No. 17-SP-0837

In the District of Columbia Court of Appeals

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS, ET AL.,

Defendants-Appellants,

-v.-

JAMES OWENS, ET AL.,

Plaintiffs-Appellees.

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS ELLEN M. BUBLICK AND PAUL T. HAYDEN IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF CONSENT, AND IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to D.C. Court of Appeals Rule 29(a)(2), *amici curiae* Law Professors Ellen M. Bublick and Paul T. Hayden ("*Amici Curiae*") have obtained consent for the filing of this brief from all of the parties participating in this appeal, *i.e.*, Defendants-Appellants the Republic of Sudan and the Ministry of External Affairs of the Republic of Sudan, and Plaintiffs-Appellees, James Owens, et al.

Amici Curiae are the authors of the leading torts treatise, *The Law of Torts* (2d ed. 2011), and the leading torts hornbook, *Hornbook on Torts* (2d ed. 2016). Their longtime co-author, Dan B. Dobbs, retired in 2008.

Together, *The Law of Torts* and *Hornbook on Torts* have been cited by courts in the District of Columbia, forty-five states, every federal circuit, and the United States Supreme Court. The United States Court of Appeals for the District of Columbia Circuit cited to *The Law of Torts* as a part of its reasoning in an earlier opinion in this litigation. *See Owens v. Sudan,* 864 F.3d 751, 811 (D.C. Cir. 2017). More than a dozen D.C. District court opinions have cited the treatise's reasoning to support holdings in intentional infliction of emotional distress cases, particularly in the case of terrorist harms. *See, e.g.*, *Estate of Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 27 (D.D.C. 2009). Moreover, this Court has cited to the treatise, *see, e.g.*, *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 175 (D.C. 2013), and to Professor Dobbs' analysis of negligent infliction of emotional

harms cases. *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 801-02 (D.C. 2011).

Amici Curiae are also coauthors of the popular Torts casebook, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (8th standard and concise eds. 2017).

Professor Ellen M. Bublick, the Dan B. Dobbs Professor of Law at the University of Arizona's James E. Rogers College of Law, previously served as Chair of the Torts and Compensation Section of the Association of American Law Schools. She edited A CONCISE RESTATEMENT OF TORTS (3d ed. 2013), on behalf of the American Law Institute (ALI), and serves as an advisor on every active Restatement Third of Torts project including the Restatement Third of Torts: Intentional Torts to Persons. She also published CASES AND MATERIALS ON ADVANCED TORTS: ECONOMIC AND DIGNITARY TORTS—BUSINESS, COMMERCIAL AND INTANGIBLE HARMS (with Dan B. Dobbs), and is a co-editor and writer of the JOTWELL Torts blog (with Gregory Keating). She has been invited to speak to audiences that include the National Institute of Justice, the Pennsylvania House of Representatives, the Obligations Discussion Group at Oxford University, the European Group on Tort Law in Vienna, Austria, and the Research Center for Civil and Commercial Jurisprudence of Renmin University of China. She is a member of both the Arizona bar (active) and Illinois bar (inactive).

Professor Paul T. Hayden, the Thomas V. Girardi Professor of Consumer Protection Law at Loyola Law School, Los Angeles, has taught torts for almost three decades. He served as Interim Dean of Loyola Law School and Interim Senior Vice President of Loyola Marymount University in 2015-2016 and was Associate Dean for Faculty at Loyola Law School from 2013 to 2015. He was elected to membership in the ALI in 1998 and has served on the ALI's consultative groups for every torts-related project the ALI has undertaken since that time. He co-authored GLOBAL ISSUES IN TORT LAW (with Julie A. Davies) (West 2008), and has taught comparative tort law five times at the University of Bologna, Italy. He has authored three editions of ETHICAL LAWYERING: LEGAL AND PROFESSIONAL RESPONSIBILITIES IN THE PRACTICE OF LAW (West 3d ed. 2012) and a number of law review articles on torts and ethics. Professor Hayden has also taught at UCLA School of Law and Indiana University School of Law in Indianapolis. He has been a member of the California Bar since 1984.

