

No. 21-381

IN THE
Supreme Court of the United States

—————
TZVI WEISS, ET AL.,
Petitioners,

v.

NATIONAL WESTMINSTER BANK PLC,
Respondent.

—————
**On Petition for 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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Interests of Amici Curiae¹

Amici curiae are former national security officials with experience in various aspects of counterterrorism. Amici have expertise in the mechanisms of terror financing, combating terror financing, and the misuse of financial systems.

Amici believe that disrupting the funding of terrorist organizations is critical to fighting global terrorism. Consistent with that goal, Congress passed the Anti-Terrorism Act (“ATA”) and the subsequent Justice Against Sponsors of Terrorism Act (“JASTA”).

Amici believe that the Second Circuit’s decision provides terrorist organizations with a template to evade the reach of the ATA. In submitting this brief, Amici respectfully urge this Court to grant review of this case and, ultimately, to reverse the decision below.

¹ Parties were notified of amici’s intention to file at least 10 days before the filing of this brief, and all consented. 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 curiae or their counsel, contributed money to fund preparing or submitting the brief.

List of Amici Curiae

Dr. David Asher

In 2014, Dr. David Asher led the Department of State's efforts to develop the economic Warfare Campaign Strategy against the Islamic State on behalf of the U.S. government and its coalition partners under the Presidential Special Envoy, General John Allen. This interagency and international campaign played a significant role in the destruction of the Islamic State's finances and economic support base. From 2008 to 2010, Dr. Asher advised the leadership of U.S. Central Command ("CENTCOM") on economic pressure strategy regarding Iran and Hezbollah, as well as on counterproliferation and counterterrorism operations. From 2010 to 2014, he served as a senior advisor to the U.S. Special Operations Command for counter threat finance and counter counterterrorism operations.

Richard A. Clarke

Richard A. Clarke served three Presidents as a senior White House Advisor. Over the course of 11 consecutive years of White House service, he held the titles of Special Assistant to the President for Global Affairs, National Coordinator for Security and Counterterrorism, and Special Advisor to the President for Cyber Security. Prior to his White House years, Mr. Clarke served for 19 years in the Pentagon, the Intelligence Community, and State Department. During the Reagan Administration, he was Deputy

Assistant Secretary of State for Intelligence. During the George H.W. Bush Administration, he was Assistant Secretary of State for Political-Military Affairs and coordinated diplomatic efforts to support the 1990-1991 Gulf War and the subsequent security arrangements.

Richard Francey

Colonel Richard Francey (Retired) served for more than 31 years in the U.S. Army. In particular, Colonel Francey commanded a combat brigade which deployed to Iraq from May 2008 to August 2009. That mission set was “full spectrum,” including working toward economic development, local governance, and counter-terrorism operations, including the disruption of terrorist financing networks. The battlespace included the largest port of entry between Iran and Iraq and required not only confrontation with Iranian-directed terrorist groups but also countering the social and civil infrastructure developed by those groups.

E. Patrick Gilman

Lieutenant Colonel Gilman (Retired) served as a Judge Advocate in the U.S. Army, primarily focused on combating terrorism and disrupting terrorist networks. He served in Iraq in 2006, 2008, and 2009, with day-to-day responsibility for helping develop Iraq’s security and rule-of-law infrastructure to combat malign Iranian and Iranian-sponsored terrorist influence. In 2018 and 2019, Mr. Gilman was

the primary legal advisor to the U.S. Army's Terrorism Criminal Investigation Unit where he led a legal team responsible for advising law enforcement agents and analysts within the Departments of Defense, State, and Justice, and the Intelligence community on U.S. and international law — including cyber intelligence, disruption of terrorist financing networks, investigations of financial crimes, and prosecution of international terrorists.

