

19-3970

IN THE
**United States Court of Appeals
for the Second Circuit**

CHARLOTTE FREEMAN, FOR THE ESTATE OF BRIAN S. FREEMAN,
KATHLEEN SNYDER, RANDOLPH FREEMAN, G.F., A MINOR, I.F., A
MINOR, DANNY CHISM, LINDA FALTER, RUSSELL FALTER, FOR THE
ESTATE OF SHAWN O. FALTER, SHANNON MILLICAN, FOR THE
ESTATE OF JOHNATHON M. MILLICAN, MITCHELL MILLICAN, BILLY
WALLACE, STEFANIE WALLACE, D.W., A MINOR, C.W, A.W., A MINOR,
TRACIE ARSIAGA, CEDRIC HUNT, SR., ROBERT BARTLETT,

(Caption continued on inside cover)

**On Appeal from the United States District Court
for the Eastern District of New York**

**BRIEF OF RETIRED GENERALS
OF THE U.S. ARMED FORCES
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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Plaintiffs-Appellants,

—against—

HSBC HOLDINGS PLC, (HSBC), HSBC BANK PLC, (HSBC-EUROPE), HSBC BANK MIDDLE EAST LIMITED, (HSBC MIDDLE EAST), HSBC BANK USA, N.A., (HSBC-US), BARCLAYS BANK PLC, STANDARD CHARTERED BANK, ROYAL BANK OF SCOTLAND, N.V., CREDIT SUISSE, BANK SADERAT PLC, JOHN DOES, 1-50, COMMERZBANK AG,

Defendants-Appellees.

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE DISTRICT COURT ERRED BY HOLDING THIS CASE INVOLVED TWO DISTINCT CONSPIRACIES, NOT THE SINGLE CONSPIRACY ALLEGED INVOLVING DEFENDANTS, IRAN, THE IRGC, AND ITS AGENTS AND PROXIES.	9
II. THE DISTRICT COURT’S PROXIMATE CAUSE ANALYSIS WAS FLAWED BECAUSE THERE WERE NO “INTERVENING ACTORS” TAKING “INDEPENDENT ACTIONS” TO BREAK THE CAUSAL CHAIN HERE.	19
III. THE DISTRICT COURT ERRED BECAUSE JASTA LIABILITY IS NOT LIMITED TO THOSE WHO CONSPIRE WITH PERSONS OR ENTITIES WHO “SOLELY EXIST FOR TERRORIST PURPOSES.”	23
CONCLUSION	29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Freeman v. HSBC Holdings PLC</i> , 413 F. Supp. 3d 67 (E.D.N.Y 2019)	<i>passim</i>
<i>Freeman v. HSBC Holdings PLC</i> , No. 14-cv-6601, 2018 WL 3616845 (E.D.N.Y. July 27, 2018)	5
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010).....	25
Statutes	
18 U.S.C. § 2333(d)(2).....	5, 8
18 U.S.C. § 2339A.....	25
Other Authorities	
153 Cong. Rec. S15876 (2007).....	25
Advisory, Department of the Treasury Financial Crimes Enforcement Network (June 22, 2010), <i>available at</i> https://www.occ.treas.gov/ news-issuances/bulletins/2010/occ2010-31a.pdf	14, 20
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Dep’t of the Treasury, “Treasury Designates Iranian Airline Linked to Iran’s Support for Terrorism” (Oct. 12, 2011), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1322.aspx>.....17

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici curiae are nineteen retired Generals of the U.S. Armed Forces—Gen. Keith B. Alexander, Gen. Vincent K. Brooks, Gen. John Campbell, Gen. Richard A. Cody, Gen. Jack Keane, Gen. Peter J. Schoomaker, Gen. James D. Thurman, Gen. William Scott Wallace, Lt.-Gen. James O. Barclay III, Lt.-Gen. Mick Bednarek, Lt.-Gen. Daniel P. Bolger, Lt.-Gen. Sean B. MacFarland, Lt.-Gen. H.R. McMaster, Lt.-Gen. Michael L. Oates, Lt.-Gen. Stephen Speakes, Lt.-Gen. James Terry, Lt.-Gen. Keith C. Walker, Maj.-Gen. Anthony Cucolo, and Br.-Gen. William H. Forrester—who led America’s efforts to counter the national security threats posed by the Islamic Republic of Iran (“Iran”) and its terrorist agents and proxies, including those that operated in Iraq.²

We respectfully seek leave to file this brief to urge reversal of the district court’s decision dismissing the Second Amended Complaint (“SAC”) in this case. We are gravely concerned that the district court’s decision, if not reversed, will effectively gut the Justice Against Sponsors of Terrorism Act (“JASTA”), which amended the Anti-Terrorism Act (“ATA”) “to provide civil litigants with the broadest possible basis to seek relief against persons, entities, and foreign countries,

¹ No party or counsel for a party authored or paid for this brief in whole or in part or made a monetary contribution to fund the brief’s preparation or submission. No one other than *amici* or their counsel made a monetary contribution to the brief.

² Biographical information for each *amici* member is included in Exhibit A.

wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.” SPA-255 § 2(b).

This is the first case in which a federal appellate court will consider claims seeking relief under the JASTA amendments and the ATA for terrorist attacks perpetrated by the Islamic Revolutionary Guard Corps (“IRGC”) and Hezbollah during Operations Iraqi Freedom and New Dawn in Iraq. It raises important issues about the evolving nature of state-sponsored terrorism, particularly regarding terrorism committed by the IRGC with and through its agents and proxies, including U.S.-designated Foreign Terrorist Organizations (“FTOs”), which we have observed and confronted firsthand.

