No. 23-9

In the Supreme Court of the United States

ASTRAZENECA UK LIMITED, ET AL.,
Petitioners,

v.

JOSHUA ATCHLEY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN D. URICK
JORDAN L. VON BOKERN
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
Counsel for the Chamber of Commerce of the United States of America

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

MARK G. HANCHET
ROBERT W. HAMBURG
BENJAMIN D. BRIGHT
WAJDI C. MALLAT
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
Counsel for Amici Curiae

[Additional counsel on inside cover]

JAMES C. STANSEL
MELISSA B. KIMMEL
Pharmaceutical Research and Manufacturers of America
950 F St., NW, Ste. 300
Washington DC 20004
Counsel for the Pharmaceutical Research and Manufacturers of America

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES---continued

Page(s)

Cases (continued)

Statutes and Rules

TABLE OF AUTHORITIES---continued

Page(s)

Statutes and Rules (continued)

Other Authorities

TABLE OF AUTHORITIES---continued

Page(s)

Other Authorities (continued)

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier and more productive lives. Over the last decade, PhRMA member companies have more than doubled their annual investment in the search for new treatments and cures, including nearly $101 billion in 2022 alone. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an *amicus curiae*.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention to file this brief.

Amici have a strong interest in the proper interpretation of the Anti-Terrorism Act (ATA), which, if interpreted too broadly, would threaten businesses with liability for engaging in legitimate, non-culpable conduct. Congress enacted the civil liability provisions of the ATA, 18 U.S.C. § 2333, to enable U.S. citizens who are victims of terrorism to hold accountable the terrorists who engage in those horrific acts, as well as the individuals or entities intimately involved in supporting those acts. That is a laudable and important goal.

The D.C. Circuit's decision below misinterprets the ATA and expands it beyond the goal of punishing terrorists and their supporters, instead threatening businesses with liability for lawful transactions with foreign governments. This Court's recent decision in *Twitter, Inc.* v. *Taamneh*, 143 S. Ct. 1206 (2023), counsels granting the petition and vacating the D.C. Circuit's decision.

Twitter's holding with respect to the standard that a plaintiff must satisfy to assert an aiding-and-abetting claim imposes significantly more demanding requirements than the test applied below by the D.C. Circuit. And *Twitter*'s analysis also indicates that the court of appeals applied an overly-lenient standard with respect to Respondents' primary liability claim.

This Court explained in *Twitter* that, "if aiding-and-abetting liability were taken too far, then ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer." 143 S. Ct. at 1221; see also *id.* at 1220 (overbroad liability "could sweep in innocent bystanders as well as those who gave only tangential assistance"). That is why "courts have long recognized the need to cabin aiding-and-

abetting liability to cases of truly culpable conduct." *Id.* at 1221.

The D.C. Circuit's overbroad liability standard threatens just such adverse consequences.

Amici therefore submit this brief to explain why the Court should grant the petition for a writ of certiorari, vacate the D.C. Circuit's judgment, and remand for further proceedings consistent with *Twitter*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici strongly condemn all acts of terrorism. Individuals and organizations that commit these heinous acts, and others who participate in them, should be brought to justice and required to compensate their victims. But Respondents did not sue those parties; rather, they are seeking to impose aiding-and-abetting liability on global pharmaceutical companies based on an impermissibly expansive interpretation of the Anti-Terrorism Act—the very construction that this Court rejected in *Twitter*.

Congress enacted the ATA to provide U.S. victims of terrorism with a cause of action to obtain compensation for their injuries. The ATA initially limited liability to the persons who themselves committed acts of international terrorism. *Rothstein* v. *UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2013). Congress amended the law in 2016 by enacting the Justice Against Sponsors of Terrorism Act (JASTA), which imposes liability on those who aid and abet, or conspire with, persons who commit acts of international terrorism that were committed, planned, or authorized by a designated foreign terrorist organization. Pub. L. No. 114-222, 130 Stat. 852 (2016).