Professor Bublick and Hayden's interest in this appeal is a scholarly interest in the legal doctrines and principles at issue in state intentional infliction of emotional distress claims. *Amici Curiae* have no personal interest in the resolution of this case, and have not received any financial remuneration in relation to this brief or this litigation. *Amici's* views are their own and do not represent the views of the University of Arizona or Loyola Law School of Los Angeles.

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SUMMARY OF THE ARGUMENT

At its essence, the question in this case is whether terrorists and those who provide material support to terrorists can engage in extreme and outrageous conduct that intentionally or recklessly causes severe and wide-ranging physical and emotional harms, and then escape responsibility to provide monetary compensation for emotional harms by invoking pragmatic limits on liability that were designed for claims in which emotional distress is less intended, certain and severe. As *Amici Curiae* have written, and as many courts have held, "[i]f the defendant's conduct is sufficiently outrageous and intended to inflict severe emotional harm against a person who is not present, no rule, nor any essential reason of logic or policy prevents liability."[1]

Given this Court's critical role in determining victim recoveries in terrorism cases, *Amici Curiae* urge the Court to consider and adopt the many prior precedents that hold terrorists, and those who provide material support to terrorists, liable for the severe emotional distress caused by their extreme and outrageous acts, regardless of whether family-member plaintiffs were present at the scene of the terrorist attack. Dozens of federal cases already have held that family members

[1] 2 DOBBS, HAYDEN & BUBLICK, THE LAW OF TORTS, § 389, at 569 (2d ed. 2011); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 47 (D.D.C. 2012) (citing *The Law of Torts* § 389 treatise language and recognizing the intentional infliction of emotional distress claims of family members of physically injured victims in the U.S.S. Cole bombing).

of people killed in terror attacks have valid intentional infliction of emotional distress claims against terrorists and those who provide material support for terrorism, regardless of whether the family members were present at the scene of the attack. *See, e.g.*, *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 304-10 (D.D.C. 2006).

The District of Columbia and other state courts have not addressed the presence requirement in the context of terrorism. Indeed, this Court has never adopted the presence requirement in the context of any IIED claims, nor should it do so in this case. Many state courts have embraced the Restatement Second's main IIED provision, § 46, but have not employed the "presence" limitations in § 46(2). Restatement (Second) of Torts § 46 (1965); *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 34 (Tenn. 2005) ("Our research reveals that only six states have clearly decided that direct claims for intentional or reckless infliction of emotional distress must be based upon conduct that had been directed at a specific person or performed in the presence of the plaintiff: California, Georgia, Oregon, Pennsylvania, South Carolina and Washington").

Indeed, in cases of terrorism, both policy and fairness counsel in favor of permitting IIED claims without a presence limitation. First, terrorists and those who provide material support to terrorists intend for their acts to produce severe and widespread emotional distress or are reckless in that regard. As such, recovery

for emotional harms in this context is particularly appropriate. Second, when defendants' extreme and outrageous actions intentionally or recklessly inflict severe and widespread distress, general tort law policies of accountability, compensation and deterrence favor recognition of plaintiffs' claims.

Of course, if this Court holds that family members who suffer severe emotional distress can recover regardless of whether they were present at the scene of the terrorist attack, plaintiffs will still need to satisfy the general elements of an IIED claim along with any jurisdictional requirements.

LEGAL ARGUMENTS

I. District of Columbia Courts Have Not Adopted a "Presence Requirement" in Intentional Infliction of Emotional Distress Cases. Nor Should This Court Do So in This Case.

State law determines the elements of a claim for intentional infliction of emotional distress (IIED). This is true for claims under the Federal Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 289 (1976) codified as amended at 28 U.S. Code §§ 1330, 1332, 1391(f), 1441(d) and 1602-1611 (FSIA), and for direct common law claims.[2]

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[2] *In re Terrorist Attacks on Sept. 11, 2001*, No. 03-MDL-1570 (GBD)(SN), 2016 WL 8711419, at *2 (S.D.N.Y. Oct. 14, 2016), *report and recommendation adopted sub nom. In re: Terrorist Attacks on Sept. 11, 2001*, No. 03-MDL-1570 (GBD)(SN), 2016 WL 6465922 (S.D.N.Y. Oct. 31, 2016) ("Although [FSIA] cases arise under a federal cause of action, 28 U.S.C. § 1605A(c), the common law of intentional infliction of emotional distress governs questions of who is entitled to recover damages.").

