No. 16-2119(L)

16-2134(con), 16-2098(con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LINDE,

Plaintiff-Appellee,

v.

ARAB BANK, PLC,

Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of New York, Nos. 04-cv-2799, 04-cv-5449, 04-cv-5564

REPLY BRIEF FOR APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court committed three fundamental errors that require reversal or, at a minimum, a new trial. Plaintiffs' efforts to point to new laws or inapposite precedent and to dismiss these errors as harmless only underscore the severity of the errors. The District Court's flawed instructions allowed Plaintiffs to prevail without ever having to prove that Arab Bank committed an act of international terrorism as defined by the ATA, or that any such act caused Plaintiffs' injuries. Moreover, the District Court further lightened Plaintiffs' burden on the remaining elements by disregarding international comity concerns and imposing a punitive sanctions order against the Bank based on its compliance with the bank-secrecy laws of the foreign countries in which it operates. The sanctions order barred the Bank from explaining to the jury *why* it could not produce the records in question. The net effect of all those rulings was to impose massive liability for providing banking services in the Middle East and to effectively direct the jury to enter judgment in Plaintiffs' favor.

I. Like the District Court, Plaintiffs argue that a violation of the material-support statute, 18 U.S.C. §2339B(a)(1), *necessarily* satisfies the ATA's "apparent intent" element. But, as the Supreme Court has recognized, the material-support statute broadly reaches many different types of "training," "expert advice or assistance," and "service[s]" that may be provided to a terrorist group. *Holder v.*

Humanitarian Law Project (*HLP*), 561 U.S. 1, 17-18, 21-22 (2010). The ATA, by contrast, requires more: The criminal acts must *also* appear intended to intimidate a civilian population, influence government policy, or affect the conduct of government by violent means. 18 U.S.C. §2331(1). Plaintiffs do not, and cannot, dispute that the District Court did not instruct the jury about those separate and more difficult-to-satisfy elements.

Perhaps recognizing the tenuous nature of the District Court's view that a violation of §2339B(1)(a) automatically suffices to establish an act of international terrorism, Plaintiffs encourage this Court to affirm on the alternative ground that the Bank's conduct violates the recently enacted statute imposing civil liability for aiding and abetting, §2333(d). But an aiding-and-abetting theory is just one more claim on which the jury was not instructed. Indeed, Congress' felt need to add aiding-and-abetting liability only underscores that the District Court's imposition of automatic liability based on the less demanding material-support showing is fundamentally flawed. In all events, liability under the new statute would require a new trial with new instructions; appellate arguments are no substitute.

II. Plaintiffs fare no better on causation. The District Court failed to instruct on but-for causation notwithstanding this Court's clear precedent that the ATA's "by reason of" language requires a showing of but-for and proximate causation. *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013). Plaintiffs do not

even attempt to show that Hamas "would have been unable to fund the attacks" that caused their injuries in the absence of the banking services at issue. *Id.* at 97.

Plaintiffs also failed to show that any actions taken by the Bank were the *proximate* cause of their injuries. As a substitute for that required showing, Plaintiffs resort to sweeping allegations that the Bank provided "tens of millions of dollars" to individuals and entities alleged to be affiliated with Hamas. But that overheated rhetoric only underscores the lack of proximate cause. Plaintiffs never alleged that the *Bank itself* provided funding to Hamas or participated in the attacks that injured them. This case concerns three specific terrorist attacks, and Plaintiffs have identified zero direct links between the Bank and the perpetrators of those attacks. The closest they come is a claim that the Bank processed two transactions for $2,655 for *relatives* of two of the nine attackers in the Route 60 shooting *two years before* the attack. Awarding a massive ATA judgment based on that single, highly attenuated link would stretch the concept of proximate causation beyond recognition.

III. Finally, as the Solicitor General and several foreign governments have explained, the District Court's extraordinary sanctions order undermines the United States' relationships with key allies and fails to show due respect for the banking laws of foreign nations. This Court recently reversed a nine-figure jury verdict in very similar circumstances and admonished against second-guessing a foreign

government's articulation of its own laws and regulations. *See In re Vitamin C Antitrust Litig.* (*Vitamin C*), 837 F.3d 175, 189 (2d Cir. 2016).

Remarkably, Plaintiffs attempt to brush this all aside as harmless error. To the contrary, the sanctions order had a profound impact on the trial and deprived the Bank of the opportunity to mount any meaningful defense. The Bank was prohibited from demonstrating its extensive compliance efforts in combatting terrorism or introducing experts on foreign banking practices; foreclosed from explaining that it closed the accounts of individuals when they were designated as terrorists by the United States; and, perhaps worst of all, muzzled in offering any explanation to the jury for *why* it could not produce certain records to the Plaintiffs. The end result was not harmless error, but a shadow of a trial that deprived the Bank of due process and gave the jury little choice but to enter judgment in favor of Plaintiffs.

