No. 18-17192

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEHIER TAAMNEH; LAWRENCE TAAMNEH;
SARA TAAMNEH; DIMANA TAAMNEH,

Plaintiffs-Appellants,

v.

TWITTER, INC.; GOOGLE LLC; FACEBOOK, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of California, No. 3:17-cv-04107-EMC,
The Honorable Edward M. Chen

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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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.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct 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 that raise issues of concern to the nation's business community.[1]

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

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae,* its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

To avoid entrapping legitimate businesses in Anti-Terrorism Act lawsuits, Congress limited liability for aiding and abetting an act of international terrorism to instances where the defendant "knowingly" provided "substantial" assistance in the commission of the relevant terrorist act. 18 U.S.C. § 2333(d)(2). But the panel determined that Plaintiffs successfully stated such a claim merely by alleging that Google, Twitter, and Facebook were generally aware that some members of ISIS—an international terrorist organization—were among the billions of users on their social media platforms. Because the complaint alleged that these unidentified terrorists had "exploited" the platforms' free communication tools in furtherance of ISIS's goals, the panel determined that Defendants could be held liable for ISIS's crimes—despite the fact that Defendants barred pro-terrorist content from their platforms and regularly removed such content when they became aware of it. Op. 71-72.[2]

The panel's interpretation of the Anti-Terrorism Act effectively eviscerates Congress's requirement that defendants must *knowingly* provide substantial assistance to terrorists before they may be held

[2] Citations to the panel opinion refer to the addendum attached to the petition for panel rehearing and rehearing en banc, Dkt. 71.

civilly liable under the Act, replacing that standard with a judicially created affirmative duty to proactively prevent any user or customer from, at any point, using a company's products or services to further a terrorist organization's goals. The panel's interpretation, if permitted to stand, will vastly expand the scope of Anti-Terrorism Act liability by subjecting companies to liability—and by requiring them to pay treble damages, *see* 18 U.S.C. § 2333(a)—whenever their anti-terrorism policies fail to root out every terrorist who may use their services or buy their products.

That expansion of liability is far beyond anything that Congress intended. The Chamber therefore submits this brief to explain why this case should be reheard en banc.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber condemns all acts of terrorism. Those who commit such heinous acts, and those who knowingly and substantially assist them, should be brought to justice and forced to compensate the victims.

But Plaintiffs here have not sued the terrorists who injured them. Nor have they sued individuals or entities that were aware of the terrorists' activities and knowingly played a role in those activities.

Rather, they have sued Facebook, Twitter, and Google—social media companies with billions of users worldwide. Plaintiffs allege that members of ISIS used the free communication tools that Defendants make available to the public at large and "exploited" those tools in order to recruit adherents and "instill fear" in others. Op. 71. And because Plaintiffs allege that Defendants could have taken more "aggressive" or "meaningful" measures than they already employed to detect and stop terrorists' use of social media, the panel determined that Plaintiffs successfully stated a claim that Defendants aided and abetted the acts of international terrorism that injured Plaintiffs. Op. 69-70.

This case is not unique. Courts have been faced with a flood of lawsuits asserting secondary-liability claims under the Anti-Terrorism Act against a wide variety of legitimate businesses, including financial institutions, pharmaceutical companies, social media businesses, international engineering and development companies, and oil companies, among others. These claims typically have rested on broad liability theories such as the one asserted here—and the overwhelming

majority have been dismissed for failing to satisfy the statute's standards.[3]

The panel's decision here is profoundly flawed, and also wholly inconsistent with interpretations of the Anti-Terrorism Act's aiding-and-abetting standard by this Court and other courts of appeals. By adopting an impermissibly expansive view of the statute's *mens rea* requirement, the decision dramatically expands the reach of the cause of action, subjecting businesses to huge litigation costs and potential treble-damages liability not authorized by Congress.

