No. 08-640

IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO BRIEF OF THE UNITED STATES

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INTRODUCTION

The softness of the Government's opposition to certiorari, and its lack of fidelity to the traditional standards governing this Court's review, are hard to overstate. The Government describes at length how the Second Circuit erred in each of the three aspects of the decision at issue here. It agrees, as it must, that a circuit split exists regarding whether the Foreign Sovereign Immunities Act ("FSIA") governs claims against individual officials. It acknowledges that the Second Circuit's due process test is inconsistent with this Court's decisions, and effectively confirms the circuit split that exists over the scope of FSIA's non-commercial tort exception. Ignoring its prior, contrary filings, the Government uses the barest of pretexts to assert that the Second Circuit's errors and the circuit conflicts do not merit this Court's review.

The Government also provides this Court with no legal or policy basis to follow its apparent effort to appease a sometimes ally, filed on the eve of the President's trip to Saudi Arabia. The Government invokes no interest of state or diplomacy in recommending against review. Its core assessment that the legal issues presented here are unimportant ignores its prior assertions to the contrary, and its brief devotes not even a single sentence to the harm suffered by the 9/11 victims, the public interest in permitting the victims their day in court, Congress's intent to authorize state tort claims against foreign states and civil enforcement of counter-terrorism laws, or the consequences of closing courthouse doors to future victims of terrorist attacks in the United States. The Government makes no effort to describe the events of September 11, 2001 or their national

significance, or to defend the obvious non-legal factors that cause it to bow to respondents. The Government's legal analysis confirms that this case satisfies the usual standards justifying review, and therefore the Court should grant the petition.

ARGUMENT

1. *FSIA's Application to Individual Officials*. The Government explains at length why the Second Circuit erred in concluding that FSIA determines the scope of suits against foreign officials. U.S. Br. 6-8. It concedes that the courts of appeals are deeply split over this issue, with the Fourth and Seventh Circuits in conflict with the Second and Ninth Circuits in particular. *Id.* 8. It even points to the practical harm caused by the Second Circuit's decision. *Id.* 7 (Congress did not "intend[ ], as would follow from the court of appeals' ruling, that the personal property of every official or employee … would be available for execution to satisfy a … judgment against the state"); *id.* ("the FSIA's focus on the status of an entity … at the time suit was filed would mean … that a plaintiff could circumvent that immunity by waiting until an official left office" (citation omitted)).

The Government's claim that review is nonetheless unwarranted because the circuit split "appears to be of limited practical consequence," *id.* 8, is wrong for three reasons. *First*, the courts of appeals are not consuming pages of the Federal Reporter in a pointless exercise. As they understand, FSIA, if it applies, creates broad exceptions to officials' immunity that often did not exist for officials under the common law and creates immunity where no common law immunity existed. *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990), which several other circuits have applied without elaboration and which the Second Circuit

followed here, clearly holds that FSIA displaces common law immunity altogether. Thus, for example, a foreign official sued in a commercial dispute or for a tort is subject to suit under FSIA's exceptions to immunity, see 28 U.S.C. § 1605(a)(2), (5), but would generally be immune from suit under the Seventh and Fourth Circuits' tests. As noted, FSIA does not extend to former officials. The Government acknowledges these effects. U.S. Br. 9-10. Conversely, the Ninth and Second Circuits' approach provides immunity to all officials without regard to the various exceptions applicable to common law immunity, as in this case (see *infra* 4-5). In sum, the source of any immunity carries extremely important consequences that support, rather than counsel against, review by this Court.

Second, the Government itself has repeatedly argued to other courts that the *Chuidian* approach has very significant practical consequences, including risks to U.S. personnel. In *Chuidian*, and then in three recent filings, the Departments of State and Justice outlined the adverse consequences of adopting the Ninth (and, now, Second) Circuit's reasoning. See Pet. 17-20, 247a-298a. Those filings warned of the "problematic results" and "troubling practical consequences" of the Ninth Circuit's approach, *id.* 251a, 275a, 295a, and pointed to the Executive Branch's reduced role in determining immunity, the inequity of attaching foreign officials' personal assets, the possible exposure to punitive damages, the erosion of immunity, and the inconsistency between international law and FSIA liability. *Id.* 255a-257a, 275a-283a, 295a-298a. Most importantly, the Government warned that the *Chuidian* approach posed risks to U.S. personnel when foreign states act reciprocally and lessen U.S. officials' protections

against foreign suits, and the "critical importance" of avoiding that result. *Id.* 281a-283a (also invoking, to the same effect, *Boos* v. *Barry*, 485 U.S. 312, 323-24 (1988)), 296a. It is shocking that the Government now fails to defend that interest before this Court, without even mentioning the threat to U.S. personnel or its prior, contrary filings.

Third, the Government is wrong even if the focus were appropriately limited to further proceedings in this case alone. The Government simply asserts, incorrectly, that the Saudi princes would receive immunity because "the Executive also would recognize such immunity." U.S. Br. 8; see *id.* 9 n.3. That immunity determination is ultimately a *judicial* one, influenced but not determined by the Executive's recommendation. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). As the Government has elsewhere argued, *e.g.*, *infra* 14a-15a, these issues are complex and require detailed judicial consideration, particularly in this case: officials' entitlement to immunity for *jus cogens* violations, including supporting terrorism, is highly contested, and even the Government admits that foreign officials who run quasi-commercial entities, such as certain of the "charities" at issue here, may well not be entitled to immunity. See U.S. Br. 10.

