No. 18-1031

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RHONDA KEMPER,

Plaintiff-Appellant,

v.

DEUTSCHE BANK AG,

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/ APPELLEE

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
Alex C. Lakatos
Marc R. Cohen
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Amicus Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Rhonda Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; U.S. Chamber Litigation Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature: S/ Andrew J. Pincus Date: 5/18/2018

Attorney's Printed Name: Andrew J. Pincus

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

Address: Mayer Brown LLP
1999 K St NW Washington, DC 20006

Phone Number: 202-263-3220 Fax Number: 202-263-5220

E-Mail Address: apincus@mayerbrown.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Rhonda Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; U.S. Chamber Litigation Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature: s/ Marc R. Cohen Date: 5/18/2018

Attorney's Printed Name: Marc R. Cohen

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

Address: Mayer Brown LLP
1999 K Street NW Washington, DC 20006

Phone Number: (202) 263-3206 Fax Number: (202) 263-5206

E-Mail Address: mcohen@mayerbrown.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Rhonda Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; U.S. Chamber Litigation Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature: S/ Alex Lakatos Date: 5/18/2018

Attorney's Printed Name: Alex Lakatos

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

Address: Mayer Brown LLP
1999 K Street N.W. Washington, D.C. 20006

Phone Number: (202) 263-3312 Fax Number: (202) 263-5312

E-Mail Address: alakatos@mayerbrown.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Rhonda Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; U.S. Chamber Litigation Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature: s/ Steven P. Lehotsky Date: 5/18/2018

Attorney's Printed Name: Steven P. Lehotsky

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

Address: U.S. Chamber Litigation Center
1615 H Street, NW Washington, DC 20062

Phone Number: (202) 463-5337 Fax Number: (202) 822-2491

E-Mail Address: slehotsky@uschamber.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Rhonda Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; U.S. Chamber Litigation Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature: s/ Warren Postman Date: 5/18/2018

Attorney's Printed Name: Warren Postman

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

Address: U.S. Chamber Litigation Center
1615 H Street, NW Washington, DC 20062

Phone Number: (202) 463-5337 Fax Number: (202) 463-5346

E-Mail Address: wpostman@uschamber.com

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes, Rules and Regulations

TABLE OF AUTHORITIES

Page(s)

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Congress enacted the civil provisions of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, to enable U.S. citizens who are victims of terrorism to hold accountable the terrorists who engaged in those horrific acts and to obtain compensation for their injuries. That is a laudable and important goal.

To properly calibrate the ATA's reach, Congress imposed several limitations on the scope of the private cause of action. These limitations include a traditional proximate cause element, no different than the proximate cause elements Congress

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

enacted in RICO, the Fair Housing Act, and a host of other statutes. Taken together, these requirements plainly preclude the ATA from being used to label legitimate companies as "terrorists" or "supporters of terrorism."

Here, the district court correctly interpreted and applied the ATA to dismiss Plaintiff's complaint. Plaintiff seeks an interpretation of the ATA that would eliminate congressional limitations on the scope of civil ATA liability and effectively hold companies strictly liable for conducting business with any counterparty, including a sovereign state, alleged to have backed a third party responsible for a subsequent act of terrorism. The Chamber submits this brief to explain why that approach—which the Second Circuit and Ninth Circuits have rejected—should not be endorsed by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The death of David Schaefer while serving our country at the hands of Iraqi Shia militants supported by the Islamic Republic of Iran are indisputable tragedies. Particularly for those two heroes and their families and friends, but also for the Nation that they loved, served, and sacrificed.

And as one aspect of the broader effort to combat these attacks and the sovereign and non-state actors who fuel them, Congress has enacted criminal and civil penalties to hold the individuals, foreign governments, and other entities accountable for their role in committing international terrorism.

That is not what this case seeks. Rather, this action attempts to impose unjustified liability on a corporate "deep pocket" based on an interpretation of the ATA that ignores the important limitations on the private cause of action intended by Congress to restrict liability to actual terrorists and their benefactors—and which the Second and Ninth Circuits have rejected.