* * *

The Bank operates a legitimate, transparent financial institution in the Middle East and around the world. As the Solicitor General has explained, the Bank serves as "a constructive partner with the United States in working to prevent terrorist financing." JA5258. And it has consistently been at the forefront of imposing measures to combat terrorism. *See* Opening Br.8-9. The judgment below branded this respected institution a terrorist by distorting the ATA and

ignoring the Bank's obligations to comply with the laws of the nations in which it operates. That judgment should be reversed.[1]

ARGUMENT

I. The District Court Failed To Require Plaintiffs To Prove The ATA's Act-Of-Terrorism Element.

A. The District Court Improperly Conflated §2333(a) and §2339B.

The District Court instructed the jury that it could find Arab Bank had committed an act of international terrorism simply by finding that the Bank had violated 18 U.S.C. §2339B(a)(1), which prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization." SPA146. That was reversible error. *See* Opening Br.22-36. A violation of a federal law, such as §2339B(a)(1), meets only *one* of the ATA's four defined conditions for an act of international terrorism. *See* 18 U.S.C. §2331(1) (defining "act of international terrorism" for purposes of §2333(a)). The District Court should have required the jury to find each of the four conditions in §2331(1).

1. This Court has recognized that a plaintiff must satisfy a four-part test to establish an "act of international terrorism" under the ATA. The action must

[1] Plaintiffs (at 18-19) allude to a contingent settlement reached by the parties. But they do not suggest that it moots or materially affects this appeal. Nor could they. The Bank would never have entered into a settlement that foreclosed it from obtaining appellate review of the judgment below. In all events, the referenced settlement includes a number of contingencies that may lead it to be dissolved.

"'[1] involve violent acts or acts dangerous to human life'; … [2] qualify as 'a violation of the criminal laws of the United States or of any State'[;] … [3] 'appear to be intended' to intimidate a civilian population, influence government policy, or affect the conduct of government by certain specified means"; and [4] occur mostly internationally. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68 (2d Cir. 2012) (quoting §2331(1)). Proof of a violation of the material-support statute, 18 U.S.C. §2339B(a)(1)—which is a "criminal law[] of the United States"—satisfies the second condition, but it does not, without more, satisfy any of the other three. Yet the District Court gave no instruction requiring the jury to find that the Bank had the requisite apparent intent or that its actions were violent or dangerous. *See* SPA146-48 (charging jury only on elements of §2339B(a)(1)).

By failing to charge essential elements of the statute, the District Court committed reversible error. *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). Under the clear language of §2331(1), an action constitutes terrorism for purposes of §2333(a) only when all of the conditions are met. Acts constitute terrorism, in part, because they are violent and dangerous. Acts constitute terrorism, in part, because they appear intended to carry out specific goals to incite terror and fear. And acts constitute terrorism—*again only in part*—because they violate U.S. law. Finally, acts constitute international terrorism if they satisfy the first three conditions and occur primarily abroad. In contrast, §2339B(a)(1)

criminalizes "knowingly provid[ing] material support or resources to a foreign terrorist organization." It says nothing about committing a violent or dangerous act and nothing about committing an act with an apparent intent to carry out terroristic aims.

Although one could provide material support in a way that is violent, appears intended to further terroristic aims, and occurs primarily abroad, none of those additional elements of §2331(1) is a necessary element of §2339B(a)(1) liability. To the contrary, the material support statute is primarily designed to extend liability to those who provide material support to terrorists without requiring prosecutors to prove a specific intent to further a group's terrorist ends. Thus, treating proof of material support as a substitute for the primary act of international terrorism that gives rise to liability under the ATA gets things almost exactly backwards.

2. Each of Plaintiffs' attempts to defend the District Court's misguided analysis fails.

Plaintiffs first assert (at 26) that apparent intent is measured objectively, rather than subjectively, and is thus not an "intent" or *mens rea* condition at all. But the Bank is not just quibbling over the wording of an instruction regarding apparent intent—it is instead challenging the District Court's refusal to provide *any* instruction regarding that statutory element. The objective or subjective character

of the apparent-intent element is wholly irrelevant to whether the jury was instructed that *Plaintiffs had to prove it*.