As importantly, the Executive has made no formal immunity recommendation in this case, and a bare *amicus* brief statement of the likelihood of doing so is hardly the same. Traditionally, the Executive's immunity recommendation follows contested proceedings and is supported by ample justification subject to public and judicial scrutiny. See, *e.g., Ex Parte Peru*, 318 U.S. 578, 581 (1943); *Sovereign Immunity Decisions*, 5 Digest U.S. Prac. Int'l L. 1017, 1019 (State Dep't 1977). Here, the Government seeks

the benefit of the immunity conclusion without assuming the burdens of proceedings or defending its analysis. The Government would be far less cavalier in its immunity assessment if forced to explain in open court why uncertain immunity principles require dismissal of claims regarding the worst terrorism attack committed on American soil. Presumably for this reason, the Government chose not to recommend immunity despite the district court's request, earlier in this very case, for its participation.

2. *The Non-Commercial Tort Exception.* The Second Circuit's holding regarding the scope of § 1605(a)(5) is indefensible: Congress could not have intended to preclude all tort claims for terrorism-related harm in the U.S. pursued against any but the few foreign states designated as state sponsors of terror. See Pet. 21-25. Understandably, the Government attacks the Second Circuit's reasoning and flatly rejects its holding. U.S. Br. 12-13. Less understandably, the Government never explains why the implications of that gross error for victims of terrorism do not warrant review.

Instead, the Government declines to recommend review because it believes petitioners would not prevail under a different construction of § 1605(a)(5), whereby only claims based on officials' acts within the U.S. are authorized. *Id.* 14-15. The Second Circuit did not remotely rely upon this theory, which should suffice to rebut the Government's entire treatment of whether this Court should review the *Second Circuit's* interpretation of § 1605(a)(5). Review is merited because the decision below on that question is wrong and conflicts with other courts of appeals.

Beyond that, the Government's construction provides no basis for declining review for several additional reasons. *First*, the statute's language provides absolutely no basis to conclude that § 1605(a)(5) stops at the nation's borders. It authorizes recovery for harm "occurring in the United States," and does not distinguish between a foreign official who arranges the bombing of Washington, D.C. from Beirut and one who does so from Chicago. Congress expressly chose to bar certain tort claims, see § 1605(a)(5)(B), but there is no exception for claims asserting secondary liability.

Second, the Government's theory does not reflect established law. Terrorism decisions of the Ninth Circuit and the D.C. district courts are squarely to the contrary. See *infra* 8-9; Pet. 22-23. The Government's view has been adopted, in part, in only one decision, unrelated to terrorism and subject to review by this Court. See *O'Brien* v. *Holy See*, 556 F.3d 361 (6th Cir. 2009), *cert. filed*, No. 08-1384 (May 7, 2009). That decision could be read as precluding recovery under § 1605(a)(5) for acts committed abroad, even where a tort is committed in the U.S. The same is not true for the other cases the Government invokes. Those cases, and especially *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), hold only that a tort committed abroad cannot support a suit under § 1605(a)(5) even if victims are indirectly harmed in the United States. See Pet. Reply 6-7. They simply do not hold that § 1605(a)(5) is inapplicable where, as here, a complete tort occurs in the United States (*i.e.*, hijacked domestic flights are deliberately crashed into U.S. buildings) and state tort law recognizes secondary liability based in part on acts occurring abroad. Even

respondents do not misread *Amerada Hess* in this manner.

Third, decisions of this Court and other courts are to the contrary. The Government's theory that § 1605(a)(5) truncates secondary liability under state tort law directly contradicts this Court's injunction that FSIA is "not intended to affect the substantive law determining the liability of a foreign state." *First Nat'l City Bank* v. *Banco Para el Comercio*, 462 U.S. 611, 620 (1983); see *Kilburn* v. *Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128-29 (D.C. Cir. 2004).

Fourth, the Government fails to mention its previous assurance to the courts that § 1605(a)(5) supports claims in precisely the circumstances here. In *Kilburn*, Libya argued (much as the Second Circuit held) that § 1605(a)(7) provided the exclusive mechanism for terrorism victims' redress and thereby preempted state law claims. The Government disagreed:

> The potential for overlap between Sections 1605(a)(5)—domestic torts—and 1605(a)(7) offers further reason to reject Libya's argument that state common law has been preempted as a source for causes of action in litigation under Section 1605(a)(7). *For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7).*

Infra 7a (emphasis added).

Fifth, petitioners' claims survive even under the Government's theory because petitioners *do* allege, with considerable specificity, that Saudi agents operating in the U.S. contributed to the 9/11 attacks. See U.S. Br. 16 n.4. Although the Second Circuit did not address this issue, the Government asserts that

this Court must disregard these allegations because the Government prefers its own evidence, see *id.*, or because the pleadings are inadequate. Actually, considerable support for the allegation exists, even beyond the claims the Government struggles to discount.[1] Those claims are hardly the "'formulaic recitation'" of legal elements condemned in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). No reason exists for the Court to prejudge issues that are not before it and that the Court would leave on remand if it reverses.

Separately, the Government confirms that a conflict exists between the Second and Ninth Circuits regarding the scope of § 1605(a)(5). The Government acknowledges that both *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989), and *Letelier* v. *Chile*, 488 F. Supp. 665 (D.D.C. 1980), involved terrorism-related claims brought under § 1605(a)(5). U.S. Br. 17. It states that "those cases are distinguishable because they involved acts in the United States directly attributable to the foreign governments," *id.*, but this has nothing to do with the reasoning of either court, which in fact rested liability on foreign officials' acts abroad. See *Liu*, 892 F.2d at 1422-23, 1431-32; *Letelier*, 488 F. Supp. at 674 (Chilean officials' actions were "carried out entirely within" Chile); see also *Doe* v. *bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008). Nor did the Second Circuit suggest that petitioners could rely on § 1605(a)(5) to the extent that Saudi officials acted in the U.S. Quite the contrary: the Government correctly notes that the Second Circuit broadly held that § 1605(a)(5) does not authorize terrorism-related claims against foreign states other than designated

[1] *See*, *e.g.*, the First Amended Complaint (¶¶ 115, 169) and hundreds of pages of substantiation accompanying the opposition to the Kingdom's motion to dismiss.

state sponsors of terror, see U.S. Br. 12-13, thus confirming rather than dispelling the circuit split between the Second and Ninth Circuits.

