18-1304

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ENTESAR OSMAN KASHEF, ALFADEL MOSABAL, ABUBAKAR ABAKAR, SIAMA ABDELNABI HAMAD, ABBO AHMED ABAKAR, HAWA MOHAMED OMAR, JANE DOE, NYANRIAK TINGLOTH, REVEREND ANDERIA LUAL, NICOLAS HAKIM LUKUDU, TURJUMAN RAMADAN ADAM, JOHNMARK MAJUC, JOSEPH JOK, HALIMA SAMUEL KHALIFA, AMBROSE MARTIN ULAU, SANDI (SUNDAY) GEORGARI MARJAN, SHAFIKA G. HASSAN, JANE ROE, JUDY DOE, SARA NOURELDIRZ ABDALLA, AMIR AHMED,

Plaintiffs-Appellants,

—against—

BNP PARIBAS S.A., a French corporation, BNP PARIBAS NORTH AMERICA, INC., a Delaware corporation, DOES 1-10, BNP PARIBAS S.A., NEW YORK BRANCH,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* THE INSTITUTE OF INTERNATIONAL BANKERS IN SUPPORT OF DEFENDANTS-APPELLEES SUPPORTING AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Institute of International Bankers (the "IIB") is a national association representing and advancing the interests of international banking institutions with operations in the United States. The IIB is not owned by a parent corporation, and no publicly held corporation owns more than ten percent of its stock.

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STATEMENT OF IDENTITY AND INTEREST[1]

The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and advancing the interests of international banking institutions with operations in the United States.

The IIB's membership consists of internationally-headquartered banks and financial institutions from more than thirty-five countries. Its member banks have substantial operations throughout the United States. The IIB's members' U.S. operations have approximately $5 trillion in assets, fund approximately twenty-five percent of all commercial and industrial bank loans made in the United States, and contribute more than $50 billion each year to the U.S. economy.

The IIB appears regularly as amicus curiae in cases that present significant issues related to international banking. The IIB and its member banks have a substantial interest in the outcome of this appeal because the position appellants advocate would expose international banking operations to limitless risk of U.S. civil liability, would create disincentives to providing banking services worldwide, and would harm the international financial system. This would have a substantial

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[1] All parties have consented to the filing of this brief. This brief was not authored in whole or part by any party's counsel; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amicus curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

negative impact on the IIB and its members, and would frustrate foreign policy goals, international security, and U.S. and international law enforcement.

INTRODUCTION

Through this lawsuit, appellants seek to deploy New York state tort law to hold a French bank, BNP Paribas, S.A. and its affiliates (together, "BNPP"), liable for brutal acts the Government of Sudan committed against its own people when that government was subject to U.S. economic sanctions. Appellants theorize that BNPP is liable because its admitted violations of U.S. economic sanctions gave the Sudanese government access to funding that enabled the government to commit those wrongs. (Joint Appendix ("J.A.") 34-35, 38-40, 43-44, 64, 82, 88, 93, 99, 126-29, 137-39, 143-82, 187-90.) *See* Brief for Appellants ("Br.") at 3-4, 7-11, 25-34.

The district court (Nathan, J.) recognized that it could not hold BNPP liable without first determining that the Sudanese government's actions violated New York law. (Special Appendix ("S.A.") 6-10.) As a result, the district court held that appellants' claims are barred by the act of state doctrine.[2] (S.A. 8-10.)

Appellants now seek reversal, arguing, *inter alia*, that the policies underlying the act of state doctrine are not implicated here because the United States has already condemned Sudan's conduct. *See* Br. at 25-42. Under these

[2] Plaintiffs have abandoned their claims of commercial bad faith and unjust enrichment. *See* Br. at 11 n.3. Those were the only claims the district court did not dismiss on act of state grounds. (S.A. 15.)

circumstances, appellants say, "[s]eparation of powers concerns are at [a] low ebb," and there is therefore "no need for judicial abstention." Br. at 38.