Lawsuits based on secondary-liability theories, such as aiding-and-abetting claims, stand apart in our legal system. The defendant's alleged conduct is not by itself inherently wrongful but is rendered

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[3] *See, e.g.*, *Honickman v. BLOM Bank SAL*, 2021 WL 3197188, at *10 (2d Cir. July 29, 2021); *Brill v. Chevron Corp.*, 804 F. App'x 630, 632-33 (9th Cir. 2020); *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 219 (2d Cir. 2019); *Crosby v. Twitter*, 921 F.3d 617, 626 (6th Cir. 2019); *Owens v. BNP Paribas*, 897 F.3d 266, 278-79 (D.C. Cir. 2018); *Bernhardt v. Islamic Republic of Iran*, 2020 WL 6743066, at *8 (D.D.C. Nov. 16, 2020); *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 97 (E.D.N.Y. 2019); *O'Sullivan v. Deutsche Bank*, 2019 WL 1409446, at *9-10 (S.D.N.Y. Mar. 28, 2019); *Clayborn v. Twitter*, 2018 WL 6839754, at *6-8 (N.D. Cal. Dec. 31, 2018); *Copeland v. Twitter*, 352 F. Supp. 3d 965, 974-75 (N.D. Cal. 2018); *Cain v. Twitter*, 2018 WL 4657275, at *2 (N.D. Cal. Sept. 24, 2018); *Ofisi v. BNP Paribas*, 2018 WL 396234, at *2 (D.D.C. Jan 11, 2018); *Pennie v. Twitter*, 281 F. Supp. 3d 874, 886-88 (N.D. Cal. Dec. 4, 2017).

unlawful because of the defendant's mental state. It is the *knowing* provision of substantial assistance that justifies holding the alleged aider and abettor liable for the harm suffered by the principal wrongdoer's victim. As a matter of common sense, therefore—and consistent with precedent—the *mens rea* necessary to trigger secondary liability under the Act must clearly separate wrongful actors from legitimate businesses.

The panel's evisceration of the *mens rea* requirement that Congress included in the Anti-Terrorism Act improperly subjects legitimate businesses with robust anti-terrorism policies to liability as aiders and abettors of terrorism. Indeed, under the panel's analysis, once a business becomes "generally aware" that terrorists use its products or services in a significant way, the business is subject to suit as an aider and abettor of terrorism. Liability follows, under such a view, not because the business chose to help terrorists, or knew that particular customers were terrorists or terrorist fronts, but because terrorists unidentified by the business were using its products or services, and the business failed to root out all such improper users.

Congress did not intend that irrational result. Rather, it limited aiding-and-abetting liability to when a defendant provides "knowing" and "substantial" assistance to a terrorist, as those terms were understood in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). *See* Pub. L. No. 114-222, § 2, 130 Stat. 852 (2016).

In *Halberstam*, the live-in partner of a burglar was found civilly liable, as a co-conspirator and an aider and abettor, for a murder that occurred during the course of a burglary. 705 F.2d at 474. The partner had actual knowledge of her companion's activities and directly provided substantial assistance to him to further his continued success, assistance that included five years of secretarial and administrative support selling his stolen goods. *Id.* at 486. *Halberstam* makes clear, therefore, that secondary liability is permissible only where the alleged aider and abettor is aware of the principal's unlawful activity and also of her role in the unlawful scheme.

The contrast between the facts of *Halberstam* and those presented here demonstrate the error in the panel's decision. Indeed, the panel's analysis is more akin to holding a newspaper responsible for a burglary enterprise because it is generally aware that as-yet-

unidentified thieves sometimes advertise stolen goods for sale in its classifieds.

Congress did not draft the Anti-Terrorism Act to reach so broadly, nor could it possibly have intended the perverse consequences that would result from the panel's construction of the statute. The petition for rehearing or rehearing en banc should be granted.

ARGUMENT

I. The Panel's Aiding-And-Abetting Standard Would Impose Liability On Legitimate Businesses With Responsible Anti-Terrorism Policies, And Produce Significant Adverse Consequences.

When a plaintiff seeks to hold a defendant liable under a theory of secondary liability, "the defendant's knowledge is of paramount importance." *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 534 (6th Cir. 2000). That is because the defendant's actions are not by themselves wrongful—if they were, the plaintiff would succeed under a theory of primary liability. Rather, it is the defendant's mental state that separates actionable from non-actionable conduct. The defendant's knowledge of the unlawful scheme "is the crucial element that prevents [the defendant] from suffering automatic liability for the conduct" of the primary violator, who relied on or used the defendant in some manner.