The U.S. District Court for the District of Columbia, applying District of Columbia law, has directly held that family-member plaintiffs not present at a terrorist bombing can assert IIED claims. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44 (D.D.C. 2007) (IIED recovery by family members of victims of bombing of U.S. Marine Corps barracks in Beirut, Lebanon, under D.C. and other state laws); *abrogation on other grounds recognized* in *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 65 (D.D.C. 2013). However, this Court is the final arbiter of the issue.

Research reveals no cases in which this Court or the D.C. Superior Court have addressed IIED requirements in the case of terrorism or related contexts. *See also Owens v. Republic of Sudan,* 864 F.3d 751, 810 (D.C. Cir. 2017) ("The District of Columbia has yet to decide whether it would apply the presence requirement or the exception in the Restatement to an act of international terrorism"; thereby certifying this question). Indeed, District of Columbia courts have never adopted a "presence requirement" to an IIED claim in any context. The D.C. Circuit in *Pitt v. District of Columbia,* 491 F.3d 494 (D.C. Cir. 2007) assumed that this Court's use of Restatement (Second) of Torts § 46 meant that it would also adopt § 46(2). *Id.* at 507. In support of its conclusion that the District of Columbia had adopted a presence requirement, the *Pitt* court cited this Court's opinion in *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982). The

Pitt court made clear that it was citing *Sere* only for the proposition that *Sere* quoted "the Restatement for the elements of IIED." *Pitt v. District of Columbia,* 491 F.3d at 37. While *Sere* does cite the three main elements of an IIED case, it does not adopt or refer to, let alone apply, § 46(2). This Court itself has never adopted § 46(2) in *Sere* or in any other case.[3] Nor should it do so for the first time in this case.

As this Court noted in *Hedgepeth v. Whitman Walker Clinic*, this Court has the ability to draw on a Restatement section without adopting the section in its entirety. 22 A.3d 789, 800 n.15 (D.C. 2011). In fact, many more state courts have embraced the Restatement Second's main IIED provision, § 46, than have embraced its "presence" limitation, in § 46(2). *See, e.g., Nichols v. Busse*, 503 N.W.2d 173, 180 (Neb. 1993) (expressly stating "we have not adopted the second subsection" of § 46, even though the court had adopted the first; therefore ruling that a mother did not have to be physically present in order to recover); *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville Supreme Court of Tennessee*, at Nashville, 154 S.W.3d 22, (Tenn. 2005). When the Tennessee Supreme Court researched the number of state courts that had adopted § 46(2), in 2005, it put the whopping total at six. *Id.* at 34. ("Our research reveals that only six states have

[3] 11/13/2017 Brief for Appellants, Republic of Sudan at 8 ("this Court has not explicitly addressed § 46(2)'s "presence" requirement).

clearly decided that direct claims for intentional or reckless infliction of emotional distress must be based upon conduct that had been directed at a specific person or performed in the presence of the plaintiff: California, Georgia, Oregon, Pennsylvania, South Carolina and Washington"). That is a dramatic contrast with the countless state cases that have applied the main requirements of § 46.[4]

Based on federal court precedent rejecting a presence requirement in IIED claims in the terrorism context, state courts' limited acceptance of a presence requirement in IIED cases in any context, and policies promoting the liability of intentional tortfeasors for their extreme and outrageous acts, particularly in the context of terrorism in which severe emotional harm is expected and intended, *Amici Curiae* urge this Court not to use this case to introduce a presence limit into its IIED jurisprudence.

II. Federal Courts Have Consistently and Appropriately Ruled That, in Cases of Terrorism, a Family-Member Plaintiff Need Not Have Been Present at the Scene of a Terrorist Event in Order to Recover for Intentional Infliction of Emotional Distress.

