NOT YET SCHEDULED FOR ORAL ARGUMENT

Case No. 20-7077

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

JOSHUA ATCHLEY, ET AL.,
Plaintiffs-Appellees,

v.

ASTRAZENECA UK LIMITED, ET AL.,
Defendants-Appellants.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

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

The Pharmaceutical Research and Manufacturers of America (PhRMA) has no parent corporation and no publicly traded company owns ten percent or more of its stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

(B) **Rulings Under Review**. The rulings under review are listed in the Brief for Defendants-Appellees.

(C) **Related Cases**. This case has not previously been before this Court or any court other than the U.S. District Court for the District of Columbia. Many of the plaintiffs in this case have filed lawsuits against other defendants in various federal courts seeking civil damages for the

same injuries, alleging that the Islamic Republic of Iran and various financial institutions are liable under the Anti-Terrorism Act and state law for causing those injuries or aiding and abetting the very same attacks from which those injuries arose. *See Bartlett v. Société Générale de Banque au Liban SAL*, No. 1:19-cv-00007 (E.D.N.Y.); *Donaldson v. HSBC Holdings PLC*, No. 1:18-cv-07442 (E.D.N.Y.); *Donaldson v. Islamic Republic of Iran*, No. 1:17-cv-01206 (D.D.C.); *Freeman v. HSBC Holdings PLC*, No. 1:14- cv-06601 (E.D.N.Y.); *Fritz v. Islamic Republic of Iran*, No. 1:15-cv-00456 (D.D.C.); *Estate of Hartwick v. Islamic Republic of Iran*, No. 1:18-cv-01612 (D.D.C.); *Holladay v. Islamic Republic of Iran*, No. 1:17-cv-00915 (D.D.C.); *Karcher v. Islamic Republic of Iran*, No. 1:16-cv-00232 (D.D.C.); *Martinez v. Islamic Republic of Iran*, No. 1:16-cv-02193 (D.D.C.); *O'Sullivan v. Deutsche Bank AG*, No. 1:17-cv-08709 (S.D.N.Y.); *O'Sullivan v. Deutsche Bank AG*, No. 1:18-cv-12325 (S.D.N.Y.); *Stephens v. HSBC Holdings PLC*, No. 1:18-cv-07439 (E.D.N.Y.); *Tavera v. HSBC Bank USA, N.A.*, No. 1:18-cv-07312 (E.D.N.Y.); *Tollefson v. Islamic Republic of Iran*, No. 1:17-cv-01726 (D.D.C.); *Williams v. Islamic Republic of Iran*, No. 1:18-cv-02425 (D.D.C.).

RULE 29(D) CERTIFICATION

Pursuant to D.C. Cir. R. 29(d), *amici* certify that a separate brief was necessary because the *amici*, the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America (PhRMA), have a unique perspective and expertise on issues raised in this appeal, and seek to address only those issues for which that perspective and expertise is most relevant. *Amici* believe that a separate brief was required to offer this unique perspective and expertise.

March 23, 2021

/s/ *Andrew J. Pincus*

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies.

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

PhRMA's member companies research, develop, and manufacture medicines that allow patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested nearly $1 trillion in the search for new treatments and cures, including an estimated $83 billion in 2019 alone—more R&D investment than any other industry in America. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an *amicus curiae*.

Congress enacted the civil provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333, to enable U.S. citizens who are victims of terrorism to hold accountable the terrorists who engage in those horrific acts as well as individuals or entities intimately involved in supporting terroristic acts, and to obtain compensation for their injuries. That is a laudable and important goal.

To avoid entrapping legitimate businesses in Anti-Terrorism Act lawsuits, Congress imposed multiple limitations on the scope of the private cause of action. The district court correctly interpreted and applied the Anti-Terrorism Act to dismiss Plaintiffs' complaint, holding that Plaintiffs' allegations fail to satisfy the statute's requirements.

Plaintiffs' response is to advocate an interpretation of the Anti-Terrorism Act that would effectively eliminate Congress's limitations on its civil liability provisions and as a practical matter hold companies strictly liable for conducting business with any counterparty, including a sovereign state, alleged to have provided support to other entities responsible for a subsequent act of terrorism. *Amici* submit this brief to explain why that approach—already rejected by the Second, Seventh, and Ninth Circuits—should not be adopted by this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici condemn all acts of terrorism. Those who commit these heinous acts should be brought to justice and forced to compensate their victims.

But Plaintiffs have not sued the terrorists who injured them, or the parties that supposedly played a role in that violence. Rather, they have sued the manufacturers and distributors of medical supplies and pharmaceuticals—critical resources that war-torn areas of the world desperately need—because those resources were provided to the Health Ministry of the sovereign government of Iraq as part of the U.S. government's effort to re-build that country.

Plaintiffs theorize that some portion of those supplies ended up in the hands of Jaysh al-Mahdi (the Shia militia group that injured them),

and claim that Defendants therefore are liable for their injuries under the Anti-Terrorism Act. This theory is profoundly flawed, and—if adopted—would present a serious threat to legitimate businesses providing critical resources to troubled areas of the world.

