

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee  
v.  
JESSICA RAE REZNICEK,  
Defendant-Appellant

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CENTER FOR CONSTITUTIONAL RIGHTS and DEAN SUDHA  
SETTY AS AMICI CURIAE IN SUPPORT OF APPELLANT AND  
REVERSAL

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
The Honorable Rebecca Goodgame Ebinger,  
United States District Judge  
DC No. 4:19-CR-00172-001

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## CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, counsel affirms that the organizational Amicus below, Center for Constitutional Rights, is a non-profit organization that has no parent corporation and has not issued any shares of stock.

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### Interest of Amicus Curiae

Amicus Curiae, Sudha Setty, is the Dean and Professor of Law at Western New England University School of Law. She is a specialist in comparative national security and the rule of law, currently serving on the editorial board of the Journal of National Security Law and Policy and having previously served on the executive committee of the American Society of Comparative Law and in leadership roles on both the Comparative Law and National Security Law sections of the Association of American Law Schools.

Dean Setty has written a 2017 book and over two dozen law review articles and book chapters on national security and the rule of law, has edited a book on comparative security and constitutional constraints, and has lectured widely in the United States and in Europe and Asia, including as a Fulbright Senior Specialist in Hong Kong. She has written articles and reports analyzing the legal use of the term “terrorism,” including a widely cited 2011 article on international and domestic definitions of terrorism, a 2014 report on U.S. counterterrorism law written at the behest of the American Society of Comparative Law as part of a submission to the quadrennial

International Congress of Comparative Law in July 2014, and a 2019 book chapter on how the label of terrorism has been repurposed based on political purposes in various legal contexts. The current litigation turns in part on the applicability of the term “terrorism” to the alleged activities of defendants.

Amicus Curiae the Center for Constitutional Rights is a national legal, educational, and advocacy organization that has spent the last twenty years at the forefront of litigation on behalf of the men detained at Guantanamo Bay, as well as many other cases challenging misuse of the terrorism label and executive overreach in the post-9/11 era. *See Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (*Bivens* claims challenging wrongful treatment of immigration detainees as suspected terrorists based on race, religion, ethnicity and national origin); *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016) (procedural due process challenge to Communication Management Units created for housing of individuals convicted of domestic or international terrorism within Bureau of Prison); *United States v. Johnson*, 875 F.3d 360 (7th Cir. 2017) (substantive due process challenge to prosecution of activists under Animal Enterprise Terrorism Act); *Blum v. Holder*, 744 F.3d 790 (1st

Cir. 2014) (facial pre-enforcement challenge to Animal Enterprise Terrorism Act on behalf of chilled activists seeking to engage in First Amendment Protected Advocacy); *Energy Transfer Equity et al v. Greenpeace, et al*, 17-cv-00173 (D.N.D.) (successful dismissal of EarthFirst! Journal and Krystal Two Bulls against unfounded allegations of eco-terrorism and racketeering); *United States v. Ahmed Abu Ali*, 19-cv-1268 (E.D. Va) (habeas challenge to material support conviction based on coerced confession after repeated interrogation under torture).

Both parties have consented to filing of this brief. No party's counsel has authored any part of this brief. No party, party's counsel, nor other person has contributed money toward the preparation or submission of this brief.

### Summary of Argument

Application of a terrorism enhancement can cause a dramatic increase in the length of a prison sentence. The terrorism label also carries significant societal stigma, and can have serious consequences for conditions of confinement, access to counsel, and allowing evidence into trial that would otherwise be excluded.

Despite these significant impacts, the legal definition of “terrorism” has been a matter of dispute for many years. The United Nations General Assembly has never reached consensus on the definition, individual nations use varied definitions of terrorism, and U.S. federal law includes about two dozen different definitions of terrorism. However, despite this variety, certain elements are common to almost all international definitions:

- a criminal act against civilians,
- committed with the intent to cause death or serious injury,
- with the purpose of provoking terror in the public or particular group, or to compel a government to act in a certain way.

The majority of the crimes qualifying as a “Federal Crime of Terrorism” for purposes of the United States Sentencing Guidelines reflect these common elements, yet a few do not. *Compare* 18 U.S.C. § 2332b(g)(5)(b)(i) “section 32 (relating to destruction of aircraft or aircraft facilities). . . 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of

mass destruction threats to the United States)” *with* 18 U.S.C. § 1361 (relating to government property or contracts).

