NOTE

THE CASE FOR REFORMING JASTA

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As the Supreme Court all but closed the door on Alien Tort Statute litigants alleging injuries from terror attacks, Congress opened a window by passing the Justice Against Sponsors of Terrorism Act (JASTA) in 2016. A review of 300 complaints reveals that in recent years, the hydraulic forces of transnational public law litigation have pushed plaintiffs toward the Anti-Terrorism Act (ATA), with the rate of lawsuits against U.S.-based corporations increasing six-fold following the JASTA amendments. At the same time, courts are gradually expanding secondary liability under the ATA, which is significant in an area with treble damages and awards ranging into the hundreds of millions of dollars.

Yet the statute and its guiding case, Halberstam v. Welch*, provide insufficient guidance to courts, lead to inconsistent outcomes, and will leave potential defendants unsure of what activity can lead to ATA liability. The expanding scope of JASTA lawsuits will pressure humanitarian and development organizations to limit operations in areas where designated Foreign Terrorist Organizations operate. Worryingly, these are precisely the regions in which American counterterrorism strategy and civilians with critical humanitarian needs benefit the most from foreign aid.*

This Note argues that JASTA is poorly constructed and that Congress should amend the ATA to more carefully tailor secondary liability arising from terror attacks. This obligation is particularly important given that nearly one-third of the Senate disavowed the legislation immediately after passage and promised to implement a fix. This Note suggests some solutions, such as allowing for licenses, discarding Halberstam*, and calibrating mens rea elements. The need for reform may become increasingly acute, as the Supreme Court is set to review aspects of both JASTA and Section 230 of the Communications Decency Act during the current term.*

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INTRODUCTION

In 2019, U.S. servicemembers, civilians, and family members brought a lawsuit under the Anti-Terrorism Act (ATA) seeking remuneration for deaths and injuries related to nearly 200 terrorist attacks in Afghanistan.[1] At least a half-dozen terror organizations operate within the country, targeting the government, civilians, and—prior to American withdrawal—U.S. soldiers.[2] Yet the plaintiffs did not sue the Taliban, who sponsored the heinous acts of violence, nor al-Qaeda or the Haqqani Network, designated Foreign Terrorist Organizations (FTOs) that participated in the brutality. Rather, plaintiffs pursued seventeen development organizations, demining groups, and other corporate entities under a theory that the corporations were directly liable for the injuries, as well as an aiding and abetting theory that Congress introduced in the Justice Against Sponsors of Terrorism Act (JASTA) in 2016.[3] The corporations operated in Afghanistan as part of an international effort to rebuild the country following the 2001 U.S. invasion, with support from U.S. agencies such as the United States Agency for International Development (USAID), the Air Force, and the Army Corps of Engineers.[4] The organizations responded in part to the Taliban's reluctance to provide basic services, including healthcare and education, to populations in areas it controlled.[5] However, the Taliban extorted money from these entities even while the organizations filled the gap in services, with the militants threatening violence if the companies did not comply.[6] Plaintiffs' claims encountered roadblocks, including the court's lack of personal jurisdiction over some defendants,[7] the fact that only some of the attacks met JASTA's requirement of FTO involvement,[8] and finally the court's conclusion that the protection payments did not substantially assist

1. Cabrera v. Black & Veatch Special Projects Corps., No. 19-CV-3833-EGS-ZMF, 2021 WL 3508091, at *1 (D.D.C. July 30, 2021).

2. Clayton Thomas, CONG. RSCH. SERV., IF10604, TERRORIST GROUPS IN AFGHANISTAN 1–2 (2022).

3. Justice Against Sponsors of Terrorism Act, Pub. L. No. 144-222, § 3, 130 Stat. 852, 853 (2016) [hereinafter JASTA].

4. *Cabrera*, 2021 WL 3508091, at *4.

5. *Id.* at *2.

6. *Id.* at *2, *4. Members of Congress appeared to believe that JASTA would not reach cases like this. Senator Schumer noted that JASTA does not apply to "situations where someone has been forced to make payments or provide aid to a foreign terrorist organization under genuine duress or, for example, as ransom payments for the release of someone taken hostage. This type of conduct is outside the scope of traditional aiding and abetting liability, and our bill does not seek to change that." 162 CONG. REC. S2846 (daily ed. May 17, 2016) (statement of Sen. Schumer).

7. *Id.* at *11–*15.

8. *Id.* at *24–*26.

in the attacks.[9] In the end, the court dismissed the claims against each defendant.[10]

Yet as this Note discusses, the judicial tides are changing, and plaintiffs are making headway bringing secondary liability cases against corporate entities—including both for-profit and non-profit organizations. The Supreme Court recently noted in dicta that following JASTA, the ATA "does permit suits against corporate entities,"[11] while a recent decision from the U.S. Court of Appeals for the District of Columbia provides grounds to broaden liability against corporate actors.[12] Awards in these lawsuits can be massive—one jury assessed $655.5 million in damages against a defendant organization.[13] In addition, the rate of ATA cases against U.S. corporations increased six-fold in the years following JASTA,[14] meaning that plaintiffs are making full use of the statute to recover against organizations whose assets sit within the reach of U.S. courts. FTOs also operate in dozens of countries,[15] and members of FTOs occupy prominent positions in several national governments.[16] This indicates that liability may arise in a wide range of locations, but particularly in those that experience the greatest instability.

Expanded transnational liability for corporate entities serves several important policy goals. ATA litigants are making progress where Alien Tort Statute (ATS) litigants have failed in recent years, given the Supreme Court's narrowing of the 1789 statute.[17] Similar headway in climate change litigation will likely prove critical to holding for-profit entities accountable for their contributions to rising temperature levels, as well as to incentivize a shift to cleaner operations.[18] Providing *some* functioning forum with personal jurisdiction over offending organizations will on net reduce the damages these entities cause. Yet expansive liability can come with its own costs, and JASTA is not carefully tailored to maximize the benefits of transnational

9. *Id.* at *27–*28.

10. *Id.* at *28.

11. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1404 (2018) (discussing corporate liability under the Alien Tort Statute).

12. Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 217 (D.C. Cir. Jan. 4, 2022).

13. Waldman v. Palestine Liberation Org., 835 F.3d 317, 322 (2d Cir. 2016). *See also* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 688 (7th Cir. 2008) (noting a $156 million award).

14. *See infra* notes 105–107 and accompanying text.

15. *See infra* note 232 and accompanying text.

16. Lina Khatib and Jon Wallace, *Lebanon's Politics and Politicians*, CHATHAM HOUSE (Aug. 11, 2021), https://www.chathamhouse.org/2021/08/lebanons-politics (discussing that Hezbollah controls large portions of the Lebanese government); *Hardliners Get Key Posts in New Taliban Government*, BBC (Sept. 7, 2021), https://www.bbc.com/news/world-asia-58479750 (discussing that members of the Haqqani Network control the Afghan Ministry of the Interior).

17. *See infra* notes 92–103 and accompanying text.

18. *See, e.g.*, Peter Kayode Oniemola, *A Proposal for Transnational Litigation Against Climate Change Violations in Africa*, 38 WIS. INT'L L.J. 301, 302 (2021); Esmeralda Colombo & Anastasia Giadrossi, *Comparative International Litigation and Climate Change: A Case Study on Access to Justice in Adaptation Matters*, 81 U. PITT. L. REV. 527, 531, 543, 546 (2020).

litigation while minimizing potential harms. Private entities should encounter secondary liability under the Anti-Terrorism Act; however, JASTA presents a messy, imprecise, and poorly designed framework for that liability and will harm U.S. foreign policy interests and foreign populations residing in conflict zones.

The problems JASTA poses for both courts and litigants may augment in the near future as the Supreme Court weighs two cases this term. One, *Twitter v. Taamneh*,[19] represents the first time the Supreme Court will review JASTA's scope. The question presented asks what counts as "knowledge" within the statute's underdetermined structure.[20] The second, *Gonzalez v. Google*,[21] targets Section 230 of the Communications Decency Act, which shields many technology companies from civil liability—including JASTA lawsuits.

Exploration of JASTA's implications within legal academia is underdeveloped, with a few authors discussing the statute's effects on state actors and sovereign immunity,[22] as well as a number of student notes seeking to stretch the statute further.[23] Few pieces have approached JASTA's substance critically, and none have addressed its potential negative effects on U.S. foreign policy outside the context of sovereign immunity. This piece seeks to fill that gap.

This Note makes four main points. First, following the Supreme Court's contraction of the ATS and Congress's expansion of liability under JASTA, litigants' claims against corporations with deep pockets are responding to hydraulic forces of litigation and flowing towards the ATA. Second, courts are gradually expanding secondary liability under the ATA, but the statute and its guiding case, *Halberstam v. Welch*,[24] provide insufficient guidance, lead to inconsistent outcomes, and will leave potential defendants unsure of what activity can lead to ATA liability. Third, the expanding scope of JASTA lawsuits will pressure humanitarian and development organizations to limit operations in areas where designated FTOs operate; yet these are precisely the regions in which American counterterrorism strategy benefits the most from their work. Finally, this Note posits that Congress, the courts, and

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19. Twitter, Inc. v. Taamneh, No. 21-1496, 2022 WL 4651263, at *1 (U.S. Oct. 3, 2022) (granting certiorari).

20. Petition for Writ for Certiorari at (i), Twitter, Inc. v. Taamneh (No. 21-1496) (U.S. Oct. 3, 2022).

21. Gonzalez v. Google LLC, No. 21-1333, 2022 WL 4651229, at *1 (U.S. Oct. 3, 2022) (granting certiorari).

22. *See, e.g.*, Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, The Anti-Terrorism Act, And JASTA*, 24 U. MIAMI INT'L & COMPAR. L. REV. 285, 362–71 (2017).

23. *See, e.g.*, Anna Elisabeth Jayne Goodman, Note, *When You Give a Terrorist A Twitter: Holding Social Media Companies Liable for Their Support of Terrorism*, 46 PEPP. L. REV. 147 (2018); John J. Martin, Note, *Hacks Dangerous to Human Life: Using JASTA to Overcome Foreign Sovereign Immunity in State-Sponsored Cyberattack Cases*, 121 COLUM. L. REV. 119, 121 (2021).

24. Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983).

others should not use JASTA as a model for defining the other forms of transnational liability that the legal system must construct in the coming years.

Part II of this Note provides background on the ATA, as well as legislative history indicating that Congress failed to consider the statute's implications and in fact disowned it within hours of its passage. Part III discusses the phenomenon of transnational public law litigation, as well as the dramatic growth of ATA lawsuits against corporate entities—both for-profit and non-profit—following JASTA's 2016 enactment. Part IV then examines theories of liability under the ATA, noting the significant hurdles litigants initially faced when bringing lawsuits under JASTA but also the more recent successes they have found in federal courts. This Part then questions the *Halberstam* aiding and abetting standard Congress packaged within JASTA. Part V addresses the normative question of whether the ATA's scope is properly drawn, and Part VI offers some solutions to properly target liability.

I. THE ATA'S TEXT AND LEGISLATIVE HISTORY

The ATA has come a great distance since its first enactment in the early 1990s. Whereas the first iteration of the statute targeted terrorists and terrorist organizations themselves, JASTA expanded its reach to those who aid and abet terrorist acts. It is important to understand how narrowly Congress drafted the original ATA, as well as the legislature's lack of careful consideration when expanding liability in JASTA.

A. The 1990s ATA

The text of the ATA, as enacted in 1992, states that a cause of action exists for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . "[25] The accompanying Senate report noted that "[t]he substance of such an action is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts."[26] Just as courts are now wrestling with the breadth of JASTA's aiding and abetting provision, courts struggled to define the scope of this statutory

25. Federal Courts Administration Act, Pub. L. No. 103-572, 106 Stat. 4507, 4522 (1992). Congress inadvertently passed the ATA in 1990 due to a clerical error. Antiterrorism Act of 1990, Pub. L. No. 101-519, 104 Stat. 2250 (1990). The bill was repealed as a technical matter in early 1991 before Congress passed the legislation again in 1992. *See* 137 CONG. REC. 8143 (daily ed. April 16, 1991) (statement of Sen. Grassley).