Unfortunately, this lawsuit is not unique. Federal courts in recent years have seen a deluge of unjustified Anti-Terrorism Act lawsuits targeting businesses in a variety of economic sectors—social media companies, financial institutions, international engineering and development companies, and oil companies, among others. The overwhelming majority of these lawsuits have been dismissed for failure to satisfy the demanding requirements of the Anti-Terrorism Act, with respect to primary liability claims; and of the later-enacted Justice Against Sponsors of Terrorism Act, with respect to conspiracy and aiding and abetting claims. This Court should similarly adhere to the statutory text and reject Plaintiffs' arguments for expansive liability.

Congress enacted the Anti-Terrorism Act to provide U.S. victims of international terrorism with the means to recover civil damages from those responsible for their injuries. But it also included key limits on the statute's application.

For instance, a defendant is not liable under the Anti-Terrorism Act's primary civil liability provisions unless the defendant (1) commits

an act of international terrorism (defined by the statute as a violent act or act dangerous to human life that appears intended to intimidate or coerce a civilian population or government) that (2) proximately caused the plaintiff's injury.

Aiding and abetting liability under the Anti-Terrorism Act is also tightly constrained. A plaintiff may recover only if (1) the plaintiff's injuries were caused by an act of international terrorism committed, planned, or authorized by a terrorist group that was designated by the U.S. State Department as a Foreign Terrorist Organization at the time of the act; and (2) the defendant directly assisted the person who committed the terrorist act. In addition, the defendant's assistance must be *knowing* (*i.e.*, the defendant must be generally aware that it is playing a role in terrorism) and *substantial*, based on the analytical framework set forth in this Court's decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

Plaintiffs' claims run afoul of each of these express limits on liability. Plaintiffs do not allege that Defendants engaged in acts of international terrorism that caused their injuries. Nor do they sufficiently allege that Defendants knowingly or substantially assisted (or provided anything at all to) Jaysh al-Mahdi, or that the violence perpetrated by this militia group was committed, planned, or authorized by a Foreign Ter-

rorist Organization. Plaintiffs allege merely that Defendants manufactured or provided medical supplies to a sovereign government's Health Ministry.

Plaintiffs' broad liability theory is not just wrong as a matter of law; it also would have very significant adverse consequences for many parts of the world that depend upon the goods and services that international businesses provide. A company could be subject to liability for doing business with non-terrorist entities—including foreign sovereigns or companies—if, in retrospect, a plaintiff could allege that the defendant could or should have known that there was a chance that its goods or services could find their way into the hands of terrorists. That would create tremendous risk for businesses that service politically unstable, conflict-ridden, and developing regions. In the face of such risk, many businesses would be deterred from entering these markets, depriving people uniquely in need of communications and financial services, infrastructure, and—in this case—public health-related products.

Congress did not draft the Anti-Terrorism Act to reach so broadly, nor could it possibly have intended the perverse consequences that would result from Plaintiffs' construction of the statute. Plaintiffs' claims were correctly dismissed by the district court, and that decision should be affirmed.

ARGUMENT

I. UNJUSTIFIED ANTI-TERRORISM ACT LAWSUITS AGAINST LEGITIMATE COMPANIES ARE INCREASING DRAMATICALLY.

The Anti-Terrorism Act enables victims of international terrorism to seek compensation from the terrorist groups that attacked them and from others intimately involved in planning or executing the attack. *See, e.g., Pescatore v. Palmera Pineda & FARC*, 345 F. Supp. 3d 68, 69-70 (D.D.C. 2018).

But most recent Anti-Terrorism Act cases have targeted "deep-pocketed," legitimate businesses that operate internationally—not those who planned, committed, or directly supported the attacks injuring the plaintiffs. These claims typically rest on attenuated theories alleging that goods or services provided by legitimate business in conflict-ridden areas of the world somehow supported terrorism. Courts have overwhelmingly rejected such claims, which have ensnared numerous companies in multiple economic sectors.

Claims against communications and technology companies. Anti-Terrorism Act plaintiffs have sued social media companies such as Twitter, Facebook, and Google, arguing that these companies provide a platform for terrorist groups to radicalize and recruit, raise funds, and otherwise promote attacks on civilians. The plaintiffs in these cases claim that

the social media companies thereby themselves either engage in, or substantially assist, acts of international terrorism.

