No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER, et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

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

BRIEF OF *AMICI CURIAE* FINANCIAL REGULATION SCHOLARS AND FORMER GOVERNMENT OFFICIALS IN SUPPORT OF PETITIONERS

DEEPAK GUPTA
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

MICHAEL S. BARR
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109
(734) 936-2878

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading scholars of financial regulation and former senior government officials who oversaw U.S. policy against terrorist financing at agencies including the U.S. Department of Justice and the U.S. Department of the Treasury. They submit this brief to lend their expertise on U.S. and international efforts to combat terrorist financing, and explain why permitting suits under the Alien Tort Statute against financial institutions that knowingly and willfully engage in terrorist financing would be consistent with U.S. law and policy objectives in combatting terrorism. A complete list of *amici* and their short biographies is contained in an appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether to permit suits under the Alien Tort Statute against corporations—and in particular against financial institutions like Arab Bank—for knowingly and willfully financing terrorism through the U.S. payments system. Allowing private enforcement of this kind would, like other complementary enforcement efforts, advance U.S. policies against terrorist financing.

The United States has a policy against allowing terrorists access to the U.S. financial system. Financial regulators and the Justice Department regularly bring enforcement actions against banks and other financial institutions for violations of U.S. anti-terrorist financing and money laundering laws. This includes cases where,

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

as here, the institution's U.S. activity includes illicitly clearing transactions. State regulators and foreign jurisdictions also regularly take action to deter terrorist financing and money laundering, and U.S. nationals may bring personal suits under the Antiterrorism Act. At the same time, violations of anti-terrorist financing and money laundering laws often go undetected for many years, leaving the U.S. financial system open to use for illicit purposes.

Considering the wide array of enforcement mechanisms, permitting Alien Tort Statute suits against banks for terrorist financing would not disrupt regulation of the financial system or U.S. foreign policy. To the contrary, it would reinforce the basic U.S. policy goal of preventing the corruption of our financial system through terrorist access.

ARGUMENT

I. Allowing liability against financial institutions under the Alien Tort Statute would further U.S. policy goals against terrorist financing.

Preventing the disruption of U.S. foreign policy has been a primary concern of this Court's previous decisions limiting the Alien Tort Statute's reach. *See Sosa v. Alvarez Machain,* 542 U.S. 692, 727–28 (2004); *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, 1665–66 (2013). But permitting private suits under the Alien Tort Statute for terrorist financing would not disrupt U.S. foreign policy.

Allowing private suits would reinforce the strong U.S. norm against permitting its financial system to be used to funnel funds to terrorists. *See* Michael S. Barr et al., *Financial Regulation: Law and Policy* 792–95 (2016) (discussing the core U.S. policy against permitting the payments system to be used for money laundering or terrorist financing). Alien Tort Statute suits against

financial institutions for terrorist financing would also parallel suits by U.S. nationals under the Antiterrorism Act, 18 U.S.C. § 2331 (2016). And permitting Alien Tort Statute suits is particularly appropriate in cases like this one, where federal and state authorities have already found that the bank in question violated U.S. antiterrorism laws, but where victims and their families have not been compensated for the resulting horrendous acts.

A. There is a clear U.S. policy against letting terrorist financing flow through the United States financial system.

The United States' commitment to preventing acts of terrorism includes preventing terrorists from accessing the U.S. financial system. As former Secretary of State Colin Powell put it, "money is the oxygen of terrorism." Colin Powell, U.S. Secretary of State, Remarks on Financial Aspects of Terrorism (Nov. 7, 2001), http://bit.ly/2s3MltH.

Restricting terrorist accessibility to the U.S. dollar is a major goal of U.S. policy. As such, "disrupting the flow of funds to terrorists and terrorist organizations" is an integral part of a broader strategy to combat terrorism. Press Release, U.S. Dep't of Treasury, Testimony of the Assistant Secretary for Terrorist Financing Daniel L. Glaser Before the House Committee on Foreign Affairs, Subcommittee on Terrorism, Nonproliferation, and Trade, and House Committee on Armed Services' Subcommittee on Emerging Threats and Capabilities (June 9, 2016) (Glaser Testimony), http://bit.ly/1XIHpZc. Combating terrorist financing requires denying terrorists access to the U.S. financial system, which is necessary to clearing financial transactions in U.S. dollars. *Id.* The U.S. goal is to create an international financial system "that is a hostile environment for terrorist financing." *Id.*