Respondents are U.S. service members, contractors, and their families who allege that the Jaysh al-Mahdi, an Iraqi militia, took control of the Iraqi Ministry of Health and diverted the Health Ministry's supplies and funds to support militia operations that inflicted grievous harm on Respondents. Rather than suing the militia, Respondents filed this lawsuit against Petitioners—pharmaceutical and medical-device companies who supplied medical goods to the Health Ministry—alleging that Petitioners were generally aware of Jaysh al-Mahdi's control over the Ministry when they supplied those goods and that Jaysh al-Mahdi used those supplies and proceeds from contracts with Petitioners to support militia operations. They contend that Petitioners are thus both secondarily and directly liable under the ATA.

After the district court dismissed the complaint for lack of personal jurisdiction and failure to state a claim, the D.C. Circuit reversed.

First, the court of appeals revived the aiding-and-abetting claims, holding that Respondents had sufficiently alleged that Petitioners knowingly provided substantial assistance to Jaysh al-Mahdi. Pet. App. 31a-37a. The court of appeals did not assess whether Respondents had plausibly alleged that Petitioners knowingly and substantially assisted in the specific acts of international terrorism that injured Respondents.

The court of appeals also held that Respondents had adequately alleged that the acts of international terrorism that injured them were "committed, planned, or authorized" by a U.S.-designated foreign terrorist organization—a threshold requirement for asserting a JASTA claim. The court ruled that a foreign terrorist organization "plans" or "authorizes" an

act of international terrorism whenever it is alleged to have provided general support to the group that actually committed the act. Pet. App. 25a-26a. Thus, even though Jaysh al-Mahdi was not a designated foreign terrorist organization at the time of the attacks that injured Respondents, the court deemed Hezbollah's alleged general support for the group sufficient to satisfy JASTA.

Second, the D.C. Circuit held that Respondents successfully pleaded direct liability under the ATA. According to the court of appeals, a defendant proximately causes an act of international terrorism if its actions "allow[]" an entity with ties to a designated foreign terrorist organization "to grow," and the plaintiff's injuries are consequently "reasonably foreseeable" to the defendant. Pet. App. 42a-43a.

After the D.C. Circuit issued its decision, this Court decided *Twitter, Inc.* v. *Taamneh*, 143 S. Ct. 1206 (2023). *Twitter* announced a more stringent standard for the knowing and substantial assistance element of aiding-and-abetting claims brought under JASTA, expressly rejecting the less exacting standard applied in the decision below. For this straightforward reason, the Court should grant the petition, vacate the judgment below, and remand to the D.C. Circuit to consider Respondents' claims in light of *Twitter*.

Twitter also seriously undermines the D.C. Circuit's holding that a defendant proximately causes the plaintiff's injuries under the ATA even without a direct relationship between the defendant's conduct and the plaintiff's injury.

Leaving the decision below in place would harm legitimate businesses. As the *Twitter* Court explained,

it is important "to cabin aiding-and-abetting liability to cases of truly culpable conduct" lest such liability "sweep in innocent bystanders as well as those who gave only tangential assistance." 143 S. Ct. at 1220-1221. Here, the D.C. Circuit's overbroad liability standard threatens companies operating in developing regions of the world. Those companies play a key role in promoting public health, good governance, and economic growth. By promoting development, these companies play an essential role in the fight against terrorism. But, faced with the threat of sprawling and expensive litigation, companies will withdraw from those parts of the world.

The Court should prevent these adverse consequences, and the very overbroad liability rejected in *Twitter*, by granting the petition, vacating the judgment, and remanding for further proceedings.

ARGUMENT

The Court Should Grant The Petition, Vacate The Judgment, And Remand For Further Proceedings.

Granting a petition for a writ of certiorari, vacating the lower court's judgment, and remanding for further proceedings (GVR) is this Court's usual practice "when 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996)).

