Exhibit A

18-2540

IN THE
United States Court of Appeals
for the Second Circuit

JEFFREY SIEGEL, Administrator of the Estate of Moustapha Akkad, deceased, and Moustapha Akkad's heirs; SOOHA AKKAD, individually; SUSAN GITELSON, Special Administrator of the Estate of Rima Akkad Monla, deceased, and Rima Akkad Monla's heirs; ZIAD MONLA;

Plaintiffs-Appellants,

v.

HSBC NORTH AMERICA HOLDINGS INC; HSBC BANK USA, N.A., HBUS,

Defendants-Appellees.

AL RAJHI BANK, fka Al Rajhi Banking; HSBC HOLDINGS PLC,

Defendants.

On Appeal from the United States District Court for the
Southern District of New York (No. 17-cv-6593)
(Hon. Denise L. Cote, District Judge)

[PROPOSED] BRIEF OF THE INSTITUTE OF INTERNATIONAL BANKERS, THE AMERICAN BANKERS ASSOCIATION, THE BANK POLICY INSTITUTE, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

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RULE 26.1 STATEMENT OF CORPORATE INTEREST

No *amicus* is owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in any *amicus*.

/s/ Marc J. Gottridge
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STATEMENT OF INTEREST

The Institute of International Bankers ("IIB"), based in New York, is the only national association devoted exclusively to representing and advancing the interests of banking organizations headquartered outside the United States that operate in the U.S.[1] The IIB's membership consists of approximately 90 banking and financial institutions from over 35 countries; none is incorporated or headquartered in this country. In the aggregate, IIB members' U.S. operations have approximately $5 trillion in U.S. banking and non-banking assets, provide approximately 25 percent of all commercial and industrial bank loans made in this country and have over 20,000 full-time employees in the U.S. Collectively, the U.S. branches and other operations of IIB member institutions enhance the depth and liquidity of the U.S. financial markets and are an important source of liquidity in those markets, including for domestic borrowers. The IIB regularly appears before this and other federal courts as *amicus curiae* in cases raising significant legal issues relating to international banking, including those involving the appropriate scope of the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq*. (the "ATA"), as amended by the Justice Against Sponsors of Terrorism Act

[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than *amicus*, its members, or its counsel contributed any money to fund the brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E); LR 29.1(b).

("JASTA"), codified at 18 U.S.C. § 2333(d)—for example, *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013), and *Freeman v. HSBC Holdings PLC*, No. 14-CV-6601(DLI)(CLP) (E.D.N.Y.) (Mot. for Leave to File *Amicus* Br., filed Sept. 20, 2018). The IIB also often appears as *amicus curiae* in cases involving other federal statutes of importance to its members, such as *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (plurality op.) (primarily concerning the extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS")).

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its over 1 million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. The ABA's membership includes all sizes and types of financial institutions, including very large and very small banking operations.

The Bank Policy Institute ("BPI") is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ

almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

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 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Amici and their members have a substantial interest in the matter now before this Court. *Amici* submit this brief to provide this Court with a broader perspective on ATA litigation and to highlight reasons of particular significance to the domestic and international banking communities and the U.S. business community why this Court should reject Plaintiffs' arguments and affirm the judgment below.

INTRODUCTION

Plaintiffs or their family members, while staying at hotels in Amman, Jordan in November 2005, were the victims of a horrendous terrorist attack. Nothing can excuse or rationalize the commission of such despicable crimes. *Amici* deplore these, and all, acts of terrorism.

As part of the United States' response to terrorist attacks around the world, Congress enacted the ATA, authorizing the imposition of criminal and civil liability on persons committing acts of international terrorism. In 2016, Congress amended the ATA through JASTA, which provides the exclusive path to secondary (*i.e.*, aiding and abetting or conspiracy) civil liability for alleged ATA violations. Congress also included in the ATA and JASTA important limitations on the private causes of action it created. Yet in a stream of actions such as this one, plaintiffs' lawyers have sought to circumvent those clear limitations by asserting novel, expansive and untenable litigation theories. In such actions, plaintiffs attempt to pursue treble-damage ATA claims against financial institutions and other legitimate businesses—even though they cannot be held liable as a matter of law when the conduct alleged is measured against the ATA's and JASTA's plain language and controlling precedent.