Courts have consistently dismissed these claims as too attenuated to support either primary liability or secondary liability under the Anti-Terrorism Act. *See, e.g., Fields v. Twitter*, 881 F.3d 739. 750 (9th Cir. 2018); *Crosby v. Twitter*, 921 F. 3d 617, 628 (6th Cir. 2019); *Clayborn v. Twitter*, 2018 WL 6839754, at *6-8 (N.D. Cal. Dec. 31, 2018); *Copeland v. Twitter*, 352 F. Supp. 3d 965, 968-69 (N.D. Cal. 2018); *Taamneh v. Twitter*, 343 F. Supp. 3d 904, 915 (N.D. Cal. 2018); *Cain v. Twitter*, 2018 WL 4657275, at *2 (N.D. Cal. Sept. 24, 2018); *Gonzalez v. Google*, 335 F. Supp. 3d 1156, 1178 (N.D. Cal. Aug. 15, 2018); *Gonzalez v. Google*, 282 F. Supp. 3d 1150, 1171 (N.D. Cal. Oct. 23, 2017) (*Gonzalez I*); *Pennie v. Twitter*, 281 F. Supp. 3d 874, 886-88 (N.D. Cal. Dec. 4, 2017).[2]

Claims against financial services companies. Plaintiffs, including many of the Plaintiffs in this case, have asserted numerous primary and

[2] Along the same lines, in *Kaplan v. Al Jazeera*, the plaintiffs alleged that Al Jazeera, an Arabic language television network incorporated in Qatar, had broadcasted footage describing and depicting the precise impact locations in Israel of rockets fired by Hezbollah. 2011 WL 2314783 (S.D.N.Y. June 7, 2011). The plaintiffs argued that these broadcasts allowed Hezbollah to better locate their rocket attacks, leading to the plaintiffs' injuries. *Id.* The court dismissed the plaintiffs' claims. *Id.*

secondary Anti-Terrorism Act claims against multinational banks. While the details of the cases differ, they invariably involve allegations that the defendant banks' customers have ties to entities or governments that are claimed to fund or engage in terrorist acts, and that the banking services therefore helped finance terrorist acts.

For example, in *Owens v. BNP Paribas*, victims of al-Qaeda attacks on U.S. embassies in Kenya and Tanzania brought Anti-Terrorism Act claims against a French bank, BNP Paribas. 897 F.3d 266, 271 (D.C. Cir. 2018). The plaintiffs there alleged that the bank provided financial services to several Sudanese banks with ties to al-Qaeda, in violation of U.S. sanctions, and that this conduct gave rise to primary and secondary liability under the Anti-Terrorism Act. *Id*. This Court affirmed dismissal of the plaintiffs' primary liability claims for failing to plausibly allege proximate cause (*id*. at 276), and their aiding and abetting claims as outside of the scope of Anti-Terrorism Act's secondary liability provisions (*id*. at 279).

Similarly, in *Bernhardt v. Islamic Republic of Iran*, the families of two U.S. contractors killed in the 2009 suicide bombing of a CIA base in Afghanistan by al-Qaeda asserted aiding and abetting and conspiracy claims under the Anti-Terrorism Act against several related HSBC bank entities. 2020 WL 6743066 (D.D.C. Nov. 16, 2020). The plaintiffs alleged

that HSBC provided financial services to Iranian and Saudi Arabian banks, that, in turn, provided some measure of financial support or banking services to al-Qaeda. *Id.* at *2. The court dismissed the claims against HSBC for failure to state a claim. *Id.* at *8.

Other courts have dismissed similar claims. *See, e.g.*, *Kemper v. Deutsche Bank*, 911 F.3d 383, 386 (7th Cir. 2018); *Siegel v. HSBC N. Am. Holdings*, 933 F.3d 217, 222 (2d Cir. 2019); *Zapata v. HSBC Holdings*, 825 F. App'x 55, 56-57 (2d Cir. 2020); *Ofisi v. BNP Paribas*, 2018 WL 396234, at *5 (D.D.C. Jan 11, 2018); *Freeman v. HSBC Holdings*, 413 F. Supp. 3d 67, 73 (E.D.N.Y. 2019); *O'Sullivan v. Deutsche Bank*, 2019 WL 1409446, at *10 (S.D.N.Y. Mar. 28, 2019).

But many Anti-Terrorism Act banking cases remain pending and still others are being filed, illustrating the risk that an overbroad interpretation of the statute will leave legitimate businesses and industries subject to unjustified claims.[3]

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[3] *See O'Sullivan v. Deutsche Bank,* No. 18-cv-12325 (S.D.N.Y.) (filed Dec. 29, 2018); *Bowman v. HSBC Holdings*, No. 19-cv-2146 (E.D.N.Y.) (filed Apr. 11, 2019); *Tavera v. HSBC Bank USA*, No. 18-cv-7312 (E.D.N.Y.) (filed Dec. 21, 2018); *Donaldson v. HSBC Holdings*, No. 18-cv-7442 (E.D.N.Y.) (filed Dec. 28, 2018); *Stephens v. HSBC Holdings*, No. 18-cv-7439 (E.D.N.Y. Dec. 28, 2018); *Bartlett v. Société Générale de Banque au Liban*, No. 19-cv-007 (E.D.N.Y.) (filed Jan. 1, 2019); *Lelchook v. Société Générale de Banque au Liban*, No. 19-cv-033 (E.D.N.Y.) (filed Jan. 2,

Claims against other international businesses. In addition to targeting technology and financial services companies, plaintiffs have asserted Anti-Terrorism Act claims against companies in a variety of other industries. In *Brill v. Chevron*, plaintiffs claimed that surcharges from Chevron's purchase of Iraqi crude oil were paid to Saddam Hussein, and used to finance terrorist attacks in Israel from 2000-2002. 804 F. App'x 630, 632 (9th Cir. 2020). They asserted primary liability and aiding and abetting claims under the Anti-Terrorism Act against the oil company. *Id*. These claims were dismissed for failure to allege proximate causation and knowing substantial assistance, respectively. *Id*.

