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BETTING ON THE SAFETY ACT: HOW RELYING ON THIS
RELATIVELY UNKNOWN STATUTE IN RECENT LITIGATION
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ALEC KRAUS*

INTRODUCTION

On October 1, 2017, Stephen Paddock fired upon the crowd at the Route 91 Harvest Festival in Las Vegas, Nevada, from a thirty-second floor window of the Mandalay Bay Resort.¹ Paddock's attack killed fifty-eight people and injured around 500 others.² Following the attack, over 2,500 individuals brought or threatened to bring lawsuits against MGM Resorts International ("MGM")—the parent company for the Mandalay Bay Resort and the owner of the Route 91 Harvest Festival grounds—and MGM's various subsidiaries allegedly involved in the incident, according to MGM.³ These lawsuits allege that MGM is liable for the deaths, injuries, and emotional distress connected to the Route 91 Harvest Festival incident.⁴

MGM then took an aggressive approach in defending these lawsuits, suing more than 1,000 of these victims in federal court and seeking a declaratory judgment absolving MGM of all tort liability for the Route 91 Harvest Festival incident.⁵ In these lawsuits, MGM argued that the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 ("SAFETY Act")⁶ bars any liability that MGM had to the victims of the incident because MGM contracted with a security company to screen concert-goers, and DHS certified those screening techniques under the

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1. Complaint for Declaratory Relief at 2, *MGM Resorts Int'l v. Eardley*, No. 2:18-cv-00567-JNP, 2018 WL 3437089 (D. Utah 2018).

2. *Id.*

3. *Id.* at 2–3.

4. *Id.*

5. *Id.* at 5.

6. 6 U.S.C. §§ 441-44 (2018).

SAFETY Act.⁷ In 2019, MGM had an approximate total of nine lawsuits in eight districts against 1,977 individuals.⁸

For understandable reasons, some highly criticized MGM's strategy.⁹ Victims described the lawsuits as adding insult to injury, showing enormous public disapproval to MGM's lawsuits.¹⁰ And the total number of lawsuits filed against MGM was somewhat debated, undermining MGM's justification for its aggressive defense strategy.¹¹ In response, MGM stated that these lawsuits will help the community and victims heal faster instead of dragging out litigation for years.¹²

Aside from facing issues of public relations, MGM also faced issues with its legal arguments as well. There was much speculation, especially given the publicity surrounding the lawsuits, whether the SAFETY Act applied in this instance and whether MGM's claims fit the requirements of the SAFETY Act.¹³ Notably, there is still considerable uncertainty as to the SAFETY Act's provisions because, despite being a significant source of tort reform legislation,¹⁴ the statute has never been the focus of such litigation before MGM's lawsuits.¹⁵

The SAFETY Act, a provision of the Homeland Security Act of 2002,¹⁶ protects providers of certain qualified anti-terrorism security technologies and services—called “sellers”—from tort liability stemming from acts of terrorism.¹⁷ The Act grants the Secretary of Homeland Security

7. *In re* Route 91 Harvest Festival Shootings in Las Vegas, Nev., on Oct. 1, 2017, 347 F. Supp. 3d 1355, 1357 (J.P.M.L. 2018).

8. *Id.* at 1356–57.

9. For instance, a New York state senator called for MGM to withdraw the lawsuits if MGM wanted to purchase a casino in the state. Kenneth Lovett, *Exclusive: New York senator calls for MGM to drop lawsuit against Las Vegas mass shooting victims if it wants to buy Yonkers casino*, NY DAILY NEWS (Aug. 9, 2018), <http://www.nydailynews.com/news/politics/ny-pol-mgm-mayer-las-vegas-shooting-mandalay-mayer-casino-20180808-story.html> [<http://perma.cc/2WBA-9RA5>].

10. Michael Goldstein, *Will MGM Resorts Lawsuit Against Shooting Victims Tarnish Its Brand?*, FORBES (July 27, 2018), <https://www.forbes.com/sites/michaelgoldstein/2018/07/27/will-mgm-resorts-lawsuit-against-shooting-victims-tarnish-its-brand/#789b0007623e> [<http://perma.cc/9AX7-95WW>].

11. See *In re* Route 91 Harvest Festival Shootings, 347 F. Supp. 3d at 1358 (noting only 38 negligence actions have been filed, of which 34 have been voluntarily dismissed).

12. Eliot C. McLaughlin, *MGM Resorts denies liability for Las Vegas shooting, asks courts for protection from lawsuits*, CNN (July 19, 2018), <https://www.cnn.com/2018/07/17/us/mgm-lawsuit-victims-las-vegas-shooting-trnd/index.html> [<https://perma.cc/657Z-MXUX>].

13. See Jackie Valley, *Liability and an obscure law: Will MGM Resorts' bold strategy of suing shooting victims pay off?*, THE NEVADA INDEPENDENT (July 22, 2018), <https://thenevadaindependent.com/article/liability-and-an-obscure-law-will-mgm-resorts-bold-strategy-of-suing-shooting-victims-pay-off> [<https://perma.cc/X4XU-FM4K>].

14. Paul Taylor, *We're All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. CIN. L. REV. 1595, 1615 (2007).

15. Valley, *supra* note 13.

16. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 861-865, 116 Stat. 296.

17. 6 U.S.C. §§ 441-44 (2018).

authority for certifying and designating these technologies and services, as well as for administrating regulations consistent with the statute.¹⁸ In general, Congress intended the Act to encourage private businesses to develop security technologies and services used to combat terrorism in the wake of the attacks on September 11, 2001.¹⁹

With those considerations in mind, there were several issues that arose under the SAFETY Act in the Route 91 Harvest Festival litigation. There was debate whether the Route 91 Harvest Festival incident qualified as an act of terrorism under the SAFETY Act. Particularly, the Department of Homeland Security (“DHS”) has never clearly stated that the incident was an act of terrorism,²⁰ leaving uncertainty as to whether MGM’s claim met the Act’s requirements.²¹ After a thorough review of DHS’s website, DHS has also never issued any statement whether any particular incident is or is not an act of terrorism under the SAFETY Act, thus heightening the uncertainty as to whether the Route 91 Harvest Festival incident was an act of terrorism. Additionally, while MGM contracted with a security company deploying screening services certified by the Department of Homeland Security,²² there was an issue with whether Paddock’s acts at the Mandalay Bay Resort are too far removed from the security services at the Route 91 Harvest Festival to fit within the SAFETY Act and the relevant regulations.

Although the parties eventually settled these lawsuits, the Route 91 Harvest Festival litigation highlights uncertainties in applying key provisions of the SAFETY Act as a legislative source of tort reform. Using MGM’s lawsuits as a backdrop, this note outlines issues for litigants arguing claims under the SAFETY Act. Part one discusses the provisions of the SAFETY Act and DHS’s related regulations. This part also pays particular attention to the historical context and legislative purpose behind the SAFETY Act’s enactment to show how Congress intended the Act to broadly protect security providers from liability stemming from certain violent incidents. Part two then considers the legal hurdles litigants must address to successfully argue that the SAFETY Act limits their liability for a terrorist incident. One of the most significant issues potential future liti-

18. *Id.* at § 441.

19. Alice Crowe, *Safety Act Liability Protections for Air Cargo Screeners*, 58 FED. LAW. 24, 25 (2011).

20. DEP’T OF HOMELAND SECURITY SAFETY ACT, <https://safetyact.gov> [<https://perma.cc/P9TC-NNM2>]; see also McLaughlin, *supra* note 12.

21. See J. Michael Littlejohn & Lauren P. McLaughlin, *Managing Terrorism Risk Safety Act Protections for Companies Selling and Using Anti-Terrorism Products and Services*, 53 FED. LAW. 34, 40 (2006).

22. Complaint for Declaratory Relief at 5, *MGM Resorts Int’l v. Acosta*, No. 2:18-cv-01288, 2018 WL 3455190 (D. Nev. July 13, 2018).

gants may face, and which MGM faced, is whether the Secretary of Homeland Security has determined that an incident was an act of terrorism. While the circumstances surrounding the Route 91 Harvest Festival litigation may be novel in this aspect, that litigation best exemplifies the uncertainty litigants may face in determining whether an incident qualifies as an act of terrorism under the SAFETY Act. Finally, part three outlines considerations for Congress to amend the SAFETY Act in light of the legal hurdles discussed in part two. As MGM's lawsuits show, one way that Congress could strengthen the SAFETY Act is by clarifying a precise method for the Secretary of Homeland Security to determine whether a particular incident is an act of terrorism.

I. BACKGROUND ON THE SAFETY ACT

This section first discusses the provisions of the SAFETY Act and the accompanying DHS regulations that are most relevant when raising a claim under the SAFETY Act, such as in the Route 91 Harvest Festival litigation. Second, this section analyzes the legislative purpose of the SAFETY Act by looking to the historical context surrounding the Act's enactment, statutory construction, and legislative history.