26. S. REP. No. 102-342, at 45 (1992).

cause of action based in tort, particularly because of its broad language.[27] While the statute's text does not expressly limit the kinds of defendants plaintiffs may hale into court, legislative history indicates that Congress intended to go after the terrorist organizations themselves.[28]

Congress enacted the original version of the ATA in response to Palestine Liberation Organization (PLO) assassinations, aircraft bombings, and—most importantly—the murder of American passenger Leon Klinghoffer during the 1985 hijacking of the *Achille Lauro* off the coast of Egypt.[29] Plaintiffs sued the owner and charterer of the ship, who in turn impleaded the PLO.[30] Congress sought to expand upon the foundation laid by the Klinghoffer litigation, directly targeting terrorist organizations and their assets.[31] Senator Grassley, who championed the legislation, asserted that "[i]f terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them."[32] Grassley noted that the legislation was "in part, symbolic;"[33] it was not clear that significant assets controlled by terrorist organizations would sit within the jurisdiction of U.S. federal courts.[34] Grassley furthermore surmised that the statute would allow U.S. companies to join the fight against terrorism, given that it would allow "those with deep pockets, such as the airline industry" to file suits.[35] Many

27. *Compare* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev., 291 F.3d 1000 (7th Cir. 2002) (determining that aiding and abetting liability exists under § 2333(a)), *with* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008) (holding that aiding and abetting liability does not exist under § 2333(a)).

28. *See* Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 540–44 (2013)

29. The incident initially prompted a 1987 statute targeting the PLO's assets and activities in the United States. Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2373 (1991); The *Achille Lauro* incident featured centrally in the messaging legislators employed when gathering support for the legislation. *See, e.g.*, 136 CONG. REC. 7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley); 136 CONG. REC. 26716 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley).

30. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 739 F. Supp. 854, 857 (S.D.N.Y. 1990). The Second Circuit later vacated the decision based on questions of personal jurisdiction and service of process. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 54 (2d Cir. 1991).

31. *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Admin. Practice of the Sen. Comm. on the Judiciary*, 101st Cong. 17 (1990). Senator Grassley described the statute as intended to "bring terrorists to justice the American way, by using the framework of our legal system to seek justice against those who follow no framework or defy all notions of morality and justice. It also sends a strong warning to terrorists to keep their hands off Americans and an eye on their assets." *Id.* at 3.

32. 136 CONG. REC. 7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley).

33. *Hearing on S. 2465*, *supra* note 31, at 2.

34. This focus on satisfaction based on the existence of a judgment vindicating plaintiffs' claims against a defendant has motivated transnational public law litigation since its inception. *See* Koh, *supra* note 29, at 2368.

35. 136 CONG. REC. 7592 (daily ed. Apr. 19, 1990) (statement of Sen. Grassley). *See also* Brief of Eight United States Senators as Amici Curiae in Support of Plaintiffs-Appellants at 10, Atchley v. AstraZeneca UK Ltd., 22 F. 4th 204 (D.C. Cir. 2021) (No. 20-7077) (asserting that the ATA was intended "to harness the initiative and resources of the private sector in pursuit of the larger aims of U.S. counterterrorism policy.").

private companies—primarily insurers—did just that.[36] At the outset, a majority of these lawsuits alleged liability directly against terrorist organizations.

Prior to JASTA, courts struggled with the question of secondary liability under the ATA, given that the statute provided a cause of action based in tort but did not explicitly authorize aiding-and-abetting liability. One of the first suits filed under the ATA tested the secondary liability of two charities. In 1996, two Hamas members killed 17-year-old David Boim during a drive-by shooting at a bus stop in the West Bank.[37] Four years later, Boim's parents filed an ATA suit against a host of defendants, including two U.S.-based non-profit corporations on the theory that they raised funds for and funneled money to Hamas to support terror attacks.[38] The Seventh Circuit held the defendants liable under the plaintiffs' aiding and abetting theory.[39]

The Seventh Circuit first considered direct liability, concluding that the ATA "clearly is meant to reach beyond those persons who themselves commit the violent act that directly causes the injury," interpreting legislative history to "indicate[] an intent by Congress to allow a plaintiff to recover from anyone along the causal chain of terrorism."[40] However, the court recognized some limitations. Liability would not be imposed simply for providing money to a group that sponsored a terror attack, as this standard would impose liability too broadly.[41] The court also noted that the non-profits were not the proximate cause of the plaintiffs' injury.[42] Still, the opinion's approach to primary liability came close to imposing direct liability on the organizations for their alleged activities.

The Seventh Circuit next considered the aiding and abetting theory. The court reasoned again that Congress intended to extend liability along the entire causal chain of terrorism,[43] that Congress meant to "import general tort law principles into the statute,"[44] and that failing to impose liability on aiders and abettors would undermine Congress's intent.[45] Appearing to rely in part on the rule against absurdity, the court explained that "[t]he statute

36. *See, e.g.*, *In re* Terrorist Attacks (Fed. Ins. v. Al Qaida), No. 03-CV-6978 (S.D.N.Y. 2004); Pacific Employers Ins. Co. et al v. Kingdom of Saudi Arabia, No. 1:04-CV-07216 (S.D.N.Y. 2004).

37. Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief and Dev., 291 F.3d 1000, 1002 (7th Cir. 2002).

38. *Id.* at 1003.

39. *Id.* at 1011.

40. *Id.* at 1011. The court in *Boim I* also held that the organizations would be directly liable if the Boims could prove that they provided material support to terrorist organizations and violated 18 U.S.C. §§ 2339A or 2339B. *Id.* at 1012. *Boim III* reversed this holding, as well. Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 691 (7th Cir. 2008).

41. *Boim*, 291 F.3d at 1011.

42. *Id.* at 1012.

43. *Id.* at 1020. The *Boim I* court relied heavily on this one line in the legislative history rather than considering the issues Congress focused on when discussing the statute.

44. *Id.*

45. *Id.* at 1020–21.

would have little effect if liability were limited to the persons who pull the trigger or plant the bomb because such persons are unlikely to have assets . . . and would not be deterred by the statute."[46] At least for the time being, an appellate court had "open[ed] courthouse doors to new classes of litigants by explicitly recognizing a right of action for aiding and abetting rather than requiring close involvement in violent terrorist activities."[47] Several lower courts followed suit.[48]

However, the Seventh Circuit's interpretation of the ATA's original text did not stand for long. In a 2008 opinion written by Judge Posner, the Seventh Circuit sitting en banc rejected the earlier panel's reasoning, holding that "statutory silence on the subject of secondary liability means there is none"[49] and that reading secondary liability into the statute "would enlarge federal courts' extraterritorial jurisdiction" without explicit instructions from Congress.[50] A Second Circuit panel reached the same conclusion after noting that other parts of the ATA explicitly include aiding and abetting liability.[51]

In response to these cases—as well as several holding that the Foreign Sovereign Immunity Act precluded suits against Saudi Arabia related to the September 11 attacks[52]—Congress passed JASTA.[53]

B. JASTA

JASTA introduced three major changes to the ATA. First, JASTA amended the Foreign Sovereign Immunities Act to abrogate immunity in cases alleging injuries caused by "an act of international terrorism in the United States" or other tortious acts of a foreign state.[54] In addition, JASTA added an exception to the ATA's own prohibition on lawsuits against

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46. *Id.* at 1021.

47. *Tort Law — Civil Remedy for Terrorism-Seventh Circuit Recognizes Implied Action for Aiding and Abetting Terrorism* — Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002)*., 116 HARV. L. REV. 713, 716 (2002).

48. *See, e.g.*, Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006); *In re* Chiquita Brands Int'l, Inc., 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010); Abecassis v. Wyatt, 704 F. Supp. 2d 623, 663–65 (S.D. Tex. 2010).

49. Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 689 (7th Cir. 2008). The *Boim* litigation continues. *See, e.g.*, Boim v. Am. Muslims for Palestine, 9 F.4th 545 (7th Cir. Aug. 16, 2021).

50. *Boim*, 549 F.3d at 689–90.

51. Rothstein v. UBS AG, 708 F.3d 82, 97–98 (2d Cir. 2013).

52. *See, e.g.*, *In re* Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 779–80 (S.D.N.Y. 2005); *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71 (2d Cir. 2008); *In re* Terrorist Attacks on September 11, 2001, 134 F. Supp. 3d 774 (S.D.N.Y. 2015).

53. *See* Schnably, *supra* note 22, at 367. Congress's only intervening change simply updated section numbers for Federal Aviation Act violations, meaning that JASTA was the first substantive change to the ATA since 1992. United States Code: Technical Amendments to Transportation Laws, Pub. L. No. 103-429, 108 Stat. 4377 (1994).

54. JASTA, *supra* note 3, § 3, 130 Stat. at 853; 28 U.S.C. § 1605B.

foreign states.[55] Critically, JASTA also provided a cause of action against those who aid and abet terrorist acts.[56] Section 2333 now includes the following provision:

> In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization . . . liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.[57]

To define the aiding and abetting standard, Congress pointed to *Halberstam v. Welch*, a 1983 D.C. Circuit tort case, to "provide[] the proper legal framework for how such liability should function in the context" of the ATA.[58] In addition, Congress stated that JASTA's purpose is to

> provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.[59]

State actors represented Congress's most obvious targets, and legislators hoped to allow claims brought by family members of those killed in the September 11 attacks, given that the 1992 version of the ATA included an express prohibition on lawsuits against states.[60] In particular, Congress responded to a 28-page report on Saudi Arabia's involvement in the attacks, which the Executive declassified in July 2016.[61]

As a result, nearly all of the debate surrounding JASTA centered on liability for foreign states, not private actors, and most discussion in hearings and on the floors of Congress understood the bill to single out governments.[62] Senator Cornyn, who introduced the legislation, noted that

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55. JASTA, *supra* note 3, § 3.

56. *Id.* at § 4.

57. *Id.* at 854; 18 U.S.C. § 2333(d)(2).

58. JASTA, *supra* note 3, § 2(a)(5), 130 Stat. at 852.

59. *Id.* at § 2(b).

60. *See* Lawton v. Republic of Iraq, 581 F. Supp. 2d 43, 44 (D.D.C. 2008) (dismissing a lawsuit against Iraq for the Oklahoma City bombing); 162 CONG. REC. S2845 (daily ed. May 17, 2016) (statement of Sen. Cornyn centered on September 11); 18 U.S.C. § 2337 (barring ATA lawsuits against foreign states).

61. Schnably, *supra* note 22, at 367–77.

62. *See generally Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution and Civil Just. Of the H. Comm on the Judiciary*, 114th Cong. (2016) (most witnesses focused on the issue of sovereign immunity).

secondary liability attaches to "terrorism sponsors," and Senator Schumer described the bill as "a responsible, balanced fix to a law that has extended too large a shield to foreign actors who finance and enable terrorism on a massive scale."[63] Representative Jerry Nadler found that the legislation "simply reinstates what was understood to be the law for 30 years—that foreign states may be brought to justice for aiding and abetting acts of international terrorism that occur on American soil."[64] Outsiders believed the bill only addressed foreign states as well, with hearing witnesses asserting that the bill "narrowly focuses on state-facilitated acts of international terrorism . . . and does not concern claims against individuals."[65] Most objections related to the potential for other states to pass reciprocal legislation,[66] and President Obama vetoed the bill, responding only to the act's abrogation of sovereign immunity.[67]

Furthermore, members of Congress effectively disowned JASTA on the same day the legislature voted to override President Obama's veto. Key legislators noted that few paid attention to the bill or its implications before it came to a vote—at which point politics pushed legislators to support victims of the September 11 attacks. [68] Neither house debated the legislation.[69] Immediately following the vote, 28 senators wrote a letter to JASTA's sponsors expressing "concerns . . . regarding potential unintended consequences that may result from this legislation for the national security and foreign policy of the United States."[70] Most critics referred to the sovereign immunity issue and a generalized sense that the bill's ramifications were not understood. The White House spokesperson called the reaction "a pretty classic case of rapid-onset buyer's remorse" and noted that "[t]he suggestion on the part of some members of the Senate was that they didn't know what they were voting for, that they didn't understand the negative consequences of the bill."[71] A chorus of prominent legislators—including

63. 162 CONG. REC. S2846 (daily ed. May 17, 2016) (statement of Sen. Schumer).

