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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

20-7077



JOSHUA ATCHLEY; ELISSA ATCHLEY; JOHN ARAGON, SR.; BRIAN BEAUMONT;
DEMPSEY BENNETT; BRANDEAUX CAMPBELL; ANGIE CAPRA; ANTHONY
CAPRA, SR.; SHARON CAPRA; MARK CAPRA; VICTORIA CAPRA; A. C., A MINOR;

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR AMICI CURIAE
CHARITY & SECURITY NETWORK AND
INTERACTION: THE AMERICAN COUNCIL FOR
VOLUNTARY INTERNATIONAL ACTION, INC.
IN SUPPORT OF DEFENDANTS-APPELLEES**

TIMOTHY P. HARKNESS
LINDA H. MARTIN
KIMBERLY H. ZELNICK (*admission pending*)
DAVID Y. LIVSHIZ
SCOTT A. EISMAN
ALTIN H. SILA (*admission pending*)
NATHAN A. HEMBREE (*admission pending*)
NOELLE L. WILLIAMS (*admission pending*)
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 277-4000
timothy.harkness@freshfields.com
linda.martin@freshfields.com
kimberly.zelnick@freshfields.com
david.livshiz@freshfields.com
scott.eisman@freshfields.com
altin.sila@freshfields.com
nate.hembree@freshfields.com
noelle.williams@freshfields.com

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Attorneys for Amici Curiae

J. C., A MINOR; S. C., A MINOR; DANIELLE CAPRA; EMILY CAPRA; JACOB CAPRA; JOANNA CAPRA; JOSEPH CAPRA; JULIA-ANNE CAPRA; MICHAEL CAPRA; RACHEL LEE; SARAH JOHNSON; SALLY CHAND; MICHAEL CHAND, JR.; CHISTINA MAHON; RYAN CHAND; BRENDA CHAND; KARA CONNELLY; JEAN DAMMANN; MARK DAMMANN; KEVIN CONNELLY; JIMMY CONNOLLY; MELISSA DOHENY; KATHY KUGLER; ROBERT KUGLER; AMY RITCHIE; DREW EDWARDS; DONIELLE EDWARDS; MICHAEL ADAM EMORY; MARIA DE LA LUZ VILLA; BOBBY EMORY; TANYA EVRARD; JACOB HARBIN; ELIJAH HARBIN; ESTHER TATE; LEASA DOLLAR; EUGENE DELOZIER; BILLY JOHNSON; BRIDGET JUNEAU; All Plaintiffs,

Plaintiffs-Appellants,

—v.—

ASTRAZENECA UK LIMITED; ASTRAZENECA PHARMACEUTICALS, LP; GE HEALTHCARE USA HOLDING LLC; GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC.; GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES GMBH; JOHNSON & JOHNSON; CILAG GMBH INTERNATIONAL; ETHICON ENDO-SURGERY, LLC; ETHICON, INC.; JANSSEN ORTHO LLC; JANSSEN PHARMACEUTICA N.V.; JOHNSON & JOHNSON (MIDDLE EAST) INC.; ORTHO BIOLOGICS LLC; PFIZER INC.; PFIZER ENTERPRISES SARL; PFIZER PHARMACEUTICALS LLC; PHARMACIA & UPJOHN COMPANY LLC; WYETH PHARMACEUTICALS INC.; F. HOFFMANN-LA ROCHE LTD.; GENENTECH, INC.; HOFFMANN-LA ROCHE INC.,

Defendants-Appellees.

CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amici Curiae* Charity & Security Network and InterAction hereby certify as follows:

(A) Parties and *Amici*. All parties appearing before the district court and in this Court thus far are listed in the Brief for Defendants-Appellees. *Amici Curiae* that submit this brief have entered appearances as *Amicus Curiae* after Defendants-Appellees filed their initial brief.

(B) Ruling Under Review. The ruling under review is listed in the Brief for Defendants-Appellees.

(C) Related Cases. The related cases are listed in the Brief for Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Charity & Security Network certifies that it is a nonprofit voluntary program fiscally sponsored by NEO Philanthropy Inc. Charity & Security Network has no parent corporation, and no publicly owned corporation owns 10% or more of Charity & Security Network's stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* InterAction certifies that it is a not for profit corporation. InterAction has no parent corporation, and no publicly owned corporation owns 10% or more of InterAction's stock.

RULE 29(d) CERTIFICATION

Pursuant to D.C. Circuit Rule 29(d), *Amici Curiae* Charity & Security Network and InterAction certify that this separate brief was necessary because the *Amici Curiae* joining this brief seek only to discuss specific points on which their interest in and experience about the practical realities of terrorism relate. Other *amici curiae* would not have the same credibility or interest in making these points, and so the inclusion of these points in an omnibus brief would not work. Similarly, the *Amici Curiae* here know less about other legal issues in the case, and it would make little sense to address those in this brief. *Amici Curiae* offer expertise and background not shared with other *Amici Curiae* and address a different set of topics and issues.