[4] The most recent District of Columbia Court of Appeals case to describe the District's IIED cause of action lists the elements of the claim as follows: "To establish a prima facie case of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1260 (D.C. 2016). Research uncovers no case in this jurisdiction, in any context, that has limited an *intentional* infliction of emotional distress claim to only those present at the scene of the harm.

Courts that have examined cases exactly like this one—IIED claims in the case of terrorism—have consistently rejected a presence requirement. Examining the many intentional infliction of emotional distress claims that arise in the context of terrorism, *Amici Curiae* find that courts confronted with the specific question at issue in this case consistently reach the same conclusion. When asked to decide, "Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress?," courts repeatedly answer "no."[5] Although judicial precedents invoke the laws of many states, their judgments have been unequivocal. Family members of terror victims should be afforded IIED recoveries even though they were not present at the scene of the attack, unless prior state law clearly precludes such recovery. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 41-45 (D.D.C. 2007).

[5] *See, e.g.*, *Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379, 387 (D.D.C. 2015) (bombing in Jerusalem restaurant); *Bodoff v. Islamic Republic of Iran,* 907 F. Supp. 2d 93 (D.D.C. 2012) (1996 bus bombing); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24 (D.D.C. 2012) (bombing in Tel Aviv restaurant); *Estate of Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 27 (D.D.C. 2009) (bombing of service members in Saudi Arabia); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 43-44 (D.D.C. 2007) (bombing of U.S. marine barracks in Lebanon); Bennett v. Islamic Republic of Iran, 507 F. Supp. 2d 117, 128 (D.D.C. 2007) (student killed in university bombing in Israel); *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008) (2003 bus bombing); *Burnett v. Al Baraka,* 274 F. Supp. 2d 86 (D.D.C. 2003) (9/11 attacks).

Because of jurisdictional and venue provisions of the FSIA, the vast majority of intentional infliction of emotional distress claims in the terrorism context have been resolved by federal courts in the District of Columbia. In these many cases, the District's federal courts have repeatedly held that family-member plaintiffs have a cause of action "even though plaintiffs were not present at the scene" of the terrorism. *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 304-10 (D.D.C. 2006) (families of service people killed in Hezbollah bomb attack in Saudi Arabia; cited more than 80 times, often in similar cases).

The District of Columbia's federal court holdings have been reaffirmed by every other federal court to examine the matter.[6] Although federal court holdings

[6] As the Southern District of New York wrote in a case against Iran regarding its support of the September 11th attacks, "the 'physical presence' requirement [of Restatement Second § 46] has been almost universally waived for solatium claims arising in under the FSIA's terrorism provisions." *In re Terrorist Attacks on Sept. 11, 2001*, 2016 WL 8711419, at *2. In agreement with other courts' universal rejection of a presence requirement, the Southern District of New York "recommended the award of solatium damages to immediate family members who were not physically present at the site of the attacks that took their loved ones' lives." *Id.* at *2 Florida's federal courts have reached the same conclusion. In *Stansell v. Revolutionary Armed Forces of Columbia (FARC),* No. 8:09-CV-2308-T-26MAP, 2010 WL 11507790, at *3 (M.D. Fla. June 14, 2010), a Florida district court awarded solatium damages under the Anti-Terrorism Act to the family of a U.S. citizen killed when his aircraft was shot down in an airborne anti-narcotics mission in Columbia. The Middle District of Florida court wrote, "federal courts have frequently awarded compensatory damages to surviving spouses and children of decedent victims of terrorist acts under the ATA." In the same vein, a federal court in New Jersey held that family-member plaintiffs not present at a terrorist attack "plead sufficient fact to support a viable claim for intentional infliction of emotional distress." *Krishanthi v. Rajaratnam*, No. 09-cv-05395 DMC-JAD, 2010

are consistent, rationales for not requiring presence in intentional infliction of emotional distress cases vary. It is important first to situate judicial rationales for rejecting presence in terrorism cases to the function of these rationales in an IIED case. Although both parties to this litigation address their arguments to the "presence requirement" and exceptions to that requirement, it is critically important to take a step back and recall this Court has never adopted a presence requirement in IIED cases. Such a requirement should not lightly be assumed.