We have direct professional knowledge of the attacks that give rise to this case and the way in which Iran, the IRGC, and Hezbollah operate. Plaintiffs are primarily family members and estates of U.S. service members who were killed or wounded in Iraq. Many of those service members served under our command. We know that the IRGC and Hezbollah have been and are targeting American interests in the Middle East and elsewhere every day. The proper interpretation and enforcement of JASTA and the ATA are essential to combatting those operations and holding all helping finance them accountable. The district court’s decision would make that accountability nearly impossible.

Plaintiffs are mostly United States service members who were killed or injured in ninety-two Iranian-backed terrorist attacks while serving as part of the United States military's combat and stability operations in Iraq (or family members of such service members). *See* SAC at ¶¶ 57, 1041–2178. Eighty-two of the attacks involved powerful Hezbollah-designed and Iranian-manufactured weapons called explosively formed penetrators (“EFPs”), designed to penetrate the armor of military vehicles. The remaining attacks involved kidnappings, shootings, improvised rocket-assisted munitions, indirect fire attacks, and small arms fire attacks. All of the attacks were committed jointly by Iran and components of its terror apparatus—namely, the IRGC and Hezbollah, using their local Iraqi proxy groups. *See id.*³

Plaintiffs allege “a wide-ranging conspiracy” involving Defendants, Iran, its banking agents (including Bank Saderat, Bank Melli, and the Central Bank of Iran (“CBI”)), certain Iranian commercial entities, the IRGC, Hezbollah, and their agents “to evade U.S. sanctions on financial and business dealings with Iran, conduct illicit trade-finance transactions, conceal the involvement of Iranian agents in financial payments to and from U.S. dollar-denominated accounts, and facilitate Iran’s provision of material support to . . . terrorist activities and organizations, including

³ While we include certain relevant allegations from Plaintiffs’ SAC for purposes of this Statement, we take no position concerning Plaintiffs’ ability to prove their claims against any specific Defendant. For the purposes of this appeal, given the procedural posture of the case (*i.e.*, consideration of a motion to dismiss), we treat all well-pleaded allegations in the SAC as true.

Hezbollah.” *Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 73 (E.D.N.Y. 2019). To advance these goals, Defendants “agreed to engage in, among other things, ‘stripping,’ whereby the banks removed or otherwise altered information on payment messages sent through U.S. correspondent banks that might have alerted the banks and American authorities to the involvement of Iranian agents in the transaction.” *Id.* at 74. They “concealed the involvement of Iranian banks in Letters of Credit used to facilitate the purchase of export-controlled goods, technologies, and weapons.” *Id.* They did so “despite knowing of Iran’s status as a state sponsor and supporter of foreign terrorist organizations and Iran’s associations with Specially Designated Global Terrorists (‘SDGTs’).” *Id.* And these Iran-affiliated FTOs and SDGTs, “including Hezbollah, the IRGC, and an IRGC directorate known as the Islamic Revolutionary Guard Corps-Qods Force (‘IRGC-QF’), developed improvised explosive devices (‘IEDs’) that were used to kill or maim American citizens in Iraq from 2004 to 2011.” *Id.*

As part of this conspiracy, Defendants laundered large sums of money on behalf of other co-conspirators, including the National Iranian Oil Company (“NIOC”), a state-owned company and an agent of the IRGC; CBI; Islamic Republic of Iran Shipping Lines (“IRISL”); Mahan Air, an Iranian airline and SDGT; and the Ministry of Defense and Armed Forces Logistics (“MODAFL”), a key procurement arm of Iran’s military and the IRGC. *See, e.g.*, SAC at ¶¶ 19–21, 50, 197–225, 337–

49, 375–81, 433–43, 568, 671, 918, 1013–22. They premised their claims, as relevant to this appeal, on JASTA, which provides that:

In an action under [§ 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization . . . as of the date on which such act of international terrorism was committed, planned, or authorized, 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 such an act of international terrorism.

18 U.S.C. § 2333(d)(2).

Under this standard, Defendants’ motions to dismiss should have been denied. Magistrate Judge Pollak, in her Report and Recommendation (“R&R”) to the district court, so found. *Freeman v. HSBC Holdings PLC*, No. 14-cv-6601, 2018 WL 3616845, at *59 (E.D.N.Y. July 27, 2018). The district court, however, declined to accept that recommendation. Instead, it dismissed the case, noting its decision was “inform[ed]” by what it perceived as “a decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy.” *Freeman*, 413 F. Supp. 3d at 73 n.2.

That was a mistake. JASTA is antithetical to the supposed “trend” the district court mentioned and sought to continue. The court should have applied JASTA as it is written and denied Defendants’ motions to dismiss. Instead, it misread the SAC, failed to draw all reasonable inferences from the SAC in Plaintiffs’ favor, and misinterpreted the law to immunize Defendants from liability for conduct that

JASTA and the ATA were intended to cover. If the district court's decision remains in effect, it will render JASTA meaningless.

