APPEAL NOS. 05-1815, 05-1816, 05-1821, 05-1822

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOYCE BOIM and STANLEY BOIM, individually and as Administrator of the ESTATE OF DAVID BOIM,

Plaintiffs-Appellees,

v.

QURANIC LITERACY INSTITUTE, and HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CASE NO. 00-2905

BRIEF FOR THE 9/11 FAMILIES UNITED TO BANKRUPT TERRORISM IN SUPPORT OF PLAINTIFFS-APPELLEES' SUPPORTING AFFIRMANCE OF THE DISTRICT COURT'S DECISION BELOW

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Circuit Rule 26.1 Disclosure Statement

Appellate Court No: 05-1815, 05-1816, 05-1821 & 05-1822

Short Caption: Boim v. Holy Land Foundation for Relief and Development

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3): 9/11 Families United to Bankrupt Terrorism

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Hanley Conroy Bierstein Sheridan Fisher & Hayes LLP; Motley Rice LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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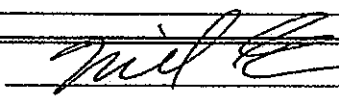
Attorney's Signature:  Date: 8/22/08

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Attorney's Signature: _____ Date: 8/22/08

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Statement of Issues

In granting the Petition for Rehearing *En Banc*, the Court invited briefing regarding:

> Whether a donor to an organization that, the donor knows, practices terrorism, can be liable under 18 U.S.C. § 2333(a) in the absence of proof that the donor intended to advance the violent component of the recipient's activities.

Boim v. Holy Land Found. for Relief & Dev., 2008 U.S. App. LEXIS 12925 (7th Cir. Ill. June 16, 2008). Amicus respectfully suggests that the answer to this question is yes.

Interests of Amicus 9/11 Families United to Bankrupt Terrorism

The 9/11 Families United to Bankrupt Terrorism ("9/11 Families") is an organization comprised of survivors and family members of those who died in the terror attacks on September 11, 2001. Many of the 9/11 Families are plaintiffs in litigation against certain individuals, banks, corporations, and charities who Plaintiffs have alleged knowingly financed the terrorist organization al-Qaeda.[1]

As direct victims of the terrorist attacks of September 11, 2001, the 9/11 Families are devoted to preventing the financing of terrorism. Specifically, the 9/11 Families are seeking to hold al Qaeda's financiers accountable for their central role in the atrocities of September 11, 2001, and desire to make the world safer by cutting off the financial pipeline fueling global terrorism. A decision for the defendants in this case would severely inhibit the

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[1] *Thomas E. Burnett, Sr., et al. v. Al Baraka Investment & Development Corp., et al.*, Case No. 03-CV-9849 (GBD) (SDNY) previously, *Thomas E. Burnett, Sr., et al. v. Al Baraka Investment & Development Corp., et al.*, Case No. 02-CV-1616 (JR) (DC).

investigation of, and education about, the individuals and organizations that used their financial resources to provide material support to al Qaeda allowing the September 11, 2001 attacks on America to occur. This Court's decision will be used either as a roadmap for terrorist financiers to avoid liability or terror victims to hold financiers civilly liable. As stated by the former General Counsel for the U.S. Department of Treasury, David Aufhauser:

> Money is the fuel for the enterprise of terror. It may also be its Achilles heel. It can have a signature, an audit trail, which, once discovered might prove the best single means of identification and capture of terrorists and pinpointing their donors. Financial records are literally the diaries of terror. Stopping the flow of money to terrorists may be one of the very best ways we have of stopping terror altogether.

Counter-terror Initiatives in the Terror Finance Program: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 108th Cong. 5 (2003) (written testimony of David D. Aufhauser, General Counsel, U.S. Dep't of the Treas.).

The standards of causation and scienter imposed by the panel decision in this case, however, are impractical and unworkable in light of the realities of terrorist financing. They are also contrary to traditional common law standards for aiding and abetting liability. Under those standards, those who knowingly provide substantial assistance to primary wrongdoers are traditionally held liable for the acts of those wrongdoers. The requirement of causation has traditionally been applied only to the primary wrongdoers and not to the aiders and abettors. Nor has aiding and abetting liability traditionally required a showing of specific intent equal to that of the primary

wrongdoer. The imposition of *higher* standards of causation and scienter in the context of terrorist financing would, perversely, make it more difficult to hold accountable those who knowingly finance terrorism than those who aid and abet lesser crimes. The 9/11 Families submit this brief to urge this Court not to impose a higher standard of scienter and causation, but to maintain traditional aiding and abetting standards in the context of the Anti-Terrorism Act.

Summary of Argument

Under traditional concepts of concerted action liability, aiders and abettors are held liable when they knowingly and substantially assist a primary wrongdoer who causes injury and are generally aware of their role as part of an overall illegal or tortious activity at the time that they provide the assistance. In other words, "cause in fact" applies to the relationship between the primary wrongdoer and the injury, not to the relationship between the aider and abettor and the injury. Specific intent to cause the harm is not required; rather, aiders and abettors need only be *generally aware* of their role as part of an overall illegal activity.