March 19, 2021

/s/ Timothy P. Harkness

Timothy P. Harkness

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GLOSSARY

This brief does not use abbreviations or acronyms that are not in common usage. When the brief quotes the Complaint or judicial decisions, it includes the following abbreviations as used in the quotations without alteration:

| | |
|-------------------------|---|
| Ministry | Iraqi Ministry of Health |
| USAID | U.S. Agency for International Development |
| NGO | Non-governmental organization |
| Manufacturer Defendants | AstraZeneca Pharmaceuticals LP, GE Healthcare USA Holding LLC, GE Medical Systems Information Technologies, Inc., Ethicon, Inc., Ethicon Endo-Surgery, LLC, Janssen Ortho LLC, Ortho Biologics LLC, Pfizer Pharmaceuticals LLC, Pharmacia & Upjohn Company LLC, Genentech, Inc., Hoffmann-La Roche Inc. |
| Supplier Defendants | AstraZeneca UK Limited, GE Medical Systems Information Technologies GmbH, Johnson & Johnson (Middle East) Inc., Cilag GmbH International, Janssen Pharmaceutica N.V., Pfizer Inc., Wyeth Pharmaceuticals Inc., Pfizer Enterprises SARL, F. Hoffmann-La Roche Ltd. |

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Amicus Curiae Charity & Security Network advocates to reduce the barriers for operating charitable programs, both abroad and in the United States. Those barriers can prevent charities and donors from engaging in critical, lifesaving work in disaster and conflict areas. Charity & Security Network was founded in 2008 as a resource center for nonprofit organizations to promote and protect their ability to carry out effective programs that promote peace and human rights, aid civilians in areas of disaster and armed conflict, and build democratic governance. Charity & Security Network is composed of a broad cross-section of nonprofit organizations, including charities working on humanitarian aid, development, peacebuilding, human rights, and civil liberties, along with grant-makers, donors, and faith-based groups.

Amicus Curiae InterAction: The American Council for Voluntary International Action, Inc., is the largest existing alliance of U.S.-based international development and humanitarian nongovernmental

¹ All parties participating in this appeal have consented to the filing of this brief. No counsel for a party to this appeal authored this brief in whole or in part, and no counsel for a party or any party itself contributed money intended to fund the preparation or submission of this brief.

organizations (“NGOs”). With more than 180 member organizations operating in every developing country, and from its headquarters in the United States, InterAction is a convener, thought leader, and voice for NGOs working to eliminate extreme poverty, strengthen human rights and citizen participation, safeguard a sustainable planet, promote peace, and ensure dignity for all people. InterAction convenes and coordinates its members to improve their practices and to influence policy and debate on issues affecting vulnerable communities worldwide.

InterAction includes member organizations headquartered in 29 U.S. states. Both faith-based and secular, these organizations foster economic and social development, provide relief to those affected by disaster and war, assist refugees and internationally displaced persons, advance human rights, support gender equality, protect the environment, address population concerns, and press for more equitable, just, and effective policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Seeking to hold Defendants liable for manufacturing and selling medical supplies and goods to Iraq's Ministry of Health, Plaintiffs ask this Court to dramatically expand the scope of direct and secondary liability under the Anti-Terrorism Act. Plaintiffs' theories of liability in support of their arguments not only flout settled law but, if endorsed by this Court, risk crippling vital humanitarian and development work that NGOs perform in the world's most fragile states. Endorsing those theories would harm NGOs and thereby frustrate U.S. foreign-policy objectives and the underlying purpose of the Anti-Terrorism Act itself.

I. NGOs, primarily through private funding but also strongly supported by the U.S. government, form the backbone of the American philanthropic tradition. NGOs perform particularly crucial services in "fragile states," typically war-torn and poverty-stricken countries that either cannot or will not provide basic services to their people. This work—which includes providing infrastructure, education, healthcare, and basic living necessities—helps to build stable and peaceful communities. The U.S. government relies on NGOs to support its

peacebuilding efforts, and NGOs play an important role in preventing terrorism.

II. Plaintiffs' theories of liability in this case pose serious risks to NGOs and their work.

A. Plaintiffs seek to hold Defendants liable without alleging that any Defendant had objective terroristic intent or that any Defendant knew that the medical supplies it provided played a role in terrorism. Instead, Plaintiffs argue that merely alleging that Defendants knew that the government agency to which they provided medical supplies—Iraq's Ministry of Health—had ties to a terrorist group is enough. Such a theory, which courts have consistently rejected, would extend liability to NGOs for providing lifesaving humanitarian aid, without terroristic intent, to governments or non-sanctioned entities that may have connections to foreign terrorists.

Plaintiffs likewise misconstrue the law by relying on a convoluted causal chain (involving stealing from a government agency and sale on the black market) in an effort to connect Defendants' actions to the attacks that caused their injuries. Plaintiffs' theory—that a defendant proximately causes terrorist acts by providing assistance to a non-

sanctioned organization if the aid is later stolen, diverted, or extorted by groups that engage in terrorism—stretches the causation requirement far beyond its breaking point and is both legally wrong and risks harm to NGOs.

B. Apart from eroding the Anti-Terrorism Act’s mental-state and proximate cause requirements, Plaintiffs also err by seeking to impose aiding-and-abetting liability on Defendants for terrorist attacks by a group that the U.S. government chose *not* to designate as a “foreign terrorist organization.” As the Act makes clear, secondary liability will attach only when a defendant aids attacks that are committed, planned, or authorized by such an organization. Yet Plaintiffs ground their secondary-liability theory on allegations that Defendants’ business with a government ministry indirectly aided Jaysh al-Mahdi, a group that has alleged “ties” to the foreign terrorist organization Hezbollah but that the U.S. government has declined to designate as a foreign terrorist organization.

To accept this theory would be to dramatically expand the scope of potential liability for NGOs and frustrate congressional intent and U.S. foreign-policy objectives. The U.S. government’s terrorist designations

are carefully calibrated policy decisions that affect the amount of aid a region receives. In one stunning example, the U.S. government's designation of a foreign terrorist organization in Africa curbed aid to Somalia during the 2011 famine, leading more than 100,000 young children to perish. As that example underscores, NGOs rely on the U.S. government's terrorist designations to order their affairs—including when deciding whether to provide aid in locations where designated terrorist organizations are closely tied to local governments. Extending aiding-and-abetting liability to cover giving to groups that are not designated as foreign terrorist organizations would dim the bright line on which NGOs rely. Nothing in the Anti-Terrorism Act—or any other law—empowers courts to so expand the scope of liability.

