ORAL ARGUMENT NOT YET SCHEDULED

No. 17-7023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SCHERMERHORN, *ET AL.*,

Plaintiffs-Appellants,

v.

THE STATE OF ISRAEL, *ET AL.*,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
Case No.: 1:16-cv-00049 (Hon. Amy Berman Jackson)

OPENING BRIEF OF APPELLANTS

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Dated: June 5, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule of Appellate Procedure 28(a)(1), Plaintiffs-Appellants David Schermerhorn, *et al.*, respectfully submit to the Court as follows:

I. Parties.

The Parties to the case below, and to this Appeal, are: David Schermerhorn, Mary Ann Wright, Huwaida Arraf, and Margriet Deknopper (all Plaintiffs below and Appellants before this Court); and The State of Israel, and the Israeli Ministries of Defense, Foreign Affairs, Justice, and Public Security (all Defendants below and Appellees before this Court).

Appellants advise the Court that they are natural persons, and that Appellees are a foreign state and four of its agencies. No intervenors or amici have appeared in either court (although the United States, responding to the district court's invitation, filed a Statement of Interest). No party to this case is a corporation, an association, a joint venture, a partnership, a syndicate, or a similar entity.

II. Rulings under Review.

The Complaint below was dismissed by Judge Amy Berman Jackson on motion, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. The opinion of the court below (Joint Appendix, pp. 46-64), and the order dismissing the case (J.A. 65), were both dated January 25, 2017. The opinion may also be found at 2017 WL 384282 (D.D.C. 2017).

III. Related Cases.

Appellants and their counsel are unaware of any related case within the meaning of D.C. Circuit Rule 28(a) currently before this Circuit or any other court.

Respectfully submitted,

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GLOSSARY

The following acronyms and abbreviations are used in this Brief:

AEDPA Antiterrorism and Effective Death Penalty Act

FSIA Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611

IDF Israeli Defense Forces

J.A. Joint Appendix

JASTA Justice Against Sponsors of Terrorism Act

UNCLOS United Nations Convention on the Law of the Sea

UNHRC United Nations Human Rights Council

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OPENING BRIEF OF APPELLANTS

Appellants David Schermerhorn, Mary Ann Wright, Huwaida Arraf, and Margriet Deknopper hereby respectfully submit their Opening Brief on Appeal from the Memorandum Opinion ("the Opinion below") and Order of the United States District Court for the District of Columbia (Hon. Amy Berman Jackson, J.), dated January 17, 2017. *Schermerhorn v. Israel*, No. CV 16-0049 (ABJ), 2017 WL 384282 (D.D.C. 2017); *see* Joint Appendix ("J.A."), pp. 46-64. Appellants allege that they were the victims of torts committed by Appellees and their agents on board a U.S.-flagged vessel on the high seas, and that Appellees are not entitled to immunity from suit.

Statement of Jurisdiction

Appellants – Plaintiffs below – invoked the jurisdiction of the trial court based upon 28 U.S.C. §§ 1330, 1605(a)(5), and 1605A. The court concluded that it did not have subject matter jurisdiction over the action. This Appeal is taken as of right from a final decision of the district court. *See* 28 U.S.C. § 1291.

Statutes

The relevant statutory material codified at 28 U.S.C. §§ 1603, 1605(a)(5), and 1605A – all sections of the Foreign Sovereign Immunities Act ("the FSIA") – is reproduced in the Addendum to this Brief.

Issues Presented for Review

Appellants present the following issues for this Court's review:

1. Whether the "non-commercial tort exception" in the FSIA, 28 U.S.C. § 1605(a)(5), permits civil actions against a foreign sovereign and its agencies and instrumentalities alleging tortious injuries suffered on board a United States-flagged vessel traveling on the high seas?
2. Whether the "terrorism exception" in the FSIA, 28 U.S.C. § 1605A, permits personal injury actions against a foreign sovereign and its agencies and instrumentalities irrespective of whether that state has been designated by the Executive branch as a "state sponsor of terrorism" within 50 U.S.C. App. § 4605(j), 22 U.S.C. § 2371, or 22 U.S.C. § 2780(d)?

