19-3970

IN THE

United States Court of Appeals for the Second Circuit

CHARLOTTE FREEMAN, FOR THE ESTATE OF BRIAN S. FREEMAN, KATHLEEN SNYDER, RANDOLPH FREEMAN, G.F., A MINOR, I.F., A MINOR, DANNY CHISM, LINDA FALTER, RUSSELL FALTER, FOR THE ESTATE OF SHAWN O. FALTER, SHANNON MILLICAN, FOR THE ESTATE OF JOHNATHON M. MILLICAN, MITCHELL MILLICAN, BILLY WALLACE, STEFANIE WALLACE, D.W., A MINOR, C.W., A.W., A MINOR, TRACE ARSIAGA, CEDRIC HUNT, SR., ROBERT BARTLETT, SHAWN BARTLETT, LISA RAMACI, ISABELL VINCENT, CHARLES VINCENT,

(Caption continued on inside cover)

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF THE INSTITUTE OF INTERNATIONAL BANKERS, THE AMERICAN BANKERS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE EUROPEAN BANKING FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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Plaintiffs-Appellants,

—against—

HSBC HOLDINGS PLC, (HSBC), HSBC BANK PLC, (HSBC-EUROPE), HSBC BANK MIDDLE EAST LIMITED, (HSBC MIDDLE EAST), HSBC BANK USA, N.A., (HSBC-US), BARCLAYS BANK PLC, STANDARD CHARTERED BANK, ROYAL BANK OF SCOTLAND, N.V., CREDIT SUISSE, BANK SADERAT PLC, JOHN DOES, 1-50, COMMERZBANK AG,

Defendants-Appellees.

RULE 26.1 STATEMENT OF CORPORATE INTEREST

No *amicus* is owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in any *amicus*.

/s/ Marc J. Gottridge
Marc J. Gottridge
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STATEMENT OF INTEREST

The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and advancing the interests of banking organizations headquartered outside the United States that operate in the U.S.[1] The IIB's membership consists of approximately 90 banking and financial institutions from over 35 countries. In the aggregate, IIB members' U.S. operations have approximately $5 trillion in banking and non-banking assets, provide approximately 25 percent of all commercial and industrial bank loans made in this country and have over 200,000 full-time employees in the U.S. Collectively, the U.S. branches and other operations of IIB member institutions enhance the depth and liquidity of the U.S. financial markets, including for domestic borrowers.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its over one million employees. ABA members provide banking services in each of the fifty states and the District of Columbia. The ABA's membership includes all

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[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, or their counsel contributed any money to fund the brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E); LR 29.1(b). All represented parties have consented to the filing of this brief.

sizes and types of financial institutions, including very large and very small banking operations.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The European Banking Federation ("EBF") is the leading professional organization of European banks. It provides a forum for European banks to discuss best practices and legislative proposals and to adopt common positions on matters affecting the European banking industry. The EBF also actively promotes the positions of the European financial services industry, and the banking industry in particular, in international fora.

Amici regularly appear before this and other federal courts as *amici curiae* in cases that raise issues of concern to the national and international banking and business communities, including those involving the scope of the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq*. (the "ATA"), as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), codified at 18 U.S.C. § 2333(d)—for

example, *Siegel v. HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019) ("*Siegel II*"), *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), and in the district court below. *Amici* also often appear as *amici curiae* in cases involving other federal statutes important to their members, such as *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (plurality op.) (primarily concerning the extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS")).

Amici and their members have a substantial interest in the matter now before this Court. *Amici* submit this brief to provide this Court with a broader perspective on ATA litigation and to highlight reasons of particular significance to the domestic and international banking and business communities why this Court should reject the arguments of Plaintiffs and their *amici* and affirm the judgment below.

INTRODUCTION

Plaintiffs or their family members, while serving in the U.S. military, were the victims of terrorist attacks in Iraq. Nothing can excuse or rationalize the commission of such horrendous crimes. *Amici* deplore these, and all, acts of terrorism. Those responsible for such acts—the groups and individuals who committed them and those who supported their commission—should be brought to justice. To that end, federal law criminalizes a wide range of terrorism-related conduct, such as bombing places of public use, 18 U.S.C. § 2332f, and providing material support to designated foreign terrorist organizations ("FTOs"), *id.* § 2339B.

This case, though, does not involve criminal charges. Rather, this appeal solely concerns JASTA's secondary civil liability provision, 18 U.S.C. § 2333(d), which permits U.S. nationals injured by reason of an act of international terrorism authorized, committed or planned by an FTO to sue (for treble damages) those who "conspire[d] with the person who committed such an act of international terrorism," and aiders and abettors who "knowingly provid[ed] substantial assistance" to the terrorists who committed the acts that injured plaintiffs. The ATA, as amended by JASTA, prescribes specific requirements that a private plaintiff must plead, and ultimately prove, in order to establish liability. These standards were carefully calibrated to ensure that the statute serves its goals of

deterring persons who commit or support acts of terrorism and compensating victims without chilling legitimate business activity or unfairly labeling banks and other businesses as "terrorists."