3. *Due Process and Material Support of Terrorism*. The Second Circuit held that the Due Process Clause requires dismissal of claims, as legally insufficient, that the Saudi princes "could and did foresee that recipients of their donations would attack targets in the United States" and "intended to fund al Qaeda through their donations" knowing of al Qaeda's "jihad against the United States." Pet. 43a-44a. The Government agrees with petitioners that this conclusion "is incorrect" and inconsistent with *Calder* v. *Jones*, 465 U.S. 783 (1984). U.S. Br. 19.

The Government declines to recommend review, however, based on a disingenuous and incorrect assertion that the Second Circuit's decision could possibly be read as "focus[ing] on the inadequacy of the particular allegations before it," thus "comport[ing] with the opinions of the district court." *Id.* 19-20. The Second Circuit could not have been clearer that it rejected the district court's reasoning and was *not* resting its decision on the complaint's insufficiency. The panel "accept[ed] [the complaint] as true at the pleading stage," Pet. 3a, and, for the point most relevant here, found that "[t]hese allegations include a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda." *Id.* 5a. The panel fully accepted, for purposes of its decision, that the princes "caused money to be given to the Muslim charities … with the knowledge that the charities would transfer the funds to al Qaeda," *id.* 6a, and otherwise supported the charities knowing that they were funding terrorist

groups that targeted the U.S. *Id.* 6a-8a. No portion of the opinion calls into question the adequacy of petitioners' allegations.[2]

Nor is there merit to the Government's assertion that a "circuit split is doubtful" because cases cited by petitioners involved "primary wrongdoer[s]." U.S. Br. 20. Circuit splits are established by decisions' holdings, which here rested on whether defendants engaged in tortious actions that caused injuries in the U.S., not primary versus secondary liability. See *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005); *Panavision Int'l* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997). Each of those holdings would clearly have yielded outcomes at odds with the Second Circuit's if applied to this case; hence a circuit split exists. Combined with *Janmark*, the Seventh Circuit's recent conclusion that supporters of terrorism are themselves primary wrongdoers, and its treatment of intention and harm, make the existence of a conflict especially clear. See *Boim* v. *Holy Land Found.*, 549 F.3d 685 (7th Cir. 2008) (en banc); Pet. Reply 9-11; *infra* 17a-18a (Government previously argued in *Boim* that no distinction exists in terrorism context between primary and secondary tortfeasors).

The Government's dismissal of the counter-terrorism implications of the Second Circuit's

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[2] The Government cites two portions of the opinion, but both actually contradict the Government's point: it refers to "causal chain," which the balance of the same sentence confirms as meaning "the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda," Pet. 42a-43a, and to "indirect funding of al Qaeda," which immediately follows the statement that the analysis assumes the princes "intended to fund al Qaeda through their donations to Muslim charities" knowing that al Qaeda targeted U.S. interests. *Id.* 43a-44a.

decision is particularly troubling. The Government professes no concern that the Second Circuit has imposed, as a constitutional matter, a heightened notice standard that benefits material supporters of terrorism abroad. U.S. Br. 21. Although the Government has largely prevailed against increasing due process challenges from terrorism financiers, defendants, and extraditees, it misjudges their ability to deploy such a powerful new principle.

The Government also is clearly wrong in suggesting that the Second Circuit's decision does not limit "the legislative jurisdiction of Congress to apply federal law extraterritorially." *Id.* The Second Circuit did precisely that in this very case. Through 18 U.S.C. § 2333, Congress authorized civil suits arising from incidents of terrorism as an important component of the nation's counterterrorism efforts, focused in large measure on ending extraterritorial support for terrorism. Indeed, petitioners have brought just such a § 2333 claim against the Saudi princes in their individual capacities. See *infra* 17a-26a (Government previously argued § 2333 extends to secondary liability). For this and subsequent cases, the Second Circuit has created a constitutional bar to use of § 2333 against supporters of terrorism who act abroad.

In a striking departure from its traditional role, the Government has thus declined to defend a federal statute against significant constitutional limitation. Indeed, it fails even to mention the issue before this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

PETITIONERS' SUPPLEMENTAL APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 03-7117.

BLAKE KILBURN, INDIVIDUALLY ON HIS OWN BEHALF,
AND AS EXECUTOR OF THE
ESTATE OF PETER C. KILBURN,

Deceased Appellees,

v.

ISLAMIC REPUBLIC OF IRAN AND
IRANIAN MINISTRY OF INFORMATION AND SECURITY,

Appellees.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA AND
LIBYAN EXTERNAL SECURITY ORGANIZATION,

Appellants.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR *AMICUS CURIAE* THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

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* * * *

[1] INTEREST OF THE UNITED STATES

The United States submits this *amicus curiae* brief pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a). This case concerns the proper interpretation of federal statutes respecting litigation in the courts of the United States by victims of state-sponsored terrorism. The first of these, Section 1605(a) (7) of the Foreign Sovereign Immunities Act ("the FSIA"), 28 U.S.C. §§ 1330, 1602-1611, "abrogates the immunity of foreign states from the jurisdiction of [United States] courts in [2] lawsuits for damages for certain acts of terrorism." *Cicippio-Puleo v. Islamic Republic of Iran,* 353 F.3d 1024, 1034 (D.C. Cir. 2004). The second statute, the "Flatow" Act, reprinted at 28 U.S.C. § 1605 Note, "creates a private right of action against officials, employees, and agents of foreign states … in their *individual* … capacities." *Cicippio-Puleo,* 353 F.3d at 1034. Because of the sensitive foreign policy nature of such statutes, their application is of great concern to the Executive Branch.