Private lawsuits under the ATA targeting financial institutions have grown increasingly common—at least two dozen have been filed, the majority in recent

years. In many cases, such as this one, plaintiffs seek to hold banks liable for acts of terrorism by (often unidentified) third parties based on defendants' transactions with other banks. Courts have dismissed most of these suits on various grounds, including lack of knowledge, absence of plausible allegations of proximate causation, and failure plausibly to allege the required elements of civil aiding and abetting or conspiracy under JASTA. *See, e.g.*, *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 276–77 (D.C. Cir. 2018) (affirming dismissal of ATA claims for lack of proximate cause and because aiding and abetting liability is unavailable for attacks that occurred before JASTA's effective date); *Shaffer v. Deutsche Bank AG*, No. 16-CR-497-MJR-SCW, 2017 WL 8786497, at *1, *4 (S.D. Ill. Dec. 7, 2017) (dismissing ATA claims "alleging that Deutsche Bank conspired with Iranian financial institutions to transfer U.S. currency to Iranian banks in violation of U.S. economic sanctions, giving the Iranian government access to currency necessary to fund terrorist activities in Iraq"; dismissing primary liability claims for failure to allege proximate causation and secondary liability claims for failure to plead a conspiracy with the person who "actually planned or orchestrated" the act of international terrorism), *appeal pending sub nom. Kemper v. Deutsche Bank AG*, No. 18-1031 (7th Cir. argued Sept. 7, 2018); *Riley v. HSBC Bank PLC*, No. 8:18-CV-1212-T-23SPF (M.D. Fla. Sept. 7, 2018), ECF No. 17 (magistrate judge's

report recommending dismissal of ATA claims for failure to plead any required elements), *adopted by* Order (M.D. Fla. Oct. 3, 2018), ECF No. 18.[2]

Financial institutions are not alone. Plaintiffs' attorneys have targeted other types of entities with similarly deficient claims, including suits against technology and media firms,[3] pharmaceutical and medical companies,[4] and tax-exempt

[2] *See also O'Sullivan v. Deutsche Bank AG*, No. 17 Civ. 8709 (LTS) (GWG), 2018 WL 1989585, at *6 (S.D.N.Y. Apr. 26, 2018) (magistrate judge's ruling staying stay of discovery in JASTA case involving Iranian transactions and injuries to U.S. service members in Iraq, holding that the 17 bank defendants had made "strong showing that plaintiffs' claims are unmeritorious"), *objection overruled by* Order (S.D.N.Y. Aug. 20, 2018), ECF No. 154.

[3] These suits allege that terrorists used defendants' social networking and communications platforms to recruit supporters, raise funds, and otherwise support their efforts. Plaintiffs have filed seven such actions; all have been dismissed at the pleading stage. *See Fields v. Twitter*, 881 F.3d 739 (9th Cir. 2018) (affirming dismissal of ATA claim against Twitter for alleged support of ISIS); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017) (dismissing complaint alleging that "[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"), *appeal pending*, No. 17-17536 (9th Cir. filed Dec. 26, 2017); *see also Force v. Facebook, Inc.*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017) (dismissing claims pursuant to Communications Decency Act § 230(c)(1)); *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 575-80 (E.D. Mich. 2018) (dismissing complaint with prejudice and finding no conspiracy, no "material support,", and no proximate causation); *Gonzalez v. Google, Inc.*, No. 4:16-CV-03282-DMR, 2018 WL 3872781, at *15–17 (N.D. Cal. Aug. 15, 2018) (dismissing complaint and finding no proximate causation); *Cain v. Twitter Inc.*, No. 17-CV-02506-JD, 2018 WL 4657275, at *2 (N.D. Cal. Sept. 24, 2018) (same (citing *Fields*)); *Taamneh v. Twitter*, No. 17-CV-04107-EMC, 2018 WL 5729232, at *5–13 (N.D. Cal. Oct. 29, 2018) (same).

entities.[5] Many of those cases have foundered on the absence of any direct connection between the companies' alleged conduct and the plaintiffs' harms. As the Ninth Circuit explained in affirming the dismissal on the pleadings of a case against Twitter:

> Communication services and equipment are highly interconnected with modern economic and social life, such that the provision of these services and equipment to terrorists could be expected to cause ripples of harm to flow far beyond the defendant's misconduct. Nothing in § 2333 indicates that Congress intended to provide a remedy to every

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[4] For example, plaintiffs sued five groups of companies, including Johnson & Johnson, Pfizer, Roche, GE, and AstraZeneca, alleging that they are liable for acts of terrorism based on business they did with the post-war, U.S.-funded Iraqi ministry of health. *See* Compl., *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' Mot. to Dismiss at 11–14, *Atchley*, ECF No. 72. The plaintiffs advanced these claims even though the U.S. government had actively encouraged pharmaceutical companies to engage with the Iraqi government. Am. Compl. ¶¶ 3, 116, 138, 198, 221, *Atchley*, ECF No. 67. Defendants' motion to dismiss is pending before the district court. *See also Brill v. Chevron Corp.*, No. 15-cv-04916-JD, 2018 WL 3861659, at *3 (N.D. Cal. Aug. 14, 2018) (applying this Court's *Linde* decision and dismissing aiding and abetting JASTA claims alleging that Chevron paid illegal kickbacks to buy Iraqi oil while Saddam Hussein was actively supporting terrorism).