Indeed, this action is one of a stream of cases that rely on novel and untenable theories in an attempt to impose ATA liability on, and recover large treble-damages awards from, legitimate businesses for acts far removed from and unrelated to the terroristic acts, performed by others, that harmed the plaintiffs. These suits have sought, for example, to hold social media platforms liable for failing to prevent terrorists from communicating over the internet, medical companies liable for failing to prevent terrorists from looting drugs and medicine, and news media companies liable for broadcasting news of terrorist attacks. While such suits have generally been dismissed, that has not chilled their proliferation, nor has it stopped plaintiffs' lawyers from shopping for new forums in which to re-test their theories.

It is understandably difficult to haul the Islamic Republic of Iran, the Iranian Revolutionary Guard, the Qods Force, Hezbollah, and of course the Iraqi Shia militias—the truly responsible and culpable parties—into court in America to provide just relief to the victims and their families. But that provides no warrant to

bend the statute that Congress has enacted to mislabel legitimate businesses as "terrorists" under the ATA.

Congress enacted the ATA to target terrorists and took care to configure the cause of action so that it would not extend more broadly. The statute "reflect[s] the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism." *Jesner v. Arab Bank plc*, 138 S. Ct. 1386, 1405 (2018) (plurality opinion).

Particularly relevant here are three statutory constraints that Congress imposed on ATA liability. *First*, the plaintiff's claimed injury must have been incurred "by reason of an act of international terrorism," 18 U.S.C. § 2333(a), statutory language that imposes a proximate causation requirement. *Second*, the defendant must have engaged in an act of "international terrorism," which requires proof that the defendant's conduct "appear to be intended" to achieve a terroristic objective. 18 U.S.C. § 2331(1)(B). *Third*, Congress required an underlying violation of "the *criminal* laws of the United States" as a predicate for ATA liability. 18 U.S.C. § 2331(1)(A) (emphasis added).

Plaintiff's proposed interpretation of the ATA would effectively eliminate these limitations, and therefore should be rejected by this Court.

To begin with, the Court should decline Plaintiff's invitation to replace the statutory requirement of proximate causation with "*Pinkerton* causation," *see*

Pinkerton v. United States, 328 U.S. 640 (1946), which would allow the causation requirement to be satisfied as long as "foreseeable" conduct of an alleged co-conspirator caused the plaintiff's injury. Courts consistently have rejected foreseeability as the relevant touchstone for proximate causation, and instead hold uniformly that proximate cause requires the plaintiff to demonstrate that her injury is a direct and substantial result of the defendant's alleged conduct.

Next, the Court should reaffirm that the objective terroristic intent requirement must be satisfied by the defendant's own conduct, and hold that the allegations here fall far short of what is required. This Court in *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) ("*Boim III*") recognized that a *donation*, made directly to a *terrorist organization*, can satisfy the statutory test, because direct donors typically appear to share the goals of the causes they support. Here, however, the defendant bank is not alleged to have made a donation, nor is it alleged to have provided services to terrorist attackers. Rather, Deutsche Bank is alleged to have facilitated wire payments to and from Iranian banks on behalf of its legitimate customers—customers that are not alleged to have made any donations, either. No reasonable person could plausibly conclude that such transactions reflect an intent to embrace the abhorrent goals of terrorist attackers.

Finally, the Court should not permit Plaintiff to avoid her statutory obligation to prove that Defendant violated a criminal law. Plaintiff seeks to

establish violations of criminal laws prohibiting the provision of support to terrorists—18 U.S.C. § 2339A or 18 U.S.C. § 2339B—by alleging that Defendant participated in a conspiracy, but she contends the conspiracy can be established on the basis of the legal standards governing *civil* conspiracy. That approach is directly contrary to the ATA's requirement that the claimed "act of international terrorism" must violate *criminal* law, which requires application of the criminal-law standard for establishing a conspiracy. And the requirement of criminal conspiracy is fatal to Plaintiff's claims because her complaint lacks any allegation that Deutsche Bank had the specific intent to commit the underlying crime of providing material support to terrorists.

For all of these reasons, this Court should affirm the district court's order dismissing the action with prejudice.