That "reasonable probability" warranting a GVR invariably is present when an intervening decision by this Court adopts a legal standard more favorable to the petitioner than the standard applied by the lower court. See, *e.g.*, *Fair* v. *Continental Resources*, No. 22-160, 2023 WL 3798629 (U.S. June 5, 2023) (mem.) (remanding Takings Clause challenge for further consideration in light of *Tyler* v. *Hennepin County*, 143 S. Ct. 1369 (2023)); *Morin* v. *Lyver*, 143 S. Ct. 69 (2022) (remanding Second Amendment challenge for further consideration in light of *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022)).

The decision below falls squarely within that category. This Court in *Twitter* interpreted the ATA to impose a legal standard for successfully pleading the "knowingly providing substantial assistance" element of a JASTA aiding-and-abetting claim significantly more demanding than the test applied the court below. Moreover, *Twitter* casts serious doubt on the D.C. Circuit's proximate cause analysis with respect to Respondents' primary liability claims and its holding regarding the degree of involvement by a designated foreign terrorist organization necessary to allege a JASTA aiding-and-abetting claim.

For these reasons, it is far more than "reasonabl[y] probab[le]" that the D.C. Circuit would be obligated to revisit its holdings in light of *Twitter*. The Court should therefore grant the petition, vacate the judgment, and remand for further proceedings. See also *Gonzalez* v. *Google LLC*, 143 S. Ct. 1191 (2023) (vacating the Ninth Circuit's judgment upholding denial of motion to dismiss and remanding for reconsideration of sufficiency of ATA claims in light of *Twitter*).

A. *Twitter* Recognized A Pleading Standard For JASTA's "Knowingly Providing Substantial Assistance" Element More Demanding Than The D.C. Circuit's Test.

Twitter held, unanimously, that JASTA requires a plaintiff asserting an aiding-and-abetting claim to plausibly allege that the defendant "consciously, voluntarily, and culpably participate[d] in" the terrorist attack at issue in the case "so as to help 'make it succeed,'" rejecting the Ninth Circuit's significantly more lenient pleading standard. 143 S. Ct. at 1223, 1230 (citation omitted).

The plaintiffs in *Twitter* alleged that Twitter, Facebook, and Google aided and abetted ISIS in its 2017 attack at an Istanbul nightclub. 143 S. Ct. at 1215. The Court found the plaintiffs' allegations that the companies provided communication services directly to ISIS users (allowing ISIS to recruit, fundraise, and spread terrorist propaganda) and that the companies served that terrorist content to other users insufficient to survive a motion to dismiss. *Id.* at 1230-1231.

In reaching that conclusion, *Twitter* explained, at length, what a plaintiff must plausibly allege in order to satisfy JASTA's "knowingly providing substantial assistance" element. This Court's analysis makes clear that the D.C. Circuit applied an impermissibly lenient standard in denying Petitioners' motion to dismiss. We here expand on Petitioners' discussion of the ways in which the D.C. Circuit's analysis fell far short of *Twitter*'s requirements. See also Pet. 13-16.

First, the D.C. Circuit treated the ATA's requirement of "knowing" and "substantial assistance" as two independent inquiries, but *Twitter* held that they

should be considered "in tandem" to determine whether a complaint's allegations support a plausible inference that "the defendant consciously and culpably 'participate[d]' in a wrongful act so as to help 'make it succeed.'" 143 U.S. at 1223 (citation omitted). "[L]ess substantial assistance require[s] more scienter" to "infer conscious and culpable assistance," and "if the assistance were direct and extraordinary then a court might more readily infer conscious participation in the underlying tort." *Id.* at 1222. "[T]he more attenuated the nexus [between the defendants' conduct and that terrorist act], the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort." *Id.* at 1230. Plaintiffs, at a minimum, must allege a "very good reason to think that defendants were consciously trying to help or otherwise 'participate in' the [terrorist] attack." *Id.* at 1227.