In *Cabrera v. Black & Veatch Special Projects Corp.*, Case No. 19-cv-3833 (D.D.C), the plaintiffs, U.S. service personnel killed or wounded while serving in Afghanistan between 2009 and 2017, allege that various Western contractors supported the Taliban in violation of the Anti-Terrorism Act by paying for security through local subcontractors while the contractors were engaged in protecting U.S. troops, re-building infrastructure, or providing other development assistance in Afghanistan. *See*

2019); *Averbach v. Cairo Amman Bank*, No. 19-cv-004 (S.D.N.Y.) (filed Jan. 1, 2019); *Singer v. Bank of Palestine*, No. 19-cv-006 (E.D.N.Y.) (filed Jan. 1, 2019).

19-cv-3833, Am. Compl. (filed June 5, 2020, ECF No. 82), ¶¶ 1-10. Motions to dismiss are pending in that action. And in *Peled v. Netanyahu*, Case No. 17-cv-260 (D.D.C.) (Compl. filed Feb. 9, 2017), the plaintiffs assert claims against senior Israeli government officials and American charities that made donations to Israel, seeking to impose Anti-Terrorism Act liability upon them for Israel's purportedly terroristic "war crimes" in the Palestinian territories.

The spike in Anti-Terrorism Act claims against large, international companies may be a consequence of the Supreme Court's restriction of private actions under the Alien Tort Statute, 28 U.S.C. § 1350. Beginning in the 1990s, plaintiffs invoked the Alien Tort Statute to assert claims against multinational corporations based on alleged human rights violations.[4] However, a series of Supreme Court rulings have significantly curtailed the scope of Alien Tort Statute claims. *See Sosa v. Alvarez-Machain,* 542 U.S. 692, 732 (2004) (holding that courts could only recognize

[4] One report found 150 such lawsuits "filed against companies in practically every industry sector for business activities in over sixty countries." U.S. Chamber Instit. for Legal Reform, *Federal Cases from Foreign Places* 23 (Oct. 2014), https://instituteforlegalreform.com/wp-content/uploads/media/federal-cases.pdf. The largest action "was filed in 2002 against more than fifty companies, including Ford and IBM, for business dealings in South Africa during the apartheid era." *Id.*

claims under the Alien Tort Statute analogous to the "historical paradigms familiar when § 1350 was enacted"); *Kiobel v. Royal Dutch Petroleum,* 569 U.S. 108, 124-25 (2013) (holding that the ATS does not apply extraterritorially); *Jesner v. Arab Bank,* 138 S. Ct. 1386, 1390 (2018) (holding that the Alien Tort Statute does not extend to non-U.S. corporations).

The Alien Tort Statute was attractive for plaintiffs' attorneys because it provided a vehicle to publicly label legitimate companies as "human rights violators" by tying these companies (through tenuous theories of liability) to atrocities in foreign countries. The reputational damage implicated by being associated with such atrocities, along with the expense and uncertainty surrounding the prospect of litigation and cross-border discovery, created significant settlement pressure on corporate defendants.

Now plaintiffs' attorneys have turned to the Anti-Terrorism Act. Although the Anti-Terrorism Act's civil provisions differ in several important respects from Alien Tort Statute claims,[5] Anti-Terrorism Act

[5] For instance, Alien Tort Statute claims are limited to citizens of other nations, while Anti-Terrorism Act plaintiffs must be U.S. citizens. And the ATS requires proof of an international law violation, but the Anti-Terrorism Act focuses on violations of U.S. criminal statutes that satisfy the statutory definition of an act of international terrorism.

claims provide similar opportunities to inflict brand damage on defendants by associating companies with horrific acts of violence and threatening massive claims for trebled damages.

As we next discuss, however, the Anti-Terrorism Act does not impose liability on legitimate businesses offering critical goods and services in unstable or developing areas of the world.

II. PLAINTIFFS' EXPANSIVE LIABILITY THEORIES VIOLATE CONGRESS'S EXPRESS, CAREFULLY-DRAWN LIMITS ON ANTI-TERRORISM ACT CIVIL LIABILITY.

Congress imposed specific limits on the scope of civil liability under the Anti-Terrorism Act. Properly applied, these limits ensure that legitimate companies engaging in routine business activities will not find themselves labeled as terrorists, ensnared in costly cross-border litigation, and facing treble damages in large-scale lawsuits. And, importantly, these limits give multinational businesses comfort and clarity that they can continue to service conflict-ridden and developing areas of the world—areas often uniquely in need of such services.