[5] 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 an American foundation that made charitable donations to Israel. Plaintiffs sought to impose ATA liability upon defendants for Israel's purportedly terroristic "war crimes" in the Palestinian territories. The *Peled* case is currently stayed pending resolution of a related appeal.

> person reached by these ripples; instead, Congress intentionally used the "by reason of" language to limit recovery.

Fields, 881 F.3d at 749 (following this Court's analysis in *Rothstein*).

Although courts have, in nearly all cases, diligently enforced the statutory boundaries of ATA causes of action, plaintiffs' counsel continue to assert novel and untenable legal theories. Plaintiffs here rely heavily on a recent outlier report and recommendation by a magistrate judge in *Freeman v. HSBC Holdings PLC*, No. 14-CV-6601(DLI)(CLP), 2018 WL 3616845 (E.D.N.Y. July 27, 2018), recommending denial of bank defendants' motion to dismiss.[6] *See* Br. 21, 22, 25–26, 28–29. In that case, the magistrate judge interpreted the primary and secondary liability provisions of the ATA beyond their statutory limits and erroneously concluded "that recent congressional action in passing JASTA, coupled with the Second Circuit's case law interpreting [it], urges judicial restraint at this preliminary stage in the litigation." *Freeman*, 2018 WL 3616845, at *63 (citation omitted). As explained below, Plaintiffs' proposed interpretation of the ATA and JASTA is not only contrary to the statutory text and controlling precedent, but if accepted, would harm *amici*'s members and adversely affect international finance and trade.

[6] Defendants' objections to the *Freeman* report and recommendation (ECF Nos. 173, 174, 183) are *sub judice*.

SUMMARY OF ARGUMENT

It is essential that courts exercise judicial vigilance to ensure that ATA plaintiffs have sustained their pleading burden. This Court should reject Plaintiffs' efforts to "bypass Congress' express limitations on liability under the Anti-Terrorism Act," *Jesner*, 138 S. Ct. at 1405, and thus upend the balance carefully calibrated by Congress. Under JASTA, a claim for secondary civil liability requires, at a minimum, that the defendant aided and abetted the person who actually committed an act of international terrorism. 18 U.S.C. § 2333(d)(2). And this Court has made clear that JASTA also requires, among much else, that the defendant was aware of its role in terrorist activities. *Linde*, 882 F.3d at 329. This case presents the Court with an opportunity to reaffirm these critical requirements at the pleading stage.

It is important that this Court do so. ATA lawsuits are a powerful weapon: they threaten defendants with treble damages[7] and, by attempting to associate defendants with heinous acts of terror, can inflict enormous reputational harm. Any expansion of ATA liability beyond what Congress has authorized will, moreover, inevitably generate a further wave of such suits.

[7] The ATA provides that a successful plaintiff "*shall* recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees." 18 U.S.C. § 2333(a) (emphasis added).

In addition to imposing unwarranted litigation risk, expense and reputational harm on financial institutions, extending civil secondary liability beyond the statutory limits would create such broad and uncertain liability that banks operating in the U.S. might refrain from providing important services to other financial institutions, including those in emerging markets, or even decline to conduct business in certain regions altogether. Providing correspondent banking services and U.S. banknotes to non-U.S. financial institutions—the activities targeted by Plaintiffs' claims in this case—are especially vital to the functioning of the global financial system and international finance and trade.

By requiring plaintiffs to plead facts that plausibly satisfy all of the elements of the secondary civil liability claims created by Congress, courts properly restrict the scope of such liability to those defendants that have knowingly provided substantial assistance to the persons who actually committed the acts of terrorism. Under Plaintiffs' theory, by contrast, any bank providing clearing services in the U.S. could be subject to substantial treble damage awards and reputational injury based upon acts, of which it is unaware and with which it was uninvolved, of unaffiliated foreign banks. If the ATA is interpreted as expansively as Plaintiffs urge, banks operating in the U.S. will be incentivized to circumscribe or terminate the appropriate and lawful provision of important banking services to certain countries, regions, foreign banks, or others with legitimate needs for such services.

This Court should also take the opportunity to reject Plaintiffs' invitation—based solely on the *Freeman* report and recommendation—to instruct district judges to exercise "judicial restraint" at the motion to dismiss stage of ATA cases, *see* Br. 28, in disregard of *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and their progeny. Although the Supreme Court has explained that its "decision in *Twombly* expounded the pleading standard for 'all civil actions,'" *Iqbal*, 556 U.S. at 686 (quoting Fed. R. Civ. P. 1), Plaintiffs effectively seek an exception for ATA cases. Such a ruling would not only contravene the Supreme Court's landmark precedents and this Court's own jurisprudence (including in ATA cases), but would require banks to defend, through an expensive and time-consuming discovery process, claims that are deficient as a matter of law (and would ultimately fail on summary judgment). It would unfairly tip the scales in favor of ATA plaintiffs, licensing them to practice "settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement regardless of the merits of the suit." *Pension Benefit Guarantee Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013) ("*PBGC*") (quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999)).