Appellant Libya urges this Court to hold that Congress's creation, in the Flatow Act, of a cause of

action exclusively against foreign state officials preempts any cause of action against the foreign state itself under state or local foreign law. In our view, the Court should reject Libya's arguments..

In Sections 1605(a)(7) and 1606 of the FSIA, Congress provided a meaningful avenue for terrorism victims to recover against foreign terrorist states "in the same manner and to the same extent as [against] a private individual under like circumstances," 28 U.S.C. § 1606. When, in the Flatow Act, Congress provided these victims of terrorism with an *additional* remedy against responsible foreign officials in their individual capacities—thereby creating an additional deterrence to such acts—it did not relieve foreign states of their own liability.

Plaintiffs go too far, however, when they argue that the Court should read Section 1606 as extending to foreign states the liability that Congress imposed on individual foreign officials [3] in the Flatow Act and the Torture Victim Protection Act. Congress expressly limited these remedies to a narrow class of defendants, and the Court should not, without clear indication from Congress, take the provocative step of extending that cause of action to foreign states themselves.

* * * *

[13] **ARGUMENT**

I. CONTRARY TO LIBYA'S CONTENTION, NEITHER SECTION 1605(a)(7) NOR THE FLATOW PROVISION PREEMPTS OTHERWISE AVAILABLE CAUSES OF ACTION UNDER APPLICABLE STATE OR LOCAL FOREIGN LAW.

In *Cicippio-Puleo*, this Court held that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1033. From this, Libya makes the unwarranted leap to a position that Section 1605(a)(7) and the Flatow Act affirmatively *preempt* causes of action that would otherwise be available against a foreign government under state or local foreign law. *See* Libya Br. at 19-24. Nothing in the FSIA, the Flatow Act, or the decision in *Cicippio-Puleo* supports that view, which is incorrect.

A. The FSIA, as originally enacted, "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 620 (1983). *Accord Cicippio-Puleo,* 353 F.3d at 1033 (quoting same). Indeed, the Act's legislative history expressly disavows any such intent, stating that "[t]he bill is not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, at 12 (1976).

[14] Section 1606 of the FSIA confirms this point, as it provides that, when a foreign state's immunity is lifted, that entity is subject to the same, pre-existing legal rules that apply to private individuals generally. Section 1606 says that "as to any claim for relief with respect to which a foreign state is not

entitled to immunity under … this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Ibid.* The section further provides a special rule of damages where, in a wrongful death action, "the law of the place where the action or omission occurred provides" only punitive damages. *Ibid.*

Congress's express recognition that, at least in some circumstances, the law that would determine the liability of "a private individual under like circumstances" would be "the law of the place where the action or omission occurred," demonstrates that Congress did not categorically preempt state and local foreign law, as Libya claims. The Supreme Court so recognized in *First National City Bank*, stating that, under Section 1606, "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." 462 U.S. at 622 n.11. *See also Bettis,* 315 F.3d at 338 ("we are bound to look to state law in an effort to fathom the 'like circumstances' to which 28 U.S.C. § 1606 refers").

[15] Nearly identical language in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, has likewise been construed to embrace, rather than preempt, state law. Like the FSIA, the FTCA removes the defense of sovereign immunity for certain tort claims, thereby making the United States liable "in the same manner and to the same extent as a private individual under like circumstances," *id.* § 2674, *i.e.*, where "a private person would be liable … in accordance with the law of the place where the act or omission occurred," *id.* § 1346(b)(1). Indeed, the language in Section 1606 (originally

contained in Section 1605(c) of the draft legislation) was modeled on Section 2674 of the FTCA. *See* Cong. Rec. S17468 (June 10, 1976) (analysis of Departments of State and Justice accompanying transmittal of proposed legislation). In light of the Supreme Court's holding that these FTCA provisions subject the United States to liability according to state law, *see, e.g., United States v. Muniz,* 374 U.S. 150, 153 (1963), *Richards v. United States,* 369 U.S. 1, 6-7, 11 (1962), Congress's use of nearly identical language in the FSIA cannot possibly be construed to *foreclose* application of state law to foreign states.

Notably, in the context of both the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), and domestic tort exception, *id.* § 1605(a)(5), courts frequently apply substantive state or local foreign law. *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 313 F.3d 70, [16] 87 (2d Cir. 2002) (Indonesian law), *cert. denied*, 123 S. Ct. 2256 (2003); *Barkanic v. General Administration of Civil Aviation of the People's Republic of China,* 923 F.2d 957, 958, 961 (2d Cir. 1991) (Chinese law); *Joseph v. Office of the Consulate General of Nigeria,* 830 F.2d 1018, 1025 (9th Cir. 1987) (California law), *cert. denied,* 485 U.S. 905 (1988); *Harris v. Polskie Linie Lotnicze,* 820 F.2d 1000, 1004 (9th Cir. 1987) (Polish law).

There is nothing unique about Section 1605(a)(7) that would, in contrast to the other FSIA exceptions, altogether preclude state or local foreign law causes of action. As the Court held in *Cicippio-Puleo*, Section 1605(a)(7), like the FSIA's other immunity exceptions, "merely abrogates the immunity of foreign states from the jurisdiction of the courts." 353 F.3d at 1034. Though Section 1605(a)(7) does not, itself, create a cause of action against foreign states, *ibid.*,

its legislative history negates any inference that Congress intended to preclude application of independently existing causes of action. *See* H.R. Conf. Rep. No. 104-518, 112 (1996) (section "permits U.S. federal courts to hear claims seeking money damages for personal injury or death against [designated terrorist] nations"). Similarly, Congress's provision that the amendment would "apply to any cause of action arising before, on, or after the date of the enactment of this Act," Pub. L. 104-132, § 221(c), indicates its recognition that such causes of action existed prior to Section 1605(a)(7)'s enactment, and would continue to do so.