Creating this "hostile environment for terrorist financing" is best accomplished through a mix of federal, state, international, and private actions. U.S. anti-terrorism policy is embedded in a range of statutes. For example, financial institutions are required under the Bank Secrecy Act (BSA), codified at 12 U.S.C. §§ 1829b, 1951–59 (2016) and 31 U.S.C. § 5311–14, 5316–32 (2016), to establish and maintain programs that both monitor financial transactions and assure their own compliance with the BSA. Under the BSA, banks must provide certain reports or records. 31 U.S.C. §§ 5312–16; *see also* Kathleen F. Brickey & Jennifer Taub, *Corporate and White Collar Crime* 571–72 (2016) (noting that failing to file required reports under the Bank Secrecy Act is an independent crime). The BSA provides the Secretary of the Treasury with broad discretion to take measures tailored to particular money-laundering and terrorist-financing problems, whether presented by specific foreign jurisdictions, financial institutions operating outside of the United States, or classes of international transactions or types of accounts. Pub. L. No. 107–56, § 302(b)(5), 115 Stat. 272 (2001).

All banks are required to establish and maintain procedures reasonably designed to ensure compliance with the BSA. 12 C.F.R. § 21.21 (2016). This includes the development of a compliance program that must be written and approved by the bank's board of directors. *Id.* § 21.21(c)(1). At a minimum, a bank's anti-money-laundering program must: (a) provide for a system of internal controls to assure ongoing compliance; (b) provide for independent testing for compliance to be conducted by bank personnel or by an outside party; (c) designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; (d) provide training for appropriate personnel; and (e) implement a customer-identification and due diligence

program, including creating procedures to identify and verify the identity of beneficial owners. *Id.* §§ 21.21(c)(2), 21.21(d); 31 C.F.R. §§ 1020.210, 1020.230. U.S. banks maintaining correspondent accounts in the United States for foreign institutions must have due diligence procedures, and in some cases subject the accounts to certain enhanced due diligence measures. 31 U.S.C. § 5318(I)(1) (2016); 31 C.F.R. § 1010.610 (2016).

The BSA also requires financial institutions to submit reports to the government. These include currency-transaction reports, 31 C.F.R. § 103.22, reports of international transportation of currency or monetary instruments, 31 C.F.R. § 1010.340, reports of foreign bank and financial accounts, 31 C.F.R. § 1010.350, and suspicious-activity reports, 12 C.F.R. § 21.11. The suspicious-activity report is particularly wide-ranging: every bank is required to file with the Financial Crimes Enforcement Network (FinCEN), a bureau within the Treasury Department, a report of any suspicious transaction that potentially involves money laundering or a violation of the BSA. 12 C.F.R. § 21.11. A transaction meets this requirement if it is conducted through a bank, involves at minimum an aggregate of $5,000, and the bank knows or has reason to suspect that the funds are derived from illegal activities, the transaction is designed to evade any requirements of the BSA, the transaction has no apparent lawful purpose, or the transaction is unusual for the customer and there is no reasonable explanation. 31 U.S.C. § 5318(g); 31 C.F.R. § 1020.320; 12 C.F.R. § 21.11.

B. U.S. policy is aimed at protecting the integrity of the U.S. financial system, including preventing its use as a pass-through conduit for terrorist financing.

A key purpose of anti-money laundering and terrorist-financing regulations is to protect the integrity of the

U.S. financial system. In the International Money Laundering Abatement and Financial Anti-Terrorist Financing Act, part of the USA PATRIOT Act of 2001, Congress declared:

> Money launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism, and, by so doing, can threaten the safety of United States citizens and undermine the integrity of the United States financial institutions.

Pub. L. No. 107–56, § 302(a)(3), 115 Stat. 296 (2001). Treasury has linked its anti-money-laundering goals directly to achieving one of its key objectives, which is to "preserve the integrity of financial systems." Peter Reuter & Edwin M. Truman, *Chasing Dirty Money: The Fight Against Money Laundering* 147 (2004).

Protecting the integrity of the U.S. financial system is essential because the "central role of the U.S. economy and financial system in the world today frequently results in the United States being the ultimate destination, or at least the conduit, for proceeds from crimes that may have been committed outside the country." *Id.* at 67. Dollar clearing—whether engaged in directly, or indirectly through another financial institution—generally must flow through the United States and is subject to U.S. regulation. *See, e.g.*, The Clearing House, CHIPS Rules and Administrative Procedures, Rule 6 & 19(a)(1) (2016), http://bit.ly/2ta2MJH. Such transactions are subject to the full panoply of U.S. anti-money laundering, terrorist financing and sanctions laws.