Plaintiffs fare no better in arguing (at 27) that a violation of §2339B(a)(1) "intrinsically demonstrate[s]" apparent intent. In a relatively small subset of cases, conduct that violates §2339B(a)(1) might also violate §2331(1), but that is neither generally nor *necessarily* so. The universe of conduct that constitutes "material support" is far larger than the universe that triggers liability under §2331(1). Selling groceries, serving food, helping mediate disputes, and a host of other activities may fall within the capacious material-support statute. *See HLP*, 561 U.S. at 17-18, 21-22. But this hardly means that those same acts themselves appear intended to "intimidate or coerce a civilian population" or "influence the policy of a government by intimidation or coercion." *See Stansell v. BGP, Inc.*, No. 09-CV-2501, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (dismissing ATA claims founded on §2339B where plaintiffs' "allegation[s] would not lead an objective observer to conclude Defendants intended to achieve any one of the results listed in §2331(1)(B)"); *Stutts v. De Dietrich Grp.*, No. 03-cv-4058, 2006 WL 1867060, at *2 (E.D.N.Y. June 30, 2006).

Plaintiffs contend (at 24) that *Weiss v. National Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014), held that ATA civil liability may be predicated solely on violations of §2339B(a)(1) with proof that material support was knowingly

provided to a terrorist organization. To the contrary, *Weiss* holds that satisfying §2339B(a)(1)'s *mens rea* requirement is *one* of the things that must be proved to satisfy the act-of-terrorism element, not that it is the *only* thing that must be proved.

In fact, the panel in *Weiss* maintained that all four of the conditions in §2331(1) defining an act of terrorism needed to be satisfied, including both a criminal violation premised on §2339B and the apparent-intent requirement of §2331(1)(B). *See* 768 F.3d at 207 & n.6 ("[W]e do not address whether NatWest fulfilled [the apparent-intent condition] or the other requirements of the statute."). That conclusion is reinforced by an exchange at oral argument in which Judge Leval emphasized that the *Weiss* plaintiffs would "have to eventually" satisfy the apparent-intent condition. JA7206. Plaintiffs' counsel agreed that the jury would have to find that element. *Id.*

In lieu of Second Circuit precedent establishing the four separate elements of an "act of terrorism," Plaintiffs (like the District Court, SPA200-01) rely heavily on *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008). There, the Seventh Circuit stretched §2333(a) far beyond its text. *See* 549 F.3d at 690 (explaining why donating money is in itself a "dangerous" act). There is no reason for this Circuit to follow the Seventh Circuit down this misguided path. Not only is *Boim* both distinguishable and wrong, *see* Opening Br.32-34, but

subsequent developments have only underscored the error. The Seventh Circuit recognized it was expanding §2333(a), because "[p]rimary liability in the form of material support to terrorism has the character of secondary liability." *Boim*, 549 F.3d at 691; *see id.* at 708 (Rovner, J., dissenting) (noting "conceptual problems" with majority's conflation of primary and secondary liability). Congress has now added a new subsection, §2333(d), that expressly imposes a distinct form of secondary liability, aiding and abetting. While Plaintiffs mistakenly seek to take advantage of that provision enacted long after the flawed jury instructions were given here, Congress' felt need to add an express provision for aiding and abetting only underscores the problems with the District Court's earlier effort to achieve something similar through the backdoor. *See* Opening Br.28-29.

B. JASTA Does Not Provide an Alternative Ground for Affirmance.

Plaintiffs (at 37-40) make the remarkable claim that this Court can affirm on an aiding-and-abetting theory that did not exist when the jury was instructed and was therefore never put before the jury. That is a complete non-starter. Although this Court has the "purely discretionary" power to affirm a district court's legal rulings on another ground adequately supported by the record, *see CILP Assocs. v. PriceWaterhouse Coopers*, 735 F.3d 114, 127 (2d Cir. 2013), that does not provide this Court with a time machine to re-instruct the jury on a not-yet-created action or allow the Court to replace the jury as the trier of fact. *See, e.g., Doe v. Gonzales*,

449 F.3d 415, 419 (2d Cir. 2006) (per curiam) ("On remand, the district court will, as appropriate, have the opportunity to receive amended pleadings, request new briefs, conduct oral argument, and, in due course, furnish its views on the constitutionality of the [retroactively amended law]."); *Diesel v. Town of Lewisboro*, 232 F.3d 92, 108 (2d Cir. 2000) (Court will not address on appeal argument that requires "new evidence or factual findings").

The Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, §4(a), 130 Stat. 852, 854 (2016), added a new subsection, §2333(d), to the ATA. That subsection provides that "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" a violation of §2333(a) that was planned or authorized by a designated foreign terrorist organization. JASTA §4(a). JASTA also states that *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), "provides the proper legal framework for how such liability should function." JASTA §2(a)(5).

Halberstam's requirements are far more demanding than those set forth in the jury instructions here. Motivated by "[a] desire to move cautiously" to cabin the liability that can arise out of simple association with a primary tortfeasor, the court set forth two essential elements that plaintiffs must satisfy to establish aiding-and-abetting liability. 705 F.2d at 489. Here, Plaintiffs were obviously not

required to prove those elements to the jury before JASTA added §2333(d) to the statute books, and Plaintiffs would not be able to make that showing on remand either.[2]

First, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance." *Halberstam*, 705 F.2d at 477. There is a continuum from operating a rental car service, to lending a car to known terrorists, to handing them the keys to a car needed for a specific attack. The former is innocent conduct, the middle might constitute material support, and the latter could be aiding and abetting under *Halberstam*, which requires *more* than just knowingly providing material support. Yet the jury here was never asked to find more than material support. Engaging in the ordinary business of banking is a far cry from taking on a knowing role in a terrorist scheme.