At issue here is Plaintiffs' attempt to assert JASTA conspiracy and aiding-and-abetting claims against several international financial institutions. These claims rely largely on settlements of several enforcement actions resulting from instances in which those institutions failed to comply, or evaded compliance, with U.S. economic sanctions on Iran, and were required to pay substantial financial penalties.[2] *Amici* do not condone, defend, or support efforts by financial institutions to evade compliance with economic sanctions. But Plaintiffs are not seeking to enforce such provisions. Nor could they, because Congress created no private right of action for sanctions violations. Rather, Plaintiffs invoke that conduct in an attempt to link the financial institutions to distant terrorist actors who allegedly committed attacks in Iraq—actors with whom the Defendants are not alleged to have had any dealings, about whom they are not alleged to have had any

[2] *See, e.g.*, JA-433 (Second Amended Complaint ("SAC") ¶ 523) (forfeiture by HSBC for sanctions-related and other issues); JA-443 ¶ 572 (civil penalties paid by HSBC); JA-451 ¶ 616 (forfeiture by Barclays); JA-490 ¶ 841 (forfeiture by SCB); JA-492 ¶ 854 (penalty paid by SCB); JA-505 ¶ 919 (forfeiture by RBS); JA-517 ¶ 988 (forfeiture by Credit Suisse); JA-934-35, Deferred Prosecution Agreement ¶¶ 7-8 (penalties and forfeiture by Commerzbank). "Defendants" or "the Banks," as used in this brief, refer to all defendants except Bank Saderat Plc. Defs.' Br. 1 n.2.

specific knowledge, and with whom they are not alleged to have shared any goal, much less the objective of committing acts of international terrorism.

As set forth below, the district court properly concluded that Plaintiffs' allegations failed to state a viable JASTA claim. Reversing the district court's judgment would expand JASTA liability far beyond the language that Congress adopted and that this Court already has interpreted.

ARGUMENT

I. THE NUMBER OF UNJUSTIFIED ATA/JASTA CLAIMS HAS INCREASED DRAMATICALLY IN RECENT YEARS.

In recent years—and particularly since JASTA was enacted in 2016—there has been a dramatic increase in the number and types of ATA filings against banks and other legitimate businesses.

Numerous cases, many in this Circuit, have been filed against international banks and financial services companies asserting claims broadly similar to those advanced here. Courts, including this one, have dismissed or affirmed dismissal of many of these suits for, among other things, failure to plausibly allege proximate causation and the *mens rea* required for primary or secondary liability claims. *E.g.*, *Siegel II*, 933 F.3d at 223-26; *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018); *Owens v. BNP Paribas, S.A.*, 897 F.3d 266 (D.C. Cir. 2018); *Rothstein v. UBS AG*, 708 F.3d 82, 91-92 (2d Cir. 2013); *O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446 (S.D.N.Y. Mar. 28, 2019). Yet the filings continue,

as exemplified by many recent JASTA actions against banks.[3] Nor are banks the only targets. Increasingly, outlandish ATA/JASTA claims are being brought against other businesses, such as social media platforms,[4] broadcast media companies,[5] and pharmaceutical companies.[6]

The increase in aggressive ATA/JASTA filings parallels the decline in claims under the ATS, resulting from a series of appellate decisions curtailing the scope of ATS claims. Beginning in the 1990s, plaintiffs' lawyers invoked the ATS to inappropriately assert substantial damages claims against transnational corporations based on alleged human rights abuses. One report found 150 such lawsuits filed against companies "in practically every industry sector" for business activities "in over sixty countries." U.S. Chamber Institute for Legal Reform, Federal Cases from Foreign Places 23 (Oct. 2014), https://tinyurl.com/y5p7d7rh.

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[3] *See, e.g.*, *Bowman v. HSBC Holdings PLC*, No. 19-cv-2146 (E.D.N.Y. filed Apr. 11, 2019); *Donaldson v. HSBC Holdings PLC*, No. 18-cv-7442 (E.D.N.Y. filed Dec. 28, 2018); *Stephens v. HSBC Holdings PLC*, No. 18-cv-7439 (E.D.N.Y. filed Dec. 28, 2018); *Tavera v. HSBC Bank USA, N.A.*, No. 18-cv-7312 (E.D.N.Y. filed Dec. 21, 2018).

[4] *E.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019) (rejecting argument that JASTA's "Findings and Purpose" impliedly repealed the civil immunity portion of the Communications Decency Act of 1996); *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018).

