18-1031

United States Court of Appeals

For the Seventh Circuit

RHONDA KEMPER
Plaintiff-Appellant,

v.

DEUTSCHE BANK AG,
Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 3:16-cv-00497-MJR-SCW
Honorable Michael J. Reagan

BRIEF FOR SENATOR RICHARD BLUMENTHAL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Appellate Court No: 18-1031

Short Caption: Kemper v. Deutsche Bank AG

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Attorney's Signature: /s/ Andrea B. Bierstein Date: 3/28/2018

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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INTERESTS OF *AMICUS CURIAE*

This brief is respectfully submitted by Senator Richard Blumenthal (D-CT) as *amicus curiae*. Senator Blumenthal serves on the Armed Services Committee and is the ranking member of the Senate Judiciary Committee Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts. Through his service in the Senate, Senator Blumenthal has become knowledgeable regarding the risks posed by willful evasion of U.S. sanctions against entities linked to terrorism. Willful violations can allow such entities to obtain resources that underwrite attacks on U.S. persons abroad. In gathering this knowledge, Senator Blumenthal has considered the informed perspectives of academic experts, concerned citizens and organizations, and members of the executive branch, including officials from the Office of the President of the United States and the Departments of Justice, State, Defense, Treasury, Commerce, and Homeland Security. Senator Blumenthal regards liability under the Antiterrorism Act (ATA) as a key component in Congress's comprehensive counterterrorism framework.

All parties to this appeal have consented to the filing of this *amicus* brief.

INTRODUCTION

This case arises from money laundering transactions facilitated by the defendant on behalf of Iranian entities designated by the United States government as terrorist organizations. As set forth in the Complaint, the defendant willfully assisted Iranian entities in concealing the true principals in financial transactions that provided funds to designated terrorist entities in violation of U.S. law. Plaintiffs, who were injured in September, 2008 and May, 2009, by acts of terrorism sponsored by the Iranian government, brought claims against defendant under 18 U.S.C. § 2333, which provides a civil cause of action for individuals injured by, *inter alia,* violations of 18 U.S.C. § 2333A,

the statute prohibiting the provision of material support to terrorists and terrorist organizations. The district court dismissed the Complaint, holding that Plaintiffs had not alleged a sufficient connection between the financial transactions the defendant facilitated and the acts of terrorism that caused Plaintiffs' injuries. *Amicus curiae* Senator Richard Blumenthal submits this brief in support of reversal of the district court's order to provide this Court with important context about the statutory framework for designating terrorists and terrorist entities, including Congress's standards regarding intentional misconduct and causation under § 2333.

As explained below, Congress established in § 2333(a) a civil cause of action, defined by standard common law tort principles, under which United States nationals injured by acts of international terrorism can sue those who commit or provide material support for the commission of those acts. Congress's comprehensive counterterrorism framework prioritizes the disruption of financial support to terrorist entities. Congress has legislated to deprive financing to both designated foreign terrorist organizations (DFTOs), such as Hezbollah, *see* International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq*., and to state sponsors of terrorism, such as Iran. *See* Iran Sanctions Act, 50 U.S.C. § 1701 note (2010), amending Iran and Libya Sanctions Act of 1996, Pub. L. 104-172, 110 Stat. 1541 (1996); *see also* Kenneth Katzmann, *The Iran Sanctions Act (ISA)*, Cong. Res'ch Service (Oct. 12, 2007), https://fas.org/sgp/crs/row/RS20871.pdf. Congress passed the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, to impose liability "at *any* point along the causal chain of terrorism" and "interrupt, or least imperil, the flow of money" to terrorist entities. S. Rep. 102-342, 102nd Cong., 2d Sess. at 28 (1992).