III. For NGOs, which operate on tight budgets and rely on donations and grants, the risk of Anti-Terrorism Act liability is an existential threat. To be clear, *Amici* are not claiming that the nature or importance of their work exempts them from the Act. On the contrary, *Amici* take seriously NGOs' obligations to comply with the law and to refrain from materially supporting or aiding and abetting terrorism. What *Amici* oppose is the expansion of Anti-Terrorism Act liability that

Plaintiffs propose—an expansion with no basis in the Act’s text or the case law interpreting it. Were Plaintiffs’ sweeping theories to become law, NGOs may well be forced to cease operating in the world’s most impoverished and war-torn areas in order to avoid the risk of liability. And in a cruel irony, curbing aid and development would serve only to impoverish these nations further. As ample data show, the lack of education and other basic needs can increase the likelihood that individuals will turn to violent extremism, thereby frustrating the aims of the Anti-Terrorism Act.

ARGUMENT

I. NGOs provide vast and important support in war-torn countries.

NGOs perform critical services and deliver necessary aid to the world’s neediest areas, alleviating poverty and suffering; strengthening health systems, human rights, and citizen participation; and promoting peace—goals that the U.S. government prioritizes.

A. Consistent with U.S. foreign policy, humanitarian NGOs provide relief to people in need, regardless of where they reside.

The U.S. philanthropic tradition has centered on the work of private nonprofit organizations. These organizations from the outset of

American history have helped American society to become “the most democratic country in the entire world”—and thus to “become a power seen from afar whose activities serve as an example and whose words are heeded.” Alexis de Tocqueville, *Democracy in America* 597, 599 (Gerald E. Bevan trans., Penguin Books 2003) (1840). Indeed, these organizations have provided vital services to local communities—often in concert with government programs—including educational institutions, hospitals, and social service agencies. Aspen Inst., *The Nonprofit Sector and Government: Clarifying the Relationship* 2 (2002), <https://bit.ly/3f13gcN>.

Today, American NGOs compose an essential element of the “third sector”—that part of society that is distinct from governmental or commercial enterprises but supports and builds upon the efforts of both. Tony Proscio, Atl. Philanthropies, *The Foundations of Civil Society* 1–3 (2003), <https://bit.ly/2ONt2WK>. The United States is home to roughly 1.5 million NGOs, including volunteer organizations rooted in shared religious faith; labor unions; groups that help vulnerable people, such as the poor or disabled; and groups that seek to empower youth or marginalized populations. Dep’t of State, *Non-Governmental Organizations (NGOs) in the United States* (2021) (*NGOs in the United*

States), <https://bit.ly/3eEWmJX>. U.S.-based NGOs provide both domestic and foreign services, with many NGOs working to alleviate poverty around the world. *Id.*

Strong government support for NGOs' work abroad is a core tenet of U.S. foreign policy. The U.S. government is the largest financial source of humanitarian and development aid worldwide, providing over \$9 billion for humanitarian crises in 2019. *Top Humanitarian Donors Come Together to Face Global Challenges*, ShareAmerica (Sept. 29, 2020), <https://bit.ly/2OOo3p6>. Grants funded by United States Agency for International Development ("USAID") serve as a major source of NGOs' funding, and USAID funds those grants in response to on-the-ground needs and U.S. foreign-policy objectives. To take just one example: in support of the United States' goals to "defeat the Islamic State of Iraq and Syria" and "remov[e] . . . Iranian forces and proxies from Syria," USAID provided more than \$320 million of foreign aid to NGOs. USAID, *Syria Country Profile 1* (2019), <https://bit.ly/3vqtM4M>; see USAID, *U.S. Foreign Aid by Country: Syria* (2019), <https://bit.ly/3rSMwbd>. The U.S. government's significant financial contribution to humanitarian aid

shows its desire for NGOs to provide relief to populations throughout the world.

Although this government funding is crucial, NGOs also receive support through private donations. In fact, private aid from those within the United States to those outside the country is more than three times that provided by the U.S. Government. See Hudson Inst., *The Index of Global Philanthropy and Remittances* 9 (2016), <https://bit.ly/3eDegMY>.

B. NGOs provide vital funding and implement programs that help build stable and peaceful communities in fragile states.

The greatest need for humanitarian and development aid is often in “fragile states.” *Eliminating Extreme Poverty Requires Urgent Focus on Fragile and Conflict-Affected Countries*, World Bank (Feb. 27, 2020), <https://bit.ly/3vOgpMj>. “[F]ragile states”—often war-torn countries—“are generally recognized as those lacking the capacity or political will to provide basic services to their people.” Michelle Dowst, INTRAC, *Working with Civil Society in Fragile States* 1 (2009), <https://bit.ly/3bOfdk2>. Aid to fragile states, the U.S. government has explained, “enable[s] the United States to better interrupt cycles of violence and fragility abroad, protect its long-term interests, and achieve better

outcomes for the American taxpayer.” Dep’t of State, Off. of U.S. Foreign Assistance Res., *The Strategic Prevention Project* 29 (2019) (*Strategic Prevention*), <https://bit.ly/2OphxVM>.

While NGOs help individuals, families, and communities in fragile states by providing much-needed goods and services, they also help to focus that aid on remedying specific ills. As the State Department has observed, “[t]he priorities, strategy, and quality of assistance matter[] at least as much as, if not more than, the volume of assistance.” *Id.* at 16. To that end, NGOs have been praised by the State Department for “develop[ing] and address[ing] new approaches to social and economic problems that governments cannot address alone.” *NGOs in the United States*. For example:

- A children-focused NGO has supported children and families in northwest Syria, many who have been displaced several times because of regional conflict that has curtailed their access to education. *Reversing Gains*, Save the Children, <https://bit.ly/3cKdvPT>. To address the growing number of children out of school because of COVID-related school closures, the NGO helped develop cellphone-based distance-learning courses. *Id.*
- An NGO receiving USAID funds have helped repair drinking-water lines in war-ravaged Syrian cities. Press Release, USAID, USAID Helps Syrians Create Infrastructure Investment Plans for a Better Future in Raqqa (May 23, 2019), <https://bit.ly/3vzP4NH>.