Second, "the defendant must knowingly and substantially assist the principal violation." *Id.* Plaintiffs (at 39) make much of the fact that the word "substantial" also appeared in the jury instructions relating to proximate cause. SPA151. But when it comes to aiding and abetting, "substantial assistance" is a term of art—as evidenced by the seven pages *Halberstam* spent discussing what qualifies. It

[2] Plaintiffs attempted to bring a pre-JASTA aiding-and-abetting claim below but the District Court dismissed that claim before trial. SPA104.

involves balancing five different factors: "the nature of the act encouraged; the amount [and kind] of assistance given; the defendant's absence or presence at the time of the tort; his relation to the tortious actor; and the defendant's state of mind." 705 F.2d at 483-84. The jury was not instructed on any of this, and Plaintiffs did not allege the Bank knew of the attacks, financed them, encouraged them, participated in them, or was present when they occurred. *See Bigio v. Coca-Cola Co.*, 675 F.3d 163, 175 (2d Cir. 2012).

Moreover, *Halberstam*'s concept of substantial assistance involves a careful balancing of factors relevant to the relationship between the primary and secondary offense. Plaintiffs' entire strategy below, as exemplified by (but by no means limited to) the District Court's conflation of §2331(1) and §2339B(a)(1), was to blur the distinction between primary and secondary liability. More fundamentally, Plaintiffs' effort (at 39-40) to pick through findings on causation and engage in a little post-hoc balancing of the *Halberstam* factors is fundamentally misguided. The role of balancing belongs to a properly instructed jury. Because Plaintiffs' new §2333(d) theory was never presented to the jury, Plaintiffs are at most entitled to a remand. Plaintiffs' casual assertion that this Court may affirm even though the jury imposed liability based on an entirely *different* set of legal standards asks this Court to usurp the jury's role.

II. The District Court Did Not Require Plaintiffs To Prove The ATA's Causation Element.

A. This Court's Precedent Requires But-For Causation.

The District Court steadfastly refused to require the jury to find that Plaintiffs would not have been injured but-for the financial services provided by the Bank. SPA150-51. But this Court's precedents clearly require *both* but-for *and* proximate causation, and relieving Plaintiffs of the burden to show but-for causation was highly prejudicial. *See* Opening Br.36-47.

The ATA requires that the plaintiff's injury occur "by reason of" the defendant's conduct. §2333(a). Interpreting that language, this Court in *Rothstein* rejected a relaxed causation standard that fell short of traditional causation requirements. *Rothstein* reasoned instead that the statutory term-of-art "by reason of" required a showing of both but-for and proximate cause. 708 F.3d at 95.[3] Indeed, the Supreme Court has endorsed that interpretation of "by reason of" in several other statutes as well. *See Burrage v. United States*, 134 S. Ct. 881, 889 (2014) ("We have … observed that … 'the phrase, "by reason of," requires at least a showing of "but for" causation.'"); *Hemi Grp. v. City of New York*, 559 U.S. 1, 9 (2010).

[3] Far from "attack[ing]" *Rothstein*, Appellees' Br.23, the Bank encourages this Court to follow it.

Plaintiffs' primary argument for why §2333(a) does not require but-for causation is that it would be too difficult to prove that the Bank's routine banking activities caused their injuries. *See* Appellees' Br.33 (requiring but-for causation would "effectively nullify the ATA"); SPA201. The argument that the causation requirement plainly required by Second Circuit precedent interpreting the same statute and Supreme Court precedent interpreting the same language is simply too hard for Plaintiffs to satisfy is not a promising one. And it is symptomatic of Plaintiffs' mistaken belief that the ATA imposes massive liability on those who provide routine services to individuals who have some remote connection to terrorism. But-for causation would indeed eliminate liability in such circumstances, but that is entirely consistent with Congress' core purpose in enacting §2333(a) of the ATA, namely, to provide a robust remedy against those who *commit* acts of terrorism. *See* Opening Br.4-6. There is nothing difficult about proving but-for causation against the individuals and entities that actually perpetrate terrorist acts.

