No. 23-568

IN THE
Supreme Court of the United States

ROBERT BARTLETT, ET AL.,
Petitioners,
v.
MUHAMMAD BAASIRI, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE[1]

Amici Curiae ("Amici") are former national security officials with decades of experience in counterterrorism and safeguarding U.S. national security interests from international terrorism. Amici have particular expertise in the misuse of financial systems to fund terrorism and in combatting terror financing.

Based upon their deep experience in these areas, Amici believe that disrupting the funding of terrorist organizations is essential to fighting global terrorism. Congress passed the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, as strengthened through the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. 114-222, 130 Stat. 582 (2016), to ensure that terror financing would be rooted out and deterred. Through its private-attorneys-general provision, the ATA enables American victims of terrorism to seek compensation in U.S. courts from those who provide support for terrorist organizations and serves as a powerful deterrent to terrorists and terrorist financiers.

Amici believe that the Second Circuit's decision poses a significant threat to the United States' counterterrorism efforts by undermining the ATA and providing terrorist financiers (and the sovereigns that support them) with a roadmap to evade ATA-conferred jurisdiction. Specifically, the decision would

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[1] The parties were notified of Amici's intention to file at least 10 days before the filing of this brief. No counsel to a party authored this brief in whole or in part. No party, or party's counsel, or any person, other than the Amici or their counsel, contributed money to fund preparing or submitting the brief.

enable private financiers who lack sovereign immunity at the time an action is filed against them to nonetheless escape the ATA's reach thereafter by achieving instrumentality status through manufactured nationalization, or, for example, temporary government-supervised receivership, by a bad-actor sovereign. Such a result is not only antithetical to this Court's holding in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), that "instrumentality status [under the Foreign Sovereign Immunities Act] is determined at the time of the filing of the complaint," *id.* at 480, but also would impede Congress's will, severely impair the ATA's deterrent effect, and increase the threat of international terrorism.

Amici therefore respectfully request that this Court grant the plaintiffs' petition for a writ of certiorari and, ultimately, reverse the Second Circuit's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 1, 2019, the plaintiffs in this action—a group of American service members who were wounded, and the relatives of service members who were killed or wounded, in terrorist attacks carried out in Iraq by proxies of the Lebanese terrorist organization Hezbollah—sued several Lebanese banks for aiding and abetting these attacks by laundering vast sums of money for Hezbollah. These banks, including Jammal Trust Bank SAL ("JTB"), were indisputably private commercial entities at the time the action was filed and therefore not instrumentalities of Lebanon nor entitled to sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"). Nearly nine months after this action was filed, however, the U.S.

Treasury Department designated JTB a Specially Designated Global Terrorist ("SDGT"). Shortly thereafter, JTB sought liquidation and was placed in public receivership under Lebanese law. JTB then argued that, by virtue of that liquidation and receivership, it had become an "instrumentality" of Lebanon and thus had sovereign immunity from this action. Notwithstanding this Court's unequivocal holding that "instrumentality status is determined at the time of the filing of the complaint," *Dole*, 538 U.S. at 480, the Second Circuit agreed with JTB, holding "that immunity under the [FSIA]. . . may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed." *Bartlett v. Baasiri*, 81 F.4th 28, 36–37 (2d Cir. 2023).

The Second Circuit's decision is not only wrong on the merits (for the reasons addressed in the plaintiffs' petition for a writ of certiorari) but may also jeopardize U.S. national security. If permitted to stand, the decision would weaken the effectiveness of the country's counterterrorism laws and, in particular, its strategy for disrupting international terrorist financing.

Decades ago, Congress responded to increasing terrorist threats to U.S. nationals abroad by passing the ATA and creating a private right of action for American victims of terrorist attacks. With this private right of action, which enjoyed strong bipartisan support, Congress filled a "gap" in U.S. counterterrorism strategy by removing jurisdictional hurdles for victims under then-existing law and creating a powerful deterrent for actual and would-be terrorists and their financiers. With JASTA, enacted in 2016 over President Barack Obama's veto, Congress then

strengthened and broadened the ATA by establishing secondary liability for anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). Through these acts, Congress made clear that terrorist financiers should reasonably anticipate being brought to court in the United States to answer for their unlawful activities.