- Another NGO receiving USAID funds rehabilitated regional water-treatment plants in Raqqa, Syria. *Id.*

NGOs also implement peacebuilding programs. Charity & Security Network, *Peacebuilding Fact Sheet 2* (2010) (*Fact Sheet*), <https://bit.ly/3rQOOY9>. Peacebuilding “involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundations for sustainable peace and development.” UN Peacebuilding Supp. Off., *UN Peacebuilding: An Orientation 5* (2010), <https://bit.ly/3cxWY1j>. It is a lengthy, multifaceted process that can involve several phases, including security, disarmament, political and electoral support, food stability, education, and public administration. *Id.*

In one particularly striking example of peacebuilding, an NGO successfully “convince[d]” women who “sewed suicide vests for [a terrorist organization]” to “end their . . . support [for that organization] and instead participate in sewing and other projects that would uplift themselves, their families, and their communities.” Int’l Civil Soc’y Action Network, *Innovative Peace Story* (2020), <https://bit.ly/3cz42ut>. While engaging women in these other projects, the NGO also taught the

women “how to identify the early warning signs of violent extremism in an individual and in their communities.” *Id.*

Peacebuilding by NGOs can also be more subtle. Given their on-the-ground work, NGOs are often uniquely positioned to understand both local problems and state politics. They can thus serve as neutral intermediaries between national and local interests—including those groups that local governments decline to recognize—to influence dialogue between parties with competing interests. *See* Jonathan Goodhand, *Aiding Peace?: The Role of NGOs in Armed Conflict* 115 (2006); *Fact Sheet*. Moreover, as NGOs work in and partner with local communities, they help local leaders to hone their managerial skills. And more broadly, NGOs help to promote civic discourse, increasing the proportion of the population that engages in local politics. Goodhand 117–18; Emilie Jelinek, *A Study of NGO Relations with Government and Communities in Afghanistan* 19 (2006), <https://bit.ly/38HNQ92>.

Through these programs, NGOs play an important role in alleviating poverty and peacebuilding, which may in turn help prevent terrorism and other political violence. Monetary and in-kind assistance provide basic goods and services that fragile-state governments could not

offer without support. Indeed, some governments rely on NGO aid for “almost” everything. Jelinek 16. That aid helps reduce poverty and political instability, which can play important roles in breeding and sustaining terrorism. See Corinne Graff, Brookings Inst., *Poverty, Development, and Violent Extremism in Weak States* 44 (2010), <https://brook.gs/2OXMboO> (“[N]ew evidence suggests that weak and failed states—many of which are among the world’s poorest counties—are at increased risk of harboring violent extremists”). Other forms of aid, such as programming for economic growth, education and social services, and healthcare, often support peacebuilding and prevention goals that likewise help reduce extremism. *Strategic Prevention* 17.

According to the State Department, these programs are particularly effective in reducing extremism when they “focus on promoting political inclusion and social cohesion or strengthening pro-peace constituencies as secondary objectives.” *Id.* A program in Somaliland, for instance, provided young people with education and civic engagement, decreasing their self-reported desire to participate in and support political violence after five years. Beza Tesfaye, *Critical Choices: Assessing the Effects of Education and Civic Engagement on Somali*

Youths' Propensity Toward Violence 7 (2016), <https://bit.ly/3vrUSbZ>. And a project in Afghanistan combined long-term aid, such as vocational training, with short-term direct aid, such as money, resulting in “a large reduction in willingness [of recipients] to engage in pro-armed opposition group actions.” Jon Kurtz et al., *Can Economic Interventions Reduce Violence?* 2–3 (2018), <https://bit.ly/2NwoiV7>. As these examples highlight, NGOs provide relief that can contribute to economic growth and prosperity and improve democracy and human rights, which are all consistent with U.S. foreign-policy goals. See Dep't of State, *What Are the Key Policies of the U.S. Department of State?*, <https://bit.ly/3eJd0rG>.

II. Endorsing Plaintiffs' theory of liability risks crippling the vital humanitarian aid that NGOs provide.

To access populations in need, NGOs must interact with local authorities, whoever they may be, on a wide range of matters including security, taxes and customs, and other operational and programmatic matters. Goodhand 104–05. For instance, the Houthis, a rebel group based in Yemen that was recently designated as a foreign terrorist organization (and soon after de-designated, given concerns such as those expressed here), are also “the de facto government in a swath of territory where the majority of Yemen's population lives, including the capital city,

Sana, and the country's biggest port." Lara Jakes & Ben Hubbard, *U.S. Rush to Declare Houthis Terrorists Threatens to Halt Aid to Yemen*, N.Y. Times (Jan. 11, 2021) (*Rush to Declare*), <https://nyti.ms/3cyKIOe>. The Houthis thus "control" many "government institutions" on which "[m]illions of Yemenis rely" for "basic goods." *Id.* What is more, "[s]hips bringing food" into the country "must pay port fees at a Houthi-controlled port," and essentially all public-sector healthcare and education workers in Yemen "work for Houthi-controlled administrations, whether they support the group or not." *Id.*

By interacting with authorities like the Houthis, NGOs do not signal any endorsement or support of terrorism. But these interactions are a practical necessity to reach civilian populations under the control of these authorities. If these authorities have ties to a terrorist organization, NGOs could be subject to billions of dollars in damages under Plaintiffs' sweeping theories of Anti-Terrorism Act liability. Those theories flout the Act itself and its underlying goals. And they would set a dangerous precedent that would jeopardize NGOs' ability and willingness to deliver vital programming.