Enforcement actions have been brought against financial institutions for clearing transactions in the U.S. that violate U.S. anti-money-laundering, terrorist-

financing, and sanctions laws. In 2009, for example, the U.S. Department of Justice and the New York County District Attorney's Office brought deferred prosecution agreements against Credit Suisse AG for "causing U.S. financial institutions to process sanctioned transactions unknowingly." Deferred Prosecution Agreement at Ex. A, 1, *United States v. Credit Suisse AG* (D.D.C. Dec. 16, 2009) (No. CR-09-352) (Credit Suisse Deferred Prosecution Agreement). In May 2010, ABN Redux was charged with violations of the International Emergency Economic Powers Act (IEEPA), the Trading with the Enemy Act (TWEA), and the BSA. The factual statement explained that ABN engaged in criminal conduct by "advising the Sanctioned Entities how to evade automated filters at financial institutions in the United States." Deferred Prosecution Agreement at Ex. A, 1, *United States v. ABN AMRO Bank N.V.* (D.D.C. May 10, 2010) (No. 10-123) (ABN Amro Deferred Prosecution Agreement).

Similarly, in August 2010, Barclays entered into deferred prosecution agreements with the U.S. Department of Justice and the New York County District Attorney. The accompanying factual statement explained that the bank's conduct "caused [Barclays'] New York branch, and other financial institutions located in the United States, to process payments that otherwise should have been held for investigation, rejected, or blocked pursuant to U.S. sanctions regulations administered by [the Office of Foreign Assets Control]." Deferred Prosecution Agreement at Ex. A, 1–2, *United States v. Barclays Bank PLC* (D.D.C. Aug. 16, 2010) (No. 10-CR-00218-EGS).

ING Bank also entered into deferred prosecution agreements with the U.S. Department of Justice and the New York District Attorney for violations of the TWEA, the IEEPA, and New York Penal Law. The factual

statement explained that ING Bank engaged in criminal conduct by "processing payments for ING's Bank's Cuban banking operations . . . without reference to the Cuban origin of the payments," "providing U.S. dollar trade finance services to sanctioned entities," and "advising sanctioned entities on how to conceal their involvement in U.S. dollar transactions." Deferred Prosecution Agreement at Ex. A, 3–4, *United States v. ING Bank, N.V.* (D.D.C. Jun. 12, 2012) (No. CR-12-136). These enforcement actions illustrate the U.S. policy against permitting the U.S. financial system to be used for clearing illicit transactions.

The fines that regulators have levied on financial institutions also provide evidence of the government's policy of protecting the integrity of the U.S. financial system. In the 2009 action against Credit Suisse AG, Credit Suisse agreed to a $536 million fine. Paul L. Lee, *Compliance Lessons from OFAC Case Studies – Part I*, 131 Banking L. J. 657, 675 (2014). In the 2012 ING Bank action, ING Bank agreed to make a $619 million forfeiture to the Department of Justice and the New York District Attorney. Press Release, U.S. Dep't of Justice, ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities (June 12, 2012), http://bit.ly/2t3jaeU. In 2012, HSBC Bank entered into deferred prosecution agreements with the Department of Justice and the New York District Attorney for violations of the BSA, TWEA, IEEPA, and New York Penal Law. HSBC agreed to the forfeiture of $1.256 billion, in addition to $500 million in civil money penalties imposed by the Office of the Comptroller of the Currency (OCC) and $165 million by the Federal Reserve Board. Paul L. Lee, *Compliance Lessons from OFAC Case Studies – Part II*, 131 Banking L. J. 717, 735 (2014).

Courts, too, have acknowledged the United States' interest in protecting the integrity of its financial sys-

tem. In *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 174 (2d Cir. 2013), for instance, the Second Circuit recognized "the United States' and New York's interest in monitoring banks and banking activity to ensure that its system is not used as an instrument in support of terrorism, money laundering, or other nefarious ends."

II. U.S. policy establishes a floor, not a ceiling, allowing for other avenues to deter terrorist financing and compensate its victims.

U.S. policy recognizes that, given the protean nature of both finance and terrorism, the U.S. federal government cannot adequately address terrorist financing by itself. This is evidenced by the broad role created under U.S. law, regulations, diplomacy, and policy for enforcement by other actors—including by U.S. states, multiple independent and executive branch federal regulators, private individuals, foreign countries, and international bodies. Federal regulations thus act as a floor rather than a ceiling on enforcement, such that Alien Tort Statute suits against financial institutions for terrorist financing would support, rather than disrupt, the goals of the regulatory system.

A. The States, and multiple independent and executive branch federal regulators, help to combat terrorist financing.

The States have been actively involved in enforcement actions against banks for terrorist financing, money laundering, sanctions violations, and related activities.

