ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 2024

Case No. 20-7077

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

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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September 3, 2024

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) **Parties and Amici**. All parties appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants and the Brief for Defendants-Appellees.

(B) **Ruling Under Review**. The ruling under review is the memorandum opinion and order issued by the Honorable Richard J. Leon of the United States District Court for the District of Columbia in Case No. 1:17-cv-2136 on July 17, 2020, dismissing Plaintiffs' Complaint for failure to state a claim under the Anti-Terrorism Act, and for lack of personal jurisdiction over the Foreign Defendants on the Anti-Terrorism Act claims and over all Defendants on the state-law claims. *Atchley v. AstraZeneca UK Ltd.*, 474 F. Supp. 3d 194 (D.D.C. 2020).

(C) **Related Cases**. This Court previously issued a decision in this case in *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022). Thereafter, the Supreme Court granted the petition for a writ of certiorari, vacated the judgment, and remanded to this Court for further consideration in light of *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). *See AstraZeneca UK Ltd. v. Atchley*, ___ S. Ct. ___, 2024 WL 3089470 (mem.) (June 24, 2024).

RULE 29(d) CERTIFICATION

Pursuant to Circuit Rule 29(d), *amicus* certifies that a separate brief is necessary because the *amicus*, the Chamber of Commerce of the United States of America, has a unique perspective and expertise on issues raised in this appeal, and seeks to address only those issues for which that perspective and expertise are most relevant. *Amicus* believes that a separate brief is required to offer this unique perspective and expertise.

September 3, 2024

/s/ *Andrew J. Pincus*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Circuit Rule 29(b), *amicus* has filed a motion for leave simultaneously with this brief.[1]

INTEREST OF THE *AMICUS CURIAE*

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.

Congress enacted the civil-liability provisions of the Anti-Terrorism Act, 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

[1] *Amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus,* its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

well as the individuals or entities intimately involved in supporting those acts. That is a laudable and important goal.

In recent years, however, legitimate businesses have become a frequent target of these claims. *Amicus* therefore has a strong interest in the proper interpretation of the statute, which, if interpreted too broadly, would threaten businesses with liability for engaging in legitimate, non-culpable conduct. The Supreme Court in its recent decision in *Twitter v. Taamneh*, 598 U.S. 471 (2023), explained the demanding requirements for asserting claims under this law. *Amicus* submits this brief to explain that standard and why this Court's prior decision in this case is inconsistent with the Supreme Court's ruling.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus condemns all acts of terrorism. Individuals and organizations that commit these heinous acts, and those who culpably participate in them, should be brought to justice. But Plaintiffs did not sue those parties; rather, they are seeking to impose liability on global pharmaceutical companies based on an unjustifiably expansive interpretation of the Anti-Terrorism Act—the very construction that the Supreme Court rejected in *Twitter*.

Plaintiffs 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 Plaintiffs. Rather than suing the militia, Plaintiffs filed this lawsuit against Defendants—pharmaceutical and medical-device companies who supplied medical goods to the Health Ministry—alleging that Defendants 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 Defendants to support militia operations.

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

First, the Court revived the aiding-and-abetting claims, holding that Plaintiffs had sufficiently alleged that Defendants knowingly provided substantial assistance to Jaysh al-Mahdi. *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 244-48 (D.C. Cir. 2022). The Court also held that Plaintiffs 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 aiding-and-abetting claim. *Id.* at 249. The Court ruled that a foreign terrorist organization "plan[s]" or "authorize[s]" an

act of international terrorism whenever it is alleged to have provided general support to the group that actually committed the act. *Id.* at 248-49. Thus, even though Jaysh al-Mahdi was not a designated foreign terrorist organization at the time of the attacks that injured Plaintiffs, the Court deemed Hezbollah's alleged general support for the group sufficient to satisfy JASTA.

Second, the Court held that Plaintiffs successfully pleaded direct liability under the Anti-Terrorism Act. The Court reasoned that 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. 22 F.4th at 251.

After the Court issued its decision and denied rehearing, the Supreme Court decided *Twitter*. *Twitter* specified a much more demanding standard for the knowing-and-substantial-assistance element of JASTA aiding-and-abetting claims than that previously applied by this Court. *Twitter* also seriously undermines this Court's holding that a defendant proximately causes the plaintiff 's injuries under the Anti-Terrorism Act even without a direct relationship between the defendant's conduct and the plaintiff 's injury.

The Supreme Court subsequently vacated this Court's judgment for further consideration in light of *Twitter*'s significantly narrowed pleading standard.

The aiding-and abetting claim here falls far short of *Twitter*'s demanding standard; and *Twitter*'s analysis shows that that the primary liability claim is also deficient. Applying the strict standards specified by the Supreme Court also prevents the significant adverse consequences that would result from expansive liability: deterring U.S. companies from responding to government requests for assistance in war or post-war zones, areas of governmental instability, or countries facing humanitarian crises.