A. Plaintiffs' theories risk creating liability for NGOs' vital work.

Plaintiffs seek to hold Defendants directly and secondarily liable under the Anti-Terrorism Act without alleging that any Defendant knew that the medical supplies Defendants provided to war-torn Iraq played a role in terrorism or that any Defendant shared any terrorist's state of mind. And Plaintiffs seek to do so for acts that were at least several steps removed from the terrorist acts and actors that caused their injuries. Plaintiffs' theories to support liability here, if accepted by this Court, would likely expose NGOs to lawsuits and even liability for providing legitimate aid to governments and organizations around the world.

1. Plaintiffs seek to substitute a strict-liability standard for the Anti-Terrorism Act's settled mental-state requirements.

Under the Anti-Terrorism Act, both direct claims and aiding-and-abetting claims include state-of-mind elements. Direct liability under 18 U.S.C. § 2333(a) requires "terroristic intent," meaning that a plaintiff must allege facts that would lead an "objective observer" to conclude that the defendant "desire[d] to intimidate or coerce a civilian population," "to influence the policy of a government by intimidation or coercion," or "to affect the conduct of a government by mass destruction, assassination, or

kidnapping.” *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 389–94 (7th Cir. 2018); 18 U.S.C. § 2331(1)(B). Aiding-and-abetting liability can be imposed only if a defendant “*knowingly* provid[ed] substantial assistance” to “the person who committed” the act that caused the plaintiff’s injuries. 18 U.S.C. § 2333(d)(2) (emphasis added). A defendant acts “knowingly” only if it was “‘aware’ that, by assisting the principal, it [was] assuming a ‘role’ in terrorist activities.” *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018) (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)). And “substantial assistance” often requires that the aider-abettor be “one in spirit with the [principal wrongdoer].” *Halberstam*, 705 F.2d at 483–84.

Plaintiffs fail to meet these state-of-mind requirements. Plaintiffs do not allege that Defendants—who produced and supplied medical goods to Iraq’s Ministry of Health (the “Ministry”)—desired to achieve terroristic ends or that they wanted to help terrorists do so. Instead, Plaintiffs ask the Court (at 37–38) to infer that Defendants knew they played a role in terrorism because the Ministry was allegedly connected to Jaysh al-Mahdi, which Plaintiffs say is a terrorist group, even though it has not been designated as such. But that allegation is precisely the

type that courts have rejected. In *Linde*, for example, the Second Circuit held that knowledge necessary for aiding-and-abetting liability is more than “knowledge of the organization’s connection to terrorism.” 882 F.3d at 329–30. And as the Seventh Circuit has held, even “wrongful actions” with a designated state sponsor of terrorism—such as helping to evade sanctions—are not enough to meet 18 U.S.C. § 2331(1)(B)’s objective-terroristic-intent requirement. *Kemper*, 911 F.3d at 390. A plaintiff must still allege that the defendant desired to achieve a terroristic end. And Plaintiffs here have not alleged that any Defendant so desired.

Imposing Anti-Terrorism Act liability absent such allegations would portend dangerous downstream consequences for entities—like NGOs—that conduct legitimate operations in countries beset by terrorism. Under Plaintiffs’ theory, NGOs could find themselves subject to liability despite lacking intent or even knowledge that their charitable acts could eventually translate to support for terrorism. An NGO could be sued and even held liable if goods given to a government entity and earmarked for legitimate aid purposes were sold to fund terrorism or freed up other resources for terrorism, so long as the NGO was merely aware of the government’s connections to terrorism. For instance, U.S.-

based NGOs routinely partner with local entities that help deliver supplies to those in need. Under Plaintiffs' theory, such an NGO would meet the Act's mental-state requirements if ISIS came to possess those supplies and then sold them on the black market, so long as ISIS had ties to the local entity to which the NGO provided the supplies.² The NGO in that example can hardly be described as supporting terrorism. Quite the contrary, the NGO was trying to support vulnerable people whose lives are made worse by terrorism. Yet that distinction would not matter under Plaintiffs' theory.

2. Plaintiffs' proximate-causation theory would punish NGOs for engaging with governments and organizations to provide critical aid, contrary to U.S. foreign policy objectives.

Plaintiffs' blurring of the Anti-Terrorism Act's mental-state requirement is not the only problem with their theory. They also try to hobble the Act's proximate-cause requirement. The Act limits direct

² The U.S. government's recent decision to de-designate the Houthis as a foreign terrorist organization highlights a core problem with this theory. The government de-designated the Houthis to allow humanitarian aid to flow into Yemen without fear of sanctions for dealing with the Houthi-controlled government. *See infra* p. 29. Plaintiffs' theory—which seeks to hold Defendants liable for dealing with government entities with alleged ties to a non-designated group—would therefore target the very aid to Yemen that the U.S. government encouraged through its de-designation.

liability to injuries caused “by reason of an act of international terrorism.” 18 U.S.C. § 2333(d). That “by reason of language,” this Court has explained, “demands a showing of proximate causation.” *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018).

Here, as the District Court correctly held, the Complaint does not adequately plead proximate causation, because Defendants’ alleged conduct does not amount to a “substantial factor” in the cause of Plaintiffs’ injuries. JA__(Op.19–23). In so holding, the District Court recognized that the involvement of the Ministry, a sovereign intermediary with legitimate operations, breaks the chain of causation because Plaintiffs made no factual allegations that Defendants’ conduct “actually . . . aided in” the alleged attacks. JA__(Op.20) (quoting *Owens*, 897 F.3d at 276).