In authorizing suits by private parties injured by terrorist acts, Congress contemplated liability that would track the common-sense principles developed in "the

law of torts." *Id*. at 48. Congress's use of tort principles as its polestar has extended from the ATA's enactment to the present day, as the liability provisions in a recent statute demonstrate. *See* Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. 114-222, 114th Cong., 2d Sess., 130 Stat. 582 (2016), § 2(a)(4) (recognizing "substantive causes of action for aiding and abetting and conspiracy liability" under ATA and other provisions dealing with material support of terrorism). Highlighting its reliance on evolving tort principles, Congress expressly noted that a landmark D.C. Circuit case, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), "has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability." *Id*. at § 2(a)(5). Congress stressed the importance of a broad definition of culpable states of mind in imposing civil liability. *Id*. at § 2(a)(6) (providing that "[p]ersons, entities, or countries" that "knowingly or recklessly contribute material support" to terrorist entities should be accountable both criminally and civilly).

Unduly narrow definitions of civil conspiracy and causation would undermine Congress's overall plan. For example, the district court held that § 2333(a) required proof of specific intent by the defendant to support terrorism. That holding frustrated Congress's plan and blinked at the facts in this case.

The defendants' conduct here was both egregious and willful. Defendants have agreed that they stripped financial information from Iranian bank transactions in order to frustrate U.S. sanctions designed to curb Iran's ability to fund terrorist violence. *See* N.Y. State Dep't of Financial Servs., *Consent Order Under New York Banking Law §§ 39 and 44* (2015). This deception occurred over a protracted period, starting in 1999 and continuing in some form even after 2006. *Id*. at 3-6. The deception spread through defendants' business operations and comprised part of its marketing strategy to attract

new business. *Id.* at 7 (noting that bank "relationship managers" wished to expand the manipulation to other countries facing sanctions, including Syria and Burma/Myanmar). Moreover, the defendant's deception involved substantial sums: the total value of the thousands of transactions performed by defendant on behalf of Iran, Libya, Syria, Burma, and Sudan exceeded *$ 10.86 billion, id.* at 2, and the penalty paid to New York regulators alone amounted to $ 200 million. *Id.* at 12. Plaintiffs alleged that Iran and Iranian entities designated by the United States for sanctions used this money or other funds made available by the defendant's alleged misconduct to supply arms to groups in Iraq that targeted United States troops.

Viewed in light of Congress's comprehensive framework, plaintiffs' allegations are sufficient to show that the substantial funds made available to Iran by defendant's financial chicanery played a causal role in those attacks. *See, e.g.*, *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983) (observing that under tort principles, conspirator supplying financial services need not "participate actively" in specific violence that resulted from the conspiracy); *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 695 (7th Cir. 2008) (observing that under tort principles incorporated into ATA, when multiple fires join and destroy a dwelling, evidence that a given party created at least one of the fires provides sufficient proof of causation).

Congress's overall counterterrorism design leaves in place common-sense limits on liability. In each case, a court could find for itself or instruct a jury to determine both the existence of a civil conspiracy and the requisite level of causation by considering factors such as the total amount of money freed up by the defendant's deceptive activities and the time that had elapsed between those deceptive activities and the violence giving rise to the claim. Liability should hinge on proof that the defendant and the terrorist

entity worked together for a substantial period of time, the defendant's acts gave the terrorist entity access to substantial amounts of money, the time period between the defendant's activities and the violence at issue was not unduly attenuated, and the defendant's conduct was willful. *See Halberstam v. Welch*, 705 F.2d 472, 483-84 (D.C. Cir. 1983). These common-sense limits are consistent with Congress's plan, but still ensure accountability for providers of financial support to terrorist entities.

In this context, the statutory framework – in particular, the provisions governing the designations Specially Designated Terrorist ("SDT"), Specially Designated Global Terrorist ("SDGT"), and Specially Designated National ("SDN") – provides important guidance with respect to the connection between financial transactions and acts of terrorism. Although the district court thought that the connection between DB's money laundering for Iranian entities and the acts of terrorism committed by Hezbollah and other Iranian-sponsored groups was too attenuated to support liability, in fact the statutory provisions governing the designation of SDTs, SDGTs, and SDNs show that Congress was well aware of, and recognized, that any funds available to SDTs, SDGTs, and SDNs facilitate terrorism. Because the entities in question had been designated by the U.S. government as terrorist organizations, it was entirely foreseeable that the provision of funds to them would result in terrorist acts. Thus, as explained below, it is these statutory designations that foreseeably connect what otherwise appear to be "mere" money laundering transactions to acts of terrorism perpetrated and/or supported by the SDTs, SDGTs, and SDNs. Moreover, the statutory scheme shows how Congress intended private lawsuits such as this one to be used to choke off the sources of funding to designated entities.