64. *Justice Against Sponsors of Terrorism Act: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary*, 114th Cong. 32 (2016) (statement of Representative Jerry Nadler).

65. *Id.* at 44 (statement of Richard Klingler, Partner, Sidley Austin LLP).

66. *Id.* at 32 (statement of Rep. Nadler).

67. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT MY APPROVAL S. 2040, THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT, S. Doc. No. 114-16, at 2 (2nd Sess. 2016).

68. Alexander Bolton, *Obama Defeat is Schumer Victory*, HILL (Sept. 28, 2016, 6:00 AM), https://thehill.com/homenews/senate/298177-obama-defeat-is-schumer-victory.

69. Schnably, *supra* note 22, at 371.

70. Letter from 28 Senators to John Cornyn and Chuck Schumer, U.S. Senators (Sept. 28, 2016), https://www.scribd.com/document/325673727/Bipartisan-Senate-JASTA-Letter-092816 [hereinafter *Letter from 28 Senators*].

71. The White House Office of the Press Secretary, *Press Briefing by Press Secretary Josh Earnest and Secretary of Education King*, (Sept. 29, 2016, 1:10 PM), https://obamawhitehouse.archives.gov/the-press-office/2016/09/29/press-briefing-press-secretary-josh-earnest-and-secretary-education-king. Josh Earnest added that "what's true in elementary school is true in the United States Congress -- ignorance

Senate Majority Leader Mitch McConnell, House Speaker Paul Ryan, and Senate Foreign Relations Committee Chairman Bob Corker—pushed immediately to rework JASTA because of the prospect of unintended consequences. [72] However, the legislation's Senate sponsors—Chuck Schumer and John Cornyn—refused to consider major alternatives, such as limiting the legislation to only allow lawsuits related to September 11.[73] In a Senate that all but requires unanimous consent agreements to bring measures to the floor, this opposition prevented legislators from implementing immediate changes to the statute.

The way in which Congress passed JASTA—focusing on foreign state liability for the September 11 attacks and failing to fully explore the ramifications of abrogating sovereign immunity—implies that it could not have considered the breadth of liability for private entities. A search of the legislative history and leading thought pieces at the time reveals that the issue of secondary liability for U.S. companies engaging in business abroad—as well as for non-governmental organizations and development corporations contracted by the U.S. government—*was not considered* during debates about the law.[74] One recent amicus brief argued that the question of aiding and

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is not an excuse, particularly when it comes to our national security, and the safety and security of our diplomats and our servicemembers." *Id.* Federal officials, U.S. allies, and the American business community all communicated these concerns to Congress in advance of the vote. *Id.* General Electric Chief Executive Officer Jeffrey Immelt, for example, noted in a letter to Senator Mitch McConnell that "[t]he bill is not balanced, sets a dangerous precedent, and has real potential to destabilize vital bilateral relationships and the global economy." Roberta Rampton & Patricia Zengerle, *Obama Vetoes Sept. 11 Saudi Bill, Sets up Showdown with Congress*, REUTERS (Sept. 23, 2016, 1:02 PM), https://www.reuters.com/article/us-usa-sept11/obama-vetoes-sept-11-saudi-bill-sets-up-showdown-with-congress-idUSKCN11T237.

72. Bolton, *supra* note 68 (noting Corker's concerns); Steven T. Dennis & Billy House, *Congress May Rewrite Saudi 9/11 Law After Veto Override*, BLOOMBERG (Sept. 29, 2016, 12:21 PM), https://www.bloomberg.com/news/articles/2016-09-29/congress-signals-regret-after-overriding-veto-of-saudi-9-11-bill#xj4y7vzkg (discussing McConnell and Paul Ryan); *Letter from 28 Senators*, *supra* note 70; Karoun Demirjian & David Nakamura, *White House Accuses Congress of 'Buyer's Remorse' on 9/11 Bill*, WASH. POST (Sept. 29, 2016, 4:57 PM), https://www.washingtonpost.com/news/powerpost/wp/2016/09/29/republican-leaders-say-911-measure-may-need-to-be-revisited-after-elections/ (discussing Senate Foreign Relations Committee ranking member Ben Cardin's and House Minority Leader Nancy Pelosi's trepidations with the final form of JASTA). Pelosi added that the bill "could have been written in a little bit of a different way" and that it was "a very sad situation." *Id.*

73. Demirjian & Nakamura, *supra* note 72.

74. *See, e.g.*, The N.Y. Times Ed. Bd., *The Risks of Suing the Saudis for 9/11*, N.Y. TIMES (Sept. 28, 2016), https://www.nytimes.com/2016/09/28/opinion/the-risks-of-suing-the-saudis-for-9-11.html? (focusing on concerns regarding reciprocal waiver of U.S. sovereign immunity in other nations); David B. Rivkin Jr. & Lee A. Casey, Opinion, *Hold on Jasta Minute!*, WALL ST. J. (Nov. 30, 2016, 7:15 PM), https://www.wsj.com/articles/hold-on-jasta-minute-1480551317?page=1; Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SEC. (Apr. 18, 2016), https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta/ (discussing previous suits against private entities, such as banks, but not reaching the implications of broad secondary liability for private entities); Jack Goldsmith & Stephen I. Vladeck, *Why Obama Should Veto 9/11 Families Bill*, CNN (Sept. 13, 2016), https://www.cnn.com/2016/09/13/opinions/obama-9-11-families-bill-goldsmith-vladeck/.

abetting was just "less controversial[]" when Congress passed JASTA;[75] however, it is difficult to believe that Congress—and American corporations—would have let the issue pass by without discussion if JASTA was truly understood to impose sweeping liability on entities connected to terrorist attacks by arm's length transactions.[76]

The apparent difficulty experienced by federal courts adjudicating aiding and abetting claims becomes clearer with this background, given that members of Congress did not expect the statute to reach as far as litigants have worked to apply it. Because Congress did not consider the full implications of JASTA lawsuits against private entities and U.S. companies operating in conflict zones, courts are correct to at least hesitate when applying the statute against those organizations.

II. THE HYDRAULIC FORCES OF TRANSNATIONAL LITIGATION

JASTA has also had unexpected effects on the direction of transnational litigation in the United States. As the Supreme Court continues to contract the scope of the Alien Tort Statute, a law providing federal courts with jurisdiction over cases alleging some forms of injury that violate international law, plaintiff's attorneys have sought alternative causes of action. Just as attorneys have probed the ATS for decades hoping courts will accept their theories of liability,[77] litigators are pushing the boundaries of the ATA and other statutes to find compensation for their clients' damages.[78] Since Congress passed JASTA, the rate of lawsuits against U.S. companies and private entities increased nearly six-fold. Plaintiffs' efforts to assert liability for terrorist activity under the ATA present the statute as one limited alternative to the ATS.

Anti-Terrorism Act claims fall generally under the umbrella of transnational public law litigation. Harold Koh described these cases as characterized by (1) a transnational party structure, (2) a transnational claim structure, (3) a prospective focus, (4) transportability of norms, and (5)

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75. Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants at 11, Atchley v. AstraZeneca, 22 F.4th 204 (D.C. Cir. 2022) (No. 20-7077).

76. Indeed, U.S. companies supported President Obama's veto of JASTA only on the grounds that it could expose their own assets in Saudi Arabia to lawsuits. Isaac Arnsdorf & Seung Min Kim, *Saudi Lobbyists Plot new Push Against 9/11 Bill*, POLITICO (Sept. 26, 2016, 6:28 PM), https://www.politico.com/story/2016/09/saudi-arabia-veto-911-228686.

77. *See* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1943 (2021) (Gorsuch, J., concurring) (noting "plaintiffs have presented for this Court's consideration one new potential cause of action after another").

78. One example can be found in a recent complaint filed against Facebook's parent company, Meta, seeking $150 billion for its role in spreading hate speech fueling the Rohingya genocide. Doe v. Meta Platforms, Inc., No. 21-06465 (Cal. Super. Ct. filed Dec. 6, 2021). Plaintiffs sought class certification for a products liability claim based on the company's algorithm, arguing that where Section 230 conflicts with Burmese law, Burmese law should apply.

institutional dialogue.[79] This litigation "seeks to vindicate public rights and values through judicial remedies."[80] Dialogue surrounding transnational public law litigation initially focused primarily on state and official actors,[81] although litigation against private actors was also contemplated.[82] With the contraction of the ATS and expansion of anti-terrorism legislation, however, the United States Congress adopted a view that human rights litigation should vindicate the interests of U.S. nationals, rather than further the idea of a cosmopolitan world.[83]

The greatest activity in U.S.-based transnational public law litigation has taken place under the Alien Tort Statute, which Congress passed as part of the Judiciary Act of 1789.[84] The ATS provides that federal courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[85] Yet the statute remained largely unused until the 20th century, with only a handful of plaintiffs unsuccessfully alleging violations during their efforts to recover for injuries with an international connection.[86] However, litigants found a major breakthrough in 1980 when the Second Circuit ruled in favor of the plaintiffs in *Filártiga v. Pena-Irala*.[87] In that case, two Paraguayans sued a Paraguayan official for the torture and death of a relative in Paraguay.[88] The Second Circuit held that "an act of torture committed by a state official

79. Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991).

80. *Id.* at 2347. Transnational litigation as a "field" received significant attention in the 2000s. *See, e.g.*, Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1314–15 (2004) (arguing for further consideration of multilateral approaches that may lead to increased procedural harmonization); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 352 (2008) (predicting that U.S. civil procedure may adopt procedural mechanisms more familiar to emerging global procedural norms); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 750–51 (2006) (arguing for law schools to teach students more transnational law); Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 434 (2002) (noting that "individuals have historically occupied an important role in the enforcement of international law and the development of foreign policies in this country and abroad").

81. In his 1991 piece, for example, Koh focused on litigation against states. Koh, *supra* note 79, at 2348.

82. Harold Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 50 TEX. INT'L L.J. 662, 665 (2016) (originally published in 1987) (advocating for Congress to create a cause of action for terrorism rather than the courts).

83. Schnably, *supra* note 22, at 293–95.

84. 28 U.S.C § 1350. Also known as the Alien Tort Claims Act.

85. *Id.*

86. *See, e.g.*, O'Reilly De Camara v. Brooke, 209 U.S. 45, 48–49 (1908) (seeking remedy after an American general ended a family's monopoly on cattle slaughter in Havana during American occupation of the city, alleging in part the violation of an 1898 treaty); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F.Supp. 919, 920, 923 (S.D.N.Y. 1966) (alleging that the ATS provides jurisdiction for U.S. federal courts to adjudicate a seaman's negligence claim against a Greek shipping company, based on the existence of a treaty between the United States and Greece).

87. 630 F.2d 876, 878 (2d Cir. 1980). *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) (noting that "the modern line of cases" began with *Filartiga*).

88. *Filártiga*, 630 F.2d at 878–80.

against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[89] *Filártiga* thus opened U.S. courts to transnational tort claims. From 1980–2011, federal courts issued opinions in 173 cases brought at least partially under the ATS.[90] Between 1994 and 2011, plaintiffs filed about six to ten ATS cases per year, with a majority targeting corporate defendants.[91]

This expansion of ATS claims prompted Supreme Court review, and in 2004 the Court began reining in the statute's scope. In *Sosa v. Alvarez-Machain*, a Mexican national brought suit against the United States, DEA agents, and several other Mexican nationals in relation to his forced abduction and transportation to the United States.[92] The Supreme Court determined that the ATS granted federal courts jurisdiction over cases that alleged violations of "the modest number of international law violations" that existed in 1789, namely "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[93] The Court added that a cause of action may also exist for norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" it explicitly recognized.[94] That forced abduction and arbitrary detention of less than a day did not fall within the ambit of these examples and was not defined within international law with specificity was "fatal" to the plaintiff's claim.[95] Although *Sosa* supported use of the ATS to vindicate some claims, the opinion greatly restricted the causes of action federal courts may recognize.