Robert Greenway

Robert Greenway was the former Deputy Assistant to the President and Senior Director of the National Security Council's ("NSC") Middle Eastern and North African Affairs Directorate. He was a principal architect of the historic Abraham Accords between the State of Israel and several Arab states. Before being assigned to the NSC, he served at the Defense Intelligence Agency ("DIA") as a Senior Intelligence Officer in CENTCOM. While assigned to CENTCOM he deployed twice to Afghanistan as the Senior Intelligence Analyst for the Commander, Special Operations Joint Task Force, from 2013-2014, and as Senior Intelligence Advisor for the Commander, International Security Assistance Forces, in 2011. Mr. Greenway retired from active duty prior to joining the DIA having commanded Special Forces units at every level from Team through Battalion. In October 2001, he deployed in support of Operation Relentless Pursuit and Enduring Freedom I while assigned to a Special Mission Unit immediately following the attacks of September 11, 2001.

Avi Jorisch

Avi Jorisch previously served in the U.S. Departments of Defense and Treasury, including in the Treasury Department's Office of Terrorism and Financial Intelligence. He is a Senior Fellow in Middle East Studies at the American Foreign Policy Council, a nonpartisan, nonprofit organization dedicated to informing United States foreign policy.

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 2011-2012, 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 2009-2010, 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, counter-insurgency, 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 counter-insurgency 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.

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.

William F. Wechsler

William Wechsler previously served as Special Advisor to the Secretary of the Treasury, where he helped establish the Department's legal regime and policies used to impose foreign sanctions and combat money laundering, and as Director for Transnational Threats on the staff of the NSC, where he chaired the first working group dedicated to disrupting the financial network of Osama bin Laden. More recently, Mr. Wechsler served as Deputy Assistant Secretary of Defense for Counternarcotics and Global Threats, where he led the effort to institutionalize the U.S. military's counter threat finance activities, and Deputy Assistant Secretary of Defense for Special Operations and Combatting Terrorism, where he was the department's lead official for interagency policymaking against terrorist adversaries. He is currently the senior director of the Rafik Hariri Center and Middle East Programs at the Atlantic Council and President of the Center on Illicit Networks and Transnational Organized Crime.

Jonathan Winer

Jonathan Winer served in positions in Congress and in the U.S. government at the intersection of financial services, foreign relations, and law enforcement, including as Deputy Assistant Secretary of State for International Law Enforcement. In that capacity, Mr. Winer served as the senior State Department official with day-to-day responsibility for formulating and

overseeing programs to combat money laundering, trafficking, and other cross-border crime.

Thomas Warrick

Thomas Warrick served as Deputy Assistant Secretary for Counterterrorism Policy at the Department of Homeland Security in 2008 and was named Deputy Counterterrorism Coordinator for Policy by the DHS Counterterrorism Coordinator and Under Secretary for Intelligence & Analysis in 2015.

Argument²

I. The ATA and JASTA Are Powerful Tools for Achieving the U.S. Government's Goal of Fighting Terrorism by Eliminating Terror Financing.

A. Congress Enacted the ATA to Cut Off Funding for Foreign Terrorist Organizations.

In 1992, Congress enacted the ATA, creating a new federal right of action for any U.S. national “injured in his or her person, property, or business by reason of an act of international terrorism.” 18 U.S.C. § 2333(a). “International terrorism” is defined to include activities that “involve violent acts or acts dangerous to human life” occurring overseas that violate U.S. criminal laws (or would violate such laws if committed in the U.S.) and are performed to intimidate or coerce populations or public policy. § 2331(1). Plaintiffs in an ATA case may pursue relief in a U.S. district court and, if liability is established, collect treble damages, plus attorney’s fees. § 2333(a).

As part of the ATA, Congress legislated accountability for corporations as well as individuals that fund terror. *See* § 2333(d)(1) (establishing liability for “any person who . . . knowingly provid[es] substantial assistance to . . . an act of international terrorism”), citing 1 U.S.C. § 1 (defining “person” to

² This brief applies equally to another petition before the Court: *Strass v. Credit Lyonnais, S.A.*, No. 21-382.

include, inter alia, “corporations, companies, associations, [and] firms”).

The ATA authorizes actions by U.S. nationals injured by acts of “international terrorism.” *See* 18 U.S.C. § 2333(a). Those legal actions impose liability on financial enablers of terrorism “where it hurts them the most: at their lifeline, their funds.” 136 Cong. Rec. S14279-01 (daily ed. Oct. 1, 1990); 137 Cong. Rec. S4511-04 (daily ed. Apr. 16, 1991) (remarks of Sen. Grassley).