[5] *E.g.*, *Kaplan v. Al Jazeera*, 2011 WL 2314783, at *6 (S.D.N.Y. June 7, 2011) (holding that plaintiffs' suggestion that broadcasting news reflects an intent to see terrorist attacks succeed "strains credulity").

[6] *E.g.*, *Atchley v. AstraZeneca UK Ltd., Inc.*, No. 1:17-cv-02136 (D.D.C. filed Oct. 17, 2017).

ATS cases were attractive to plaintiffs' lawyers because they provided a vehicle for labeling legitimate companies "human rights violators" or "international law violators" and—through convoluted causation arguments, secondary liability claims, or both—tying those companies to horrific events in foreign countries. Because the claimed injuries were inflicted outside the U.S., typically in areas facing civil strife, discovery was almost always difficult and invariably expensive. The combination of vague international law standards, reputational damage from association with human rights abuses, and asymmetrical discovery burdens created enormous settlement pressure.

Beginning in 2004, however, a series of Supreme Court and Second Circuit decisions limited plaintiffs' lawyers' ability to bring abusively expansive claims under the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), limited the range of cognizable ATS claims to those analogous to the "historical paradigms" familiar when the statute was enacted. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), held that the ATS does not apply extraterritorially. In 2018, the Supreme Court ruled that the ATS does not extend to foreign corporations. *Jesner*, 138 S. Ct. at 1407. This Court, meanwhile, subjected ATS aiding-and-abetting claims to a stringent criminal-law *mens rea* requirement, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), and held that international law does not authorize ATS claims against corporations. *Kiobel v. Royal Dutch Shell*

Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013).

ATA/JASTA claims share many characteristics with ATS claims: the business defendant is labeled a "terrorist" or "supporter of terrorism," and the harm occurred primarily outside the U.S., almost always in a conflict zone. Lawyers seeking to bring large damages actions against global businesses have aggressively packaged similar types of claims as "conspiring" to promote, or aiding and abetting, "terrorism," as the cases discussed above demonstrate. *Jesner*'s further narrowing of the ATS outlet, coupled with Congress' enactment of a limited degree of secondary liability in JASTA, appears to have encouraged plaintiffs' lawyers to misuse the latter statute by asserting dubious theories of liability, far beyond what the statute permits. This case epitomizes this trend.

II. THE COURT SHOULD REJECT PLAINTIFFS' EXPANSIVE AND ATEXTUAL THEORIES OF SECONDARY LIABILITY.

The ATA's plain language, as amended by JASTA, imposes two independent threshold requirements on secondary liability claims; plaintiffs must satisfy both. *First*, Section 2333(d)(2) applies only to injuries arising from acts of international terrorism "committed, planned, or authorized" by an organization that had been officially designated as an FTO as of the date on which the act was committed, planned, or authorized. *Second*, Section 2333(d)(2) applies only to those who aid and abet or "conspire[] with the person who committed such an act

of international terrorism."

The district court found that Plaintiffs had failed to meet the second condition: they did not plausibly allege a direct agreement between the Banks and the persons who committed the terrorist attacks that injured Plaintiffs, *i.e.*, a conspiracy "*with* the person who committed such an act of international terrorism." SPA-44-45. The district court further reasoned that to plead a JASTA conspiracy, "a plaintiff must allege facts tending to show that the alleged co-conspirators agreed on the essence of the underlying illegal objectives and the kind of criminal conduct in fact contemplated." SPA-25, 41 n.36. Plaintiffs failed to meet this standard because they did not allege that the Banks and the terrorists shared a common unlawful objective. Rather, the court found that Plaintiffs plausibly alleged only that the Banks participated in "a conspiracy to help Iranian financial and commercial entities evade American sanctions," SPA-25-27, not a conspiracy to commit acts of terror.

The district court's conclusion that the SAC failed to state a JASTA claim was compelled by the ATA's clear text. Plaintiffs' contrary interpretation—under which a business could be found liable for conspiring only with someone other than the terrorists who injured a plaintiff, and even though the business shared neither the attackers' terroristic goal nor any other common objective—lacks any support in the statute or precedent, and would represent a dangerous expansion of a

limited secondary liability regime.

A. Plaintiffs' Proposed Secondary Liability Tests Have No Limiting Principle and Would Contravene JASTA.

Although the district court correctly rejected Plaintiffs' proposed conspiracy and aiding-and-abetting tests based on the ATA's text and established precedent, "[t]he practical consequences of an expansion" of secondary liability "provide a further reason to reject [Plaintiffs'] approach." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008) (concerning § 10(b) of the Securities Exchange Act of 1934). As Plaintiffs portray the law, they need not allege a direct agreement between a defendant and the persons who committed the terrorist attack that caused their injuries (here, Iraqi Shia militias), or indeed any common object or shared intent between the defendant and the attackers. Rather, under Plaintiffs' theory, it is sufficient that: (1) an FTO such as Hezbollah planned or authorized the attack[7]; and (2) a bank agreed to assist certain Iranian banks to evade U.S.