[17] The potential for overlap between Sections 1605(a)(5)—domestic torts—and 1605(a)(7) offers further reason to reject Libya's argument that state common law has been preempted as a source for causes of action in litigation under Section 1605(a)(7). For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7). If state law provides the cause of action for a suit under paragraph (a)(5), there is no reason to believe that Congress intended to foreclose state law from providing a cause of action merely because the plaintiff invoked paragraph (a)(7) rather than paragraph (a)(5).

B. Libya argues that Congress's creation, in the Flatow Act, of a cause of action for the kinds of acts encompassed within Section 1605(a)(7), but which is available only against foreign state officials, reflects Congress's intent to *replace* foreign state liability entirely with the liability of individual foreign officials. But nothing in the Flatow Act compels, or even supports, such a conclusion. That provision does not, by its terms or structure, occupy the entire field

of claims arising out of state-sponsored terrorism. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 713 (1985). Nor does the existence of claims directly against foreign states in any way impair Congress's objectives in making foreign officials individually liable. *Cf. Hines v. Davidowitz,* 312 U.S. [18] 52, 67 (1941) (federal law preempts state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal policy); *American Insurance Association v. Garamendi,* 123 S. Ct. 2374, 2391-92 (2003).

The Flatow Act is simply silent with respect to the liability of foreign states. And there is no indication that Congress intended to diminish the remedies it had permitted plaintiffs to pursue only months before when it lifted foreign states' immunity for claims of state-sponsored terrorism. To the contrary, the Conference Report accompanying the Flatow Act states: "The conference agreement inserts language *expanding the scope of monetary damage awards available* to American victims of international terrorism." H.R. Conf. Rep. No. 104-863, 985 (1996) (emphasis added).

There is no inherent inconsistency in limiting the new federal cause of action in the Flatow Act to suits against individual foreign officials, while leaving foreign states subject to the same generally-applicable rules of liability that apply to private individuals. The remedy against the individual serves an additional deterrent effect, while the remedy against the state may, in some cases, offer the injured party a greater likelihood of recovery. *Cf.* 28 U.S.C. § 2679(b)(2)(A) (availability under the FTCA of claim against the United States [19] based on state law

does not foreclose *Bivens* suit against federal official).[5]

The Flatow Act's particularly broad definition of recoverable damages, coupled with its retroactive application, *see* H.R. Conf. Rep. No. 104-863, 985 ("this section shall apply to cases pending upon enactment of this Act"), could also explain why Congress chose to extend the new cause of action only to foreign officials, while leaving existing remedies against foreign states in place. Congress might well have been willing to take the "significant step" of subjecting individual foreign officials to expansive, retroactive liability while deciding not to take the "even greater step" of subjecting foreign states to such liability. *See Cicippio-Puleo,* 353 F.3d at 1036.

While Congress plainly chose not to subject foreign states to additional liability under the Flatow Act, the continued viability of state or local foreign causes of actions against foreign states in no way undermines the federal statutory scheme.

C. While neither Section 1605(a)(7) nor the Flatow Act categorically precludes application of state law causes of action against foreign countries, we note that the FSIA and various constitutional principles may constrain application of state law [20] in a given suit that, like this one, arises in a foreign country's territory.

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[5] We note that, in the domestic context, a plaintiff may be precluded from obtaining relief against *both* the United States and an individual officer. *See* 28 U.S.C. 2676. No issue of double recovery is presented in this case, so the Court need not address what would happen in the event a plaintiff attempted to recover both against a foreign sovereign under applicable state law and against a foreign official under the Flatow Act.

As previously noted, the FSIA contemplates that, at least in some circumstances, the applicable law will be "the law of the place where the action or omission occurred," 28 U.S.C. § 1606, which, in this case, is Lebanon. On remand, the district court may have to decide whether the law of Lebanon or some other jurisdiction applies and, moreover, whether the choice of law analysis is governed by the law of the forum or by uniform federal principles - a question as to which the circuits are in disagreement. *See Karaha Bodas Co.,* 313 F.3d at 84 ("the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law"); *Liu v. Republic of China,* 892 F.2d 1419, 1425-26 (9th Cir. 1989) ("the federal choice of law rule controls the applicable law of respondeat superior both for jurisdiction under the FSIA and on the merits"), *cert. dismissed,* 497 U.S. 1058 (1990); *Harris,* 820 F.2d at 1003 (same). *See also DuMont v. Saskatchewan Government Insurance,* 258 F.3d 880, 886 (8th Cir. 2001) ("there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern").[6]

[21] Where, as here, the injury occurred abroad, the FSIA and constitutional principles limiting the power of the states might independently prevent a U.S. state from applying its domestic law. Even in the domestic context, several constitutional provisions

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[6] Plaintiffs' research (see Pls. Br., 48) indicates that they may have a cause of action under both Lebanese law and the law of the potentially relevant U.S. jurisdictions. On remand, the district court will have to determine whether the elements of the respective causes of action and damages available under the laws of the various jurisdictions differ. If they do, the court may need to resolve the choice of law issue.

limit a state's ability to project its substantive law extraterritorially. *See, e.g.*, *BMW of N. America, Inc. v. Gore,* 517 U.S. 559, 572 (1996) (Due Process Clause); *Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989) (Commerce Clause); *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 272 (1980) (plurality) (Full Faith and Credit Clause). These limitations also restrict a court's ability to apply the forum state's law to extraterritorial conduct pursuant to choice-of-law analysis. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 816-17 (1985); *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981) (plurality).