The Court continued to narrow the ATS over the ensuing years. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court applied the presumption against extraterritoriality to conclude that the ATS does not apply to cases arising in foreign states,[96] and in *Jesner v. Arab Bank, PLC*, it held that plaintiffs may not sue foreign corporations for torts committed abroad under the statute.[97] Most recently, the Court held in *Nestlé v. Doe* that "general corporate activity" in the United States does not create sufficient nexus to impose liability for aiding and abetting forced labor abroad, even when the allegations are made against a U.S. corporation.[98]

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89. *Id.* at 880.

90. Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357 (2011).

91. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011).

92. Sosa v. Alvarez-Machain, 542 U.S. 692, 697–99 (2004).

93. *Id.* at 724.

94. *Id.* at 725.

95. *Id.* at 725.

96. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

97. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018).

98. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021).

Some litigants attempted to bring terrorism claims under the ATS, experiencing mixed success. For example, in *Almog v. Arab Bank, PLC*, plaintiffs sued a Jordanian bank for allegedly supporting terrorist organizations that conducted attacks in Israel.[99] The district court held that terrorism was a cause of action subject to federal court jurisdiction under the ATS, and that the bank could be held liable for aiding and abetting.[100] However, later rulings disagreed with this conclusion. In a case related to the September 11 attacks, the Second Circuit determined that because no universal and clearly defined international law norm against terrorism existed in 2001, the ATS did not provide federal courts jurisdiction over their claim.[101] The very next day, the Supreme Court decided in *Kiobel* that the ATS did not cover claims arising outside the United States, preventing litigants from pursuing recovery for most terror attacks occurring abroad.[102] The Supreme Court also expressed skepticism in *Jesner* that terrorism claims may be brought under the ATS, in part because the ATA may displace any common-law action against terrorism.[103] As a result, plaintiffs have had to look elsewhere to vindicate their international terrorism claims.

Many litigants have turned to the ATA to provide relief for injuries suffered abroad, and suits against domestic and foreign business entities have increased significantly since Congress passed JASTA. As of early 2021, litigants had filed approximately 300 cases under the ATA.[104] The rate of ATA complaints against U.S. companies and corporate entities increased six-fold following the 2016 amendments.[105] The number of filings against U.S. companies increased more than those against foreign companies, which tripled during the same timeframe. JASTA also prompted a dramatic shift away from theories of direct liability and toward indirect liability. Prior to JASTA, 43 percent of cases mainly alleged direct liability, while 57 percent

99. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 260 (E.D.N.Y. 2007).

100. *Id.* at 287, 294.

101. *In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118, 125 (2d Cir. 2013); *See also In re* Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1321–22 (S.D. Fla. 2011) (suit against Chiquita for supporting a Colombian terrorist organization, where the district court determined that terrorism-based claims were not actionable under the ATS).

102. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013); *See also* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189–1193 (11th Cir. 2014) (dismissing a lawsuit against Chiquita for supporting a terrorist organization in Colombia following *Kiobel*).

103. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018).

104. The author gathered these filings using Westlaw and Bloomberg Law. A list of the complaints is on file with the author, and it includes complaints filed between 2000 and early 2021.

105. Of the 49 suits against U.S. companies, plaintiffs filed 20 lawsuits from 2000–2016, while 29 occurred from September 2016–February 2021. Overall, 110 complaints targeted companies and incorporated entities, ranging from banks to social media firms, an agriculture corporation, health and pharmaceutical companies, and international development organizations. Plaintiffs filed 49 of these complaints against U.S. companies and 61 of the complaints against foreign companies. A further 136 lawsuits focused on foreign governments, and 47 targeted entities alleged to be terrorists or terror organizations.

alleged indirect liability. Following JASTA, only 8 percent of complaints alleged direct liability, and 92 percent pleaded indirect theories of liability.[106] In addition, throughout the statute's life, only about 16 percent of ATA cases have targeted terrorist organizations themselves.[107] Following JASTA, the ATA provides what the ATS cannot: jurisdiction and a cause of action in federal court for international harm. Litigants have naturally migrated to the ATA as an alternative.

III. THEORIES OF LIABILITY UNDER THE ATA

Plaintiffs often assert that defendants both directly caused the terror attack that led to their injuries and that defendants aided terrorists in their attacks. This Part explores the development of case law under each of these theories. Although claims of direct liability often fail, plaintiffs have made headway claiming that corporations—both for-profit and non-profit—aided terrorists in their violent goals.

A. Direct Liability under the ATA

Until recently, appellate courts have largely rejected plaintiffs' claims that companies and corporations directly violate the ATA.[108] Plaintiffs typically encounter trouble pleading two key facets of primary ATA liability, namely proximate cause and an act of international terrorism. The ATA allows any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism" to sue in federal court and recover treble damages.[109] To succeed, a plaintiff must therefore prove three elements: (1) injury to a U.S. national, (2) causation, and (3) an act of international terrorism.[110] The statute defines international terrorism, the third element, as requiring a further three sub-elements: the act of international terrorism must (1) be violent and violate U.S. law, (2) be intended to intimidate civilians or influence government policy, and (3) occur at least in part outside the United States.[111] Some courts will find

106. Prior to JASTA, 46 cases primarily alleged direct liability, while 61 alleged indirect liability. Following JASTA, only 16 complaints alleged direct liability, and 182 pleaded indirect theories of liability.

107. Only 47 of the 300 complaints reviewed sought to recover against terrorist organizations.

108. *See* Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 210, 230 (D.C. Cir. 2022) (holding that defendants proximately caused the plaintiffs' injuries).

109. 18 U.S.C. § 2333(a).

110. *See* Owens v. BNP Paribas, S.A., 897 F.3d 266, 270 (D.C. Cir. 2018).

111. 18 U.S.C. § 2331(1); *see also* Linde v. Arab Bank, PLC, 882 F.3d 314, 325 (2d Cir. 2018) (reversing a lower court's jury instructions that material support for terrorism, without more, is sufficient to establish an act of international terrorism).

material support for terrorism[112] and conspiracy to kill a U.S. national abroad[113] to satisfy the first requirement for international terrorism.[114] However, a wide range of activity could potentially serve as the predicate criminal act for an ATA claim.

For example, in *Sisso v. Islamic Republic of Iran*, a plaintiff sued Hamas for involvement in a 2002 suicide bombing in Tel Aviv that resulted in his mother's death.[115] Hamas claimed responsibility for the attack, and an expert witness testified regarding the group's modus operandi of targeting civilians to influence policy.[116] The bombing represented international terrorism because it would have violated criminal law if committed in the United States, was intended to intimidate a civilian population, and occurred outside the United States.[117] Because the plaintiff suffered emotional injury, Hamas proximately caused the injury, and the act represented international terrorism, the district court ruled against the terrorist group and awarded the plaintiff treble damages.[118]

Courts of appeals considering claims against private companies have often focused on the causation requirement, and many courts find the statute to demand proximate causation.[119] In *Kemper v. Deutsche Bank AG*, for example, the Seventh Circuit determined that a case against the defendant bank should be dismissed because the plaintiff did not plead facts "plausibly indicating" that the bank proximately caused her son's death from an Iranian-planted roadside bomb in Iraq.[120] Although the plaintiff plausibly alleged that Iran "had a role" in the soldier's death,[121] and that the bank intentionally helped Iranian entities to evade U.S. sanctions,[122] the court held that the bank's activities were not the proximate cause of the attack.[123] The court focused in part on the scope of the Iranian companies' and Iranian government's non-terrorist activities, differentiating the case from instances where a bank might assist entities that are largely devoted to terrorist activities, such as Hamas.[124] The court decided that the cause was

112. 18 U.S.C. §§ 2339A–2339B.

113. 18 U.S.C. § 2332b.

114. Est. of Parsons v. Palestinian Auth., 651 F.3d 118, 122 (D.C. Cir. 2011); *compare to Linde*, 882 F.3d at 325 (holding that material support is insufficient to establish an act of international terrorism).

115. Sisso v. Islamic Republic of Iran, No. 1:05-cv-394-JDB, 2007 WL 2007582, at *1 (D.D.C. July 5, 2007).

116. *Id.* at *4.

117. *Id.* at *11.

118. *Id.*

119. Kemper v. Deutsche Bank AG, 911 F.3d 383, 390–91 (7th Cir. 2018); Owens v. BNP Paribas, S.A., 897 F.3d 266, 273 (D.C. Cir. 2018); Fields v. Twitter, Inc., 881 F.3d 739, 744–45 (9th Cir. 2018); Rothstein v. UBS AG, 708 F.3d 82, 95–96 (2d Cir. 2013).

120. *Kemper*, 911 F.3d at 386.

121. *Id.* at 387.

122. *Id.* at 387–88.

123. *Id.* at 390–91.

124. *Id.* at 392–93.

even more remote because of the intervening criminal decisions of many other actors, including a sovereign state, leading up to the attack in Iraq.[125] Cases have come out similarly in the Second,[126] Ninth,[127] and D.C. Circuits.[128]

Only recently did a D.C. Circuit panel determine that plaintiffs adequately alleged proximate causation sufficient to support direct liability.[129] In *Atchley v. AstraZeneca UK Ltd.*, the court determined that the defendant medical supply companies proximately caused the deaths and injuries of those harmed in Jaysh al-Mahdi terror attacks in Iraq because the companies' business with terrorist-linked entities represented a substantial factor in the ensuing injuries, and these injuries were foreseeable.[130] The companies substantially assisted in the attacks by allegedly paying "cash and cash equivalents" to the involved organization as kickbacks for medical supply contracts.[131] In addition, the events were foreseeable, based on the complaint, because Jaysh al-Mahdi was a known terrorist organization that fully controlled the Ministry of Health with which the companies did business.[132] While the facts of *Atchley* differ from those in *Kemper*, the different treatment of funding assistance is remarkable, and *Atchley* certainly expanded the scope of direct liability under JASTA.

Furthermore, some courts have held that private companies' actions do not amount to acts of international terrorism. For example, in *Weiss v. National Westminster Bank, PLC*, the Second Circuit held that allegations that a U.K. bank provided services to Hamas, along with several Hamas terror attacks committed between 2002 and 2004, would not make the bank liable for international terrorism.[133] The court reasoned that "proof of the provision of banking services . . . is insufficient either to show that the services involved an act of violence or threat to human life or to give the appearance that such services were intended to intimidate or coerce a civilian population or government."[134] In addition, in *Kemper*, the Seventh Circuit held that the bank's assistance in Iranian entities' sanctions-avoidance

125. *Id.* at 393–94.

126. Rothstein v. UBS AG, 708 F.3d 82, 96–97 (2d Cir. 2013); *see also* Zapata v. HSBC Holdings PLC, 414 F. Supp. 3d 342, 358 (E.D.N.Y. 2019), *aff'd*, 825 F. App'x 55 (2d Cir. 2020) (holding that plaintiffs failed to plead to a proximate cause standard).

127. Fields v. Twitter, Inc., 881 F.3d 739, 741 (9th Cir. 2018).

128. Owens v. BNP Paribas, S.A., 897 F.3d 266, 269 (D.C. Cir. 2018).

129. Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 226 (D.C. Cir. 2022).

130. *Id.* at 226–27.

131. *Id.* at 227.

132. *Id.* at 227–28.

133. Weiss v. Nat'l Westminster Bank, PLC., 993 F.3d 144, 151, 153 (2d Cir. 2021).

134. *Id.* at 162–63.

efforts was neither "violent" nor "dangerous to human life" and did not show a terroristic intent.[135]

Six circuits considering theories of direct liability for private companies under the ATA have upheld lower court opinions dismissing those complaints, while one panel in the D.C. Circuit has determined that direct liability is appropriate. While plaintiffs can most often plead injury to a U.S. national, they often either fail to show that the private entity proximately caused those injuries, or that it did so through an act of international terrorism. For this reason, most plaintiffs in recent years have claimed that companies are secondarily liable for their injuries under an aiding-and-abetting rationale.