SUMMARY OF ARGUMENT

The district court's decision granting Defendants' motions to dismiss was based on at least three interrelated and fundamental errors. *First*, in contravention of the SAC's well-pleaded allegations (and our extensive experience in the region), the district court drew artificial factual distinctions between the conduct of the IRGC and the commercial and financial entities it controls. Although the court recognized that, as pleaded in the SAC, the IRGC, its proxies, and Hezbollah worked symbiotically in Iraq, jointly committing hundreds or perhaps thousands of terror attacks directed at American targets, and recruiting, establishing, arming, funding, training, and directing local Iraqi proxies to assist them in carrying out those acts of terrorism, it ignored the fact that the IRGC had infiltrated the Iranian financial and commercial sectors and used them extensively to support its terrorist aims. As a result, the district court held that this case involved two separate conspiracies—one between Defendants and the Iranian financial and commercial entities to launder billions of dollars, and a second between those same Iranian financial and commercial entities and the IRGC, its proxies, and Hezbollah to carry out acts of terrorism. This holding contradicts the SAC's well-pleaded allegations and is, in our experience, counterfactual. According to the SAC, the Iranian commercial and

financial entities at issue here were agents and proxies—or, to borrow the district court’s language, “conduits”—for the IRGC. They were part of a single conspiracy aimed at obtaining the financial means to carry out the IRGC’s terroristic aims. Those allegations must be credited at this stage of the litigation and are, in our experience, consistent with reality.

Second, and relatedly, in its ruling on proximate causation, the district court portrayed Iran’s conspiracy to target Coalition Forces in Iraq (*i.e.*, troops from the United States, United Kingdom, Poland, and elsewhere) as a chain of causation involving “intervening actors in this case, *i.e.*, Iran and its commercial entities, whose independent actions break th[e] inferential chain.” 413 F. Supp. 3d at 92. But that holding fails to credit the SAC’s well-pleaded allegations. Moreover, in our experience, it ignores the truth about how the IRGC works.

While the selection of a specific location or vehicle may have been the result of independent decisions made by individual terrorists or a local cell commander, the IRGC’s terror campaign as a whole was the result of a single, unified design, jointly executed by the IRGC, IRGC-QF, and Hezbollah, under the ultimate direction of the late Qassem Soleimani. As particularly relevant here, none of the Iranian financial or commercial entities were “intervening actors” in any meaningful sense; each was effectively an instrument of IRGC policy and a source of, or conduit for, revenue for its operations. They were not performing “independent actions”

breaking the causal link between Defendants' conduct and Plaintiffs' injuries. The district court's contrary holding, which ignored the SAC's well-pleaded allegations and contradicts our extensive experience with the IRGC's operations in the region, was error.

Third, the district court erroneously concluded that, because the IRGC and its agents operate what the court described as "commercial entities" with "legitimate functions," and do not "solely" fund or engage in terrorism, it was implausible that Plaintiffs' injuries were a foreseeable consequence of Defendants' conspiracy to launder billions of dollars on behalf of those enterprises. But JASTA liability is not limited to those who conspire with entities that "solely" fund or engage in terrorism. JASTA says "liability may be asserted as to any person who aids and abets . . . or who conspires with the person who committed such an act," 18 U.S.C. § 2333(d)(2) (emphasis added)—*regardless of what else that person may have been doing*. Consistent with Plaintiffs' allegations, our collective professional experience confronting the complex threats posed by Iran and the IRGC suggests no meaningful separation between the IRGC's commercial and terrorist activities. As numerous public sources of information show, Plaintiffs' injuries were the reasonably foreseeable consequence of Defendants' agreement to join a money-laundering conspiracy that aided the IRGC, its agents, and proxies by funding and facilitating their acts of terrorism. That the IRGC and its financial and commercial agents do

not “solely” commit or fund terrorism—a requirement that finds no support in the law—and may also conduct some “legitimate” functions, does not alter this inevitable conclusion.

For these reasons, the district court’s decision granting Defendants’ motion to dismiss should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED BY HOLDING THIS CASE INVOLVED TWO DISTINCT CONSPIRACIES, NOT THE SINGLE CONSPIRACY ALLEGED INVOLVING DEFENDANTS, IRAN, THE IRGC, AND ITS AGENTS AND PROXIES.

The district court’s first critical error arose from its internally inconsistent description of the alleged conspiracy. At first, the court characterized Plaintiffs’ SAC as alleging a single “wide-ranging conspiracy . . . to evade U.S. sanctions on financial and business dealings with Iran, conduct illicit trade-finance transactions, conceal the involvement of Iranian agents in financial payments to and from U.S. dollar-denominated accounts, and facilitate Iran’s provision of material support to . . . terrorist activities and organizations, including Hezbollah.” *Freeman*, 413 F. Supp. 3d at 73 (citing SAC at ¶¶ 22–23). It noted that Plaintiffs alleged this single conspiracy included “Defendants, the Government of Iran, and multiple state-affiliated and private Iranian entities that, at times, operate as financial and logistical conduits for the [IRGC’s] and Hezbollah’s activities.” *Id.* (citing SAC at ¶¶ 22).

When discussing proximate causation, however, the district court abandoned its previous characterization of Plaintiffs' allegations and instead described the allegations as giving rise to *two* conspiracies. *See id.* at 87–89. “[A]t most,” the court said, “the SAC alleges that Defendants agreed to join a conspiracy with the *sole purpose* of evading U.S. sanctions and that some of the actors involved in this conspiracy were also members of a *separate and distinct* conspiracy to provide material support to Hezbollah.” *Id.* at 87 n.28 (emphases added) (not citing the SAC).