The Second Circuit's decision, however, threatens to undermine Congress's oft-stated objective. The decision encourages foreign sovereigns—either alone or in collusion with aiders and abettors of terrorism they are trying to protect—to thwart the ATA and JASTA by nationalizing the entities (even temporarily) after they are sued in U.S. federal courts and thereby insulating them from the civil accountability that Congress specifically intended. The decision incentivizes bad-actor foreign sovereigns to manufacture immunity so that terrorists' funding—terrorists' lifeblood—can continue to flow unabated.

Although the Second Circuit sought to minimize the scope and effect of its ruling by noting that, in this case, the catalyst for JTB's liquidation and receivership was the U.S. government's designation of JTB as an SDGT, the ruling is, in fact, unmistakably broad and sets the stage for dangerous gamesmanship any time an aider and abettor of terrorism is sued under the ATA. Moreover, even focusing only on the circumstances in this case, the ruling creates a disincentive for the U.S. government to designate certain aider and abettor of terrorism as SDGTs any time a private plaintiff sues that party before a designation has been

made. Such consequences would bolster terrorist financing networks and increase the threats of international terrorism impacting U.S. nationals—the exact outcomes Congress intended to thwart with the ATA and JASTA.

For these reasons and those discussed below, Amici respectfully request that the Court grant the plaintiffs' petition for a writ of certiorari and, ultimately, reverse the Second Circuit's decision.

ARGUMENT

I. The ATA and JASTA are Critical Tools for Safeguarding U.S. National Security.

A. Combatting terror financing is vital to the United States' counterterrorism strategy.

Combatting international terrorism directed at the United States, its nationals, and its allies is "an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). And disrupting sources of funding for terrorists and terrorist organizations is a critical part of that effort because "money" is "terrorism's lifeblood." *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Cts. & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 85 (1990) ("1990 Senate Hearing"). Indeed, "[f]or any criminal or terrorist enterprise to have global and sustained reach, it must have a financial infrastructure to raise, hide, and move money to its operatives and operations. Banks are the most convenient and important of these nodes of the financial system and are critical to nefarious networks." Juan C. Zarate, Treasury's War: The Unleashing of a New Era of Financial Warfare, 145–46

(2013) (former Deputy Assistant to the President and Deputy National Security Advisor for Combating Terrorism).

As Joseph Morris, the President and General Counsel of the Lincoln Legal Foundation, testified before the Senate Judiciary Committee's Senate Subcommittee on Courts and Administrative Practice in a hearing before passage of the ATA:

> [T]errorism in these days is an industry. Its financial resources are phenomenal. Terrorist masters clearly pay a lot more attention to money than they do to the personal well-being of their own troops. People are more expendable to them than money is, and anything that could be done to deter money-raising in the United States, money laundering in the United States, the repose of assets in the United States, and so on, would not only help benefit victims, but would also help deter terrorism.

1990 Senate Hearing at 79. At that same hearing, Daniel Pipes, then Director of the Foreign Policy Research Institute, echoed the centrality of disrupting terrorist financing to the overall counterterrorism effort: "[i]t is not enough simply to go after the footmen, the soldiers, the terrorists, the individuals. One must strike at the heart of the organization, and that means going after the funding." *Id.* at 110.

In the years since passage of the ATA, combatting terrorist financing has been as critical as ever. In 2002, an independent task force sponsored by the Council on Foreign Relations panel concluded that

"[c]ombatting terrorist financing must remain a central and integrated element of the broader war on terrorism." Maurice R. Greenberg et al., *Terrorist Financing: Report of an Independent Task Force Sponsored by the Council on Foreign Relations* 22 (2002), https://cdn.cfr.org/sites/default/files/pdf/2002/10/Terrorist_Financing_TF.pdf. "'[F]ollowing the money' can go a long way toward disrupting terrorist cells and networks and thereby can help prevent future terrorist attacks." *Id*. In furtherance of that goal, the Treasury Department, in 2004, created the Office of Terrorism and Financial Intelligence, which is dedicated to identifying and disrupting mechanisms of terror financing. *Anti-Terrorism Financing: Progress Made and the Challenges Ahead*, *Hearing Before the S. Comm. on Finance*, 110th Cong. 55 (2008) ("2008 Senate Hearing"); *see also* About, Terrorism and Financial Intelligence, U.S. Dep't of the Treasury, https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence (last visited Dec. 18, 2023) ("Terrorism and Financial Intelligence develops and implements U.S. government strategies to combat terrorist financing domestically and internationally . . . .").