Statement of the Case

In general, the presentation of the facts in the Opinion is accurate, although the court below accepted as true certain interpretations of the facts tendered by Appellees, but contested by Appellants.[1] The following brief summary taken from the Complaint is proffered for the Court's convenience.[2]

On May 31, 2010, the Israeli Defense Forces ("the IDF"), agents of Appellees the State of Israel and its Ministries, intercepted and attacked six vessels sailing in international waters in the Mediterranean Sea as part of the Gaza Freedom Flotilla ("the Flotilla"). The vessels were carrying civilian passengers, as well as humanitarian aid and medical supplies intended for delivery to the residents of Gaza. *Challenger I,* sailing under the U.S. flag, was one of the ships boarded by the IDF. Appellants were passengers on *Challenger I.*

Appellants allege that the attack on the high seas was unjustified and illegal under international law. The IDF's operations against *Challenger I* included torture; cruel, inhuman, or degrading treatment; arbitrary arrest and detention; assault and battery; and intentional infliction of emotional distress. IDF violence also resulted in the killing of 10 civilian passengers of American and Turkish nationality on board another vessel in the Flotilla, *Mavi Marmara.* Appellants witnessed the attack on *Mavi Marmara* as it unfolded and escalated.

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[1] *See* pp. 6-8 and n.3, *infra.*

[2] The full Complaint may be found at J.A. 8-28.

A full naval blockade of the Gaza Strip was established by Israel on January 3, 2009. The Gaza Freedom Flotilla was planned by a number of humanitarian organizations, to draw international attention to the situation, to break the blockade, and to deliver humanitarian assistance and supplies. All six vessels in the Flotilla were subject to strict security checks prior to their departures; none had any weapons on board.

Challenger I is owned by Mediterranean Trips, LLC, a Delaware limited liability company. The ship set sail from Crete on May 29, 2010, under the flag of the United States of America, carrying humanitarian aid, including medical equipment and supplies, as well as a large amount of media equipment. At the time of the IDF attack, *Challenger I* was sailing in international waters in the Mediterranean Sea, approximately 70 nautical miles from land, and over 60 miles outside the declared blockade zone. Aboard were 17 individuals, including crew, of American, Israeli, British, Irish, Australian, Dutch, Belgian, and Polish nationalities. They were humanitarian workers, medics, and journalists. All of the passengers and crew of *Challenger I* had undergone training in passive resistance and non-violence techniques, including instructions that, were the IDF to board the ship, there should be no response involving physical force.

The Government of Israel had been aware since February 2010 of the plans for the Flotilla to bring humanitarian relief to Gaza. In mid-April, orders were given by high-level Israeli Government officials to begin preparing an operation to intercept the Flotilla. The Government's plan was approved by the Chief of the Israeli General Staff

on May 13, 2010. Appellee Ministries were all parties to planning, approving, preparing for, ordering, and executing the raid on the Flotilla, and the Government and its Ministry of Defense maintained command and control authority over the operation.

In the May 31, 2010 IDF attack on the Gaza Freedom Flotilla, in addition to the 10 civilian deaths on *Mavi Marmara*, approximately 156 civilians sustained injuries, 52 of them reported to have been serious. Passengers and crews were arbitrarily arrested and detained, and intentionally subjected to emotional distress, even after they tried to surrender. The ships themselves were also damaged. *Challenger I* was seized by the IDF and has never been returned to its American owners.

When it became clear that the IDF intended to seize and board *Challenger I*, it accelerated out of the formation of the Flotilla, and was eventually intercepted by two Israeli boats and one helicopter. At least one stun grenade was launched before the IDF soldiers sought to board *Challenger I*. The grenade exploded in Appellant Schermerhorn's face, leaving him partly blinded in one eye.

'When the IDF soldiers began to board the ship they fired paintballs and rubber bullets directly at the passengers. Appellant Deknopper was shot with a rubber bullet that broke her nose, and another passenger was shot five times. Passengers in the way of the soldiers were forcibly removed.

The soldiers proceeded to detain everyone on board. While attempting to climb to the fly bridge, Appellant Arraf was pulled off the stairs; her head was slammed against the deck, and a soldier then stood on it. She and another passenger were then forced

to kneel with tight handcuffs while hooded for an extended period of time, despite complaining of breathing difficulties. Passengers on the deck, including Appellant Deknopper, were pushed to the floor. A soldier forced a passenger's face into broken glass on the deck and then stood on her head and back.