Courts have held several other reasons sufficient to dismiss cases against private firms under both the direct theories discussed in this section and the indirect theories detailed in the next. These bars to liability include the ATA's act of war exception, Section 230, and the conclusion that a terror organization had no connection to the attack. In *Adams v. Alcolac, Inc.*, for example, plaintiffs alleged that Alcolac provided a mustard gas precursor to Saddam Hussein, who then used it to create mustard gas used against U.S. military personnel during the 1991 Gulf War.[136] However, the ATA prohibits civil cases under § 2333 "for injury or loss by reason of an act of war."[137] The statute defines an act of war as "any act occurring in the course of" a "declared war"; an "armed conflict, whether or not war has been declared, between two or more nations"; or an "armed conflict between military forces of any origin."[138] Plaintiffs argued in part that the Iraqis' use of mustard gas could not represent an act of war because "it grossly violated the basic norms and rules established by the laws of war."[139] The Fifth Circuit rejected the proposition that the use of mustard gas was instead an

135. *Kemper*, 911 F.3d at 390. The Seventh Circuit's holding in *Kemper* does not align perfectly with its holding in *Boim III*. Boim v. Holy Land Found. For Relief & Dev., 549 F.3d 685 (7th Cir. 2008). In *Boim III*, the court held that material support for terrorism could support liability under the ATA if a donor knew "that the money would be used in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad." *Id.* at 691. This reasoning omits the requirement that the act be itself violent or dangerous to human life. *See also* Crosby v. Twitter, Inc., 921 F.3d 617, 622 n.2 (6th Cir. 2019) (expressing skepticism that provision of social media services can meet the definition of international terrorism).

136. Adams v. Alcolac, Inc., 974 F.3d 540, 542 (5th Cir. 2020), as revised (Sept. 25, 2020).

137. 18 U.S.C. § 2336(a).

138. 18 U.S.C. § 2331(4). Note that the Anti-Terrorism Clarification Act narrowed the Act of War exception by excluding from "military force" any designated terror organizations or specially designated global terrorists, as well as any forces a court determines "to not be a 'military force'." 18 U.S.C. § 2331(6); Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, § 2, 132 Stat. 3183, 3183 (2018). Congress narrowed the exception in part to ensure that the ATA captures organizations such as Hezbollah that may approximate a traditional military structure. Harry Graver and Scott R. Anderson, *Shedding Light on the Anti-Terrorism Clarification Act of 2018*, LAWFARE (Oct. 25, 2018), https://www.lawfareblog.com/shedding-light-anti-terrorism-clarification-act-2018.

139. *Adams*, 974 F.3d at 544.

act of international terrorism, noting that the act of war exception contains no requirement that the acts comply with international law.[140] The exception therefore precluded the plaintiffs' ATA claims against the firm that provided chemicals to the Iraqi government.[141]

Several federal courts of appeals have also found Section 230 of the Communications Decency Act to shield technology companies from ATA liability. As noted in the introduction, the Supreme Court is set to review the scope of this immunity in *Gonzalez v. Google* this term. Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[142] Section 230(c)(1) therefore precludes causes of action that treat a computer service provider as a publisher or speaker of the offending words.[143] In *Force v. Facebook, Inc.*, five plaintiffs sued Facebook under the ATA following Hamas terror attacks in Israel that resulted in injuries to themselves and the deaths of their relatives.[144] Plaintiffs alleged that Hamas used Facebook to encourage terror attacks in Israel and the attackers allegedly viewed those posts on the website.[145] They also argued that Facebook did not act as a Section 230(c)(1) publisher in part because the website uses algorithms to suggest new content to users.[146] The Second Circuit disagreed that these matchmaking algorithms rendered Facebook a non-publisher,[147] noting that courts "are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity."[148] Rejecting several of the plaintiffs' other arguments, the court held that Section 230(c)(1) applied to Facebook's alleged conduct in the case, precluding the civil cause of action under the ATA.[149] In *Gonzalez v. Google*, the Ninth Circuit recently held that Section 230(c)(1) barred a similar claim against social media companies related to the 2015 ISIS attacks in Paris, France.[150]

Finally, some courts have held that aiding and abetting claims failed because a designated terror organization had no meaningful connection to the attack. In *Crosby*, a group of plaintiffs sued Facebook, Google, and Twitter in part under a theory of secondary liability following the 2016 Pulse

140. *Id.*
141. *Id.*
142. Communications Decency Act, Pub. L. No. 104-104, § 509, 110 Stat. 113, 138 (1996).
143. Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J. L. & PUB. POL'Y 553, 563 (2018).
144. Force v. Facebook, Inc., 934 F.3d 53, 57–58 (2d Cir. 2019).
145. *Id.* at 59.
146. *Id.* at 65.
147. *Id.* at 66–68.
148. *Id.* at 64.
149. *Id.* at 71–72.
150. Gonzalez v. Google LLC, 2 F.4th 871, 880, 897 (9th Cir. 2021) (Gonzalez plaintiffs).

nightclub attack.[151] Secondary liability under the ATA requires that a designated foreign terrorist organization committed, planned, or authorized an act of international terrorism.[152] The Sixth Circuit held that the social media companies could not be held liable because the complaint did not allege that ISIS—which later claimed responsibility for the attack—was actually involved in the commission or planning of the self-radicalized attacker's acts.[153] Furthermore, liability attaches to the person who aids and abets the "person who committed such an act of international terrorism," meaning that the companies' alleged assistance to ISIS would be insufficient, given that the U.S.-based attacker committed the terrorist act.[154]

As this section demonstrates, courts' analyses in response to theories of direct ATA liability lack a strong, common framework. Some courts weigh heavily the distance between a corporation and the terrorist attack, while others find it unimportant. Courts have also approached companies' actions differently, with a few finding that non-violent actions satisfy the ATA's text and others determining that material support, for example, is insufficient. This confusion only worsened when Congress passed JASTA.

B. Secondary Liability under the ATA

The reach of secondary liability under the ATA is hotly contested, with some arguing that courts have failed to properly implement the full scope of JASTA's plain text,[155] and others warning of serious consequences if courts were to widen the net to capture more private entities.[156] Courts previously proved restrained when considering aiding and abetting complaints against private entities, often finding that plaintiffs fail to plead key elements of the secondary liability standard. Recently, however, some federal appellate courts have begun to conclude that liability exists, in part because litigants are learning how to tailor their complaints and briefings to navigate the nascent JASTA case law.

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151. Crosby v. Twitter, Inc., 921 F.3d 617, 619 (6th Cir. 2019); *see also* Retana v. Twitter, Inc., 1 F.4th 378, 382 (5th Cir. 2021) (holding that the foreign terrorist organization did not plan or commit a July 2016 mass shooting in Dallas, Texas, and that it was not an act of international terrorism).

152. 18 U.S.C. § 2333(d)(2).

153. *Crosby*, 921 F.3d at 626; *see also* Colon v. Twitter, Inc., 14 F.4th 1213, 1221 (11th Cir. 2021) (holding similarly). The Ninth Circuit also recently reached a similar outcome in a case against Facebook, Google, and Twitter regarding the 2015 shooting in San Bernardino, California. *Gonzalez*, 2 F.4th at 884, 911–12 (Clayborn plaintiffs).

154. *Crosby*, 921 F.3d at 626–27.

155. *See, e.g.*, Brief of Eight United States Senators as Amici Curiae in Support of Plaintiffs-Appellants at 3, Atchley v. AstraZeneca UK Ltd., 22 F.4th 204 (D.C. Cir. 2022); Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants at 3, Atchley v. AstraZeneca UK Ltd., 22 F.4th 204 (D.C. Cir. 2022).

156. *See, e.g.*, Brief for Amici Curiae Charity & Security Network and InterAction: The American Council for Voluntary International Action, Inc. in Support of Defendants-Appellees at 3, Atchley v. AstraZeneca UK Ltd., 22 F.4th 204 (D.C. Cir. 2022).

As noted above, Congress pointed courts to *Halberstam v. Welch* to guide the assessment of aiding and abetting liability under JASTA.[157] An extensive review of the legislative history revealed no reasoning for deploying the case within the statute, other than the assertion in JASTA's findings and purpose that *Halberstam* was "widely recognized as the leading case" on aiding and abetting liability.[158] In *Halberstam*, the D.C. Circuit found the live-in companion of a burglar liable for aiding and abetting the murder of a burglary victim despite the fact that she was neither present at the time of the crime nor aware that he planned to burglarize the victim's home.[159] The woman lived with the burglar for five years, during which she served as his "banker, bookkeeper, recordkeeper, and secretary," and the trial court inferred that "she knew she was assisting [the burglar's] wrongful acts."[160] Synthesizing from the Restatement (Second) of Torts, the *Halberstam* court concluded that aiding and abetting consists of three primary elements: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation."[161] The court further identified six factors for evaluating whether the assistance would be "substantial" under the third *Halberstam* element listed above. These factors include (1) the nature of the act encouraged, (2) the amount and nature of assistance given, (3) the defendant's absence or presence at the time of the tort, (4) the defendant's relation to the tortious actor, (5) the defendant's state of mind, and (6) the duration of the assistance provided.[162]

Litigants experience only occasional difficulty properly pleading the first *Halberstam* element—that the aided party caused injury through a wrongful act. Parties in these cases seek to recover for terrorist attacks, instances in which injuries are clearly documented and widely reported. For example, in *Siegel v. HSBC North America Holdings, Inc.*, plaintiffs sued the defendant banks in connection with al-Qaeda's 2005 bombings of three hotels in Amman, Jordan.[163] The defendant bank did not even dispute that the attacks satisfied the first *Halberstam* element.[164] In other cases, however, plaintiffs have failed to plausibly allege that the aided party is a designated foreign

157. JASTA, § 2(a)(5).

158. *Id.*

159. Halberstam v. Welch, 705 F.2d 472, 474, 487–88 (D.C. Cir. 1983).

160. *Id.* at 474, 487.

161. *Id.* at 477.

162. *Id.* at 483–84.

163. Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 219 (2d Cir. 2019).

164. *Id.* at 223. *See also* Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018) (noting that the parties did not dispute the first element); Honickman v. BLOM Bank SAL, 6 F.4th 487, 501 (2d Cir. 2021) (deciding that the first element "merits little attention").

terrorist organization (FTO) as the statute requires. In *Cabrera*, the civil action against a number of companies, including development companies and firms specializing in ordnance disposal—plaintiffs alleged that the Taliban, al-Qaeda, and the Haqqani network committed 197 attacks injuring servicemembers from 2009–2019.[165] Because the Afghan Taliban has never been designated as an FTO,[166] and the United States designated the Haqqani network in September 2012, only 33 of the attacks fell under the purview of the ATA's aiding and abetting provision.[167]

In contrast to the first *Halberstam* element, the second and third elements have emerged as substantial barriers to many litigants' claims. The second element requires that the aider and abettor "be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities."[168] The Second Circuit noted that this awareness requires knowledge regarding an "*act* of international terrorism," not generalized material support for the organization.[169] In *Linde v. Arab Bank, PLC*, the court held that the jury would have to find that the bank, by providing financial services to Hamas, was generally aware that it was playing a role in "Hamas's violent or life-endangering activities."[170] In *Siegel*, plaintiffs alleged that the defendant U.S. banks conducted business with a Saudi bank that "was, at all relevant times, involved in financing terrorist activity."[171] The U.S. banks were aware of the Saudi bank's link to terrorist organizations and helped the Saudi bank to evade U.S. sanctions and law enforcement.[172] Yet the Second Circuit found these pleadings inadequate because the plaintiffs failed to allege that the bank was aware that by providing services to the Saudi institution, "it was supporting [al-Qaeda], much less assuming a role in [al-Qaeda's] violent activities."[173] Similarly, in *Brill v. Chevron Corporation*, plaintiffs alleged that Chevron sent kickbacks from its purchase of Iraqi crude oil to Saddam

165. Cabrera v. Black & Veatch Special Projects Corps., No. 19-CV-3833-EGS-ZMF, 2021 WL 3508091, at *1 (D.D.C. July 30, 2021).