In an increasingly globalized world, the risk of exploitation of the financial system to fund terrorist operations is magnified. As Stuart Levey, the first Under Secretary of the Treasury for Terrorism and Financial Intelligence, testified before the Senate Finance Committee, "[t]he financing of terrorism and weapons proliferation often occurs within the same system that spreads prosperity at home and abroad." 2008 Senate Hearing at 55. Per Mr. Levey:

> Terrorist networks and organizations require real financing to survive. The support they require goes far beyond funding attacks. They need money to pay their operatives, support their families, indoctrinate and recruit new members, train, travel, and bribe officials. When we restrict the flow of funds to terrorist groups or disrupt a link in their financing chain, we can have an impact.

Id. at 59. The "value," therefore, from sustained "counter-terrorist financing efforts" is that they provide the United States with a critical "means of maintaining persistent pressure on terrorist networks." *Id.* (statement of Under Secretary Levey).

B. Congress intended the ATA and JASTA to be robust tools in the fight against financial terrorism.

"[T]he civil provisions of the [ATA]," as fortified by JASTA, are "an integral component of our nation's broader strategy to combat the financing of international terrorism and advance vital American national security and foreign policy interests." Brief for Eight U.S. Senators as Amici Curiae in Support of Plaintiffs-Appellants at 1, *Freeman v. HSBC Holdings*, 57 F.4th 66 (2d Cir. 2023), cert. denied, 144 S. Ct. 83 (2023) (No. 19-3970), ECF No. 87.

1. *The ATA*

In 1992,[2] Congress enacted the ATA to cut off private funding to foreign terrorist organizations, by providing U.S. terror victims treble damages and attorneys' fees to incentivize so-called "private attorney general suits." *See* 18 U.S.C. § 2333(a). The ATA's civil liability provision provides as follows:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

Id.

With this provision, Congress intentionally "fill[ed] [a] gap" in U.S. counterterrorism strategy by "establishing a civil counterpart" to existing criminal penalties for international terrorism. 136 Cong. Rec. 26,716 (1990) (statement of Sen. Grassley); *see also Antiterrorism Act of 1991: Hearing on H.R. 2222 Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary* 102nd

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[2] The same language Congress enacted in 1992 was initially enacted on November 5, 1990 as part of the Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250 (1990), and known as the "Anti-Terrorism Act of 1990." *Id.* Because of an enrolling error, it was repealed five months later, and then promptly reenacted. *See Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 265–66 (E.D.N.Y. 2007) (retracing this history).

Cong. 13 (1992) (statement by Rep. Edward F. Feighan) ("This legislation will fill in the gap in our laws and offer American victims of terrorism an opportunity to recover treble damages from their attackers."); H.R. Rep. No. 102-1040, at 1 (1992) (House Judiciary Committee explaining that the ATA was designed to provide "a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals").

As Senator Charles E. Grassley, the ATA's author, explained when introducing the act, up until that point the U.S. "civil justice system provide[d] little civil relief to the victims of terrorism," because "victims who turn[ed] to the common law of tort or Federal statutes . . . f[ound] it virtually impossible to pursue their claims because of reluctant courts and numerous jurisdictional hurdles." 136 Cong. Rec. 7,592 (1990) (statement of Sen. Grassley). Congress sought to cure this issue for victims who, without the ATA, would find jurisdictional hurdles insurmountable. *See* 137 Cong. Rec. 8,143 (1991) (statement of Sen. Grassley) ("The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation."); *see also Antiterrorism Act of 1991: Hearing on H.R. 2222 Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary* 102nd Cong. 10 (1992) (letter from Sen. Charles E. Grassley to Hon. Carlos J. Moorehad, Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary (letter dated Sept. 17, 1992)) ("[T]he bill will create a cause of action for American victims of terrorism abroad and will be an important instrument in the fight against terrorism.