[7] *Amici* note that, though their argument focuses chiefly on the requirement of a common objective, Plaintiffs' conspiracy claim also fails to satisfy JASTA's first threshold requirement—that the injuries at issue have arisen from an act of international terrorism committed, planned, or authorized *by an FTO*. 18 U.S.C. § 2333(d)(2). Plaintiffs allege that all of the attacks at issue were committed by Iraqi Shia militias, and that one was "planned" by a then-designated FTO: Hezbollah, SAC ¶¶ 229, 1042, and that one was committed by a then-designated FTO: Kata'ib Hezbollah, *id.* ¶¶ 302, 304, 2139. The district court held that Hezbollah "train[ed] and arm[ed]" terrorist groups that committed certain attacks, "provid[ed] advisors to Shi'a militants in Iraq," and sent personnel who "assist[ed] Iran in training its terrorist proxies in Iraq." SPA 42. But Plaintiffs make no

economic sanctions through "wire stripping" or trade financing. This is enough, in Plaintiffs' view, because the Iranian government was known to support Hezbollah and other terrorist groups, supposedly making any terroristic objectives separately agreed between Iran and Hezbollah or other terrorists "foreseeable" and hence a part of the sanctions-evasion conspiracy that the SAC alleges. Plfs.' Br. 36-45.

The implications of this remarkably expansive and atextual theory of JASTA conspiracy liability are disturbing, particularly for banks. Were Plaintiffs' views adopted, a financial institution could be held liable for engaging in inappropriate transactions—not with FTOs or terrorists carrying out their plans, but instead with foreign states and other banks that supported still other organizations and entities that *themselves* may have separately assisted or conspired with FTOs or terrorist attackers. In effect, that would mean that "any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state." *Rothstein*, 708 F.3d at 96.

Such a formulation would lead to unacceptably limitless liability. For example, accepting that Iran funds terrorism in Iraq, Afghanistan and Israel, Plaintiffs' theory could expose any bank providing financial services (or any company providing goods or services) to Iran to liability for every American

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allegations that plausibly suggest that Hezbollah (or any other FTO) authorized—much less planned or committed—any specific attacks by those groups.

casualty in the Iraq War, every American casualty in the Afghanistan War, and every American victim of terrorism in Israel. This Court rejected precisely such a result in the primary liability context in *Rothstein*. It would be inconsistent with JASTA to create such breathtaking liability on a secondary liability theory. Such an expansion of liability would not only reach the type of actions complained of in this case, but would also chill the provision of "routine banking services to organizations and individuals," for fear that they might be "said to be affiliated" with terrorists. *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013).

Plaintiffs' conspiracy theory, moreover, has no logical stopping point. There is no reason why a defendant's conduct would have to involve sanctions violations; any improper or tortious conduct could be the springboard for a JASTA claim. On Plaintiffs' theory, for example, a counterfeiter who conspired to provide phony prepaid courier envelopes to an Iranian bank could be liable under JASTA. It would suffice to allege that the Iranian bank supplied the sham envelopes to an Iranian business affiliated with the IRGC and that business used envelopes—not necessarily even the phony envelopes provided by the counterfeiter—to send aid to the IRGC which in turn financed terrorist attacks on U.S. citizens in a third country. That is not the law. *See Kemper*, 911 F.3d at 395 ("The facts here suggest only that Deutsche Bank may have engaged in business dealings that

incidentally assisted a separate terrorism-related conspiracy involving Iran; they do not suggest that Deutsche Bank ever agreed to join that conspiracy.").[8]

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), upon which Plaintiffs rely heavily, does not support this untenably broad framework; to the contrary, *Halberstam* reflects core common-law secondary liability principles that establish traditional limits on secondary liability. *Infra* at 19-21. It is therefore no surprise that many federal courts, both within and outside this Circuit, have declined to adopt Plaintiffs' expansive understanding of JASTA conspiracies. Brief of Law Professors ("Law Profs. Br.") 14-19.

These concerns apply with equal force to Plaintiffs' proposed expansion of JASTA aiding-and-abetting liability. As this Court noted just last year in *Siegel II*, Plaintiffs' approach would subject banks to liability for "providing banking services" to financial institution customers without offering any allegations that, *inter alia*, "most, or even many, of [those customers'] banking activities are linked to terrorists," or "non-conclusory allegations" of any connection between those financial dealings and the specific attacks that harmed plaintiffs. *Siegel II*, 933

[8] The *Kemper* court noted that such a theory would allow plaintiffs to sue "if Deutsche Bank had facilitated Iran's purchase of a crate of oranges," given that "that deal could [also] violate U.S. sanctions." *Kemper*, 911 F.3d at 394. Although conspiring to help Iran purchase citrus fruit in violation of sanctions is unquestionably "something illegal," Plfs.' Br. 37, it is, fairly understood, so remote from any conspiracy to commit terror attacks on U.S. persons that it cannot be actionable under JASTA.