Under the Restatement (Second) provisions, there are three main ways that a court might permit an IIED claim for family members who were not present at the scene of a terrorist attack.[7] The first is to note that even when courts have adopted Restatement (Second) § 46, they need not adopt, and many courts have not adopted, section § 46(2). The second approach is to classify family-member

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WL 3429529, at *15 (D.N.J. Aug. 26, 2010) (Anti-Terrorism Act case regarding bombing in Sri Lanka).

[7] Restatement Second § 46 provides:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
> (a) *to a member of such person's immediate family who is present at the time*, whether or not such distress results in bodily harm, or
> (b) to any other person who is present at the time, if such distress results in bodily harm.

plaintiffs as direct victims of the terrorist acts, and so decide their claims under § 46(1), not § 46(2). The third approach is to decide family member claims under § 46(2)'s provision for conduct directed at third parties, but then invoke the Restatement Second "caveat" to the presence requirement, as explained in comment l. That caveat to Section 46 is intended to "leave open the possibility of situations in which presence at the time may not be required." Restatement (Second) § 46 cmt. l (1965).

The federal courts have generally rejected the presence requirement based on the second and third rationales—holding that terrorist's extreme and outrageous acts are directed at family members, or that family members' presence at the time should not be required given the egregiousness of terrorist and terror-supportive conduct. State courts have been much more likely to adopt the first approach—largely disregarding section 46(2). This section addresses the federal court rationales that terrorist attacks are directed at family members, or that presence is not required under the caveat. Section III will address state court reluctance to adopt § 46(2).

The first prominent rationale federal courts use to reject a presence requirement is that the terrorist acts are "directed at" immediate family members as

well as decedents. "Courts have uniformly held that a terrorist attack—by its nature—is directed not only at the victims but also at the victims' families."[8]

To the extent that family members are direct victims of terrorists' extreme and outrageous conduct, § 46(2) would be irrelevant to the claims of family members, who would then be direct victims governed by § 46(1). *Dammarell v. Islamic Republic of Iran*, No. 01-2224 (JDB/JMF) 2006 WL 2382704, 176 (D.D.C. Aug. 17, 2006) (when "defendants' extreme and outrageous conduct was directed at the victims' family members," state's "possible presence requirement is inapplicable").

Indeed, some federal courts asked to distinguish between "claimants" and "victims" under the FSIA have specifically defined family members who were not victims of extrajudicial killing, but suffered emotional or physical harm as "victims" themselves for purposes of the statute. For example, in *Valore v. Islamic Republic of Iran*, the Court wrote that the FSIA "identifies victims as those who suffered injury or died as a result of the attack and claimants as those whose claims arise out of those injuries or deaths but who might not be victims themselves." 700 F. Supp. 2d 52, 68 (D.D.C. 2010). The court was tasked with sorting victims and

[8] *In re Terrorist Attacks on Sept. 11, 2001*, 2016 WL 8711419, at *1 (citing prior cases); *Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 26, 283 (D.D.C. 2006) (IIED claims from the bombing of the U.S. embassy in Beirut; attacks were direct at service people and families); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 115 n. 12 (D.D.C. 2005).

claimants in the case before it, which involved claims by service people killed or injured in a marine barracks bombing in Beirut and their families who had suffered emotional harms. Performing its sorting function, the court wrote, "in this case, victims include the 241 members of the U.S. armed forces who were killed, the many more who were physically and emotionally injured, and the family members alleging injury suffered from intentional infliction of emotional distress." *Id.* [9]

To say that the family members who suffer severe emotional distress as a result of terrorist acts are victims, and that terrorist attacks are "directed at" family members, is not to say that terrorists and their collaborators' aim is to cause distress to families members but not others.[10] The "directed at" conclusion simply reflects that defendants' acts intended to cause distress to family members, not that defendants did not intend to cause distress to others as well.

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[9] *See also Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 572 (7th Cir. 2012) (Seventh Circuit raised, on its own initiative, argument that family members who suffer physical and emotional harms from a terrorist attack are themselves "victims" rather than "claimants").