A. Statutory and Regulatory Provisions of the SAFETY Act

In general, the SAFETY Act creates a federal cause of action for "claims arising out of, relating to, or resulting from an act of terrorism" where anti-terrorism technologies or services designated or certified by the Department of Homeland Security "have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller" of the anti-terrorism technologies or services.²³ The Act grants federal district courts "original and exclusive jurisdiction over all actions for any claim or loss or property, personal injury, or death arising out of, relating to, or resulting from" the act of terrorism.²⁴ Yet this cause of action "shall be brought only for claims for injuries that are proximately caused by sellers" of qualified anti-terrorism technology.²⁵ For these claims, there can be only one cause of action, and it "may be brought only against the Seller of the Qualified Anti-Terrorism Technology and

23. 6 U.S.C. § 442(a)(1).

24. *Id.* § 442(a)(2); *see also* 6 C.F.R. § 25.7(d) (2018).

25. 6 U.S.C. § 442(a)(1).

may not be brought against the buyers . . . or any other person or entity.”²⁶ The Act also limits liability to the amount of liability insurance that each seller must maintain.²⁷

1. Act of Terrorism

The SAFETY Act broadly defines the term, “act of terrorism.” Under the statute, an “act of terrorism” is “any act that the Secretary [of Homeland Security] determines meets the requirements” set out within the SAFETY Act’s broad definition.²⁸ Yet the Secretary of Homeland Security is required to determine only that any act in question fits the following requirements:

[T]he act . . .

- I. is unlawful;
- II. causes harm to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States; and
- III. uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.²⁹

DHS’s regulations do not further clarify what an act of terrorism is.³⁰ The regulations use nearly identical language of the SAFETY Act.³¹ In its final regulations, DHS clarified issues relating only to the geographic location of a terrorist act in response to commenters.³² According to the DHS regulations, an act occurring outside of the United States can be considered an act of terrorism for purposes of the SAFETY Act.³³ However, the regulations do not address the procedures and timing for the Secretary of Homeland Security to determine whether a particular incident is an act of

26. 6 C.F.R. § 25.7(d).

27. 6 U.S.C. § 443(c).

28. *Id.* § 444(2)(A).

29. *Id.* § 444(2)(B).

30. *See* 6 C.F.R. § 25.2.

31. *Id.*

32. Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147-01, 33,154 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25 *et seq.*).

33. *Id.*

terrorism,³⁴ nor whether a mass shooting, such as the Route 91 Harvest Festival incident, may qualify as an act of terrorism.³⁵ Particularly, the SAFETY Act and the accompanying DHS regulations include a potentially over-inclusive definition of terrorism and also fail to define “mass destruction.”³⁶

2. Sellers

Aside from broadly defining an “act of terrorism,” the SAFETY Act itself also does not define the term, “seller,” beyond being “[a]ny person or entity that sells or otherwise provides a qualified anti-terrorism technology to . . . customers.”³⁷ The Department of Homeland Security regulations further add the requirement that a “seller” is also a “person, firm, or other entity . . . to whom or to which (as appropriate) a Designation and/or Certification has been issued under this part (unless the context requires otherwise).”³⁸

3. Qualified Anti-Terrorism Technology

The SAFETY Act applies to “qualified anti-terrorism technology.”³⁹ That includes the following:

[A]ny product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary [of Homeland Security].⁴⁰

DHS further clarifies that “technology” includes “any combination” of the enumerated definitions and may also include “[d]esign services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and

34. See John J. Pavlick, Jr. & Dismas N. Locaria, *Final Safety Act Rule Resolves Some Questions, Generates Others, and Creates Important Procurement Linkage to the Safety Act*, 42 *PROCUREMENT LAW*, 1, 24 (2006).

35. See Regulations Implementing the SAFETY Act, 71 *Fed. Reg.* at 33,154; see also 6 C.F.R. § 25.2.

36. Alison M. Levin, *The Safety Act of 2003: Implications for the Government Contractor Defense*, 34 *PUB. CONT. L.J.* 175, 200 (2004).

37. 6 U.S.C. § 443(a)(1) (2018).

38. 6 C.F.R. § 25.2.

39. 6 U.S.C. § 442.

40. *Id.* § 444; see also 6 C.F.R. § 25.2 (adding that such technology may also be sold for the noted purposes).

other analyses relevant to homeland security.”⁴¹ As these regulations show, the SAFETY Act applies to a broad range of technologies, including products-based, service-based, and analysis-based technologies.⁴² While the Secretary of Homeland Security has broad discretion in designating technology as qualified anti-terrorism technology,⁴³ there are still detailed procedures in this designation process.⁴⁴

4. Liability Protections

When DHS designates technology as qualified anti-terrorism technology, the SAFETY Act provides extensive liability protections. First, there is an exclusive cause of action requirement, meaning for any particular act of terrorism, there can be only one claim relating to a seller’s use of qualified anti-terrorism technology.⁴⁵ According to the DHS regulations, this claim can be brought only against the seller of the designated technology, not the buyers or downstream users.⁴⁶ In effect, this provision affords significant protection from liability for all other companies and persons in the stream of commerce from claims under the SAFETY Act.

Second, damages for claims arising under the SAFETY Act are significantly limited. Neither punitive damages nor prejudgment interest can be awarded.⁴⁷ Plaintiffs may recover noneconomic damages, such as those for physical and emotional pain, suffering, loss of enjoyment of life, or other nonpecuniary losses, only if the plaintiff suffered physical harm.⁴⁸ There is also no joint and several liability for noneconomic damages.⁴⁹ Additionally, liability cannot exceed the seller’s required liability insurance coverage limit.⁵⁰ Because there is no “one-size-fits-all” numerical requirement for insurance coverage,⁵¹ DHS determines the maximum liability for each seller on an individual basis.⁵² Each seller must maintain liability insurance at that level.⁵³

41. 6 C.F.R. § 25.2.

42. Regulations Implementing the SAFETY Act, 71 Fed. Reg. 33,148-49, 33,154 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25 *et seq.*).

43. 6 C.F.R. § 25.4.

44. *Id.* § 25.6.

45. *Id.* § 25.7(d).

46. *Id.*

47. 6 U.S.C. § 442(b)(1) (2018); *see also* 6 C.F.R. § 25.7(b)(1).

48. 6 U.S.C. § 442(b)(2).

49. *Id.*

50. *Id.* § 443(c) (2018); *see also* 6 C.F.R. § 25.7(a).

51. Regulations Implementing the SAFETY Act, 71 Fed. Reg. 33,149 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25 *et seq.*).

52. 6 C.F.R. 25.5(g).

53. 6 U.S.C. § 443(a)(1); *see also* 6 C.F.R. § 25.5(a).

There are additional protections for technologies that are certified as an “Approved Product for Homeland Security.”⁵⁴ To be certified, the technology must first be designated as a qualified anti-terrorism technology and then go through a separate application process for certification.⁵⁵ If certified, those technologies are also eligible for the government contractor defense for claims arising under the SAFETY Act.⁵⁶ The government contractor defense immunizes defendants from liability.⁵⁷ There is a rebuttable presumption that the government contractor defense applies for claims arising under the SAFETY Act regardless of whether or not the seller is actually contracting with the federal government (the presumption applies even when the seller contracts with state or local governments or private entities).⁵⁸ This presumption can be overcome only by evidence that the seller acted “fraudulently or with willful misconduct” during the certification application process.⁵⁹

Thus, whether technology is designated or certified, the SAFETY Act provides significant liability protections. DHS provides further details on the SAFETY Act online, including application materials and an updated list of both designated and certified technologies.⁶⁰

B. Evidence of Legislative Context and Purpose

While the exact meaning of some of its provisions may be vague when applied to incidents, such as the Route 91 Harvest Festival incident, the SAFETY Act’s general purpose is clear, given the context of its enactment, broad statutory language, and legislative history. The Act serves to encourage private security providers to develop and deploy anti-terrorism technologies and services. To do so, Congress sought to give private actors certainty to the extent of any possible liability surrounding terrorist incidents and to also severely limit that liability.

54. 6 C.F.R. § 25.9; *see also* 6 U.S.C. § 442(d)(3).

55. 6 C.F.R. § 25.9(a).

56. 6 U.S.C. § 442(d); *see also* 6 C.F.R. § 25.8(a).

57. Regulations Implementing the SAFETY Act, 71 Fed. Reg. at 33,149 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25 *et seq.*); *see also* Littlejohn & McLaughlin, *supra* note 21, at 36–37.

58. 6 U.S.C. § 442(d)(1); *see also* 6 C.F.R. § 25.8(b).