ARGUMENT

I. SECTION 2333 IS AN INTEGRAL PART OF CONGRESS'S COMPREHENSIVE COUNTERTERRORISM FRAMEWORK TARGETING IRAN AND OTHER STATE SPONSORS OF TERRORISM

A. Terrorism-Related Designations Serve the Fundamental Public Policy Goal of Suppressing Terrorism by Disrupting the Financial Foundations upon which Designated Entities Depend

The capacity of the executive branch to "designate" foreign entities and individuals to be either "Specially Designated Terrorists," "Specially Designated Global Terrorists," or "Specially Designated Nationals" plays a crucial role in the government's efforts to suppress terrorism. This authority empowers the executive branch to freeze the assets of designated entities, to embargo them economically, and otherwise to undermine the economic support structure that is the lifeblood of terrorism. Designated entities face a vast range of legal disabilities, and fairly may be said to have been "outlawed" for purposes of U.S. law. In the case of the Specially Designated Global Terrorist list, the President's purpose in crafting the sanctions regime expressly includes the goal of suppressing terrorism financing and, relatedly, to compel domestic and foreign financial institutions to disclose information relating to such activity. In both cases, moreover, the sanctions regime is supported by the force of federal criminal law.

A review of the origins and evolution of the Executive Branch's designation authority serves to place the scope and significance of that power in context, and to illustrate the centrality of the designation process to U.S. counterterrorism policy.

The current legal framework has its roots in legislation enacted by Congress in the midst of World War I: the Trading with the Enemy Act of 1917, or TWEA. *See* Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44). In the 1970s, Congress replaced the relevant provisions of TWEA with a new statute known as the

International Emergency Economic Powers Act ("IEEPA"). *See* 50 U.S.C. § 1701 *et seq*. IEEPA works in the following fashion. First, the President's authority is conditioned upon the formal declaration of a national emergency arising out of "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). Once such a declaration has been issued, IEEPA delegates to the President the authority to impose an array of economic disabilities. 50 U.S.C. § 1702(a). Among other things, IEEPA specifies that the President may prohibit (or otherwise regulate) any transactions or dealings involving the property of foreign states or foreign nationals, subject to certain exceptions. *See* § 1702(a)(1)(B) and (c).[1] IEEPA further specifies that the President may promulgate regulations to carry this authority into effect. *See id.* § 1702(a).

IEEPA authority was used in connection with the problem of international terrorism as early as 1986, when President Reagan used it to impose an embargo on Libya in reaction to its state-sponsorship of such activity. *See* Exec. Order No. 12,543, 51 FR 873-01, 1986 WL 97851 (1986). Over the years that followed, however, the locus of the terrorist threat began to shift more clearly toward the activities of relatively independent, non-state organizations, particularly those hostile to Israel and to U.S. efforts to produce a peaceful settlement of disputes in the Middle East. This eventually led to the first use of IEEPA authority to impose embargo-like restraints on foreign non-state actors, in January 1995.