ARGUMENT

I. THE FILING OF UNJUSTIFIED ATA CLAIMS HAS INCREASED DRAMATICALLY IN RECENT YEARS.

Private lawsuits under the Anti-Terrorism Act targeting legitimate companies have grown increasingly common. The statute was enacted in 1992, but recent years have seen a dramatic increase in the number and types of filings against legitimate businesses and other non-terrorist defendants:

Claims against technology and media companies. These suits against firms such as Google, Facebook, and Twitter allege that terrorists used these companies'

social networking and communications platforms to recruit supporters, raise funds, and otherwise support their efforts. *See* Plaintiffs' First Amended Verified Complaint at ¶ 2, *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017) ("[w]ithout Defendants Twitter, Facebook, and Google (YouTube), HAMAS' ability to radicalize and influence individuals to conduct terrorist operations outside the Middle East would not have been possible"); *see also Force v. Facebook, Inc.*, 1:16-cv-05158 (NGG) (LB) (E.D.N.Y. filed July 10, 2016); *Crosby v. Twitter, Inc.*, Case Number 2:16-cv-14406 (E.D. Mich. filed Dec. 19, 2016); *Gonzalez v. Google, Inc.*, Case No. 4:16-cv-03282-DMR (N.D. Cal. filed June 14, 2016).

Although courts dismissed all of the foregoing suits on various grounds including lack of knowledge and want of proximate causation, *see, e.g., Crosby v. Twitter, Inc.*, Case Number 2:16-cv-14406, 2018 WL 1570282 (E.D. Mich. Mar. 30, 2018), that has not deterred plaintiffs' attorneys from filing copycat suits in late 2017 and early 2018 in other venues and circuits. *See, e.g., Colon v. Twitter, Inc.*, No. 6:18-cv-515-CEM-GJK (M.D. Fla. filed Apr. 4, 2018); *Palmucci v. Twitter*, No. 1:18-cv-01165 (N.D. Ill. filed Feb. 14, 2018).

In *Kaplan v. Al Jazeera*, the plaintiffs alleged that Al Jazeera—the Arabic language television network incorporated in Qatar—broadcast "real-time audiovisual footage verbally and visually describing and depicting the precise

impact locations in Israel of rockets fired by Hezbollah," which in turn may have assisted Hezbollah to better target its rocket attacks, giving rise to ATA liability. First Amended Complaint at ¶ 39, *Kaplan v. Al Jazeera*, No. 10 Civ. 5298, 2011 WL 2314783 (S.D.N.Y. June 7, 2011). The court eventually dismissed the action, but only after the litigation had dragged on for over a year. *See Kaplan*, 2011 WL 2314783, at *6 (holding that plaintiffs' suggestion that broadcasting news reflects an intent to see terrorist attacks succeed "strains credulity").

Claims against pharmaceutical companies. Plaintiffs sued five groups of companies, including Johnson & Johnson, Pfizer, Roche, GE, and AstraZeneca, alleging that they are liable for downstream acts of terrorism based on their doing business with post-war, US-funded Iraqi ministry of health. *See* Complaint, *Atchley v. AstraZeneca UK Ltd, Inc.*, No. 1:17-cv-02136 (D.D.C. Oct. 17, 2017), ECF No. 1. Liability was premised on allegations that defendants' provision of life saving medicines and medical equipment to the Iraqi ministry of health yielded—through looting and black-market sales—cash that terrorists then used to help fund attacks on U.S. forces. *See* Domestic Defendants' Motion to Dismiss at 11-14, *Atchley*, ECF No. 72. The plaintiffs advanced these claims even though the US government actively encouraged pharmaceutical companies to engage with the Iraqi government. Amended Complaint at ¶¶ 3, 116, 138, 198, 221, *Atchley*, ECF No. 67.

Claims against financial services companies. Numerous cases have been filed against multinational banks and financial services companies asserting claims similar to those advanced in this case—seeking to hold the defendants liable for instances of terrorism based on their transactions with Iranian banks. *Rothstein v. UBS AG*, 708 F.3d 82, 91-92 (2nd Cir. 2013) (affirming dismissal for lack of proximate causation); *O'Sullivan v. Deutsche Bank AG*, No. 17 Civ. 8709 (LTS) (GWG), 2018 WL 1989585, at *6 (S.D.N.Y. Apr. 26, 2018) (claims against 17 bank defendants involving Iranian transactions and injuries to US service members in Iraq; staying discovery and holding that defendants had made "strong showing that Plaintiffs' claims are unmeritorious"); *Freeman v. HSBC Holdings*, No. 1:14-cv-6601-DLI-CLP (E.D.N.Y. filed Nov. 10, 2014) (similar claims against 11 bank defendants; motion to dismiss pending); *Siegel v. HSBC Holdings, plc*, 283 F. Supp. 3d 722 (N.D. Ill. 2017) (case against 4 banks involving transactions with Saudi bank and injury in Jordan, transferred to the Southern District of New York, case no. 1:17-cv-06593; motion to dismiss pending); *Martinez v. Deutsche Bank AG*, 1:17-CV-02474-NGG-RER (E.D.N.Y. 2017) (case against multiple banks involving Iranian transactions and injuries to US service members in Iraq; voluntarily dismissed after transfer); *Zapata v. HSBC Holdings PLC*, No. 1:16-CV-030, 2017 WL 6939210 (S.D. Tex. Oct. 18, 2017) (suit against 4 bank defendants