It will remove the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation."); *Statement by President of the United States George Bush Upon Signing S. 1569*, 1992 U.S.C.C.A.N. 3942, 1992 WL 475753 (Oct. 29, 1992) ("I am pleased that the bill explicitly authorizes an American national to file suit in the United States for the recovery of treble damages against the perpetrators of international terrorism."). Per Representative Edward F. Feighan, a bill sponsor, the ATA was intended to be "an important and timely addition to [the United States'] arsenal aimed at ending the scourge of international terrorism." 137 Cong. Rec. 9,883 (1991). And, as a group of ten United States Senators explained previously to this Court, Congress's remedy was intentionally "broad," and, "[b]y enacting a broad remedy, Congress understood that the bill would 'open[] the courthouse door to victims of international terrorism.'" Brief of 10 Members of the United States Senate as Amici Curiae in Support of Petitioners at 10, *Weiss v. Nat'l Westminster Bank, PLC*, No. 21-381 (Oct. 8, 2021) (quoting S. Rep. No. 102- 342, at 45 (1992)); *see also* S. Rep. No. 102-342, at 22 (1992) (noting that Congress intended the ATA to "allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed.").

Congress intended the ATA to impose civil liability on terrorists and enablers of terrorism "where it hurts them the most: at their lifeline, their funds." 136 Cong. Rec. 26,717 (1990); 137 Cong. Rec. 8,143 (1991) (remarks of Sen. Grassley) ("[T]his bill provides victims with the tools necessary to find terrorists' assets

and seize them."). Congress recognized that, to provide a meaningful remedy and a meaningful deterrent, civil liability had to extend beyond terror operatives to all who helped to facilitate their unlawful activities, even donors: "By its provisions for compensatory damages, tremble [sic] damages, and the imposition of liability *at any point* along the causal chain of terrorism, [the ATA] would interrupt, or at least imperil, the flow of money." S. Rep. No. 102-342, at 22 (1992) (emphasis added). The financial links in this chain were critical components. As Senator Grassley made plain: with the ATA, Congress intended to "put terrorists on notice: To keep their hands off Americans and their eyes on their assets." 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley). Creating this deterrent effect, in fact, was one of Congress's central purposes. *Antiterrorism Act of 1991: Hearing on H.R. 2222 Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary* 102nd Cong. 13 (1992) (statement by Rep. Edward F. Feighan) (noting the legislation's "deterrent effect in putting terrorists' assets at risk and deterring them from using the U.S. financial system to hide and augment their wealth").

Testimony at congressional hearings, from across the U.S. government, emphasized the ATA's broad scope and importance to counterterrorism efforts. For instance, when the bill that would become the ATA was introduced, Joseph A. Morris, a former Department of Justice attorney and General Counsel of the U.S. Information Agency, testified in support of it, remarking that "the bill as drafted is powerfully broad, and its intention . . . is to . . . bring [in] all of the substantive law of the American tort law system."

Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev., 291 F.3d 1000, 1010 (7th Cir. 2002).

Alan Kreczko, then-Deputy Legal Adviser to the U.S. Department of State, testified that the ATA would be a "welcome addition to our arsenal against terrorists," noting that the ATA's civil enforcement provision "may deter terrorist groups from maintaining assets in the United States, from benefitting from investments in the United States, and from soliciting funds from within the United States." 1990 Senate Hearing at 12. Mr. Kreczko noted specifically that "the possibility of civil damages may well serve as an economic disincentive to terrorism." *Id.* at 17.

The Department of Justice agreed that the proposed legislation's "fundamental objectives" were "of great importance to the United States" and that the bill "would bring to bear a significant new weapon against terrorists by providing a means of civil redress for those who have been harmed by terrorist acts." *Id.* at 25 (statement of Steven Valentine, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice). The Justice Department also professed its "support" for the ATA's "new civil remedy against terrorists" because of, among other things, its "deterrent effect on the commission of acts of international terrorism against Americans." *Id.* at 34.

2. *JASTA*

In 2016, Congress enacted JASTA to strengthen and broaden the ATA by establishing secondary liability for anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act

of international terrorism." 18 U.S.C. § 2333(d)(2). As Senator John Cornyn—the bill's co-sponsor—made clear, Congress enacted JASTA to "help[] fulfill the promise of the original [ATA], which was intended to 'interrupt, or at least imperil, the flow of money' to terrorist groups." 162 Cong. Rec. 6,093 (2016); *see also* 160 Cong. Rec. 17,707 (2014) (statement of Sen. Schumer) (noting that terrorists "need a great deal of money and material support to carry out attacks such as what occurred on 9/11"). And Representative Carolyn B. Maloney, in supporting JASTA, stated that "[t]he bill is needed" for two primary reasons: first "to make it possible for the survivors and for the families of the victims of savage acts of international terrorism to seek a measure of justice through the civil courts," and, second, "because both Congress and the executive branch have affirmed that civil litigation against terror sponsors . . . can have an important deterrent effect." 162 Cong. Rec. 13,915 (2016).