Relatedly, Plaintiffs assert (at 32) that §2333(a) was intended to impose liability "up the causal 'chain of terrorism.'" But any such "chain" in this case has been stretched beyond its breaking point. The alleged link is that the Bank processed financial transactions by which an unrelated organization gave money to one attacker's son for an unknown reason two years before one of the attacks in

question. *See infra* pp. 21-22. Given the the attenuation of those connections, the causal chain here evaporates into thin air; the Bank simply did not cause Plaintiffs' injuries. To the extent there are any "difficulties" in proving a causal link here, this is a feature of the statutory design, not a flaw. In all events, the biggest problem with Plaintiffs' "too-difficult-to-prove" argument is that an element of a cause of action cannot be discarded simply because proving it makes imposing liability on certain defendants too hard.

Plaintiffs also note that there are other categories of torts for which but-for causation has been relaxed, *see* SPA205; *Boim*, 549 F.3d at 695-98, but those situations are entirely inapposite. For example, Plaintiffs assert (at 34) that an ATA claim based on "provision of funds to terrorists" is the "quintessential example" of a multi-causal tort. That is wrong. A tort is multi-causal when at least two causes are independently sufficient to cause the plaintiff's injury, and therefore none is strictly necessary to cause that injury. An example often given is two fires, each the result of a different defendant's negligence, that converge on the same house and burn it down. *See Boim*, 549 F.3d at 695-96. Neither defendant's negligence was a but-for cause of the damage, but either fire *alone* would have destroyed the house. But this is not such an overdetermined equation where multiple tortfeasors were the independent and sufficient causes of the terrorist attacks. Multiple financial institutions may have provided fungible cash to individuals tangentially

connected to the attacks, but they are no more liable than multiple banks that provided services to relatives of negligent defendants in the dual-fire scenario.

Finally, Plaintiffs (at 34) cite *Paroline v. United States*, 134 S. Ct. 1710, 1724 (2014), for the proposition that "alternative and less demanding causal standards" may be used where needed to "vindicate the law's purpose." But *Paroline* was a case about criminal restitution, not a civil tort. The Court adopted an admittedly unusual causation rule to address a scenario in which the victim (who had been depicted in child pornography) had been injured by many individuals who viewed those images, none of whom was the but-for cause of her harm. The Court thus adopted a rule of approximate proportional liability, not joint-and-several liability for 100% of the victims' injuries.

Here, Plaintiffs have expressly disavowed a proportional-liability theory akin to the one in *Paroline*, instead asserting that "Arab Bank *is 100% legally responsible* for the damages that the Plaintiffs sustained as a result of the terrorist attacks for which the jury found the Bank liable." Mem. of Law in Supp. of Pls.' Mot. to Strike Expert Report of Dr. Marc Sageman, *Linde v. Arab Bank, PLC*, No. 04-CV-2799 (E.D.N.Y. July 10, 2015), ECF No. 1285-1 at 4 (emphasis added); *see id.* ("Arab Bank's 'comparative responsibility' for the three attacks at issue" is "irrelevant."). Having litigated this entire case on the premise that Arab Bank is "100% legally responsible" for their injuries (indeed, by virtue of the ATA's treble-

damages provision, 300% responsible), Plaintiffs cannot now rely on a highly idiosyncratic causation rule for comparative-fault, criminal restitution cases. *Paroline*'s diluted causation rule should not be combined with joint-and-several liability absent the clearest direction from Congress.

The reason why Plaintiffs have resorted to these far-fetched arguments why but-for cause should not be required is simple: It is the only way to sweep in secondary tortfeasors as primary violators of §2333(a). *See* SPA202. But the problem with this strategy is that it also sweeps in a lot more. In general, secondary tort liability for either aiding and abetting or civil conspiracy does not require that the secondary tortfeasor cause the conduct of of the primary tortfeasor. *Cf. Boim*, 549 F.3d at 692. But other rules (that do not appear in §2333(a)) can be used to limit liability. The notions of "substantial assistance" and the "scope of the conspiracy" perform a similar function as causation to make sure that liability is extended only to parties that are sufficiently culpable.

Relaxing but-for causation as applied to *primary* violators under §2333(a) both eliminates a statutory element and makes no sense. It is one more example of Plaintiffs' efforts to distort a statutory scheme that was set up to reach the conduct of primary actors in order to artificially mimic secondary liability without providing commensurate protections. The addition of §2333(d) means that these

contortions are not necessary—and Congress' decision to add that subsection underscores that §2333(a) was always about primary liability.

* * *

At bottom, the District Court's decision and Plaintiffs' arguments are in direct conflict with *Rothstein*, which recognizes that both but-for and proximate causation are required by §2333(a). Not only did the District Court relieve Plaintiffs of the burden to prove but-for causation, SPA201, but Plaintiffs went so far as to admit that they *could not prove it*, JA4468. The Bank is entitled to judgment, not just a new trial, based on Plaintiffs' concession that they cannot prove a central element of their claims.