With the utmost sympathy for appellants in light of the horrific suffering they have endured, the IIB writes respectfully to explain that the separation-of-powers and public-policy concerns underlying the act of state doctrine are fully implicated by appellants' attempt to engage in private enforcement of the U.S. sanctions laws. The district court's judgment of dismissal should therefore be affirmed.

Congress has not authorized private claims to enforce the sanctions laws. And for good reason, given the delicate foreign-policy and law-enforcement challenges that such cases present. Yet under appellants' approach, every violation of the sanctions laws would expose a bank to untrammeled liability under state tort law, for whatever harm the sanctioned government goes on to commit.

And under appellants' view of the law, it makes no difference what enforcement choices may have been made by the federal agencies that have statutory responsibility for enforcing this nation's economic sanctions. It matters not to a private plaintiff that exposing a foreign bank to civil liability in cases like this may cause diplomatic friction, not only with a hostile foreign government but also with an ally where the bank is headquartered. Similarly, private plaintiffs do not consider the risk that governments well understand—that, faced with the risk of

open-ended civil liability, banks may simply withdraw entirely from high-risk regions. Such "de-risking" impedes the very economic development that is key to improved human rights, and could lead to *more* financial crime as money instead changes hands through underground, unregulated channels.

For these reasons, amicus curiae the IIB respectfully urges this Court to decline appellants' invitation to relax the act of state doctrine to allow their state-law claims to proceed. The important policy considerations that underlie the act of state doctrine require its faithful application to bar the claims asserted here.

ARGUMENT

THE DISTRICT COURT'S JUDGMENT SHOULD BE AFFIRMED TO PREVENT STATE-LAW CLAIMS FROM UNDERMINING IMPORTANT NATIONAL POLICIES THAT UNDERGIRD THE INTERNATIONAL FINANCIAL SYSTEM

This Court should affirm the district court's holding that the act of state doctrine precludes state-law claims through which appellants seek to hold a global banking group liable for human-rights abuses perpetrated by a foreign government that was subject to U.S. economic sanctions. (S.A. 6-10.)

The act of state doctrine "'precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State.'" *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 743 (2d Cir.), *cert. denied*, 137 S. Ct. 160 (2016) (quoting *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972)). The doctrine is a facet of the separation of powers. *See Fed. Treasury Enter. Sojuzplodoimport*, 809 F.3d at 743 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1403 (2018). And the act of state doctrine recognizes that, to avoid hindering the United States' foreign-policy and other goals, the judicial branch must avoid sitting in judgment on the acts of foreign

governments within their own borders. *See Fed. Treasury Enter. Sojuzplodoimport*, 809 F.3d at 743.[3]

Allowing private plaintiffs to bring civil claims to enforce U.S. economic sanctions would harm the international banking system and thereby undermine important national interests that underlie the act of state doctrine. Thus, the district court was correct to conclude that claims "predicated on the contention that BNPP facilitated circumvention of U.S. sanctions" are "properly left to the judgment of the Executive Branch rather than the courts." (S.A. 6.) The district court's judgment should therefore be affirmed.

A. Private State-Law Enforcement of U.S. Sanctions Programs Would Conflict With the Federal Regulatory Scheme

1. Congress has not authorized private enforcement of the U.S. sanctions laws

Appellants label themselves "intended beneficiaries" of the economic sanctions the United States imposed against Sudan. (J.A. 35, 81, 135, 137.) But that moniker is misleading insofar as it suggests that appellants have private claims arising from BNPP's admitted violation of those sanctions.

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[3] *See also Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 125-26 (2d Cir. 2001) (discussing the "'constitutional underpinnings'" of the act of state doctrine, emphasizing "'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for

The Sudan sanctions were imposed pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, 1702. Congress' purpose in enacting the IEEPA was not to promote the welfare of residents of foreign nations, but rather to deal with extraordinary threats "to the national security, foreign policy, or economy of the United States."[4] Similarly, a recent amendment to the IEEPA enhancing the penalties that can be imposed under it was enacted to "advance foreign policy objectives and protect the national security of the United States." S. Rep. No. 110-82 (2007).[5] Accordingly, the IEEPA authorizes the President to impose sanctions for the purposing of combatting threats to the "national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). The statute provides two methods for the enforcement of U.S. economic sanctions: criminal penalties, and civil penalties to be imposed by federal agencies. *See id.* § 1705.