The D.C. Circuit addressed "knowing" and "substantial assistance" as analytically independent requirements. Pet. App. 31a. The court first held that the knowledge component was satisfied because Petitioners did not "accidental[ly]" provide medical goods. Pet. App. 32a. It then separately analyzed the six "substantial assistance" factors. Pet. App. 32a-37a. The court of appeals thus failed to consider how the two requirements operated "in tandem," and whether there was any basis to conclude that Petitioners were consciously trying to help or participate in the attacks that injured Respondents.

Second, in its (erroneous) separate consideration of the "knowing" requirement, the D.C. Circuit applied a standard substantially less stringent than the construction adopted in *Twitter*. This Court held that

JASTA's requirement of "knowing" provision of substantial assistance is separate from, and more demanding than, the "general awareness" element of a JASTA aiding-and-abetting claim—it is "designed to capture the defendant's state of mind with respect to their actions and the tortious conduct * * * not the same general awareness that defines *Halberstam*'s [general awareness] element." *Twitter*, 143 S. Ct. at 1229. The Court specifically criticized the Ninth Circuit for "analyz[ing] the 'knowing' subelement as a carbon copy of the antecedent element of whether the defendants were 'generally aware' of their role in ISIS' overall scheme." *Ibid.*

The D.C. Circuit held that the "knowledge component" of a JASTA aiding-and-abetting claim is satisfied "[i]f the defendant knowingly—and not innocently or inadvertently—gave assistance." Pet. App. 31a-32a (quoting *Kaplan* v. *Lebanese Canadian Bank, SAL*, 999 F.3d 842, 863-64 (2d Cir. 2022)). Because "[d]efendants d[id] not argue that their provision of cash and free goods was in any way accidental," the court concluded that "the assistance was given knowingly." Pet. App. 32a. The court of appeals thus required an even less demanding showing of knowledge for the substantial assistance element than it did for the general awareness prong—and fell far short of assessing the complaint's allegations based on this Court's "culpabl[e] participat[ion]" standard. That holding is plainly contrary to *Twitter*.

Third, the D.C. Circuit's assessment of *Halberstam*'s factors for determining whether the alleged assistance was substantial followed the very approach this Court rejected in *Twitter*. This Court recognized *Halberstam*'s "articulat[ion of] six factors to help de-

termine whether a defendant's assistance was 'substantial.'" *Twitter*, 143 S. Ct. at 1219. But it rejected the Ninth Circuit's assessment of those factors identified in *Halberstam* as "a sequence of disparate, unrelated considerations without a common conceptual core." *Id.* at 1229. The Court explained that "[t]he point of these factors is to help courts capture the essence of aiding and abetting: participation in another's wrongdoing that is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor." *Ibid.*

The D.C. Circuit followed the same erroneous approach, without focus on the "conceptual core" animating the *Halberstam* framework. Like the Ninth Circuit, the D.C. Circuit recited each substantial assistance factor in isolation, concluding that four factors supported substantiality, one factor did not, and one factor was neutral—and therefore holding that Respondents had plausibly pled knowing and substantial assistance. Pet. App. 31a-37a. The court of appeals thus failed to identify, focus on, and address the overarching inquiry specified in *Twitter*.

Moreover, the D.C. Circuit found that factors "favor[ed] aiding-and-abetting liability" by applying plaintiff-friendly interpretations that were subsequently, and squarely, rejected by this Court in *Twitter*.

For example, this Court found error in the Ninth Circuit's focus "primarily on the value of defendants' platforms *to ISIS,* rather than whether defendants culpably associated themselves with ISIS' actions." *Twitter*, 143 S. Ct. at 1229.

The D.C. Circuit committed a similar error in assessing the first substantiality factor—the nature of the act encouraged. The court of appeals stated that the relevant focus was the "[f]inancial support * * * to the operation of [the] terrorist organization," Pet. App. 32a (internal quotation marks omitted)—thus applying the same erroneous analysis as the Ninth Circuit by assessing the benefit to the terrorist group rather than whether the factor demonstrated Petitioners' culpable association with the Jaysh al-Mahdi's wrongdoing.