In a Senate hearing on the bill, S.2465, witnesses repeatedly testified that § 2333(a) was an important mechanism for deterring terrorists and disrupting their financial foundations. For instance, the Justice Department representative testified:

The department strongly supports the fundamental objectives of Senate bill 2465. They are of great importance to the United States. The enactment of Senate bill 2465 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 Senate bill 2465 would supplement our criminal law enforcement efforts by creating [such a remedy].

Antiterrorism Act of 1990: Hearing Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 101st Cong., 2d Sess. at 25 (July 25, 1990) (“1990 Hearing”).

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.” *Id.* at 12. He explained that the civil enforcement avenue the law provided “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.” *Id.*

At the same hearing, Daniel Pipes, then-Director of the Foreign Policy Research Institute, added: “it 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.

Congress then sought to expand on the ATA’s deterrence against financial enablers of terrorism by passing the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which expressly provided that the funding of terrorism violates international law. *See* AEDPA, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996). Congress also found that deterring the funding of terrorism fulfilled the United States’ international obligations.

AEDPA added penalties for financial institutions that provide “material support or resources” to foreign terrorist organizations (“FTOs”), which was defined to include “financial services,” wherever a defendant acted knowingly. *See* 18 U.S.C. §§ 2339A, 2339B. *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) (“Congress chose knowledge about the organization’s connection to terrorism, not specific intent to further its terrorist activities, as the necessary mental state for a violation.”).

Because Hamas is infamous for its violent activities and stated intentions, knowingly providing

Hamas with material support, particularly access to fungible funds, can never be benign. “The mental element required to fix liability on a donor to Hamas is therefore present if the donor knows the character of that organization.” *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 695 (7th Cir. 2008) (en banc).

B. The ATA and JASTA are Intended Not Only to Compensate Victims, but also to Incentivize Private Actors to Disrupt Terrorist Financial Networks.

By providing terror victims treble damages and even attorney’s fees, *see* 18 U.S.C. § 2333, the ATA incentivizes so-called “private attorney general suits,” which are a vital part of the U.S.’s overall counterterrorism approach.

As Professor Robert M. Chesney—a scholar and expert on terrorism-related laws—explained in a declaration for the plaintiffs-appellees before the district court, the ATA “is not merely a private law mechanism to facilitate victim compensation.” *Weiss v. National Westminster Bank, PLC*, No. 05-cv-4622 (DLI) (RML), ECF No. 84-2 at 2 (E.D.N.Y. filed Dec. 18, 2006). His research of the statute and its context demonstrated that the ATA “was intended to enroll private entities or individuals as ‘private attorneys general’ whose resources could be brought to bear in support of the government’s general goal of suppressing terrorism and particular goal of disrupting the financial-support framework for terrorists.” *Id.* *See also* Brief for Eight U.S. Senators as Amici Curiae Supporting Plaintiffs-Appellants at 1,

Freeman v. HSBC Holdings, No. 19-3970, ECF No. 87 (2d Cir. Mar. 18, 2020) (calling these provisions “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”).

In 2016, Congress enacted JASTA to strengthen and broaden the ATA. JASTA established claims against 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). Congress expressly stated: “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).

JASTA sponsor Senator Cornyn opined that JASTA was intended to “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. S2846 (daily ed. May 17, 2016). Representative Maloney enumerated two reasons to support JASTA: it allows families of terror victims to seek justice through the courts and civil litigation against terror sponsors has a proven deterrent effect. 162 Cong. Rec. H6029 (daily ed. Sept. 28, 2016).

Through JASTA, Congress clearly intended to fortify and expand the reach of the ATA. And together, these statutes show the U.S.'s commitment to disrupting terror financing by empowering victims and their families.

C. The ATA and JASTA Should Be Interpreted Broadly to Give Effect to Their Purpose.

Congress intended the ATA and JASTA to be broad avenues for accountability, and courts should interpret them accordingly. In fact, Congress's express purpose for JASTA was "to provide civil litigants with the *broadest* possible basis, consistent with the Constitution of the United States, to seek relief." *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 855 (2d Cir. 2021) (citing JASTA, Pub. L. No. 114-222, § 2(b), 130 Stat. at 853 ("Purpose") (emphasis added)); *see also, id.* at 855 ("LCB disregards Congress's instruction that JASTA is to be read broadly and to reach persons who aid and abet international terrorism 'directly or indirectly.'").