The broad United States definition of terrorism allows for problematic results. A fistfight in a bar among civilians may involve the intent to cause serious injury, and may provoke a strong sense of fear or terror in the bar patrons in close proximity to the fight—but it would be extraordinary for counterterrorism laws to treat such an incident as “terrorism” because the laws generally have been interpreted in a limited fashion to apply to certain categories of criminal behavior, including politically or religiously motivated violence against civilians that is intended to intimidate and coerce a civilian population and that will often include mass destruction, assassination, or kidnapping. Similarly, while a protest by anti-nuclear arms activists using a hammer and crowbar to damage a B-52 bomber would arguably meet the requirements for a terrorism enhancement, it would be equally extraordinary to punish such nonviolent action as a crime of terrorism.<sup>1</sup>

While Amici agree with Appellant that the criminal acts at issue do not meet the statutory requirements for a terrorism enhancement,

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<sup>1</sup> *See United States v. Allen*, 760 F.2d 447 (2d Cir. 1985).

we demonstrate below that even if the Court were to find otherwise, application of the enhancement here works a profound injustice, as the acts in question do not amount to “terrorism” as that term is generally understood internationally and domestically.

## Argument<sup>2</sup>

### I. International Definitions of Terrorism

The quest to establish a universal definition of terrorism is entangled in questions of law, history, philosophy, morality, and religion. Many believe that the definitional question is, by nature, a subjective one that eludes large-scale consensus. However, counterterrorism law and policy depend on definition. If the international community or any individual nation is to address the problem of terrorist activity, it must first define terrorism’s parameters. This foundational question is of the utmost importance in determining who a state, nation or international body will consider a terrorist and,

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<sup>2</sup> Many of the arguments set forth in this amicus brief derive in significant part from a law review article: Sudha Setty, *What’s in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT’L L. 1 (2011), and a book chapter: Sudha Setty, *Assessing Unconventional Applications of the “Terrorism” Label*, in Satvinder Juss, ed., BEYOND HUMAN RIGHTS AND THE WAR ON TERROR (Routledge 2019).

therefore, who will be subject to the stricter laws, diminished rights protections, and harsher penalties that are concomitant with the designation of “terrorism.” The definitional ambiguity gives rise to international concern that governments will undercut civil liberties and civil rights by defining terrorism in an overly broad manner, allowing them to unfairly punish those who would not, in the ordinary course, be considered by the international community as “terrorists.”<sup>3</sup>

The United Nations General Assembly has attempted to establish an internationally accepted definition of terrorism numerous times since the 1960s,<sup>4</sup> with the belief that “the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally

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<sup>3</sup> See U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 26-27, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005) (“[R]epeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.”)

<sup>4</sup> The search for a supranational definition of terrorism dates at least back to 1937, when the League of Nations considered the *Convention for the Prevention and Punishment of Terrorism*, Nov. 16, 1938, 19 League of Nations O. J. 23 (1938). Article 1(2) of the proposed Convention defined terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.”

agreed definition of international terrorism.”<sup>5</sup> While each effort failed based on the perceived subjectivity of any such definition, almost all nations agreed that the definition of “terrorism” included common core elements such as the purposeful killing of civilians.

With a strong post-September 11 mandate to establish counterterrorism measures,<sup>6</sup> but without universal definition of terrorism on which to depend, the United Nations Security Council has established partial measures, such as including general descriptions of acts that fall within the rubric of terrorist activity without purporting to fully define terrorism. One working definition used by the United Nations is:

Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism

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<sup>5</sup> G.A. Res. 42/159, U.N. GAOR, 42<sup>nd</sup> Sess., Supp. No. 49 at 300, U.N. Doc. A/RES/42/159 (Dec. 7, 1987).

<sup>6</sup> *See* S.C. Res. 1373, U.N. SCOR, 4385<sup>th</sup> mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001) [hereinafter S.C. Res. 1373] (mandating that all U.N. member nations take proactive steps to combat terrorism, including increasing criminalization and implementing harsher sentencing for terrorist acts, freezing funds of those financing terrorist acts, sharing intelligence information with other member nations, and tightening border controls to prevent the migration of terrorists).



is a criminal act, but it is more than mere criminality.<sup>7</sup>

Security Council Resolution 1566, offers this partial explanation of what constitutes a terrorist act:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism . . . .<sup>8</sup>

Importantly, Resolution 1566 limits its application to acts committed with the intent to cause death or serious bodily injury. In the Security Council's corresponding press release, the representative of the United States emphasized this component, stating that "deliberate massacre" is "never justifiable," thus further highlighting the centrality of purposeful killing or physical injury in the definition of terrorism.<sup>9</sup>

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<sup>7</sup> *Measures to Eliminate International Terrorism: Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57th Sess., Annex at para. 13, U.N. Doc. A/57/273-S/2002/875 (2002).