[10] In *Dammarell*, the court wrote, "defendant's campaign of attacks against Westerners was intended . . . to instill terror in their loved ones and others in the United States." *Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261(D.D.C. 2006). Many other cases take the same view. *See, e.g., Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 305 (D.D.C. 2006) ("systematic plan of funding and organizing terrorist attacks" had intent to "instill terror" in the physical injury victims' "loved ones and others in the United States").

As the Texas Supreme Court wrote of the distinction between bystanders and direct victims, "Where emotional distress is solely derivative of or incidental to the intended or most likely consequence of the actor's conduct, recovery for such distress must be had, if at all, under some other tort doctrine. On the other hand, if conduct is intended or primarily likely to produce severe emotional distress, section 46 is an applicable theory of recovery even if the actor's conduct also produces some other harm, such as physical injury. See Restatement (Second) of Torts § 46(1) (1965)." *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W. 2d 62, 67 (Tex. 1998). Reviewing the history of the IIED tort, the *Standard Fruit* court wrote, "From the structure of the Restatement, it is clear that section 46 is meant to provide redress only when the tortfeasor desired or anticipated that the plaintiff would suffer severe emotional distress."

If the question is, as the Texas court saw it, whether the tortfeasor desired or anticipated harm to the victim, § 46(1) would apply even if the defendant anticipated harm to others as well. This is the view of *Amici Curiae* as well. "If the defendant's conduct is sufficiently outrageous and intended to inflict severe emotional harm against a person who is not present, no rule, nor any essential reason of logic or policy prevents liability." 2 DOBBS, HAYDEN & BUBLICK, THE LAW OF TORTS, § 389, at 569 (2d ed. 2011). Under this view, the D.C. Circuit's comment that widespread distress "provides a considerably weaker basis for IIED

liability" would not be well founded. *Owens v. Republic of Sudan*, 864 F.3d at 811 (D.C. Cir. 2017). It is the intent to harm the plaintiff that supports relief. Why should the defendant face less tort liability by intending distress to the plaintiff and a wider range of people?

Although terrorist acts may create distress to a large number of people, courts have generally awarded IIED recovery primarily to close family members because those family members bear the heaviest burden of distress. As a New York court perceptively wrote in the context of the 9/11 attacks, "Terrorist attacks, by their very nature, are meant to inflict severe emotional distress upon society as a whole, but the loved ones of their victims bear a burden which is unquestionably heavier. As the September 11 attacks have left deep scars in the consciousness of this city and this nation, family members of the decedents are left with constant and stark reminders of their tragic losses." *In re: Terrorist Attacks on Sept. 11, 2001*, No. 03-MDL-1570(GBD)(SN), 2016 WL 6493158, at *4 (S.D.N.Y. Oct. 12, 2016), *report and recommendation adopted*, No. 03-MDL-1570(GBD)(SN), 2016 WL 6496359 (S.D.N.Y. Oct. 31, 2016). Thus, it is fair to say that for purposes of intentional infliction of emotional distress recoveries, terrorism is directed at both families and broader social institutions, but families can recover because they bear the heaviest weight of the emotional harm.

In addition to the rationale that terrorist conduct is directed at family members, courts reject the presence requirement because of the extreme and outrageous character of terrorist and terror-supportive acts, the defendant's intent, and the severity of emotional and physical harms. In the frequently cited case, *Estate of Heiser v. Islamic Republic of Iran,* the court reasoned that "a terrorist attack is precisely the sort of situation in which presence at the time is not required in light of the severity of the act and the obvious range of potential grief and distress that directly results from such a heinous act."[11] 466 F. Supp. 2d 229, 328 (D.D.C. 2006).[12]

III. Although Many State Courts Have Embraced the Restatement (Second) of Torts, Few Have Created a Presence Requirement in Intentional Infliction of Emotional Harm Cases.

[11] Indeed, in a previous case in which Sudan was found to have harbored and supported terrorists who killed or injured service people in attacks on the U.S.S. Cole, non-present family members received solatium damages on the ground that terrorism is "unique among the types of tortious activities in both its extreme methods and aims." *Harrison v. Sudan*, 882 F. Supp. 2d 23, 47 (D.D.C. 2012).