The New York District Attorney and the New York Department of Financial Services, in particular, have played major roles in such enforcement actions. For example, the Department of Financial Services found

that Standard Chartered Bank had violated U.S. law by transacting with Iranian companies, and entered into an agreement requiring the bank to pay $340 million in civil penalties, install a monitor to evaluate money-laundering risk controls in its New York branch, and hire audit personnel. Press Release, N.Y. Dep't of Fin. Servs., Statement from Benjamin M. Lawsky, Superintendent of Financial Services, Regarding Standard Chartered Bank (Aug. 14, 2012), http://on.ny.gov/2syCTC2. The Department of Justice and the New York District Attorney's Office then took further action against the bank, and the bank entered into a deferred prosecution agreement for illegal transactions with sanctioned countries—including Iran, Sudan, and Libya. Deferred Prosecution Agreement, *United States v. Standard Chartered Bank* (D.D.C. Dec. 10, 2012) (No. 1:12-cr-00262). In 2014, the Department of Financial Services announced that the bank had failed to remediate its anti-money laundering compliance problems as required in the 2012 settlement, and ordered it to suspend clearing through its New York branch for high-risk transactions. N.Y. Dep't Fin. Servs., Consent Order, *In the Matter of Standard Chartered Bank* (Aug 19, 2014), http://on.ny.gov/2rKIMcA.

The New York District Attorney's Office was likewise actively involved in enforcement actions against, and eventual deferred prosecution agreements with, Credit Suisse AG and Lloyds TSB Bank PLC. *See* Credit Suisse Deferred Prosecution Agreement, *supra*; Deferred Prosecution Agreement, *United States v. Lloyds TSB Bank PLC* (D.D.C. Jan. 9, 2009) (No. 1:09-cr-00007) (Lloyds Deferred Prosecution Agreement).

To further state and federal enforcement against terrorist financing, there is a memorandum of understanding between the U.S. Department of Treasury, the Office of Foreign Assets Control (OFAC), and the New York State Banking Department on exchanging information in

money laundering and terrorist financing cases. Memorandum of Understanding, U.S. Dep't of Treasury (Nov. 29, 2006), http://bit.ly/2sZisPF. These actions demonstrate that federal policy allows for, and even welcomes, alternate enforcement mechanisms.

In a few instances, state anti-money-laundering enforcement has even played a larger role than federal enforcement. For example, the New York District Attorney's Office and Department of Financial Services played an integral role in the case against BNP Paribas S.A. for its violation of the IEEPA and the TWEA. The District Attorney's Office announced that the bank pleaded guilty to falsifying business records of transactions with sanctioned countries. Press Release, N.Y. Cty. Dist. Attorney's Office, BNP Paribas Bank Pleads Guilty, Pays $8.83 Billion in Penalties for Illegal Transactions (June 30, 2014), http://bit.ly/2t31zEw. New York's Department of Financial Services also fined the bank over $2 billion for its conduct, in contrast with the Federal Reserve Board's $508 million penalty. *See* Press Release, N.Y. Dep't of Fin. Servs., Cuomo Administration Announces BNP Paribas to Pay $8.9 Billion, including $2.24 billion to NYDFS, Terminate Senior Executives, Restrict U.S. Dollar Clearing Operations for Violations of Law (June 30, 2014), http://on.ny.gov/2t3aDsp; Press Release, Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), http://bit.ly/1WlVVlr.

Multiple regulatory agencies have deployed their enforcement power in previous actions, demonstrating that U.S. policy recognizes the necessity of multiple avenues of enforcement. In the BNP Paribas action, the bank entered into agreements with the Department of Justice, the New York Department of Financial Services, Treas-

ury, OFAC, and the Federal Reserve Board. Barbara I. Keller, *Enforcement Actions for U.S. Sanctions Violations Offer Lessons for Compliance* 13–17 (2014), http://bit.ly/2sK88IS. Similarly, multiple federal and state regulators—including the Federal Reserve Board, New York and Illinois banking departments, OFAC, and FinCEN—brought enforcement actions against ABN Amro, N.V., for violations of anti-money laundering laws. *Id.* at 4. Standard Chartered Bank, in addition to its agreements with the Department of Justice and the New York District Attorney's Office, entered into a deferred prosecution agreement with OFAC for $132 million in penalties. Press Release, U.S. Dep't of Treasury, Treasury Department Reaches $132 Million Settlement with Standard Chartered Bank (Dec. 10, 2012), http://bit.ly/2s3NHoB.

Not only have regulatory agencies brought actions against other banks, they have taken action against Arab Bank in particular. Arab Bank entered into a consent order with FinCEN and OCC, and has paid civil penalties to the U.S. Department of Treasury for violations of the Bank Secrecy Act. Press Release, FinCEN, FinCEN and OCC Assess $24 Million Penalty against Arab Bank Branch (Aug. 17, 2005), http://bit.ly/2sZ5BwM. Actions from multiple enforcers emphasize the fact that federal policy permits multiple channels for deterring terrorist financing.

B. The United States acknowledges that federal enforcement is insufficient to prevent terrorist financing and encourages foreign enforcement as well.