Use of traditional aiding and abetting liability in the context of the Anti-Terrorism Act ("ATA") furthers Congress' manifest intent to disrupt the causal chain of terror. In enacting the ATA as part of a comprehensive counterterrorism statutory scheme, Congress sought to focus in particular on

financial support of terrorism. This Court should apply a standard to the issues of both causation and scienter that implements Congress' intent.[2]

Regarding causation, this Court should hold that the "aid or encouragement" contemplated by aiding and abetting liability includes financial assistance to a group whose practice of violence is open and pervasive. Regarding scienter, this Court should hold that plaintiffs under the ATA need not prove that a defendant who provides financial support to a terrorist group specifically intended to facilitate a particular act of violence. Instead, a defendant's knowing contribution to a group like Hamas, whose use of violence was open and pervasive, should be sufficient evidence of scienter under the ATA.

The structure, incentives and operation of terrorist groups demonstrate the wisdom of the traditional view of causation as adopted by Congress in the ATA. Terrorist organizations such as Hamas and al Qaeda are integrated operations in service to a violent objective. In such organizations, the isolation of violence from putatively nonviolent programs simply is not supported by the facts.

Contributions to supposedly nonviolent programs of a terrorist group advance violence in a myriad of ways. As the panel decision recognized, money is fungible, so that even small donations to putatively nonviolent

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[2] An appellate court ruling on a grant of summary judgment below should follow the same sage advice given long ago by Justice Brandeis to decide only those matters that require decision. *See Ashwander v. TVA*, 297 U.S. 288, 345-348 (U.S. 1936) (Brandeis, J., concurring). Simplicity is particularly important in a case such as this, where complex, interdependent issues predominate. Following such a prudential course would allow this Court to rule on the decision below without the extended and largely hypothetical discussion engaged in by the *Boim II* panel.

activities free up resources for violence. *See Boim v. Holy Land Found. For Relief & Dev.*, 511 F.3d 707, 738 (7th Cir. Ill. 2007) ("Boim II").

The fungibility of funds is merely the tip of the iceberg in the complex relationship between financial aid and violence. Financial aid to the families of suicide bombers and families of persons imprisoned as a result of terrorist acts works as an incentive for violent acts. The terrorist group's activities in religion, social services or education serve the ends of violence by facilitating recruitment of suicide bombers, legitimizing the use of violence, and creating a culture of acceptance within the community of the violent actions of the groups. A causation standard that encompasses contributions to groups like Hamas and al Qaeda engaged in the open and regular practice of violence addresses these issues, and vindicates Congress' concern for extending liability to those along the entire causal chain of terrorism.

The same approach should govern the intent standard in ATA actions. A requirement that a defendant specifically intends the particular harm alleged by plaintiffs would undermine common law aiding and abetting principles and defeat the accountability that Congress sought to enhance by enacting the statute. Any knowing contribution to a group engaged in open and regular acts of terrorism should suffice to prove the requisite intent under the ATA.

Argument

I. The Anti-Terrorism Act Does Not Require Proof of Specific Intent to Assist in Violent Acts

Congress enacted the ATA as a civil remedy designed to impose liability "at any point along the causal chain of terrorism." *See* S. Rep. No. 102-342

(1992), 1992 WL 187372 (Leg. Hist.), at 22. Congress' goal was as simple as its remedy was comprehensive: to "interrupt, or at least imperil, the flow of money" to terrorist activity. *Id.* In keeping with this objective, proof of a defendant's knowing contribution to a group engaged in open and regular acts of violence should meet the ATA's intent requirement.

Analysis of this scienter standard's consistency with Congress' comprehensive scheme requires two steps. First, it is helpful to examine liability under the ATA for violations of 18 U.S.C. 2339B, which prohibits the provision of material support to a group designated by the Secretary of State as a specially designated global terrorist ("SDGT"). *See Linde v. Arab Bank*, 384 F. Supp. 2d 571, 576 (E.D.N.Y. (2005). Second, the analysis turns to groups that were *not* designated at the time of the harm alleged by plaintiffs. Since the government had not yet designated Hamas at the time of the events at issue in the instant case, scienter for this second step is directly at issue here.

A. Scienter and Civil Liability for Violations of Section 2339B

The statute is clear that criminal culpability is triggered by any knowing contribution to a SDGT under 18 U.S.C. § 2339B, and that specific intent is not required. Congress enacted § 2339B because critics noted that criminal laws already on the books would subject the government to difficult problems of proof by requiring proof of specific intent. *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. Legis. 1, 13 (2005) . The 9/11 Commission staff succinctly summarized the problem with earlier laws, noting that under such earlier

criminal provisions "prosecuting a financial supporter of terrorism required tracing donor funds to a particular act of terrorism – a practical impossibility." *Id.* (citing Staff of National Commission on Terrorist Attacks upon the United States, Monograph on Terrorist Financing 31-32 (2004)), available at http://govinfo.library.unt.edu/911/staff_statemnts/index.htm#monographs. Congress enacted § 2339B to alleviate these problems with enforcement. *See* H.R. Rep. 104-383, at *43, 104th Cong. (1995) (recognizing that existing law allowed terrorist groups to obtain funds for violent acts "under the cloak of a humanitarian or charitable exercise"). *See Linde*, 384 F. Supp. 2d at 587, citing above history. In passing section 2339B, Congress expressly found that financial contributions to the overall organization aided and encouraged violence.