K & S P'ship v. Cont'l Bank, N.A., 952 F.2d 971, 977 (8th Cir. 1991); *see also* Baruch Weiss, "What Were They Thinking?: The Mental State Of The Aider And Abettor And The Causer Under Federal Law," 70 FORDHAM L. REV. 1341, 1348 (2002) ("[T]he mental element is really what defines the aider and abettor.").

Because the *mens rea* element is what separates lawful from unlawful conduct under an aiding-and-abetting theory, that standard must clearly distinguish wrongdoers from those who have not knowingly associated themselves with the principal's wrongful scheme. Otherwise, individuals and entities will be subject to liability even when they did not intend to support or associate with the principal's wrongdoing, or even know that they were doing so at all.

For example, consider a newspaper that may be generally aware that thieves have placed advertisements in its classifieds to sell stolen goods. The newspaper may even have caught and stopped such thieves in the past. But absent allegations that the newspaper knew that a particular customer was a thief selling stolen goods and that the newspaper ran the customer's advertisement anyway, the newspaper's general awareness of an unlawful scheme perpetrated by others using

its services is a far cry from *knowing* assistance of that scheme, which is what would be required to hold the newspaper liable as an aider and abettor.

This case presents an application of that flawed approach. Plaintiffs alleged that Defendants were generally aware that ISIS-affiliated terrorists are among the billions of social media users worldwide, and that those terrorists have "exploited" social media platforms to further their plans. Op. 71. Because Plaintiffs asserted that Defendants could have used more "aggressive" or "meaningful" measures than those already in place to stop this use of social media platforms, the panel held that Plaintiffs successfully stated an aiding-and-abetting claim. Op. 69-70. But as the panel itself recognized, Defendants had no "intent to further or aid ISIS's terrorist activities," did not "share[] any of ISIS's objectives," and had "at most, an arms-length transactional relationship with ISIS" because ISIS's adherents used Defendants' social media platforms like any other consumer. Op. 72.

Further, despite the allegations that Defendants theoretically could have used more "aggressive" or "meaningful" actions against

terrorists using social media, Defendants' "policies prohibit posting content that promotes terrorist activity" and Defendants "regularly removed ISIS-affiliated accounts and content" once notified of them. Op. 72. And, importantly, Plaintiffs did not allege that Defendants knew either the particular uses of their platforms that allegedly aided ISIS's terroristic activity in general, or those uses that supposedly aided the attack that injured Plaintiffs.

The panel's reasoning means that if a business recognizes that somewhere in its customer base—which for many companies includes tens or hundreds of millions of people—unidentified individuals are using the business's products or services in a way that significantly furthers terrorists' goals, then the company may be subject to secondary liability. And the business would be liable even though it did not know the specifics of any terrorist's plans, did not know who among its customer base may be a terrorist, had absolutely no intent to aid international terrorism or to associate itself with, or provide assistance to, the terrorist's goals—and, to the contrary, took affirmative steps to stop terrorists from using its services.

That standard more closely resembles strict liability than the principles governing aiding-and-abetting liability. If the panel's decision is permitted to stand, businesses with responsible anti-terrorism policies, that have worked to rid terrorists from their customer base when notified of terrorist-affiliated accounts, will nevertheless be forced to pay treble damages for terrorists' crimes if they are unable to completely stop terrorists from using their product—that is, unless courts deem that the businesses have used sufficiently "aggressive" and "meaningful" measures to stop terrorism-affiliated consumers. *See* Op. 69-70.

The panel's decision therefore will have multiple far-ranging repercussions.

First, although this case involves social media companies, nothing will prevent enterprising plaintiffs from using the same theory against other types of businesses. Any company that can be accused of having "some terrorists" among its customer base could be alleged to be aiding and abetting terrorist activity simply by interacting with its customers—even if the company has no knowledge of any particular transactions with customers that it knows to be terrorists. That is a

recipe for broad assertions of liability—assertions that have been held insufficient by other courts of appeals.

For example, a plaintiff could argue that a bank is liable as an aider and abettor based on a general allegation that its customers include alleged terrorists—without identifying the particular customers or alleging facts supporting a plausible inference that the bank knew that particular customers were terrorists or affiliated with terrorists. Other courts have consistently rejected that liability theory—insisting on allegations supporting a plausible inference that the bank knew that identified customers were terrorists or terrorist-affiliated[4]—but plaintiffs surely will argue that the panel's holding here permits such actions to survive a motion to dismiss.