166. The Taliban *has* been labeled a Specially Designated Global Terrorist since 2002 under E.O. 13224, but not a Foreign Terrorist Organization "under section 219 of the Immigration and Nationality Act" as the ATA requires. 18 U.S.C § 2333(d).

167. *Cabrera*, 2021 WL 3508091, at *26–27. The court went on to determine that the companies' alleged assistance was not substantial. *Id.* at *28.

168. Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018).

169. *Id.*

170. *Id.*

171. Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 220 (2d Cir. 2019).

172. *Id.* at 220–21.

173. *Id.* at 224. The court added that the U.S. banks ended the relationship with the Saudi bank ten months prior to the Amman attacks, indicating that they could not knowingly assume a role in the attacks. *Id.* at 224. The Second Circuit recently addressed this same element in *Honickman v. BLOM Bank SAL*, holding that plaintiffs did not successfully allege that a Lebanese bank was generally aware of its clients' links to Hamas, in particular. Honickman v. BLOM Bank SAL, 6 F.4th 487, 501, 503 (2d Cir. 2021). The court focused in particular on the fact that the public sources cited in the complaint were published after the attack, meaning that they did not support the inference the bank knew of its role at the time it provided the assistance. *Id.* at 501–02.

Hussein, who used the money to support terror attacks in Israel from 2000–2002.[174] The Ninth Circuit determined that while the complaint alleged Chevron knew of the kickbacks to Saddam Hussein, it did not allege the company knew that its payments would support terror attacks in Israel.[175] Plaintiffs therefore bear the burden of alleging and proving that an aider and abettor was aware of its role in the terror attack at the time of the assistance.

In the years since Congress passed JASTA, the third *Halberstam* element has also revealed itself as a hurdle, given that plaintiffs must allege that the aider and abettor's assistance was both knowing and substantial. In *Siegel*, for instance, the Second Circuit held that the plaintiffs injured by al-Qaeda's 2005 bombings in Amman failed to adequately plead the substantial assistance element.[176] The court reasoned that the defendant U.S. bank did not encourage any violent acts, that there is no evidence al-Qaeda received funds provided by the intermediary Saudi bank, and that the defendants were not present at the time of the attack.[177] The U.S. bank also had no relationship with al-Qaeda, did not assume a role in the attack, and did not provide assistance over an extended period of time.[178] The court thus dismissed the complaint. In *Brill*, as well, the Ninth Circuit concluded that Chevron's kickbacks to Saddam Hussein did not amount to substantial assistance to terrorists.[179] The court observed that Chevron did not encourage the terrorists' acts, only had an arm's-length relationship with a third party, and that the company had no direct relationship with the terrorist organization itself.[180] Any assistance would therefore be insubstantial.[181]

These cases show how—in the years immediately following JASTA—plaintiffs struggled to convince courts of appeals that their pleadings for corporate secondary liability met the *Halberstam* standard for § 2333(d). Yet litigants have recently made progress in appellate courts when pursuing money damages against U.S. companies for terrorists' acts overseas. Plaintiffs sued Facebook, Google, and Twitter in the wake of the 2017 Reina nightclub attack in Istanbul, alleging that the social media companies "were critical to ISIS's growth."[182] The companies' services, according to the

174. Brill v. Chevron Corp., 804 F. App'x 630, 632 (9th Cir. 2020).

175. *Id.*

176. Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 225 (2d Cir. 2019).

177. *Id.*

178. *Id.*

179. *Brill*, 804 F. App'x at 632.

180. *Id.*

181. The third element again hindered plaintiffs' claim in a case against Google related to ISIS's use of the site around the 2015 Paris attacks. Gonzalez v. Google LLC, 2 F.4th 871, 880 (9th Cir. 2021) (Gonzalez complaint).

182. *Id.* at 883 (Taamneh complaint). The district court dismissed the complaint on the merits of the § 2333(d) claim, and it therefore did not reach the issue of § 230(c)(1) immunity. *Id.* at 907–08.

plaintiffs, allowed ISIS "to recruit members, issue terrorist threats, spread propaganda, instill fear, and intimidate civilian populations," and the companies did too little to interfere with this activity.[183] The court observed that the allegations suggested the companies were generally aware "after years of media coverage and legal and government pressure concerning ISIS's use of their platforms"—that they were playing a role in "ISIS's terrorism enterprise."[184] Finally, the court turned to the third *Halberstam* element requiring knowledge and substantial assistance. Reviewing the complaint through the lens of the *Halberstam* factors, the Ninth Circuit reasoned that (1) the social media companies allegedly served as a "matchmaker" for ISIS, that (2) the assistance was purportedly "integral to ISIS's expansion," but that (3) the defendants were not present at the time of the attack.[185] Furthermore, (4) the complaint described the relationship as arms-length, (5) the companies had no intention of assisting ISIS in its objectives, and (6) the assistance took place from approximately 2010 onward.[186] In stark contrast to the complaint related to the Paris attacks, the Ninth Circuit found the Reina nightclub complaint sufficiently alleged substantial assistance.[187] As a result, the complaint contained all three of the *Halberstam* elements and adequately stated a claim against Facebook, Google, and Twitter for secondary liability under the ATA. If the Supreme Court upholds this outcome, and the plaintiffs can prove their allegations at trial, the companies will be found to have aided and abetted ISIS in its 2017 terror attack.

The Ninth Circuit provided only brief guidance to differentiate between the Reina nightclub complaint and its analysis of the Paris attacks within the same opinion, for which it did not assign secondary liability to the companies. The Paris attacks complaint successfully pleaded the first and second *Halberstam* elements, failing only because the court of appeals weighed the factors under the third element and found the assistance insubstantial.[188] Whereas the Paris complaint alleged that Google provided some unspecified amount of money to the terrorist organization, the Reina complaint claimed that the social media companies' services "were central to ISIS's growth and expansion, and that this assistance was provided over

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Given the Ninth Circuit's outcome regarding the *Gonzalez* plaintiffs, it is likely the district court will conclude that immunity applies to the social media companies.

183. *Id.* at 883. As usual, the parties did not dispute the first *Halberstam* element—that the victims were killed in an ISIS-sponsored act of international terrorism. *Id.* at 908.

184. *Id.* This conclusion diverges from the Second Circuit's requirement in *Linde v. Arab Bank* that the aider and abettor be involved in terrorists' violent activities themselves, not in arms-length activities such as banking. *See supra* notes 168–173 and accompanying text.

185. *Id.* at 909–10.

186. *Id.* at 909.

187. *Id.* at 910.

188. *Id.* at 880.

many years."[189] Both complaints described arms-length relationships where the companies involved had no intention of assisting terrorists and were not present for the attacks. While evaluating the substantiality of these acts can certainly be difficult, the Ninth Circuit appears to have boiled down the test to only the second factor—the amount and nature of assistance given.[190]

The D.C. Circuit's recent opinion in *Atchley* also ruled for the injured plaintiffs, espousing a broad conception of ATA liability. Plaintiffs sued U.S. and foreign pharmaceutical and medical equipment companies for injuries suffered from terror attacks in Iraq from 2005 to 2011.[191] The complaint alleged that Jaysh al-Mahdi, the militant arm of the Iraqi Sadrist Movement, fully infiltrated and corrupted Iraq's Ministry of Health, and that Jaysh al-Mahdi had close ties to Hezbollah.[192] Plaintiffs contended that by selling medicines and medical devices to the Ministry of Health, the companies—including AstraZeneca, GE Healthcare, Johnson & Johnson, and Pfizer—aided and abetted Jaysh al-Mahdi's attacks on U.S. servicemembers in Iraq.[193] The D.C. Circuit held that Hezbollah's alleged "provision of weaponry, training, and knowledge to Jaysh al-Mahdi with the intent of harming Americans in Iraq constituted a 'plan'" sufficient to support the involvement of an FTO.[194] The court also concluded that the "defendants' dealings with the Ministry were equivalent to dealing with the terrorist organization directly,"[195] which colored its analysis of the *Halberstam* substantial assistance factors. The court reasoned that (1) in relation to terrorist acts, "even relatively trivial aid could count as substantial," and that money easily met this requirement; and (2) the financial assistance was "at least significant."[196] The companies (3) were not present and (4) had no special relationship with the organization.[197] The court held that (5) *Halberstam* only required the company to have knowledge of its own actions, not specific intent to assist in the attacks, and that (6) the duration of the alleged assistance—several years—weighed toward substantiality.[198] Reversing the trial court, the D.C. Circuit held that the companies' assistance was substantial.

Atchley lowered the bar for ATA plaintiffs. Holding that any meaningful exchange between an FTO and a non-designated terrorist organization

189. *Id.* at 910.

190. The Second Circuit recently decided a more clear-cut case holding that a Lebanese bank may be liable for aiding and abetting in relation to U.S. citizens injured by mid-2006 Hezbollah rocket attacks in Israel. Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 845 (2d Cir. 2021).

191. Atchley v. AstraZeneca UK Ltd., 474 F. Supp. 3d 194, 200 (D.D.C. 2020).

192. *Id.* at 200–01.

193. *Id.* at 211.

194. Atchley v. AstraZeneca UK Ltd., No. 20-7077, 2022 WL 30153, at *9 (D.C. Cir. Jan. 4, 2022).

195. *Id.* at *2.

196. *Id.* at *12.

197. *Id.* at *13.

198. *Id.* at *13–14.

satisfies the statute's requirement for FTO planning will increase the number of entities that can trigger liability. Congress likely included the requirement that an FTO "commit, plan, or authorize" an attack so that private parties would be able to anticipate liability by consulting Treasury Department sanctions lists; however, *Atchley* weakens that protection for actors within conflict zones. In addition, the opinion's language surrounding substantial assistance will capture much more activity, given that even "relatively trivial" support will weigh in favor of liability. *Atchley* will likely prompt additional ATA litigation in the D.C. Circuit.

Federal courts have proved slow to open their doors to ATA aiding and abetting lawsuits against companies and corporations. *Halberstam* has presented itself as a complicated standard to plead, with the second and third elements creating significant hurdles for litigants filing claims. Yet in recent cases—nearly five years after JASTA became law—litigants have demonstrated the basic viability of these secondary liability cases against companies both foreign and domestic. The implications for entities operating in countries known to contain terrorist organizations, as well as the distance the ATA has traveled from its enactment in the early 1990s, cannot be overlooked.

C. The Problems with Halberstam

Although the D.C. Circuit based *Halberstam* on general American tort law principles,[199] courts have stumbled when applying the opinion's framework in the context of JASTA. Similarly to its international counterpart, civil aiding and abetting under U.S. law has suffered from both lack of focus and lack of general coherence.[200] Furthermore, courts have not applied the concept consistently or regularly in many contexts, meaning that the doctrine is not developed well in the case law.[201] As a result, the federal judicial opinions discussing *Halberstam* in the greatest depth are overwhelmingly cases brought rather recently under JASTA, meaning that courts are essentially fashioning their own precedents for what forms of activity lead to liability under the statute.

JASTA cases have magnified *Halberstam*'s imperfections, and the case is not particularly compatible with international corporate liability. For example, many of the opinion's elements and factors blend together. The first *Halberstam* element and the first factor in the substantial assistance test both evaluate the wrongful nature of the perpetrator's act. In addition, the

199. Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983).