Projection by a state of its legal norms onto foreign nations when the relevant actions occur abroad could present even greater problems of extraterritoriality, disuniformity, and interference with United States foreign policy. *Cf. Garamendi,* 123 S. Ct. at 2390-92; *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 447-449 (1979); *Zschernig v. Miller,* 389 U.S. 429, 434-35 (1968). Indeed, even federal statutes are presumed not to apply extraterritorially in other nations, unless Congress clearly indicates otherwise. *See EEOC v. Arabian American Oil* [22] *Co.,* 499 U.S. 244, 248 (1991) (rule "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord").

Furthermore, while some of these constitutional limitations do not protect foreign states directly, *see, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82, 95-100 (D.C. Cir. 2002) (foreign states not entitled to Due Process Clause protection), the FSIA itself may well prevent states from applying to foreign sovereigns substantive rules that would not apply to "private individuals in like circumstances." 28 U.S.C. § 1606.

D. Significantly, however, to the extent that foreign law applies, Section 1606 would also prevent a foreign state from invoking the foreign equivalent of sovereign immunity. *Cf. Feres v. United States,* 340 U.S. 135, 141 (1950) (nearly identical language in the FTCA indicates "not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence").[7]

* * * *

[30] CONCLUSION

For the above reasons, if the Court exercises pendent appellate jurisdiction over the merits issues addressed by the parties, the Court should hold that neither the FSIA nor the Flatow Act categorically preempts all state or local foreign causes of action against a foreign state, but that plaintiffs may not assert claims against a foreign state pursuant to the Flatow Act or the TVPA.

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[7] Plaintiffs here do not rely upon federal common law, which this Court rejected as a source of liability under the FSIA in *Bettis,* 315 F.3d at 333 (Section 1605(a) (7) "does not … 'authorize the federal courts to fashion a complete body of federal [common] law'"). They also concede that the question of the availability of a claim under international law, which does not generally provide private rights of action, *see, e.g.*, *United States v. Li,* 206 F.3d 56, 67 (1st Cir.) (en banc) ("treaties do not generally create rights that are privately enforceable in the federal courts"), *cert. denied*, 531 U.S. 956 (2000), is not ripe for review at this time, Pls. Br., 51. Thus, we do not address either as a potential source of causes of action under Section 1605(a) (7).

Respectfully submitted,

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PETITIONERS' SUPPLEMENTAL APPENDIX B

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

KENSINGTON INT'L LTD.,

v.

BRUNO JEAN-RICHARD ITOUA AND
SOCIÉTÉ NATIONALE DES PÉTROLES DU CONGO.

Nos. 06-1763, 06-2216.

May 23, 2007.

LETTER BRIEF[*]

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* * * *

[3]1. COMMON LAW, NOT THE FSIA, GOVERNS THE QUESTION WHETHER DEFENDANT ITOUA HAS IMMUNITY.

* * * *

[11] As to whether Itoua is ultimately entitled to claim common law immunity here, the Court should remand the case for the district court to decide that issue in the first instance, as it turns on potentially complex questions that have not been raised or

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[*] [Additional excerpts of this brief appear at pages 250a-257a of the Petition Appendix. Excerpts of three other U.S. briefs that contradict the Government's arguments in this case appear at pages 247a-249a and 258a-298a of the Petition Appendix.]

briefed by the parties and that are not addressed in the United States' Statement of Interest in *Dichter*. In particular, while common law immunity clearly extends to the official acts of traditional government ministers, such as the internal security minister sued in the *Dichter* case, it is not clear whether (and if so, to what extent) this immunity applies to corporate officers of a state owned commercial enterprise, such as Itoua. Moreover, even if common law immunity did extend to such individuals, there would still remain the question whether Itoua's allegedly corrupt conduct should be regarded as official or private in nature, *see* Dichter Statement at 24, a question that has received only cursory treatment here. *Compare* Pl. Br. 44 n.14, *with* Itoua Reply Br. 18 n.6. The government may wish to submit views on these and other relevant questions on remand.

* * * *

PETITIONERS' SUPPLEMENTAL APPENDIX C

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

Nos. 05-1815, 05-1816, 05-1821, 05-1822.

STANLEY BOIM, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID BOIM, AND JOYCE BOIM,

Plaintiffs/Appellees,

V.

HOLY AND FOUNDATION FOR RELIEF AND DEVELOPMENT MOHAMMAD ABDUL HAMID KHALIL SALAH, *et al.*,

Defendants/Appellants.

August 21, 2008.

On Appeal from the United States District Court for the Northern District of Illinois

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

* * * *

[5] ARGUMENT

As validly construed, Section 2333(a) provides liability under common law tort principles that include aiding/abetting and conspiracy liability in appropriate circumstances. This construction is supported by the text and history of Section 2333(a). It gains further support from Congress' determination that monetary assistance to a designated terrorist organization is forbidden regardless of whether the donor subjectively intends to help the organization's violent component.

[6] When the conditions for civil aiding/abetting and conspiracy liability are met, the imposition of liability raises no serious constitutional question. Neither the First Amendment nor any other part of the Constitution guarantees a right to provide money to a foreign terrorist organization.

A. SECTION 2333(A) PROVIDES A REMEDY TO U.S. VICTIMS OF INTERNATIONAL TERRORISM THAT INCORPORATES TORT PRINCIPLES OF SECONDARY LIABILITY.

Because "Congress has not enacted a general civil aiding and abetting statute," the question whether a particular civil cause of action encompasses aiding and abetting must be determined case-by-case. *See Central Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S. 164, 182 (1994). As we next show, the text, history, and context of Section 2333(a) make clear that Congress intended to incorporate tort principles of secondary liability. In this respect, Section 2333(a)

differs from certain other federal statutes, discussed in more detail below, where those factors do not support the imposition of secondary liability.