The passengers offered no resistance when the soldiers entered the bridge. Once the IDF detained all passengers and crew and began to escort *Challenger I* (along with the rest of the Flotilla) to the Israeli port of Ashdod, passengers were assaulted, handcuffed, and forcibly held inside the cabin. They were made to stay in stress positions for the time it took to reach land, and were denied access to toilets and to water and food. Their injuries went unattended despite the presence of an IDF medic on board. All personal property and the ship's entire cargo – including all media equipment and film footage – were confiscated and never returned.

The raid on the Flotilla was illegal in international law. Appellees suggested to the court below that a deeply political coloration to this entire subject matter demonstrates that Appellants' claims lie outside judicial competence, and that the court should have no compunction in leaving Appellants – who, in the vernacular for blaming the victim, "had it coming," or "asked for it" – without a remedy. But these conclusions, apparently adopted by the trial court, are unsupported in the record.

For example, Appellants cited in their Complaint, at ¶ 18, J.A. 13, the so-called "Palmer Panel Report," dated September 2011, by an independent U.N. body consisting of a former Prime Minister of New Zealand, a former President of Colombia,

and representatives of Turkey and Israel. Its key overall findings, entirely contrary to its defenders' assertion that Israel's violent raid on the vessels was consistent with international law, included this: "Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable."

The United Nations Human Rights Council ("the UNHRC Report") was especially critical of the degree of force used by Israeli agents in the raid on the Flotilla:[3]

> Insofar as the Israeli interception of the flotilla was unlawful – and the Mission considers that it was unlawful – the use of force by the Israeli forces in seizing control of *The Mavi Marmara* and other vessels was also *prima facie* unlawful since there was no legal basis for the Israeli forces to conduct an assault and interception in international waters. Moreover, in undertaking these operations and regardless of the legality of the operation, the Israeli forces were obliged to do so in accordance with the law, including Israel's international human rights obligations.
> ****

[3] Appellants acknowledge that the "Turkel Commission Report," prepared by appointees of the Israeli Government, unsurprisingly came to the conclusion that Israel was entirely blameless and justified in raiding the Flotilla. Appellants indicated in their submissions to the court below that they believe the Turkel Report to have been, in short, a whitewash and a cover-up. The trial court, however, seemed to take the conclusions of the Turkel Report as established fact (which is how Appellees presented them), and included excerpts in its Opinion. *See*, for example, J.A. 49 n.4. If the purpose of those references was simply to show that some of the claims set out in the Complaint are contested, that is a conclusion to which Appellants readily accede. But the court, citing the Turkel Report and wholly disregarding the Palmer Panel and UNHRC Reports that assigned blame to Israel, thereby indicated that it assumed the reliability of the former and not the others. Certainly nothing in the record in this case attested to the accuracy, independence, or credibility of the Turkel Commission Report, and the district court had no proper basis for reliance on it.

> The Mission is also concerned with the nature of the force used by the Israeli forces in the interception of [*inter alia*, *Challenger I*]. … The Mission has found that the force used by the Israeli soldiers in intercepting *Challenger I* … was unnecessary, disproportionate, excessive and inappropriate, and amounted to violations of the right to physical integrity, as stipulated in article 7 of the International Covenant on Civil and Political Rights.

Appellants' purpose in citing this material is not to ask this Court (as they did not ask the court below) to endorse the conclusions of any one of the reports, but rather only to show that the facts should not be assumed to be as Appellees paint them, and as Judge Jackson apparently was willing to accept. The characterizations of the events on which Appellees and the court below relied are subjective and hotly contested, and the world community has not unified in concluding that the acts of which Appellants complain in this lawsuit were even remotely justified. Precedent, however, required the trial court to accept all well-pleaded allegations of the Complaint as true when it considered the motion to dismiss (to defeat such a motion, courts "do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).[4]

[4] Widely-disseminated statements in 2016 reported that the diplomatic dispute between the Governments of Israel and Turkey concerning the Gaza Freedom Flotilla have been resolved, and that the Israeli Government is proposing to make some sort of payment to Turkey. Those reports, if true, have nothing to do with the case at Bar or with Appellants, who are not of Turkish nationality.