59. 6 U.S.C. § 442(d)(1); *see also* 6 C.F.R. § 25.8(b) (noting there must be a “knowing and deliberate intent to deceive” DHS).

60. *See generally* DEP’T OF HOMELAND SECURITY SAFETY ACT, *supra* note 20.

1. Historical Context

The SAFETY Act, part of the Homeland Security Act of 2002, was one of Congress's responses to the September 11th terrorist attacks.⁶¹ Immediately after the attacks, the federal government sought help from the private sector in fighting terrorism.⁶² However, many worried that these efforts would be ineffective if security providers never actually deployed advancements in security out of fear of legal liability.⁶³ Naturally, even if anti-terrorism technology is properly designed and utilized, innovative criminals may still overcome this technology.⁶⁴ And before the September 11th attacks, private entities did not benefit as much as government entities did from sovereign immunity, especially within the context of public safety.⁶⁵ Plaintiffs could sue private security companies in state court under numerous causes of action, including invasion of privacy or even business interruption.⁶⁶ As a result of this potential liability, private companies were often reluctant to develop or deploy new anti-terrorism technologies.⁶⁷

Although the September 11th attacks highlighted to a global audience many of these issues in deploying security technologies, those issues had already existed in the United States for years.⁶⁸ Private companies developing and deploying national security technologies were often exposed to uncertain but sometimes substantial liability, which created a significant disincentive to employ these technologies.⁶⁹ Thus, anti-terrorism technologies were very narrowly deployed, often only by the federal government.⁷⁰ Congress previously sought to address these issues, but none of those efforts were as sweeping as the SAFETY Act would be.⁷¹ These national security concerns largely continued until the September 11th attacks became the most notable example of massive liabilities following a terrorist

61. Littlejohn & McLaughlin, *supra* note 21, at 35.

62. Paul Taylor, *We're All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. CIN. L. REV. 1595, 1602 (2007).

63. *Id.* at 1603–04.

64. Crowe, *supra* note 19, at 25.

65. Taylor, *supra* note 62, at 1604.

66. Littlejohn & McLaughlin, *supra* note 21, at 35.

67. Crowe, *supra* note 19, at 25.

68. Taylor, *supra* note 62, at 1617–18.

69. *Id.*; see also Ava A. Harter, *Encouraging Corporate Innovation for Our Homeland During the Best of Times for the Worst of Times: Extending Safety Act Protections to Natural Disasters*, 2007 DUKE L. & TECH. REV. 7, 4 (2007) (listing examples of significant liability for private industries before the September 11th attacks).

70. Taylor, *supra* note 62, at 1618.

71. *Id.* at 1615, 1618.

incident, as shown by the massive civil tort liabilities in the wake of the September 11th attacks.⁷²

In response to these concerns, Congress created the SAFETY Act, one of the most extensive examples of legislative tort reform, to encourage private actors to develop and deploy anti-terrorism security technologies. Of course, the SAFETY Act's underlying purpose is national security.⁷³ But the statute's specific provisions reflect the particular concerns specified above.

2. Statutory Construction

The SAFETY Act's statutory construction, the best evidence of legislative intent, generally shows a broad purpose and scope.⁷⁴ For example, the Act applies to all "claims arising out of, relating to, or resulting from an act of terrorism."⁷⁵ This language suggests a generally broad scope. The Act also includes a potentially over-inclusive definition of "act of terrorism," encompassing a broad scope of incidents and limited only by the Secretary of Homeland Security's discretion.⁷⁶ Congress and DHS may have intentionally left this definition vague so that the SAFETY Act's scope can evolve alongside terrorist threats, especially given that both of these entities have recognized that terrorism is a constantly developing threat.⁷⁷ For instance, the use of weapons of mass destruction was an emerging issue at the time of the September 11th attacks, and cyberterrorism presents emerging issues today. Still, this definition denotes a broad overall scope. Finally, the SAFETY Act applies to a comprehensive range of technologies, as explained in detail above.⁷⁸ The Act can apply to technology with multiple purposes even if fighting terrorism is not the sole or intended purpose.⁷⁹ The SAFETY Act's language strongly indicates a generally broad purpose and potentially over-inclusive scope.

72. Harter, *supra* note 69, at 5–6.

73. See Levin, *supra* note 36, at 203; see also H.R. REP. NO. 107-609(I), at 63 (2002), reprinted in 2002 U.S.C.C.A.N. 1352, 1352.

74. See Levin, *supra* note 36, at 177–78.

75. 6 U.S.C. § 442(a)(1) (2018).

76. Levin, *supra* note 36, at 200.

77. See H.R. REP. NO. 107-609(I), at 63–64; see also Dep't of Homeland Security, *The 2014 Quadrennial Homeland Security Review*, <https://www.dhs.gov/sites/default/files/publications/qhsr/the-2014-quadrennial-homeland-security-review-overview.pdf> [<https://perma.cc/ZA3F-H3RS>].

78. See 6 U.S.C. § 444; see also 6 C.F.R. § 25.2 (2018).

79. Levin, *supra* note 36, at 177–78.

3. Legislative History and DHS's Interpretation

The SAFETY Act's legislative history also shows that the primary purpose of the Act is to provide certainty to security providers in the hopes of encouraging them to develop and deploy anti-terrorism technologies. As stated in the House Select Committee on Homeland Security Report, "technological innovation is the Nation's frontline defense against the terrorist threat."⁸⁰ However, the report also stated as follows:

[T]he Nation's products liability system threatens to keep important new technologies from the market where they could protect our citizens. In order to ensure that these important technologies are available, the Select Committee believes that it is important to adopt a narrow set of liability protections for manufacturers of these important technologies.⁸¹

Legislators also generally recognized that the specific legislative purpose was to broadly encourage security providers to develop and deploy anti-terrorism technologies and services.⁸² During congressional debates, one representative remarked that the "fatally flawed tort system in America and the unbounded threat of liability are blocking the deployment of anti-terrorism technologies. . . ." but "[t]he SAFETY Act provisions place reasonable and sensible limits on lawsuits so America's leading technology companies will be able to deploy solutions to defeat terrorists."⁸³

The bill's supporters in the Senate agreed that the SAFETY Act "helps ensure that effective antiterrorism technologies that meet stringent requirements are commercially available. The reality is that without these safeguards, the threat of unlimited liability prevents leading technology companies from providing their best products to protect American citizens, American businesses, and governmental agencies."⁸⁴ One senator also recognized that "[s]ome of our Nation's top defense contractors will not sell [anti-terrorism security] products because they are afraid to risk the future of their company on a lawsuit."⁸⁵ Overall, Congress acted on the belief that "it is essential that we tap into the resources and expertise of America's private sector" because the "government cannot effectively fight this war against terrorism without their support."⁸⁶ Thus, Congress enacted the SAFETY Act in recognition "that the private sector cannot realistically step

80. H.R. REP. NO. 107-609(I), at 118.

81. *Id.*

82. Levin, *supra* note 36, at 177-78.

83. 148 CONG. REC. H5793-06 (daily ed. July 26, 2002) (statement of Rep. Watts).

84. 148 CONG. REC. S11012-02 (daily ed. Nov. 14, 2002) (statement of Sen. Allen).

85. 148 CONG. REC. S11405-01 (daily ed. Nov. 19, 2002) (statement of Sen. Warner).

86. 148 CONG. REC. S9200-02 (daily ed. Sept. 25, 2002) (statement of Sen. Hatch).

up to help wage [the] fight against terrorism without some reasonable protection from frivolous tort litigation.”⁸⁷

After Congress enacted the SAFETY Act, DHS stated in its final regulations implementing the Act that its purpose is to “provide[] critical incentives for the development and deployment of anti-terrorism technologies by providing liability protections for providers of ‘qualified anti-terrorism technologies.’”⁸⁸ Likewise, the stated purpose of DHS’s accompanying regulations “is to facilitate and promote the development and deployment of anti-terrorism technologies that will save lives.”⁸⁹ With these concerns in mind, DHS has interpreted the SAFETY Act to have a broad scope, especially for applying the government contractor defense.⁹⁰

In sum, the overall legislative purpose generally shows that the SAFETY Act primarily serves to encourage the private security industry to develop and deploy anti-terrorism technologies and services. As the Act’s broad statutory language, the context of its enactment, and its legislative history show, Congress sought to incentivize security providers in this way by both (a) severely limiting potential liability and (b) providing certainty as to the amount of potential liability. Overall, Congress and DHS intended this incentive to apply to a broad scope of conduct.