F.3d at 224. Such a scheme would expose banks and other business engaged in international business to treble damages and reputational harm even where they would have "little reason to suspect that [they were] assuming a role in . . . terrorist activities." *Id.*

Moreover, and contrary to the suggestion by Plaintiffs' law professor *amici* (Law Profs. Br. 21-22), it is entirely proper for federal courts to weed out, at the pleading stage, claims that fail to satisfy JASTA's threshold requirements. In cases involving other statutes, the Supreme Court and this Court have exercised precisely such vigilance, curtailing plaintiffs' overly aggressive attempts to stretch the bounds of civil liability beyond what Congress expressly intended. For example, the Supreme Court and this Court have held that private rights of action under Section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b)), the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1964(c)), and Section 22(a) of the Commodity Exchange Act (the "CEA") (7 U.S.C. § 25(a)) lack extraterritorial reach, where Congress did not specifically provide for it.[9] Similarly, after plaintiffs' lawyers invoked the ATS's 200 year old grant of federal subject matter jurisdiction to file massive damages actions against

[9] *See, e.g.*, *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010) (Section 10(b)); *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) (civil treble damages claims under RICO); *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014) (private right of action under the CEA).

multinational corporations based on alleged human rights abuses, both the Supreme Court and this Court substantially restricted such claims by adhering to the limits of customary international law. *See supra* at 8-9.

Absent a clear statement from this Court enforcing the statutory requirements, the sympathetic nature of many plaintiffs invoking JASTA and the horrific acts of terrorism in these cases may lead to claims being improperly sustained at the motion to dismiss stage, to the detriment of *amici*'s members, other legitimate businesses, and international commerce. At a minimum, the potential *in terrorem* effect of sustaining such claims would be substantial. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) ("[A] plaintiff with a largely groundless claim [may] simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value . . . ." (internal quotations omitted)); *Fed. Deposit Ins. Corp. v. First Horizon Asset Secs., Inc.*, 821 F.3d 372, 385-86 (2d Cir. 2016) (noting that "Congress established a strict repose period in the Securities Act based on its 'fear that lingering liabilities would disrupt normal business and facilitate false claims.'"). Enforcing JASTA's limits avoids that result.

B. By Limiting Secondary Liability for Conspiracy to Those Who Conspire "With" a Terrorist Actor, JASTA Effectively Imposes a "Directness" Requirement.

As noted above, JASTA limits secondary liability for conspiracy to cases where a defendant has "conspire[d] *with*" the person that committed the terrorist act that injured the plaintiff. 18 U.S.C. § 2333(d)(2) (emphasis added). The district court called this a directness requirement, SPA-44-45, and that label was entirely appropriate. *See* Defs.' Br. 17-20.

Contrary to Plaintiffs' contention, JASTA does not authorize "liability for defendants who conspire with individuals or entities *engaged in terrorism*" generally, Plfs.' Br. 35 (emphasis added), or with other types of wrongdoers. Congress drew the line in a different place, expressly requiring plaintiffs to allege a conspiracy "with" the "person who committed" the particular act of international terrorism that caused plaintiff's injury.

In arguing otherwise, Plaintiffs ignore the operative statutory text while relying instead on excerpts from JASTA's "Findings and Purpose" that purportedly demonstrate Congress' intent to extend "indirect" conspiracy liability. *E.g.*, Plfs.' Br. 24, 28, 31, 35, 41. But as the district court found and as Plaintiffs concede (*id.* 41 n.22), the general statements in JASTA's "Findings and Purpose" cannot override "the plain language" of 18 U.S.C. § 2333(d)(2). Moreover, "[t]he fact that Congress chose to impose some forms of secondary liability, but not others,

indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994).[10]

C. To Plead a JASTA Conspiracy, Plaintiffs Were Required To Allege That Defendants Agreed With the Attackers and Shared With Them a Common Objective To Commit Acts of Terrorism.