Procedural History

This Complaint initiating this case was filed on January 11, 2016, J.A. 8-28. Appellants attempted to serve Appellees pursuant to 28 U.S.C. § 1608(a)(2), and The Hague Convention on the Service of Process Abroad, but the State of Israel and its agencies declined to accept such service. Ultimately, service was accomplished under the provisions of 28 U.S.C. § 1608(a)(3). Appellees then timely filed a motion to dismiss, alleging both a lack of subject matter jurisdiction and a failure to state a claim, pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, respectively. Appellants opposed the motion, and Appellees replied. Appellants sought and were granted the opportunity to file a surreply, addressing certain events that had occurred after the initiation of the case, to which Appellees replied.[5]

Judge Jackson decided the case without oral argument (argument had been requested by Appellants, a request opposed by Appellees), dismissing it for want of jurisdiction on January 17, 2017, and not reaching the other arguments raised by Appellees (which are therefore not on appeal before this Court). *See* the Opinion Below, J.A. 46-64.

Standard of Review

The court below having based its decision entirely on the alleged legal insufficiency of the Complaint, this Court reviews all aspects of that decision *de novo*.

[5] In addition, the United States filed a Statement of Interest, J.A. 30-45, to which the court permitted both sides to respond. Appellants did so; Appellees did not.

United States v. Anthem, Inc., No. 17-5024, 2017 WL 1521578, at *5 (D.C. Cir. Apr. 28, 2017).

Summary of Argument

The law is clear that, for a trial court to assert jurisdiction over a foreign sovereign or its agencies, the plaintiff(s) must demonstrate applicability of one or more exceptions to the principle of sovereign immunity laid out in the FSIA. Appellants argue that two such exceptions apply to the instant Action: "the non-commercial tort exception," 28 U.S.C. § 1605(a)(5), and "the terrorism exception," 28 U.S.C. § 1605A.

The former is pertinent because the torts alleged in the Complaint occurred on board a U.S.-flagged vessel in international waters: a location that qualifies as being "in the United States," as that term is defined in the FSIA. The second exception applies here because, although Israel is not a designated "state sponsor of terrorism," the 2008 amendments to the FSIA removed designation as a prerequisite for allowing the case to proceed. Both issues present this Court with a case of first impression, and the caselaw cited by the district court does not mandate, or even support, its dismissal for lack of subject-matter jurisdiction.

Argument

The starting point of the analysis now required of this Court is not in doubt. In the FSIA, Congress codified its intentions: "Claims of foreign states to immunity **should henceforth be decided by courts** of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (emphasis

added). Expressing its confidence in the judiciary to perform this function, Congress specifically precluded short-cuts: it took off the table the possibility of talismanic invocations whose pronouncement by a sovereign defendant or by the Department of State would guarantee entitlement to immunity from suit.

The FSIA provides a presumption of immunity: a foreign state "shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" elsewhere in the Act. 28 U.S.C. § 1604. Jurisdiction over a case against a sovereign defendant thus must be grounded in one of the Act's exceptions. *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434-35 (1989). That much is settled law, and neither Appellees nor the trial court dispute it in principle.

This is a case of first impression in this Court, in two respects. Appellants invite the Court to conclude that the "non-commercial tort exception" in the FSIA, 28 U.S.C. § 1605(a)(5), by which a foreign sovereign is not entitled to jurisdictional immunity for torts committed "in the United States," applies to such acts taking place on board vessels flying the flag of the United States in international waters. And Appellants submit that the "terrorism exception" in the FSIA, 28 U.S.C. § 1605A, in its current iteration, lifts the immunity of foreign sovereigns and their agencies accused of certain acts, even if those foreign states have not been designated as "state sponsors of terrorism."[6]

[6] Before the district court, Appellants made the argument that they were required only to make a "non-frivolous" claim of a jurisdictional foundation in order to defeat a

The decision of the district court, denying the applicability of either of those exceptions, was in error. There is, in short, no basis – not in precedent, not in the language, objects, or purposes of the relevant statute, and not in common sense – for permitting a state to commit acts of violence against the passengers on a ship of American nationality sailing in international waters, and to deprive those victims of a judicial remedy. The FSIA provides the rules governing immunity, but its objective is not to create a regime of impunity for tortfeasors.

I. The "Non-Commercial Tort Exception" in the FSIA Lifts Sovereign Immunity for Torts Committed On Board a United States-Flagged Vessel on the High Seas.