The same separation-of-powers doctrine that animates the act of state doctrine precludes courts from implying private causes of action into federal

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itself and for the community of nations as a whole in the international sphere'") (quoting *Sabbatino*, 376 U.S. at 423).

[4] *Revision of Trading with the Enemy Act, Markup Before the House Comm. on Int'l Relations*, 95 Cong. 1st Sess. 5 (1977).

[5] Congress did not discuss the notion that the IEEPA would confer rights on individuals. Congressional debate focused on the President's authority to regulate international economic transactions. *See id.*; *Amending the Trading with the Enemy Act: Hearing Before the Subcomm. on Int'l Fin, Comm. on Banking, Housing and Urban Affairs*, 95 Cong. 1-2, 8 (1977).

statutes. *See Jesner*, 138 S.Ct. at 1402. A statute confers no private right of action when—as in the case of the IEEPA—it "contains no language expressing solicitude for those who might be victimized," and omits private claims from its menu of enforcement mechanisms. *See Rep. of Iraq v. ABB AG*, 768 F.3d 145, 170–71 (2d Cir. 2014) (victims of bribery have no claim under the Foreign Corrupt Practices Act).[6]

The executive orders that instituted the Sudan sanctions further belie any claim that appellants were "intended beneficiaries" of the Sudan sanctions program. Those orders state that they confer "no right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, *or any other person*." (S.A. 47 (Exec. Order No. 13,412, Sec. 9, 3 C.F.R. 13412 (Oct. 13, 2006)) (emphasis added); S.A. 107 (Exec. Order No. 13,067, Sec. 6, 3 C.F.R. 13067 (Nov. 3, 1997).) Consistent with that position, at BNPP's sentencing, the government stated that those who—like appellants—were victimized by the Sudanese government "cannot show that they were directly harmed by BNPP's

[6] *Accord Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981) (there is "far less reason to infer a private remedy in favor of individual persons where Congress, rather than drafting the legislation with an unmistakable focus on the benefited class, instead has framed the statute simply as a general prohibition or a command to a federal agency") (quotation marks and citation omitted).

conduct" and "are not victims of" BNPP's crime. (J.A. 387 (Transcript, *United States of America v. BNP Paribas*, No. 14-460 (LGS) (S.D.N.Y. May 1, 2015), ECF No. 55, at 9).)

2. Due to the obvious foreign-policy concerns, Congress has only rarely permitted private claims that implicate the conduct of foreign governments

On rare occasions, Congress has authorized U.S. courts to entertain claims against individuals and corporations that may implicate the conduct of foreign governments. But in those instances, Congress has done so expressly and circumspectly, cognizant of the sensitive foreign-affairs issues that such cases are likely to present. Permitting appellants' state-law tort claims to proceed here would wholly undermine the careful approach that Congress has taken.

Most pertinent to the claims asserted here, in 1991, Congress enacted the Torture Victim Protection Act ("TVPA"), creating a cause of action against state actors who commit torture or extrajudicial killings. *See* Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note following 28 U.S.C. § 1350). Appellants did not sue under the TVPA, and they could not successfully have done so. That is because "Congress took care to delineate the TVPA's boundaries" so as to manage the statute's "foreign-policy implications." *Jesner*, 138 S. Ct. at 1403 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.). The TVPA imposes an exhaustion requirement and a statute of limitation, and also "authorizes liability solely against

natural persons." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012); *see also Jesner*, 138 S. Ct. at 1404.[7]

Then, in 1992, Congress enacted the Anti-Terrorism Act ("ATA"), creating a civil damages claim for United States nationals who are injured by acts of international terrorism. 18 U.S.C. § 2333(a). Unlike the TVPA, corporate entities can be liable under the ATA, but the statute imposes significant hurdles to recovery. The ATA allows civil claims only for damages caused "by reason of" an act of international terrorism, not all violent activities of a foreign government. And a bank cannot be found to have committed an "act of international terrorism" within the meaning of the ATA simply by providing routine banking services to a person who goes on to commit a terrorist act. *See Linde v. Arab Bank, PLC*, 882 F.3d 314, 327 (2d Cir. 2018). Moreover, the ATA can be invoked only by U.S. nationals. *See id.* at 319.