In other words, the district court now believed that, while the SAC's allegations “indicate that *Iran* conspired with IRISL, Mahan Air, and others to provide material support to Hezbollah and other terrorist organizations in order to facilitate acts of terrorism in Iraq,” Plaintiffs alleged only that Defendants joined a “more limited” conspiracy to help Iranian financial and commercial institutions evade U.S. sanctions. *Id.* at 88 (emphasis in original) (now citing only SAC at ¶ 6). Based on this reading, the district court concluded that it could not “infer . . . that Defendants agreed to provide illegal financial services to Iranian financial and commercial entities, which have many legitimate interests and functions, with the intent that those services would ultimately benefit a terrorist organization.” *Id.* Nor did the court believe it could “plausibly infer that Defendants knew that these funds [*i.e.*, those they conspired to conceal and disguise in violation of U.S. sanctions]

were intended to finance or facilitate Hezbollah’s or any other terrorism activities.” *Id.* at 89. Indeed, the court believed it could not plausibly infer such an agreement or belief, despite “Defendants’ knowledge of, or deliberate indifference to, their Iranian co-conspirators’ involvement in funding terrorism.” *Id.* at 87 n.28. Thus, the court dismissed Plaintiffs’ claims.

As the district court acknowledged in its initial description, however, the SAC meticulously describes a single conspiracy that involves Defendants, Iran, Iranian financial and commercial institutions, the IRGC, the IRGC-QF, and Hezbollah, among others. The court’s later bifurcation was artificial, unsupported by the SAC, and at variance with our extensive experience in the region, generally, and with these Iran-affiliated entities, in particular.

The district court’s reliance on its self-contradictory bifurcation suffers two fatal flaws. *First*, as the SAC alleges, Iran has long perpetrated and supported terrorism by using proxy groups to carry out its military and political objectives, including in Iraq. *See, e.g.*, SAC at ¶¶ 7, 9, 102–04, 112–13, 226–58. According to the SAC, between 2004 and 2011, Iran worked cohesively with Hezbollah to carry out attacks against American service members. *See, e.g., id.* at ¶¶ 226–81. Iran and Hezbollah facilitated and directed those attacks by providing local proxies sophisticated EFPs designed to pierce the armor of military vehicles, training those proxies to use those deadly devices, and then directing them to attack American

military personnel with those and other weapons. *See, e.g., id.* at ¶¶ 226–329; John D. Negroponte, Dir. of Nat’l Intelligence, “Annual Threat Assessment of the Dir. of Nat’l Intelligence for the Senate Select Comm. on Intelligence” at 12 (Feb. 2, 2006), *available at* https://fas.org/irp/congress/2006_hr/020206negroponte.pdf (noting that “Iran provides guidance and training to select Iraqi Shia political groups and weapons and training to Shia militant groups” to establish “a Shia dominated and unified Iraq” and to cause “the US to experience continued setbacks in our efforts to promote democracy and stability” in the region).

Critically, the SAC alleges that Iran employed the IRGC, the IRGC-QF, and Hezbollah to carry out these efforts.⁴ *See, e.g.,* SAC at ¶¶ 249–50 (noting the U.S. Department of the Treasury press release stating that the IRGC-QF “provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraqi Shi’a militants who target and kill Coalition and Iraqi forces and innocent Iraqi civilians”); *id.* at ¶ 270 (noting that then-Brigadier Gen. Kevin J. Bergner, a U.S. Army spokesman, stated in a briefing that the IRGC-QF had been “training, funding and arming” terrorist groups in Iraq); General David H. Petraeus, “Report to Congress on the Situation in Iraq” at 4 (Sept. 11, 2007), *available at* <https://www.>

⁴ The IRGC, including the IRGC-QF, was designated as an FTO on April 8, 2019. *See* “Designation of the Islamic Revolutionary Guard Corps” (April 8, 2019), *available at* <https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/>.

foreign.senate.gov/imo/media/doc/PetraeusTestimony070911a.pdf (noting, as Commander of Multi-National Force-Iraq, that Hezbollah worked with the IRGC-QF to “support the training, arming, funding, and, in some cases, direction of” Iraqi proxies for Iran-sponsored terrorism).

Indeed, the U.S. government has repeatedly linked Iran and its terrorist proxies to the use of EFPs in Iraq. For example, a March 2007 Department of Defense Report to Congress stated:

Consistent with the National Intelligence Estimate, Iranian support to Shi’a militias, such as JAM and the Badr Organization, includes providing lethal weapons, training, financing, and technical support. This includes supplying some Shi’a extremist groups with explosively formed projectiles (EFPs), the most effective of the roadside bombs. Shi’a extremist groups have been implicated in direct attacks against Coalition forces, including with EFP technology. EFPs require advanced manufacturing processes and training for employment that clearly place them outside the category of “improvised explosive devices.”