Plaintiffs ignore these key limitations. They allege that Defendants manufactured medical goods, equipment, and pharmaceuticals, or supplied those products to the Iraqi Ministry of Health and its state-owned subsidiary Kimadia, and that some portion of those products ended up in

the hands of Jaysh al-Mahdi, the militia group that perpetrated the violence that injured Plaintiffs. Opening Br. 19-22. These attenuated allegations are insufficient to support Anti-Terrorism Act claims for either primary or secondary liability.

A. Express Limitations on Primary Liability.

The primary civil liability provision of the Anti-Terrorism Act, 18 U.S.C. § 2333(a), provides a cause of action for U.S. nationals injured "by reason of an act of international terrorism." This language imposes two requirements: proof of proximate causation and the commission of an act of international terrorism by the defendant.

First, Congress's use of the "by reason of" language was not accidental. Courts have recognized that this formulation has a "well-understood meaning" in federal statutes such as RICO and federal antitrust laws: it "has historically been interpreted as requiring proof of proximate cause." *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013).

By expressly incorporating a proximate cause requirement in Section 2333(a), Congress ensured that remote actors alleged to have some attenuated role in terrorist acts would not be subject to primary liability—as this Court and others have recognized. *See, e.g., Owens*, 897 F.3d at 273 n. 8 (discussing with approval the view that proximate cause requires a direct relationship between the defendant's conduct and the

plaintiff's injury); *see also Rothstein*, 708 F.3d at 95; *Fields*, 881 F. 3d at 744-49; *Freeman*, 413 F. Supp. 3d at 83-84; *O'Sullivan*, 2019 WL 1409446, at *5.

Here, as the district court determined (*Atchley v. AstraZeneca UK Limited*, 474 F. Supp. 3d 194, 209 (D.D.C. 2020)) and Defendants explain (Br. 22-36), there is nothing close to a direct relationship between the Defendants' alleged acts and Plaintiffs' injuries. Defendants are merely alleged to have manufactured medical supplies or provide those supplies to the Iraqi Health Ministry. *Atchley*, 474 F. Supp. 3d at 209. Plaintiffs contend that, sometime thereafter, the supplies were looted and then sold on the black market, with proceeds then used to fund (in part) military operations by Jaysh al-Mahdi. *Id.*

That sort of indirect relationship between alleged conduct and injury is insufficient to support proximate causation. *See, e.g.*, *Owens*, 897 F.3d at 276 (affirming dismissal of Anti-Terrorism Act claims for failure to allege that banking services to sovereign state proximately caused plaintiffs' injuries); *Rothstein*, 708 F.3d at 97 (same); *Fields*, 881 F. 3d at

744-49 (affirming dismissal of claims against social media company for failure to allege facts satisfying proximate cause requirement).[6]

Second, Congress specified that primary liability attaches only when the defendant itself committed an "act of international terrorism," as defined in 18 U.S.C. § 2331. *See Owens*, 897 F.3d at 270 n. 1. That requirement makes clear that the Anti-Terrorism Act does not reach all allegedly wrongful conduct—but rather only conduct that both "involves violent acts or acts dangerous to human life" and appears intended to "intimidate or coerce a civilian population; to influence the policy of a government through intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1).

In other words, Congress enacted § 2333(a) to provide for civil claims against *perpetrators of terrorism*, not to provide claims against

[6] Plaintiffs contend (Br. 27-29) that their allegations that Defendants provided free pharmaceutical products somehow help to satisfy the proximate cause requirement, asserting that the provision of free products supports a nefarious inference. But providing free products is frequently an element of contracting in this area. *See, e.g.*, 42 CFR § 447.505(c)(12) (Medicaid "best price" provision acknowledging existence of "Manufacturer-sponsored programs that provide free goods, including but not limited to vouchers and patient assistance programs").

companies engaged in legitimate international business that plaintiffs allege is somehow indirectly linked to terrorists.

But that is precisely what Plaintiffs advocate. Here, Plaintiffs do not allege facts supporting a plausible inference that Defendants—manufacturers or suppliers of pharmaceuticals and medical equipment—engaged in "violent acts" or "acts dangerous to human life" that led directly to Plaintiffs' injuries or that appeared intended to "intimidate or coerce" civilians or governments through terrorist acts. Plaintiffs allege that Defendants manufactured or provided medicine and supplies to Iraq's sovereign Ministry during a period of armed conflict. That plainly fails to satisfy the "acts of international terrorism" requirement. *Zapata*, 825 F. App'x at 56 (affirming dismissal for failure to allege that bank defendants engaged in "acts of international terrorism").

B. Express Limitations on Secondary Liability.

When Congress enacted the Justice Against Sponsors of Terrorism Act, and created secondary liability under the Anti-Terrorism Act, it provided specific limitations on this cause of action. Giving force to Congress's limitations on liability is particularly important in this area, because—as the Supreme Court has recognized—in general, "rules for de-

termining aiding and abetting liability are unclear." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

To provide clear standards for imposing secondary liability under the Anti-Terrorism Act, Congress adopted express limitations on such claims, grounded in both the text of the statute and in this Court's decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress specifically referenced in its statutory findings. Pub. L. 114-222, § 2(a)(5), 130 Stat. 852, 852 (*Halberstam* "provides the proper legal framework for how [aiding and abetting and conspiracy] liability should function" under § 2333(d)).