And for the fifth substantiality factor (state of mind), the court rejected Petitioners' argument that the absence of any allegation that they were "one in spirit" with the terrorist attackers militates against a finding of substantiality, holding instead that Petitioners' general awareness that the alleged assistance supported terrorism favors finding aiding-and-abetting liability. Pet. App. 34a, 36a. In doing so, the court of appeals not only conflated the general awareness and knowing-and-substantial assistance prongs, it also failed to give proper weight to Petitioners' "undisputed lack of intent to support [Jaysh al-Mahdi]." *Twitter*, 143 S. Ct. at 1229-30.

Fourth, the *Twitter* Court made clear that JASTA aiding-and-abetting requires more than assistance to a terrorist organization. Rather, a defendant "must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism." 143 S. Ct. at 1224. "The focus must remain on assistance to the tort for which plaintiffs seek to impose liability." *Id.* at 1230.

And while the Court left open the possibility that a defendant could be found liable for serial attacks by

a terrorist principal, it made clear that this would require systematic aid assisting each of the attacks, which would necessitate a showing of "pervasive, systemic, and culpable assistance," such as where defendants "intentionally associated themselves with [a terrorist organization's] operations or affirmatively gave aid that would assist each of [the] terrorist acts" and "formed a near-common enterprise" with the terrorist group. 143 S. Ct. at 1228.

The D.C. Circuit, by contrast, did not focus on Petitioners' alleged assistance to the injury-causing acts of international terrorism at issue, but rather on "substantial assistance to Jaysh al-Mahdi" generally, Pet. App. 39a, such as the complaint's allegations that "defendants gave Jaysh al-Mahdi at least several million dollars per year in cash or goods," Pet. App. 33a.

In sum, this Court in *Twitter* applied a significantly more stringent standard for assessing JASTA aiding-and-abetting claims than the test applied by the D.C. Circuit below. The Court should therefore grant the petition, vacate the judgment, and remand for the D.C. Circuit to consider Respondents' claims in light of *Twitter*.

B. *Twitter* Also Undermines The D.C. Circuit's Rulings Regarding Proximate Causation And Terrorist Group Involvement.

Twitter also casts serious doubt on two other aspects of the decision below. First, the D.C. Circuit's proximate causation analysis in connection with the primary liability claim. Second, the court of appeals' holding that, to satisfy the threshold requirement for JASTA claims, a foreign terrorist organization need

only have provided general support to those who perpetrated the act to have "planned" or "authorized" a terrorist attack.

1. Twitter *provides guidance with respect to the connection between the assistance and the specific terrorist act necessary to plead a primary liability claim.*

The Court's decision in *Twitter* sheds light on how lower courts should analyze whether the defendant proximately caused an ATA plaintiff's injuries.

Under the ATA's primary liability provision, a defendant may be held liable only if the plaintiff 's injuries are caused "by reason of" the defendant's acts. 18 U.S.C. § 2333(a). This Court "has repeatedly and explicitly held that when Congress uses the phrase 'by reason of' in a statute, it intends to require a showing of proximate cause." *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 391 (7th Cir. 2018) (citing *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 267-268 (1992); *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 532-535 (1983)). As every court of appeals has recognized, Congress's use of "by reason of" in the ATA imposes a proximate causation element. See *Kemper*, 911 F.3d at 391; *Crosby* v. *Twitter, Inc.*, 921 F.3d 617, 623 (6th Cir. 2019); *Owens* v. *BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018); *Fields* v. *Twitter, Inc.*, 881 F.3d 739, 744-745 (9th Cir. 2018); *Rothstein* v. *UBS, AG*, 708 F.3d 82, 95-96 (2d Cir. 2013).

"Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 692 (2011). "To prevent infinite liability, courts and legislatures" will often "appropriately place limits on the chain of causation"

through the imposition of proximate causation. *Id.* at 701 (internal quotation marks omitted). "Common-law formulations [of proximate causation] include, *inter alia*, the 'immediate' or 'nearest' antecedent test; the 'efficient, producing cause' test; the 'substantial factor' test; and the 'probable,' or 'natural and probable,' or 'foreseeable' consequence test." *Ibid.* Proximate causation is properly understood to require "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268.

The D.C. Circuit held that the proximate cause requirement could be satisfied by "allegations of 'some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.'" Pet. App. 41a (citation omitted). Proximate causation, the court stated, functions "to 'eliminate[] the bizarre'" and causal links that are "'mere fortuity.'" *Ibid.* (citations omitted).

That explication of the proximate causation standard appears inconsistent with this Court's precedents defining proximate cause and, in addition, with *Twitter*'s explanation of what is required to establish a "direct" connection. 143 S. Ct. at 1230. Indeed, this Court in *Twitter* determined that, based on the complaint's allegations, "the relationship between defendants and the Reina attack is highly attenuated." *Id.* at 1227. But the court of appeals based its ruling on proximate causation on the same allegations that underpinned its aiding-and-abetting holding. See Pet. App. 41a-43a.

A GVR will allow the court of appeals to reconsider its proximate cause standard, and its application of the legal standard to the allegations here, in light of this Court's analysis in *Twitter*.

2. Twitter *also is relevant to the degree of involvement by the terrorist group needed to plausibly allege aiding and abetting under JASTA*

Twitter also undermines the D.C. Circuit's holding that a foreign terrorist organization plans or authorizes every attack undertaken by groups that they allegedly support.

Under JASTA, a defendant may be held liable only for aiding and abetting an "act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization." 18 U.S.C. § 2333(d)(2). By limiting liability to injuries arising from an act of international terrorism, Congress made clear that the defendant must have aided or abetted the specific act of international terrorism that caused the plaintiff's injury.

But Congress imposed an additional limitation, reserving secondary liability claims for only those specific acts of international terrorism that involve the most notorious of terrorist organizations—those designated by the U.S. government. (The State Department currently lists only 68 such entities globally.[2])

The court of appeals recognized that Jaysh al-Mahdi was not a designated foreign terrorist organization at the time of the attacks. Pet. App. 20a; see TAC ¶ 355. It relied instead on allegations relating to Hezbollah, which was a designated organization. The court held, first, that a foreign terrorist organization

---

[2] See U.S. Dep't of State, *Foreign Terrorist Organizations* (last visited July 28, 2023), https://www.state.gov/foreign-terrorist-organizations.

"plan[s]" a specific act of international terrorism simply by providing others with general "weaponry, training, and knowledge," Pet. App. 25a; and, second, that a foreign terrorist organization "authorize[s]" a specific act of international terrorism by generally "exert[ing] religious, personal, and operational authority" over the group that committed the act. Pet. App. 26a.

That holding is fundamentally inconsistent with *Twitter*. The Court there assessed the required link between the defendant's assistance and the plaintiff's injury—based on the statutory requirement that the defendant "knowingly provid[e] substantial assistance, or * * * conspire[] with the person who committed such an act of international terrorism." *Twitter*, 143 S. Ct. at 1214 (citing 18 U.S.C. § 2333(d)). The Court stated that "it is not enough * * * that a defendant have given substantial assistance to a transcendent 'enterprise' separate from and floating above all the actionable wrongs that constitute it." *Id.* at 1224. Rather, "the text requires that defendants have aided and abetted the act of international terrorism that injured the plaintiffs." *Id.* at 1225.

The statute's designated organization requirement is phrased similarly. It imposes liability "for an injury arising from an act of international terrorism committed, planned, or authorized by [a designated terrorist] * * * as to any person who aids and abets * * * , or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d).