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) (referring to Morris's testimony during the 1990 hearing at 136). Taken with the legislative history and

context of these statutes, no reasonable doubt remains about whether they should be applied broadly to effect their purpose.

The ATA and JASTA would be rendered impotent if the Second Circuit's holding were affirmed. "The statute would have little effect if liability were limited to the persons who pull the trigger or plant the bomb because such persons are unlikely to have assets, much less assets in the United States, and would not be deterred by the statute." *Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief & Dev.*, 291 F.3d at 1021. And "the United States has an obvious interest in the proper application of this statute." Brief for the United States as Amicus Curiae Supporting Affirmance at *2-3, *Boim v. Quranic Literacy Inst.*, Nos. 01-1969, 01-1970, 2001 WL 34108081 (7th Cir. Nov. 14, 2001). As former national security officials, Amici also have a vested interest in the correct interpretation of these laws and the deterrent effect they are intended to provide.

II. Violent Terrorist Groups Like Hamas Thrive by Raising Money Through Ostensible "Charity" Organizations Like Interpal.

A. Both Hamas and Interpal Are Officially Designated Terrorist Groups.

Hamas originated in the late 1980s as a Palestinian offshoot of the Muslim Brotherhood and has controlled the Gaza Strip since 2007. In 1988, Hamas published its charter, calling for the destruction of the State of Israel and the establishment of an "Islamic society" in historic

Palestine. See Hamas Covenant 1988, https://avalon.law.yale.edu/20th_century/hamas.asp. The group has conducted countless terrorist attacks targeting civilians that have killed or injured hundreds of U.S. citizens, via suicide bombings, shootings, stabbings, and rocket launches. See *Hamas: The Palestinian militant group that rules Gaza*, BBC WORLD NEWS (July 1, 2021), <https://www.bbc.com/news/world-middle-east-13331522> (last accessed Oct. 1, 2021); *Hamas*, ENCYCLOPEDIA BRITANNICA (May 13, 2021), <https://www.britannica.com/topic/Hamas> (last accessed Oct. 1, 2021).

In 1997, the U.S. designated Hamas as an FTO. The Department of Justice described Hamas's structure: "While Hamas thus engages in many different activities, it is one organization. The social and charitable elements of Hamas are inexorably intertwined with the terrorist elements in the organization's overall mission. For example, Hamas' charitable network helps it maintain popular support, to compete with the Palestinian Authority, and to recruit activists, including individuals for its deadly terrorist attacks." *Holy Land Found. for Relief and Development v. John D. Ashcroft*, No. 02-5307, 2003 WL 25586055, at 6 (D.C. Cir. Jan. 24, 2003) (Final Brief for the Appellees).

Interpal is nominally a charitable organization operating out of the U.K. However, Interpal has been closely linked to Hamas since the 1990s and has been used by Hamas to raise funds and disguise the flow of money from other organizations. In 2003, the U.S. government designated Interpal as a Specially Designated Global Terrorist ("SDGT") because of its close ties to Hamas. See *U.S. Designates Five*

Charities Funding HAMAS and Six Senior HAMAS Leaders as Terrorist Entities, DEP'T OF THE TREASURY, JS-672 (Aug. 22, 2003), <https://www.treasury.gov/press-center/press-releases/pages/js672.aspx>. In that designation, the U.S. government described Hamas's relationships with its charitable apparatuses as follows:

HAMAS raises tens of millions of dollars per year throughout the world using charitable fundraising as cover. While HAMAS may provide money for legitimate charitable work, this work is a primary recruiting tool for the organization's militant causes. HAMAS relies on donations from Palestinian expatriates around the world and private benefactors located in moderate Arab states, Western Europe and North America. HAMAS uses a web of charities to facilitate funding and to funnel money. Charitable donations to non-governmental organizations are commingled, moved between charities in ways that hide the money trail, and then often diverted or siphoned to support terrorism.