Plaintiffs resist the conclusion that they were "required to plead that Defendants intended to support terrorism." Plfs.' Br. 35. But as the district court explained and Defendants' brief makes clear, JASTA requires precisely that. Defs.' Br. 26-30; SPA-41-42. "The crux of any conspiracy is an agreement between the co-conspirators." *Kemper*, 911 F.3d at 395. Co-conspirators must have "agree[d] to participate in . . . a collective venture directed toward a common goal." *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1980). This is true for criminal and civil conspiracies alike. *See, e.g.*, *Chen Gang v. Zhao Zhizhen*, 799 F. App'x 16, 19 (2d Cir. 2020) ("The element of agreement is a key

[10] Plaintiffs' law professor *amici* claim that by applying 18 U.S.C. § 2333(d)(2) as written, district courts have displayed "skepticism of JASTA." Law Profs. Br. 22; *id.* at 23 (asserting that courts have refused to apply "the contours of secondary liability that Congress *intended* to authorize.") (emphasis added). Quite the opposite. As the professors' brief acknowledges, where a statute's text "yields a clear answer" about its meaning, "judges must stop." *Id.* at 23 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)). That is precisely what the court below did, and other district courts have done, in applying JASTA's plain language. Arguments about what Congress "intended to authorize" are entirely beside the point. *See Lockhart v. United States*, 546 U.S. 142, 146 (2005).

distinguishing factor for a civil conspiracy action."). Plaintiffs failed to allege that Defendants entered into any agreement to commit the terrorist acts that caused their injuries. *See* Defs.' Br. 30-35.

Plaintiffs and their law professor *amici* rely heavily on *Halberstam* to argue that Defendants can be held liable for the allegedly "reasonably foreseeable consequence[s] of the scheme." 705 F.2d at 487; *see* Plfs. Br. 34-35; Law Profs. Br. 14-21. But *Halberstam* does not establish an amorphous "foreseeability" standard for secondary liability. Defs. Br. 39-42. Rather, as the district court explained, the critical questions are what "scheme" the putative conspirators allegedly agreed to, and whether the challenged acts *further* it. *See* SPA-25 n.28 (acknowledging "the well-established principle, confirmed in *Halberstam*, that any member of a conspiracy, *once established*, can be held responsible for any act committed *in furtherance of* the conspiracy").

By definition, every conspiracy requires a "showing that a wrong was committed jointly by the conspirators and that, because of their common purpose and interest, the acts of one may be imputed to the others." *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 591 (2d Cir. 2005); *see also United States v. Stavroulakis*, 952 F.2d 686, 690 (2d Cir. 1992) (noting that "conspiracy involves an agreement by at least two parties to achieve *a particular illegal end*.") (emphasis added). Thus, only "[i]f [the plaintiff] can establish that [one defendant]

participated in or induced the alleged wrongful actions of [a second defendant] pursuant to an agreement, then [the first defendant] is liable as a conspirator for the damages proximately caused by these wrongs." *Halberstam*, 705 F.2d at 479 n.11.

In *Halberstam*, the two conspirators (Welch and Hamilton) were a cohabitating couple with three children; they had also conspired to commit "personal property crime at night," with Hamilton serving as Welch's live-in banker, bookkeeper, recordkeeper, and secretary. 705 F.2d at 488. Because the couple had directly agreed to achieve that particular illegal objective, Hamilton was held liable for Welch's "use of violence"—his murder of plaintiff's decedent—where the facts established that Welch committed that murder during the course of a nighttime burglary while trying "to escape apprehension." *Id.* at 487. Violence "was certainly not outside the scope of [that] conspiracy," *id.*, and in fact furthered it.

Plaintiffs' attempt to analogize this case to *Halberstam* breaks down at every turn.

First, while the *Halberstam* co-conspirators knew one another (to say the least) and directly conspired to commit nocturnal property crimes, Plaintiffs have not plausibly alleged that the Banks agreed to do *anything* with the terrorists who caused their injuries. *Halberstam*—and the cases *Halberstam* relied upon—involved indisputably close relationships. *See Davidson v. Simmons*, 280 N.W.2d

645 (Neb. 1979) (burglar and getaway driver); *Tabb v. Norred*, 277 So.2d 233 (La. App. 1973) (two armed burglars); *Peterson v. Cruickshank*, 300 P.2d 915 (Cal. App. 1956) (doctor and man who together falsely imprisoned the latter's ex-girlfriend in a mental hospital).

Second, the *Halberstam* conspirators shared an agreement to achieve the *same* unlawful goal—"a conspiracy to obtain stolen goods through regular nighttime forays and then to dispose of them," *id.* at 487—while here Plaintiffs have pleaded at most that the Defendants conspired with Iranian banks and corporate entities to evade the U.S.'s economic sanctions against Iran through "wire stripping" and trade finance (*see* SAC ¶¶ 7, 22). That is self-evidently different from the objective of the Iraqi Shia militia attackers (or *their* FTO conspirators), who sought to direct violence at U.S. service members.

Third, while the *Halberstam* court concluded that committing an act of violence while escaping was an overt act in furtherance of the Welch-Hamilton conspiracy to commit "personal property crime at night," terrorist attacks on U.S. service members plainly did not further the conspiracy that Plaintiffs alleged—between the Banks and Iran to facilitate payments that evaded U.S. economic sanctions. Indeed, in a footnote, Plaintiffs concede that the terrorists' conduct did not further Defendants' alleged activities. *Compare Halberstam*, 705 F.2d at 487 ("Welch was trying to further the conspiracy by escaping") *with* Plfs.' Br. 39 n.19

(agreeing that "[t]errorist acts do not 'further' material support").