By referring to injury "arising from an act of international terrorism" and then referring to "such an act of international terrorism," the text makes clear that the first reference means the same "act" as the

second reference. Therefore, the *Twitter* Court's holding that the "act" must be the one that injured the plaintiff, also applies to the "committed, planned, or authorized" element—the particular act injuring the plaintiff must have been "committed, planned, or authorized" by the designated organization.

The D.C. Circuit relied on allegations of general Hezbollah assistance, not a plausible inference that Hezbollah planned or authorized the attacks that injured plaintiffs. Pet. App. 23a-27a. And it did not find that Hezbollah's involvement was so pervasive that it planned or authorized all of Jaysh al-Mahdi's terrorist activities. On remand, the D.C. Circuit can apply the proper standard to the allegations of the complaint.

C. Leaving The D.C. Circuit's Ruling In Place Would Harm Legitimate Business.

If permitted to stand, the D.C. Circuit's decision will result in significant negative consequences for the business community.

First, legitimate multinational businesses could be subject to suit for providing services to legitimate businesses and state sovereigns that are then alleged to in some way do business in a manner claimed to provide some generalized assistance to a terrorist group. As the Second Circuit observed in the context of banking services, such a theory would mean that "any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state." *Rothstein*, 708 F.3d at 96. And ATA defendants would be subjected to aiding-and-abetting liability for providing goods or services to legitimate enterprises, even when they "had little reason to suspect that [they were] assuming a role in * * * terrorist

activities." *Siegel* v. *HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 224 (2d Cir. 2019).

Under the court of appeals' reasoning, the cost of doing business in developing areas of the world would become prohibitive. Companies operating in such regions would be unable to undertake the diligence needed to assure themselves that counterparties lack even arguable connections to other entities that may be alleged to have some link to a terrorist group, no matter how remote. Setting aside the cost of conducting deep-dive, multi-level diligence on every counterparty (and their downstream counterparties), in many areas of the world it would be practically impossible to eliminate counterparty risk, given the small-scale and insular nature of markets in developing countries and conflicting views of the legitimacy of businesses, charities, or humanitarian groups that operate in the same region.

Second, the standards applied by the court of appeals would subject legitimate businesses to costly and invasive discovery. The discovery burdens for defendants facing ATA claims are particularly onerous, because the relevant conduct often "occurs in a foreign country with an undeveloped legal system that does not, or cannot, cooperate with discovery or in a country with a government that is hostile to the litigation and associated discovery." Alan Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2190-91 (2012).

These discovery burdens "will push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007); see also *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) ("[A] plaintiff with a largely groundless claim

[may] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." (internal quotations omitted)).

The pressure to settle is particularly acute in the ATA context because the mere pendency of claims can inflict significant reputational harm on companies by branding them as "supporters of terrorism" complicit in horrific attacks on the American citizens, including military veterans. Indeed, enterprising plaintiffs may seek to publicly associate responsible companies with terrorism simply to increase the pressure to settle.

Third, faced with onerous and impracticable diligence obligations and large litigation expenses, along with potential exposure to treble damages and reputational risk, many companies would be forced to "de-risk." De-risking occurs when businesses stop providing services to certain regions or clients, even those with legitimate and pressing needs, because the threat of liability and expensive, drawn-out litigation is simply too great. Failing to give effect to Congress's limitations on ATA liability would dramatically increase de-risking activity as businesses seek to eliminate potential exposure to burdensome and reputation-threatening litigation, however meritless.