200. Swan, Sarah L., *Aiding and Abetting Matters*, 12 J. TORT L. 255, 255, 258 (2019).

201. *Id.* at 256 (noting that the question of the proper mens rea element has "caused constant consternation"); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) ("The doctrine has been at best uncertain in application, however.").

second and third *Halberstam* elements both assess the defendant's knowledge, and the fifth factor in the substantial assistance test examines the defendant's state of mind further. Some courts have fully merged prongs of this test.[202] Furthermore, JASTA directs courts to use *Halberstam* but also instructs them to use other factors that conflict with the opinion. For instance, *Halberstam* requires that the person assisted directly commits the wrongful act,[203] but Congress also stated in its findings and purpose that JASTA should impose liability against those who assist "directly or *indirectly*."[204]

The facts and tone of *Halberstam* also fit poorly with those of transnational public law litigation cases. In the opinion, the D.C. Circuit wrote of "encouragement" and "moral support" that further the ultimate tort, factors that do not often apply to organizations.[205] Furthermore, the *Halberstam* court was itself unclear regarding application of the "knowledge" mens rea element, appearing to blend the knowledge and purpose men rea standards:

> If, as the district court found, Hamilton's assistance was knowing, then it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise. Hamilton's continuous participation reflected her intent and desire to make the venture succeed; it was no passing fancy or impetuous act.[206]

The *Halberstam* court apparently did not believe that the defendant simply knew of the burglar's activities, but rather inferred that knowledge of the burglar's action over time implies her purpose to assist him. Whereas JASTA litigants are struggling to plead that defendants even knew their assistance would support a terrorist organization—let alone a *terrorist attack* itself—*Halberstam* in reality concerned a defendant who played a much more central role in the alleged criminal activity. Therefore, when courts use the case as "the proper legal framework for how [secondary] liability should function," [207] this application of law to facts remains relevant and unnecessarily confuses the law.

In practice, many cases hinge on the third *Halberstam* factor, the question of whether the defendant's assistance was substantial.[208] A stark example

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202. *See, e.g.*, Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 225 (2d Cir. 2019) (using the standard for the second *Halberstam* element (general awareness) when evaluating the fifth factor in the substantial assistance test (the defendant's state of mind)).

203. *Halberstam*, 705 F.2d at 477.

204. JASTA, *supra* note 3, § 2(a)(6) (emphasis added).

205. *Halberstam*, 705 F.2d at 478.

206. *Id.* at 488.

207. JASTA, *supra* note 3, § 2(a)(5).

208. *See, e.g.*, Cabrera v. Black & Veatch Special Projects Corps., No. 19-CV-3833-EGS-ZMF, 2021 WL 3508091, at *28 (D.D.C. July 30, 2021).

can be found in the Ninth Circuit's recent consolidated opinion regarding liability for social media companies in relation to various terror attacks. In the section discussing liability against Google for the Paris attacks, the court determined that three of the six *Halberstam* substantial assistance factors weighed towards liability.[209] However, the court found assistance insubstantial because the complaint did not allege specifically how much assistance Google provided, and it did not suggest that the company "intended to assist ISIS."[210] With little explanation, however, the court held similar facts substantial regarding the Reina nightclub attack, noting only that the complaint alleged the social media companies' services were "central to ISIS's growth" and "provided over many years."[211] The court declined to elaborate on why the assistance was sufficient in one case but not the other, and the lack of reasoning implies that the court's discretion essentially governs this factor.

In truth, the question for federal courts comes down to a normative judgment—whether a person was sufficiently involved in the primary wrong to merit liability.[212] Courts receive little clear guidance from *Halberstam*, which also represents a poor case on which to base analogy to arms-length transactions completed by major corporations in foreign countries. While some have criticized courts for allegedly failing to follow *Halberstam*,[213] it is not certain that there is a clear, single understanding of *Halberstam* to follow. The D.C. Circuit itself described the case as "only a beginning probe into tort theories as they apply to newly emerging notions of economic justice for victims of crime," and it is necessary for Congress to provide more thoughtful guidance.[214]

D. Aiding and Abetting in Other Areas of International Law Litigation

Placing JASTA's aiding and abetting standard in the context of other areas of international law litigation emphasizes the other options Congress may have pursued. Relevant comparisons can be found in international criminal law and the Alien Tort Statute. Although Congress painted JASTA as a simple tort statute, it occupies a similar space as the ATS and, by extension, international law defining secondary liability. In addition, the ATS and JASTA can both be characterized as statutes repurposed to impose broader liability than Congress may have initially envisioned. Whereas

209. Gonzalez v. Google LLC, 2 F.4th 871, 905–07 (9th Cir. 2021).

210. *Id.* at 907.

211. *Id.* at 910.

212. Swan, *supra* note 200, at 257.

213. *See* Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants at 22–23, Atchley v. AstraZeneca, 22 F.4th 204 (D.C. Cir. 2021) (No. 20-7077).

214. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983).

Congress passed the ATS largely in response to a diplomatic incident,[215] it passed JASTA to target the state sponsors of the September 11 attacks. While JASTA's standard of liability as articulated through *Halberstam* fits within the range of options contemplated under international law, it is certainly not the only path Congress could have taken.

Aiding and abetting is a relatively novel feature of international criminal law, arising at the beginning of the 20th century but beginning to mature primarily in the 1990s with the U.N. Security Council's creation of the ICTY and ICTR.[216] The Rome Statute, the foundational document of the International Criminal Court, represents the most forceful statement of criminal aiding and abetting liability, finding responsibility when a defendant "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."[217] Yet international tribunals are split regarding the nature of the mens rea and actus reus constituting the crime. Several courts—including the ICTY, ICTR, Special Court for Sierra Leone, and Cambodia Tribunal—require that acts have a substantial effect on the principal crime, and that the person have knowledge that the acts will assist.[218] This standard roughly tracks with that found in JASTA. In contrast, two tribunals—the International Criminal Court and the Special Tribunal for Lebanon—require the lesser actus reus of *some* effect combined with a stricter mens rea of purpose or intent.[219]

These contrasting principles have disoriented American courts seeking to establish an aiding and abetting standard under the ATS, resulting in a circuit split.[220] Some U.S. courts have relied heavily on the Rome Statute to conclude that aiding and abetting in international law requires the mens rea of acting with "purpose" toward the principal offense.[221] In contrast, some authors argue that there is no single international standard for aiding and

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215. Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004) (discussing the Marbois affair).

216. Oona Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593, 1601–05 (2019).

217. Rome Statute Art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

218. Hathaway et al., *supra* note 216, at 1607–09. International courts also struggle to define what constitutes a "substantial effect" as part of the actus reus. *Id.* at 1611.

219. *Id.*

220. *Compare* Doe v. Drummond Co., 782 F.3d 576, 608 (11th Cir. 2015) (adopting "knowledge" mens rea and "substantial assistance" actus reus), *with* Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011) (adopting purpose); Khulumani v. Barclay National Bank Ltd., 504 F.3d 254, 275 (2d Cir. 2007) (per curiam) (adopting purpose). *See also* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1023–24 (9th Cir. 2014) (expressing skepticism regarding the purpose standard); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (applying the Second Circuit's purpose standard). Note that the Supreme Court has at least acknowledged the existence of aiding and abetting under the ATS, although it has not yet dealt with the issue directly. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

221. *See, e.g.*, *Khulumani*, 504 F.3d at 275; Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1085 (C.D. Cal. 2010).

abetting liability, and that "differentiated standards for aiding and abetting liability are often a result of purposive and functional pluralism."[222] For example, because the International Criminal Court resulted from interstate negotiations to create a court of last resort that would only deal with serious crimes, it makes sense that the Rome Statute would provide for aiding and abetting liability only where a person acts with purpose toward the principal crime.[223] This implies that the two standards *can* co-exist within a single understanding of international law.

JASTA falls in line with the standard shared by the ICTY and ICTR requiring only knowledge regarding the assistance. Yet reviewing international law emphasizes the existence of another potential option: a mens rea of purpose and a de minimus actus reus requirement.

IV. SHOULD THE ATA REACH THESE CASES?

Regardless of whether courts currently *do* impose secondary liability on corporate entities for ATA claims, we should consider whether U.S. law *should* impose liability in the way JASTA does—through a broadly worded statute with few restrictions. The question is increasingly important, given that the volume of litigation has increased and litigants are making progress bringing ATA claims.[224] Judgments in these cases may also be massive. For example, a jury imposed $156 million in damages against organizations linked to the murder of David Boim.[225] Furthermore, the stigma associated with ATA claims and the prospect of lawsuits can be enough to push companies and NGOs out of affected areas.[226] In addition, a filing surviving a motion to dismiss leads to a public trial regarding claims that a company aided and abetted terrorists. Corporations often settle at this stage, such that a failed motion to dismiss means the plaintiffs likely win.[227] Finally, it is relevant that an FTO—the Haqqani Network—is currently an active part of the new Afghan government under the Taliban, opening companies that choose to operate in the country to liability under expansive theories.

There are certainly normative benefits to imposing secondary liability against corporations with various connections to terrorist activity. We might consider that tort liability for transnational corporate entities serves three

222. Hathaway et al., *supra* note 216, at 1593.

223. *Id.* at 1625–26.

224. One author pushed back on objections to private enforcement of international law by pointing out that "the volume of litigation is actually quite low." Stephens, *supra* note 80, at 434. This objection is now less persuasive given the dozens of lawsuits JASTA has prompted.

225. Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 688 (7th Cir. 2008) (upholding the verdict).

226. See discussion of Talisman *infra* note 243 and accompanying text.

227. *See, e.g.*, Curt Anderson, *Settlement Reached in Chiquita Case Involving US Deaths*, AP NEWS (Feb. 5, 2018), https://apnews.com/article/8d072ac47826400ea2340f0aa4be12df.

main purposes: remedies for injured parties, transparency regarding abuses, and incentives to change behavior.[228] ATA cases serve all of these interests, including providing defendants with significant coffers to deliver monetary compensation for defendants' losses. The 2018 settlement of a lawsuit against Chiquita for making dozens of protection payments to the FARC provides a good example of this mechanism.[229] Similarly, the prospect of liability forces organizations to closely monitor their arm's-length transactions and preemptively cut off relationships with entities that might engage in or assist with terrorism. For example, the potential for civil liability might have pushed the financial institutions in *Siegel* to end their relationships with a Saudi bank connected to terrorist organizations.[230] This facet has growing importance given changing views on corporate social responsibility to hold profit-seeking entities to account for the damages they cause, even when existing positive law does not create constraints beforehand.[231]

Yet JASTA's expansive secondary liability may come with serious policy consequences. Incentives for potential tortfeasors to change their behavior can sweep too broadly, deterring behavior that on the whole serves U.S. national interests and the international community. In particular, ATA secondary liability poses serious risks for humanitarian and development organizations operating in conflict zones, including U.S. government partners. FTOs currently operate in at least 38 countries,[232] where the United States government spends approximately $7.6 billion on foreign assistance per year,[233] predominantly working with private NGO and corporate implementing partners that lack immunity. These organizations also have their own assets, which reach across borders. This means that there is money—sometimes tracked and announced publicly—for litigants to pursue. Even the threat of litigation can cause aid groups to hesitate. For example, the prospect of lawsuits following the expansion of U.S. personal

228. *See* LIESBETH FRANCISCA HUBERTINA ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND: EXPLORING THE ROLE OF TORT LAW IN PROMOTING INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY AND ACCOUNTABILITY 560–61 (2012).

229. Anderson, *supra* note 227.

230. *See* footnotes 163, 176–178 and accompanying text.

231. *See, e.g.*, Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (criticizing the legal consensus against broad corporate liability); and Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 171–92 (2018) (describing current understandings of corporate social responsibility).

232. The U.S. Department of the Treasury lists all FTOs, which each operate predominantly in specific regions or countries. *See* OFF. OF FOREIGN ASSETS CONTROL, https://sanctionssearch.ofac.treas.gov/ (last visited Feb. 16, 2023).

233. Aggregated figure sourced from https://foreignassistance.gov, excluding aid to Egypt and Israel that is overwhelmingly for Foreign Military Financing. *See* FOREIGNASSISTANCE.GOV, https://www.foreignassistance.gov/ (last visited Feb. 6, 2023).

jurisdiction under the Anti-Terrorism Clarification Act prompted some organizations to close programs.[234]

Private party lawsuits against legitimate aid organizations have increased in the past few years, placing legal pressure on groups that the U.S. government has vetted as partners. For example, in 2018, one private party brought a False Claims Act action against Norwegian People's Aid that settled for more than $2 million.[235] The same organization—which has filed a number of lawsuits targeting aid organizations operating in the Palestinian Territories[236]—also sued Oxfam for $160 million regarding similar False Claims Act violations.[237] The gradual expansion of ATA liability against incorporated entities will foreseeably lead to additional lawsuits against aid and development organizations operating in locations where FTOs operate.