Then, in 2016, Congress enacted the Justice Against Sponsors of Terrorism Act ("JASTA"), 18 U.S.C. § 2333(d). JASTA amended the ATA to impose secondary liability on those who aid and abet designated foreign terrorist organizations in the commission of terrorist attacks. *See id.* Passed after vigorous

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[7] These limitations were enacted to "ensure[] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred" and to "avoid exposing U.S. courts to unnecessary burdens." H.R. Rep. No. 102-367, at 5 (1991).

debate between the political branches,[8] JASTA, too, imposes significant pre-conditions to liability, including a demanding *mens rea* requirement—the defendant must have been "aware" that it was assuming a "role" in terrorist activities. *See Linde*, 882 F.3d at 329; *see also Owens v. BNP Paribas, S.A.*, --- F.3d ---, No. 17-7037, 2018 WL 3595950, at *8 (D.C. Cir. July 27, 2018) (discussing the enactment and requirements of JASTA in rejecting ATA claims based on financial transactions between a foreign bank and the Government of Sudan).[9]

Earlier this year, in *Jesner*, the Supreme Court emphasized the foreign-policy implications of suits such as this one, and held that the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, did not authorize common-law claims against a foreign bank that was alleged to have provided banking services that facilitated the commission of terrorist attacks overseas.[10] *See Jesner*, 138 S. Ct. at 1393-95, 1407-

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[8] Jennifer Steinhauer, Mark Mazzetti and Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), https://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html.

[9] *See also Siegel v. HSBC Bank USA, Inc.*, No. 17-cv-6593 (DLC), 2018 WL 3611967, at *5 (S.D.N.Y. July 27, 2018) (noting the importance of ensuring that a plaintiff asserting a JASTA claim has pleaded the required elements "[b]ecause money is fungible and because the international banking system depends on cooperation among financial institutions across borders").

[10] Before *Jesner* precluded ATCA claims against corporations altogether, this Court recognized that plaintiffs face a high bar for asserting secondary-liability

08. As Justice Kennedy put it, the decision to impose human-rights liability on foreign corporations requires "delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs." *Id.* at 1408 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.). In light of all these "foreign-policy and separation-of-powers concerns," the Court concluded that Congress—and not the courts—must decide whether to permit such claims under the ATCA. *Id.* at 1403, 1407.

The foreign-affairs and separation-of-powers problems raised by these cases are even more acute when—as here—plaintiffs assert claims under state law. State law has no legitimate role in the nation's foreign affairs, which are the exclusive concern of the federal political branches. *See, e.g.*, *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012) (en banc); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). State law has, in particular, no independent role in matters of economic sanctions. *Cf. Crosby v. Nat'l Foreign*

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claims under the ATCA. Knowledge or complicity is insufficient. Rather, a plaintiff must prove that the defendant "purposefully facilitated" the commission of a human-rights violation. *See Balintulo v. Ford Motor Co.*, 796 F.3d 160, 167 (2d Cir. 2015). Moreover, an ATCA claim must "touch and concern" the United States with "sufficient force" to overcome the presumption against the extraterritorial application of U.S. statutes. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

Trade Council, 530 U.S. 363, 381 (2000) (Massachusetts state law sanctions against Burma pre-empted by the federal sanctions regime).

B. Private Enforcement of the Federal Sanctions Laws Threatens to Harm the International Banking System and Thereby to Undermine Important National Interests

1. The U.S. sanctions programs form part of a carefully calibrated federal regulatory scheme

Banks operating in the United States are subject to a complex federal regulatory scheme that is designed to prevent the financial system from being used by wrongdoers. A part of that scheme, economic sanctions are implemented and enforced by the Office of Foreign Assets Control ("OFAC"), an office within the United States Department of the Treasury.