B. Scienter Absent Designation as a SDGT

Liability for contributions to a group not yet named as a SDGT should similarly fulfill Congress' purpose of deterring help to terrorist activity "at any point along the causal chain of terrorism." *See* S. Rep. No. 102-342 (1992). A narrow test for scienter pegged to specific intent to aid violence would frustrate this goal. In contrast, a less rigid scienter standard would be consistent with Congress' comprehensive counterterrorism focus. Accordingly, a plaintiff under the ATA suing a contributor to a non-SDGT should need to prove only that the defendant knowingly contributed to a group engaged in the open and regular pursuit of violence.

In the instant case, Hamas' reputation as a lethal terrorist organization preceded its official designation by several years. *See* Clyde Haberman, *Arab*

Car Bomber Kills 8 in Israel; 44 Are Wounded, N.Y. Times, April 7, 1994, A1; Clyde Haberman, *5 Killed in Israel as Second Bomber Blows Up a Bus*, N.Y. Times, April 14, 1994, A1; Clyde Haberman, *Attack in Israel: The Overview; 20 Killed in Terrorist Bombing in Tel Aviv; 48 Are Hurt*, N.Y. Times, Oct. 20, 1994, A1. As of the week of April 7-14, 1994, when Hamas launched two suicide attacks that killed a total of 13 civilians and wounded scores more, donors were on notice of Hamas' commitment to suicide bombings. In the eleven year period dating from February 1989, Hamas "carried out at least twenty-seven attacks, including twelve suicide bombings... [t]hese attacks caused approximately 185 deaths and left over 1,200 people wounded." *See* Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Services of Jihad* 12 (Yale University Press 2006).

This campaign of violence, proudly acknowledged by Hamas, was a signature element of its program. Hamas regularly used media outreach to publicize and glorify suicide bombers. *Id.* at 141 (describing publicity efforts centering on dissemination of "living wills" of suicide bombers). All donors to Hamas, therefore, were clearly on notice well before Hamas' official designation by the United States government that contributions would directly or indirectly aid violence. Attaching liability to such aid therefore serves the comprehensive statutory scheme that Congress enacted over time to deal with the infrastructure of terrorism.

If some desire to assist violence is required under § 2339A, defendant-appellants in this case clearly meet that standard. Evidence demonstrates that they have repeatedly expressed their support for violence as a program,

and for replenishing terrorist infrastructure. *See Boim II,* 511 F.3d at 741. In other situations, intent to further violence generally can be inferred from the facts. For example, the specific and targeted distribution of death benefits to families of suicide bombers amply demonstrates special approval of past terrorist acts, and the hope that others will follow the example of the "martyr." *Cf. Holy Land Found. v. Ashcroft,* 219 F. Supp. 2d 57, 72-73 (D.D.C. 2002) (citing provision of such special death benefits as one basis for government's designation of Holy Land Foundation as SDGT), aff'd, 333 F.3d 156 (D.C. Cir. 2003). The knowing and targeted aid to families of suicide bombers is analogous to the knowing and ongoing aid to a burglar found to be sufficient in *Halberstam* to support aiding and abetting liability for a murder committed during a burglary's course. *See Halberstam v. Welch,* 705 F.2d 472, 486-88 (D.C. Cir. 1983).[3] In each case, the assistance provided over time by the defendant warrants an inference that the defendant sought to aid and encourage a course of conduct predicated on illegal acts. To avoid loopholes in Congress' comprehensive antiterrorist scheme and ensure deterrence all along terrorism's causal chain, this Court should hold that such a showing is sufficient proof of intent under the ATA.

Other courts in terrorism cases have endorsed a parallel analysis. In *Almog,* the court made clear that the ATA does not require that defendants have the specific intent to "cause the specific acts" that resulted in harm to the plaintiffs. *See Almog v. Arab Bank, PC,* 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007); *see also Linde v. Arab Bank,* 384 F. Supp. 2d 571, 586

[3] The *Halberstam* case is discussed in greater detail below, *see* Point II, *infra.*

(E.D.N.Y. 2005) (none of the provisions that support civil or criminal liability for aiding and abetting acts of terrorism requires specific intent "to commit specific acts of terrorism").