In Executive Order 12,947, President Clinton wrote that "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an

[1] IEEPA also authorizes the President to seize foreign assets when the U.S. has come under armed attack. *See* 50 U.S.C. § 1702(a)(1)(C).

unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," and on that basis declared a national emergency requiring the imposition of IEEPA sanctions. Exec. Order No. 12,947, 60 FR 5079, 1995 WL 17211724 (1995). Attached to his order was an annex listing twelve foreign terrorist organizations subject to sanctions, and the order itself authorized the Secretary of State to designate additional organizations to be subject to sanctions.[2] Exec. Order No. 12,947 § 1, 60 FR 5079, 1995 WL 17211724. Collectively, entities designated under this order were known as "Specially Designated Terrorists," or "SDTs," and the sanctions they faced included blocking of their U.S. assets and a prohibition on persons in the U.S. providing them funds, goods, or services of any kind. Notably, § 1705 criminalizes violations of orders and regulations promulgated under IEEPA, including a maximum sentence of ten years' imprisonment.

Two weeks after the 9/11 attacks, President Bush promulgated Executive Order 13,224, declaring a national emergency with respect to both the 9/11 attacks and the prospect of further attacks and imposing an array of economic sanctions comparable to those described above with respect to the SDT list. *See* Exec. Order No. 13,224, 66 FR 49079, 2001 WL 34773846 (2001). Notably, however, President Bush prefaced his order by explaining that "because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists." *See id*. He also added his finding "that a need exists for further consultation and cooperation with, and *sharing information by*, United States and f*oreign financial institutions* as an additional tool

[2] The Treasury Secretary was separately authorized to designated groups subject to the control of already-designated entities. *See id*.

to enable the United States to combat the financing of terrorism." *See id*. (italics added). As with the SDT order in 1995, the 2001 IEEPA order both directly identified embargoed entities and also delegated to cabinet officials the authority to designate additional entities for inclusion in the future on the new list – known as the "Specially Designated Global Terrorist" list, or "SDGT."

As noted above, designation as an SDT or SDGT subjects a foreign entity to a relatively comprehensive economic embargo enforceable by federal criminal penalties, and at least in the latter case the policy expressed by the President in structuring this regime is explicitly directed towards suppressing the financing of terrorism.

The particular Iranian entities with which the defendant conspired and with whom it engaged in illegal financial transactions were themselves specifically designated by the U.S. government as blocked entities engaged in sponsoring terrorism. In an October 25, 2007 press release concerning the designations of two Iranian banks with whom the defendant regularly conducted financial transactions, the Treasury Department explained that these were two of "Iran's largest banks, and they … have facilitated Iran's proliferation activities or *its support for terrorism*." U.S. Dept. of Treasury, *Statement by Secretary Paulson on Iran Designations*, HP-645 (Oct. 25, 2007) (emphasis added). In the same statement, Secretary Paulson stated: "We call on responsible banks and companies around the world to terminate any business" with these entities. *Id.* The district court's conclusion that the transfer of funds to these entities was not sufficiently, or foreseeably, connected to the terrorist acts carried by Hezbollah and other Iranian-supported entities using Iranian manufactured weapons, defies congressional findings underlying the designation programs that funding *does* foreseeably facilitate terrorist attacks.

In 2017, Congress reinforced its concern about Iranian entities' support of terrorism with the Countering America's Adversaries Through Sanctions Act (CAATSA), Pub. L. 115-44, 115th Cong., 1st Sess., 131 Stat. 886, in which Congress expressly cited Iran's Islamic Revolutionary Guard Corps (IRGC) *as a whole* as being "responsible for implementing Iran's international program of destabilizing activities, support of acts of international terrorism, and ballistic missile program." *Id*. at § 105(a)(3). CAATSA was a capstone of longtime congressional efforts to identify and sanction Iranian entities responsible for terrorist attacks spanning the globe.

B. Section 2333 Was Intended by Congress to Further the Policy of Suppressing Terrorism by Obtaining the Assistance of "Private Attorneys General" in Exposing, Punishing, and Deterring Those Who Commit and Facilitate Terrorist Attacks

The sanctions regime described above is not the only mechanism through which federal law seeks to facilitate the long-standing U.S. government policy of suppressing terrorism through disruption of the financial support upon which terrorist organizations depend. Since the early 1990s, federal law also has relied on private attorneys general to pursue the same aim, via 18 U.S.C. § 2333(a), as well as to pursue the equally significant aims of deterring terrorism and compensating the victims of terrorism.