1. Threshold Requirements for Application of § 2333(d)

Section 2333(d), which defines secondary liability under the Anti-Terrorism Act, includes two threshold requirements for secondary liability (here, aiding and abetting) claims.

First, secondary liability under § 2333(d) is available only for a specific subset of injuries—those arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a Foreign Terrorist Organization at the time of the attack. By imposing this limitation, Congress ensured that liability may be im-

posed on secondary actors only for acts committed, planned, or authorized by known, officially recognized, terrorist organizations (of which there are currently only approximately 70).[7]

Second, § 2333(d) aiding and abetting liability requires proof that the defendant "knowingly provid[ed] substantial assistance . . . [to] the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). The requirement that the assistance run directly from the secondary actor to the primary actor—which also is specified in this Court's decision in *Halberstam*, 705 F.2d at 477 ("the party whom the defendant aids must perform a wrongful act that causes an injury")—ensures that remote or downstream conduct by unwitting actors does not give rise to aiding and abetting liability.

The district court correctly held that Plaintiffs failed to meet either of these threshold requirements. With respect to the Foreign Terrorist Organization requirement, the district court observed that Plaintiffs allege that they were injured by violence perpetrated by Jaysh al-Mahdi, not by a designated Foreign Terrorist Organization. 474 F. Supp. 3d at 212.

[7] *See* https://www.state.gov/foreign-terrorist-organizations/.

Nor, the district court held, do Plaintiffs assert non-conclusory allegations that Hezbollah, which is a designated Foreign Terrorist Organization, planned or authorized the violence by the militia group Jaysh al-Mahdi. *Id*. The district court correctly rejected Plaintiffs' efforts to satisfy the statute's Foreign Terrorist Organization requirement simply by invoking the name of such an organization without plausible factual allegations that the organization "had a significant role in a particular attack." *Id*. Other courts have similarly rejected attempts to side-step this requirement. *See Crosby*, 921 F.3d at 626 ("To get around this [Foreign Terrorist Organization] requirement, Plaintiffs rely on the same tenuous connection to argue that ISIS was responsible for the shooting . . . without more, there are insufficient facts to allege that ISIS 'committed, planned, or authorized' the Pulse Night Club shooting.").

Plaintiffs also failed to satisfy the second statutory requirement, because they do not allege that Defendants substantially assisted the group that carried out the attacks. 474 F. Supp. 3d at 212. Rather, they allege that Defendants provided assistance to the Ministry and Kimadia, by providing these entities with medical supplies and pharmaceuticals or, for some Defendants, merely by manufacturing those products. *Id*. Only after the products were delivered to the Ministry, Plaintiffs allege, did the Jaysh al-Mahdi loot the Ministry, including some of the supplies

the Defendants had manufactured or provided, and sell those supplies on the black market to finance their operations. *Id.*

2. Anti-Terrorism Act Aiding and Abetting Elements

Congress incorporated the two basic elements of an aiding and abetting claim into the statutory text—which makes clear that, to be liable as an aider and abettor, a defendant must provide *knowing* and *substantial* assistance to the primary actor. 18 U.S.C. § 2333(d)(2). Unwitting or incidental support to primary violators does not suffice.

As the Second Circuit has explained, the "knowledge" element requires the secondary actor to be aware that, by assisting the principal, it is itself "assuming a 'role' in terrorist activities." *Linde v. Arab Bank plc*, 882 F.3d 314, 329 (2d Cir. 2019) (citing *Halberstam*, 705 F.2d at 477).

That "knowledge" or "general awareness" element prevents plaintiffs from asserting claims against businesses that, like Defendants here, merely engaged in routine transactions with other non-terrorist entities. For instance, the Second Circuit in *Siegel* affirmed the dismissal of § 2333(d) aiding and abetting claims against several HSBC entities alleged to have substantially assisted al-Qaeda through the provision of banking services to a Saudi bank with supposed ties to the terror group. 933 F.3d at 224. The court rested its decision on the determination that the *Siegel* complaint contained no non-conclusory allegations that HSBC was aware

that, by providing arms-length banking services to another financial institution, it was playing a role in the terrorist activities of al-Qaeda. *Id.*

The Ninth Circuit in *Brill* rejected an aiding and abetting claim based on similar reasoning. There, the plaintiffs alleged that the defendant, Chevron, knew that kickbacks from its purchase of crude oil would be remitted to the Iraqi government (which allegedly funded terrorist activity in Israel). 804 F. App'x at 632. In affirming dismissal, the court held that these allegations did not plausibly suggest that Chevron "knew that those funds were then provided to a terrorist organization and that those same funds were specifically used to finance the terrorist activity in Israel that resulted in the injuries to [the plaintiffs] and their family members." *Id.* at 633.