Applying the familiar *Twombly* standard rigorously to ATA cases weeds out implausible claims against institutions that played no direct, knowing part in

promoting acts of terror, and keeps defendants "free from the burdens of discovery," *Iqbal*, 556 U.S. at 686, when discovery is unwarranted. Those burdens are particularly likely to be onerous in ATA cases, as the claims necessarily center on matters that occurred in distant and often tumultuous corners of the world.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THE LIMITS ON SECONDARY CIVIL LIABILITY UNDER THE ATA

The only route to secondary civil liability under the ATA is through JASTA, 18 U.S.C. § 2333(d)). *See Rothstein*, 708 F.3d at 97–98 (holding, pre-JASTA, that the ATA did not authorize civil aiding and abetting claims). Enacted in 2016, JASTA added a cause of action that is available only in narrow circumstances, subject to express limitations imposed by Congress.

This case presents this Court with an opportunity to make clear that under JASTA a civil aiding and abetting claim requires a plaintiff to allege and establish that: (1) the defendant aided and abetted *the person who committed an act of international terrorism;* and (2) the act in question was committed, planned, or authorized by an officially designated foreign terrorist organization ("FTO"). 18 U.S.C. § 2333(d)(2). This Court should also reaffirm that there is no liability under JASTA unless, among other things, the defendant was *aware of its role in terrorist activities*. *Linde*, 882 F.3d at 329. If JASTA's requirements are disregarded or substantially watered down, as Plaintiffs suggest, financial

institutions and other entities will be exposed to broad secondary liability that Congress never intended.

A. Plaintiffs Are Required to Plausibly Allege that Defendant Aided and Abetted the Person Who Committed the Act of International Terrorism

JASTA authorizes civil redress for aiding and abetting only (i) for injuries arising from "an act of international terrorism committed, planned, or authorized" by an organization that had been designated" by the Secretary of State as an FTO as of the date on which the act was "committed, planned, or authorized," (ii) against "any person who aids and abets, by knowingly providing substantial assistance [to] . . . *the person who committed such an act of international terrorism*." *See Linde*, 882 F.3d at 320 (alteration in original; citing 18 U.S.C. § 2333(d)(2)). In *Linde*, this Court observed that civil aiding and abetting liability under JASTA requires the act causing plaintiff's injury to have been performed by "the party whom the defendant aids." *Id.* at 329 (quoting *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983)).

Plaintiffs nevertheless suggest that a bank in the U.S. may be held liable for aiding and abetting for providing correspondent banking services or U.S. banknotes to an unaffiliated foreign bank that in turn provided banking services that "helped facilitate" the commission of acts of terrorism by others. *See* A-54 ("The [Third Amended Complaint] alleges that members of [Al Qaeda in Iraq

("AQI")] used banking and financial services provided by [Al Rajhi Bank ("ARB")] and that those services helped facilitate the November 9 Attack, along with other terrorist attacks") (District Court op.). The magistrate's report and recommendation in *Freeman*, on which Plaintiffs heavily rely, similarly recommended that plaintiffs' claims against a number of international banks survive a Rule 12(b)(6) motion, even though plaintiffs failed to allege that the defendants conspired with the persons who actually committed the acts of terrorism; plaintiffs instead merely alleged that the defendants conspired with a foreign government and others to evade U.S. economic sanctions. *Freeman*, 2018 WL 3616845 at *6–7, *26.[8]

ATA plaintiffs should not be permitted to thus elide the plain requirements of the statute and controlling precedent. Aiding and abetting liability under JASTA requires a direct connection between the alleged aiders and abettors and the persons actually committing the act of "international terrorism." Allowing claims to proceed without plausible allegations of such a direct connection would disregard the Supreme Court's recent admonition against upsetting the policy balance struck by Congress in the ATA. *See Jesner*, 138 S. Ct. at 1405 ("The

[8] The magistrate judge's report and recommendation also erroneously overlooked the fact that nearly all the alleged terrorist attacks in *Freeman* were not even "committed, planned or authorized" by a designated FTO, as the statute plainly requires. *Id.* at *11, *16–17.

detailed regulatory structures prescribed by Congress [in the ATA] and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism" and adding that "it would be inappropriate for courts to displace this considered statutory and regulatory structure"). Plaintiffs' argument that it is enough to allege that a bank "was aware of the actions of [other banks that allegedly supported terrorism] and continued to do business with them," Br. at 22 (citing *Freeman*, 2018 WL 3616845, at *6–7, *26), is not the law under *Linde*. It is, therefore, critical that courts continue to hold that secondary civil liability under JASTA requires a direct connection between the defendant and the party committing the act of terrorism. *See, e.g.*, *Shaffer*, 2017 WL 8786497, at *1 n.1 (dismissing claim where it was alleged that Deutsche Bank entered into "a conspiracy with Iran" rather than with an FTO (or any other entity that committed an act of terrorism that was "planned or authorized" by an FTO)).