The district court's ruling, refusing to recognize the established connection between transfer of funds to designated entities and the terrorist attacks funded by those entities, has the effect of preventing private litigants from performing their role in the statutory scheme. The narrow and rigid view of conspiracy taken by the district court conflicts with Congress's overall counterterrorism framework.

In April 1990, Senator Chuck Grassley introduced S.2465, the "Anti-Terrorism Act of 1990." *See* 136 Cong. Rec. S4568-01 (1990), which would receive strong bipartisan support in Congress. Senator Grassley's bill provided in relevant part that "[a]ny

national of the United States injured in his person, property, or business by reason of an act of international terrorism may sue therefore in any appropriate district court of the United States . . . ."

From the beginning, it was clear that the legislation aimed not merely to address the issue of victim compensation but also to harness the initiative and resources of the private sector in pursuit of the larger aims of U.S. counterterrorism policy. In the course of introducing the bill, Senator Grassley explained that it "will serve as a further incentive to those with the deep pockets, such as the airline industry, to spend resources and go after terrorists: This bill establishes an express cause of action to gain compensation as fruit of their efforts." In the summer of 1990, the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held a hearing on the subject of S.2465. Witnesses included Alan J. Kreczko (Deputy Legal Adviser, Department of State) and Steven R. Valentine (Deputy Assistant Attorney General, Civil Division, Department of Justice), as well as several family members of persons killed in terrorist attacks and a handful of outside experts. Participants repeatedly took the opportunity to clarify their understanding that § 2333(a) was to be more than just a mechanism for victim compensation; it was also to be a mechanism for deterring terrorists and disrupting their financial foundations, and thus formed an integral part of U.S. counterterrorism policy.

The first witness, Alan Kreczko from the State Department, told the Committee that S.2465 would "add to the arsenal of legal tools that can be used against those who commit acts of terrorism against U.S. citizens abroad." *Antiterrorism Act of 1990: Hearing on S.2465*, Testimony before Senate Subcommittee on Courts and Admin. Practice of the Senate Comm. On the Judiciary, 101st Cong. 11 (1990) ("Senate Hearing"). He explained

that the State Department endorsed the bill "as a useful addition to our efforts to strengthen the rule of law against terrorists." *Id*. at 11, 12.

Following Mr. Kreczko, Deputy Assistant Attorney General Steven Valentine offered the views of the Justice Department regarding S.2465. Echoing the State Department's position, Mr. Valentine offered a robust endorsement of § 2333(a):

> 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.]

Senate Hearing at 25 (emphasis added).[3]

In similar fashion, Joseph A. Morris, the President and General Counsel of the Lincoln Legal Foundation, testified that "by its provisions for compensatory damages, treble damages, and the imposition of liability at any point along the causal chain of terrorism, [§ 2333(a)] would interrupt, or at least imperil, the flow of terrorism's lifeblood: money." *Id*. at 85. "Even if the bill had no greater impact than to deter terrorists from choosing American targets and from keeping their assets where Americans might reach them," he elaborated, "it would make profound contributions to the antiterrorism struggle. Drying up terrorism's financial support in the United States would be an important step forward." *Id*.

[3] 3 Mr. Valentine did not follow Mr. Kreczko's lead in specifying the particular ways in which § 2333(a) suits would advance U.S. counterterrorism policy, except to specify in his written statement that such suits not only would address victim compensation but also would "have a deterrent effect on the commission of acts of international terrorism against Americans." *Id*. at 34.

In the wake of this hearing, in late September 1990, the Subcommittee on Courts and Administrative Practice favorably reported the Antiterrorism Act bill. *See* Statement of Senator Grassley, Oct. 1, 1990, 136 Cong. Rec. S 14279, 14284 (Amendment No. 2921). In the course of introducing the amendment, Senator Grassley explained that the bill would "strengthen our ability to both deter and punish acts of terrorism." *Id*. He concluded by emphasizing in particular the connection between § 2333 and the overall goal of suppressing terrorism finance:

> We must make it clear that terrorists' assets are not welcome in our country. And if they are found, terrorists will be held accountable where it hurts them most: at their lifeline, their funds. With the Grassley-Heflin bill, we put terrorists on notice: To keep their hands off Americans and their eyes on their assets.