In challenging that ruling, Plaintiffs, who were allegedly injured by Jaysh al-Mahdi attacks, do not allege that Defendants provided goods, services, or funding to the Jaysh al-Mahdi fighters who carried out those attacks. Instead, Plaintiffs rely on a lengthy causal chain to connect Defendants’ actions to the attacks that caused their injuries: Plaintiffs

seek to hold the Supplier Defendants,³ which supplied medical goods to the Ministry's subsidiary, liable based on allegations that those goods were stolen and sold on the black market to fund Jaysh al-Mahdi's activities. And Plaintiffs seek to hold the Manufacturer Defendants—which are yet one more step removed from any terrorist act—liable for supplying goods to the Supplier Defendants. In Plaintiffs' view, these contacts with the Ministry caused their injuries by enriching the Ministry, which in turn supported Jaysh al-Mahdi. Pls.' Br. 21–22. Plaintiffs thus urge the Court (at 20) to hold that a complaint pleads proximate causation by alleging that a defendant engaged in acts that were utterly unrelated to terrorism but that, through several steps, ultimately “made it easier” for a group “to commit attacks.”

Not only is that theory legally flawed, *see* Defs.' Br. 24–25, but its boundless nature risks extending liability to NGOs conducting important humanitarian and development work that is completely divorced from terrorism. Indeed, because money is fungible, Plaintiffs' theory could conceivably cover *any* aid—whether in the form of money, goods that can

³ *Amici* use “Manufacturer Defendants” and “Supplier Defendants” as Defendants use those terms. *See* Defs.' Br.9 n.1, 11 n.3

be monetized, or in-kind services—that eventually enriches an entity that later commits a terrorist act. Some NGOs, for example, support infrastructure by helping to pave roads in impoverished countries. *See, e.g., USAID, Paving Roads to Local Government—Activist Partnerships in Ukraine* (2020), <https://bit.ly/3cPW7cD>. But paving roads is not supporting terrorism. And an NGO that paves roads should not be held to have caused injuries if the road-paving saves money for a government agency (like the Ministry) that allegedly uses those savings to pay another group, which then conducts attacks.

Plaintiffs’ proximate-causation theory poses yet another risk to NGOs: the risk of liability for attacks by terrorist groups that loot the aid that NGOs provide. According to the Complaint, Iraq’s Ministry of Health was a “sprawling bureaucracy” that employed “every public-sector doctor, pharmacist, nurse, and medical technician in Iraq.” JA__ (¶ 72). The Ministry administered Iraq’s “government-run healthcare system” and provided “free medical care to all Iraqis.” JA__ (¶¶ 2, 72). Likewise, its state-owned import subsidiary, Kimadia, had a monopoly over all medical imports in Iraq and was therefore responsible for “importing and distributing” medical goods. JA__ (¶¶ 71–72, 119). But according to

Plaintiffs, not all of those medical goods were put to their intended use. Instead, Plaintiffs allege, those goods were “looted” and “stole[n]” by Jaysh al-Mahdi and then sold on the black market. JA__ (¶¶ 5, 129–32). Despite those intervening acts, Plaintiffs contend that Defendants proximately caused their injuries because Jaysh al-Mahdi committed the attacks after profiting from its theft of goods Defendants provided to the Ministry. Again, that theory is legally wrong. Defs.’ Br. 26–28.

On that theory, NGOs who provide aid in fragile states would face liability if goods provided for legitimate purposes were stolen and sold to fund terrorism. Such a scenario is easy to imagine. Countries that require humanitarian aid are often rife with corruption, and even humanitarian organizations’ strong internal controls and thorough due diligence cannot eliminate the risk that some assistance may be diverted. Just as Plaintiffs’ causation theory would improperly extend liability to Defendants for providing medical supplies that were later stolen by Jaysh al-Mahdi, that theory could extend liability to NGOs whose aid was stolen. If such theft gave rise to civil liability under the Anti-Terrorism Act, humanitarian organizations may decline to provide any assistance at all in certain areas.

Finally, Plaintiffs' theory of liability for the Manufacturing Defendants—businesses that merely supplied the Supplier Defendants with the medical goods (and components) that the Supplier Defendants in turn provided to the Ministry—would spread liability even further, expanding the risk of liability faced by NGOs. This liability could, under Plaintiffs' theory, even extend to NGOs that partner with other NGOs. *See, e.g., Who We Are*, Constr. for Change, <https://bit.ly/3rVgNWE> (describing mission of “partner[ing] with other NGOs and government ministries” to provide aid).

B. Plaintiffs' theory of the “foreign terrorist organization” element of aiding-and-abetting claims would risk frustrating congressional intent and U.S. foreign policy objectives.

The flaws with Plaintiffs' theory do not end there. Their theory also blurs the line between aiding and abetting an act committed, planned, or authorized by “an organization that has been designated as a foreign terrorist organization,” which the Anti-Terrorism Act forbids, 18 U.S.C. § 2333(d)(2), and aiding and abetting a group that has ties to a foreign terrorist organization, which the Act does not forbid. Plaintiffs nowhere allege that Defendants aided the acts of any foreign terrorist organizations. Instead, Plaintiffs claim that although “U.S.

policymakers” made a “strategic diplomatic decision” *not* to designate Jaysh al-Mahdi as a foreign terrorist organization, the Act still applies because Jaysh al-Mahdi has ties to Hezbollah. JA__ (¶ 355). Adopting such a theory would dramatically expand the potential scope of liability for NGOs and frustrate congressional intent and U.S. foreign policy objectives.