II. THE SAFETY ACT IN COURT

This section discusses potential difficulties for litigants in arguing SAFETY Act claims. MGM’s lawsuits, the first significant lawsuits to debate the SAFETY Act’s provisions, exposed several requirements about which the Act is unclear. MGM faced several hurdles to have successfully argued that the SAFETY Act limited its liability for the Route 91 Harvest Festival incident. Specifically, MGM likely had to, and future litigants may also have to, face the difficult task in proving that the Secretary of Homeland Security has determined that an incident, such as the Route 91 Harvest Festival incident, was an act of terrorism and that a qualified seller’s use of anti-terrorism technology was the proximate cause of the victims’ injuries. After considering the SAFETY Act’s provisions and purpose, this section outlines potential methods for litigants and courts to resolve these issues.

A preliminary step in this analysis is to consider if and how the DHS regulations apply to claims under the SAFETY Act. DHS’s interpretation

87. 148 CONG. REC. S9200-02 (daily ed. Sept. 25, 2002) (statement of Sen. Hatch).

88. Regulations Implementing the SAFETY Act, 71 Fed. Reg. at 33,147 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25 *et seq.*).

89. *Id.*

90. *Id.* at 33,150 (noting “the Act and the legislative history make clear that the scope is broad”).

may not necessarily bind courts, but district courts would presumably provide that interpretation much deference.⁹¹ Still, even assuming courts will defer to DHS's regulations, a litigant must show its claims satisfy several SAFETY Act requirements. These requirements include (1) showing that an incident, such as the Route 91 Harvest Festival incident, was an "act of terrorism"; (2) showing that the Secretary of Homeland Security has the sole authority to determine whether incidents were acts of terrorism; and (3) showing that the Secretary did so in that instance. This note expands upon these issues in greater detail in the sections that follow.

A. Protections for Different Parties under the SAFETY Act

The first issue litigants, such as MGM (and the Mandalay Bay Resort), must address is whether that litigant is a "seller." This presents a difficult argument for plaintiffs in circumstances similar to the Route 91 Harvest Festival litigation—where MGM contracted with a security provider and did not provide the security services itself. While it may be arguable in such a case that a party similar to MGM has "otherwise provide[d] Qualified Anti-Terrorism Technology to any customer(s)"⁹² by contracting with a security provider, the security contractor, not MGM, actually had the qualified anti-terrorism technology certified by DHS in this scenario.⁹³ Still, the DHS regulations do include an exception that the designation and/or certification requirement applies "unless the context requires otherwise."⁹⁴ There is no apparent legislative history or administrative guidance on exactly what circumstances could give rise to this exception. However, a plaintiff like MGM must argue that the incident (e.g., the Route 91 Harvest Festival incident) falls within this exception. Although both the statutory language and legislative history generally indicate a broad scope for the SAFETY Act, the primary purpose of the Act, as explained in detail above, is to provide incentives and liability protection for private security companies, not necessarily hospitality or entertainment companies who hire private security companies. And so, potential plaintiffs (like MGM) face a steep hurdle in showing it is a "seller" for purposes of the Act.

But the analysis does not stop there. Even if a party like MGM is not a "seller"—the intended beneficiary of the SAFETY Act's protections—it could still have significant liability protections if the victims' claims fall

91. Littlejohn & McLaughlin, *supra* note 21, at 40.

92. 6 U.S.C. § 443(a)(1) (2018); *see also* 6 C.F.R. § 25.2 (2018).

93. *See* Complaint for Declaratory Relief, *supra* note 1, at 2–3.

94. 6 C.F.R. § 25.2.

under the SAFETY Act. Under the DHS regulations, plaintiffs can bring claims for SAFETY Act violations only against the seller.⁹⁵ That is, a potential plaintiff like MGM may still be successful so long as (1) the Secretary of Homeland Security first determines that the incident was an act of terrorism, and (2) the security contractor's use of qualified anti-terrorism technology was the proximate cause of the victims' injuries. Yet these can be significant obstacles for some plaintiffs, such as MGM, to overcome.⁹⁶

B. Defining an Act of Terrorism

The litigation following the Route 91 Harvest Festival incident exposed potential difficulties in determining whether an incident was an "act of terrorism" under the SAFETY Act—even if the circumstances surrounding that incident were somewhat unique. Among the most significant issues for MGM to have been successful (had the court addressed the merits of MGM's claims) was whether the Route 91 Harvest Festival incident was an act of terrorism under the SAFETY Act. The definition of "an act of terrorism" is somewhat vague when applied in this context. The Act also requires the Secretary of Homeland Security to have first determined that the incident was an act of terrorism. Accordingly, future litigation may need to address (a) whether the Secretary of Homeland Security has the sole authority to determine what incidents are acts of terrorism, and (b) how to determine whether the Secretary has done so. This note discusses issues relating to the Secretary's determination in later sections and focuses this section on the Act's other requirements for an act of terrorism: the act is unlawful; harms people, property, or an entity in the U.S.; and uses or attempts to use weapons designed to cause mass destruction.

1. Statutory Definition

Regardless of whether the Secretary ever determined that the Route 91 Harvest Festival was an act of terrorism, the statutory meaning of an act of

95. *Id.* § 25.7(d).

96. Some commentators have speculated that the SAFETY Act may not actually be limited to acts of terrorism. See Littlejohn & McLaughlin, *supra* note 21, at 40 (noting the broad statutory language in § 442(a)(1) includes claims "arising out of, relating to, or resulting from an act of terrorism"). Due to how rarely the SAFETY Act has ever been involved in litigation, courts have never directly addressed this issue. See *Ivyport Logistical Servs., Inc. v. Caribbean Airport Facilities, Inc.*, 502 F. Supp. 2d 227, 230 (D.P.R. 2007) (stating merely that the SAFETY Act does not apply because "it is limited to specific types of claims arising out of, relating to, or resulting from an act of terrorism.") (internal quotation marks omitted). Still, it is likely courts will read 6 U.S.C. § 442(a)(1) consistently with DHS's interpretation under 6 C.F.R. § 25.7 as requiring an act of terrorism to occur for SAFETY Act protections to apply. In its ordinary meaning, a claim cannot arise out of, relate to, or result from an act of terrorism if there is no act of terrorism in the first place.

terrorism is so broad that it may include that incident. Paddock's attack was clearly unlawful and caused harm to people in the United States. And although the Act does not precisely define "mass destruction,"⁹⁷ it is hardly debatable that Paddock used weapons "designed or intended to cause mass destruction, injury or other loss" to U.S. citizens.⁹⁸ Paddock fired upon an open crowd, killing fifty-eight people and injuring approximately 500 others.⁹⁹ Looking at this statutory text alone, this incident may fit within the general parameters of an act of terrorism (assuming that the Secretary of Homeland Security determined this incident was an act of terrorism).

2. Comparison to Other Statutory Definitions

In future litigation involving the SAFETY Act, courts may consider guidance beyond the statutory text. This analysis, however, becomes more complicated if, considering how MGM's lawsuits were the first notable cases involving the SAFETY Act, courts look to similar statutes for guidance. Generally, other definitions in the federal code for terms similar to "act of terrorism" require the actor to have had a political motivation. For instance, under the Homeland Security Act generally, "terrorism" means any unlawful activity that (a) "is dangerous to human life or potentially destructive of critical infrastructure or key resources" and (b) "appears 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 kidnaping."¹⁰⁰ And federal criminal laws define "domestic terrorism" as an illegal act occurring "primarily within the territorial jurisdiction of the United States" that is "dangerous to human life" and that meets the exact same intent requirement as the Homeland Security Act's definition of "terrorism."¹⁰¹

Likewise, "terrorism," as it applies to the State Department's annual country reports on terrorism, means "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."¹⁰² In similar vein, other immigration laws applying to inadmissible aliens define "terrorist activity," in relevant part, as any illegal activity that involves certain enumerated offenses, such as a "violent attack

97. Another section of the Homeland Security chapter of the federal code defines "mass killings" as "3 or more killings in a single incident." 6 U.S.C. § 455(d)(2)(A) (2018).

98. 6 U.S.C. § 444(2)(B) (2018).

99. Complaint for Declaratory Relief, *supra* note 1, at 5.

100. 6 U.S.C. § 101(18) (2018).

101. 18 U.S.C. § 2331(5) (2018).

102. 22 U.S.C. § 2656f(d)(2) (2018).

upon an internationally protected person,” “[a]n assassination,” or “seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.”¹⁰³

Overall, if a court were to construe the definition of “act of terrorism” like these other provisions, then the Route 91 Harvest Festival incident may not have fit this definition. Law enforcement agencies investigating the incident apparently have not found any motivation, let alone a political motivation, behind Paddock’s acts.¹⁰⁴

Yet the SAFETY Act is different. The Act includes a broad definition of “act of terrorism.” And noticeably absent from this statute is any requirement relating to the actor’s intent. Given how courts are often resistant to consider legislative silence when other statutes include certain provisions,¹⁰⁵ this silence may indicate that an “act of terrorism” under the SAFETY Act can apply to a broad category of conduct within the Secretary of Homeland Security’s discretion even if a particular incident would not necessarily be an act of terrorism under other statutes that require a political motivation. Because the Act serves to shield security providers from potentially massive liability, not requiring a political motivation and instead allowing a broad scope of coverage is arguably consistent with the Act’s purpose. Thus, numerous incidents, such as the Route 91 Harvest Festival incident, may fall within the SAFETY Act’s meaning of “act of terrorism.” However, this is true only if the Secretary of Homeland Security first determines that the incident was an act of terrorism.