involving injuries committed by Mexican drug cartels in Mexico; case dismissed as to one party and transferred as to others).

Other claims. In *Peled v. Netanyahu*, No. 1:17-cv-00260-RBW (D.D.C. filed Feb. 9, 2017), the plaintiffs not only sued senior Israeli government officials, but also American charities, such as the Kushner Family Foundation, that made donations to Israel, seeking to impose ATA liability upon them for Israel's purportedly terroristic "war crimes" in the Palestinian territories. Motions to dismiss are pending.

The increase in these filings parallels the decline in claims under the Alien Tort Statute, 28 U.SC. § 1350 ("ATS"), as a result of a series of Supreme Court decisions curtailing liability under the ATS. Beginning in the 1990s, ATS actions were used to assert huge damages claims against multinational corporations based on alleged human rights abuses. One report found 150 such lawsuits "filed against companies in practically every industry sector for business activities in over sixty countries." U.S. Chamber Institute for Legal Reform, *Federal Cases from Foreign Places* 23 (Oct. 2014), https://goo.gl/Bdg4wX. The largest action "was filed in 2002 against more than fifty companies, including Ford and IBM, for business dealings in South Africa during the apartheid era." *Id*.

But the Supreme Court's rulings in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), overturned

lower court rulings that had interpreted the ATS expansively. *Sosa* held that courts could only recognize claims under the ATS analogous to the "historical paradigms familiar when §1350 was enacted"—piracy, assaults on ambassadors, and violations of safe conduct. 569 U.S. at 732. *Kiobel* held that the ATS did not apply extraterritorially.

ATS cases were attractive to plaintiffs' lawyers because they provided a vehicle for labeling legitimate companies as "human rights violators" or "international law violators" and—through extended causation arguments or secondary liability claims, or both—tying those companies to horrific events in foreign nations, such as murders of civilians by government forces or claims of forced labor or slavery. Because the claimed injuries were outside the United States, typically in areas beset by civil strife, discovery would be difficult and extremely expensive. And the combination of vague international law legal standards and the reputational damage of being associated with atrocities created enormous settlement pressure.

ATA claims have many of the same characteristics: the business defendant is labeled a "terrorist" or "supporter of terrorism"; and the harm occurred outside the United States, almost always in a conflict zone.

It is true that the scope of the two actions differ. For example, ATS claims are limited to citizens of other nations, while ATA plaintiffs must be U.S. citizens.

And the ATS requires proof of an international law violation, but the ATA focuses on violations of U.S. criminal statutes that satisfy the statutory definition of an act of terrorism.

But law firms seeking to bring large damages actions against multinational corporations have had little difficulty finding ways to package similar types of claims as "terrorism" assertedly giving rise to an action under the ATA—as the cases discussed above demonstrate.

Just last month, in *Jesner v. Arab Bank plc*, 138 S. Ct. 1386 (2018), the Supreme Court again limited the scope of the ATS liability, holding that the ATS does not extend to non-US corporations. If history is any guide, *Jesner*'s further closing of the ATS avenue will only serve to divert more litigation traffic towards dubious theories of ATA liability.

II. CONGRESS CAREFULLY CALIBRATED THE SCOPE OF ATA CIVIL ACTIONS.

Congress in the ATA enacted a civil remedy imposing treble-damages liability on individuals and entities that commit acts of terrorism and—in very narrow circumstances—those who conspire with terrorists. Congress deliberately included in the ATA a number of carefully calibrated limitations on private liability designed to accomplish that goal—and, just as importantly, preclude liability for companies and individuals outside those categories.