[12] It is not only that terrorist acts are especially egregious and their consequences foreseeably agonizing, but terrorism's *very purpose* is to cause emotional distress. In *Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93 (D.D.C. 2012), involving Iran's support for a bus bombing in Jerusalem, the Court invoked Restatement § 46's exception to the physical presence requirement on the basis that "Terrorism [is] unique among the types of tortuous [sic] activities in both its extreme methods and aims ... 'All acts of terrorism are by the very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror.'" *Id.* at 104 (citing *Estate of Heiser*, 659 F. Supp. 2d 20, 27 (D.D.C. 2009)).

Restatement (Second) § 46(2) envisions a presence limit for harms directed at third parties. The suggested rule would divide intentional infliction of emotional distress claims into direct victim and bystander claims. Such a rule would parallel the direct victim-bystander distinction that has been widely adopted in negligent infliction of emotional distress claims. In fact, if Restatement (Second) § 46(2) were adopted, bystander emotional distress claims under those IIED claims would have precisely the same limits and has been adopted for NIED bystander claims. Restatement (Third) of Torts: Physical and Emotional Harms § 48 (2012). Bystander claimants in both causes of action would have to show presence and a close family relationship in order to recover. *Id*. (requiring in NIED contemporaneous observance and status as a close family member); Restatement (Second) § 46(2) (requiring presence and status as an immediate family member). But while the Restatement (Second) § 46(2) envisions such limits, most state courts themselves have not embraced a presence requirement in IIED claims.

Federal cases that interpret state IIED laws in the terrorism context conclude that almost all state laws would permit recovery without proof of presence. *See, e.g., Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 304-10 (D.D.C. 2006) (granting recovery under the law of many states). In *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007), the court noted that most jurisdictions, like the District of Columbia, "have been silent on the issue" of

presence. *Id*. at 43. A plethora of federal opinions examining particular state laws reach the same conclusions.[13]

Amici Curiae's independent research affirms that only a very small slice of UXstate case law supports a presence requirement in the *intentional* infliction of emotional distress context. Westlaw searches suggest that thousands of cases cite to Restatement Second § 46, but only a few dozen of these have addressed the presence requirement in § 46(2). Among the state court cases that cite §46(2), some of these have expressly declined to adopt a "presence requirement," despite adopting the Restatement (Second) § 46 as a whole.[14] Other courts that have

[13] *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008) ("Under Ohio and Virginia law as predicted by the District Court, claims for intentional infliction of emotional distress (IIED) may be brought by family members of terrorist attack victims without having to establish presence at the scene."); *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200, 212 (D.D.C. 2008) (New York does not have a presence requirement in a suit arising from a terrorist attack); *Bennett v. Islamic Republic of Iran*, 507 F. Supp. 2d 117, 128 (D.D.C. 2007) (under California law, the plaintiff's presence is not always required, and is deemed unnecessary in situations where the defendant is aware of the high probability that the defendant's acts will cause a plaintiff severe emotional distress).

[14] For example, in *Baldonado v. El Paso Natural Gas Co.*, the New Mexico Court of Appeals wrote, "We decline to adopt the categorical limitations imposed by Subsection (2) of Section 46." 143 N.M. 297, 306 (N.M. Ct. App. 2006). Similarly, in *Rogers v. Louisville Land Co*., 367 S.W. 3d 196, 205 (Tenn. 2012), the Tennessee Supreme Court held "the alleged wrongful conduct was reckless, which need not be directed at a specific person or occur in the plaintiff's presence." *Rogers v. Louisville Land Co.*, 367 S.W. 3d 196, 205 (Tenn. 2012).

examined § 46(2) note that they have not adopted the provision.[15] Some states do indeed adopt a presence requirement.[16]

But even when a presence requirement has been adopted, opinions make clear the importance of exceptions in the case of egregious conduct.[17] In addition, courts may use "presence" as a factor more than a requirement.

While some state courts reject section 46(2) and others adopt it, as in the District of Columbia, most jurisdictions are simply silent on the matter. The Restatement Third has dropped the clause from its blackletter. *See* Restatement

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[15] *See, e.g., Checkley v. Boyd*, 14 P.3d 81 (Ore. 2000) ("Neither we nor the Oregon Supreme Court has expressly adopted section 46(2) of the Restatement"); *Allen v. Clemons*, 920 S.W.2d 884 (Ky. Ct. App. 1996) ("the Supreme Court did not adopt § 46(2)").

