JASTA (and rejecting the magistrate judge's exhaustive R&R) by dismissing what she described as "Congress's **apparent** intent" in enacting that statute. 413 F. Supp. 3d at 98 n.41 (emphasis added); *see also id.* at 94 n.35 ("[A]lthough Congress enacted JASTA to provide 'the broadest possible basis [for civil litigants] . . . to seek relief against persons, entities, and foreign countries' that have provided direct or indirect material support to terrorism, the Act's amendments **themselves** do not alter the applicable causation standard." (emphasis added; second alteration in original)).

But Congress's intent in JASTA was not "apparent"; it was expressly and unambiguously stated on the face of the statute. *See* JASTA § 2, 130 Stat. at 852–53. This is therefore not an instance in which there is tension between the statute's purposes and its text, *see, e.g.*, *Kloeckner* v. *Solis*, 568 U.S. 41, 55 n.4 (2012); it is, instead, an instance in which the statute's text makes its purposes inescapably plain. And as the Supreme Court recently reiterated, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of

the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citing *Schindler Elev. Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 407 (2011)); *see also Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016) ("Statutory interpretation, as we always say, begins with the text.").

Nor is it any response to this straightforward textual analysis that Congress expressly articulated JASTA's purpose in provisions other than the operative amendment to the ATA. To whatever extent such language might be required to yield to the language of operative provisions when they conflict, there is no conflict here. Rather, JASTA's operative provision expressly authorizes secondary liability in new § 2333(d), and its statutory recitation of purpose specifically identifies the contours of the secondary liability that the operative provision authorizes. *See Gundy* v. *United States*, 139 S. Ct. 2116, 2127 (2019) (plurality opinion) ("[T]he placement of such a statement within a statute makes no difference." (citing ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 220 (2012))); *see also Rubin* v. *Islamic Rep. of Iran*, 830 F.3d 470, 479–80 (7th Cir. 2016) ("None of the standard

objections to judicial reliance on legislative history inhibit our resort to a **statutory** declaration of purpose for help in interpreting a part of the statute to which it applies.”).

Here, JASTA’s text and structure provide clear answers as to the contours of secondary liability that Congress intended to authorize under the ATA. Courts may not agree that *Halberstam* provides the most **normatively desirable** approach to aiding-and-abetting liability, but given JASTA’s plain text, there can be no question as to whether it provides the **governing** standard for assessing aiding-and-abetting liability under the ATA; it does. *See Nat’l Ass’n of Mfrs.*, 138 S. Ct. at 631 (“Because the plain language of [the statute] is ‘unambiguous,’ ‘our inquiry begins with the statutory text, and ends there as well.’” (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)); *see also Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016) (“[A]n exercise of congressional authority regarding foreign affairs [is] a domain in which the controlling role of the political branches is both necessary and proper.”).

Insofar as courts have not followed *Halberstam* in their decisions cabining secondary liability under the ATA, they are therefore engaging

in the very "casual disregard of the rules of statutory interpretation" that the Supreme Court has repeatedly dismissed as a "relic from a bygone era of statutory construction." *Food Mktg. Inst.*, 139 S. Ct. at 2364 (internal quotation marks omitted). It would be one thing if these courts identified reasons for **distinguishing** *Halberstam*, or for not being bound by Congress's determination in JASTA that *Halberstam* should govern the scope of aiding-and-abetting liability under the ATA. But none of these courts have done so. Instead, they have purported to **follow** *Halberstam* — while badly misstating what it actually held.

III. The District Court's Aiding-and-Abetting Analysis Suffers from the Same Flaws, and Should Be Reversed

The district court in this case is no exception. In holding that Plaintiffs-Appellants failed plausibly to allege aiding-and-abetting claims, Judge Leon reached at least five conclusions about the scope of secondary liability under the ATA that cannot be reconciled with either the plain text of JASTA, this Court's analysis in *Halberstam*, or both.