OFAC is tasked with administering and implementing the mosaic of U.S. sanctions programs. Those programs vary quite widely in type, and are frequently amended. Some are "comprehensive," meaning that they target a particular country or territory and prohibit virtually all transactions or dealings with the government and persons and entities located therein. Others are list-based and are designed to impose sanctions on specific individuals and entities engaged in certain activity, for example, terrorism or narcotics-related activity. Some, but not all, programs

permit OFAC to authorize a transaction that would otherwise be prohibited.[11] Across its many sanctions programs, OFAC maintains and publishes a list of "Specially Designated Nationals and Blocked Persons" (the "SDN" list), which currently identifies approximately 6,300 individuals and companies that OFAC has determined are sanctions targets. The SDN list is updated frequently, sometimes daily.[12] Due to OFAC's expertise and the complexity and sensitivity of the issues, courts extend particular deference to OFAC's decisions. *See, e.g., In re 650 Fifth Ave.*, No. 08-cv-10934 KBF, 2013 WL 2451067, at *6 (S.D.N.Y. June 6, 2013); *Karpova v. Snow*, 402 F. Supp. 2d 459, 466 (S.D.N.Y. 2005), *aff'd*, 497 F.3d 262 (2d Cir. 2007).

In a separate but related part of the regulatory system, the Department of the Treasury's Financial Crimes Enforcement Network ("FinCen") implements, administers, and enforces compliance with the anti-money laundering provisions set forth in the Bank Secrecy Act, 31 U.S.C. § 5311, *et seq*., and related regulations.

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[11] *See generally* OFAC FAQs: General Questions, Basic Information on OFAC and Sanctions, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic (last visited Aug. 13, 2018); Where is OFAC's Country List? What countries do I need to worry about in terms of U.S. sanctions?, https://www.treasury.gov/resource-center/sanctions/Programs/Pages/faq_10_page.aspx (last visited Aug. 13, 2018).

[12] *See* Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists, https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last updated Aug. 15, 2018).

Among other requirements, banks must maintain due diligence programs to identify transactions that have no apparent lawful purpose, *see* 31 C.F.R. § 1010.610(a), and report such transactions by filing suspicious activity reports, *see id.* § 1020.320(a)(2)(iii). FinCen recently published guidance to help financial institutions identify and report on transactions through which foreign politicians use the U.S. banking system to engage in corruption that can lead to human rights abuses.[13]

This federal scheme to stop terrorist financing and related financial crimes is not intended to be—and, indeed, it would not be in the national interest for it to become—a "zero tolerance" regime. Instead, the responsible regulators have made clear that it is intended to be a "risk-based" system, in which regulators and financial institutions work together.[14] Then-Under Secretary of the Treasury David Cohen told the American Bankers Association in 2014 that U.S. regulators and

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[13] *See* U.S. Dep't of the Treasury Financial Crimes Enforcement Network, Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators, FIN-2018-A003 (June 12, 2018), https://www.fincen.gov/sites/default/files/advisory/2018-07-03/PEP%20Facilitator%20Advisory_FINAL%20508%20updated.pdf.

[14] *See* Staff of House of Representatives Task Force to Investigate Terrorism Financing, 114th Cong., Stopping Terror Finance: Securing the U.S. Financial Sector ("Stopping Terror Finance") 28 (2016); Financial Action Task Force, *FATF takes action to tackle de-risking*, Oct. 23, 2015 ("FATF Action") 1, https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-de-risking.html (last visited Aug. 13, 2018).

banks "collaborat[e] toward [a] common objective—promoting financial integrity, combating illicit finance, and ensuring that the U.S. financial system remains the envy of the world."[15] To comply with this complex set of requirements, the banking industry has put in place measures including personnel and systems, such as state-of-the-art software that uses sophisticated algorithms to identify and interdict prohibited transactions in real time.[16]

2. Private enforcement of U.S. sanctions would impair the functioning of the international banking system and undermine national policy goals

Just as the decision to impose a program of economic sanctions implicates the federal government's core foreign-policy prerogatives, *supra* at 8-9, enforcement of such a program bears on important federal foreign-policy and law-enforcement interests. Empowering private plaintiffs effectively to intrude into these delicate areas would undermine the functioning of the international banking system and impair those national interests.