Plaintiffs and their *amici* urge this Court to infer Defendants' knowledge of their supposed role in terrorism from the manufacture of medical supplies and the provision of those supplies to a Health Ministry. *See* Opening Br. at 33, Senators' Amicus Br. (Doc. No. 18806867) at 30-33. But their arguments contradict the plain language of § 2333(d) and finds no support in Anti-Terrorism Act jurisprudence or in *Halberstam*.

Courts have made clear that § 2333(d) aiding and abetting requires the defendant to be aware of its own role in violent or life-endangering activities. As the Second Circuit has explained:

> although "[s]uch awareness does not require proof of ... specific intent" or knowledge "of the specific attacks at issue," it does require that "the bank was generally aware that[, by providing financial services to a client,] it was thereby playing a 'role' in [the] violent or life-endangering activities." *Id.* We contrasted this [in *Linde*] with "the *mens rea* required to establish material support in violation of 18 U.S.C. § 2339B, which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities." *Id.* at 329-30.

Siegel, 933 F.3d at 224 (*citing Linde*, 882 F. 3d at 329-30). The manufacture and provision of *medical supplies* to *a sovereign nation* falls woefully short of supporting an inference satisfying this requirement.

Plaintiffs and their *amici* point to the statement in *Halberstam* that a defendant is liable as an aider and abettor if he is "generally aware of his role as part of an overall illegal or tortious activity" (705 F.2d at 477), asserting that § 2333(d)'s knowledge requirement is satisfied if the defendant is aware of any illegal activity, and need not be aware that it is playing a role in terroristic activities. That is a misunderstanding of *Halberstam*. There, the Court was addressing the general requirement for common law aiding and abetting and therefore framed the standard generally in terms of any illegal activity. But Congress here created liability for aiding and abetting a particular type of illegal activity, *i.e.*, an act of

international terrorism, and § 2333(d) therefore requires that the aiding and abetting defendant be aware of its role in terroristic activities. That is why courts require allegations supporting a plausible inference that the defendant was aware of its role in terrorism.

Judge Bates followed the same approach in rejecting the plaintiffs' aiding and abetting claims in the *Ofisi* case. He recognized that the defendant in *Halberstam* was held liable for aiding and abetting her partner's burglaries because she "had actual knowledge of the ongoing tortious activity of her [partner] and she provided substantial assistance to directly further the continued success of the illicit burglary scheme." 2018 WL 396234, at *5. The *Ofisi* plaintiffs' claim of aiding and abetting terroristic acts fell short because the plaintiffs "failed to plausibly allege that [the defendant] BNPP directly funded any terrorist group, had knowledge of Sudan's use of BNPP-provided funds to sponsor terrorist activities, or knew that BNPP's conduct actually enabled the attacks." *Id.* In other words, the plaintiffs failed to allege that the defendant knew of its role in the terroristic acts.

The complaint here does not include allegations supporting a plausible inference that Defendants were aware that they were assuming a role in terrorist activities. Br. 52-56. It therefore fails to state an aiding and abetting claim.

The second aiding and abetting element—substantial assistance—ensures that remote, inconsequential support to a primary actor, bearing little or no relationship to the plaintiffs' injuries, will not support § 2333(d) liability.

As the district court recognized, Plaintiffs here do not allege that Defendants provided anything to the group that committed the attacks at issue, much less anything substantial. Rather, Plaintiffs are alleged to have manufactured or provided medical supplies and pharmaceuticals to the Ministry and Kimadia. This type of indirect, insubstantial "assistance," that lacks a meaningful connection to Plaintiffs' injuries, cannot qualify as "substantial" for the purposes of § 2333(d) aiding and abetting.

This conclusion is confirmed by the substantiality factors that this Court identified in *Halberstam* and is consistent with the conclusions of other courts that have applied those factors in the context of § 2333(d). *See Siegel*, 933 F.3d at 225 (affirming dismissal of § 2333(d) aiding and abetting claims against international bank, analyzing each *Halberstam* substantiality factor); *Bernhardt*, 2020 WL 6743066, at *6-7 (dismissing § 2333(d) aiding and abetting claims against international bank upon review of *Halberstam* factors).

* * * * *

In sum, Plaintiffs' theories of liability conflict with Congress's clearly articulated limits on Anti-Terrorism Act liability and should be rejected by this Court.

III. THE BROAD ANTI-TERRORISM ACT LIABILITY ADVOCATED BY PLAINTIFFS WOULD DETER COMPANIES FROM PROVIDING CRITICAL GOODS AND SERVICES TO TROUBLED PARTS OF THE WORLD.

Under Plaintiffs' view of the Anti-Terrorism Act, liability does not require a direct connection between Defendants and the group that committed the acts of international terrorism in this case. It is enough, according to Plaintiffs, that Defendants manufactured or provided medical supplies to Iraq's (U.S. backed) Health Ministry; that Jaysh al-Mahdi later stole and monetized some portion of those supplies; that a separate terrorist group, Hezbollah, provided some vague measure of training or support to Jaysh al-Mahdi; and that Plaintiffs were injured in attacks committed by Jaysh al-Mahdi. Thus, in Plaintiffs' view, engaging in routine business with non-terrorist counterparties that are alleged to have some ties to terror is a sufficient basis for Anti-Terrorism Act liability.