Second, because the panel ruled that Plaintiffs have successfully stated a claim by merely alleging that Defendants could have done more to stop terrorists from using their services, even well-meaning and responsible defendants facing Anti-Terrorism Act claims will have difficulty staving off costly and invasive discovery, a result that "will push cost-conscious defendants to settle even anemic cases." *Bell Atl.*

[4] *See, e.g.*, *Honickman*, 2021 WL 3197188, at *10; *Siegel*, 933 F.3d at 224.

Corp. v. Twombly, 550 U.S. 544, 559 (2007); *see also Dura Pharm., 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)).

That is especially true because the mere pendency of these actions inflicts significant harm on companies by branding them as "supporters of terrorism" that are complicit in horrific terrorist attacks. Indeed, enterprising plaintiffs may seek to publicly associate responsible companies with terrorism simply to increase the pressure to settle. That factor too, will tend to force settlement in unjustified cases.

Third, the increase in litigation expenses and settlement costs that will follow the panel's decision will increase the cost of doing business for companies in all types of industries. The ultimate result, then, of the panel's decision is not that wrong-acting companies will be held to account, as Congress intended, but that innocent companies, and in many contexts their customers as well, will bear the cost of unjustified litigation.

As we next explain, the statutory construction that produces these significant adverse consequences is directly contrary to what Congress intended when it created aiding-and-abetting liability under the Anti-Terrorism Act.

II. The Panel's Expansive Liability Theory Contravenes Congress's Limitations On Anti-Terrorism Act Secondary Liability.

Congress imposed specific limits on the scope of aiding-and-abetting liability under the Anti-Terrorism Act. Properly applied, those limits ensure that legitimate companies engaged in routine business activities will not find themselves ensnared in costly litigation or facing treble damages in large-scale lawsuits. And importantly, those limitations give responsible and well-meaning companies the comfort and clarity that they need to design policies and operating guidelines that will keep them firmly on the right side of the law.

For aiding-and-abetting liability, the Act requires proof that the defendant "knowingly provid[ed] substantial assistance . . . [to] the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). To guide courts in applying this provision, Congress pointed to the aiding-and-abetting analysis in *Halberstam v.*

Welch, 705 F.2d 472 (D.C. Cir. 1983), which it specifically referenced in its statutory findings. *See* Pub. L. 114-222, § 2(a)(5), 130 Stat. 852, 852 (*Halberstam* "provides the proper legal frame work for how [aiding and abetting and conspiracy] liability should function" under § 2333(d)).

In addition to the statute's express requirement of "knowledge," *Halberstam* specifies that the *mens rea* element requires that the defendant must be "generally aware" of its role in the illegal activity. 705 F.2d at 477. In *Halberstam*, the court determined that the defendant, Hamilton, could be held civilly liable for the murder committed by her long-term partner, with whom she lived and had several children. 705 F.2d at 474-76. Hamilton's partner had been engaged in a five-year-long burglary enterprise. During those five years, Hamilton watched her partner, who "had no outside employment," disappear "four or five" evenings each week, watched him smelt inexplicably obtained gold and silver into bars in their garage, and performed the secretarial and administrative tasks necessary to sell those bars, afterwards depositing the receipts into her own bank accounts. *Id.* And Hamilton could not have supposed that her partner's gains were legally purchased; she never saw money go out, only come

in. *Id.* In short, Hamilton had actual awareness that her partner was engaged in criminal activity and actual knowledge of how her actions supported that activity.

Halberstam thus makes clear that unwitting or incidental support to primary violators does not suffice to establish aiding-and-abetting liability. Indeed, Hamilton was found liable as an aider and abettor because it "defie[d] credulity that Hamilton did not know that something illegal was afoot" in connection with her boyfriend's activities—activities that she was actively assisting. *Halberstam*, 705 F.2d at 486.