Because U.S. banks and the U.S. dollar are integral to the global financial markets, combating terrorist financing and money laundering within the U.S. is essential to protecting the integrity of the financial

system as a whole. The U.S. government recognizes, however, that the U.S., acting alone, may not be sufficient to prevent terrorist financing, and has therefore worked with foreign regulators to strengthen enforcement. As with its encouragement of state enforcement, U.S. policy also promotes enforcement by international bodies and foreign regulators, signaling that U.S. policy focuses on encouraging alternate enforcement mechanisms rather than merely relying on federal enforcement.

While the U.S. has made anti-money laundering and anti-terrorist financing one of its primary goals, it recognizes that the interconnectedness of the financial system makes it difficult for the U.S. to combat the issue alone. *See, e.g.*, Int'l Monetary Fund, *Anti-Money Laundering/Combating the Financing of Terrorism – Topics*, http://bit.ly/2sZ34m8. As former Assistant Secretary for the Department of the Treasury Daniel L. Glaser stated in his testimony before the House Committee on Foreign Affairs, "[g]iven the interconnectedness of the international financial system and the global nature of terrorism, targeted action by U.S. authorities alone cannot effectively disrupt terrorist financing activity." *See* Glaser Testimony, *supra*.

Recognizing this reality, U.S. officials routinely engage with other countries to encourage complementary action. For example, Treasury has worked closely with the Iraqi government to disrupt financing for the Islamic State of Iraq and the Levant (ISIL) and Treasury worked with the Iraqi government to cut off approximately ninety Iraqi bank branches from their headquarters to make it difficult for ISIL to access funds. Daniel L. Glaser, Washington Institute, *The Evolution of Terrorism Financing: Disrupting the Islamic State* (Oct. 21, 2016), http://bit.ly/2s3AFYc. Treasury has also worked with international partners to deny Al-Qaida

access to financial systems, and has worked extensively with both the Lebanese government as well as Latin American, South American, West African, and Middle Eastern governments to ensure that Hizballah does not have access to the international financial system. *See* Glaser Testimony, *supra*. Further, Treasury worked with Congress to pass the Hizballah International Financing Prevention Act of 2015 as part of its policy to financially target and weaken Hizballah. *Id.* The United States and Saudi Arabia also established the Terrorist Financing Targeting Center as a way of collaborating on issues regarding terrorist financing. Press Release, U.S. Dep't of Treasury, U.S. and Saudi Arabia to Co-Chair New Terrorist Financing Targeting Center (May 21, 2017), http://bit.ly/2t2WfRs. This recognition of, and collaboration with, multiple other actors further reinforces that the U.S. regulatory regime is only one aspect—certainly not the sole aspect—of the fight against terrorist financing.

C. The United States has led international efforts to expand the ways in which entities responsible for terrorist financing can be held liable.

The United States' interest in pursuing a multi-pronged approach to fighting terrorist financing can also be seen in its leadership of international efforts to tackle the problem.

In 1999, the United Nations' General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism; the United States played a leading role in preparing this treaty and has been a party since 2002. International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002). The Convention notes the ongoing

concern about the "worldwide escalation of acts of terrorism in all its forms and manifestations" and sets forth requirements for the prevention of terrorist financing. *Id.* ¶ 2. Article 18 provides that States take measures "requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measure available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from criminal activity." *Id.* art. 18. Article 2 makes it an offense to "by any means, directly or indirectly, unlawfully and willfully, provide[] or collect[] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" an act such as terrorism. *Id.* art. 2. And Article 5 requires States to adopt measures holding entities liable through "criminal, civil, or administrative" means for violations of Article 2. *Id.* art. 5. Thus, this type of lawsuit is specifically contemplated by Article 5 of the Convention.

In September 2001, the United Nations Security Council, acting under its Chapter VII powers, adopted Resolution 1373, which *mandated* that all States shall "[p]revent and suppress the financing of terrorist acts." S.C. Res. 1373, § 1(a) (Sept. 28, 2001). It ordered that States were to freeze, without delay, "funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts." *Id.* § 1(c). The Security Council ordered that States prohibit their nationals from "making any funds, financial assets, or economic resources . . . available, directly or indirectly, for the benefit of persons who commit or attempt to commit . . . terrorist acts." *Id.* The Resolution further declared that States must "[e]nsure that any person who

participates in the financing . . . of terrorist acts is brought to justice." *Id.* Finally, the Resolution urged those States who were not yet parties to the International Convention for the Suppression of the Financing of Terrorism to become parties as soon as possible. *Id.* at § 3(d). This further suggests the degree to which anti-terrorist financing has become a global goal.