B. Plaintiffs Did Not Prove that the Bank Proximately Caused Any of the Attacks at Issue.

Even setting aside but-for causation, Plaintiffs were not held to their burden to prove proximate cause. Proximate cause requires a direct connection between action and injury. *See Rothstein*, 708 F.3d at 96-97. Such a connection might be shown if, for example, a defendant "participated in" an attack or gave terrorists money that actually "aided in" an attack. *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 124 (2013). But "providing routine banking services to organizations and individuals said to be affiliated" with a terrorist organization is plainly insufficient. *Id.*

Three specific attacks are at issue here: the March 2002 bombing at Café Moment, the March 2003 bombing of Bus No. 37 in Haifa, and the June 2003 shooting attack on Route 60. With respect to each, Plaintiffs did not and cannot prove that the Bank's services proximately caused the attack. There is no allegation that the *Bank itself* provided any funding for these attacks; at most, the Bank is alleged to have processed transactions for the benefit of others allegedly affiliated with Hamas and unrelated to these attacks. In all events, Plaintiffs adduced zero evidence establishing how these three attacks were financed, let alone that money transferred through the Bank was used to commit them. *See* JA7157, JA7164, JA7168-69. Notwithstanding their possession of the transfer records for *every* Saudi Committee transaction, Plaintiffs offered no proof that any of the attackers received a payment from the Saudi Committee or otherwise received the benefit of any of the Bank's services. *See* Opening Br.36-40.

Plaintiffs attempt to bolster their allegations of proximate causation by asserting (at 13-15, 36) that the Bank transferred "millions" of dollars to "Hamas charities," and that those transfers were "a substantial factor in the sequence of events responsible for causing Plaintiffs' injuries." But those figures are based on a deeply misleading portrayal of the record evidence. For example, Plaintiffs assert (at 4, 14) that the Bank processed "$32 million" for charities that were "Hamas fronts." But those charities were not designated as terrorist organizations

at the time, JA5637-38; were licensed by the Israeli government, JA5656; were largely endorsed by USAID, *e.g.*, JA6392, JA6397, JA6403; and were mostly organized *before* Hamas was founded, JA5655, JA6217.

Similarly, Plaintiffs allege (at 36) that the bank processed "$3 million" for "senior Hamas leaders," without mentioning that all but a handful of those transactions were for individuals who have never been designated as terrorists, JA581-83, *see* Opening Br.11 (describing rare, inadvertent exceptions). Plaintiffs also have no response to the undisputed fact that more than 100 other U.S. and international financial institutions participated in processing those routine, automated, electronic transfers, *see, e.g.*, CA1071-107, and that the transfers were executed in compliance with the banking laws and regulations in the jurisdictions where they were processed, *see* JA6727-28, JA7017-18.

In short, none of the individuals identified as perpetrating the three attacks in question was connected to the Bank in *any* way, at *any* time. The only evidence of money transferred through the Bank that Plaintiffs have even attempted to link to one of the attacks are two Saudi Committee transactions involving *relatives* of two of the nine perpetrators of the Route 60 shooting. The alleged son of one attacker and a person with an unspecified relationship to another received payments from the Saudi Committee for $2,655.78 each on January 25, 2001 and December 23, 2000 respectively—more than *two years before* the attack. *See* JA878, JA896,

JA7168-69. But Plaintiffs introduced no evidence connecting those relatives or payments to Hamas, let alone to the Route 60 attack. And there was no evidence the Bank contributed any funds to the Saudi Committee or played any role in choosing these two individuals as beneficiaries of Saudi Committee payments.

Simply put, there is no evidence showing that the Bank's services *actually* aided in any of the three attacks. Under Plaintiffs' view, if a bank processes a transaction for an individual who is alleged *years later* to be linked to a terrorist organization, that is enough to impose massive liability under the ATA for any terrorist attack committed by *other* affiliated individuals over an indefinite time period. The breadth of liability available under such a limitless view of causation is staggering. Plaintiffs' theory is wholly unmoored from this Court's precedents and longstanding principles of proximate causation.

III. The District Court's Flawed Sanctions Order Gave Insufficient Weight To International Comity And Violated Due Process.

A. The Comity Analysis Disregarded the Importance of Compliance with Foreign Law.

1. As the Solicitor General recognized in a brief filed with the U.S. Supreme Court, the comity analysis underlying the District Court's sanctions order "was flawed in several respects." JA5250. The District Court failed to recognize and appropriately weigh all of the important interests involved when a foreign law prohibits disclosure, failed to credit the statements of foreign nations about their

own laws, and erroneously penalized the Bank for complying with government investigations. Finally, the District Court dismissed the considered view of the United States as articulated by the Solicitor General as mere dicta. *See* Opening Br.48-54.