ARGUMENT

I. *Twitter* Adopted A More Demanding Standard For JASTA's "Knowingly Providing Substantial Assistance" Element Than The Test Previously Applied By This Court.

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.'" 598 U.S. at 493, 505 (citation omitted); *see also Amazon Servs., LLC v. USDA*, 109 F.4th 573, 580 (D.C. Cir. 2024) (recognizing that, following *Twitter*, "civil

aiding-and-abetting liability requires a culpable mind" (internal quotation marks omitted)).

The plaintiffs in *Twitter* alleged that Twitter, Facebook, and Google aided and abetted ISIS in its 2017 attack at an Istanbul nightclub. 598 U.S. at 478-79. The Court found the plaintiffs' allegations that the companies provided communication services directly to ISIS users and that the companies served that terrorist content to other users insufficient to survive a motion to dismiss. *Id.* at 506-07.

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. The Supreme Court's analysis makes clear that this Court's previous decision applied a significantly less exacting standard, as the Solicitor General recognized in the government's *amicus* brief before the Supreme Court in this case. *See* Brief for United States as Amicus Curiae (SG Br.) at 16, *AstraZeneca UK Ltd. v. Atchley*, No. 23-9 (2024) (summarizing *Twitter*'s key holdings in reversing the Ninth Circuit and finding "similar errors" in this Court's decision).

First, *Twitter* held that the Anti-Terrorism Act's requirement of "knowing" and "substantial assistance" 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.'" 598 U.S. at 491, 493 (citation omitted). "[L]ess substantial assistance require[s] more scienter" to "infer conscious and culpable assistance." *Id.* at 492.

"[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 506. 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 500 (citation omitted).

In its prior decision, this Court addressed "knowing" and "substantial assistance" as analytically independent requirements. *Atchley*, 22 F.4th at 221. The Court first held that the knowledge component was satisfied because Defendants did not "accidental[ly]" provide medical goods. *Id.* at 222. It then separately analyzed the six "substantial assistance" factors. *Id.* at 222-24.

The Court thus failed to consider how the two requirements operated "in tandem," and failed to make the critical determination: whether the allegations supported a plausible inference that Defendants acted "culpably"—in other words, whether they "consciously, voluntarily, and culpably participate[d] in" the terrorist attack at issue in the case "so as

to help 'make it succeed.'" 598 U.S. at 493, 505 (citation omitted); *accord* SG Br. at 13-14.

Second, the Supreme 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*, 598 U.S. at 504. The Supreme Court 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." *Id.* at 503.

This Court's previous decision held that the "knowledge component" of a JASTA aiding-and-abetting claim is satisfied as long as the defendant did not act "innocently or inadvertently." 22 F.4th at 222. 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." *Id.* The Court thus applied an even less demanding scienter test for the substantial-assistance element than it did for the general-awareness prong. That holding is plainly contrary to *Twitter*. *Accord* SG Brief at 16.

Third, the Supreme Court recognized *Halberstam*'s "articulat[ion of] six factors to help determine whether a defendant's assistance was 'substantial,'" but rejected the Ninth Circuit's assessment of those factors as "a sequence of disparate, unrelated considerations without a common conceptual core," *Twitter*, 598 U.S. at 504. The Supreme Court explained that "[t]he point of those factors is to help courts capture the essence of aiding and abetting: participation in another's wrongdoing that is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor." *Id.*

Like the Ninth Circuit, this Court 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 Plaintiffs had plausibly pled knowing and substantial assistance. *Atchley*, 22 F.4th at 246-48. The Court therefore did not focus on the "conceptual core" animating the *Halberstam* framework. *See* SG Br. at 17.

Moreover, this Court found that the factors "favor[ed] aiding-and-abetting liability" by applying interpretations that were subsequently, and squarely, rejected in *Twitter*. *Atchley*, 22 F.4th at 223.

For example, the Supreme 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*, 598 U.S. at 504.

This Court made a similar error in assessing the first substantiality factor—the nature of the act encouraged. The Court stated that the relevant focus was the "[f]inancial support . . . to the operation of [the] terrorist organization," 22 F.4th at 246 (internal quotation marks omitted)—thus applying the same erroneous analysis as the Ninth Circuit by assessing the benefit to the terrorist group. *Accord* SG Br. at 17-18.

And for the fifth substantiality factor (state of mind), the Court rejected Defendants' 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 Defendants' general awareness that the alleged assistance supported terrorism favors finding aiding-and-abetting liability. *Atchley*, 22 F.4th at 247-48. In so doing, the Court conflated the general-awareness and knowing-and-substantial-assistance prongs and failed to give proper weight to Defendants' "undisputed lack of intent to support" the terrorist group. *Twitter*, 598 U.S. at 504; *see also* SG Br. at 16-17; *Amazon*, 109 F.4th at 583.