Dep’t of Defense Report to Congress, “Measuring Stability and Security in Iraq,” at 17 (Mar. 2007), *available at* https://www.globalsecurity.org/military/library/report/2007/iraq-security-stability_mar2007.pdf; *see also* Declassified Defense Intelligence Agency Report, FY 2010 NDAA Conference Report, *available at* <https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FOIA-Reading-Room-Iran/FileId/199471/> (“In addition to weapons and support, Iran continues training Shia militants in the use of IEDs, EFPs, and the counter-measures designed

to defeat these weapons and the networks that design, build, emplace and fund them draw persistent counter-responses.”).⁵

Second, as the United States has long known, Iran manipulates the international financial system to fund terrorism by having the IRGC “run[] numerous private companies . . . and exploit[] its far-reaching political and social influence to raise additional revenue.” Defense Intelligence Agency Report, “Iran Military Power” (2019), *available at* https://www.dia.mil/Portals/27/Documents/News/Military%20Power%20Publications/Iran_Military_Power_LR.pdf; *see also* Advisory, Department of the Treasury Financial Crimes Enforcement Network (June 22, 2010), *available at* <https://www.occ.treas.gov/news-issuances/bulletins/2010/occ2010-31a.pdf> (noting that “the increasing infiltration of Iran’s legitimate

⁵ Treasury Department designations of terrorists operating in Iraq bolster this conclusion. *See, e.g.*, Press Release, Dep’t of the Treasury, “Treasury Designates Individual, Entity Posing Threat to Stability in Iraq” (July 2, 2009), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg195.aspx> (announcing the designation of the Iranian-supported Iraqi terrorist Abu Mahdi al-Muhandis—who was killed on January 2, 2020, with IRGC-QF commander Qassem Soleimani—and stating that “instructors from Hizballah” trained al-Muhandis’ militia group to utilize explosives to attack Coalition Forces and that al-Muhandis’ militia moved EFPs from Iran to Iraq for the purpose of targeting Coalition Forces there); Press Release, Dep’t of the Treasury, “Treasury Designates Individuals and Entities Fueling Violence in Iraq” (Sept. 16, 2008), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/hp1141.aspx> (announcing the designation of Abdul Reza Shahlai, a deputy commander of the IRGC–QF, as a terrorist and stating that, “[a]s of May 2007, Shahlai served as the final approving and coordinating authority for all Iran-based Lebanese Hizballah training for JAM Special Groups to fight Coalition Forces in Iraq”).

economy by designated entities, including especially the IRGC, exposes international financial institutions to increased risk of doing business with entities directly involved in Iran's proliferation-sensitive activities"). The truth is plain: the IRGC has infiltrated Iran's financial and commercial sectors specifically to facilitate its support for terrorism.

As but one example, based on this known reality, the Department of Treasury undertook an unprecedented effort in 2006 to inform financial institutions of the significant risks associated with the provision of financial services to state-owned Iranian banks, including Bank Saderat. *See, e.g.*, Robin Wright, "Stuart Levey's War," <https://www.nytimes.com/2008/11/02/magazine/02IRAN-t.html> (Oct. 31, 2008) (describing the efforts of then-Under Secretary for Terrorism and Financial Intelligence at the Department of the Treasury Stuart Levey, who made "more than 80 foreign visits . . . to talk to more than five dozen banks" about Iranian banks' misuse of the financial system, including American intelligence tracing "\$50 million transmitted by Iran's Bank Saderat through a London subsidiary to a charity affiliated with Hezbollah in Lebanon"). In September 2006, the Treasury denied Bank Saderat access to the U.S. financial system, explaining that the bank was "used by the Government of Iran to transfer money to terrorist organizations." Press Release, Dep't of the Treasury, "Treasury Cuts Iran's Bank Saderat Off from U.S.

Financial System” (Sept. 8, 2006), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/hp87.aspx>.

In 2007, the Treasury designated MODAFL, the IRGC-QF, Bank Saderat, Bank Melli, Bank Mellat, and nine IRGC-owned-or-controlled companies, calling on “responsible banks and companies around the world to terminate any business” with these entities “and all companies and entities of the IRGC” because they were *known* to have “facilitated Iran’s proliferation activities or its support for terrorism.” Dep’t of the Treasury, “Statement by Secretary Paulson on Iran Designations” (Oct. 25, 2007), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/hp645.aspx>; *see also* Press Release, Dep’t of the Treasury, “Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism” (Oct. 25, 2007), *available at* <https://www.treasury.gov/press-center/press-releases/pages/hp644.aspx>.

In that same press release, Secretary Paulson warned: “The IRGC is so deeply entrenched in Iran’s economy and commercial enterprises, it is increasingly likely that, if you are doing business with Iran, you are doing business with the IRGC,” which was responsible for “proliferation activities and . . . for providing material support to the Taliban and other terrorist organizations.” *Id.* The Treasury specifically found, for example, that Bank Melli had been “used to send at least \$100 million” to the IRGC-QF and that it had “employed deceptive banking practices to

obscure its involvement from the international banking system,” including by “request[ing] that its name be removed from financial transactions.” *Id.*

In addition, the U.S. Government has designated other Iranian commercial entities as central to Iran’s terror apparatus, including: (1) the NIOC, which the Treasury designated an agent of the IRGC in 2012, *see* SAC at ¶ 400,⁶ and later identified as part of IRGC’s “oil-for-terror” scheme⁷; (2) Mahan Air, which smuggled IRGC personnel and weapons into Iraq and smuggled weapons for Hezbollah, *see id.* at ¶ 686⁸; (3) IRISL, which facilitated arms shipments for the IRGC and the Iranian military, *see id.* at ¶¶ 197–225; and (4) various fronts for MODAFL, which acted as the IRGC’s weapons and equipment procurement arm, *see id.* ¶¶ 713–93.

⁶ Press Release, U.S. Dep’t of the Treasury, “Treasury Submits Report to Congress on NIOC and NITC” (Sept. 24, 2012), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1718.aspx> (designating NIOC, which is owned by the Iranian government, as an “agent or affiliate of the IRGC”).