Id. See also *Holy Land Found.*, 2003 WL 25586055, at 6 (“The overseas funds flowing into Hamas’ social and charitable infrastructure free other resources for use in terrorist operations.”).

Hamas continues to operate in the Middle East and has perpetrated countless terrorist attacks since its designation as an FTO in 1997. Zachary Laub and Kali Robinson, *What is Hamas?* COUNCIL ON FOREIGN RELATIONS, (Aug. 17, 2021), <https://www.cfr.org/backgrounders/what-hamas> (last accessed Oct. 1,

2021). And unfortunately, Hamas continues to enjoy robust financial support. By 2003, Hamas's annual budget was at least \$50 million. *The Hamas Asset Freeze and Other Government Efforts to Stop Terrorist Financing: Hearing Before the House Committee on Financial Services Subcommittee on Oversight and Investigations*, 108th Cong., 1st Sess. (Sept. 24, 2003) (Testimony of John S. Pistole), <https://archives.fbi.gov/archives/news/testimony/the-terrorist-financing-operations-section> (last accessed Oct. 1, 2021).

B. Hamas Has Long Sought to Access the U.S. Banking System through “Charitable” Organizations that Funnel Money to Hamas’s “Social Wing” in the Palestinian Territories.

Terror networks often use compromised or complicit charities and businesses to support their objectives. For example, some terrorist groups have cultivated charitable front organizations in high-risk jurisdictions or under-developed parts of the world. In failed or failing states, where social welfare infrastructure is limited or non-existent, terrorist organizations like Hamas, Hezbollah, and others use social welfare institutions to fill a genuine need and exploit that need to gain adherents, recruit operatives, and radicalize local populations. Indeed, the Treasury Department has designated dozens of nominal charities for their fundraising activities on behalf of Al Qaeda and 11 Hamas organizations, as well as other terrorist groups. *See* Dep't of the Treasury, *Designated Charities and Potential Fundraising Front Organizations for FTOs*, <https://www.treasury.gov>

/resource-center/terrorist-illicit-finance/Pages/protecting-fto.aspx.

In this context, groups that use terrorism as a primary means to pursue their objectives often use charities affiliated with those groups both as a source of fundraising that may be diverted to fund terrorist attacks and as a means of terrorist recruitment, by providing a veil of legitimacy for terrorism through outwardly social organization.

For example, courts have found that charitable organizations—like the Holy Land Foundation—have contributed to Hamas’s social wing to support families of terrorists and free up financial resources for future attacks. *United States v. El-Mezain*, 664 F.3d 467, 486 (5th Cir. 2011), as revised (Dec. 27, 2011). “The social wing also supports the families of Hamas prisoners and suicide bombers, thereby providing incentives for bombing, and it launders money for all of Hamas’s activities. Therefore, aid to Hamas’s social wing critically assists Hamas’s goals while also freeing resources for Hamas to devote to its military and political activities.” *Id.* In fact, many of the same Hamas entities that received funding from the Holy Land Foundation also received wire transfers facilitated by National Westminster Bank (“NatWest”) in this case.

Indeed, although the Holy Land Foundation was the primary fundraiser for Hamas in the U.S., Hamas was also able to gain access to the U.S. financial system through its fundraising organizations in Europe and around the world because even financial institutions like NatWest, permitted Hamas’s fundraiser, Interpal, to maintain U.S. dollar accounts

and clear those dollars through correspondent banks in New York.

C. Money Donated to an SDGT, Even a Component of an FTO's "Social Wing," Necessarily Aids the Terrorist Organization's Violent Activities.

When enacted in 1994, 18 U.S.C. § 2339A made it unlawful to provide “material support or resources knowing or intending that they are to be used” in preparing or carrying out certain specified terrorism-related crimes. This was, in effect, Congress’s first attempt to criminalize aiding and abetting in the terrorism context. Notably, the statute’s original definition of “material support” expressly excluded “humanitarian assistance to persons not directly involved in such violations.” § 2339A(a) (1994 ed.).