As a plurality of the Supreme Court recently explained, "[t]he Anti-Terrorism Act . . . is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing" that "reflect[s] the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism." *Jesner*, 138 S. Ct. at 1405. Recognizing the importance of Congress's detailed design, the plurality refused to construe the ATS in manner that would allow plaintiffs to "bypass Congress' express limitations on liability under the Anti-Terrorism Act." *Id*.

First, Congress required the plaintiff to prove that her claimed injury was incurred "by reason of an act of international terrorism." 18 U.S.C. § 2333(a). The "by reason of" requirement—drawn from the antitrust laws and RICO—requires proof that the plaintiff's injury was proximately caused by the act of international terrorism. *See Rothstein*, 708 F.3d at 95.

Second, Congress defined the term "international terrorism" to require proof that the allegedly wrongful conduct "appear[s] to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). Thus, in contrast to a statute such as RICO that was intended to target organized crime but did not require proof that the defendant was engaged in organized crime (*see*

Sedima, S.P.R.L. v. Imrex, Co., Inc., 473 U.S. 479 (1985)), Congress in the ATA specifically required proof that the defendant was engaged in terrorism or terrorism-linked activities.

Moreover, because the defendant must commit an act of international terrorism to be subject to ATA liability, the defendant's own conduct must satisfy this objective terroristic intent requirement—which ensures that liability cannot be imposed under the ATA unless the defendant itself engaged in terrorism. *See Boim III*, 549 F.3d at 694 (holding that defendants' actions satisfied definitional elements of international terrorism, including the "appear to be intended" requirement that was included "in order to distinguish terrorist acts from other violent crimes"); *Linde v. Arab Bank, PLC*, 882 F.3d 314, 326-27 (defendant's own actions must satisfy the "appear to be intended" standard).

Third, when Congress enacted the ATA, it did not authorize a private action for secondary violations such as aiding and abetting or conspiracy. Courts have repeatedly held, accordingly, that the ATA did not permit recovery of damages based on theories of secondary liability. *Boim III*, 549 F.3d at 689; *see also Rothstein*, 708 F.3d at 98; *cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The recent amendments to the ATA, enacted as the Justice Against Sponsors of Terrorism Act, Pub. Law 114-222, 130 Stat. 852 (2016) ("JASTA"), confirm this conclusion by adding an express, limited private

action against secondary violators. JASTA creates liability for conspiracy only if (1) the defendant directly "conspires with the person who committed [the terroristic attack]" and (2) the attack was planned, authorized or committed by a organization officially designated as a Foreign Terrorist Organization at the time it occurred. 18 U.S.C. § 2333(d).

Respect for these essential limitations enacted by Congress is particularly important for an additional reason: the ATA is expressly extraterritorial. *See* 18 U.S.C. § 2331(1)(C). As the United States has explained, when it comes to adjudicating ATA claims, "other important interests"—such as the "the United States' vital interest in maintaining close cooperative relationships with . . . [various non-US] partners in the fight against terrorism"—"are at stake." Brief of the United States as *Amicus Curiae* at 19, *Arab Bank, PLC v. Linde*, No. 12-1485, (U.S. May 23, 2014), 2014 WL 2191224, at *19; *see also Boim III*, 549 F.3d at 689-90 (declining to read secondary liability into the ATA because, among other things, doing so "would enlarge the federal courts' extraterritorial jurisdiction").

III. THIS COURT SHOULD REJECT PLAINTIFF'S ATTEMPT TO RENDER MEANINGLESS THE STATUTORY LIMITATIONS ON ATA LIABILITY.

Plaintiff offers a variety of arguments that, if accepted, would effectively eliminate the congressionally designed limitations on the scope of the ATA's private cause of action. All lack merit.

A. The Proximate Causation Requirement.

Plaintiff seeks to avoid the ATA's proximate cause requirement by asserting that she may rest on what she describes as "the *Pinkerton* causation principle for a conspiracy claim." Br. at 45. Plaintiff's request to substitute "*Pinkerton* causation" for proximate causation would, she argues, allow her to hold liable "all . . . [of a conspiracy's] members . . . for injuries caused by acts pursuant to or in furtherance of the conspiracy," provided that such injuries are "foreseeable." *Id*. That is not the statute Congress enacted. By using the statutory term "by reason of," Congress adopted a traditional proximate cause requirement, which does not permit such far-flung theories of civil liability.