[16] *See, e.g., Thayer v. Herdt,* 586 A.2d 1122, 1126 (Vt. 1990); *Dornfeld v. Oberg,* 503 N.W.2d 115 (Minn. 1993). One difficult aspect of tracking the number of jurisdictions with each view is that many cases are not state supreme cases. Moreover, and various states are listed by various courts as both having and not having a presence rule. For example, the D.C. Circuit in *Pitt* stated that this Court has a presence rule. *Pitt v. District of Columbia,* 491 F.3d 494 (D.C. Cir. 2007). Yet no local District case supports that proposition. And other federal cases, some decided at a similar time, say D.C. does not have such a rule. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44 (D.D.C. 2007).

[17] *See, e.g., R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994) (applying caveat to Restatement's presence rule when decedent's husband brought suit against decedent's stepfather, alleging that stepfather sexually abused decedent and gave her implements to commit suicide); *Nancy P. v. D'Amato*, 517 N.E.2d 824, 827, 828 (Mass. 1988) ("A custodial parent of a young child sexually abused by a trusted adult neighbor might present a particularly appealing case for not imposing a presence requirement. We do not, however, decide the point". *See also Hatch v. Davis*, 102 P.3d 774, ¶ 29 (Utah Ct. App. 2004).

(Third) of Torts: Physical and Emotional Harms § 46. So now would be an odd time for a court to first adopt that subsection. Still, a court could reach a similar conclusion through Restatement Third commentary. Compare Restatement Third § 46 cmt. m (emotional harm cause by harm to a third person), with cmt. i (conduct directed at the claimant).[18]

IV. POLICY AND FAIRNESS COUNSEL THAT A PLAINTIFF NEED NOT HAVE BEEN PRESENT AT THE SCENE OF A TERRORIST BOMBING IN ORDER TO RECOVER FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In cases of terrorism and material acts in support of terrorism, policy and fairness counsel in favor of permitting IIED claims without a presence limitation. Although *Amici Curiae* have developed their policy views at length elsewhere, *see, e.g.*, 2 DOBBS, HAYDEN & BUBLICK, THE LAW OF TORTS, § 381-397 (2d ed. 2011), two related points seem particularly worthy of note here. First, terrorists and those who provide material support to terrorists intend for their extreme and outrageous acts to produce severe and widespread emotional distress. Bruce Hoffman, in his seminal book INSIDE TERRORISM (Columbia University Press 2006), contrasts

[18] Sudan makes much of the Restatement Third Reporter's note to comment m of § 46. In the note, the Reporters said the development of IIED claims in terrorism cases is "worthy of note," but "falls well short of the development of another exception to the presence requirement that the Institute would endorse." To *Amici Curiae*, this comment seems to wish for a longer arc of development in the common law before the ALI takes a position. It does not seem to take a position itself. *Amici Curiae* do have a position in this case. *Amici Curiae* believe that this is not the case in which to initiate a presence requirement.

terrorists with other types of criminals. He writes, "Terrorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack. It is meant to instill fear within, and thereby intimidate, a wider 'target audience'." Given this specific intent to produce, not only death and injury, but also fear and intimidation of a broader target audience, recovery for intentional infliction of emotional distress in this context is particularly appropriate.

Second, when defendants' extreme and outrageous actions intentionally or recklessly inflict severe and widespread distress, general tort law policies of accountability, compensation and deterrence favor extended liability for those intended harms. Arthur Ripstein, in his article *As If It Had Never Happened,* counsels that the purpose of damages is to make it "as if a wrong had never happened." 48 W. & M. L. Rev. 1957, 1957 (2007). Of course, there is no way to undo acts of terrorism. But that makes it especially important for courts to recognize aggrieved parties' right to receive due compensation.

CONCLUSION

For all of the foregoing reasons, this Court should answer the certified question in the negative.

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Respectfully Submitted,

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