C. Sound Counter-Terrorism Policy Supports the Absence of a Specific Intent Requirement

The economics of deterrence and civil enforcement also support liability without proof of specific intent. When actors enjoy asymmetries in control over information and their conduct imposes costs on the public, the law should require actors to internalize some of those costs. Scholars have argued that when standards are amorphous and parties have asymmetric information about performance, the party with superior information has an incentive to game the system. In this fashion, amorphous standards create moral hazard. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 602-04 (2003). Default rules that leave less room for interpretation prevent this kind of strategic behavior.

Terrorist financing hinges on asymmetric information. The financiers know more, forcing law enforcement to play "catch-up." This problem is compounded by the vast repertoire of ways financial contributions directly or indirectly promote violence, including fungibility, poor accounting, enhancement of group legitimacy and recruitment, and prevention of defection. Congress sought to address these asymmetries by asserting that terrorist organizations were so tainted with violence that *any* contribution would further illegal conduct. *See* Pub. L. No. 104-132 § 301(a)(7), 110 Stat. at 1247 (emphasis added).

From a law enforcement perspective, requiring that a donor to a terrorism group possess specific intent exacerbates the chronic problem of information asymmetry. A donor who knows that the government will have to prove specific intent can game the system, hiding behind a cloak of plausible deniability. Like Claude Rains' genially corrupt Captain Renault in *Casablanca*, the donor has an incentive to proclaim his shock when confronted with evidence of his knowledge of illegal conduct. Permitting the plaintiff to prevail without proof of specific intent removes this moral hazard.

D. Imposing Liability Without Specific Intent is Constitutionally Permissible

Imposing civil liability, like imposing criminal culpability, is constitutionally permissible here. Since the dawn of the republic, Congress has imposed embargoes on trade with other countries where Congress believed that trade would foster dangerous foreign entanglements or otherwise imperil United States foreign policy or national security. Congress may delegate to the executive branch authority to designate foreign nations or organizations as hostile. *See Zemel v. Rusk*. 381 U.S. 1 (U.S. 1965); *Regan v. Wald*, 468 U.S. 222 (U.S. 1984). Courts have declined to read specific intent requirements into these statutes, holding that *any* financial contribution or assistance, whatever its purpose, violated the statutory scheme. Under the same rationale, courts have upheld criminal liability under § 2339B. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. Cal. 2000) (holding that restrictions on assistance to foreign terrorist organizations constitute merely incidental restrictions on speech); accord, *United States v.*

Hammoud, 381 F.3d 316, 329 (4th Cir. 2004); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1015 (D. Minn. 2008).

Other statutes similarly target foreign organizations and states alike, including the Foreign Intelligence Surveillance Act (FISA). As September 11 has shown, a foreign organization has as much power to inflict damage as many sovereign states, and often greater ability to use that power, precisely because the group has no "return address" that ensures accountability. It would be odd if the Constitution forbids categorical restrictions on aid to such groups, which can often be more dangerous than sovereign states. The Constitution imposes no such rigid requirement on actions by Congress to safeguard national security.

II. The Causation Requirement Imposed by the Panel Constituted a Marked Departure from the Test Courts Have Applied to Aiding and Abetting Liability.

The Restatement (Second) of Torts delineates the traditional common law scope of liability for aiders and abettors. The Restatement provides that a party is subject to aiding and abetting liability if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other." *See* Restatement (Second) of Torts, § 876(b) (1979). A comment to § 876(b) notes that, "[a]dvice or encouragement to act operates as a moral support to a tortfeasor and ... has the same effect upon the liability of the advisor as participation or physical assistance." Comment d [to Clause (b)], REST. (2d) OF TORTS, § 876(b) cmt. d. (1979)

Courts have typically applied a rule of reason to causation requirements in the aiding and abetting context. This approach reaches helping behavior that

materially decreases the risk-reward ratio for wrongdoers. By targeting such helping behavior, the accepted approach effectively deters aid or encouragement of tortious acts. In contrast, a rigidly applied "cause-in-fact" causation requirement fosters formation of the primary tortfeasor's support network, defeating the purposes of aiding and abetting liability.

Case law has applied this standard to reach all those who knowingly provide material support to wrongdoers. This Court has noted that "assisting" a fraud would suffice to support liability, without proof that such assistance in any direct way caused the underlying act. *See Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. Ill. 2000). Judge Learned Hand observed that an aider and abettor need merely "in some sort associate himself with the venture... seeking by his action to make it succeed." *See United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. N.Y. 1938).

The D.C. Circuit articulated the same "legal cause" test in an opinion that the Supreme Court praised as a "comprehensive opinion on the subject." *See Halberstam v. Welch*, 705 F.2d 472, 476-78 (D.C. Cir. 1983), cited in *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (U.S. 1994). The case was also cited with approval by Defendant Quranic Literacy Institute:

> With respect to aiding and abetting, the first element of civil aiding and abetting has been described as follows: "Aiding and abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury..." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

Supplemental Brief of Appellant at 7, *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (No. 00-C-2905)

The *Halberstam* Court upheld a finding of liability for aiding and abetting a murder in the course of a burglary where the defendant helped dispose of items taken in a string of burglaries by the same primary tortfeasor. In a thoughtful decision not cited by the *Boim II* panel, the *Halberstam* Court reasoned that this aid was vital to realizing financial gain from the burglaries. The *Halberstam* Court held that:

> (1) the party the defendant aids must perform a wrongful act that causes an injury; (2) the Defendant must be generally aware of this rule as part of an overall illegal or tortious activity at the time he provided assistance; and, (3) the Defendant must knowingly provide substantial aid.