1. This Court's decision in *Boim III* forecloses Plaintiff's argument. There, the Court held that because the ATA "does not create secondary liability, so that the only defendants are primary violators, the ordinary tort requirements relating to fault, state of mind, causation, *and* foreseeability must be satisfied for the plaintiff to obtain a judgment." 549 F.3d at 692 (emphasis added). Through her "*Pinkerton*" theory, however, the Plaintiff seeks to collapse causation into foreseeability. That is flatly inconsistent with *Boim III*'s recognition that they are separate elements, which this Court accordingly analyzed separately. *Id.* at 695-699.

Indeed, Plaintiff's argument is far from novel. In *Boim III*, the plaintiff made the same "*Pinkerton*" argument—asserting that causation should be deemed satisfied as to one of the defendants because "the undisputed evidence established the [defendant's] membership in the Hamas conspiracy" rendering the defendant liable "for future acts of the conspirators." Brief of Plaintiff-Appellee in *Boim III*, 2005 WL 6190437 (7th Cir.) (citing *Pinkerton,* 328 U.S. at 648).

Rather than adopting that argument, *Boim III* held that "the law requires proof . . . that there was a substantial probability that the defendants' [wrongful acts] were the cause" of plaintiff's injury. 549 F.3d at 697. In circumstances where it may be difficult to disaggregate the conduct of multiple actors, the Court held causation can be satisfied only if a defendant's *own* conduct "itself is sufficient to bring about harm to another." *Id.* (quoting Restatement (Second) of Torts § 432(2) (1979)).

2. Other courts of appeals have rejected similar efforts to negate the ATA's proximate causation requirement. As the Second Circuit held in *Rothstein*, not only must a plaintiff plead and prove that the resulting injury was foreseeable, but the plaintiff must also plausibly allege that the defendant's conduct "led *directly* to the [P]laintiffs' injuries'" and that it was a "substantial factor in the sequence of responsible causation." *Rothstein*, 708 F.3d at 91-92. *See also O'Neill*,

Jr. v. Al Rajhi Bank, 714 F.3d 118, 125 (2d Cir. 2013) (rejecting mere foreseeability standard).

The Ninth Circuit recently agreed. It stated that "for purposes of the ATA, it is a direct relationship, rather than foreseeability, that is required." *Fields v. Twitter, Inc.*, 881 F.3d 739, 748 (9th Cir. 2018).

3. These holdings are compelled by the ATA's use of the language "by reason of" (18 U.S.C. § 2333(a)), which has a "well-understood meaning" when included in federal statutes—it has "historically been interpreted as requiring proof of proximate cause." *Rothstein*, 708 F.3d at 95. In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), for example, the Supreme Court held that RICO requires demonstration of proximate cause because Congress enacted the statute "knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4."

And, in analogous statutory settings, the Supreme Court has repeatedly rejected arguments that causation may be satisfied by mere foreseeability—the contention that Plaintiff advances here. In *Hemi Group, LLC v. City of New York, New York*, 559 U.S. 1, 12 (2010), the Court specifically rejected an interpretation of the "proximate cause requirement" that would "turn on foreseeability, rather

than on the existence of a sufficiently 'direct relationship'" between the conduct at issue in the suit and the plaintiff's injury.

In *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), the Court considered the proximate cause requirement of the Fair Housing Act's bar on racial discrimination in connection with real estate transactions. Because "foreseeability alone does not ensure the close connection that proximate cause requires," the Court held that "foreseeability alone is not sufficient to establish proximate cause." *Id*. at 1305-06. Although an FHA violation may "be expected to cause ripples of harm to flow far beyond the defendant's misconduct," "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel." *Id*. at 1306 (internal quotation marks omitted).

4. Plaintiff's argument also conflicts with the recently-enacted JASTA. As noted above, JASTA permits secondary liability only when the defendant directly "conspires with the person who committed [the attack]" that was "planned, authorized or committed" by an officially-designated Foreign Terrorist Organization. 18 U.S.C. § 2333(d).

Under Plaintiff's construction of the statute, JASTA's secondary liability provisions would do no independent work—a defendant would already be liable for foreseeable acts committed by co-conspirators. Moreover, Congress's judgment to limit conspiracy claims would effectively be overridden, because a claim that

could not proceed as a conspiracy claim under JASTA's strict standards could nonetheless be upheld on Plaintiffs' theory that the acts of one alleged co-conspirator can be imputed to another conspirator for purposes of satisfying the ATA's proximate cause requirement. Because the whole of JASTA cannot be interpreted to be superfluous (*see Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994)), and because JASTA's limits on conspiracy liability should not be rendered meaningless, Plaintiff's view of the ATA's causation requirement must be rejected.