More generally, "[t]he fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994); *see also Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 843 (2d Cir. 1998) (holding that for Rule 10b-5 claims, "where the requirements for primary liability are not

independently met, they may not be satisfied based solely on one's participation in a conspiracy in which *other parties* have committed a primary violation") (emphasis in original); *Rothstein*, 708 F.3d at 98 (finding that although Congress did not "intend[ ] to authorize civil liability for aiding and abetting through its silence," "[i]t of course remains within the prerogative of Congress to create civil liability on an aiding-and-abetting basis and *to specify the elements*, such as *mens rea*, of such a cause of action" (emphasis added)).

B. Plaintiffs are Required to Plausibly Allege that Defendant was Aware of Its Role in Terrorist Activities

Plaintiffs seek to avoid the requirement that, to state a claim for secondary liability under JASTA, they must plead facts that, if proven, would show that defendants were "'aware' that, by assisting the principal, [they were] [them]sel[ves] assuming a 'role' in terrorist activities." *Linde*, 882 F.3d at 329 (quoting *Halberstam*, 705 F.2d at 477). In Plaintiffs' view, a bank providing dollar-clearing services to another bank could be held liable for acts of terrorism, even though it was unaware that its services facilitated payments made to support terrorist activities by its customer's customers, much less that it knowingly supported those activities or desired "to make the [terrorists'] venture succeed." *Halberstam*, 705 F.3d at 488. That is not the law, as Judge Cote correctly recognized. *See* A61–62 (District Court op.). *See also Taamneh*, 2018 WL 5729232, at *11 (complaint "failed to . . . allege that Defendants were generally

aware that . . . they were playing or assuming a 'role' (as required in *Linde*) in . . . terrorist activities"); *O'Sullivan*, 2018 WL 1989585, at *6 (complaint lacked "plausible, non-conclusory" knowledge allegations).

C. International Finance and Trade Would Be Harmed if Courts Relax the Statutory Limitations on Secondary Civil Liability

"The practical consequences of an expansion" of secondary ATA liability "provide a further reason to reject [Plaintiffs'] approach." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008) (concerning §10(b) of the Securities Exchange Act of 1934). Financial institutions could be held liable for acts of international terrorism for engaging in transactions not with terrorists, but rather with foreign states or even with other banks that may have assisted or conspired with FTOs—without even being generally aware of having assumed a role in any terrorist activity. This Court rejected that result in the primary liability context, *Rothstein*, 708 F.3d at 96, and for good reason: it would chill the provision of "routine banking services to organizations and individuals" for fear that they might be "said to be affiliated" with terrorists. *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013).

That risk is equally real in the secondary liability context, as exemplified by the fact pattern of this case, where the alleged misconduct of a U.S. bank consisted of providing correspondent banking services and U.S. banknotes to an unaffiliated

foreign bank, ARB.[9] Domestic banks, such as Defendant HSBC Bank USA, engage in thousands of transactions with other financial institutions around the world daily, including the kinds of transactions at issue here: the clearing of international U.S. dollar-denominated payments and the provision of U.S. dollar banknotes.

Virtually every international bank clears U.S. dollar-denominated payments through New York. For example, the Clearing House Interbank Payments System, or "CHIPS," is an interbank system that transmits and settles orders in U.S. dollars for domestic and foreign banks such as *amici*'s members.[10] Almost "all wholesale international transactions involving the use of the dollar go through CHIPS." *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014). On an average day, CHIPS settles over 440,000 "payment messages" worth an aggregate of $1.5 trillion.[11] *See Jesner*, 138 S. Ct. at 1394–95 (incorporating facts about CHIPS that the IIB brought to the Court's attention in its

[9] Plaintiffs describe ARB as Saudi Arabia's largest private bank, with assets of $80 billion and over 500 branches. A-24.

[10] *See Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 119 n.7 (2d Cir. 2010).

[11] *See* CHIPS, *Annual Statistics from 1970 to 2017*, https://www.theclearinghouse.org/-/media/tch/pay%20co/chips/reports%20and%20guides/chips%20volume%20through%20july%202017.pdf?la=en (last visited Nov. 29, 2018).

amicus brief). "For these reasons, CHIPS has been widely regarded as a systemically important payment system." CHIPS, *Public Disclosure of Legal, Governance, Risk Management, and Operating Framework*, June 2018, https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips-public-disclosure-2018.pdf (last visited Nov. 29, 2018).