C. Authority to Determine Acts of Terrorism

Even if an incident like the Route 91 Harvest Festival incident fit within the general definition of an “act of terrorism,” the SAFETY Act still requires that the Secretary of Homeland Security first determines that the incident meets the statutory definition. This note explores two issues that future litigation likely must address in resolving SAFETY Act claims: (1) whether the Secretary of Homeland Security has the sole authority to de-

103. 8 U.S.C. § 1182(a)(3)(B)(iii) (2018).

104. Vanessa Romo, *Police End Las Vegas Shooting Investigation; No Motive Found*, NPR (Aug. 3, 2018), <https://www.npr.org/2018/08/03/635507299/las-vegas-shooting-investigation-closed-no-motive-found> [<https://perma.cc/R6JN-SY6S>].

105. *Cf. Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (“We have said that ‘[d]rawing meaning from silence is particularly inappropriate’ where ‘Congress has shown that it knows how to direct sentencing practices in express terms.’”) (internal citations omitted).

termine whether incidents are acts of terrorism, and (2) whether the Secretary of Homeland Security has actually done so. Although the Secretary appears to have sole authority to determine what are acts of terrorism under the SAFETY Act, the litigation following the Route 91 Harvest Festival highlights the difficulties in determining whether the Secretary has made this determination.

1. The Secretary's SAFETY Act Authority

Future lawsuits may need to address whether the Secretary of Homeland Security has the sole authority to determine what incidents are acts of terrorism.¹⁰⁶ Some of the victims of the Route 91 Harvest Festival incident argued that the Secretary of Homeland Security has the exclusive authority to determine whether incidents are acts of terrorism and that courts may not even make or review this determination.¹⁰⁷ On its face, the SAFETY Act supports this view. After all, the phrase, "act of terrorism," means "any act that the Secretary [of Homeland Security] determines meets the requirements under subparagraph (B), as such requirements are further defined and specified by the Secretary."¹⁰⁸ And the Act also states that "[t]he Secretary [of Homeland Security] shall be responsible for the administration of this part."¹⁰⁹ DHS interprets the Secretary's authority on this matter to be exclusive, allowing the Secretary of Homeland Security to delegate to the Under Secretary for Science and Technology "[a]ll of the Secretary's responsibilities, powers, and functions under the SAFETY Act, *except the authority to declare that an act is an Act of Terrorism.*"¹¹⁰ At a minimum, the SAFETY Act and the DHS regulations confer broad discretion to the Secretary of Homeland Security. At a maximum, these provisions confer exclusive authority to the Secretary. These provisions, however, suggest the Secretary has exclusive authority.

The legislative context and purpose also suggest that the Secretary of Homeland Security having sole authority to declare acts of terrorism may be desirable. Congress and DHS sought to encourage private security companies to combat terrorism by providing broad liability protections and certainty to the extent of potential liability for future incidents. The Secretary having sole authority to determine what incidents invoke the Act's

106. See Littlejohn & McLaughlin, *supra* note 21, at 40 (outlining possible issues to litigate generally under the SAFETY Act).

107. Plaintiff's Motion for Remand at 10, Sheppard v. Mandalay Bay, LLC, No. 2:18-cv-01120, 2018 WL 3738838 (D. Nev. 2018).

108. 6 U.S.C. § 444(2)(A) (2018).

109. *Id.* § 441(a).

110. 6 CFR § 25.3 (2018) (emphasis added).

protection gives private security providers more certainty as to whether they would be liable for incidents. Under this interpretation, security providers do not have to monitor whether one of numerous officers or entities declares an incident to be an act of terrorism.

2. Comparison to Other Statutory Authorities

The issue becomes murkier after considering how other statutes delegate similar authority in other situations. One example is the Terrorism Risk Insurance Act of 2002 (TRIA),¹¹¹ a congressional effort around the same time as the SAFETY Act to limit insurance claims related to terrorist incidents. As with the SAFETY Act, TRIA gives the Secretary of the Treasury the power to certify acts of terrorism.¹¹² Unlike in the SAFETY Act, TRIA states that the Secretary of the Treasury must certify acts of terrorism “in concurrence with the Secretary of State, and the Attorney General of the United States.”¹¹³ But provisions in TRIA—that are not in the SAFETY Act—also clearly establish that the Secretary of the Treasury’s authority to certify acts of terrorism is final. The Secretary of the Treasury’s determination to certify or not certify an act of terrorism “shall be final, and shall not be subject to judicial review.”¹¹⁴ Under TRIA, the Secretary of the Treasury also “may not delegate or designate to any other officer, employee, or person, any determination” of whether an act of terrorism has occurred.¹¹⁵

In similar vein, where Congress has intended to allow for congressional or judicial review of similar declarations, the statutory text clearly indicates that ability for review. For instance, the Secretary of State may designate foreign terrorist organizations “in consultation with the Secretary of the Treasury and the Attorney General.”¹¹⁶ But, under clear statutory language, “Congress, by an Act of Congress, may block or revoke a designation[.]”¹¹⁷ Likewise, the precise scope and extent of judicial review allowed is also expressly stated.¹¹⁸

Yet to be successful, future litigants may face a difficult hurdle. Those litigants likely must show that the SAFETY Act’s text is vague and that these outside provisions overcome the Act’s statutory language. To do so, a

111. Pub. L. No. 107-297, 116 Stat 2322 (2002).

112. *Id.* § 102(1)(A).

113. *Id.*

114. *Id.* § 102(1)(C).

115. *Id.* § 102(1)(D).

116. 8 U.S.C. § 1189(d)(4) (2018).

117. *Id.* § 1189(a)(5).

118. *Id.* § 1189(c).

litigant will likely have to argue the differences in how the SAFETY Act delegates the power to determine an incident is an act of terrorism and how similar statutes, such as TRIA, delegate similar power suggest that the Secretary of Homeland Security does not have exclusive authority in declaring acts of terrorism. But the SAFETY Act does not state that the Secretary must consult with other officials, as TRIA does. Similarly, the absence of any provisions allowing for or defining the scope of outside review may also suggest that Congress did not allow for review of the Secretary's determinations. And most significantly, the statutory meaning of "act of terrorism" requires the Secretary to first determine that the incident meets the statutory requirements. If a future litigant—in a situation as uncertain as the Route 91 Harvest Festival incident was—is to be successful on the merits, these issues can be significant barriers to overcome.

D. Process for Determining Whether an Act is an Act of Terrorism

Even if the SAFETY Act delegates sole authority to the Secretary of Homeland Security to declare acts of terrorism, future lawsuits will likely need to address whether the Secretary has actually declared the incident to be one. The Act currently is not clear about how the Secretary may do this. Neither the Act nor the DHS regulations define how "the Secretary determines" an incident is an act of terrorism¹¹⁹ or what qualifies as the Secretary "determin[ing] [a particular incident] to have met the . . . requirements" of the Act.¹²⁰ Additionally, neither DHS's general website¹²¹ nor DHS's website for the SAFETY Act¹²² further define this process. And a careful review of both websites reveals no official statement or instance where DHS has ever explicitly stated whether any other incident is or is not an act of terrorism invoking SAFETY Act protections.

As a result, courts may look to the plain meaning of the statutory language for guidance. On its face, all the SAFETY Act requires is for the Secretary of Homeland Security to determine, rather than designate or certify, an incident to be an act of terrorism. In its ordinary meaning, "determination" means "[t]he act of deciding something officially; esp., a final decision by a court or administrative agency."¹²³ Likewise, "determine" means, in relevant part, "to fix conclusively or authoritatively" or "to come

119. 6 U.S.C. § 444(2)(A) (2018).

120. 6 C.F.R. § 25.2 (2018).

121. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/> [<http://perma.cc/Z5B2-6MLH>].

122. DEP'T OF HOMELAND SECURITY SAFETY ACT, *supra* note 20.

123. *Determination*, BLACK'S LAW DICTIONARY (10th ed. 2014).

to a decision.”¹²⁴ The definitions do imply some affirmative act on the part of the Secretary of Homeland Security is required; however, they still offer little guidance on this issue. Through comparison to other statutory schemes, it appears the SAFETY Act requires a relatively informal process for the Secretary to make a determination. However, there is still a need for Congress or the courts to clarify how potential litigants can know the Secretary has done so—and the Route 91 Harvest Festival litigation outlines this issue of potential uncertainty.