The only interest in the laws of other nations the District Court even began to credit was the Bank's desire to avoid foreign criminal prosecution. SPA89. But the interests of the United States and foreign sovereigns cannot be so narrowly cabined. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S.D. Iowa*, 482 U.S. 522, 543-44, 546 & n.27 (1987). The United States' interest in preserving diplomatic relations with other countries, foreign sovereigns' interest in protecting their citizens' confidential information, and the Bank's desire to respect the laws of countries where it operates were all given short shrift by the District Court's incomplete and flawed comity analysis. *See* JA5252-57. By failing to weigh those values, the sanctions order "undermine[s] the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism." JA5257. It disregards the United States' "significant interest in the stability of Jordan's financial and political system." JA5258. And it gives "scant weight" to "laws of general applicability that reflect legitimate sovereign interests in protecting foreign citizens' privacy and confidence in the nations' financial institutions." JA5254-55. Plaintiffs (at 44-47)

quibble with various factual assertions in the United States' brief, but they do not seriously dispute the United States' views regarding the weighty foreign policy and international comity interests implicated by this case.

Plaintiffs argue (at 44) that the Bank "misstates" the "foreign interests at issue," but the submissions of foreign governments and regulators speak for themselves. The government of Jordan (a close ally of the United States) has expressly warned that "[w]hen an American judge punishes a Jordanian company simply for following Jordan's laws—as the District Court did here—it is a direct affront to Jordan's sovereignty." Brief for *Amicus Curiae* the Hashemite Kingdom of Jordan in Support of Appellant and Reversal, at 15; *see id.* at 23-30. And the District Court brushed aside concerns raised by Jordanian (JA3547, JA3826-27), Lebanese (JA3554, JA3820-21), and Palestinian (JA3543-44, JA3823-24) officials. The District Court's ruling amounts to a conclusion that either foreign sovereigns and foreign governments do not really know what they are talking about when it comes to their own laws or that their views are simply irrelevant.

This Court has already made clear that neither explanation is acceptable. *See Vitamin C*, 837 F.3d at 189-92. To the contrary, this Court emphasized that a U.S. court is "bound to defer" to a foreign government's views regarding the "construction and effect of its laws and regulations." *Id.* at 189. Likewise, "factual evidence" of a foreign government's "unwillingness or inability to enforce" its

laws is irrelevant. *Id.* at 192. Like the District Court, Plaintiffs seek to do exactly what *Vitamin C* prohibits: namely, to disregard statements made by foreign governments about foreign law in filings before this Court. *See, e.g.*, Appellees' Br.48-49 (arguing that the Bank would not necessarily face threat of prosecution for noncompliance with foreign banking laws).

2. Perhaps because the District Court unambiguously failed to balance the weighty comity interest at stake, Plaintiffs argue (at 21, 45-47) that the sanctions order actually penalized separate "discovery misconduct." But the sanctions order was explicitly directed at the Bank's "refusals to produce materials called for by the production orders on the basis of foreign bank secrecy." SPA86. The District Court made no finding of bad faith. *See* SPA92. In fact, the Bank diligently pursued (under the magistrate's close supervision) every avenue to obtain the records lawfully and promptly produced them when it secured the necessary approvals from foreign governments or accountholders. *See, e.g.*, JA2471-72, CA18-20.[4]

[4] Plaintiffs suggest (at 9, 44) that records of cash transactions are not protected under the foreign banking laws at issue. That is wrong. An individual withdrawing funds in cash that have been wired to an Arab Bank branch in the Palestinian Territories, for instance, is a customer of the Bank. Applicable law mandates that the Bank accord confidential treatment to the records of those customers.

Plaintiffs attribute the length of discovery to the Bank's "misconduct," but the length of discovery was due to the complexity of the case. For example, the Bank did not "wai[t] until May 2008," Appellees' Br.6, to produce records; it produced records according to a schedule set by the magistrate. In many cases, discovery delays were caused by the magistrate or by Plaintiffs themselves. *See, e.g.*, JA2141, JA2433, JA2442. When the Bank tried to ask Plaintiffs to cooperate to obtain waivers of the bank-secrecy laws, Plaintiffs responded: "It's not our job to figure out how they get around their obligations." JA2045. The reality of discovery is that it can be long and arduous, especially in a case as complex as this one, which involved 12 original actions, 53 pleadings and 38 discovery conferences. Although the Bank started the process of seeking permission from foreign authorities to disclose account records early in discovery, *see, e.g.*, JA2101, 2435-36, that process was time-consuming. Conducting discovery in the Palestinian Territories also presented unique challenges. *See* JA2815. The notion that the extraordinary sanctions order was the product of "discovery misconduct" rather than the impossibility of simultaneously satisfying the strictures of foreign law and Plaintiffs' discovery demands is simply not plausible.