As for the supply of U.S. banknotes abroad, it is estimated that over one-half of the value of all U.S. currency in circulation is held abroad, and U.S. dollars are "viewed as a safe asset, where conventional safe assets are not available"; demand for U.S. currency abroad is also higher during periods of greater economic uncertainty.[12] Investors and companies outside the U.S. rely on U.S. currency "as the ultimate source of liquidity," and suffer when U.S. dollars are in short supply.[13]

Under Plaintiffs' expansive interpretation of JASTA, the clearing of U.S. dollar transactions for foreign banks and the lawful provision of U.S. banknotes under the aegis of the Federal Reserve[14] could expose banks to significant civil

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[12] Ayelen Banegas, *et al.*, Bd. of Governors of the Fed. Res., Int'l Fin. Discussion Paper, *Int'l Dollar Flows* at 1, 6, 11 (Sept. 2015), https://www.federalreserve.gov/econresdata/ifdp/2015/files/ifdp1144.pdf (last visited Nov. 29, 2018).

[13] Jon Sindreu, *Dollar Shortage Hurts Emerging Mkts.*, Wall St. J., Nov. 20, 2018, at B1.

[14] *See generally Rothstein*, 708 F.3d at 88 (describing program permitting certain banks to facilitate the international distribution of U.S. banknotes).

liability under the ATA, even if they have no direct relationship with terrorist organizations, are not aware of directly assisting those organizations, and have not provided substantial assistance in committing terrorist acts. That would, in turn, deter financial institutions, including many of *amici*'s members, from engaging in lines of business that strengthen the global economy and allow the U.S. dollar to remain the world's reserve currency. Domestic and international authorities have voiced concern that excessive "de-risking" by banks may "disrupt financial services and cross-border flows, including trade finance and remittances, potentially undermining financial stability, inclusion, growth, and development goals."[15] It is appropriate for this Court to take such concerns into account in determining whether to adopt Plaintiffs' expansive and atextual reading of the ATA. *See, e.g.*, *Shipping Corp. of India v. Jaldhi Overseas Pte.*, 585 F.3d 58, 62 (2d Cir. 2009) (overruling Circuit precedent allowing attachment of electronic fund transfers in New York because it "not only introduced uncertainty into the

[15] International Monetary Fund, SDN/16/06, *The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action* (June 2016), https://www.imf.org/external/pubs/ft/sdn/2016/sdn1606.pdf (last visited Nov. 29, 2018). *See also* U.S. Dep't Treasury, *et al.*, *Joint Fact Sheet on Foreign Correspondent Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement* (Aug. 30, 2016), https://www.ots.treas.gov/topics/compliance-bsa/foreign-correspondent-banking-fact-sheet.pdf (last visited Nov. 29, 2018) (Treasury and four U.S. federal banking regulators, addressing de-risking efforts, stating that "[t]he global financial system, trade flows, and economic development rely on correspondent banking relationships").

international funds transfer process, but also undermined the efficiency of New York's international funds transfer business," a result that "if left uncorrected, [could] discourage dollar-denominated transactions and damage New York's standing as an international financial center" (internal quotation marks omitted)).[16]

D. Judicial Vigilance in Enforcing JASTA's Requirements Is Critical in Light of the Increase in Filing of Unjustified ATA Claims against Financial Institutions and Other Legitimate Entities

As noted, deficient ATA claims, including claims of secondary liability reaching far beyond Congressional limitations on civil aiding and abetting and conspiracy liability, have proliferated in recent years. *See supra* at 6–7 & nn.3, 4, 5. Continued judicial vigilance in enforcing JASTA's requirements is critical in order to prevent such claims from proceeding beyond the motion to dismiss stage and exposing defendants to the costs of extensive discovery concerning matters that happened abroad, as well as unwarranted reputational risk.

In cases involving other statutes, the Supreme Court and this Court have demonstrated precisely such vigilance, curtailing litigants' overly aggressive attempts to stretch the bounds of civil liability beyond what Congress expressly

[16] Plaintiffs' brief reprises their allegations, which the District Court dismissed (*see* A-53 n.1), that Defendants "deviated from international and domestic [banking] standards" adopted by the U.S. government and others. A-55. Without commenting on those specific allegations, which are not relevant to ATA liability, *amici* do not condone or approve actions that violate such standards or applicable laws.

intended. For example, the Supreme Court and this Court have held that private rights of action under Section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b)), the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1964(c)), and Section 22(a) of the Commodity Exchange Act (the "CEA") (7 U.S.C. § 25(a)) lacked extraterritorial reach, where Congress did not specifically provide for it.[17] This Court has also held that plaintiffs seeking to impose aiding and abetting liability on defendants under the CEA must plead and prove the same *mens rea* as in a federal criminal prosecution, rather than the more permissive common law tort standard.[18]

Similarly, after plaintiffs' lawyers invoked the ATS's 200 year old grant of federal subject matter jurisdiction to file massive damages actions against multinational corporations based on alleged human rights abuses,[19] both the

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[17] *See, e.g., Morrison v. National Australia Bank, Ltd*., 561 U.S. 247 (2010) (SEA § 10(b)); *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) (civil treble damages claims under RICO); *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014) (private right of action under the CEA).