De-risking is not merely theoretical. It is already happening in the banking sector. According to the Financial Action Task Force, de-risking "is having a significant impact in certain regions and sectors" and "may drive financial transactions underground which creates financial exclusion and reduces transparency,

thereby increasing money laundering and terrorist financing risks."[3] A 2023 Department of Treasury report warned that "[d]e-risking undermines several key U.S. government policy objectives by driving financial activity out of the regulated financial system," thereby rendering monitoring for illicit activities more difficult and delayed much-needed humanitarian aid.[4] De-risking also "has the potential to push countries to seek closer relationships with geopolitical competitors and cause significant macroeconomic damage to regions of U.S. foreign policy interest."[5] As the Comptroller of the Currency observed in 2016:

> Longstanding business relationships may be disrupted. Transactions that would have taken place legally and transparently may be driven underground. Customers whose bank-

---

[3] Financial Action Task Force, *FATF takes action to tackle de-risking* (Oct. 23, 2015), https://tinyurl.com/yyot5v83; see also Staff of House of Representatives Task Force to Investigate Terrorism Financing, 114th Cong., *Stopping Terror Finance: Securing the U.S. Financial Sector* 26-27 (2016), https://tinyurl.com/y2saxcgy (noting that many financial institutions have ceased processing remittance transfers to certain countries, which "eventually will drive legitimate transfers into the illegitimate underground economy"); Tracey Durner & Liat Shetret, Global Ctr. on Coop. Security/Oxfam, *Understanding Bank De-Risking and its Effects on Financial Inclusion* 19 (2015), https://tinyurl.com/y3r99hdn (withdrawal of legitimate financial institutions may "encourage entities to move into less regulated channels, thus reducing transparency and limiting monitoring capacities").

[4] U.S. Dep't of Treasury, *The Department of the Treasury's De-Risking Strategy* 36 (2023), https://home.treasury.gov/system/files/136/Treasury_AMLA_23_508.pdf.

[5] *Id.* at 38.

> ing relationships are terminated and who cannot make alternate banking arrangements elsewhere may effectively be cut off from the regulated financial system altogether. And there have been many instances of real human hardship that results when customers find themselves unable to transmit funds to family members in troubled countries.[6]

De-risking could result in particularly perverse and significant harm in regions and countries (such as Iraq) in which companies are working closely with the United States government and its allies to promote stability by delivering much-needed products, services, healthcare, or infrastructure.[7] U.S. companies would be deterred from responding to government requests for assistance in war or post-war zones, areas of governmental instability, or countries facing humanitarian crises, given the possibility that the goods or services may fall into the wrong hands, or that the downstream recipients may be accused of supporting terror.

Depriving governments and populations of key partners in the fight against terrorism and important

---

[6] Thomas J. Curry, Comptroller of the Currency, *Remarks before the Institute of International Bankers* (Mar. 7, 2016), https://tinyurl.com/y7x4jcxm.

[7] Indeed, the U.S. government has invested substantially in Iraq for at least the past decade, and encouraged the provision of services to that country. See, *e.g.*, *Economic and Financial Reconstruction in Iraq: Hearing before the Senate Banking Subcommittee on International Trade and Finance*, (Feb. 11, 2004) (testimony of E. Anthony Wayne, Ass't Secretary for Economic and Business Affairs), https://bit.ly/45dPRow; Press Release, U.S. Dep't of Treasury, The United States and Iraq Sign Loan Guarantee Agreement (Jan. 5, 2017), https://bit.ly/43ToFKD.

tools for promoting public health, humanitarian aid, good governance, and economic growth does nothing to help the victims of terror or further the Anti-Terrorism Act's goals. It has the opposite effect. This Court should avoid those adverse consequences and direct the D.C. Circuit to reconsider its approach in light of *Twitter*.

CONCLUSION

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

Respectfully submitted.

JONATHAN D. URICK
JORDAN L. VON BOKERN
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

JAMES C. STANSEL
MELISSA B. KIMMEL
Pharmaceutical Research and Manufacturers of America
950 F St., NW, Ste. 300
Washington DC 20004

Counsel for the Pharmaceutical Research and Manufacturers of America

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

MARK G. HANCHET
ROBERT W. HAMBURG
BENJAMIN D. BRIGHT
WAJDI C. MALLAT
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020

Counsel for Amici Curiae

AUGUST 2023