The consequences of such a broad theory of Anti-Terrorism Act liability would be dramatic. Legitimate multinational businesses could be held liable for providing services not to Foreign Terrorist Organizations or terrorist operatives, but to other businesses and state sovereigns. As

the Second Circuit observed in the context of international banking, such a theory 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. And Anti-Terrorism Act defendants would be subjected to aiding and abetting liability for providing goods or services to legitimate enterprises, even when they "had little reason to suspect that [they were] assuming a role in [] terrorist activities." *Siegel*, 933 F.3d at 224.

Under Plaintiffs' theory, the cost of doing business in developing areas of the world would become prohibitive. Companies operating in such regions would be unable to undertake the diligence needed to assure themselves that counterparties lack even arguable connections to other entities that may have involvement with terror financing or terrorist activities. Setting aside the cost of conducting deep-dive, multi-level diligence on every counterparty (and their downstream counterparties), in many areas of the world it would be practically impossible to eliminate counterparty risk, given the small-scale and insular nature of markets in developing countries and conflicting views of the legitimacy of businesses, charities, or humanitarian groups that operate in the same region.

Faced with onerous and impracticable diligence obligations and large litigation expenses, along with potential exposure to treble damages and reputational risk, many companies would be forced to "de-risk." De-risking occurs when 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. Failing to give effect to Congress's limitations on Anti-Terrorism Act liability would dramatically increase de-risking activity as businesses seek to eliminate potential exposure to burdensome and reputation-threatening litigation, however meritless.

De-risking is not merely theoretical. It is already happening in the banking sector. According to the Financial Action Task Force, de-risking "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."[8] As the Comptroller of the Currency observed in 2016:

[8] Financial Action Task Force, FATF takes action to tackle de-risking (Oct. 23, 2015), https://tinyurl.com/yyot5v83; *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-

> 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.[9]

De-risking could result in particularly perverse and significant harm in regions and countries (such as war-torn Iraq) in which companies are working closely with the United States government and its allies to promote stability by delivering much-needed products, services, health

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"); Tracey Durner & Liat Shetret, Global Ctr. on Coop. Security/Oxfam, Understanding Bank De-Risking and its Effects on Financial Inclusion 19 (2015), https://tinyurl.com/y3r99hdn (withdrawal of legitimate financial institutions may "encourage entities to move into less regulated channels, thus reducing transparency and limiting monitoring capacities").

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

care, or infrastructure.[10] U.S. companies would be deterred from responding to government requests for assistance in war or post-war zones, areas of governmental instability, or countries facing humanitarian crises, given the possibility that the goods or services may fall into the wrong hands, or that the downstream recipients may be accused of supporting terror.

The danger of de-risking to the developing world is perhaps most apparent from the circumstances of this case. Access to pharmaceuticals and medical supplies in destabilized areas is always critical, but never more so than during a deadly global pandemic. Several Defendants are involved in developing and producing vaccines and other treatments for deadly illnesses such as COVID-19, and they should be encouraged, not discouraged, from making these life-saving medical services and supplies accessible to populations that are most vulnerable and underserved.

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[10] Indeed, the U.S. government has invested substantially in Iraq for at least the past decade, and encouraged the provision of services to that country. *See, e.g.*, *Economic and Financial Reconstruction in Iraq*: *Hearing before the Senate Banking Subcommittee on International Trade and Finance,* (Feb. 11, 2004) (testimony of E. Anthony Wayne, Ass't Secretary for Economic and Business Affairs), https://2001-2009.state.gov/e/eeb/rls/rm/29288.htm; Press Release, U.S. Dep't of Treasury, The United States and Iraq Sign Loan Guarantee Agreement (Jan. 5, 2017), https://www.treasury.gov/press-center/press-releases/Pages/jl0697.aspx.

Depriving governments and populations of key partners in the fight against terrorism and important tools for promoting public health, humanitarian aid, good governance, and economic growth does nothing to help the victims of terror or further the Anti-Terrorism Act's goals. It has the opposite effect. This Court should avoid those adverse consequences and reject Plaintiffs' invitation to ignore the express limits that Congress placed on liability under the Anti-Terrorism Act.

CONCLUSION

The District Court's judgment should be affirmed.

Dated: March 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), and D.C. Cir. R. 28(c) and 32(e), I hereby certify that this brief contains 6,444 words, as calculated by the word count function in Microsoft Word, and excluding the items that may be excluded under Fed. R. App. B. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e). This brief uses a proportionally spaced typeface, Century Schoolbook, with 14-point typeface, in compliance with Fed. R. App. P. 32(a)(5)(A) and 32(a)(6).

Dated: March 23, 2021

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and D.C. Cir. R. 25, I hereby certify that on this 23rd day of March, 2021, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated: March 23, 2021

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