Courts assessing aiding-and-abetting claims under the Anti-Terrorism Act therefore have required that, at a minimum, the complaint allege facts supporting a plausible inference that the claimed aider and abettor engaged in transactions with specific persons or entities that it knew at the time of the transactions to be terrorists or terrorist fronts. As the Second Circuit has put it, the secondary actor must be aware that, by assisting the principal, it is itself "assuming a 'role' in terrorist activities." *Linde v. Arab Bank PLC*, 882 F.3d 314, 329 (2d Cir. 2019) (citing *Halberstam*, 705 F.2d at 477).

The Second Circuit applied that principle in *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021). There, plaintiffs successfully alleged that a bank had aided and abetted Hizbollah, an international terrorist organization, because the bank knew that "Hizbollah require[s] wire transfer and other banking services in order to plan, prepare for, and carry out terrorist attacks," and yet it provided financial services to customers that it *knew* were Hizbollah affiliates—knowledge that the bank had because Hizbollah itself had publicized that information. *Id.* at 849-50, 860, 862, 865. Additionally, the *Kaplan* complaint alleged that the bank's "provision of banking services" to the Hizbollah affiliates was not "routine" and "that the bank had violated banking regulations and disregarded its own internal policies in order to grant its known Hizbollah-affiliated Customers 'special exceptions' that permitted those Customers to deposit hundreds of thousands of dollars a day without complying with the requirement that the source of funds be disclosed." *Id.* at 858.

In contrast, the Second Circuit in *Siegel* affirmed the dismissal of § 2333(d) aiding-and-abetting claims against several banking entities alleged to have substantially assisted al-Qaeda through the provision of

banking services to a Saudi bank with supposed ties to the terror group. 933 F.3d at 224. The court rested its decision on the determination that the *Siegel* complaint contained no non-conclusory allegations that HSBC was aware that, by providing arms-length banking services to another financial institution, it actually was playing a role in the terrorist activities of al-Qaeda, notwithstanding the allegations that the other financial institution allegedly had links to terrorists. *Id.* Similarly, the Second Circuit affirmed the dismissal of § 2333(d) aiding-and-abetting claims in *Honickman* because the plaintiffs' allegations "d[id] not support a reasonable inference that [the defendant] Bank knew of [its] Customers' links to Hamas . . . ." *Honickman*, 2021 WL 3197188, at *10.

Applying that same principle here makes clear the panel's error. Unlike *Kaplan*, where the defendant bank knew the terrorist ties of specific customer accounts, and unlike *Halberstam*, where the defendant had direct, actual knowledge of the principal's wrongdoing and her role in furthering it, the complaint here fails to allege *any* knowledge by Facebook, Google, or Twitter of specific consumers who used their services to support ISIS's terroristic activities. Instead, as

the panel itself recognized, the "scenario presented in *Halberstam* is, to put it mildly, dissimilar to the one at issue here." Op. 56.

Nor does the complaint allege that Defendants engaged in anything other than routine business activities with the alleged terrorists using their social media platforms. That failure is particularly significant, because courts have recognized that in the context of commercial transactions, an even "higher degree of knowledge" is required when a plaintiff accuses a business engaged in "routine" actions that are "part of normal everyday business practices" of aiding and abetting an unlawful scheme. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991).

* * *

Properly applied, the *Halberstam*-informed limitations on secondary liability in the Anti-Terrorism Act ensure that a business is not held liable because unidentified actors are using its products or services to further terrorism, even if the business is generally aware that this is happening somewhere in its customer base. If the rule were otherwise, businesses would be burdened with the insurmountable task

of actively policing their entire customer bases, which in the case of Defendants, number in the billions.

But Congress did not impose that investigative task on U.S. businesses through the Anti-Terrorism Act. Rather, Congress determined that when a business *knows* it is providing aid to a terrorist—as shown by allegations supporting a plausible inference that the defendant knew that a particular customer or user or account was being used by terrorists—then it may be properly held liable as an aider and abettor to terrorism. The panel failed to apply that standard, and in doing so, greatly expanded the scope of the Anti-Terrorism Act, far beyond the bounds fixed by Congress.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing en banc.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 29-2, undersigned counsel certifies that this petition:

(i) complies with the type-volume limitation of Circuit Rule 29-2(c) because it contains 3,911 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: August 13, 2021

/s/ *Andrew J. Pincus*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 13, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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