1. Comparison to Other Statutory Schemes

To determine how the Secretary of Homeland Security officially determines that an incident is an act of terrorism, courts may again compare the SAFETY Act to other similar statutory schemes. For example, the Public Readiness and Emergency Preparedness Act of 2005 (PREP Act)¹²⁵ is informative primarily because it was based on the SAFETY Act.¹²⁶ The PREP Act provides a specific process and time for the Secretary of Health and Human Services to declare that a disease or health condition is a public health emergency.¹²⁷ The Secretary of Health and Human Services “may make a declaration, through publication in the Federal Register, recommending, under conditions as the Secretary may specify, the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures, and stating that” the PREP Act’s liability protections apply.¹²⁸ This declaration must contain certain contents, such as stating the specific health risks included and how long the declaration is in place.¹²⁹

Under another similar statutory scheme, the Secretary of State may designate foreign terrorist organizations under a statutorily defined procedure.¹³⁰ To do so, the Secretary of State must first notify certain congressional leaders in writing that the Secretary of State intends to designate an organization as a foreign terrorist organization and then publish the designation in the Federal Register seven days later.¹³¹ Both the Secretary of Health and Human Services and the Secretary of State have statutory au-

124. *Determine*, MERRIAM-WEBSTER ONLINE DICTIONARY (2019), <https://www.merriam-webster.com/dictionary/determine> [<https://perma.cc/CEK3-9HFU>].

125. 42 U.S.C. § 247d-6d (2018).

126. See Harter, *supra* note 69, at 23.

127. 42 U.S.C. § 247d-6d(b).

128. *Id.* § 247d-6d(b)(1).

129. *Id.* § 247d-6d(b)(2).

130. 8 U.S.C. § 1189(a)(2) (2018).

131. *Id.*

thority to designate public safety threats through formal and statutorily defined processes. These provisions may suggest that Congress typically intends for this type of designation to be through a formal process, such as publication in the Federal Register.

But yet again, the SAFETY Act does not include this sort of formal process for the Secretary of Homeland Security to determine that incidents are acts of terrorism. This silence may lead courts to conclude that Congress did not intend for a formal process under the SAFETY Act. A court may conclude that any absence of this language was intentional.¹³² The SAFETY Act's text suggests so; the Act uses the term, "determine," instead of "designate" or "certify," as the other statutes do. Still, it would make little sense if the Secretary of Homeland Security could "determine" that an act is an "act of terrorism" without some sort of official statement—even if this is done through a slightly more informal process than publishing in the Federal Register. Thus, while the Secretary of Homeland Security may not need to publish this determination in the Federal Register, the Secretary still needs to somehow notify the public that an incident is an "act of terrorism."¹³³ However courts may eventually resolve this issue, it can be difficult for potential litigants to determine whether an incident was an act of terrorism under the SAFETY Act; the Route 91 Harvest Festival litigation is an example of such an instance—even if the circumstances surrounding that particular incident were somewhat unique.

2. The Route 91 Harvest Festival Incident as an Act of Terrorism

The Route 91 Harvest Festival litigation helps expose the uncertainty for potential litigants to determine whether the SAFETY Act applies to a specific incident when the Act does not clearly define *how* the Secretary of Homeland Security officially determines that an incident was an act of terrorism. In that instance, MGM relied on four sources to argue that the Secretary made this determination: (1) the acting Secretary of Homeland

132. Cf. *Dean v. United States*, 137 S. Ct. 1170, 1177 ("We have said that '[d]rawing meaning from silence is particularly inappropriate' where 'Congress has shown that it knows how to direct sentencing practices in express terms.'") (internal citations omitted).

133. Because the legislative intent behind the SAFETY Act includes providing certainty and limits to security providers' liability for terrorist incidents, this litigation outlines an issue for the legislature to consider in amending the SAFETY Act and fulfilling its statutory purpose. As a threshold matter, the SAFETY Act could reasonably require this determination to be in writing on DHS's website, as DHS often issues statements on incidents this way. See, e.g., Dep't of Homeland Security, *Statement By The Acting Press Secretary On Apparent Act Of Terrorism* (Oct. 31, 2017), <https://www.dhs.gov/news/2017/10/31/statement-acting-press-secretary-apparent-act-terrorism> [<https://perma.cc/XVS2-MUGE>] (noting DHS is aware of a particular incident and describing that incident as an "apparent act of terrorism").

Security's November 30, 2017, congressional testimony; (2) a May 2018 DHS release; (3) the Secretary of Homeland Security's May 15, 2018, congressional testimony; and (4) a June 4, 2018, DHS announcement.¹³⁴ Whatever communications qualify as the Secretary's "determination," it would be problematic for this type of evidence to be sufficient.

MGM's first source of the Secretary's "determination" was the acting Secretary of Homeland Security's November 30, 2017, congressional testimony. In this testimony, the acting Secretary stated that "terrorists and other violent criminals are placing significant emphasis on attacking soft targets. We have seen this with recent tragedies in Nevada, New York, and Texas."¹³⁵ Those tragedies refer to the Route 91 Harvest Festival incident, the October 31, 2017, incident in New York City where an ISIS-inspired driver ran over victims, and the November 5, 2017, shooting at a church in Texas, respectively. There was nothing, however, in the acting Secretary's statement stating that she ever determined that these "tragedies" were acts of terrorism.¹³⁶ The acting Secretary may have concluded that acts involving "terrorist and other violent criminals" were not necessarily acts of terrorism for purposes of the SAFETY Act. Particularly, "tragedies" and "terrorist[s] and other violent criminals" are generalized terms that stray from the Act's terminology. Even with the Act's broad scope, the Act still draws a line at incidents that the Secretary of Homeland Security determines to be acts of terrorism. It could prove problematic if remarks like this are sufficient to trigger SAFETY Act liability protections. For example, potential litigants may then have to consider all of the Secretary of Homeland Security's public statements to know whether the SAFETY Act bars any claims.

MGM's second source, DHS's May 2018 release, raised similar concerns. The release mentioned that "the U.S. has experienced mass shootings in . . . a concert" but did not explicitly mention the Route 91 Harvest Festival incident or state that the Secretary determined it was an act of terrorism

134. Plaintiff's Motion for Remand, *supra* note 107, at 10–11; *see also* Complaint for Declaratory Relief, *supra* note 1, at 53–54.

135. Dep't of Homeland Security, *Written testimony of DHS Acting Secretary Elaine Duke for a House Committee on Homeland Security Hearing Titled "World Wide Threats: Keeping America Secure in the New Age of Terror"* (Nov. 30, 2017), <https://www.dhs.gov/news/2017/11/30/written-testimony-dhs-acting-secretary-elaine-duke-house-committee-homeland-security> [<https://perma.cc/H2LV-MJVK>].

136. A DHS statement on the New York incident did label it an "apparent act of terrorism" but did not state that the acting Secretary ever determined the incident actually was an "act of terrorism" under the SAFETY Act. Dep't of Homeland Security, *supra* note 133. There is no statement on DHS's website regarding the Texas incident.

as opposed to a “mass shooting.”¹³⁷ As with the acting Secretary’s congressional testimony, if this release was sufficient to prove a “determination,” it could similarly create uncertainty as to whether other incidents prompt SAFETY Act protections.

Likewise, the other sources MGM cited did not mention the Route 91 Harvest Festival incident. The Secretary of Homeland Security’s May 15, 2018, congressional testimony mentioned that DHS is “seeking to ramp up ‘soft target’ security efforts” to “address threats to soft targets – including . . . entertainment venues, major events, and public spaces” but not that the incident was an “act of terrorism.”¹³⁸ And DHS’s June 4, 2018, announcement merely mentioned that because of “the increased emphasis by terrorists and other extremist actors to leverage less sophisticated methods to inflict harm in public areas, it is vital that the public and private sectors collaborate to enhance security of locations such as . . . special event venues, and similar facilities.”¹³⁹ Overall, none of these sources plainly showed that the Secretary of Homeland Security ever determined that the Route 91 Harvest Festival incident was an act of terrorism.

There was also significant evidence weighing against MGM’s claim. First, at the time of this note’s publication, there was a disclaimer on DHS’s SAFETY Act website directly stating that the Secretary of Homeland Security has never determined the Route 91 Harvest Festival incident to be an act of terrorism (while also noting that DHS was currently reviewing the matter).¹⁴⁰ Also, DHS issued an initial statement on the incident,

137. Dep’t of Homeland Security, *U.S. Department of Homeland Security Soft Targets and Crowded Places Security Plan Overview* (May 2018), https://www.dhs.gov/sites/default/files/publications/DHS-Soft-Target-Crowded-Place-Security-Plan-Overview-052018-508_0.pdf [https://perma.cc/P2S9-U6Q4].