The United States has led a range of initiatives to increase the ways in other countries also combat terrorist financing. The United States successfully led efforts to have the Financial Action Task Force (FATF), an international, inter-governmental body that issues recommendations and evaluates member countries on their compliance with those recommendations, issue eight special recommendations on terrorist financing. *See* U.S. Dep't of Treasury, *Contributions by the Department of the Treasury to the Financial War on Terrorism: Fact Sheet* 13 (2002) (Contributions by the Department of the Treasury); *see also* Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures: United States Evaluation Report* (2016), http://bit.ly/2gKd5Oy. The United States plays an active role in the Egmont Group—an international organization of sixty-nine financial-intelligence units (FIUs)—that has made the prevention of terrorism financing a priority. Contributions by the Department of the Treasury, *supra*, at 19. The United States and the European Union have entered into an agreement to share information on illicit payments. *See* http://bit.ly/1J5eYJv. As the International Monetary Fund (IMF) has declared, "[t]he international community has made the fight against money laundering and the financing of terrorism a priority." Int'l Monetary Fund, *Anti-Money Laundering*, *supra.*

D. Federal policy already relies in part on private enforcement to further deter terrorism and provide relief to victims.

Federal anti-terrorist financing policies contemplate private enforcement, suggesting that private enforcement should also be available in the Alien Tort Statute context.

The Antiterrorism Act, 18 U.S.C. § 2333 (ATA), provides a private right of action for U.S. nationals harmed by international terrorism. It provides that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . may sue therefor in any appropriate district court of the United States." *Id.*

The willingness of the U.S. government to use multiple avenues and channels for enforcement in the financial sector—especially in the context of anti-money laundering and terrorist financing—suggests that a private claim under the Alien Tort Statute brought against banks for illicit use of the U.S. financial system for terrorist financing would function well in a cohesive and multi-modal framework to fight terrorist financing.

III. Clearing is a core function of finance, not some ancillary, automatic, or ministerial activity.

A. Clearing in the U.S. provides a sufficient basis for enforcement of U.S. law.

Clearing through a U.S. branch has been held sufficient for application of U.S. law in a range of contexts—including the Alien Tort Statute, IEEPA, and the Foreign Corrupt Practices Act.

Lower courts have found a sufficient nexus to the United States under the Alien Tort Statute where a party performs repeated wire transfers through a U.S. account. In *Licci v. Lebanese Canadian Bank*, 732 F.3d

161 (2d Cir. 2013), the Second Circuit found such a nexus when a Lebanese bank used a correspondent account in New York to effectuate wire transfers on behalf of a terrorist organization. The court "conclude[d] that the selection and repeated use of New York's banking system, as an instrument for accomplishing the alleged wrongs for which the plaintiffs seek redress, constitutes 'purposeful[] avail[ment] . . . of the privilege of doing business in [New York], so as to permit the subjecting of the [Lebanese Bank] to specific jurisdiction.'" *Id.* at 171 (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002)).

Similarly, in *Mustafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), the Second Circuit found sufficient contacts when the defendant corporation used an escrow account in New York to launder money to aid torture. Although the court ultimately declined to impose liability under the ATS because the plaintiffs failed to allege intentional aiding and abetting of violations of international law, the court did find that the defendants' payments through an escrow account in New York City and its financing arrangements in New York provided "conduct that appears to 'touch[]and concern[]' the United States with sufficient force to displace the presumption against extraterritoriality and establish . . . jurisdiction under the ATS." *Id.* at 191.

Financial institutions have also been sanctioned for attempting to hide their violations of U.S. sanctions laws by "stripping" the identity of payors or payees when clearing transactions through the United States. One major example is the Department of Justice and the New York District Attorney's Office's investigation into Lloyds' U.K.-based international payments processing unit, which was systematically evading U.S. laws by secretly transferring funds through the United States on behalf of Iranian banks. *See* Lloyds Deferred Prosecu-

tion Agreement, *supra*, at Ex. A, 1. Lloyds had established an internal policy to "strip," or remove, any wire transfer messages of references to Iran. *Id.* at Ex. A, 7. Employees were removing data from payment messages to "avoid detection of the involvement of OFAC-sanctioned parties by filters used by U.S. depository institutions," allowing Lloyds's U.S. correspondent banks to complete wires that would have otherwise been blocked or rejected pursuant to OFAC regulations. *Id.* at Ex. A, 1. Lloyds even created an internal document called the "Payment Services Aide Memoire" documenting its practices—noting that any Iranian payments using U.S. dollars should be processed in the "normal way," which included removing references to Iran from the payment instructions. *Id.* at Ex. A, 7. By doing so, Lloyds prevented U.S. depository institutions located in the United States from recognizing the transaction as originating in Iran. *Id.* at Ex. A, 8. Lloyds was charged with "knowingly and willfully" violating and attempting to violate the IEEPA. *Id.* at Ex. A, 1. And Lloyds was charged with violation of U.S. law regardless of the fact that the stripping itself took place outside of the United States because the dollar clearing occurred in the U.S. *Id.* at Ex. A, 8–9.