Halberstam, 705 F.2d at 477. The defendant's aid to the overall enterprise in *Halberstam* supported liability, even though the defendant concededly had not intended that a murder occur, had no advance knowledge of the act, and did not commit any acts connected directly to the burglary or slaying. "It was not necessary that Defendant knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night – whether as a fence, burglar, or armed robber made no difference – because violence and killing is a foreseeable risk in any of these enterprises." *Id.* at 488.

A standard that targets all knowing and non-incidental helping behavior effectively deters aid or the encouragement of tortious and/or criminal acts. A "cause-in-fact" causation requirement provides an appealing loophole for those seeking to help others to engage in illegal acts by encouraging and allowing these "helpers" to fine-tune their assistance to avoid sanctions. In contrast, a legal cause requirement sends a clear message that individuals

should cease and desist from harmful helping. This closes the loophole provided by "cause-in-fact" causation.

Substantive acts of assistance, such as knowingly providing material support to a group engaged in criminal acts of terrorism, are sufficient to find aiding and abetting of an underlying tort. There is no additional requirement that the donor specifically intended to advance the violent component of the recipient's actions. The substantive assistance in itself coupled with the knowledge that the primary activity the group is engaged in terrorist acts is sufficient. For example, in *Keel*, the court held that a student who only collected and retrieved erasers thrown by other students may be found liable to a student struck by an eraser. *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958). Through his actions alone, the student substantially encouraged the wrongful activity that resulted in the injury. Liability was found even though there was no evidence the student retrieved the actual eraser that hit the victim or aided the specific thrower. Substantial assistance to a group he knew was engaged in tortious activity was sufficient.

Aiding and abetting need not occur at the actual scene of the tort for the conduct to be sufficient to find liability. In *Russell v. Marboro Books*, 183 N.Y.S.2d 8 (N.Y. Sup. Ct. 1959), the court held that a book company could be found liable because it sold a picture of a model to a company with the knowledge that the purchaser may use the picture to alter and then defame the subject of the photograph. In these cases there was no requirement the plaintiff prove the aider and abettor intended for the purchaser of the photograph to defame the person depicted or the group of eraser throwers to

strike the plaintiff in the glasses in order that she lose an eye. The intent of the aider and abettor is found in the knowledge that the primary tortfeasors are engaged in tortious conduct and in the providing substantial assistance.

Similarly, an individual may be held liable for aiding and abetting an underlying tort when he knowingly provides financial assistance to al Qaeda and/or Hamas knowing that such groups have publicly declared their intent to kill and injure innocent U.S. civilians and knowing that the groups carried out a series of attacks directed at innocent civilians. As Part IV of this brief illustrates, any financial contribution to a group, such as Hamas, that engaged in an open and regular campaign of violence aids such violence. Deterring such contributions therefore places aiding and abetting liability squarely within the framework intended by Congress.

III. A Causation Standard that Encompasses Contributions to a Known Terrorist Group Furthers the Role of Civil Liability under the Anti-Terrorism Act in Congress' Comprehensive Scheme for Dismantling Terror

Judicial decisions applying the Anti-Terrorism Act (ATA) typically adopt and extend the *Halberstam* causation standard. *See* 18 U.S.C. §§ 2331-38 (2008). Congress made clear in enacting the ATA that it was extending general principles of tort liability, including aiding and abetting liability. *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1019 (7th Cir. Ill. 2002) ("Boim I"), cited in *Linde v. Arab Bank,* 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); *see also Burnett et al v Al Baraka et al,* 274 F.Supp.2d 86, 106 (D.D.C. 2003). In addition, as the court in *Boim I* noted, Congress intended in the ATA, 18 U.S.C. § 2333, to make civil liability "at least as extensive" as

criminal liability for terrorism, and it is clearly established that criminal liability for terrorist activity includes aiding and abetting. *See Boim I*, 291 F.3d at 1019. Moreover, the *Halberstam* view of causation is manifestly consistent with Congress' purpose of "cutting off the flow of money to terrorists at *every point* along the chain of causation." *Boim I*, 291 F.3d at 1019, *Linde*, 384 F. Supp. 2d at 583 (emphasis added).