First, Judge Leon highlighted Defendants' assertion that the Plaintiffs-Appellants "allege that defendants provided medical goods and devices to the Ministry, **not** JAM." 474 F. Supp. 3d at 212 (emphasis added). Thus, in his view, because the Plaintiffs-Appellants failed "'to

allege a direct link between the defendants and the individual perpetrator,'" their aiding-and-abetting claims fail as a matter of law. *Id.* (quoting *Crosby*, 921 F.3d at 627 n.6). But JASTA's text expressly **eschews** such a "direct link" requirement. *See* JASTA § 2(b), 130 Stat. at 853 (noting that JASTA's purpose is to impose liability upon those who support acts of international terrorism, whether "directly **or indirectly**" (emphasis added)). Indeed, the whole point of JASTA was to respond to lower-court decisions that had unduly narrowed — if not altogether foreclosed — **indirect** liability under the ATA.

Second, even assuming the existence of a sufficient link between the Defendants-Appellees and JAM, Judge Leon wrongly framed his aiding-and-abetting analysis by inaccurate reference to the Second Circuit's inapposite and incorrect analysis in *Linde*:

> [P]laintiffs' allegations fail to establish that any assistance was "substantial." For the assistance to be "substantial," the ATA "requires more than the provision of material support to a designated terrorist organization." Rather, "the secondary actor [must] be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities."

474 F. Supp. 3d at 212–13 (quoting *Linde*, 882 F.3d at 329) (alteration in original). This analysis inaccurately **conflates** *Linde*'s discussion of the scienter requirement for aiding-and-abetting liability with its

discussion of "substantial assistance" factor. In any event, it is directly contradicted by *Halberstam* — in which this Court affirmed Hamilton's civil liability for Welch's murder of Halberstam under an aiding-and-abetting theory even though Hamilton had **no** knowledge that, by assisting Welch, she was "assuming a 'role'" in the murder (or even the burglaries) — as opposed to a criminal enterprise more generally. *See* 705 F.2d at 488 ("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.").

Third, Judge Leon held that, assuming "defendants provided general support to JAM through their contracts with the Ministry," "absent a link between that support and the principal violation, defendants' purported assistance is not substantial." 474 F. Supp. 3d at 213. But *Halberstam*'s discussion of whether Hamilton's support for Welch was "substantial" did not turn on whether it was more than "general support" for Welch's illicit enterprise; it turned on the **nature**

of that "general support," by reference to the five factors set out in the *Restatement (Second) of Torts* § 876 (1979). Again, there was no "direct link" between Hamilton's ability to dispose of the goods Welch illicitly acquired and Welch's murder of Halberstam.

Fourth, Judge Leon paid lip service to whether Defendants-Appellants were "present" when the underlying torts were committed, relying on Plaintiffs-Appellants concession that Defendants-Appellants were not **physically** present. 474 F. Supp. 3d at 213. As *Halberstam* makes clear, though, that inquiry focuses on more than just physical proximity. Hamilton's "presence," this Court explained, derived from her **disposition of the goods Welch stole** — the technical assistance on which "the success of the tortious enterprise" rested. *See* 705 F.2d at 488 ("Hamilton was admittedly not present at the time of the murder or even at the time of any burglary. But as we noted above, the success of the tortious enterprise clearly required expeditious and unsuspicious disposal of the goods, and Hamilton's role in that side of the business was substantial.").

In terrorist financing cases, the relevant comparator to Hamilton's ability to dispose of Welch's burgled goods, in *amici*'s view, is the source

of **funding** of the terrorist acts of groups like JAM. And here, Plaintiffs-Appellants have plausibly alleged that "the success of the tortious enterprise" rested on JAM's ability to have access to the substantial sums of cash (and cash equivalents) that Defendants-Appellants allegedly — and **knowingly** — provided. As *Halberstam* makes clear, just because Plaintiffs-Appellants concede that Defendants-Appellees were not "present" at the commission of the underlying torts does not mean that this factor militates against the plausibility of their aiding-and-abetting claims as a matter of law.

Finally, Judge Leon misread *Halberstam*'s (and the common law's) test for the state of mind required for aiding and abetting. In the district court's view, Plaintiffs-Appellants' allegations — that "defendants knowingly provided medical goods to the Ministry for economic gain and were aware those goods would be used by JAM to support terrorist attacks" — "do not even suggest defendants were 'one in spirit' with JAM's desire to kill American citizens in Iraq or that defendants intended to help JAM succeed in doing so." 474 F. Supp. 3d at 213.