After their deferred prosecution agreement with Lloyds, the Department of Justice and the New York District Attorney's Office entered into deferred prosecution agreements with Credit Suisse and ABN Amro for similar "stripping" activity. *See* ABN Amro Deferred Prosecution Agreement, *supra*; Credit Suisse Deferred Prosecution Agreement, *supra*.

The U.S. government also frequently prosecutes companies under the Foreign Corrupt Practices Act (FCPA) based on illicit payments through U.S. accounts. *See, e.g.*, Information ¶¶ 20(e), 22, *United States. v. JGC Corp.* (S.D. Tex. Apr. 6, 2011) (No. 11-cr-260); Infor-

mation ¶ 50, *United States v. Alcatel-Lucent, S.A.* (S.D. Fl. 2010) (No. 1:10-cr-20907-PAS); *see also* Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 Wis. L. Rev. 689, 712 ("[S]everal years ago federal regulators began to assert FCPA jurisdiction over non-U.S. companies based on U.S. dollar wire transfers through the foreign banks. These transfers typically involved the use of 'correspondent' accounts held by foreign banks at U.S. banks that were maintained to clear foreign U.S. dollar transactions."). The FCPA guide states that any act in furtherance of a corrupt payment that occurs in the United States confers jurisdiction, including "sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system." U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 11 (2012).

B. Clearing is a core function of finance.

The clearing of U.S. dollars is not an automatic, or ministerial activity, but a core function of finance involving extensive systems designed to preserve the integrity of the U.S. financial system. "Payments systems are the essential plumbing of the financial system and, like other parts of finance, can be used for good or ill. The United States attempts to police the financial system to avoid its use for money laundering or terrorist financing." Barr et al., *supra,* at 792. The process of clearing involves processing, transferring, and delivering funds from one institution to another. When a foreign entity clears in the U.S., it can access dollars essential to its global activities. Clearing is not a mere administrative activity—when a foreign party clears in the United States, the act of clearing provides a connection with, and exposure to, the U.S. financial system.

Financial institutions clearing in the United States must put in place an array of functions. These include detailed internal policies, procedures, and processes, control systems and personnel, software screens with various levels of intensity and effectiveness that must be chosen by bank personnel and adjusted according to the relative risk of different transactions, oversight by compliance groups and management, and a range of substantive judgments about whether to permit or to block any given transaction based on the risk that the transaction might pose. This process is all intended to protect the integrity of the financial institution, and of the U.S. and global financial systems as a whole. Financial regulators in the U.S. supervise the compliance programs that financial institutions set up in order to determine whether they are sufficiently protective. And financial institutions are subject to various enforcement actions and liabilities when BSA law and rules are violated.

Underscoring the importance of clearing, regulators have made a ban on clearing a core penalty for serious violations of anti-money laundering, terrorist financing, and sanctions laws. As part of its agreement with the New York Department of Financial Services, for example, BNP Paribas was suspended from dollar clearing services through its New York branch for one year. N.Y. Dep't Fin. Servs., Consent Order, *In the Matter of BNP Paribas, S.A.* 18 (June 30, 2014), http://on.ny.gov/1lOf67R. In response, the bank went as far as to ask other banks for help to clear its energy transactions—clearing was seen as necessary to keep its energy-finance division running. Karen Freifeld et al., *Exclusive: BNP Asks Other Banks for Help as Dollar Clearing Ban Nears*, Reuters (Oct. 6, 2014, 7:25 PM), http://reut.rs/2sysZQW.

Dollar clearing in the United States is both essential to the global financial system and critical for terrorist financing and money laundering. Stopping the illicit use of U.S. clearing is a linchpin of U.S. anti-money laundering and anti-terrorist financing policy. It would be exactly backward to carve clearing out of anti-terrorist financing policy.

IV. Arab Bank has been found to have violated U.S. antiterrorist financing regulations and to have knowingly financed terrorism.

In 2005, the OCC issued a consent order regarding the New York branch of Arab Bank, explaining that it had identified "deficiencies in the Branch's internal controls, particularly in the area of Bank Secrecy Act and Anti-Money Laundering compliance." OCC, Consent Order, *In the Matter of The Federal Branch of Arab Bank PLC* (Feb. 24, 2005), http://bit.ly/2t3zoVu. Through its order, the OCC took the extraordinary step of effectively stripping the branch of its banking powers, including funds transfer and deposit-taking activities, and requiring conversion from a full-service branch to a federal agency with limited powers. The OCC also assessed a $24 million penalty against the institution.