<sup>8</sup> See S.C. Res. 1566, U.N. SCOR, 5053<sup>rd</sup> mtg., U.N. Doc. S/RES/1566, at ¶ 3 (Oct. 8, 2004) (condemning all forms of terrorism, regardless of its motivations).

<sup>9</sup> Press Release, United Nations Security Council, *Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as*

Moreover, the language of the resolution limits the use of the label of “terrorism” to offenses that are recognized in previously agreed upon international conventions and protocols, thereby tethering the implementation of Resolution 1566 to offenses commonly understood to fall under the umbrella of terrorism. Even with these interpretive limitations, the Security Council went further in protecting individuals and organizations from inappropriate designation as “terrorists” given the harsh consequences of such a designation. The Security Council designated an Ombudsperson to field petitions from individuals and organizations seeking to be delisted from being subject to international sanctions as terrorists.<sup>10</sup> Concerned about the severe repercussions of being designated as a terrorist, various Member States also moved for a process by which the designation process became more transparent, allowed for a challenge and delisting process for individuals and organizations, and strengthened international security by improving

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*One of the Most Serious Threats to Peace*, UN Doc. SC/8214 (Oct. 8, 2004) available at <https://www.un.org/press/en/2004/sc8214.doc.htm>

<sup>10</sup> See S.C. Res. 1904, U.N. SCOR, 6247<sup>th</sup> mtg., U.N. Doc. S/RES/1904 (Dec. 17, 2009) ¶ 20 (mandating that “when considering delisting requests, the [Counter-Terrorism] Committee shall be assisted by an Office of the Ombudsperson”).

the perceived legitimacy of the United Nations as an international regulator of security matters.<sup>11</sup>

The First United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism emphasized the wisdom of Resolution 1566's cumulative approach:

The important feature of the resolution is the cumulative nature of its characterization of terrorism, requiring the trigger-offence to be accompanied with: the intention of causing death or serious bodily injury (or the taking of hostages); for the purpose of provoking terror, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act. *This cumulative approach acts as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct.* (Emphasis Added).<sup>12</sup>

This definition, which mirrors that in the International Convention for

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<sup>11</sup> E.g., Press Release, United Nations Security Council, *Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime, Authorizes Appointment of Ombudsperson to Handle Delisting Issues*, U.N. Press Release SC/9825 (Dec. 17, 2009), available at <https://www.un.org/press/en/2009/sc9825.doc.htm> (noting the concern of delegations from various nations that the process of designating terrorists be made more accessible, transparent, and equitable).

<sup>12</sup> See U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005), at 38.

the Suppression of the Financing of Terrorism,<sup>13</sup> demonstrates a “high degree of political consensus internationally on the core description of terrorism.”<sup>14</sup> Under this core international definition, Jessica Reznicek’s criminal acts are unequivocally *not* terrorism, as there is no evidence that she had any intent to cause death or serious bodily injury; rather the evidence suggests that she took pains to ensure her actions would not cause physical harm to any individuals. PSR ¶ 27.

## II. United States Definitions of Terrorism

In the United States, federal agencies utilize dozens of different definitions of terrorism based on the function of the agency and the purpose of the definition.<sup>15</sup> Each of the following definitions is an

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<sup>13</sup> See *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, U.N. GAOR, 54<sup>th</sup> Sess., U.N. Doc. A/RES/54/109 (Dec. 9, 1999) (Defining “terrorism” to include any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”)

<sup>14</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counterterrorism and Human Rights*, 2009, at 7. Available at [https://reliefweb.int/sites/reliefweb.int/files/resources/5C941500ECEDDA6F492576040021DD91-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/5C941500ECEDDA6F492576040021DD91-Full_Report.pdf)

<sup>15</sup> See Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. Legis. 249, 249-50

important tool in U.S. counterterrorism efforts:

A. The Anti-Terrorism and Effective Death Penalty Act of 1996

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>16</sup> was enacted in response to the 1993 World Trade Center bombings and the 1995 Oklahoma City bombing as part of a broader plan to prevent material support to terrorists that was seen as essential to those bombings. Under the AEDPA, terrorism is defined as:

[A]n activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of government by mass destruction, assassination, kidnapping, or hostage-taking.<sup>17</sup>

The AEDPA defines terrorism for the purpose of designating Foreign Terrorist Organizations (FTOs) and freezing the assets of such

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(2004) (examining twenty-two definitions of terrorism under U.S. federal law).