But nothing in *Halberstam*, or in the common law cases on which it relied, requires that defendants who aid and abet a tort share the

primary tortfeasor's specific intent. Otherwise, they would themselves be subject to primary liability — defeating the need for (and purpose of) secondary liability. *See, e.g.*, *Restatement (Third) of Torts* § 28 cmt. c (2020) ("It need not be shown that the defendant desired the tortious outcome. Nor does the defendant need to have understood the full legal significance of the facts, or all the details of the primary wrongdoing. It is sufficient if the defendant was aware of facts that made the primary conduct wrongful."). Again, Hamilton's state of mind was sufficient to support secondary liability in *Halberstam* **not** because of any evidence that she shared Welch's goals (whatever they may have been), but because they reflected **her** long-term intent to participate — and participation — in a criminal enterprise that, for her own reasons, she wanted to succeed. *Halberstam*, 705 F.2d at 488 ("If . . . Hamilton's assistance was knowing, then it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise. Hamilton's continuous participation reflected her intent and desire to make the venture succeed; it was no passing fancy or impetuous act.").

Here, Plaintiffs-Appellants have plausibly alleged — and Judge Leon did not dispute — that Defendants-Appellees provided the allegedly

unlawful aid over the course of a decade. *See* 474 F. Supp. 3d at 214. Plaintiffs-Appellants have also plausibly alleged that Defendants-Appellees provided such aid **knowing** that they were facilitating tortious activities by JAM and others — and did it anyway. That is all that *Halberstam* requires.

* * *

Amici therefore believe that Plaintiffs-Appellants **have** plausibly alleged claims for aiding-and-abetting liability under the ATA. At the very least, because the district court applied the incorrect standard, this Court should vacate the decision below (at least with respect to the dismissal of Plaintiffs-Appellants' aiding-and-abetting claims[8]) and remand for further proceedings.

But even if this court disagrees and concludes that Plaintiffs-Appellants' allegations are insufficient under a proper application of *Halberstam*, it is incumbent upon this Court to clarify that it is **that** reasoning that govern claims for secondary liability under the ATA. Otherwise, the "trend" that Judge Chen identified in *Freeman* and that Judge Leon alluded to below will likely continue, closing courthouse doors

8. *Amici* take no position on the other questions raised in this appeal.

to tort claims for which Congress expressly provided a meaningful federal remedy.

Nor would allowing ATA claims based upon the modes of liability that *Halberstam* contemplated open the floodgates, even as applied to acts of international terrorism outside the United States. Plaintiffs still must plausibly allege that defendants knowingly aided a criminal enterprise — that the defendants had unclean hands — and that acts of international terrorism were a foreseeable result of those misdeeds. That is a meaningfully high bar. But even if this Court would prefer to set the bar even higher:

> [t]his Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue. Even if the proper interpretation of a statute upholds a very bad policy, it is not within our province to second-guess the wisdom of Congress' action by picking and choosing our preferred interpretation from among a range of potentially plausible, but likely inaccurate, interpretations of a statute.

Harbison v. *Bell*, 556 U.S. 180, 197 (2009) (Thomas, J., concurring in the judgment) (citation and internal quotation marks omitted).

Notwithstanding rulings like the decision below adopting narrower interpretations of secondary liability under JASTA, the plain language of the statute is clear. So, too, is the obligation of courts to follow it.

CONCLUSION

For these reasons, *amici* respectfully submit that the district court's dismissal of Plaintiffs-Appellants' aiding-and-abetting claims should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), and D.C. Cir. R. 28(c) and 32(e), I hereby certify that this brief contains 6230 words, as calculated by the word count function in Microsoft Word, and excluding the items that may be excluded under Fed. R. App. B. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e). This brief uses a proportionally spaced typeface, Century Schoolbook, with 14-point typeface, in compliance with Fed. R. App. P. 32(a)(5)(A) and 32(a)(6).

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January 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2021, a true and correct copy of the foregoing Brief of Law Professors as *Amici Curiae* in Support of Plaintiffs-Appellants was served on all counsel of record in this appeal via CM/ECF, pursuant to D.C. Cir. R. 25(a) and (f). I further certify that, consistent with D.C. Cir. R. 31(b), an original and eight copies of this brief will be filed with the court forthwith.

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January 19, 2021