B. Imposing the Sanctions Order Was Not Harmless Error.

Plaintiffs attempt to dismiss the extraordinary sanctions order as harmless error because the adverse-inference instruction "was effectively lost in the nearly

seven weeks of trial proceedings." Appellees' Br.55 (quoting SPA191).[5] The draconian sanctions order could not possibly have been harmless. Courts routinely recognize that an "adverse inference instruction, when not warranted, creates a substantial danger of unfair prejudice." *Morris v. Union Pac. R.R.*, 373 F.3d 896, 903 (8th Cir. 2004).

Moreover, *this* sanctions order went far beyond permitting an adverse inference; it effectively foreclosed the Bank's ability to mount a meaningful defense. *See* JA4627 (Judge Cogan "underst[ood] [the order] ma[de] it very difficult to defend the case"). The Bank was prohibited from offering critical evidence that went to the heart of its defense. It was barred from demonstrating its compliance efforts in combatting terrorism, *e.g.*, JA4598-606, JA6973-77, JA7004-09, or introducing experts on foreign banking practices, SPA114-15. It was prohibited from explaining that it closed the accounts of any individuals when they were designated terrorists. JA6915-16, JA7118-21. And, on top of those hurdles, the Bank was prohibited from using any of its evidence to establish its innocent state of mind in providing the financial services at issue. JA7142.[6]

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[5] Plaintiffs also suggest (at 22) that the Bank itself wanted the adverse inference instruction. Of course the Bank did not want *any* adverse inference instruction; it opposed the more harmful instruction Plaintiffs proposed.

[6] Judge Weinstein allowed the introduction of identical evidence. *See Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 551 (E.D.N.Y. 2012).

Worse still, the District Court prohibited the Bank from explaining *why* it had not produced certain records. Instead, Plaintiffs' counsel repeatedly told the jury that the Bank was engaging in deception by refusing to disclose the records. *E.g.*, JA7124-29. The jury was permitted to infer that those records would demonstrate culpability, and the Bank was prohibited from providing any other reason why it would not produce them, such as compliance with foreign law. This made the jury unable to effectively apply even the *permissive* adverse inference. The practical effect of the District Court's gag order rendered the inference not just permissive, but dispositive, and Plaintiffs blink reality by suggesting that this could have somehow been harmless error.

C. The Sanctions Order Violated the Bank's Due-Process Rights.

The sanctions order was erroneous and harmful. That is enough to require reversal. But the draconian order went so far it violated the Bank's fundamental right to due process.

As a matter of due process and fundamental fairness, a jury cannot evaluate whether to apply a permissive sanction unless it hears the party's *reason* for the non-production. *See Tupman Thurlow v. S. S. Cap Castillo*, 490 F.2d 302, 308-09 (2d Cir. 1974). By coupling the permissive inference instruction with a refusal to permit any countervailing explanation, the sanctions order effectively told the jury what to find. *See* JA7129; *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 750

(8th Cir. 2004) (when "the jury is deprived of sufficient information on which to base a rational decision of whether to apply the adverse inference, and an otherwise permissive inference easily becomes an irrebuttable presumption"). Such a severe sanction, unsupported by any finding of bad faith, violated the Bank's right to due process. *See Cine Forty-Second St. Theatre v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066-68 (2d Cir. 1979).

Plaintiffs argue that a permissive inference can be justified even in the event of good-faith noncompliance with discovery orders, *see* Appellees' Br.50, and that the permissive inference was not really dispositive, *id.* at 50-53. Those arguments entirely miss the point. The sanctions order was far more punitive than a permissive inference: Because the Bank was barred from taking any steps to rebut the inference, the jury effectively had no choice but to find that the Bank provided financial services to Hamas and that the Bank had knowingly processed payments from the Saudi Committee to terrorists. *See* Opening Br.56-58. It was the equivalent of entering a finding for Plaintiffs on nearly every element of their claims—at least those for which the District Court had not *already* decided that Plaintiffs did not need to bear the burden of proof.

* * *

If this Court adopts the District Court's flawed interpretation of §2333(a) or approves its disregard of the laws of other nations, the effects would be felt far

beyond just this case. If Plaintiffs succeed, the provision of fungible services to someone who might commit a terrorist act years in the *future* would open the door to massive ATA liability (including treble damages) for any resulting harm. The effect not only on the Bank, but on every legitimate businesses operating in a volatile region plagued by terrorism, would be devastating. The District Court's unprecedented disregard of foreign policy and international comity concerns would also hinder the cooperation of foreign sovereigns with the United States in the fight against terrorism. The decision below is inconsistent with this Court's precedents, the relevant statute, the foreign policy interests of the United States and common sense. It should not be allowed to stand.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed and judgment entered for the Bank. At a bare minimum, this Court should vacate the judgment of the District Court and remand for a new trial.

Respectfully submitted,

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February 15, 2017

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I hereby certify that:

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February 15, 2017

s/Paul D. Clement
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I hereby certify that on February 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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