For these reasons, the district court's rejection of Plaintiffs' conspiracy claim is entirely consistent with *Halberstam* and JASTA.

D. Plaintiffs' Proposed Aiding and Abetting Test Ignores Established Circuit Precedent.

Plaintiffs also contend that they should be permitted to assert aiding and abetting claims against one Bank. As Defendants' brief explains, Plaintiffs waived this argument by raising it for the first time in their motion for partial reconsideration of the order granting Defendants' motion to dismiss. Defs.' Br. 43-45.

Waiver aside, this Court has held that to state an aiding-and-abetting claim, "a plaintiff must plausibly allege that the defendant was 'aware that, by assisting the principal, it is itself assuming a role in terrorist activities.'" *Siegel II*, 933 F.3d at 224 (quoting *Linde*, 882 F.3d at 329) (cleaned up). Plaintiffs do not argue that they have met this standard. *See, e.g.*, Plfs.' Br. 55-61. Rather, Plaintiffs contend that it was sufficient for them to allege that a Defendant was "generally aware" of its role in money laundering activities involving Iran. *See id.* at 59-60. Plaintiffs' law professor *amici* appear to agree. *See* Law Profs. Br. 18-21. But *Siegel II* squarely forecloses Plaintiffs' argument. Perhaps for that reason, neither Plaintiffs

nor their *amici* have anything of substantive import to say about *Siegel II*.[11] Plaintiffs, moreover, have failed to heed JASTA's requirement that they allege facts sufficient to establish that a defendant "substantially assisted" the actual terrorists in their "activities." *Siegel II*, 933 F.3d at 225-26.

III. PLAINTIFFS' EXPANSIVE INTERPRETATION OF THE ATA WILL UNDERMINE INTERNATIONAL FINANCE AND TRADE.

Allowing plaintiffs to skirt JASTA's requirements would have significant adverse consequences for the availability of U.S. dollar-based banking services around the world, among other types of international business—and therefore adverse effects on the global economy.

A. Plaintiffs' Proposed Secondary Liability Tests Would Imperil Dollar-Clearing Services—A Systemically Crucial Function.

The type of transactions at issue in this case—clearing of international U.S. dollar-denominated payments by the domestic branches of foreign financial institutions—is ubiquitous and systematically important to international trade and finance. Virtually every international bank clears U.S. dollar-denominated payments through New York, and the clearing of foreign payments is a routine part

[11] *Amici* law professors chastise district judges for supposedly misreading *Linde*, asserting that the proposition that a plaintiff must allege that a defendant had "general awareness of its role in 'terrorist activities,' specifically" is an "implausible" interpretation of the case. Law Profs. Br. 19 n.6. But there is nothing "implausible" about that reading; it is the one that this Court correctly adopted in *Siegel II*.

of conducting dollar-denominated transactions. For example, the Clearing House Interbank Payments System, or "CHIPS," is an interbank system that transmits and settles orders in U.S. dollars for domestic and foreign banks such as *amici*'s members.[12] Almost "all wholesale international transactions involving the use of the dollar go through CHIPS." *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014). On an average day, CHIPS settles over 440,000 "payment messages" worth an aggregate of $1.5 trillion.[13] *See Jesner*, 138 S. Ct. at 1394–95 (incorporating facts about CHIPS that the IIB brought to the Court's attention in its *amicus* brief). "For these reasons, CHIPS has been widely regarded as a systemically important payment system." *See* CHIPS, Public Disclosure of Legal, Governance, Risk Management, and Operating Framework, June 2018, *available at* https://tinyurl.com/y7zk7nj2 (last visited May 20, 2020).

Under Plaintiffs' expansive interpretation of JASTA, clearing U.S. dollar transactions for foreign banks could expose banks operating in the U.S. to significant litigation risk, even though the clearing bank does not deal with terrorist organizations, is not aware that the transactions assist such organizations, and does not provide substantial assistance to the commission of terrorist acts. Indeed, such

[12] *See Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 119 n.7 (2d Cir. 2010) (noting that CHIPS "is more frequently used for international transactions" than its competitor, Fedwire).

[13] *See* https://tinyurl.com/y7nzqmam (last visited May 20, 2020).

liability would exist even where those clearing transactions were made in full compliance with relevant anti-money laundering and other regulations. Plaintiffs' theory would not logically require future plaintiffs even to plead sanctions violations; any alleged agreement to do anything tortious would suffice.