Fourth, *Twitter* 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." 598 U.S. at 495. "The focus must remain on assistance to the tort for which plaintiffs seek to impose liability." *Id.* at 506.

And while the Supreme 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. 598 U.S. at 502; *see also* SG Br. at 15 & n.1 (rejecting argument that Plaintiffs had satisfied the "demanding" pervasive-and-systemic standard because the attacks were a foreseeable result of Defendants' conduct, explaining that "[t]he foreseeability of an attack is not a substitute for finding that the secondary defendant aided and abetted that attack (or a number of attacks) by providing knowing and substantial assistance").

This Court, by contrast, did not assess Defendants' alleged assistance to the injury-causing acts of international terrorism, but rather on "substantial assistance to Jaysh al-Mahdi" generally, 22 F.4th at 209-10,

such as the complaint's allegations that "defendants gave Jaysh al-Mahdi at least several million dollars per year in cash or goods," *id.* at 222; SG Br. at 17-18.

In sum, *Twitter* applied a significantly more stringent standard for assessing JASTA aiding-and-abetting claims than the test previously applied by this Court. This Court should assess the complaint's sufficiency under *Twitter*'s corrected standard, particularly in determining whether the complaint plausibly alleges the requisite culpability and the necessary connection between the alleged assistance and the acts of international terrorism that injured Plaintiffs.

II. *Twitter* Also Undermines The Court's Rulings Regarding Proximate Causation And Terrorist-Group Involvement.

Twitter also casts serious doubt on two other aspects of the Court's prior decision. First, the Court's proximate-causation analysis in connection with the primary-liability claim. Second, the Court's 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.

A. Proximate Causation.

Under the Anti-Terrorism Act'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). The "by reason of" phrase incorporates a proximate-cause requirement. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018); *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 391 (7th Cir. 2018). Proximate causation requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

This Court held in its previous decision 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.'" 22 F.4th at 226 (citation omitted). Proximate causation, the Court stated, functions "to 'eliminate[] the bizarre'" and causal links that are "'mere fortuity.'" *Id.* (citations omitted).

That explication of the proximate-causation standard appears inconsistent with the Supreme Court's precedents and with *Twitter*'s explanation of what is required to establish a "direct" connection. 598 U.S. at 506. Indeed, *Twitter* determined that, based on the complaint's allegations, "the relationship between defendants and the Reina attack is highly attenuated." *Id.* at 500. But this Court based its ruling on proximate causation on the same allegations that underpinned its aiding-and-abetting holding. *See* 22 F.4th at 250-51.

Accordingly, the Court should reconsider its proximate-cause standard, and its application of the legal standard to the allegations here, in light of the Supreme Court's analysis in *Twitter*—and hold that the complaint fails to state a primary liability claim.

B. Designated Terrorist Group Involvement.

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 for only those specific acts of international terrorism that involve the most notorious of terrorist organizations—those designated by the U.S. government.

This Court recognized that Jaysh al-Mahdi was not a designated foreign terrorist organization at the time of the attacks. 22 F.4th at 216; *see* TAC ¶ 355. It relied instead on allegations relating to Hezbollah, which was such a designated organization. The Court held, first, that a

foreign terrorist organization "plan[s]" a specific act of international terrorism simply by providing others with general "weaponry, training, and knowledge," 22 F.4th at 218; 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, *id.* at 219.

That holding is fundamentally inconsistent with *Twitter*. There, the Supreme Court assessed the required link between the defendant's assistance and the plaintiff 's injury, explaining 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." 598 U.S. at 495. Rather, "the text requires that defendants have aided and abetted the act of international terrorism that injured the plaintiffs." *Id.* at 497.

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. Therefore, *Twitter*'s holding that the "act" must be the one that injured the plaintiff means that the particular act injuring the plaintiff must have been "committed, planned, or authorized" by the designated organization.

This Court relied on allegations of general Hezbollah assistance. 22 F.4th at 217-19. Following *Twitter*, the Court should apply the correct standard to the allegations in the complaint.

* * *

Twitter's interpretation limiting Anti-Terrorism Act liability to culpable actors not only conforms to the law's text and context; it also avoids the significant adverse consequences that would result from overbroad liability. 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 important tools for promoting public health, humanitarian aid, and economic growth does nothing to

further the statute's goals. This Court should apply *Twitter* and hold the complaint here insufficient to state a claim.

CONCLUSION

The District Court's judgment should be affirmed.

Dated: September 3, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), in light of the Court's July 26, 2024 order, because it contains 3,233 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Gothic 14- point font.

Dated: September 3, 2024

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25 and Circuit Rule 25, I hereby certify that on this 3rd day of September, 2024, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated: September 3, 2024

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