<sup>16</sup> *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scatter sections of 8, 18, and 28 U.S.C.) (authorizing the Secretary to designate foreign organizations as terrorists if they engage in terrorist activity as defined by the statute).

<sup>17</sup> *See* Exec. Order No. 13,224, 66 F.R. 49079; *see also* 31 C.F.R. 594.201.

organizations.<sup>18</sup> Because the consequences of FTO designation can be severe—the procedural safeguards, however limited, are crucial. Such safeguards include the opportunity to contest the designation proposed by the State Department<sup>19</sup> and the mandatory review and renewal process for the Secretary of State.<sup>20</sup> These safeguards echo the review and delisting process that the United Nations adopted to improve

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<sup>18</sup> See, e.g., AEDPA §§ 219(a)(1)(A)-(C), 219(a)(2)(C) (codified in 8 U.S.C. § 1189(a)) (finding that anyone who interacts with FTOs is violating the statute, and authorizing the Secretary of the Treasury to freeze the assets of entities designated as FTOs). President Clinton signed Exec. Order 12,947, 60 F.R. 5079, in January 1995, which was geared toward facilitating a peace agreement in the Middle East, but gave broad authority to cabinet departments to designate Foreign Terrorist Organizations (FTOs) with the purpose of disrupting their financial and operational capabilities, thereby laying the foundation for the authority granted under the AEDPA.

<sup>19</sup> Under the AEDPA, courts have the power to set aside the State Department designation of an FTO if it is arbitrary, capricious, and an abuse of discretion, or if it is not based on substantial evidence. AEDPA § 302(b)(3) (codified as 8 U.S.C. § 1189(c)(3)). Courts have, however, been extremely deferential to the State Department, choosing not to review classified evidence in some instances, but relying instead on State Department affirmations of substantial evidence to support its designation decision. E.g., *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003).

<sup>20</sup> If no State Department review has been made of an FTO designation for five years, the Secretary of State must review the listing to determine whether it should be revoked due to a change in the organization's mission and actions, or a change in the national security assessment by the United States. 8 U.S.C. § 1189(a)(4)(C), (a)(6) (2006).

procedural protections against erroneously being designated a terrorist and suffering the ramifications of that inappropriate designation.

## B. The USA PATRIOT Act

The USA PATRIOT Act (“Patriot Act”),<sup>21</sup> passed in the weeks immediately following the September 11, 2001 attacks, offered vast resources to the government, including an increase in surveillance powers and government authority to conduct intelligence-gathering operations in matters of suspected terrorism, as well as allowing for the civil seizure of assets based only on probable cause, and heightened punishments for any of the underlying crimes related to the newly broadened understanding of “domestic terrorism,” which includes:

[A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) [that] appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.<sup>22</sup>

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<sup>21</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

<sup>22</sup> *Id.* § 802.

While broad, the Patriot Act definition includes reference to some commonly understood elements of terrorism: acts that are dangerous to human life and that are intended to intimidate a civilian population are included, and common underlying crimes, such as mass destruction, assassination or kidnapping, are identified as exemplars. These same elements appear in the Foreign Intelligence Surveillance Act of 1978 (“FISA”)<sup>23</sup> definition, on which the Patriot Act definition was based.

Given the far-reaching consequences of being suspected of terrorism and the broad powers for surveillance authorized under FISA at the time of its enactment, Congress expressed significant concern over the implications of FISA on civil liberties, and the potential for government overreach. This concern led to numerous safeguards, including reports to Congress regarding the nature and extent of FISA-based surveillance,<sup>24</sup> mandated minimization procedures to ensure that individual privacy rights are safeguarded to some extent,<sup>25</sup> and

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<sup>23</sup> *See* Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(c).