Congress made this intended deterrent effect plain within JASTA itself:

> Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, *and should reasonably anticipate being brought to court in the United States to answer for such activities.*

JASTA § 2(a)(6) (emphasis added). And JASTA's stated "purpose" confirmed that the statute's purpose was "to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief . . . ." JASTA § 2(b) ("Purpose").

The robustness of the ATA and JASTA's civil provisions are all the more important given the paucity of criminal prosecutions against corporate malfeasors under the criminal statutes. For example, when the Department of Justice announced its recent plea agreement with Lafarge S.A. for knowingly (and criminally) providing material support to ISIS, its press release noted that it was the Department's "[f]irst [c]orporate [m]aterial [s]upport for [t]errorism [p]rosecution." *Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations*, U.S. Dep't of Just. (Oct. 18, 2022), https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations.

II. The Second Circuit's Ruling Jeopardizes U.S. National Security and Encourages Gamesmanship by Providing Terrorists and Their Supporters with a Roadmap to Evade the Jurisdiction of U.S. Courts.

The Second Circuit's ruling allows foreign sovereigns—either alone or in collusion with the terrorists and terrorist financiers they seek to protect—to thwart the ATA and JASTA by nationalizing (even temporarily) the entities after they are sued in U.S. federal courts. In effect, the ruling incentivizes foreign sovereigns to immunize malicious private actors,

thereby weakening the national-security policies reflected in those laws and empowering the terrorist networks that Congress sought to disrupt.

Bad-actor foreign sovereigns have little reason not to follow the Second Circuit's roadmap to manufacturing immunity in this way, particularly given that (depending on the foreign states' laws) the foreign sovereigns could re-privatize the entities once the lawsuits against them are dismissed. Indeed, foreign states supporting or tolerating aiders and abettors of terrorism, without legal and economic norms to restrain such conduct, would be incentivized to do just that. The effect of the Second Circuit's ruling, therefore, will be wide ranging: it will eliminate victims' ability to seek compensation for the murder and maiming inflicted by terrorist organizations and their sponsors, and encourage terrorist networks to continue their activities unabated in derogation of U.S. national security interests.

The Second Circuit acknowledged that "allowing post-filing changes in sovereign status" is a "real concern[,]" but it brushed the concern away simply because, in this case, the United States' designation of JTB as an SDGT—rather than a decision by Lebanon itself—drove the bank into liquidation and public receivership. *Bartlett*, 81 F.4th at 36–37. This attempted minimization is wrong, for multiple reasons.

First, regardless of whether gamesmanship occurred in this case (a very real possibility given that the parties involved were a designated terrorist and a central bank whose chairman at the time has also now been designated by the U.S. Treasury Department for

corruption),[3] the Second Circuit's ruling is unmistakably broad: the court held that "immunity under the [FSIA] may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed." *Id.* at 30. This rule creates clear incentives for bad-actor foreign sovereigns to manufacture immunity through nationalization whenever important or politically protected corporations are sued.

As just one example of the harm likely to flow from the decision below, on September 7, 2017, the New York State Department of Financial Services ("NYSDFS") entered into a Consent Order with Pakistani Habib Bank Limited ("Habib Bank") stemming from, among other things, NYSDFS's findings that Habib Bank, through its New York branch, facilitated billions of dollars in transactions with a Saudi private bank linked to al Qaida and improperly permitted transactions by an identified terrorist, an intentional arms dealer, an Iranian oil tanker, and other potentially sanctioned persons and entities. Consent Order Under New York Banking Law §§ 39, 44, and 605 at 1–2 & ¶ 1, *In re Habib Bank Limited & Habib Bank Limited, New York Branch* (Sept. 7, 2017), https://www.dfs.ny.gov/system/files/documents/2020/03/ea170907_habib.pdf. As part of the consent order, Habib Bank agreed to pay a civil mon-

[3] The Second Circuit's opinion noted the possibility of an exception where the potential for manipulation is present. This exception may apply in the rare case in which a plaintiff could establish the foreign government acquired a majority interest in a corporation for the purpose of thwarting U.S. jurisdiction. In the vast majority of cases, however, this standard would be difficult or impossible to meet.

etary penalty in the amount of $225,000,000, in addition to admitting that it conducted its banking business in an unsafe and unsound manner and failed to maintain an effective and compliant anti-money laundering program and OFAC compliance program, true and accurate books, accounts, and records reflecting all transactions and actions. *Id.* ¶¶ 37–39. Habib Bank, Pakistan's largest bank, was majority owned by the government of Pakistan until 2004, but, as of the date of the consent order, the Pakistani government had no ownership interest in the Bank. *Id.* ¶ 1.