[18] *See In re Amaranth Natural Gas Commodities Litig*., 730 F.3d 170 (2d Cir. 2013).

[19] One analysis identified 150 such lawsuits "filed against companies in practically every industry sector for business activities in over sixty countries." U.S. Chamber Inst. for Legal Reform, *Fed. Cases from Foreign Places* 23 (Oct. 2014), https://www.instituteforlegalreform.com/uploads/sites/1/federal-cases.pdf (last visited Nov. 29, 2018).

Supreme Court[20] and this Court[21] substantially limited such claims by strictly applying the limits of customary international law. Despite the different sources of law and causes of action involved, ATS cases are similar to ATA cases in at least two important ways. First, the claimed injuries occur outside the United States, typically in areas beset by civil strife, making discovery particularly difficult and expensive. And second, the reputational damage to defendants from being associated with atrocities generates enormous settlement pressure. Indeed, ATA claims have sometimes been brought alongside ATS claims in the same or parallel actions. *See, e.g.*, *Jesner*, 138 S. Ct. at 1394 (noting that "[t]wo of the five lawsuits included claims by American nationals under the" ATA), 1404 ("in these suits some of the foreign plaintiffs joined their [ATS] claims to those of United States nationals suing Arab Bank under the" ATA).

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[20] *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding 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); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding that the ATS did not apply extraterritorially); *Jesner*, 138 S. Ct. 1386 (holding that the ATS does not extend to claims against non-U.S. corporations).

[21] *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (subjecting aiding and abetting claims under the ATS to a stringent criminal-law mens rea requirement); *Kiobel v. Royal Dutch Shell Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (holding that ATS claims could not be maintained against corporations), *aff'd on other grounds*, 569 U.S. 108 (2013).

Absent a clear statement from this Court enforcing the statutory limits of ATA claims, the sympathetic nature of many ATA plaintiffs and the horrific acts of terrorism in these cases may lead to claims being improperly sustained at the motion to dismiss stage, to the detriment of the members of *amici*, other legitimate businesses and international commerce. The practical consequences of such misjudgments in this area can be significant. As Judge Cote explained, "because money is fungible and because the international banking system depends on cooperation among financial institutions across borders, it is particularly important to focus with care in cases like this on each of the necessary elements to a finding that JASTA has been violated." A-62 (Dist. Ct. op.).

II. THIS COURT SHOULD REAFFIRM THAT ATA CLAIMS ARE SUBJECT TO THE *TWOMBLY* PLEADING STANDARD, JUST LIKE ANY OTHER CIVIL CLAIMS IN FEDERAL COURT

In support of the proposition that they should be permitted to proceed to discovery even if they fell short of alleging the required elements of a secondary liability claim under the ATA, Plaintiffs cite only the magistrate judge's report and recommendation in *Freeman* (as to which timely objections remain pending in the district court). That report construed the enactment of JASTA and this Court's decision in *Linde* as "urg[ing] judicial restraint at this preliminary stage in the litigation." *Freeman*, 2018 WL 3616845 at *63; *see* Br. 28–29.

That is emphatically not the law. On the contrary, where a plaintiff fails to meet the *Twombly* standard, so that his "complaint is deficient under Rule 8, he is not entitled to discovery" of any kind. *Iqbal*, 556 U.S. at 686. Under *Twombly*, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Moreover, plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id.* And "[t]o survive dismissal, a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Twombly*, 550 U.S. at 570). "[T]he complaint must demonstrate 'more than a sheer possibility that a defendant has acted unlawfully.'" *PBGC*, 712 F.3d at 718 (quoting *Iqbal*, 556 U.S. at 678).

This Court has already explained that *Twombly* itself forecloses the proposition advanced by Plaintiffs here (and seemingly endorsed by the magistrate judge in *Freeman*)—that a claim lacking "plausibility" may nevertheless be permitted to "proceed to discovery." In *Biro v. Condé Nast*, 807 F.3d 541, 546 (2d Cir. 2015), this Court stated that "*Twombly* rejected this approach" and "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process." *Biro*, 807 F.3d at 546

(quoting *Twombly*, 550 U.S. at 559). Indeed, one of the main reasons the Supreme Court in *Twombly* abandoned the unworkable and overly lenient "no set of facts" rule of *Conley v. Gibson*, 355 U.S. 42, 47 (1957) was that it encouraged unnecessary, burdensome and expensive discovery (comprising up to 90% of total litigation costs in many cases), while the "success of judicial supervision in checking discovery abuse" had only been "modest." *Twombly*, 550 U.S. at 559.