<sup>24</sup> *See* 50 U.S.C. §§ 1807, 1808 (describing the reports required by the Attorney General and other congressional oversight measures).

<sup>25</sup> *See, e.g.,* 50 U.S.C. § 1801(h) (2006) (directing the use of minimization procedures to “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons”).



penalties available to punish those who conduct unlawful and overreaching surveillance.<sup>26</sup>

It remains problematic that the Patriot Act uses the FISA definition of terrorism without the concomitant FISA safeguards in place. The lack of parallel due process protections in the application of the Patriot Act exacerbates the problems inherent in applying conflicting definitions of terrorism, including the potential lack of notice to individuals as to whether they will be categorized as a terrorist and exactly what kind of conduct is prohibited.<sup>27</sup> Even with some safeguards in place, vagueness in these statutes has led to concern of potential abuse if definitions are repurposed to punish non-terrorist activity, precisely what occurred in New York in the case of *People v. Morales*.<sup>28</sup>

### III. New York's Terrorism Statute

Six days after the September 11, 2001 terrorist attacks, New York became the first state in the United States to pass its own anti-

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<sup>26</sup> E.g., 50 U.S.C. §§ 1809, 1810 (describing civil liability and criminal sanctions for breaches of FISA).

<sup>27</sup> See, e.g., Perry, *supra* note 15, at 270 (arguing that conflicting definitions of terrorism could result in confusion and ambiguity).

<sup>28</sup> *People v. Morales*, 20 N.Y.3d 240, 244-45 (NY 2012).

terrorism statute, the Anti-Terrorism Act of 2001.<sup>29</sup> This law ratchets up the potential penalties where an underlying criminal act is committed with the intent to “intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping.”<sup>30</sup>

The possibility of misuse of broad terrorism definitions is clear in the case of *People v. Morales*, 20 N.Y.3d 240, 244-45 (NY 2012). Edgar Morales was allegedly involved in a gang-related shooting at a 2002 christening in the Bronx in which a child was killed and another bystander was severely injured.<sup>31</sup> Morales was indicted under the New York terrorism statute on the theory that he acted with the intent to intimidate the Mexican-American civilian population living in the area of the shooting.<sup>32</sup> He was found guilty of terrorism and sentenced to 40 years to life in prison.<sup>33</sup>

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<sup>29</sup> Anti-Terrorism Act of 2001, 2001 N.Y. Laws, Ch. 300 (Sept. 17, 2001).

<sup>30</sup> N.Y. Penal Law § 490.25(1) (defining the act of terrorism for the purposes of the Anti-Terrorism Act of 2001).

<sup>31</sup> *See People v. Morales*, 20 N.Y.3d 240, 244-45 (NY 2012).

<sup>32</sup> *Id.* at 245.

<sup>33</sup> *Id.* at 246.

The intermediate appellate court modified the sentence based on its findings that Morales' gang-related activity in a civilian neighborhood did not qualify as terrorist activity.<sup>34</sup> The appellate court looked to the language of the Anti-Terrorism Act itself, notably the examples of prior terrorist activity that helped motivate the passage of the statute (such as the September 11 attacks, the 1993 attack on the World Trade Center, the 1998 bombings of U.S. embassies in Kenya and Tanzania, the 1995 Oklahoma City federal building bombing, the 1988 downing of Pan Am flight 103 over Lockerbie, Scotland, a 1997 shooting at the Empire State Building, and the 1994 murder of a teenager on the Brooklyn Bridge as acts of terrorism).<sup>35</sup> Since the New York terrorism

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<sup>34</sup> See *People v. Morales*, 924 N.Y.S.2d 62, 67 (App. Div. 2011).

<sup>35</sup> See N.Y. Penal Law § 490.00. Whether all of those acts should have been described as “terrorism” remains a matter of debate. See Shaila K. Dewan, *U.S. Decides '94 Attack on Hasidim Was a Lone Act*, NEW YORK TIMES, Dec. 6, 2000, available at <http://www.nytimes.com/2000/12/06/nyregion/us-decides-94-attack-on-hasidim-was-lone-act.html> (noting that the U.S. Attorney had, in 2000, re-characterized the 1994 murder of Ari Halberstam on the Brooklyn Bridge as a “terrorist act”); *but see* Glenn Greenwald, *New York's top court highlights the meaninglessness and menace of the term “terrorism,”* THE GUARDIAN, Dec. 16, 2012, available at <http://www.theguardian.com/commentisfree/2012/dec/16/court-terrorism-morales-gangs-meaningless> (critiquing the inclusion of all of these highly differentiated crimes as terrorist acts, opining that the single common theme for six of these seven acts is that they were

act was informed by language from FISA, the Court also considered examples of international terrorism that motivated the passage of FISA,<sup>36</sup> such as “the detonation of bombs in a metropolitan area” and “the deliberate assassination of persons to strike fear into others to deter them from exercising their rights.”<sup>37</sup>