138. Dep’t of Homeland Security, *Written testimony of DHS Secretary Kirstjen Nielsen for a Senate Committee on Homeland Security and Governmental Affairs Hearing Titled “Authorities and Resources Needed to Protect and Secure the United States”* (May 15, 2018), <https://www.dhs.gov/news/2018/05/15/written-testimony-dhs-secretary-nielsen-senate-committee-homeland-security-and> [https://perma.cc/YC2E-ABMR].

139. *Securing Soft Targets and Crowded Places*, DEP’T HOMELAND SECURITY (Feb. 15, 2019), <https://www.dhs.gov/securing-soft-targets-and-crowded-places> [http://perma.cc/SN72-MQ4F].

140. DEP’T OF HOMELAND SECURITY SAFETY ACT, *supra* note 20. The statement read as follows: Route 91 Harvest Festival Mass Shooting Incident - October 1, 2017 : According to recent court filings, entities involved in litigation relating to the Route 91 Harvest Festival mass shooting incident have cited the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, 6 U.S.C. §§ 441-444 (the “SAFETY Act”). The SAFETY Act provides liability protections relating to the deployment of “qualified anti-terrorism technologies” in defense against, response to, or recovery from an “act of terrorism.” Pursuant to 6 U.S.C. § 444(2), the Secretary of Homeland Security possesses the authority to determine whether an act was an “act of terrorism” for purposes of the SAFETY Act. To date, the Secretary of Homeland Security has not made any such determination regarding the Route 91 Harvest Festival mass shooting incident. The matter is currently under review within the Department of Homeland Security.

referred to there as a “horrific shooting” and a “tragedy” but did not indicate that the Secretary determined that the incident was an act of terrorism.¹⁴¹ At the time of this note’s publication, DHS’s website did not include any follow-up statement indicating otherwise.

In sum, because the SAFETY Act lacks a defined method for the Secretary of Homeland Security to officially determine whether an incident was an act of terrorism, there can be much uncertainty whether the SAFETY Act applies to a specific incident. As a result, both litigants and courts may have a more difficult time resolving SAFETY Act claims when it is unclear whether or not the Secretary has made a determination. The Route 91 Harvest Festival litigation exemplifies this possibility, even if it followed somewhat unique circumstances. In that instance, none of MGM’s proffered statements directly showed that the Secretary of Homeland Security ever determined that the Route 91 Harvest Festival incident was an act of terrorism. Even if the acting Secretary’s comments acknowledged that the incident could have been an act of terrorism and even if Congress did not intend a formal process to do so (as Congress did with other statutes), these comments were likely too informal to have indicated an official determination. On the other hand, if MGM’s proffered evidence was sufficient to show that the Secretary made a determination under the Act, such a low threshold could heighten uncertainty as to whether an incident triggers the SAFETY Act’s liability protections. More importantly, however, this litigation shows the difficulties that potential litigants may face in determining whether the Secretary of Homeland Security has determined that an incident was an act of terrorism for purposes of the Act.

E. Proximate Cause of Victims’ Injuries

In addition to addressing those issues outlined above, plaintiffs raising a SAFETY Act claim must show that the “seller’s” conduct proximately caused the victims’ injuries. MGM, for example, would have had to prove that its security contractor—the seller of the qualified anti-terrorism technology at the Route 91 Harvest Festival—proximately caused the victims’ injuries to be successful on the merits of its claim. The exclusive federal cause of action for “claims arising out of, relating to, or resulting from an act of terrorism,” as determined by the Secretary of Homeland Security, applies “only for claims for injuries that are proximately caused by sellers”

Id.

141. Dep’t of Homeland Security, *DHS Statement on Las Vegas Shooting* (Oct. 2, 2017), <https://www.dhs.gov/news/2017/10/02/dhs-statement-las-vegas-shooting> [http://perma.cc/UKT4-M4JU].

of qualified anti-terrorism technology.¹⁴² While MGM's lawsuit does not highlight any novel questions to litigate under this requirement, it is still important to mention the proximate cause requirement since other potential SAFETY Act claims must also address the issue.

Although this note does not attempt to resolve this issue, MGM's argument appears to have been quite a gamble. MGM argued that the victims' claims "implicate[d] security at the concert, including training, emergency response, evacuation and adequacy of egress" and "may [have] . . . result[ed] in loss to . . . the 'Seller[.]'"¹⁴³ Paddock's attack was also directed at concert-goers, and the security contractor was presumably also trying to protect against a similar attack from occurring within the festival grounds by screening concert-goers. However, Paddock fired upon the crowd from a room at the Mandalay Bay Resort, not from the Route 91 Harvest Festival grounds (where the security contractor screened concert-goers).¹⁴⁴ One likely issue with MGM's argument was that the victims never implicated the security contractor in this incident. The victims did not have claims against the security contractor and, thus, never argued that their claims were for injuries proximately caused by the "seller."¹⁴⁵ How this issue would have been resolved is beyond the scope of this note. However, future potential litigants should not overlook this proximate cause element; it may create more issues when raising a claim under the SAFETY Act, such as in the case of the Route 91 Harvest Festival litigation.

III. NEW CONSIDERATIONS FOR THE SAFETY ACT

Regardless of how courts may resolve claims such as the Route 91 Harvest Festival litigation, those lawsuits highlight concerns for applying the SAFETY Act. This litigation was the first time that the SAFETY Act has been the focus of such controversial litigation. And a review of DHS's and the SAFETY Act's websites show that DHS has never clearly stated that the SAFETY Act has ever applied to any incidents. Thus, one may assume that Congress has overlooked the Act's provisions since its enactment. But since then, the SAFETY Act has mostly benefited from strong bipartisan support¹⁴⁶ even though the Act was originally criticized in both

142. 6 U.S.C. § 442(a)(1) (2018).

143. Complaint for Declaratory Relief, *supra* note 1, at 47.

144. Plaintiff's Motion for Remand, *supra* note 107, at 14–15.

145. *Id.* at 11.

146. Taylor, *supra* note 62, at 1639 (citing subsequent bipartisan efforts by Congress to direct DHS to streamline the SAFETY Act).

the House and Senate as being potentially overreaching and protecting security companies no matter how culpable they may act.¹⁴⁷ There have also been recent efforts to broaden the SAFETY Act by clearly making it applicable to cybersecurity threats (even if Congress has not yet given significant attention those potential amendments).¹⁴⁸

Still, MGM's lawsuits show a need to address issues in applying the SAFETY Act because Congress can now consider how the Act may apply to incidents that have occurred since the September 11th attacks. This litigation not only offers a chance to revisit the SAFETY Act as a whole, but also provides Congress a chance to clarify uncertainties under the Act that these lawsuits expose.

A. Revisiting the SAFETY Act's Purpose

The liability protections under the SAFETY Act are generally still desirable in the years since the September 11th attacks. The Act creates enormous incentives for the private sector to improve safety and security standards—a goal still desirable today. Allowing certain technology and services to be designated or certified still enhances competition between security companies and may create new industry standards based on designated and certified technologies.¹⁴⁹ These benefits extend beyond incidents falling under the Act's scope since these security products and practices are still employed in circumstances outside of acts of terrorism.

And alternatives to the SAFETY Act may be less desirable. For example, one alternative would be for Congress to replace the Act with a scheme for the federal government to indemnify otherwise qualifying sellers under the Act.¹⁵⁰ However, as one commentator has noted, an indemnification scheme would also expose taxpayer funds to the same uncertainty and risk of liability that the SAFETY Act serves to limit.¹⁵¹ Likewise, relying on victim compensation funds could also be inefficient in serving the SAFETY Act's purpose. Because Congress sought to afford security providers certainty and protection for potential liability in terrorist incidents, security providers would not benefit from the same certainty in the amount of their potential liability if they must constantly rely on the

147. H.R. REP. NO. 107-609(I), at 221–22 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1352, 1419; *see also* Levin, *supra* note 35, at 178.

148. *See* Cyber SAFETY Act of 2018, S. 2392, 115th Cong. (2nd Sess. 2018).

149. Harter, *supra* note 69, at 15.

150. *See* H.R. REP. NO. 107-609(I), at 222.

151. *See* Levin, *supra* note 36, at 204.

federal government to establish victim compensation funds for each possible act of terrorism.

B. Redefining Acts of Terrorism

The MGM lawsuits provide an opportunity for Congress to strengthen the SAFETY Act by precisely defining its scope and application. Specifically, MGM's lawsuits expose new, perhaps even overlooked, issues in applying the SAFETY Act for Congress to consider resolving.