B. The Objective Terroristic Intent Requirement.

To establish liability under the ATA, a plaintiff must prove that the defendant committed an act that "appear[s] to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1).

The test is objective: it "does not depend on the actor's beliefs, but imposes on the actor an objective standard to recognize the apparent intentions of actions." *Weiss v. Nat'l Westminster Bank plc*, 768 F.3d 202, 207 n.6 (2d Cir. 2014). And, because there is no secondary liability under the ATA (save in limited circumstances not applicable here), it is the *defendant*'s own conduct—and not the

conduct of others that inflicted the injury on the plaintiff—that must satisfy this objective requirement.

As the Court explained in *Boim III*, this element serves the essential function of "distinguish[ing] terrorist acts from other violent crimes." 549 F.3d at 694. It reflects the basic premise that not all violence is terrorism. Mafia organizations, human trafficking rings, transnational gangs, and drug cartels can and do engage in horrifically violent acts. But Congress specified that *terrorism* is limited to those acts that a defendant commits for the apparent purpose of accomplishing one of the enumerated terroristic ends.

Boim III held that, when an individual donates money to a terrorist organization, this requirement may be satisfied. 549 F.3d at 693-94. That makes sense: if one donates money to PBS, an objective observer may reasonably believe that the donor intended to support public broadcasting. A knowing *donation* to a terrorist group therefore may well satisfy this requirement.

But that conclusion says nothing at all about the sort of claim alleged here, which rests on allegations that a German bank facilitated transactions with or for Iranian banks. No reasonable observer could conclude that the German bank *intended* to accomplish terroristic ends.

Plaintiff asserts (at 25-26), that this is a jury question, but Plaintiff does not allege facts sufficient to create a triable question.

Plaintiff's theory appears to be that merely engaging in business transactions with Iranian banks is enough to create a factual issue. But at the time of most of the alleged conduct here, the United States itself permitted transactions with Iranian banks, *see* former 31 C.F.R. § 560.516 (U-Turn Exemption), and the United States recognized that other governments could engage in certain legitimate business with Iran and its central bank. *See* Stephen L. Meyers, *U.S. Exempts Japan and 10 Other Countries From Sanction Over Iran Oil*¸ N.Y. Times, Mar. 20, 2012. It is therefore implausible to conclude, as Plaintiff asserts, that transacting with Iranian banks is alone sufficient to demonstrate that one *intends* to accomplish terroristic objectives.

Plaintiff appears to argue that when a bank facilitates payments to and from Iranian banks at the behest of its customers, those actions reasonably demonstrate that the bank shares the murderous ambitions of terrorists who are beneficiaries of Iran's largesse. Br. 25. That is a wholly unreasonable conclusion.

As "a government," Iran "has many legitimate agencies, operations, and programs." *Rothstein*, 708 F.3d at 97. And, in addition, Iran has considerable financial assets. *Id*. at 93 ("Iran held billions of U.S. dollars in its reserves"). Facilitating customer-driven banking activities for Iranian banks or with Iranian banks as counterparties cannot reasonably be viewed as associating the bank with the intent of terrorists that are separated from the bank by multiple parties—the

Iranian banks and Iran itself—who can and do engage in many legitimate activities. There simply is no basis for a reasonable observer to attribute terroristic intent to the German bank.[2]

The holding and reasoning of *Linde v. Arab Bank, PLC*, further supports this conclusion. That case involved the defendant bank's provision of services to customer that was a known terrorist organization—Hamas. Although the provision of those services satisfied one of the prerequisites for ATA liability (violation of the federal criminal statute prohibiting the provision of material support), the court concluded that it did not automatically satisfy the objective terroristic intent element, and merely created an issue for the jury: "[s]pecifically, and as relevant here, providing financial services to a known terrorist organization may afford material support to the organization even if the services . . . do not manifest the apparent intent required by § 2331(1)(B)." 882 F.3d at 326.

Here, where there is no allegation that Deutsche Bank provided services to a known terrorist organization, but only that it facilitated transactions involving Iranian banks, a reasonable jury could not conclude that the Bank's actions provided a basis for concluding that it acted with terroristic intent.