The Court of Appeals (the highest court in New York), went even further, ordering a new trial for Morales based on the finding that the entire trial was tainted by the unreasonable categorization of Morales’ acts as terrorism.<sup>38</sup> The Court offered further clarification of what does not constitute terrorism: drive-by shootings, “ordinary violent crimes” such as robbery or personal vendettas, or the orchestration of a murder by an organized crime family of another syndicate’s soldier.<sup>39</sup>

#### IV. The Terrorism Enhancement was Misapplied in this Case

Given the shifting definitions of terrorism in the United States, it is no wonder the term is misapplied. The Sentencing Guidelines’

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committed by Muslims against non-Muslims, and suggesting that the label of “terrorism” is a tool used to create a lesser system of justice for Muslim defendants).

<sup>36</sup> Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq.

<sup>37</sup> *People v. Morales*, 924 N.Y.S.2d 62, 69 (App. Div. 2011).

<sup>38</sup> *See People v. Morales*, 20 N.Y.3d at 248, 250.

<sup>39</sup> *Id.* at 249.

definition of terrorism is so broad that it has the power to encompass more actions than the Commission ever intended to address.

In the case at hand, just as in *Morales*, defendants suffer from misuse of the term “terrorism” beyond what was contemplated by the legislature:

[T]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act . . . Because the legislature was aware of the difficulty in defining or categorizing specific acts of terrorism, it incorporated a general definition of the crime . . . and referenced seven notorious acts of terrorism that serve as guideposts for determining whether a future incident qualifies for this nefarious designation.<sup>40</sup>

Both history and experience demonstrate that the terrorism enhancement does not and should not apply to Jessica Reznicek’s actions. Despite the lack of data collected at its inception,<sup>41</sup> U.S.S.G. §

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<sup>40</sup> *People v. Morales*, 20 N.Y.3d at 249.

<sup>41</sup> James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 115 (2010); see also *United States v. Awan*, No. CR-06-0154, 2007 WL 2071748, \*2 (E.D.N.Y. July 17, 2007), *rev’d on other grounds*, 607 F.3d 306 (2d Cir. 2010) (noting that U.S. Sentencing Guidelines Manual § 3A1.4 took effect in November 1995, and “there is limited legislative or administrative history discussing how and why this sentencing enhancement came into being.”).

3A1.4’s history points to the intent of Congress to target large scale dangerous threats to civilians. This is evident by the magnitude of the events that inspired the intensification of terrorism legislation.

In 2002, presumably influenced by the 9/11 attacks, subsection (a) of U.S.S.G. § 3A1.4 added a definition for “Federal crime of terrorism” with the meaning given in 18 U.S.C. § 2332b(g)(5).<sup>42</sup> Acts include use of biological weapons, chemical weapons, governmental assassinations, weapons of mass destruction, threats to the United States, conspiracy to murder, hostage taking, bombing public places, and missile systems designed to destroy aircrafts.<sup>43</sup> These acts—which cause great bodily harm and death to civilians and state actors through violence, in hopes of forcing the government to act—meet the commonly understood definition of terrorism described above. However, the enhancement also pulls within its ambit crimes that *may or may not* be intended to cause civilian death and injury, such as causing harm to government property or contracts.

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<sup>42</sup> U.S.S.G. § 3A1.4.

<sup>43</sup> 18 U.S.C. § 2332b(g)(B)(i).