With the Second Circuit's decision, bad-actor entities like Habib Bank now will be incentivized to seek government majority ownership (for the first time or anew) after being named as ATA or JASTA defendants by U.S. nationals—or even, perhaps, in an effort to evade the consent order entered into with NYSDFS—as Pakistan acquiring majority ownership would insulate them from civil liability. The prospect of retroactive immunity may also embolden bad actors to continue financing terrorism because, should they be sued, their sovereign patron could simply bring them under the protective umbrella of FSIA immunity. These dangers are particularly acute with respect to an entity like Habib Bank, which is currently facing JASTA secondary liability claims in an action pending in the U.S. District Court for the Southern District of New York—an action that has already survived a motion to dismiss. *See King v. Habib Bank Ltd.*, No. 20 CIV. 4322 (LGS), 2022 WL

4537849, at *1 (S.D.N.Y. Sept. 28, 2022), *reconsideration denied*, 2023 WL 8355359 (S.D.N.Y. Dec. 1, 2023).[4]

Similarly illustrating these dangers is a pending lawsuit against MTN Group Ltd. (one of the largest mobile network operators in the world), in which it faces JASTA secondary-liability claims in an action in the U.S. District Court for the Eastern District of New York stemming from allegations that MTN aided and abetted terror attacks in Iraq and Afghanistan committed by known proxies of the Islamic Revolutionary Guard Corps ("IRGC") by providing "funding, embargoed American technologies, and logistical support to the terrorist proxies supported by and aligned with the IRGC." *Zobay v. MTN Grp. Ltd.*, No. 21-CV-3503 (CBA), 2023 WL 6304961, at *1 (E.D.N.Y. Sept. 28, 2023) (denying motion to dismiss as to MTN Group, Ltd.). The Second Circuit's decision now gives these companies and their respective sovereigns an

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[4] As the district court recounted in *King*:

> [Habib Bank] has provided banking services for decades to notorious terrorists, fronts and fundraisers with direct connections to al-Qaeda, including Osama bin Laden; Jalaluddin Haqqani, founder of the Haqqani Network; Hafiz Muhammad Saeed and Zafar Iqbal, founders of LeT; Al Rashid Trust, an al-Qaeda front; Al-Rehmat Trust, a JeM front; Dawood Ibrahim, founder of the al-Qaeda-linked terrorist and criminal group D-Company; and Pakistan's Inter-Services Intelligence. One of Defendant's largest U.S. dollar clearing accounts was held by Al Rajhi Bank . . . , which the U.S. government and the media have linked to funding of al-Qaeda.

2022 WL 4537849, at *1.

easy escape hatch from accountability, neutering the ATA and JASTA.

The risks flowing from the Second Circuit's broad ruling are far from theoretical, particularly given the proclivity of foreign sovereigns to seek to protect domestic entities through the assertion of sovereign immunity. For example, this year, the Turkish bank Halkbank—supported by Azerbaijan, Pakistan, and Qatar as amici—argued to this Court that it was immune from U.S. prosecution (premised on its money laundering and terrorism sanctions evasion on behalf of IRGC) because it was owned by the Turkish state. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 268–70 (2023). The argument, although made in the criminal context and ultimately rejected by this Court, *id.* at 272, evidences foreign states' real willingness to use the FSIA to attempt to insulate bad-actor domestic corporations from accountability in U.S. courts.