⁷ Press Release, U.S. Dep’t of the Treasury, “Treasury Designates Vast Iranian Petroleum Shipping Network That Supports IRGC-QF and Terror Proxies” (Sept. 4, 2019), *available at* <https://home.treasury.gov/news/press-releases/sm767>.

⁸ Press Release, U.S. Dep’t of the Treasury, “Treasury Designates Iranian Airline Linked to Iran’s Support for Terrorism” (Oct. 12, 2011), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1322.aspx> (explaining that Mahan Air’s “close coordination” with the IRGC-QF “reveals yet another facet of the IRGC’s extensive infiltration of Iran’s commercial sector to facilitate its support for terrorism”).

Put simply, it is clear that, as alleged, Iran was engaged in an extensive, but singular, conspiracy to fund terrorism in, among other places, Iraq. And it is equally clear that, as alleged, Iran used the IRGC, IRGC-QF, and a network of financial and commercial entities to achieve that singular aim. Given this reality, the district court's error is laid bare: There was no second, "more limited" conspiracy here. Iran sought to use various financial and commercial institutions, many of which were conduits of the IRGC and Hezbollah and have been designated as SDGTs, to evade U.S. sanctions for the specific purpose of funding terrorism. And, according to the SAC, Defendants participated in that scheme knowing their efforts would support terrorism.

Even if it were true that Defendants did not specifically intend for their services to benefit a terrorist organization—which is ultimately a question of fact for the jury and is not required by JASTA—it is reasonable to infer that they “knew these funds were intended to finance or facilitate . . . terrorism activities.” *Freeman*, 413 F. Supp. 3d at 88 (suggesting that such an inference would be sufficient to survive a motion to dismiss but concluding that the SAC did not support that inference). Indeed, that conclusion may be the only reasonable inference to be drawn from these facts, particularly once one assumes—as the district court did, *see id.* at 87 n.28—that Defendants had specific knowledge of, or deliberate indifference to, their Iranian co-conspirators *direct* involvement in funding terrorism. Nonetheless,

the district court apparently inferred, despite the SAC's allegations, the voluminous evidence discussed above, and the obviously illegal nature of their conduct, that Defendants believed these Iranian entities sought to evade U.S. sanctions and conceal their involvement in financial transactions for entirely benign purposes. This inference strains credulity and is contrary to the requirement that, at this stage of the proceeding, all reasonable inferences are to be drawn in the Plaintiffs' favor. By making it, the district court erred.

II. THE DISTRICT COURT'S PROXIMATE CAUSE ANALYSIS WAS FLAWED BECAUSE THERE WERE NO "INTERVENING ACTORS" TAKING "INDEPENDENT ACTIONS" TO BREAK THE CAUSAL CHAIN HERE.

As a logical, if not inevitable, extension of its first error, the district court next concluded that "Iran and its commercial entities"—presumably NIOC, Mahan Air, and IRISL, among others—were "intervening actors in this case . . . whose independent actions break the inferential chain" connecting Defendants' conduct to the attacks that injured Plaintiffs. *Id.* at 92 & n.32. In this respect, the court reasoned that Defendants' conduct was less like "giving a loaded handgun to a child" and "more akin to giving a loaded gun to the parent of a small child who then gives the gun to the child." *Id.* The intervening "decision to give the gun to the child is certainly dangerous and likely gives rise to an inference of malintent, but it constitutes an intervening act that attenuates any meaningful connection between the

original gun donor and the consequences of the child pulling the gun's trigger." *Id.* at 92 n.32.

As discussed above, however, Iran's financial and commercial entities were not "independent" in any meaningful sense. They were agents of or effectively controlled by the IRGC. Indeed, the U.S. Government has repeatedly acknowledged that the IRGC has "infiltrat[ed] . . . Iran's legitimate economy" and "runs numerous private companies . . . to raise additional revenue" for its terrorist purposes. Advisory, Department of the Treasury Financial Crimes Enforcement Network (June 22, 2010), *available at* <https://www.occ.treas.gov/news-issuances/bulletins/2010/occ2010-31a.pdf>; Defense Intelligence Agency Report, "Iran Military Power" (2019), *available at* https://www.dia.mil/Portals/27/Documents/News/Military%20Power%20Publications/Iran_Military_Power_LR.pdf.

The U.S. Department of Treasury has warned that "Iran . . . funnels hundreds of millions of dollars each year through the international financial system to terrorists" and that "Iran's banks aid this conduct, using a range of deceptive financial practices intended to evade even the most stringent risk-management controls." Dep't of the Treasury, "Statement by Secretary Paulson on Iran Designations" (Oct. 25, 2007), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/hp645.aspx>. As particularly relevant here, the Department of Treasury has described the IRGC as "deeply entrenched in Iran's

economy and commercial enterprises,” rendering it “nearly impossible to know one’s customer and be assured that one is not unwittingly facilitating the regime’s reckless conduct.” *Id.*; *see also* Press Release, Dep’t of the Treasury, “Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism” (Oct. 25, 2007), *available at* <https://www.treasury.gov/press-center/press-releases/pages/hp644.aspx> (noting that the IRGC “has significant political and economic power in Iran, with ties to companies controlling billions of dollars in business and construction and a growing presence in Iran’s financial and commercial sectors,” and that the IRGC “is involved in a diverse array of activities, including petroleum production and major construction projects around the country”).