With activism on the rise<sup>44</sup> the natural risk of a broad definition of terrorism is misapplication of the terrorism enhancement to traditional means of civil resistance: for example, a sit-in style protest near train tracks,<sup>45</sup> a demonstration at a military exercise,<sup>46</sup> or opposition to government immigration policies at airports around the country might next be subject to the label of terrorism.<sup>47</sup> Surely application of a terrorism enhancement is not appropriate for these actions, despite arguably fitting within the technical parameters of 18 U.S.C. §

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<sup>44</sup> See Jennifer McNulty, *Youth Activism is on the rise around the globe, and adults should pay attention, says author*, UC SANTA CRUZ NEWSCENTER, Sept. 17, 2019, available at <https://news.ucsc.edu/2019/09/taft-youth.html>; Alyssa Biederman et al., *Meet Gen Z activists: Called to action in an unsettled world*, BUCKS COUNTY COURIER TIMES, Sept. 29, 2020, available at <https://apnews.com/article/climate-race-and-ethnicity-shootings-climate-change-school-violence-01673bd21da246ce942d1e98a08fc96f>

<sup>45</sup> Andrew Russell, *Do Tyendinaga Mohawk protests amount to “terrorism”? Experts say no*, Global News, Feb. 27, 2020, available at <https://globalnews.ca/news/6604017/tyendinaga-mohawk-protests-not-terrorism-experts/>

<sup>46</sup> American Civil Liberties Union, *How the USA PATRIOT Act Redefines “Domestic Terrorism”* available at <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism>

<sup>47</sup> Emanuella Grinberg & Madison Park, *2nd day of protests over Trump’s immigration policies*, CNN, January 30, 2017, available at <https://www.cnn.com/2017/01/29/politics/us-immigration-protests/index.html>

2332b(g)(5)(b)(i) acts of terrorism definitions.<sup>48</sup> Similarly, recent politically motivated acts of violence in international airports by individuals refusing to comply with federal mask mandates arguably qualify for a terrorism enhancement; yet no such charges appear likely.<sup>49</sup>

Given the significant risk of arbitrary application of the terrorism enhancement to politically-motivated non-violent crimes, proper application of the terrorism enhancement must be reserved for cases that meet the international and common sense understanding of terrorism. Certain acts may technically qualify for a terrorism enhancement, but such application would work a profound injustice.

This is because the enhancement reflects Congress's and the Sentencing

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<sup>48</sup> *See* 18 U.S.C. § 2332b(g)(5)(b)(i), including “[18 U.S.C. §] 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air); “[18 U.S.C. §] 1361 (relating to government property or contracts),” and *see also* 18 U.S.C. § 37 (allowing for prosecution regardless of whether act is intended to cause / causes injury, and excepting dangerous situations caused by labor disputes but not other political advocacy).

<sup>49</sup> *Id.*, *see also e.g.* David Koeing, *Flight Attendants Report High Frequency of Violent of Unruly, Sometimes Violent, Passengers*, Associated Press, July 30, 2021, available at <https://apnews.com/article/business-663d05a98fabfa56c41be8d6aa5f8b21>



Commission’s policy judgment that “an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that terrorists and their supporters should be incapacitated for a longer period of time.” *United States v. Meskini*, 319 F.3d 88, 91–2 (2d Cir. 2003).

### Conclusion

Under international law, the consensus is clear that only acts intended to cause serious injury or death qualify as “terrorism.” United States domestic laws are somewhat broader and, when read divorced from context, leave open the possibility of the terrorism enhancement being inappropriately applied. Perhaps even more troublesome is the enhancement’s application to acts that are meant to persuade government and motivate the public through activism, not to force action through violence, intimidation, or coercion. Vandalism and property destruction of the sort allegedly committed by Reznicek are crimes, but they are not terrorism. If Reznicek’s acts can be punished as terrorism, the United States will have moved so far past the international consensus as to be operating in a completely different

realm. This precedent is not only dangerous to activists and movements engaged in non-violent civil disobedience, but also risks diluting attention and resources from genuine counterterrorism efforts.

November 12, 2021

\_\_\_\_/s/\_\_\_\_Rachel Meeropol\_\_\_\_

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November 12, 2021

\_\_\_/s/\_\_\_Rachel Meeropol\_\_\_

Rachel Meeropol

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November 12, 2021

\_\_\_\_/s/\_Rachel Meeropol\_\_\_\_

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RE: 21-2548 United States v. Jessica Reznicek

Dear Counsel:

The amicus curiae brief of the Center for Constitutional Rights and Dean Sudha Setty has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at [www.ca8.uscourts.gov/all-forms](http://www.ca8.uscourts.gov/all-forms).

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans  
Clerk of Court

HAG

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