Two years later, Congress expanded that criminal liability dramatically in the AEDPA. The AEDPA removed the “humanitarian assistance” exception, leaving a far narrower exception for “medicine” and “religious materials” (each very strictly construed, *see* H.R. Rep. 104-383 at *82). As this Court observed, the change “demonstrated that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.” *Holder*, 561 U.S. at 29.

Congress was explicit that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” AEDPA, Pub. L. No. 104-132, § 301(a)(7) (18 U.S.C. § 2339B (note)). Accordingly, any support “helps defray the costs to the

terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.” H.R. Rep. 104-383 at 81 (1995). The Executive branch “support[ed] Congress’s finding,” explaining in an affidavit:

Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions - regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.

Holder, 561 U.S. at 33 (internal quotation marks and citation omitted).

Thus, any financial support of an FTO, even if for allegedly charitable purposes or with altruistic intent, aids the organization’s terrorist activities. First, as noted above, “charitable” or social welfare activities sponsored by terrorist organizations help them cultivate popular support. Congress and the Executive branch have found that even non-fungible support confined to humanitarian purposes causes harm by increasing the terrorist group’s goodwill, recruiting, and image of legitimacy. *Holder* at 30.

Consistent with these findings, the Fifth Circuit held that: “The social wing is crucial to Hamas’s success because, through its operation of schools, hospitals, and sporting facilities, it helps Hamas win the ‘hearts and minds’ of Palestinians while promoting its anti-Israel agenda and indoctrinating the populace

in its ideology.” *El-Mezain*, 664 F.3d at 486. This is also supported in the record here. *See, e.g.*, Expert Report of Arie D. Spitz: “[Hamas’s social infrastructure’s] contribution to education toward mass murder was of significant importance both in creation of the social environment that supported Hamas’s violent goals, and in expanding the reservoir of recruits for carrying out terrorist attacks against Israel.” JA-354-55.³

Second, any financial support contributes to Hamas’s overall budget, allowing it to spend its other resources on violent activities. DOJ has specifically found that permitting Hamas’s social wing to receive funds frees up money for Hamas terrorist attacks. *See Holy Land Found.*, 2003 WL 25586055.

Thus, material support is harmful regardless of whether the funder or facilitator of the payments intends to support terrorist acts. “Once the support is given, the donor has no control over how it is used.” *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000).

³ Citations to JA-____ are to the joint appendix in the Court of Appeals.

III. JASTA Liability Does Not Require That a Defendant Have Actual Knowledge That the Specific Assistance Provided Will Be Used for Terroristic Purposes.

A. The Second Circuit's Holding Weakens the U.S.'s Ability to Combat Terror Financing.

Here, the Second Circuit has imposed a newly formulated standard for a subset of cases involving the knowing provision of purportedly humanitarian assistance to FTOs. Although it previously found a triable issue as to whether NatWest *knowingly* provided Hamas with over \$10 million in violation of § 2339B, it affirmed dismissal because:

[T]he charities to which NatWest transferred funds as instructed by Interpal performed charitable work and ..., as plaintiffs admitted, Interpal did not indicate to NatWest that the transfers were for any terroristic purpose; and plaintiffs proffered no evidence that the charities funded terrorist attacks or recruited persons to carry out such attacks.

Weiss v. Nat'l Westminster Bank PLC., 993 F.3d 144, 161 (2d Cir. 2021) (“*Weiss II*”).

That is, where there is a triable issue as to whether a bank transferred millions of dollars to entities it *knew* belonged to Hamas's purportedly “charitable wing,” Plaintiffs are nevertheless required to show NatWest received “indications” that the funds transfers were for a “terroristic purpose.” Terrorist

groups generally know better than to provide a “terroristic purpose” on their funds transfer.

In *Kaplan*, the Second Circuit subsequently explained its holding in *this case* as predicated on the fact that “the record was insufficient to show that NatWest had been knowingly providing substantial assistance to the FTO Hamas or that it was generally aware that it was playing a role in Hamas’s acts of terrorism.” *Kaplan*, 999 F.3d at 861. Yet the Circuit had previously found there *was* sufficient evidence for a jury to conclude that NatWest knowingly violated § 2339B, *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 204-05 (2d Cir. 2014) (“*Weiss I*”). *Weiss II* therefore suggests that knowingly providing millions of dollars to Hamas is not sufficient to satisfy *Halberstam*’s general awareness requirement, at least when the funding is received by FTO-controlled entities that “performed charitable work.”