The court below summarily rejected Appellants' argument that a tort committed on board a vessel flying the flag of the United States while sailing in international waters took place in "the United States," as that term is defined in 28 U.S.C. § 1603(c). The decision by the trial court, which appears to have been based on the notion that "the United States" is purely a geographical concept, was reversible error.

A. For Purposes of the FSIA, Torts Committed on Board *Challenger I* Occurred in the United States.

The FSIA provides that sovereign immunity may **not** be invoked in actions

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motion under Rule 12(b)(1). The court rejected that contention, concluding that Appellants were required to meet the jurisdictional standard at the outset. *See* J.A. 46-48. Appellants now concede that their argument is foreclosed by the recent decision of the United States Supreme Court in *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 137 S. Ct. 1312 (May 1, 2017), which was handed down subsequent to the briefing and decision below.

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring **in the United States** and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment,

28 U.S.C. § 1605(a)(5) (emphasis added), with exceptions that do not apply here.[7]

The statutory definition says that "the 'United States' **includes** all territory and waters, continental or insular, subject to the jurisdiction of the United States" (emphasis added). 28 U.S.C. § 1603(c). The term is not defined to **mean**, or to be limited to, the listed components. The Supreme Court has recognized the dispositive difference between what a statutory term **means** and what it **includes**: "As a rule, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979), citing 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978). That is not true of a definition declaring what a term "includes." The Court in *Colauti* contrasted a definition based on "meaning" with the kind provided in § 1603(c), which is by its very terms inclusive, and not exclusive.

In the FSIA, the other terms that Congress considered necessary to define, with one exception, were assigned explicit, enumerated statutory **meanings**. Thus "an

[7] The Complaint certainly alleges that Appellants suffered "personal injury," and that the acts giving rise to this case were committed by Israel or "official[s] or employee[s] of [Israel] while acting within the scope of [their] office or employment." Those prerequisites for the § 1605(a)(5) exception were not contested below.

agency or instrumentality of a foreign state **means** any entity" that meets certain listed criteria, under § 1603(b); a "commercial activity **means**" certain conduct or acts, according to § 1603(d); and a "commercial activity carried on in the United States by a foreign state" is likewise defined in § 1603(e) in terms of what it **means**, not what it **includes**.

This Court has specifically recognized such statutory context – and the distinction between the word "mean" and the word "include" – to be a reliable indicator of whether Congress intended to limit a definition to the items stated, or simply to ensure that the listed instances are covered, opening the door to the inclusion of others that share common attributes. As the Court observed in interpreting provisions of the Clean Water Act, 33 U.S.C. § 1251 *et seq*., "the wording of [§ 1362(6)] makes us cautious in adding new terms to the definition. Congress used **restrictive phrasing** – '[t]he term "pollutant" **means** dredged spoil, [etc.]' – rather than **the looser phrase 'includes,' used elsewhere in the Act**." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 171-72 (D.C. Cir. 1982) (emphasis added).

Here, Congress's use of the word "includes" in § 1603(c), when it employed the word "means" elsewhere in the same section, signifies that locations not listed may also come within the definition of "the United States," so long as they share the key relevant characteristics with those expressly mentioned. Those characteristics are to be determined in the same manner by which courts apply the maxims "*ejusdem generis*" and "*noscitur a sociis*" in the deciphering of statutory language, whereby an arguably

ambiguous term may be "given more precise content by the neighboring words with which it is associated." *United States v. Stevens*, 559 U.S. 460, 474 (2010). Or, as this Court put it in language truer to the Latin meaning of the phrase, "a word is known by the company it keeps." *Amgen, Inc. v. Smith*, 357 F.3d 103, 112 (D.C. Cir. 2004).

The interpretative task, therefore, is identifying the attributes and characteristics that link the items in the express statutory list. In this case, Congress indicated the "common denominator": "the United States" was to embrace, for purposes of the FSIA, territory, waters, and other areas that share a comparable degree of U.S. sovereign control. And U.S.-flagged vessels do, as a matter of law and fact, sufficiently demonstrate the relevant attributes in common with "territory and waters, continental or insular, subject to the jurisdiction of the United States" to come within the definition.