First, the SAFETY Act provides a broad, yet still somewhat vague, meaning of "act of terrorism." As explained in detail above, the Act's text does not require a political intent behind an act of terrorism, as other statutes require. There is also no definition within the Act for "mass destruction." This somewhat vague definition vests wide discretion in the Secretary of Homeland Security to determine what incidents invoke SAFETY Act protections. MGM's lawsuits also expose how a potentially overbroad definition may afford liability protections for incidents that would not qualify as acts of terrorism under other statutes. For example, if the Secretary of Homeland Security determined that the Route 91 Harvest Festival incident was an act of terrorism for purposes of the Act, the incident may clearly qualify for SAFETY Act protections despite the shooter having no political motivation for the incident. This example exposes how the Act's primary purpose is to protect security providers beyond those terrorist incidents, such as the September 11th attacks, which Congress clearly considered when enacting the SAFETY Act.¹⁵²

Yet these uncertainties arguably should not result in significant changes to the statutory definition of "act of terrorism." Affording the Secretary discretion in determining which incidents fall under the SAFETY Act allows the Act to adapt to evolving threats. MGM's lawsuits merely expose how the SAFETY Act's liability protections can be far-reaching.

C. Providing Certainty to when the SAFETY Act Applies

Another problem MGM's lawsuits expose is whether the SAFETY Act grants the Secretary of Homeland Security the sole discretion to deter-

152. Although the September 11th attacks were the primary motivation behind the SAFETY Act, other incidents since then have been much more controversial in whether they are designated as terrorist acts or not—often drawing divisions along partisan lines. The SAFETY Act, however, provides finality as to whether or not an incident is an act of terrorism, invoking liability protections for security providers. But the SAFETY Act only provides this certainty if DHS issues a clear statement on whether or not the Secretary of Homeland Security has determined that a particular incident is or is not an act of terrorism under the statute.

mine whether an incident is an act of terrorism. Because the legislative purpose of the Act is to encourage security innovation by affording security providers certainty in their potential liabilities, a clear way to provide certainty is for the Secretary to expressly have the sole authority to make these determinations. Even though courts may address this issue through future litigation, the Act could benefit, as other statutes do, by expressly stating whether the Secretary has the sole authority in this area.

But more importantly, there is ambiguity in how the Secretary of Homeland Security actually determines whether an incident is an act of terrorism under the Act.¹⁵³ There is no defined method under the Act for security providers or potential plaintiffs to know whether the Secretary of Homeland Security ever makes this determination. Differences between the SAFETY Act and other statutory schemes suggests that Congress intended a unique process under the Act. And because there have never been any statements from DHS that any other incident was or was not an act of terrorism under the Act, it is unclear whether the SAFETY Act has ever explicitly applied to any incident. This gap raises potentially significant issues.

Most obviously, security providers and potential plaintiffs may not know whether certain claims are barred under the SAFETY Act until plaintiffs raise their claims in court. This possibility directly contradicts the Act's purpose to afford security providers certainty that they will not be sued after terrorist incidents.

And changes in DHS leadership or administrations could also raise uncertainties about whether the Act applies. The Secretary's determinations need to be permanent to truly be consistent with the legislative purpose of providing certainty. But as DHS leadership may change, it might be possible for the outgoing Secretary to make a determination and the incoming Secretary to then change course before the public is aware. MGM's lawsuits highlight this possibility. Assume, for sake of argument, that the acting Secretary determined that the Route 91 Harvest Festival incident was an act of terrorism in her November 30, 2017, congressional testimony (occurring before MGM filed its declaratory judgment lawsuits). Under the current statutory scheme, the current Secretary possibly could have then overridden this determination through the statement on the SAFETY Act's

153. It is possible that DHS notifies security providers with designated or certified technologies when an incident is an act of terrorism. But if the statutory purpose of the SAFETY Act is to prevent these security providers from ever being brought to court for acts of terrorism, then Congress can strengthen the Act by also notifying potential plaintiffs when their claims are or are not barred by the Act.

website. Without a precise process for security providers and the public to know when the Secretary has determined that an incident is or is not an act of terrorism, the SAFETY Act allows uncertainty whether its protections do—or will continue to—apply.

Although these concerns may not be relevant to every possible act of terrorism, this litigation outlines the potential for Congress to strengthen the Act. One possible solution is to require the Secretary of Homeland Security to publish in the Federal Register any decisions about whether incidents were acts of terrorism, as other statutes require. Congress could accompany this solution by requiring the Secretary to issue a statement on either DHS's or the SAFETY Act's website that the Secretary intends to publish this decision in the Federal Register. This solution would provide both immediate notice to security providers and potential plaintiffs, as well as certainty that the Secretary's decision is final and binding.

D. Considering Other Implications of MGM's Lawsuits

It is likely that these lawsuits will result in some judicial clarification on some of these issues. Still, the Act could benefit from precisely defining "act of terrorism" and an exact process for the Secretary of Homeland Security to determine that an incident was an act of terrorism. After all, the Act itself is aimed at providing certainty to security providers.¹⁵⁴ As the context surrounding the SAFETY Act's enactment shows, uncertainty provides security providers a disincentive to provide anti-terrorism measures—an issue the SAFETY Act attempts to resolve.

The outcome of this litigation may also affect how willing DHS is to designate and certify technology and services under the SAFETY Act. If the Act applies to too many incidents and technologies, there is a possibility DHS may become more hesitant to designate and certify technology under the Act. This is significant because DHS has noted how an increase in the number of technologies developed may result in lower average effectiveness against terrorist attacks.¹⁵⁵ Thus, Congress should be mindful that over-applying the SAFETY Act to various security technologies and services could hinder the ultimate goal of public safety.

To that end, however, either DHS or Congress may need to address disparities in designation and certification for different types of industries

154. Potential plaintiffs also benefit from knowing whether or not the SAFETY Act bars their claims completely or limits their potential recovery.

155. Regulations Implementing the SAFETY Act, 71 Fed. Reg. at 33,158 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25 *et seq.*).

and facilities. DHS has recognized that threats are now often directed at various types of public spaces.¹⁵⁶ But hotels and casinos, while often crowded, are often less likely to receive SAFETY Act protections.¹⁵⁷ One possible explanation for this disparity is that security at casinos is often aimed at theft detection instead of anti-terrorism.¹⁵⁸ This may need to be addressed in DHS's designation and certification process. It is also noteworthy, however, that the SAFETY Act is not the only means of encouraging security innovation across all public spaces and that DHS may incentivize different industries to do so by combining the Act's protections with other initiatives.

Still, amending the SAFETY Act to provide more clarity should not be an open invitation to change the Act's core application and scope. The Act benefits from being limited to acts of terrorism. For instance, security providers may deploy qualified technologies for their intended use and protect against incidents similar to acts of terrorism without quite meeting the statutory definition.¹⁵⁹ But the statutory language is broad enough to account for evolving threats while still providing clarity as to when the Act's protections would apply (provided a precise process for the Secretary to determine when incidents are acts of terrorism). While these concerns are not intended to be perfect solutions, MGM's lawsuits show how Congress and DHS can resolve newly revealed issues regarding the SAFETY Act.

CONCLUSION

Congress designed the SAFETY Act to encourage private companies to be innovative in developing security technologies and services by shielding those companies from civil liability for terrorist incidents. In the wake of the September 11th attacks, Congress feared private companies would choose not to develop or provide anti-terrorism security services and products due to the possibility of costly liability following mass terrorist incidents. MGM's lawsuits following the Route 91 Harvest Festival incident highlight problems that litigants must address in lawsuits under the

156. See generally *Securing Soft Targets and Crowded Places*, *supra* note 139.

157. Regina Garcia Cano, *Security for Stadiums, Malls Get U.S. Approval — But Not Hotels*, CHICAGO DAILY LAW BULLETIN (Aug. 27, 2018), https://www.chicagolawbulletin.com/security-for-stadiums-malls-gets-us-approval-but-not-hotels-20180827?utm_source=subscriber&utm_medium=email&utm_campaign=headlines&utm_content=3b-Security+for+stadiums%2c+malls+get+U.S.+approval+%26mdash%3b+but+not+hotels [http://perma.cc/64FH-AKED].

158. *Id.*

159. See Littlejohn & McLaughlin, *supra* note 21, at 40.

SAFETY Act. Among these issues are how the Act defines an “act of terrorism” and how the Secretary of Homeland Security “determines” that an incident is an act of terrorism. Regardless of how courts may resolve these issues, MGM’s lawsuits raise new considerations for Congress to strengthen the SAFETY Act. Primarily, there is a need to statutorily define a precise process for the Secretary of Homeland Security to determine whether an incident is an act of terrorism that gives notice to private security providers and potential plaintiffs. Then, relying on the SAFETY Act may truly be a safer bet.