Such an expanded liability scheme would inevitably deter U.S. financial institutions and U.S. branches of non-U.S. financial institutions from engaging in a line of business that provides much-needed U.S. dollar liquidity to the global economy and allows the U.S. dollar to remain the world's reserve currency. Those concerns further counsel against adopting Plaintiffs' atextual reading of JASTA. *See, e.g.*, *Shipping Corp. of India v. Jaldhi Overseas Pte.*, 585 F.3d 58, 62 (2d Cir. 2009) (overruling precedent allowing attachment of electronic fund transfers in New York that "not only introduced uncertainty into the international funds transfer process, but also undermined the efficiency of New York's international funds transfer business," a result that "if left uncorrected, [could] discourage dollar-denominated transactions and damage New York's standing as an international financial center") (internal quotation omitted).

To be sure, the sanctions-related violations described in Plaintiffs' pleadings are serious. But those violations are not actionable under JASTA, and requiring Plaintiffs to adequately allege the elements of their claims under that statute is critical. As Judge Cote aptly observed:

> Because money is fungible and because the international banking system depends on cooperation among financial institutions across borders, it is particularly important to focus with care in cases like this on each of the necessary elements to a finding that [JASTA] has been violated. Those elements present a substantial hurdle when one financial institution is accused of having violated the ATA by providing assistance to terrorist organizations through engaging in common commercial banking practices with a foreign financial institution.

Siegel I, 2018 WL 3611967, at *5. That reasoning applies with the same force here.

B. Plaintiffs' View of the ATA Would Encourage "De-Risking."

"De-risking" occurs when banks or other businesses stop providing services to certain regions or clients, even those with legitimate and pressing needs, because the threat of liability and expensive, drawn-out litigation is simply too great. An expansive interpretation of the ATA produces just those consequences and therefore would dramatically increase de-risking activity as banks and other businesses seek to eliminate potential exposure to burdensome and reputation-threatening litigation, however meritless.

According to the Financial Action Task Force ("FATF"), de-risking in the banking sector already "is having a significant impact in certain regions and sectors" and "may drive financial transactions underground which creates financial exclusion and reduces transparency, thereby increasing money laundering and

terrorist financing risks."[14] As the Comptroller of the Currency observed in 2016:

> Longstanding business relationships may be disrupted. Transactions that would have taken place legally and transparently may be driven underground. Customers whose banking relationships are terminated and who cannot make alternate banking arrangements elsewhere may effectively be cut off from the regulated financial system altogether. And there have been many instances of real human hardship that results when customers find themselves unable to transmit funds to family members in troubled countries.[15]

De-risking could also affirmatively undermine the fight against terrorism. The withdrawal of legitimate financial institutions may "encourage entities to move into less regulated channels, thus reducing transparency and limiting monitoring capacities."[16] De-risking also has consequences "for the ability of humanitarian organisations to reach people in need, particularly in areas under the

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[14] FATF, *FATF takes action to tackle de-risking* (Oct. 23, 2015), https://tinyurl.com/yyot5v83.

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

[16] Tracey Durner & Liat Shetret, Global Center on Cooperative Security/Oxfam, *Understanding Bank De-Risking and its Effects on Financial Inclusion* 19 (2015), https://tinyurl.com/y3r99hdn. *See also* Staff of House of Representatives Task Force to Investigate Terrorism Financing, 114th Cong., *Stopping Terror Finance: Securing the U.S. Financial Sector* 26-27 (2016), https://tinyurl.com/y2saxcgy (noting that many financial institutions have ceased processing remittance transfers to certain countries, which may "eventually drive legitimate transfers into the illegitimate underground economy"); Yaya Fanusie & Landon Heid, *What ISIS Is Banking On*, Forbes (June 17, 2016), https://tinyurl.com/y487gp9w (discussing increasing use of money exchanges as "concerns about terror financing and safety have disrupted much of the formal banking activity in [ISIS] territory").

control of proscribed groups."[17]

Depriving governments and civil society of key partners in the fight against terrorism and important tools for promoting good governance and economic growth does nothing to help the victims of terror or further the ATA's goals. That is another important reason why this Court should reject Plaintiffs' invitation to upset the careful balance Congress struck in crafting JASTA.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: New York, New York
May 26, 2020

Respectfully submitted,

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[17] Stuart Gordon & Sherin El Taraboulsi-McCarthy, Humanitarian Policy Group, *Counter-terrorism, bank de-risking and humanitarian-response: a path forward* (Aug. 2018), https://tinyurl.com/y5c4u9ho.

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 6,410 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: May 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020, an electronic copy of the foregoing Brief of *Amici Curiae* was filed with the Clerk of the Court using the ECF system and thereby served upon all counsel appearing in this case.

I further certify that, in addition to service via ECF, on May 27, 2020, the undersigned caused the brief to be sent, via U.S. Mail, to the following address provided by Bank Saderat PLC's withdrawing counsel: Bank Saderat PLC 5 Lothbury London, UK EC2R 7HD Attn: Managing Director.

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