B. The Second Circuit’s Holding Would Provide a Safe Harbor for Aiding and Abetting Terrorist Organizations Through Nominal Charities.

As the Seventh Circuit correctly held, terrorist acts are “foreseeable consequences” of monetary support for an FTO’s charitable wing:

[I]f you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization’s nonterrorist activities does not get you off the liability hook.... The reasons are twofold. The first is the fungibility of money.... Second, Hamas’s

social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for indoctrinating schoolchildren. *Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability.*

Boim, 549 F.3d at 698 (emphasis added).

DOJ's amicus brief in *Boim* agreed in substance, concluding, "civil tort liability can be imposed under Section 2333(a) on a defendant who knowingly provides substantial assistance to an organization engaged in terrorist activities, the operatives of which then carry out a reasonably foreseeable act of international terrorism. Such liability can be imposed on a defendant in appropriate circumstances even if the defendant did not have a specific intent to further terrorist activities or the violent components of a terrorist organization." Brief for the United States as Amicus Curiae, *Boim v. Holy Found. for Relief & Dev.*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, 2008 WL 3993242 (7th Cir. Aug. 21, 2008).

Unfortunately, the Second Circuit's holding appears to suggest that knowingly providing substantial assistance to an FTO does not create a foreseeable risk of terrorism where the assistance is provided to parts of an FTO that "perform charitable work" as long as a defendant is not informed that the assistance is intended for a "terroristic purpose." This safe harbor is found nowhere in the statute's language, and it can only weaken the law's intended deterrent effect by emboldening foreign financial institutions to assist terrorist groups – including those like Interpal who have been designated as SDGTs by the U.S. – as long as their customers and counterparties are not indiscreet enough to "indicate" that funds are earmarked for terrorism.

C. Through NatWest, Hamas Received Millions of Dollars that it Used to Fuel a Deluge of Savage Terrorist Attacks that Killed and Maimed Dozens of American Citizens.

As recently as this May, the world witnessed Hamas's deadly capabilities, including its capacity to launch hundreds of rocket attacks at civilian targets in Israel. But the most recent crisis did not occur in a vacuum. It is only the latest chapter in Hamas's three-decade long campaign to subvert the Palestinian Authority, derail the peace process, and terrorize Israel's population. This case arises from the millions of dollars that Hamas allegedly received from Interpal through NatWest between 2000 and 2004. It is impossible to disconnect that enormous sum from maintenance of Hamas's social and political infrastructure in the Palestinian Territories during

the Second Intifada, when Hamas and other Palestinian terrorist groups were committing near-daily, large-scale terrorist attacks in Israel. As Petitioners' terrorism expert opined:

The overt, social welfare activity of Hamas - a U.S. and European Union designated terrorist organization - provides the grassroots foundation for the movement's political, social, and terrorist activities. Indeed, and as described above, there is ample evidence for the role of Hamas social institutions in the terror activities directed and authorized by Hamas leaders and commanders. These activities amplify, enable, and accelerate Hamas's overall ability to engage in incitement, recruitment, and logistical and operational support for weapons smuggling, reconnaissance, and terror attacks. Hamas's social welfare institutions also provide day jobs for field commanders, shelter fugitive operatives, and create an environment conducive to radicalizing and recruiting a steady stream of new members, operatives and supporters.

JA-332-33. While the record does not suggest that Interpal earmarked those millions of dollars at issue to finance Hamas's budget for terrorist attacks, this Court has long recognized that:

Money is fungible, and when foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put. But there is

reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations. Thus, funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.

Holder, 561 U.S. at 31 (internal citations omitted). Based on amici's professional experience, this analysis is sound. Moreover, terrorist attacks of the kind that injured the petitioners here are a foreseeable consequence of knowingly providing millions of dollars – fungible money – to an FTO like Hamas.

Conclusion

JASTA cannot bring back those who have been killed in Hamas-perpetrated terror attacks. But the law is intended to deter and penalize terror financing of the kind implicated in this case.

For these reasons, Amici respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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