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[15] Press Release, U.S. Dep't of the Treasury, Remarks of Under Secretary David S. Cohen at the American Bankers Association / American Bar Association Money Laundering Enforcement Conference (Nov. 10, 2014), https://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx.

[16] *See* R. Richard Newcomb, *Targeted Financial Sanctions: The U.S. Model, in Smart Sanctions: Targeting Economic Statecraft* 41, 58-59 (David Cortright & George A. Lopez eds. 2002).

OFAC's guidelines emphasize that responsible sanctions enforcement requires "sufficient flexibility" for regulators to "determine an appropriate enforcement response to apparent violations of sanctions programs" in each case. Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57594, 57600 (2009).[17] When it exercises its enforcement discretion, OFAC's "primary mission" is to promote "U.S. national security, foreign policy, and economic objectives." *Id.*[18] OFAC recognizes that the U.S. financial system is "essential to proper functioning of the global economy and correspondent banking relationships."[19] OFAC thus attempts the delicate balance of finding policy responses that result in "a safe and reliable financial system that is protected from abuse by illicit actors." *Id.*

As Deputy Attorney General Rod Rosenstein noted in March 2018, "[c]orporate America is often the first line of defense for detecting and deferring

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[17] Available at https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.

[18] *See also* Press Release, U.S. Dep't of the Treasury, Testimony of R. Richard Newcomb, Director Office of Foreign Assets Control Before the House Financial Services Subcommittee on Oversight and Investigations (Jun. 16, 2004), https://www.treasury.gov/press-center/press-releases/Pages/js1729.aspx.

[19] Press Release, U.S. Dep't of the Treasury, Remarks by Acting Under Secretary Adam Szubin at the American Bankers Association / American Bar Association Money Laundering Enforcement Conference (Nov. 14, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0608.aspx.

fraud."[20] Thus, federal law-enforcement agencies increasingly encourage corporate citizens to self-disclose wrongdoing. That is now a widely applicable Department of Justice policy,[21] and OFAC in particular treats voluntary self-disclosure as a mitigating factor in civil-penalty proceedings.[22]

Appellants' approach stands in stark contrast with this carefully calibrated regulatory scheme, which encourages banks to disclose problems to their regulators, and affords those experts discretion to formulate an appropriate response, taking into account the circumstances of the violation and consequences of imposing a particular remedy. Under appellants' approach, a bank that facilitates a transfer to a sanctioned government is liable by virtue of the transfer for whatever harm that government later causes. Although BNPP has acknowledged willfully violating U.S. sanctions in this case, appellants' theory would not limit liability to deliberate violations that have already been subject to regulatory

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[20] Press Release, U.S. Dep't of Justice, Remarks at the 32nd Annual ABA National Institute on White Collar Crime (Mar. 2, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-32nd-annual-aba-national-institute.

[21] *See, e.g.*, Antonio M. Pozos and Joseph A. Rillotta, *The Department of Justice Announces Expansion of Self-Disclosure-Based Leniency Principles to All Corporate Cases*, The Nat'l L. Rev. (March 5, 2018), https://www.natlawreview.com/article/department-justice-announces-expansion-self-disclosure-based-leniency-principles-to.

[22] *See* OFAC FAQs: General Questions, Basic Information on OFAC and Sanctions, *supra* note 11, § 13.

enforcement proceedings. To the contrary, under appellants' theory, open-ended civil liability could even be imposed for *un*intentional violations that regulators may have decided not to penalize.

Unlike the federal regulators, private plaintiffs are unconcerned with—and courts adjudicating their claims lack the "institutional capacity," *Jesner*, 138 S. Ct. at 1403, to evaluate—the significant risks posed by exposing banks to untrammeled tort liability for violating U.S. sanctions laws. As the Supreme Court acknowledged in *Jesner*, lawsuits such as this one may cause harm beyond simply offending a hostile foreign government. For instance, threatening ruinous liability to a bank that is headquartered in a U.S. ally may cause "significant diplomatic tensions" with that country. *Jesner*, 138 S. Ct. at 1394, 1406-07.