Foreign sovereigns' appetite for seizing property in furtherance of nefarious economic or other gains is also evidenced by the prevalence of actual or threatened expropriation. *E.g.*, Ananya Bhattacharya, *Russia's seizure of two foreign firms' assets is a warning shot to the West*, Yahoo Finance (Apr. 26, 2023), https://finance.yahoo.com/news/russias-seizure-two-foreign-firms-142200684.html; Nathan Bomey, *American companies at risk of asset seizure in Russia as war drag on*, Axios (Mar. 11, 2022), https://www.axios.com/2022/03/11/russia-ukraine-war-business-nationalization; Zachary Halaschak, *Top Russian official proposes nationalization of foreign-owned factories*, Washington Examiner (Mar. 8, 2022) (discussing threatened seizure of assets),

https://www.washingtonexaminer.com/policy/economy/top-russian-official-proposes-nationalization-of-foreign-owned-factories. The Second Circuit failed to grapple with this reality or the message that its ruling sends to foreign sovereigns looking to exploit the financial system in ways injurious to U.S. national security interests.

Second, the Second Circuit's ruling—even if limited to situations in which the U.S. government's SDGT designation is the initial event in a chain leading to nationalization—would have perverse effects on U.S. national security. In this case, for instance, the bank's liquidation under Lebanese law prioritizes depositors, which, according to the U.S. Treasury Department, include senior Hezbollah officials and entities. *See Motion for Substitution of Party, To Intervene, and to Dismiss Based on Subject Matter Jurisdiction and International Comity* at 38 , *Bartlett v. Societe Generale de Banque au Liban SAL,* 2020 WL 11564735 (E.D.N.Y. Dec. 30, 2020), ECF No. 182; Pet'r App. 68a–69a (U.S. Dep't of the Treasury Press Release describing Hezbollah accounts at JTB).) Under the Second Circuit's ruling, therefore, the bank's post-filing liquidation not only manufactures immunity, but also ensures that Hezbollah will continue to have use of its assets in the liquidated bank.

Moreover, if the Second Circuit's ruling stands, the United States' post-filing designation of a private entity as an SDGT could automatically lead to immunity under the home country's liquidation and receivership procedures. Such designation would perversely reward the SDGT, its backers, and its depositors for being designated a terrorist financier. This would create a disincentive for the United States to

designate as SDGTs terrorist financiers subject to a pending lawsuit so as not to trigger unwanted sovereign immunity and thereby defeat the plaintiffs' claims.

As just one more example, the United States recently sanctioned several Turkish entities and individuals in its efforts to curb funding for Hamas following the terrorist organization's October 7, 2023 massacre of Israeli civilians. Daphne Psaledakis, *US adds sanctions on Hamas, Iran's Revolutionary Guard members*, Reuters (Oct. 27, 2023, 1:53 PM), https://www.reuters.com/world/us-puts-new-sanctions-hamas-members-irans-revolutionary-guard-2023-10-27/. And the U.S. Treasury's Under Secretary for Terrorism and Financial Intelligence recently visited Turkey and expressed his deep concerns about Hamas and Russia raising funds through Turkish entities. Ian Talley & Jared Malsin, *U.S. Leans on Turkey to Stop Supporting Hamas and Russia*, Wall Street Journal (Nov. 30, 2023, 8:43 AM), https://www.wsj.com/finance/u-s-leans-on-turkey-to-stop-supporting-hamas-and-russia-de61f6ce; Jonathan Spicer, *U.S. presses sceptical Turkey to curb Hamas fundraising*, Reuters (Nov. 30, 2023, 11:11 AM), https://www.reuters.com/world/us-presses-sceptical-turkey-curb-hamas-fund-raising-2023-11-30/. While nationalization based alone on these warnings may be too costly, once a suit is filed against the Turkish government's preferred banks or commercial entities—perhaps by American victims of Hamas's massacre—little, if anything, would restrain it from immunizing them by following the Second Circuit's roadmap.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant plaintiffs' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX: LIST OF AMICI CURIAE

Simone Ledeen

Simone Ledeen is the former Deputy Assistant Secretary of Defense for the Middle East and previously served as the Principal Director to the Deputy Assistant Secretary of Defense for Special Operations and Combating Terrorism. From 2011 to 2012, she served as Senior Intelligence Advisor at the U.S. Department of the Treasury, detailed to the Office of the Director of National Intelligence. From 2009 to 2010, Ms. Ledeen was the Senior Treasury Department Representative to International Security Assistance Force/U.S. Forces, Afghanistan, and previously served from 2006 to 2009 as the Assistant Secretary of Defense's lead foreign analyst and advisor on political, military, and economic aspects of United States defense policy with respect to combating terrorist, insurgent, and illicit finance networks.