By contrast, as the Supreme Court has taught, the canon of statutory interpretation that "*expressio unius est exclusio alterius*" (explicit incorporation of a list of items in a statute implies that excluded exemplars are not intended to be covered) is not relevant here. That principle "expresses a rule of construction, not of substantive law," *United States v. Barnes*, 222 U.S. 513, 519 (1912), and

> does not apply "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), … the canon can be overcome by "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion," *United States v. Vonn*, 535 U.S. 55, 65 (2002).

Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1175 (2013). Here, nothing in the text of the FSIA, or in its legislative history, suggests that Congress intended to extend sovereign immunity to a state whose agents commit torts aboard a U.S-flagged vessel on the high seas, much less that it meant *sub silentio* to bestow on such tortfeasors an impunity that they do not deserve. Had Congress intended that goal, it could have accomplished it by stating restrictively what the term "the United States" **means**, and not loosely what it **includes**.[8]

Appellants respectfully submit that the correct reading of § 1605(a)(5) embraces, within the meaning of "the United States," ships flying the American flag in international waters, which, like U.S. "territory and waters, continental or insular," are certainly "subject to the jurisdiction of the United States." And they argue that this inclusion would not open the door to exceptions to immunity for torts committed on the premises of U.S. diplomatic missions abroad or in U.S.-registered aircraft flying in the airspace of foreign nations, as the court below apparently but mistakenly inferred.[9]

The precise meaning of the words "territory … subject to the jurisdiction of the United States" is no simple matter. It is not answered simply by looking at a map, because geography does not provide the definitive solution: the United States does have

[8] The specific language of § 1603(c) defining "the United States" apparently appears in only two other places in the U.S. Code: 22 U.S.C. § 8772 and 50 U.S.C. § 195. Neither provision has any relevance to the instant considerations, and no court appears to have been called upon to interpret either of them.

[9] *See* pp. 27-31, *infra*.

"jurisdiction" over places not within the country's land borders and territorial sea. *See*, for example, *Rasul v. Bush*, 542 U.S. 466, 475 (2004) (in which the Court concluded that the United States had "plenary and exclusive jurisdiction, but not 'ultimate sovereignty,'" over the Guantanamo Bay Naval base located on Cuban soil).[10]

Appellants do not argue, as did the owners of the bombed tanker in *Amerada Hess*, *supra*, that the term "the United States" includes the vastness of the high seas simply because the Constitution confers admiralty jurisdiction upon the judicial branch. U.S. Constitution, Art. III, sec. 2. That fanciful argument was rejected by the Supreme Court, 488 U.S. 428, 440-41. But the tanker in that case sailed under the flag of the Republic of Liberia, not the Stars and Stripes. The decision of the *Amerada Hess* Court, finding that an attack on that tanker was not within the courts' jurisdiction, says and implies nothing about whether **U.S. ships** on the high seas – as opposed to **the seas themselves** covering some 70% of the total surface area of our planet – come within the reach of the FSIA tort exception. Nor do Appellants claim, as suggested by Judge Jackson below and as would be inconsistent with this Court's holding in *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984), that §

[10] The Second Circuit observed in *United States v. Gatlin*, 216 F.3d 207, 214 (2d Cir. 2000) that "[i]nterestingly, both United States citizens and aliens alike, charged with the commission of crimes on Guantanamo Bay, are prosecuted under United States laws," citing *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir. 1992), *vacated on other grounds sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).

1605(a)(5) is "a broad exception for all alleged torts that bear **some relationship** to the United States." J.A. 57 (emphasis added).[11]

The judge below based her opinion rejecting Appellants' position primarily on two cases that are distinguishable on their faces. Neither has anything to do with the special, if not unique, status in international and domestic law of this nation's ships in international waters.[12] The only case concerning ocean-going vessels on which the trial court relied was *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923), J.A. 59, in which the Supreme Court concluded that the language, history, and context of the National Prohibition Act did not extend the Eighteenth Amendment to U.S. vessels on the high seas, although it did cover foreign ships within the physical jurisdiction of the United States. There is simply no comparable legislative history of the relevant FSIA provision, or any language in the statute itself, that might justify an inference of similar congressional intent. It would be odd indeed if a decision concerning the consumption of alcohol on cruise ships in the 1920s were to be held to dispose of a claim concerning

[11] In *Asociacion de Reclamantes* – a decision by then-Circuit Judge Scalia – this Court rejected the notion that a taking of property occurring in Mexico came within the (a)(5) exception, because "[t]he legislative history makes clear that for the exception of § 1605(a)(5) to apply 'the tortious act or omission must occur **within the jurisdiction of the United States**.' House Report, 1976 U.S. Code Cong. & Ad. News 6619." 735 F.2d 1517, 1524 (emphasis added). U.S.-flagged ships, such as *Challenger I*, **are**, in fact, "within the jurisdiction of the United States" with respect to civil and criminal matters.