And as Justice Kennedy further noted in *Jesner*, imposing civil liability in cases like this may ultimately discourage banks from doing business in developing countries altogether, out of fear that they may face liability for processing a transaction that should have been, but for whatever reason was not, blocked. *See Jesner*, 138 S. Ct. at 1406 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.).[23]

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[23] *See also* Pierre-Laurent Chatain, et al., *The Decline in Access to Correspondent Banking Services in Emerging Markets: Trends, Impacts, and Solutions*, World Bank Group (2018), http://documents.worldbank.org/curated/en/552411525105603327/pdf/125422-replacement.pdf.

Such "de-risking" is entirely counterproductive—deterring the very "corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.). Correspondent banking relationships, frequently the first casualties of de-risking, "are critical for ensuring that resources flow within and across economies to facilitate trade, foster economic growth, and provide access to financial services."[24] Smaller, poorer countries that are highly dependent on remittance payments have the most to lose from global banks de-risking.[25]

When banks de-risk by exiting high-risk regions, the risk of illicit financial activity actually *increases*, as transactions are forced underground, away from the regulated financial system.[26] Authorities in one country surveyed by the World Bank between April and November 2017 said many customers who lost access to money transfer operators due to de-risking instead moved to unregulated

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[24] Remarks by Acting Under Secretary Adam Szubin at the ABA/ABA Money Laundering Enforcement Conference, *supra* note 19.

[25] James A. Haley, *De-Risking of Correspondent Banking Relationships: Threats, Challenges and Opportunities*, Woodrow Wilson International Center for Scholars (Jan. 2018), https://www.wilsoncenter.org/sites/default/files/2018_haley_report-edits-2-2018-final.pdf.

[26] *See* FATF Action, *supra* note 14, at 1.

channels.[27] The de-risking trends the World Bank is seeing "could undermine AML/CFT [*i.e.*, anti-money laundering and countering financing of terrorism] objectives by making millions of financial transactions untraceable." *Id.*

The Congressional Task Force to Investigate Terrorism Financing has cited Somalia as a prime example of how de-risking can result in *more* financial crime. Concerned about processing transfers of funds that could find their way to terrorists, banks stopped processing transfers to that region altogether. Money continued to flow, but in less transparent ways that are harder to detect and regulate, such as bulk cash transfers.[28] The problems posed by de-risking are broadly acknowledged, including by domestic and international governmental bodies, such as the Congressional Task Force, House Financial Services Committee, Financial Action Task Force, and Basel Committee on Banking Supervision.[29]

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[27] Chatain, et al., *supra* note 23.

[28] *See* Press Release, U.S. House of Representatives Financial Services Committee, *Subcommittee Examines the BSA/AML Regulatory Compliance Regime* (June 28, 2017), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=402092; The World Bank Group, *Report on the G20 Survey on De-Risking in the Remittance Market* (October 2015).

[29] *See* Congressional Task Force Press Release, *supra* note 28; Stopping Terror Finance, *supra* note 14, at 26; FATF Guidance on Correspondent Banking Services (Oct. 21, 2016), http://www. fatf-gafi.org/media/fatf/documents/reports/Guidance-Correspondent-Banking-Services.pdf; BCBS Guidelines on Sound Management of Risks Related to Money

Private plaintiffs asserting civil claims, on other hand, are wholly unconcerned with such delicate, systemic issues. And if appellants' position were accepted, the result could be more de-risking, with all of the attendant harms. The better approach—the one intended by Congress—is to encourage engagement, risk-management, monitoring and reporting.

Laundering and Financing of Terrorism (June 2017), http://www.bis.org/bcbs/publ/d405.pdf.

CONCLUSION

Amicus curiae the Institute of International Banks respectfully submits that this Court should affirm the judgment of the district court.

August 16, 2018

Respectfully submitted,

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