Michael Pregent

Michael Pregent is a former U.S. intelligence officer with over 28 years of experience working on security, terrorism, counterinsurgency, and policy issues in the Middle East, North Africa, and Southwest Asia. Mr. Pregent served as an advisor to then-Iraqi Prime Minister Nouri al-Maliki's Office of the Commander in Chief where he worked to prevent Iranian-backed terrorist groups from subverting Iraq's security and political process. From 2007 to 2011, he served as a civilian subject matter expert working for the DIA as a political and military advisor to U.S. Forces in Iraq,

focusing on reconciliation and countering malign Iranian influence in Iraq. Mr. Pregent also previously served as a U.S. liaison officer in Egypt during the 2000 outbreak of the Second Intifada and as a counterinsurgency intelligence officer at CENTCOM in 2001. He is now a senior fellow at Hudson Institute and a visiting fellow at the Institute for National Strategic Studies at the National Defense University.

Joel D. Rayburn

Joel D. Rayburn is the former Deputy Assistant Secretary of State for Levant Affairs and served as the U.S. special envoy for Syria from 2018 to 2021. Before joining the State Department, Mr. Rayburn served for 26 years as a U.S. Army officer, concentrating in strategic intelligence, and he also served as senior director for Iran, Iraq, Syria, and Lebanon on the NSC staff. From 2007 to 2011, he served as a strategic intelligence advisor to General David H. Petraeus in Iraq, at CENTCOM, and in Afghanistan.

Norman T. Roule

Norman T. Roule served for 34 years in the Central Intelligence Agency, managing significant programs relating to the Middle East. Mr. Roule's service in the CIA's Directorate of Operations included roles as Division Chief, Deputy Division Chief and Chief of Station. He has held multiple senior assignments in Washington as well as during more than 15 years of overseas work. He served as the National Intelligence Manager for Iran (NIM-I) at the Office of the Director of National Intelligence from November 2008 until

September 2017. As NIM-I, he was the principal Intelligence Community official responsible for overseeing national intelligence policy and activities related to Iran and Iran-related issues, to include Intelligence Community engagement on these topics with senior policymakers in the National Security Council, the Department of State and Congress.

Dr. Jonathan Schanzer

Jonathan Schanzer previously worked as a terrorism finance analyst at the U.S. Department of the Treasury, where he played an integral role in the designation of numerous terrorist financiers. He is currently the Senior Vice President for Research at the Foundation for Defense of Democracies ("FDD"), a Washington, DC-based nonpartisan, nonprofit research institute focusing on national security and foreign policy. Dr. Schanzer also serves on the leadership team of FDD's Center on Economic and Financial Power.

Ambassador Mark Wallace

Ambassador Mark Wallace served in several leadership positions in the Executive Branch, including as the U.S. Ambassador to the United Nations for Management and Reform. Mr. Wallace is currently the CEO of United Against Nuclear Iran, a bipartisan, nonprofit advocacy group that seeks to prevent Iran from obtaining nuclear weapons, and is the CEO of the Counter Extremism Project, a nonprofit, nonpartisan international policy organization combating extremism by, among other things, encouraging pressure against financial and material support networks.

Ambassador Lee Wolosky

Mr. Wolosky served under four U.S. presidents in national security and legal positions, most recently as Special Counsel to President Biden. He previously served as director of Transnational Threats on the National Security Council at the White House under Presidents Clinton and George W. Bush. In that capacity, Mr. Wolosky had specific responsibility for coordinating U.S. policy regarding the impact of illicit finance on national security. Under President Obama, he served as chief diplomat responsible for efforts to close the Guantanamo Bay detention camp, with the personal rank of Ambassador.

Rob Zachariasiewicz

Rob Zachariasiewicz spent 22 years with the Drug Enforcement Administration (DEA), including serving as the Deputy Chief of the Office of Financial Investigations where he was responsible for planning and overseeing global anti-money-laundering programs and threat finance investigations. His work involved close cooperation with the U.S. Department of the Treasury regarding money laundering investigations and financial sanctions imposed on foreign nationals and entities connected to transnational criminal and terrorist organizations. He also spearheaded DEA's efforts to target money laundering networks affiliated with hostile states and organizations posing a threat to U.S. national security. Mr. Zachariasiewicz spent most of his DEA career in the Special Operations Division ("SOD"), where he helped to identify, investigate, and bring to justice some of the world's most powerful and elusive drug kingpins, narco-terrorists, arms traffickers, and corrupt foreign government officials.