[2] Plaintiff places great weight on Defendant's non-transparent processing of the transactions involving Iranian banks. Br. 12-15, 16-17. But the fact that these transactions led to settlements over civil banking infractions provides no basis for attributing to Defendant the intent to coerce or intimidate civilians or government policy, or to affect the conduct of a government by mass destruction, assassination, or kidnapping—which is what the ATA's objective terroristic intent standard requires.

C. The Criminal Law Violation Requirement.

The ATA's requirement that the plaintiff prove that the defendant engaged in an act of "international terrorism" necessitates proof of a violation of *criminal* law: "the term 'international terrorism' means activities that . . . are a violation of the criminal laws of the United States," *see* 18 U.S.C. § 2331. Two such criminal laws are 18 U.S.C. § 2339A (providing material support to terrorists) and 18 U.S.C. § 2339B (providing material support or resources to designated Foreign Terrorist Organizations).

Plaintiff asserts that she can establish that the defendant here violated Section 2339A or Section 2339B by showing a conspiracy between the defendant and other parties under the test for a civil conspiracy set forth in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). That attempt to water-down the statutory standard is contrary to the plain language of the ATA.

Plaintiff must establish a violation of an underlying federal criminal statute to meet the ATA's express requirement of a predicate criminal violation. It follows *a fortiori* that if she seeks to comply with that requirement by proving that the defendant engaged in a conspiracy violative of a federal criminal law, she must satisfy criminal conspiracy principles—otherwise she would not have met the criminal violation predicate requirement. As *Boim III* cautions, "the state-of-mind

and causation requirements in criminal cases often differ from those in civil cases." 549 F.3d at 692.

Plaintiff's allegations, however, fail to meet the standard for demonstrating a criminal conspiracy. "[C]onspiracy is a specific intent crime[.]" *United States v. Ross*, 510 F.3d 702, 713 (7th Cir. 2007). To be guilty of a conspiracy offense, a defendant must "reach an agreement with the 'specific intent that the underlying crime be committed.'" *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016) (citation and emphasis omitted). Here, Plaintiff cannot satisfy this criminal conspiracy standard, because her complaint lacks any allegations that defendant Deutsche Bank had the specific intent that the underlying crime—material support for terrorism—be committed. Plaintiff's brief does not even attempt to argue that the complaint meets this standard. Instead, effectively conceding that her complaint cannot survive under principles of criminal conspiracy law, Plaintiff asks this court to find a criminal violation by reference to an inapposite civil standard.

That contention is wrong for multiple reasons. To begin with, there is a significant difference between the criminal and civil standards for proving conspiracy—indeed, the civil standard is notoriously murky. *Krulewitch v. United States*, 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring) (observing that the claim of civil conspiracy is "so vague that it almost defies definition."); W. PAGE

KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 46 at 322 (5th ed. 1984) (stating that torts such as civil conspiracy "have been surrounded by no little uncertainty and confusion" and "have meant very different things to different courts").

Moreover, nebulous conspiracy principles coupled with the lure of treble damages under the ATA would provide a particularly potent recipe for multiplying strike suits. *See Stoneridge Inv. Partners LLC v. Atlanta-Scientific, Inc.*, 552 U.S. 148, 158 (1992) (limiting theory of secondary liability that "would expose a new class of defendants" to strike suits).

Finally, JASTA confirms that civil conspiracy standards cannot apply—because it specifically adopts them only in the limited context in which the defendant directly "conspires with the person who committed [the attack]" that was "planned, authorized or committed" by a designated Foreign Terrorist Organization. 18 U.S.C. § 2333(d). Here, the district court concluded that Plaintiff could not establish a JASTA conspiracy, A2 n.1, and Plaintiff does not challenge that conclusion on appeal, Br. 27 n.17.

For all of these reasons, Plaintiffs' attempt to satisfy her criminal-law burden by invoking civil conspiracy standards must be rejected.

CONCLUSION

This Court should affirm the district court's order dismissing the action with prejudice.

Dated: May 18, 2018

Respectfully submitted.

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

s/ *Andrew J. Pincus*
Andrew J. Pincus
Alex C. Lakatos
Marc R. Cohen
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 5,839 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

s/ *Andrew J. Pincus*
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ *Andrew J. Pincus*
Andrew J. Pincus