To describe these entities as “independent” ignores Plaintiff’s well-pleaded allegations, defies logic, and blinks reality. Indeed, as the district court itself acknowledged, these financial and commercial entities were merely “conduits” for the IRGC’s activities. *Freeman*, 413 F. Supp. 3d at 73. And, as discussed above, several of them—including the NIOC, Mahan Air, and IRISL—have been designated agents for the IRGC and effectively operate pursuant to its control. *See* Press Release, U.S. Dep’t of the Treasury, “Treasury Designates Entities Tied to the IRGC and IRISL” (Dec. 21, 2010), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1010.aspx> (noting that “the IRGC and IRISL are

major institutional participants in Iran’s illicit conduct and in its attempts to evade sanctions” and that, “[w]ith the IRGC’s expanding influence and control over broader segments of the Iranian economy—including the defense production, construction, and oil and gas industries—increasing numbers of Iranian businesses are subsumed under the IRGC’s umbrella and identified with its illicit conduct”); Press Release, U.S. Dep’t of the Treasury, “Treasury Submits Report to Congress on NIOC and NITC” (Sept. 24, 2012), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1718.aspx> (reporting to Congress that NIOC “is an agent or affiliate of Iran’s [IRGC]” and describing the IRGC as “Iran’s most powerful economic actor, dominating many sectors of the economy, including energy, construction, and banking”); Press Release, “Treasury Designates Iranian Commercial Airline Linked to Iran’s Support for Terrorism (Oct. 12, 2011), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1322.aspx> (describing “Mahan Air’s close coordination with the IRGC-QF” as revealing “yet another facet of the IRGC’s extensive infiltration of Iran’s commercial sector to facilitate its support for terrorism”).

For that reason, the Iranian financial and commercial entities cannot reasonably be viewed as “intervening actors” performing “independent actions” that broke the causal chain between those entities, like Defendants, that assisted them in breaking the law and those individuals, like Plaintiffs, ultimately harmed by the

IRGC-sponsored terrorism made possible as a result. Given its broad infiltration, coordination, and control over these entities, the IRGC is equally responsible for the supposedly “intervening” and “independent” actions of these financial and commercial entities and the terrorism that harmed Plaintiffs.

Moreover, to the extent Defendants’ conduct was unlike handing a loaded gun directly to a child, it was more akin to handing a loaded gun to a parent with a documented and extensive history of distributing loaded guns to children, with predictably disastrous results, who is widely known to be on the lookout for additional loaded guns to hand off to children, despite repeated warnings not to give that parent any guns. In other words, it was sufficiently “dangerous” to give rise to “an inference of malintent” on Defendants’ part. *Freeman*, 413 F. Supp. 3d at 92 n.32. In concluding otherwise, the district court once again erred.

III. THE DISTRICT COURT ERRED BECAUSE JASTA LIABILITY IS NOT LIMITED TO THOSE WHO CONSPIRE WITH PERSONS OR ENTITIES WHO “SOLELY EXIST FOR TERRORIST PURPOSES.”

The district court’s final error involves the misplaced significance it gave the so-called “legitimate functions and activities” of the Iranian financial and commercial entities Defendants’ conduct helped. *See id.* at 94. For example, the district court explained that the NIOC’s daily oil sales were “legitimate business activities” it conducted “*in addition to* the activities it allegedly engages in on behalf of terrorist organizations.” *Id.* at 91 (emphasis added). Because Plaintiffs had not

pleaded—and presumably could not plead—that these Iranian entities “solely exist for terrorist purposes,” the court believed “it strains credulity to assume or infer that any person or business that provides services to [them], even illegal services, becomes a substantial factor in the sequence of responsible causation for any terrorist attack that the Iranian organization later supports.” *Id.* at 94 (internal quotation marks and citations omitted). This analysis is flawed in at least two respects.

First, and fundamentally, there is no statutory requirement that the persons engaged in a conspiracy under JASTA support entities that “solely exist for terrorist purposes.” The exact genesis of such a requirement is unclear, but it is not borne of the statute. In our experience, such a requirement is at odds with the realities of the international terrorism threats our nation faces. Indeed, even the deadliest, most far-ranging FTOs do not “solely exist for terrorist purposes.” Instead, they frequently include ostensibly “legitimate” activities like operating hospitals, schools, religious institutions, and other businesses. The truth is that one cannot fund such “legitimate” operations without providing concomitant support for deadly acts of terrorism. That is why JASTA was enacted. In this respect, our experience confirms the factual findings of both Congress and the Executive Branch that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, § 301(a)(7),

110 Stat. 1247 (1996). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 29, 33 (2010) (deferring to the congressional finding announced in AEDPA and similarly deferring to the Executive Branch’s conclusion that “all contributions to foreign terrorist organizations further terrorism”).

The district court’s reasoning has the effect of protecting Defendants from liability, even as knowing participants in a conspiracy to launder money for the express purpose of funding and facilitating terrorism—as long as they operate through a co-conspirator that performs at least some “legitimate” activities. It ignores the critical role the Iranian financial and commercial entities play in the IRGC’s terrorist campaigns, the allegations in the SAC, our experience, and the plain wording of JASTA. Indeed, prohibiting the means of violence alone would be of little use without also prohibiting the provision of the financial and human capital that enables violence. *See, e.g.*, 18 U.S.C. § 2339A. And just as “[t]here is no such thing as ‘good’ aid to a terrorist organization, because all aid is fungible and can be converted to evil purposes,” 153 Cong. Rec. S15876 (2007), there is no such thing as “good” aid to an entity conspiring with an FTO to launder money for terrorism.