Arab Bank PLC also entered into a consent order with FinCEN. FinCEN, Consent Order, *In the Matter of The Federal Branch of Arab Bank, PLC* (Aug. 17, 2005), http://bit.ly/2rKJR4n. As part of this consent order, Arab Bank agreed to pay a $24 million fine, concurrent with the OCC's penalty. *Id.* at 8. FinCEN determined that Arab Bank violated multiple components of the BSA. These violations included both failing to implement an anti-money laundering program and violating the requirement to report suspicious transactions to the appropriate authorities. *Id.* at 3–6. FinCEN determined that Arab Bank failed to implement an adequate system

of internal controls. FinCEN also found that Arab Bank violated the reporting requirements of the BSA by failing to file suspicious activity reports in a timely manner, and failing to identify suspicious fund transfers. *Id.* at 7. The order explained that Arab Bank–New York cleared fund transfers for originators and beneficiaries that OFAC or the Department of State designated as "specially designated terrorists," "specially designated global terrorists," or "foreign terrorist organizations." *Id.* Arab Bank–New York did not even file the majority of its suspicious activity reports until after the OCC reviewed its activities in 2004. *Id.*

FinCEN's order stated that the New York branch of Arab Bank posed heightened risks of money laundering and terrorist financing. *Id.* at 4. The order explained that Arab Bank–New York established "inappropriate limitations on the scope of systems and controls to comply with the Bank Secrecy Act." *Id.* The bank neglected to monitor transactions or review originators and beneficiaries without accounts at Arab Bank–New York. *Id.* Due to this failure, the branch did not adequately monitor for suspicious activity fund transfers that they cleared as an intermediary institution. *Id.* FinCEN found, further, that Arab Bank–New York failed to implement procedures to monitor and identify fund transfers that warranted further investigation. *Id.* Finally, FinCEN determined that Arab Bank–New York failed to comply with the anti-money laundering program because it did not implement adequate procedures for independent testing. *Id.* at 6.

In parallel proceedings to this one, involving the claims of U.S. nationals, Arab Bank was found to have knowingly engaged in terrorist financing. *Linde v. Arab Bank,* 97 F. Supp. 3d 287, 299 (E.D.N.Y. 2015).

CONCLUSION

Permitting suits under the Alien Tort Statute against financial institutions clearing transactions in the United States for their knowing and willful support of terrorist financing is consistent with U.S. law and policy to combat terrorism.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

MICHAEL S. BARR
UNIVERSITY OF
MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109
(734) 936-2878

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Counsel for Amici Curiae

APPENDIX: LIST OF *AMICI CURIAE*

Michael S. Barr served as Assistant Secretary of the Treasury for Financial Institutions. He is currently the Roy F. and Jean Humphrey Proffitt Professor of Law and Professor of Public Policy, and faculty director of the Center on Finance, Law, and Policy, at the University of Michigan. He is the co-author of *Financial Regulation: Law and Policy* (2016).

Luke Bronin served as Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury.

Christopher Brummer is the Agnes N. Williams Research Professor, Faculty Director of the Institute of International Economic Law, and Professor of Law at Georgetown University Law Center.

Erik F. Gerding is Professor of Law at the University of Colorado Law School.

Theodore S. Greenberg served as Chief of the Money Laundering Section of the Criminal Division, U.S. Department of Justice.

Robert Hockett is the Edward Cornell Professor of Law and Professor of Public Affairs at Cornell University.

Howell E. Jackson is the James S. Reid, Jr. Professor of Law at Harvard Law School and co-author *of Financial Regulation: Law & Policy* (2016).

Stephen J. Lubben is the Harvey Washington Wiley Chair in Corporate Governance and Business Ethics at Seton Hall Law School. He is the author of *Corporate Finance* (2d ed. 2017).

Jonathan Macey is the Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law at Yale Law School, and Professor in the Yale School of Management. He is author of *Macey on Corporation Laws*, and co-author of two leading casebooks, *Corporations: Including Partnerships and Limited Liability Companies* and *Banking Law and Regulation*.

Patricia McCoy is Professor of Law at Boston College Law School and a former senior official in the Consumer Financial Protection Bureau.

James D. Smith teaches International Money Laundering, Corruption and Terrorism at George Washington University Law School, and served as Chief of Litigation for the Federal Deposit Insurance Corporation, where he managed programs that recovered $6 billion for misconduct and fraud.

Jennifer Taub is Professor of Law at Vermont Law School. She is the co-author of *Corporate and White Collar Crime: Cases and Materials* (6th ed. 2017). She previously served as an associate general counsel with Fidelity Investments.

Rory Van Loo is Associate Professor at Boston University School of Law.

Arthur E. Wilmarth, Jr. is Professor of Law at George Washington University Law School, and has served as Executive Director of GW's Center for Law, Economics & Finance.

Yesha Yadav is Professor of Law at Vanderbilt University.