When Congress amended the Anti-Terrorism Act to include the aiding-and-abetting provision, Congress made clear that the “foreign terrorist organization” requirement served as a key limitation on the scope of liability. *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. (statement of Chairman Rep. Bob Goodlatte). Congress intended that limitation to keep the “unintended consequences” of “secondary liability” “to a minimum.” *Id.*

Indeed, the foreign-terrorist-organization limitation serves precisely that function for NGOs. It provides a bright-line rule for the many NGOs providing humanitarian and development assistance where acts of terrorism and violence are common. *See, e.g., Save the Children, Annual Report 12* (2019), <https://bit.ly/2P7VSBBr> (discussing camp in

Syria for displaced children). NGOs like these understand that there are strict limits on engaging with foreign terrorist organizations, and when operating in these areas, can readily determine which organizations the U.S. government has designated as foreign terrorist organizations and which it has not.⁴ NGOs can also readily determine whether the Executive Branch has granted humanitarian exceptions allowing certain groups to interact with foreign terrorist organizations. *See, e.g.*, Dep't of Treasury, General License No. 11, <https://bit.ly/3vBY4BT> (General License 11).

These foreign-terrorist-organization designations and exceptions thus provide humanitarian organizations with needed certainty to help manage the risks of operating in fragile states and nonpermissive environments. And they strike a delicate and carefully calibrated balance between the delivery of urgently needed humanitarian assistance and the isolation of foreign terrorist organizations.

That balance would be upended by Plaintiffs' theory—which would extend liability to NGOs that help groups controlled by other groups with

⁴ NGOs also pay close attentions to other U.S. government designations, such as the Specially Designated Global Terrorist List.

ties to foreign terrorist organizations. The significant gray area that this approach creates would force NGOs to refrain from interacting with groups that are one or more steps removed from foreign terrorist organizations—even though these groups might be the best partners to provide crucial humanitarian aid in the region. *See supra* pp. 15–16. NGOs would need to decide whether to accept the risk of liability for providing humanitarian aid or withdraw entirely from the region. Many would choose to withdraw. *See infra* Pt. III.A.

This risk is hardly theoretical. In 2011, for instance, fear that humanitarian organizations would be prosecuted for providing material support to al-Shabaab—a foreign terrorist organization in East Africa and Yemen—caused NGOs to “halt[] aid deliveries to Shabab-controlled areas” during the famine in Somalia. Robyn Dixon, *U.S. Policy Seen as Factor in Somalia Famine Deaths*, L.A. Times (May 2, 2013), <https://lat.ms/3s0BVLf>. That chilling of humanitarian aid, caused by uncertainty over legal liability, contributed to nearly 260,000 deaths, half of which were of children under age five. *Id.*⁵

⁵ The U.S. government has since given clear guidance to humanitarian organizations to try to avoid exactly this kind of calamity in the future.

The U.S. government recently averted a similar crisis by removing the Houthis' foreign-terrorist-organization designation. As noted above (at 15–16), the Houthis serve as the de facto government in part of Yemen, and so control access to aid that reaches the Yemeni people. The designation of the Houthis as a foreign terrorist organization thus sparked an immediate outcry from members of Congress, the United Nations, and NGOs, all citing the devastating humanitarian impact of the decision. *See, e.g., Rush to Declare.*⁶ The U.S. government revoked the designation weeks later, out of concern that the designation would “impede assistance to those already suffering what has been called the world’s worst humanitarian crisis.” Press Release, Dep’t of State, Revocation of the Terrorist Designations of Ansarallah (Feb. 12, 2021), <https://bit.ly/3lbXYw1>.

See Somalia Sanctions, Dep’t Treasury (Aug. 4, 2011), <https://bit.ly/3vw7H57>.

⁶ *See also Meeks Leads Lawmakers in Denouncing Pompeo’s Reckless Yemen Policy*, U.S. House of Representatives Comm. on Foreign Relations (Jan. 15, 2021), <https://bit.ly/38KQHOB> (“Designating the Houthi movement a Foreign Terrorist Organization (FTO) will make it much harder to deliver vital life-saving assistance since . . . many aid organizations will be unable to continue their operations due to legal liability and financial risk involved.”).

The Houthi example aptly illustrates the dangers that could flow from accepting Plaintiffs' theory of liability in this case. Although the U.S. government issued a handful of humanitarian licenses allowing transactions with the Houthis,⁷ those licenses did not necessarily shield licensees from criminal prosecution under 18 U.S.C. § 2339B, the statute barring material support to foreign terrorist organizations. Many aid groups would have therefore made the difficult choice to withdraw from Yemen rather than face potential Anti-Terrorism Act liability.

The Houthi example also points up another problem with Plaintiffs' theory. Although the Houthis are no longer a designated foreign terrorist organization, they are closely connected to Hezbollah, which is. *See* Bruce Riedel, Brookings Inst., *A Pragmatic View on Yemen's Houthis* (2021). Under Plaintiffs' theory—which attempts to link Hezbollah to the terrorist attacks by Jaysh al-Mahdi, JA__ (¶¶ 364–407)—NGOs that provide aid to the Yemeni people through Houthi-controlled government agencies could face aiding-and-abetting liability, even though the U.S. government has de-designated the Houthis. The result, of course, would

⁷ *See* General License 11.

be to choke off humanitarian aid into the territory controlled by the Houthis.