Courts interpreting the ATA have cited Congress' comprehensive statutory scheme in rejecting a rigid causation standard. In *Linde*, the court found that a cause-in-fact standard would have undermined the purpose of the ATA, in a case concerning allegations that the defendant bank both solicited funds for groups designated as terrorist organizations by the Secretary of State and administered a substantial death benefit paid to the families of suicide bombers. The key fact for the *Linde* Court was that the defendant's actions, particularly the death benefit plan, lowered the risk/reward ratio for terrorist activity, supplying an "incentive" for suicide bombings. *Id.* at 585. The court found that the financial services allegedly provided by the defendants met the "advice or encouragement" standard in the Restatement. *Id.* at 584. Observing that *Halberstam* held that the defendant's acts constituted aiding and abetting even though there was no showing that her services directly caused the murder, the *Linde* Court found that the defendant bank's services were sufficient to establish liability for terrorist acts. *Id.* at 584-85. In a related case, the court similarly cited *Halberstam* in finding that the financial services allegedly provided by the bank constituted "substantial assistance to international terrorism and

encouraged terrorists to act." *See Almog v. Arab Bank, PC,* 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007). If the material support allegedly provided by Arab Bank met this standard, the fundraising allegedly engaged in by defendant-appellants in the instant case also falls within the ATA's scope. *Id.*

IV. Rejection of an Overly Rigid Causation Standard Best Addresses the Complex Interaction of Terrorism and Financial Support

Both case law and expert analysis demonstrate that fundraising and financial services, even when they cannot be traced to a particular terrorist attack, assist and encourage terrorism on a number of levels. Congress recognized this complex relationship between financial and material assistance and terrorism when it declared its intention that plaintiffs' remedies under the ATA "interrupt, or at least imperil, the flow of money" to terrorist activity. *See* S. Rep. No. 102-342 at 22 (1992). To illustrate the depth and seriousness of Congress' commitment, it is helpful to separate and analyze the strands that connect terrorism with material support.

A. Terror Funding and Fungibility

Case law uniformly notes that the fungibility of financial support obviates the need to trace back such support to a particular terrorist act, or even to the division of terrorist groups charged with planning and executing violence. Indeed, the *Boim II* panel opinion noted, financial contributions are "fungible," *Boim II,* 511 F.3d at 741. The panel opinion further noted that the fungibility of financial assistance justified liability for financial support to a known terrorist group. *Id.* at 738. Support for putatively nonviolent programs "frees up resources that can be used for terrorist acts." *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1136 (9th Cir. Cal. 2000).

This Court has previously observed that requiring a direct link between financial assistance to a terrorist group and a specific act of violence would defeat congressional intent, "as it would enable a terrorist organization to solicit funds for an ostensibly benign purpose, and then transfer other equivalent funds in its possession to promote its terrorist activities." *See Hussain v. Mukasey*, 518 F.3d 534, 538-39 (7th Cir. 2008) (citing *In re: S-K-*, 23 I. & N. Dec. 936, 944 (B.I.A. 2006)).

B. Terror Funding Off the Books

Terrorist groups' reluctance to follow general accounting principles compounds the fungibility problem. In the absence of robust accounting safeguards, terrorist groups can use money earmarked for a nonviolent activity to support violence. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) (commenting that "terrorist organizations can hardly be counted on to keep careful bookkeeping records"); *Humanitarian Law Project,* 205 F.3d at 1136 ("terrorist organizations do not maintain open books"); *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. N.C. 2004) (citing *Humanitarian Law Project* discussion of terrorist accounting methods in holding that proof of specific intent is not required for criminal conviction based on defendant's financial contribution to Hizballah).

C. Materially Supporting Nonviolent Programs as an Incentive for Terror

Financial support to putatively nonviolent programs can also function as an incentive for terrorist activity. For example, a terrorist group may use contributions supposedly dedicated to "peaceful purposes" to aid the families of suicide bombers, "thus making the decision to engage in terrorism more

attractive." *See Humanitarian Law Project*, 205 F.3d at 1136, cert. denied, 532 U.S. 904 (U.S. 2001); *Linde*, 384 F.Supp.2d at 585 (targeted payments to families of suicide bombers constitute "incentive" to terrorist acts).

Social scientists who assembled a database of interviews with incarcerated terrorists have noted the salience of this incentive for their subjects. *See* Jerrold M. Post, Ehud Sprinznak & Laurita M. Denny, *Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists*, 15(1) Terrorism & Pol. Violence 171, 175 (2003) (jailed terrorists reported "financial and material support from the organization and community for ... [their] families"). *See also id.* at 177 (quoting jailed terrorist as noting that "families of terrorists who were wounded, killed, or captured enjoyed a great deal of economic aid and attention ... families got a great deal of material assistance, including the construction of new homes..."). This incentive created a feedback loop, signaling to the community that suicide bombers and their families merited "enhanced social status." *Id.* at 175. The enhanced social and material status of the families of terrorists also "strengthened popular support for the attacks." *Id.* at 177.