JASTA also provides limited room for the Executive to make policy judgments.[238] Many sanctions imposed by executive action under section 219 of the Immigration and Nationality Act, as well as through Executive Order 13224, allow for the government to provide licenses to individuals and entities that operate in high-risk areas.[239] This furthers U.S. foreign policy goals by guaranteeing that certain organizations will not be subject to criminal sanctions when providing assistance that the United States deems important. Yet the ATA lacks these carveouts. For example, if the Executive believes it *needs* G.E. Healthcare to help rebuild the Iraqi Ministry of Health, it cannot assure the company that it will not run into ATA secondary liability for working in the country. Similarly, even if the Executive finds it critical

234. Samuel Oakford, *Aid Groups Worry New US Anti-Terror Law Could Leave Them Liable*, NEW HUMANITARIAN (Mar. 12, 2019), https://www.thenewhumanitarian.org/analysis/2019/03/12/aid-groups-worry-new-us-anti-terror-law-could-leave-them-liable. The ATCA requires recipients of some types of foreign assistance, including U.S. government partners, to submit to U.S. personal jurisdiction. These types of aid include Economic Support Funds, International Narcotics and Law Enforcement Funds, and Nonproliferation, Anti-Terrorism, and Demining funds. Anti-Terrorism Clarification Act, Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (2018).

235 . Ben Parker, *Oxfam Faces $160 Million Legal Threat Over Palestine Aid Project*, NEW HUMANITARIAN (Sept. 12, 2019), https://www.thenewhumanitarian.org/news/2019/09/12/NGO-counter-terrorism-Gaza-Palestine-oxfam-lawsuit.

236. Ben Parker, *A Q&A with The Pro-Israel US Lawyer Rattling NGOs on Counter-Terror Compliance*, NEW HUMANITARIAN (Sept. 25, 2018), https://www.thenewhumanitarian.org/2018/09/25/qa-pro-israel-us-lawyer-rattling-ngos-counter-terror-compliance.

237. Parker, *supra* note 236. Oxfam received $53 million in U.S. government funding. The United States initially hesitated to file a motion to dismiss, but eventually did so in September 2019. *See TZAC Files Notice of Voluntary Dismissal in Case Against Oxfam GB, Charity & Security Network*, CHARITY & SEC. NETWORK (Dec. 19, 2019), https://charityandsecurity.org/news/lawfare-suit-against-oxfam-gb-unsealed/.

238. President Obama expressed similar concerns regarding plaintiffs' decisions to sure foreign states: "JASTA threatens to take decisions concerning potential foreign state involvement in terrorist attacks out of the hands of national security and foreign policy professionals and to place such decisions instead in the hands of private litigants and courts." Letter from Barak Obama, President of the United States, to Harry Reid, Minority Leader, U.S. Senate (Sept. 27, 2016) https://static.politico.com/c7/a5/6d2749d74ed89b9fe73112ee460e/obama-reid-jasta-letter.pdf.

239. 31 C.F.R. § 501.801 governs OFAC licenses.

that a humanitarian organization provide food, health care, and water to civilians in a war-torn area, the government cannot reassure the organization that it will not be secondarily liable for a terrorist attack committed in the area. For example, a late 2021 Treasury Department order allowed NGOs and development organizations to pay taxes and other fees to the Taliban and the Haqqani Network to facilitate the provision of humanitarian assistance.[240] However, the order could not abate ATA liability, meaning that even though the United States has *specifically authorized* certain transactions with the Haqqani network to further emergency humanitarian goals, NGOs and development organizations would still be liable under the ATA.[241] Even if the government can intervene in a lawsuit to prompt dismissal, the lack of prior authorization can and does have a cooling effect on organizations' life-saving activities.

Furthermore, anti-terrorism is distinct from other areas where Congress has found fit to appoint private attorneys general. Unlike cases brought under the ATS, for example, the Executive already aggressively pursues enablers of terrorism and may do so better—and more clearly in the public interest—than private plaintiffs. The government is more likely to pursue criminal charges when entities have committed meaningful wrongs, as opposed to litigants who seek remuneration. In addition, the difficult foreign policy concerns involved in these Anti-Terrorism Act cases differentiate them from domestic lawsuits like antitrust actions, where the Executive may be no better placed to carefully calibrate a response to domestic issues.

Transnational public law litigation can also push businesses out of conflict areas, where economic development is most necessary.[242] The ATS lawsuit against Talisman Energy provides an example where litigation that the court ultimately dismissed prompted a company to depart Sudan, only to be replaced by a Chinese company likely less responsive to human rights interests.[243] Lack of foreign investment and development further exacerbates the issues of poverty, instability, and terrorism, meaning that overbroad ATA liability will prove counterproductive.[244]

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240. General License No. 14 Authorizing Humanitarian Activities in Afghanistan (Dep't of Treas. Sept. 24, 2021), https://home.treasury.gov/system/files/126/ct_gl14.pdf.

241. "Nothing in this general license relieves any person from compliance with any other Federal laws …" *Id.*

242. Sant, *supra* note 28, at 586.

243. Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2195–96 (2012). While Talisman's support for the Sudanese government's atrocities may be unconscionable, its departure from the country nonetheless provides evidence that transnational public law liability influences companies' decisions regarding where to do business.

244. *See, e.g.*, Andreas Freytag et al., *The Origins of Terrorism: Cross-Country Estimates of Socio-Economic Determinants of Terrorism*, 27 EURO. J. OF POL. ECON. S5 (2011) (concluding that economic development and growth can prompt a reduction in terrorism).

Finally, JASTA's assignment of treble damages to both terrorists and those found liable for aiding and abetting is incongruous. In practice, the act places on equal footing the individual who makes an explosive device for a terror attack, the bank that conducted financial services benefitting a terror organization, and a social media company that neglected to purge terrorists' postings on their websites. These entities all might be liable, but they deserve different amounts of liability; this is particularly true when courts interpret the ATA broadly. In addition, applying treble damages to any party incurring liability incentivizes litigants to pursue the entities against which recovery is easiest, such as U.S. corporations, rather than those that do the most damage, such as foreign states or the terror organizations themselves. While suits against terror organizations represented approximately 31 percent of ATA lawsuits prior to JASTA, this share dropped to 7 percent post-JASTA. Treble liability assigned to aiders and abettors likely contributed to this shift.[245]

Secondary liability under the ATA produces numerous benefits, including moral vindication for those affected by abhorrent terror attacks. However, this liability also produces significant costs that may on balance prevent the U.S. government and its partners from conducting lifesaving humanitarian and development activities that serve as part of a multi-pronged effort to reduce terrorism and instability abroad. Congress should therefore tailor secondary liability to maximize its benefits and minimize its harms.

V. POTENTIAL SOLUTIONS

Although private defendants sued under the ATA have a wealth of legal arguments to combat secondary liability claims,[246] in the long-run Congress should complete its unfinished task of fixing JASTA to properly tailor secondary liability. Defendants may continue to press on ATA complaints with motions to dismiss, challenging everything from connection with an FTO to the substantiality of the assistance. In addition, litigants might look to JASTA's legislative history to argue that courts should read the statute narrowly. Yet in the context of expanding secondary liability, these arguments may only get so far.

Various changes to JASTA might more properly tailor the statute to the sorts of cases Congress envisioned when enacting the statute. Most importantly, JASTA must allow the Executive to provide licenses to organizations it deems necessary to support U.S. foreign policy goals. Several models exist for provision of licenses in the context of sanctions,

245. *See supra* note 104.

246. *See supra* Part III(a)–(b).

including both general and specific licenses issued by the Office of Foreign Assets Control.[247] Executive Order 13224—which provides for the naming of Specially Designated Global Terrorists—also allows for licenses.[248] It would be relatively straightforward to draft a carveout within 18 U.S.C § 2333 allowing the Treasury Secretary to provide licenses exempting organizations from the statute in a certain geographical region for a period of time; the executive branch could then issue licenses exempting entities from the ATA whenever it issues an order exempting organizations from U.S. sanctions regimes. This would encourage humanitarian organizations and other private entities to continue operating in conflict areas where local governments have little infrastructure—where they are needed most.[249] In the interim, litigants should seek greater involvement from the Department of State and Department of Justice, who have statutory power to file a Statement of Interest.[250] State Department intervention has led to dismissal of cases brought under the ATS.[251] In other cases, the State Department has clarified that suits do not adversely affect U.S. foreign policy.[252] However, reliance on this intervention after a lawsuit has been filed, rather than before organizations enter high-risk areas, is unlikely to assuage the policy concerns discussed in Part IV.

In addition, Congress should remove the instruction to employ *Halberstam* given courts' difficulty applying the case to the facts of terrorism litigation, as well as the case's inherent issues. Congress should replace the *Halberstam* standard with factors more specific to terrorism fact patterns.[253] This will provide greater certainty not only to entities that might be subject to ATA lawsuits, but also to courts navigating an area of foreign affairs in which many appear hesitant. Finally, Congress should re-evaluate whether treble damages are appropriate in the context of secondary liability, where

247. 31 C.F.R. § 501.801 (2019); 31 C.F.R. § 594.501–17 (2022) (describing the effects of licensing).

248. Exec. Order No. 13224, § 1, 66 C.F.R. 49079 (2001); 31 C.F.R. § 597.500–13 (2022). For an example license pursuant to the order, see General License No. 14 Authorizing Humanitarian Activities in Afghanistan (Sept. 24, 2021), https://home.treasury.gov/system/files/126/ct_gl14.pdf.

249. It is worth noting that the U.S. government vets it partners intensely. USAID partners, for example, must enact internal safeguards to minimize or eliminate transactions with sanctioned groups. USAID, Certifications, Assurances, Representations, and Other Statements of the Recipient (July 2022), https://www.usaid.gov/sites/default/files/2022-12/303mav.pdf.

250. *See* 28 U.S.C § 517.

251. *See, e.g.*, Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116, 1198 (C.D. Cal. 2002). In *Sarei*, the Statement of Interest included the State Department Legal Advisor's opinion that the lawsuit "would risk a potentially serious adverse impact" on peace negotiations in Papua New Guinea and may therefore damage U.S. foreign relations. *Id.* at 1191. The court determined that the political question doctrine barred the plaintiff's claims. *Id.* at 1198–99, 1208–09.

252. Nat'l Coal. Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 335 (C.D. Cal. 1997); Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995).

253. Congress has defined aiding and abetting more specifically in other statutes. The Elementary and Secondary Education Act of 1965, for instance, provides a specific definition for aiding and abetting sexual abuse, which courts are less likely to encounter trouble applying. *See* 20 U.S.C § 7926.

the actor may be less morally culpable and less responsible for the harm than a primary tortfeasor.[254]

Congress may also consider altering the nature of the mens rea and actus reus for which JASTA imposes liability. As discussed in Part III(d), some international courts do use the mens rea of purpose or intent, along with the lesser actus reus of *any* assistance. A mens rea requiring the defendant to aid and abet with an act of terror as the purpose of the assistance would still capture actors such as Saudi Arabia, which JASTA targeted, while excluding entities engaged in arms-length transactions. This modified standard would also eliminate the arbitrary nature of courts' determinations regarding substantial assistance, as exemplified by the Ninth Circuit's consolidated opinion in *Gonzalez v. Google*. There is no meaningful requirement for Congress to adhere to traditional theories of tort law in these contexts, particularly given the nascent nature of civil aiding and abetting liability.

CONCLUSION

As the world grows ever more interconnected, and as plaintiffs and policymakers seek to define tort remedies for international harms, such as emissions causing climate change, transnational public law litigation will grow. New causes of action will be defined and courts will have to grapple with evolving issues that strain existing models. When legislators and treaty negotiators endeavor to draft these international causes of action, they should not use JASTA as a template, but rather as an example from which to steer away.

Congress should address its "buyer's remorse" and amend JASTA to mitigate the legislation's recognized unintended consequences and properly target bad actors. This primarily includes more concretely defining the cause of action and providing a carve out for licenses. Until Congress does so, private entities that rebuild within war zones and respond to the most urgent humanitarian crises will face ever-increasing liability.

254. *See* Swan, *supra* note 200, at 279–81 (discussing the problem of parity between a primary and secondary tortfeasor).