Plaintiffs' theory would thus frustrate U.S. foreign-policy objectives. The Executive Branch carefully balances foreign policy concerns in deciding which groups to designate as foreign terrorist organizations. Audrey Kurth Cronin, Cong. Rsch. Serv., RL32120, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations* 8–9 (2003). The designation rests on much more than whether an organization engages in terrorism. Among other things, sanctions associated with counterterrorism legislation tend to slow relief efforts, even when the sanctions expressly exclude humanitarian activities from their scope.⁸ The Executive Branch is therefore properly entrusted with deciding whether to designate a group as a foreign terrorist organization—a policy-based determination that carries with it liability for those who assist such organizations. The Court should not usurp the Executive Branch's role by expanding liability for aiding

⁸ For example, U.S. sanctions in Syria caused banks to refuse to process dollar-denominated humanitarian transactions over liability concerns, even though such transactions are legal. See Eric Schwartz & Hardin Lang, *Six Reasons Why a Terrorist Designation for Yemen's Houthis Is a Bad Idea*, Just Security (Dec. 3, 2020), <https://bit.ly/3loSGx9>.

foreign terrorist organizations to those who desire to do no such thing. *See People's Mojahedin Org. of Iran v. Dep't of State*, 182 F. 3d 17, 23–24 (D.C. Cir. 1999) (government's national security finding justifying foreign-terrorist-organization designation is not subject to judicial review).

III. Plaintiffs' theories would cause NGOs to cease operating in fragile states, frustrating the Anti-Terrorism Act's underlying purpose and harming the NGOs themselves.

A. Construing the Anti-Terrorism Act to cover NGOs' legitimate activities in fragile states would have grave consequences for peacebuilding and democracy-building, which can help curb extremism. As explained above (at 11–14), NGOs operating in fragile states provide many forms of relief, including development and peacebuilding programs, that contribute to economic prosperity and improve health and education, in turn helping to mitigate the spread of violent extremism. But NGOs would be forced to substantially curb their efforts in those states were courts to adopt Plaintiffs' capacious reading of the Anti-Terrorism Act.

One reason for that reduction in aid to fragile states is simple: NGOs cannot afford to pay Anti-Terrorism Act judgments. Those

judgments can total billions of dollars. *E.g.*, *Fain v. Islamic Republic of Iran*, 885 F.Supp.2d 78, 80, 83 (D.D.C. 2012) (\$9 billion judgment against Iran); *Linde*, 882 F.3d at 318 (\$100 million judgment, later vacated on appeal). Yet many NGOs operate on shoestring budgets. Anti-Terrorism Act liability would thus pose an existential threat to those NGOs, which would be forced to close if hit with an Anti-Terrorism Act judgment. Even the threat or possibility of such a judgment would force NGOs to reassess their work and may cause them to scale back or withdraw from the most dangerous areas of the world, where aid is most needed.

This concern is substantiated by the State Department's swift reversal of the decision to designate the Houthis as a foreign terrorist organization. That reversal was reportedly driven by a concern that the designation would exacerbate an already tragic humanitarian situation by restricting delivery of aid from NGOs that feared legal liability. *See supra* p. 29.

Such reductions of humanitarian aid have ripple effects. NGOs provide humanitarian, development, and peacebuilding aid to fragile states. Without NGO support, war-torn countries would lose out on aid and development programs that help to reduce poverty and increase

social cohesion, often in tandem. Suspending that programming would almost certainly cause a rise in violent extremism. *See supra* pp. 14–15.

That outcome is at odds with the Anti-Terrorism Act itself. As Plaintiffs note (at 4), Congress enacted the Anti-Terrorism Act “to reduce global terrorism and thus protect Americans here and abroad.” H.R. Rep. No. 115-858, at 3–4 (2018). Decreasing NGO support to fragile states does the opposite.

B. *Amici* and their member organizations will be harmed if this Court blesses Plaintiffs’ theories of liability. *Amici*’s mission is to support NGOs that assist people affected by crisis, disasters, and armed conflicts. *See, e.g., What We Do*, InterAction, <https://bit.ly/3qSmF1y>; *About, Charity & Security Network*, <https://bit.ly/3vslk1N>. *Amici* and their members are law-abiding and law-promoting organizations. Charity & Security Network, for example, offers resources to help NGOs understand legally permissible activities. *Permissible Activities*, Charity & Security Network, <https://bit.ly/3ljHbXK>. But in violent conflicts, “[i]ntervention by aid actors inevitably affects the calculus of those involved in conflict; there is always an impact.” Goodhand 6.

Under Plaintiffs' view of the law, NGOs—alongside Defendants here—would face significant increased risk of liability through convoluted chains of causation and by ignoring terroristic intent. If the Anti-Terrorism Act is interpreted to mean that an NGO's impact "helps" terrorists within the meaning of the Anti-Terrorism Act, the organizations that *Amici* support will be unable to fulfill their missions, which include feeding the hungry, caring for the sick and afflicted, defending the poor, and building peace—not just in areas free from strife, but throughout the world.

Plaintiffs' theories would thus deter NGOs that aid some of the world's most vulnerable people, many who are themselves victims of terrorism.

CONCLUSION

The Court should affirm the District Court's judgment.

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Respectfully submitted,

/s/ Timothy P. Harkness

Timothy P. Harkness

Linda H. Martin

Kimberly H. Zelnick (*admission pending*)

David Y. Livshiz

Scott A. Eisman

Altin H. Sila (*admission pending*)

Nathan A. Hembree (*admission pending*)

Noelle L. Williams (*admission pending*)

FRESHFIELDS BRUCKHAUS

DERINGER US LLP

601 Lexington Avenue, 31st Floor

New York, New York 10022

(212) 277-4000

timothy.harkness@freshfields.com

linda.martin@freshfields.com

kimberly.zelnick@freshfields.com

scott.eisman@freshfields.com

altin.sila@freshfields.com

nate.hembree@freshfields.com

noelle.williams@freshfields.com

Attorneys for Amici Curiae

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Respectfully submitted,

/s/ Timothy P. Harkness
Timothy P. Harkness

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/s/ Timothy P. Harkness
Timothy P. Harkness