D. Materially Supporting Social Services Legitimizes Terrorist Violence

Contributions that enhance the social services offered by groups such as Hamas also legitimize terrorist activity. *See Linde*, 384 F.Supp.2d at 585. The provision of social services is an important signal to the community that the organization is a stable repeat player, not a fly-by-night operation engaged in "cheap talk." *See* Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Services Provisions, and Terrorism*, 20(3)

Terrorism & Pol. Violence 356, 358 (2008). However, moving beyond cheap talk is expensive. Groups like Hamas that can generate high levels of contributions are best situated to send the signal associated with social services provisions. *See id.* at 359 ("the most likely candidate to utilize social provision strategies are groups that have a relatively high level of external funding and also have a strong need for legitimacy, like Hamas"). The enhanced legitimacy that accompanies the provision of social services increases support for *all* aspects of a group's operation, including violent attacks. *Id.* at 365.

E. Funding Nonviolent Programs Aids Terrorist Recruitment

Donations to putatively nonviolent programs, such as schools and mosques run by terrorist groups such as Hamas, also underwrite indoctrination and recruitment into violence. *See* Levitt, Hamas: Politics, Charity, and Terrorism, supra, at 135 (noting links between Hamas-affiliated cleric preaching violence and individual inspired by cleric to "scout potential sites for suicide bombings in Jerusalem"); Post, et al., *supra* at 173 (50 percent of jailed terrorists interviewed by authors cited experience at a mosque or other religious influence as "central").

F. Material Support for Social Services Ensures the Loyalty of Violent Operatives to the Terrorist Organization

The provision of public goods such as education, health services and welfare by terrorist groups ensures operatives will not defect. *See* Eli Berman & David D. Laitin, *Religion, Terrorism, and Public Goods: Testing the Club Model*, National Bureau of Economic Research, Working Paper 13725 (2008), available at http://www.econ.ecsd.edu/~elib/tc.pdf, at 4; *see also* Magouirk,

supra, at 358 (discussing Hamas' provision of social services). Terrorist groups seek operatives whose "self-image becomes ... intimately intertwined with the success of the organization ... [w]ith no other means to achieve status and success, the organization's success becomes central to individual identity and provides a 'reason for living'."). *See* Post, et al., *supra*, at 175. Terrorist groups looking for reliable operatives depend on sacrifices as "signals of commitment." *See* Berman & Laitin, *supra*, at 3. These sacrifices act as a bonding mechanism, making it less likely that a member of the group will defect and thereby endanger the group's survival by exposing the remaining members to state enforcement efforts. *Id.* at 3 & n.5.

To elicit these sacrifices from members, the group provides reciprocal public goods, such as education, health services, and welfare benefits. *Id.* at 17. Provision of these public goods secures the member's loyalty, and deters defection, since a defector loses entitlement to the public goods. *Id.* at 24. As the authors observe, "*[t]he stronger the social service provision of the [terrorist organization]... the more loyal will be its operatives, and thus the more damaging will be its suicide attacks.*" *Id.* at 28 (emphasis in original); *id.* at 31-32 (proving hypothesis through data on terrorist attacks).

Hamas has a particularly well-developed network for the provision of public goods. *Id.* at 8; Magouirk, *supra*, at 358-59. Deterring donations to Hamas weakens its ability to provide such services. By enhancing such deterrence, aiding and abetting liability will also remove a key building block in the architecture of terror.

G. Any Material Contributions Are Ample to Support Liability

Given the pernicious effects of funding for terror groups, the size of the financial contribution should not be dispositive on the issue of liability, as both *Boim I* and *Boim II* recognize. As the *Boim I* court observed, "Congress has made clear... that even small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability." *Boim I*, 291 F.3d at 1015. The *Boim II* panel agreed. *See Boim II*, 511 F.3d at 738 ("even small donations... might suffice to render the donor liable"); cf. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) (holding that provision of food and lodging constituted material support of terrorism). Any other result would allow terrorists to continue to game the system by "pooling together small donations," thereby undermining Congress' clear objective of "cutting off funding for terrorism." *See Boim I*, 291 F.3d at 1015.

Boim I made clear that fulfilling Congress' objective in its comprehensive counterterrorism scheme requires expanding liability "beyond the persons directly involved in the acts of violence." *Boim I*, 291 F.3d at 1021. The *Boim I* court, in reasoning not contradicted by *Boim II*, noted that Congress sought to reach forms of aid and encouragement that build terrorist infrastructure. As the court noted, terrorist violence depends on "resources to acquire... tools of terrorism and to bankroll the persons who actually commit the violence." *Id.* at 1021. Curbing the flow of resources for acts of violence requires imposing liability on those who offer financial support to such endeavors. *Id.*

V. If The Court Rules Some Proof Of Cause-in-Fact is Required To Establish Aiding & Abetting Liability Under ATA, Plaintiffs Need Only Prove That Defendants' Support Indirectly Facilitated Hamas' Terrorist Activities

To be clear, Plaintiffs' position for all the reasons discussed above is that there is no requirement for Plaintiffs separately to prove a causal connection between their injury and the defendants' acts of assisting Hamas in order to establish aiding and abetting liability under ATA § 2333. It is sufficient that Hamas caused the injury and defendants provided substantial assistance to any part of Hamas' activities with knowledge of Hamas' terrorist agenda. That said, assuming *arguendo* this Court were to rule now that ATA aiding and abetting liability under the ATA requires proof that defendants' provision of funds was a cause-in-fact of Boim's death, the Court should rule that to prove cause-in-fact plaintiffs need only prove by a preponderance of the evidence that defendants' financial support of Hamas *indirectly facilitated* Hamas' terrorist activities.