Thus, the mere fact that a co-conspirator conducts some “legitimate” activities cannot insulate Defendants from liability under the ATA and JASTA for their knowing participation in a conspiracy to evade U.S. sanctions and facilitate funding to terrorist organizations. The existence of such activities does not categorically

cleanse co-conspirators of their illicit aims. Nor can Defendants be permitted to ignore the foreseeable consequences of their participation in the conspiracy simply because some co-conspirators also engaged in some “legitimate” (*i.e.*, not facially illegal) activity.

Second, the district court’s proximate causation holding ignores Plaintiffs’ well-pleaded allegations and misconstrues the nature of the alleged conspiracy. In particular, the district court found that, because “Defendants’ alleged Iranian clients are engaged in worldwide commerce, it strains credulity to . . . infer that any person or business that provides services, . . . even illegal services,” to them “becomes a substantial factor in the sequence of responsible causation for any terrorist attack that the Iranian organization later supports.” *Freeman*, 413 F. Supp. 3d at 94. The district court’s incredulity appears to be based, at least in part, on the belief, discussed above, that the Iranian financial and commercial entities are “intervening actors” taking “independent actions,” rather than agents of the IRGC. As noted above, however, that belief is contrary both to the well-pleaded allegations in the SAC and to our experience.

Indeed, the district court had already acknowledged that these Iranian financial and commercial entities were alleged to have been members of the conspiracy to fund and facilitate terrorism. *See id.* at 73 n.4 (noting that “[t]he Iranian bank co-conspirators are Bank Saderat Iran, the CBI (also known as bank

Markazi), Bank Melli Iran, Bank Mellat, Bank Tejarat, Bank Refah, and Bank Sepah”); *id.* at 73 n.5 (noting that the “Iranian commercial actors involved in the alleged conspiracy” included “the Islamic Republic of Iran Shipping Lines (‘IRISL’), the National Iranian Oil Company (‘NIOC’), and Mahan Air”). Thus, the district court’s assessment of causation bears no relation to the facts Plaintiffs alleged, which conform to our understanding of the IRGC’s general enterprise. Instead of focusing on how to join a supposed “trend” to immunize “defendants who did not deal directly with a terrorist organization or its proxy,” the district court should have asked whether it is plausible that the conspiracy Defendants joined was the proximate cause of the terrorist acts that injured Plaintiffs. The answer, of course, is “yes.”

Through that lens, which appropriately credits Plaintiffs’ well-pleaded allegations and conforms to our experience confronting Iran’s malign activities, there was and is no valid reason to dismiss Plaintiffs’ claims based on proximate causation. Indeed, the eventual acts of terrorism were the foreseeable and natural result of Defendants’ conspiratorial conduct. The significance of the support provided by the Iranian financial institutions is confirmed in the Department of Treasury’s statement that “the Iranian regime has funneled the equivalent of billions of dollars for the [IRGC-QF] through the banking sector” and that certain banks, including Bank Melli, “served as financial conduits for the IRGC-QF,” MODAFL,

and Mahan Air, among others, and “Bank Melli’s presence in Iraq was part of this scheme.” Press Release, Dep’t of the Treasury, “U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign” (Nov. 5, 2018), *available at* <https://home.treasury.gov/news/press-releases/sm541>. That conclusion finds further support in the Treasury Department’s finding that “Iran’s Central Bank has provided billions of dollars” to the IRGC, the IRGC-QF, and its terrorist proxies. *See* Press Release, Dep’t of the Treasury, “Treasury Sanctions Iran’s Central Bank and National Development Fund” (Sept. 20, 2019), *available at* <https://ir.usembassy.gov/treasury-sanctions-irans-central-bank-and-national-development-fund/>. The SAC alleges—and we have little doubt—that these funds were a substantial factor in the IRGC’s ability to sustain a lethal terrorist campaign against Coalition Forces in Iraq.

The Department of Treasury has reached similar conclusions with respect to NIOC. In particular, it recently described NIOC as “an entity instrumental in Iran’s petroleum and petrochemical industries, which helps to finance [the IRGC-QF] and its terrorist proxies.” Press Release, Dep’t of the Treasury, “Treasury Targets International Network Supporting Iran’s Petrochemical and Petroleum Industries” (Jan. 23, 2020), *available at* <https://home.treasury.gov/news/press-releases/sm885>. In short, oil sales have long been the lifeblood of the IRGC’s terror activities.

These findings demonstrate the plausibility of Plaintiffs' allegations generally. They reveal that the IRGC has been working closely with NIOC, Bank Melli, Mahan Air, CBI, Bank Saderat, and other Iranian agents for decades to achieve its destructive and deadly goals. It is thus eminently plausible that the IRGC would use these instrumentalities and agents to move funds through the international financial system and provide for its global terrorist operations. Indeed, Plaintiffs' conspiracy allegations are consistent with our experience that these Iranian financial and commercial entities are agents of the IRGC. To exempt from liability all persons who knowingly conspire with terrorists because they do not "solely exist for terrorist purposes," *Freeman*, 413 F. Supp. 3d at 94, would create an enormous loophole in the statute that Congress neither legislated nor intended. There is simply no support—in law or in fact—for the district court's conclusion. JASTA should be enforced as written.

CONCLUSION

For all of these reasons, this Court should reject the district court's flawed analysis and reverse its decision granting Defendants' motion to dismiss.

Dated: March 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 29.1(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,647 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that this 18th day of March 2020, I caused a true and correct copy of the foregoing Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

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