1. The text of Section 2333(a) supports the imposition of secondary liability. The statutory language provides that "[a]ny national of the United States injured in his or her person [or] property ***by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor ***." 18 U.S.C. § 2333(a). Although Congress specifically barred suits under this provision against certain types [7] of defendants (the United States and foreign states, as well as their agencies, or officers or employees acting in an official capacity or under color of legal authority, *see* 18 U.S.C. § 2337), Congress did not address - and thus in no way restricted - the other types of defendants who can be held liable. Nor does the statutory text distinguish between primary and secondary tortfeasors.

Moreover, the wording of Section 2333 (a) closely resembles in key ways a civil damages provision in RICO (18 U.S.C. § 1964(c)). At the time that Section 2333(a) was passed in 1990 and 1992, this provision in RICO had been interpreted to include aiding/abetting liability. *See, e.g., Petro-Tech, Inc. Western Co.,* 824 F.2d 1349, 1356 (3d Cir. 1987). Congress' utilization of similar language in Section 2333(a) thus supports an inference that the remedy created by that provision encompasses secondary liability. *See, e.g., Bragdon v. Abbott,* 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well").

As we next show, the conclusion that Congress intended for Section 2333(a) to encompass secondary liability is also strongly supported by the history and context of that provision.

[8] 2. Section 2333(a) was first enacted by Congress in 1990 (*see* Pub. L. No. 101-519,104 Stat. 2250), but was repealed in 1991. *See* S. Rep. No. 102-342, at 22 (1992); 137 Cong. Rec. 8143 (1991) (Sen. Grassley). It was reenacted in 1992, in identical form to its prior version. *See* Pub. L. No. 102-572, 106 Stat. 4506 (1992).

During hearings in 1990 on the provision that became Section 2333(a), former Justice Department official Joseph A. Morris explained that "American victims seeking compensation for physical, psychological, and economic injuries naturally turn to the common law of tort. American tort law in general would speak quite effectively to the facts and circumstances of most terrorist actions not involving acts of state by foreign governments." Antiterrorism Act of 1990, Hearing before the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990), at 83. At that time, a recognized body of civil tort law extended liability not only to defendants who actually committed a tort, but also to those who aided and abetted its commission. *See*, *e.g.*, *Restatement (Second) of Torts*, §876(b) (1979) (describing tort liability for concerted action); *Damato v. Hermanson,* 153 F.3d 464, 472 n.10 (7th Cir. 1988) (applying civil tort aiding/abetting liability); *Halberstam v. Welch,* 705 F.2d 472, 477-88 (D.C. Cir. 1983) (same).

[9] At the 1990 hearing, Professor Wendy Perdue questioned whether the proposed cause of action was sufficiently broad, noting that a meaningful remedy for victims would have to extend not only to those

who commit terrorist acts, who are unlikely to have assets in the United States, but also to "the organizations, businesses and nations who support, encourage and supply terrorists[,] who are likely to have reachable assets." Hearing, at 126.

Senator Grassley raised this concern about secondary tort liability with Morris, who responded that the bill would "bring all of the substantive law of the American tort law system" into play. *Id.* at 136. Morris noted that in criminal law there is a doctrine of vicarious liability, and "[t]he tort law system has similar rules where liability attaches to those who knowingly or negligently make it possible for some actor grievously to injure somebody else. As Section 233 3(a) of this bill is drafted, it brings all of that tort law potential into any of these civil suits." *Ibid.*

Senator Grassley sponsored Section 2333(a), and explained that his bill "empowers victims with all the weapons available in civil litigation ***. The [Anti-terrorism Act] accords victims of terrorism the remedies of American tort law ***." 137 Cong. Rec. 8143 (1991).

The Senate Report on Section 2333(a) emphasized that, by imposing "liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, [10] the flow of money." S. Rep. No. 102-342, at 22 (1992) (emphasis added). This report also explained that the substance of actions under Section 2333(a) "is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts." *Id.* at 45.

Thus, the history of Section 2333(a) and the context of its enactment show that Congress was specifically concerned with enabling victims to sue not only those

who actually carry out terrorist attacks, but also those who make terrorist acts possible through, for example, donations of funds. Congress was assured that Section 2333(a) would address this concern by incorporating domestic tort law principles of secondary liability; this provision was designed from the outset to permit recovery against those who aid and abet international terrorists. Reading Section 2333(a) to include secondary liability effectuates Congress' goal of reaching those who support terrorist attacks through donation of funds.

* * * *

[15] B. SECTION 2333(A) PERMITS AIDING/ABETTING LIABILITY WHEN A DEFENDANT HAS PROVIDED KNOWING AND SUBSTANTIAL ASSISTANCE TO A TORTFEASOR, AND THE ACT OF INTERNATIONAL TERRORISM THAT INJURES THE VICTIM WAS REASONABLY FORESEEABLE BY THE DEFENDANT.

Because Section 2333(a) imposes civil liability and because Congress plainly intended to incorporate civil tort law principles, this Court should look to civil aiding/abetting and conspiracy jurisprudence to define the reach of secondary liability under the statute. That jurisprudence is summarized in the seminal D.C. Circuit [16] opinion in *Halberstam v. Welch,* 705 F.2d 472 (D.C. Cir. 1983), authored by Judge Wald, joined by then-Judge Scalia and Judge Bork, which the Supreme Court has described as "a comprehensive opinion on the subject." *Central Bank,* 511 U.S. at 181. *Accord In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation,* 113 F.3d 1484, 1495-96 (8th Cir. 1997) (relying on *Halberstam* discussion of civil aiding/abetting

liability); *Fassett v. Delta Kappa Epsilon* (New York), 807 F.2d 1150, 1162-64 (3d Cir. 1986) (same).