In other words, if this Court, sitting *en banc*, adopts the ruling in *Boim II* that "the plaintiffs must be able to produce *some* evidence permitting a jury to find that the activities of [defendants] contributed to the fatal attack on David Boim and were therefore a cause in fact of his death," the issue would become *what* needs to be proven to establish that causal link. *Boim II,* 511 F.3d at 710-11.

In articulating what needs to be shown to establish cause-in-fact, the *Boim II* majority opinion becomes so muddled as to require *en banc* clarification now. As put by Circuit Judge Evans dissenting in part:

> [H]ow must one prove that [causal] link...? The majority wisely declines to set up an absurd requirement that the money given to Hamas by the defendants must be traced directly to, say, purchasing the guns used in the attack.... At times, though, it seems that the majority is requiring a pretty clear trail leading from a defendant to the specific act which caused David's death.

Boim II, 511 F.3d at 759.

The conflicting signals put forth by the *Boim II* majority about establishing cause-in-fact are manifest. On the one hand, the majority states "[n]othing in *Boim I* demands that the plaintiffs establish a *direct link* between the defendants' donations (or other conduct) and David Boim's murder," *but* on the other hand states there must be proof of "a causal link between the assistance that the court found [defendants] to have given Hamas and the murder of David Boim." *Id.* at 736, 741. Then the majority states "[i]t is not enough to show simply that a defendant generally aided and abetted [Hamas], there must be proof that the defendant aided and abetted [Hamas] in the commission of tortious acts that have some *demonstrable link* with David Boim's death," *but* then states "[a] factfinder reasonably could conclude that those who provide money and other general support to a terrorist organization are [] essential in bringing about the organization's terrorist acts." *Id.* at 740-41.

That said, there was some agreement between the *Boim II* majority and Judge Evans's dissent on *certain* ways that plaintiffs could prove cause-in-fact to establish § 2333 liability. As put by the *Boim II* majority:

> One way to do this ... would be to show that donations went into a central pool of funds that provided weapons and training for Hamas agents.... Another avenue would be to demonstrate that money from the defendant organizations went to Hamas for its

> charitable endeavors, and thereby freed up funds that Hamas could use for terrorist activities *during the time period when David Boim was killed.*

Boim II, 511 F.3d at 756. Judge Evans agreed:

> I do not disagree [that] what must be shown is that the defendant established a funding network or provided 'general support' for terrorist activities; if that is established, then the fact finder could infer that establishing the network was a cause of Hamas terrorism. That is especially true if the funding was *within a reasonable time of the terrorist act*..... [T]errorist acts that follow *within a reasonable time* the donations and other support provided by a defendant to the perpetrators of those acts could be deemed to have been caused by those acts.

Boim II, 511 F.3d at 759 (Evans, J., dissenting in part).

Boim II further recognized that "even conduct that *indirectly facilitated* Hamas' terrorist activities might render a defendant liable for the death of David Boim" in light of Congress's intent that "liability for terrorism extend the full length of the causal chain." *Id.* at 710.

Accordingly, if the Seventh Circuit *en banc* is inclined to require proof of cause-in-fact for ATA aiding and abetting liability, the Court should articulate the standard for § 2333 cause-in-fact as follows: Plaintiffs need only show that defendants' financial support indirectly facilitated Hamas' terror activities when David Boim was killed.

Conclusion

For the foregoing reasons, The 9/11 Families United to Bankrupt Terrorism respectfully urge this Court to affirm the decision of the U.S. District Court for the Northern District of Illinois, Eastern Division.

Dated: August 21, 2008

Respectfully submitted,

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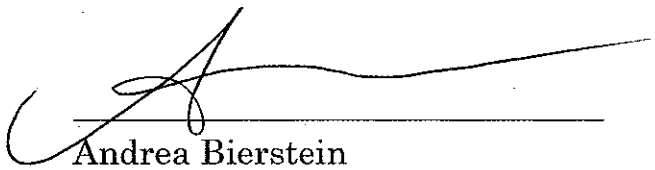
Certificate of Compliance

I certify that the foregoing brief is proportionally spaced, has a serif type face (Century) of 13 points, in Word 2007, and contains 6,990 words, according to the word processing system used to prepare this brief. I understand that a material misrepresentation can result in the Court striking the brief or imposing sanctions.



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Dated: August 21, 2008

CERTIFICATE OF SERVICE

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