Id.

The Senate agreed to the amendment without further debate, and the amended bill went on to be enacted as Pub. L. No. 101-5 19, 104 Stat. 2250. The Antiterrorism Act of 1990 thus became law in November 1990. *See* Pub. L. No. 101-519, § 132(b)(4), 104 Stat. 2250, 2251.[4]

[4] After Congress recognized that a technical error had marred the statute's enactment, it quickly remedied the error. Senator Grassley immediately reintroduced the legislation, this time as S. 740. *See* S. Rep. 102-342, at 22; 137 Cong. Rec. S 4511-04 (Apr. 16, 1991). It passed by voice vote, and the accompanying Senate Report both related and incorporated the legislative history described above. *See* S. Rep. 102-342, at 22. *See also* H. Rep. 102-1040 (House Report accompanying companion legislation, H.R. 2222). Without further significant developments, the Antiterrorism Act was reenacted in the same form as described above, this time as the Antiterrorism Act of 1992. *See* Pub. L. 102-572, Title X, 106 Stat. 4506, 4522 (Oct. 29, 1992).

II. UNDER COMMON LAW TORT STANDARDS EXPRESSLY INCORPORATED BY CONGRESS, PLAINTIFF'S ALLEGATIONS SUPPORT A CLAIM OF INTENTIONAL MISCONDUCT UNDER THE ATA

Under the tort principles that Congress has made applicable to the ATA, intentional misconduct includes "knowingly or recklessly contribut[ing] material support" to terrorist entities. *See* JASTA, § 2(a)(6), 18 U.S.C. § 2333 note. In enacting JASTA, Congress expressly noted that a groundbreaking D.C. Circuit case, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), "provides the proper legal framework for how such liability should function in the context of Chapter 113B." *Id.*, § 2(a)(5).

Congress's express reference to tort principles dovetailed with its commitment to impose "liability at any point along the causal chain of terrorism" and "interrupt, or least imperil, the flow of money." S. Rep. 102-342, at 28. Flexibility in the service of terrorism's victims was Congress's touchstone. The legislative history of the ATA makes clear that rigid limits and narrow parsing of legal elements were antithetical to Congress's intent. As a key report explains, "the substance of … an action [under the ATA] is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courthouse door to victims of international terrorism." S. Rep. 102-342, at 48.

Congress pegged liability to proof of the willful and wanton nature of the defendant's acts. *See also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 693 (7th Cir. 2008) (explaining that "intentional misconduct" under the ATA related to financial support of terrorism included situations where the defendant either "knows that the organization [receiving the support] engages in … acts [of terrorism] or is deliberately indifferent to whether it does or not"); *id.* (analogizing such manifest disregard to "wantonness"). Mere incidental assistance to a terrorist entity will not trigger civil

liability under the ATA. Rather, the behavior must provide a basis for inferring the wanton and willful state of mind described above, including giving a loaded gun to a young child or "fling[ing] rocks from an overpass at the cars traveling on the highway underneath." *Id*. at 695. The conduct already acknowledged by the defendant here, *see* N.Y. State Dep't of Financial Servs., Consent Order, *supra*, including the willful stripping of Iran-related information from thousands of substantial financial transactions, surely meets that standard of wanton and willful activity.

III. CONGRESS EXPRESSLY HARMONIZED ITS STANDARD FOR INTENT UNDER THE ATA WITH EVOLVING TRENDS IN TORT LAW

Dovetailing with the Senate report's reference to flexibility in tort liability, courts have increasingly turned to a more flexible view of civil conspiracy. Pursuant to Congress's express guidance in JASTA's § 2(a)(5), 18 U.S.C. § 2333 note, the controlling case is *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). In *Halberstam*, the court articulated the appropriate scope of a conspiracy in a wrongful death suit brought against the live-in partner of a burglar who had killed the owner of a house in the course of a burglary. The partner had provided financial services regarding the proceeds of multiple burglaries but professed to have no knowledge of the burglaries or any role in the doctor's death.