Although *Twombly* was an antitrust case, its holding and rationale extend to "all civil actions." *Iqbal*, 556 U.S. at 684 (quoting Fed. R. Civ. P. 1); *see also Biro*, 807 F.3d at 544 (collecting cases). As Judge Cote recognized below, *see* A-57 (quoting *Iqbal*), this of course includes ATA cases. Thus, in *Rothstein*, this Court, quoting *Twombly* and *Iqbal*, affirmed the Rule 12(b)(6) dismissal of ATA claims against an international bank for making cash transfers to Iran, which allegedly supported terrorist organizations that carried out murderous attacks in Israel. *See Rothstein*, 708 F.3d at 93–98. Since JASTA's enactment, district courts have continued regularly to grant Rule 12(b)(6) motions. *See supra* at 5. Certainly, nothing in the ATA or JASTA suggests that cases brought under those laws are exempt from the requirements of *Twombly*. And the *Freeman* magistrate judge's reliance on *Linde* as authority for exercising "judicial restraint" in evaluating Rule 12(b)(6) motions in ATA cases, is misplaced; *Linde* does not remotely support any such proposition. In *Linde*, on appeal from a judgment after

a *jury trial*, this Court held that the jury had not been properly instructed as to material elements of plaintiffs' claims. *See Linde*, 882 F.3d at 328–31.[22]

Strict adherence to the *Twombly* standard is every bit as important in ATA cases as in antitrust, securities, or RICO litigation. Relaxing the pleading standard in ATA litigation would create a serious risk that "plaintiff[s] with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence." *PBGC*, 712 F.3d at 719 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Plaintiffs' approach, although couched in terms of "judicial restraint," would actually promote judicial abdication of the duties imposed by *Twombly* and its progeny. This Court should reject Plaintiffs' invitation to diminish the federal judiciary's vigilance in guarding against the risk of "settlement extortion," *id.* at 719, by creating a *de facto* ATA exception to *Twombly*.

[22] In that posture, remand was necessary because this Court could not conclude as a matter of law that those statutory elements—that Arab Bank was "generally aware" of its role in Hamas's terrorist activities and that the bank's provision of financial services "provided substantial assistance" to those activities—were satisfied by the jury's finding only that Arab Bank provided banking services to Hamas. *See Linde*, 882 F.3d at 329–30.

Financial institutions have a particular interest in the federal courts' continued vigilance in this area. The member institutions of *amici* often provide banking services in emerging markets, including some that are beset by violence, where the attacks and injuries underlying ATA actions may arise. By increasing expense and risk, exposure to baseless ATA actions—even if they are ultimately dismissed at summary judgment—could discourage banks from providing legitimate banking services in violence-plagued regions. Iraq provides an excellent example: for over a decade, the United States government has invested substantially in Iraq and encouraged financial institutions to provide services there.[23] If district courts cease playing their gatekeeper role under *Twombly* in ATA actions,[24] such emerging markets may become toxic, and the efforts of our government to encourage their progress and economic growth will be substantially impeded.

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[23] *See, e.g.*, Testimony of E. Anthony Wayne, Ass't Secretary for Econ. & Bus. Affairs, Before the Senate Banking Subcommittee on International Trade & Finance, Feb. 11, 2004; "The United States and Iraq Sign Loan Guarantee Agreement," U.S. Dep't of Treasury Press Center, Jan. 5, 2017, https://www.treasury.gov/press-center/press-releases/Pages/jl0697.aspx (last visited Nov. 29, 2018).

[24] "By requiring district courts to make plausibility determinations based on the pleadings, *see* [*Iqbal* and *Twombly*], the Supreme Court has, in effect, made district courts gatekeepers." *Palin v. N.Y. Times Co.*, 264 F. Supp. 2d 527, 530 n.1 (S.D.N.Y. 2017).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below and make clear that: (i) the limitations on the scope of secondary liability claims for alleged ATA violations in JASTA, 18 U.S.C. § 2333(d)(2), should be unwaveringly enforced; and (ii) ATA claims are fully subject to the *Twombly* pleading standards, no less than any other types of claims filed in federal courts.

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 6,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: November 30, 2018

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Commerce of the United States

CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2018, an electronic copy of the foregoing Brief for *Amicus Curiae* the Institute of International Bankers the American Bankers Association, the Bank Policy Institute and the Chamber of Commerce of the United States was filed with the Clerk of the Court using the ECF system and thereby served upon all counsel appearing in this case.

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