* * * *

[22] 3. While Section 2333(a) is defined by civil tort principles, the subsequent enactments of 18 U.S.C. §§ 2339A and 2339B reinforce the conclusion that Section 2333(a) cannot properly be limited to those who personally commit acts of [23] international terrorism.[5] In addition, the anti-terrorism policies embodied in Section 2339B in particular reflect a complementary legislative scheme that should influence cases involving claims arising out of the provision of funds to entities designated as terrorist organizations by the United States. Thus, in order to carry out the important Congressional purpose of deterring terrorism—reflected in both the civil provisions in Section 2333(a) and the criminal provisions in Section 2339B—tort liability under the former can in some circumstances validly be imposed on defendants who provide substantial assistance to terrorist organizations such as Hamas through donations of money, knowing that these groups have been so designated or that they engage in terrorism as part of their broader activities.

Section 2339A makes it unlawful to provide "material support or resources *** knowing or intending that they are to be used" in preparing or carrying out certain specified terrorism-related crimes. Section 2339B makes it unlawful to "knowingly provid[e] material support or resources," to an entity designated by the United States as a "foreign terrorist organization." Guilt under Section 2339B does not depend on any showing of specific

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[5] Section 2339A was enacted in 1994, shortly after Section 2339(a), while Section 2339B was enacted in 1996.

intent by a defendant to further the illegal activities of the terrorist organization. *See* [24] *Humanitarian Law Project v. Mukasey,* 509 F.3d 1122, 1132 (9th Cir. 2007); *United States v. Taleb-Jedi,* F. Supp. 2d, 2008 WL 2832183, at *14-*18 (E.D.N.Y. July 23, 2008); *United States v. Assi,* 414 F. Supp. 2d 707, 719-24 (E.D. Mich. 2006); *United States v. Marzook,* 383 F. Supp. 2d 1056, 1068-71 (N.D. Ill. 2005).

In enacting Section 2339B, Congress determined 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 ("Antiterrorism Act"), Pub. L. No. 104-132 § 301(a)(7), 18 U.S.C. 2339B note (emphasis added). Because of "the fungibility of financial resources and other types of material support," any such support "helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 104-383, at 81 (1995).

Given its fungibility, material support can further an organization's terrorist activities whether or not the donor intends that result. "Once the support is given, the donor has no control over how it is used." *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1134 (9th Cir. 2000).

[25] Further, even if monetary support were not fungible and even if a donor could somehow ensure that his donation would be used only for legal purposes, that support could still further terrorist activities by allowing terrorist entities to gain goodwill that can be used for terrorist recruitment or other assistance, or to gain political legitimacy for those who carry out deadly terrorist acts. *See Taleb-*

Jedi, 2008 WL 2832183, at *7 ("[T]hese organizations use their humanitarian pursuits to garner support for their terrorist activity. ***[C]onduct that is overtly non-terrorist, or even eleemosynary, can serve violent ends when performed on behalf of a terrorist organization").

Accordingly, Congress banned a broad array of types of material support because the risk is too great that it would wind up furthering the terrorist group's violent activities, regardless of the donor's intent. *See Assi*, 414 F. Supp. 2d at 722 ("Congress, concerned that terrorist organizations would raise funds 'under the cloak of humanitarian or charitable exercise,' sought to pass legislation that would 'severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.'") (quoting H.R. Rep. No. 104-383, at *43 (1995), and *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005), *aff'd*, 509 F.3d 1122 (9th Cir. 2007)).

Congress in Section 2339B imposed criminal liability not only on those who personally commit acts of terrorism, but also on those who assist such acts by [26] providing material support to terrorists or terrorist organizations. It did so because such support to a foreign terrorist organization undermines the anti-terrorism policies of the United States even if the donor does not have any specific intent to further the violent activities of such an organization. The support alone, regardless of the intent of the donor, is the underpinning of criminal liability for material support because terrorist organizations such as Hamas do not actually have dual and independent capacities. Rather, the two components are inseparable parts of the same organization that has

an overall goal that is to be achieved in part through terrorism.

4. Taking *Halberstam*'s reasoning and the Congressional intent behind Section 2333(a) and Section 2339B into account, we believe that the answer to this Court's specific question in its June 16 order is that a donor to a terrorist organization can be civilly liable for a terrorist act on an aiding/abetting theory even if the donor does not intend to advance the violent component of the recipient organization's activities. Nevertheless, in order to recover under an aiding/abetting claim, a plaintiff under Section 2333(a) must show that the defendant knowingly provided substantial assistance to a terrorist organization. Whether the assistance provided qualifies as substantial will depend on an analysis of the relevant conduct by reference to the six *Restatement and Halberstam* factors. The plaintiff must then also show that the act [27] of international terrorism that actually injured the victim was reasonably foreseeable by the defendant.

We do not believe that it is sufficient for liability under Section 2333(a) to show simply that a defendant provided funds to a terrorist group, and that group later committed an act of international terrorism injuring a U.S. national. However, the provision of funds could be a basis for liability if the donor knew that the group had been designated as a terrorist organization or was aware of the group's terrorist activity, and if the provision of funds was sufficiently substantial and the ultimate terrorist act was reasonably foreseeable. In the case at bar, the required analysis is more complex because it involves support provided by the defendants to Hamas in part before that entity had been designated by the United States as a terrorist organization, although the

murder of David Boim occurred after donations of money to Hamas by U.S. persons were already illegal under Executive Order 12,947. Accordingly, in this specific case, application of Section 2333(a) may be most properly carried out by reference simply to the standard secondary tort liability principles described in Halberstam without reference to the policy embodied in Section 2339B.

* * * *