Finding a conspiracy between the burglar and his partner, the *Halberstam* court first outlined the partner's detailed work over time on transactions disposing of the proceeds of the burglaries. Through this work and the burglar's ongoing forays, the couple had gross earnings of well over $ 1 million. *Id*. at 476. Discussing evidence that is relevant to inferring an agreement in a civil conspiracy case, the court pointed to "the relationships between the actors and between the actions (e.g., the proximity in time and place of the acts, and the duration of the actors' joint activity)," *id*. at 481, and the benefits

realized by the defendant. *Id*. at 487. The court noted that to establish liability for acts in furtherance of the conspiracy, it was not necessary that a given conspirator "participate actively in or benefit from" the violence that capped the conspiracy. *Id*. at 481. Moreover, the *Halberstam* court explained, the conspirator need not have "planned or known about" the violence. *Id* (emphasis added).

Similarly, here it would be profoundly disruptive to Congress's plan to require proof that the defendant participated in or knew in advance of the violent terrorist attack suffered by victims. Under Congress's framework, the U.S. designations against the many Iranian entities aided by the defendants furnished strong evidence that those entities had been instrumental in past acts of terror. An agreement that entailed wantonly and willfully aiding such entities despite this knowledge constitutes an actionable conspiracy. Moreover, the defendants profited handsomely from their financial manipulation on Iran's behalf. Because many companies with the expertise and resources to do such work actually comply with the law, the handful of companies that willfully break the law can command a sizeable premium for their illegal conduct. Destroying those incentives to illegality through tort remedies is exactly what Congress wished to achieve with the ATA.

IV. THE COMMON-SENSE TORT STANDARD ON CAUSATION ALSO SERVES CONGRESS'S OVERALL COUNTERTERRORISM PLAN

Congress's comprehensive framework also reflects a common-sense view of causation. Congress expressly recognized that financial services and support were an integral part of terrorism's "causal chain." S. Rep. 102-342, at 28. In enacting the ATA, Congress aimed to disrupt the links between terrorism and its financial enablers. The district court's narrow view of causation disrupts Congress's careful design.

The ATA reflects Congress's common-sense view of causation. Because money is fungible, it will be difficult as a practical matter to show that a given financial contribution directly underwrote a given terrorist attack. A restrictive view of causation would thus reinforce the impunity that Congress wished to eliminate. *See*, *e.g.*, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 697 (7th Cir. 2008) (observing that in ATA suits, the "requirement of proving causation is relaxed because otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury").

Under accepted tort standards accepted by Congress, when overlapping unsafe conditions cause an injury, proof of causation is complete with a showing that a party has created at least one of those conditions. *See*, *e.g.*, *id.* at 695 (noting that, under tort principles, when multiple fires join and destroy a dwelling, evidence that a party was at fault in creating at least one of the fires will be sufficient to prove causation, even though another extant fire spreading independently could also have destroyed the house).

Under the ATA, the same holds true for a defendant who provided financial support or services to a designated entity supplying weapons to kill U.S. service members. That evidence is sufficient to prove causation in the case of a lethal attack by the entity, even when the death "could not be traced to any of the contributors" in particular. *Id.* at 698. Any other result would needlessly hamstring accountability under the ATA. This common-sense view of causation holds whether the defendant has allegedly lent material support to a DFTO or a state sponsor of terrorism. Only this common-sense view of causation upholds Congress's comprehensive framework.

CONCLUSION

Amicus curiae respectfully submits that this Court should reverse the decision of the district court dismissing Plaintiffs' claims.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a) as modified by Circuit Rule 32. This brief contains 5,089 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by the word-counting feature of Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief of *amicus curiae* was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on March 28, 2017. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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