[12] These cases – *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) (concerning U.S. embassies abroad), and *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996) (U.S. aircraft in the airspace of another nation) – are discussed at pp. 27-31, *infra*.

human rights abuses in the Mediterranean Sea some 90 years later. The policy concerns, not to mention the text[13] and context, of the Prohibition-era case have nothing to do with the case now before this Court.

B. That Ships Are "Floating Islands" Is Not a Mere Metaphor.

The district court disparaged the decision of the Permanent Court of International Justice in *The S.S. Lotus [Fr. v. Turk.]*, [1927] P.C.I.J., ser. A, No. 10, and its discussion of ships as "floating islands" of the states whose flags they fly, as dealing in "a figure of speech, a metaphor." J.A. 59. Yet, while of course the "floating island" concept is not meant to be understood literally (an "island" is by definition something fixed and not mobile), the principle for which it stands is far from fictional. Indeed, it is well embedded in international law both ancient and modern. "On the high seas even merchant vessels constitute detached portion of the territory of the State whose flag they bear, and consequently [acts committed on the high seas] are only justiciable by their respective national authorities." *The "Costa Rica Packet" Arbitration*, reported in 5 John Bassett Moore, International Arbitrations (Gov't Printing Office 1898), p. 4952.

[13] The statutory language that the Court interpreted in *Cunard* was "the United States and all territory subject to the jurisdiction thereof." 262 U.S. 100, 121. This intended coverage of the law was not stated in terms of what it "included." Given the clear congressional intent behind that statute, it made perfect sense for the Court to conclude that the 18th Amendment and its implementing legislation were meant to apply only within the geographic boundaries of the country, and not to passengers on ships far from our shores.

The floating island meme has been upheld and expressly cited by U.S. courts on numerous occasions. The law is that while on the high seas, "vessels are normally considered within the exclusive jurisdiction of the country whose flag they fly." *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982) (citing *The S.S. Lotus*; other citations omitted); *see also United States v. Carvajal*, 924 F.Supp.2d 219, 243 (D.D.C. 2013), *aff'd sub nom. United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015).

Nor is there any lack of federal court jurisprudence referring to U.S.-flagged ships not only metaphorically as "floating islands," and not only as subject to specific statutory jurisdiction, but actually as part of the territory of the United States. As long ago as 1891, the Supreme Court observed that "[t]he deck of a private American vessel …is considered, for many purposes, **constructively as territory of the United States**." *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (emphasis added). The Court cited with approval an English decision in *The Queen v. Anderson*, [1868] 1 L.R. C.C.R. 161, to the effect that, at least while not in the waters of another country, "a ship which bears a nation's flag is to be treated as a part of the territory of that nation. A ship is a kind of floating island." *Ross*, 140 U.S. 453, 477; *see also Patterson v. Eudora*, 190 U.S. 169, 176-77 (1903).[14]

[14] "A ship on the high seas **is considered foreign territory**, functionally, a floating island of the country to which it belongs." 21 Am. Jur.2d Criminal Law § 438 (citation omitted; emphasis added). Much of the early reported jurisprudence on this subject simply assumed that a ship was part of the nation whose flag it flew, but addressed the more complicated question whether a foreign state into whose waters such a ship might

In *United States v. Flores*, 289 U.S. 137 (1933), the Supreme Court held that the presumption against reading legislation extraterritorially by implication "has never been thought to be applicable to a merchant vessel which, **for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies** to punish crimes committed upon it, **is deemed to be a part of the territory of that sovereignty**." 289 U.S. 137, 155 (emphasis added). In *Flores*, the Supreme Court found application of such a statutory provision to be constitutional **precisely because** its reach was a qualification of, and not an exception to, "the territorial principle."

C. U.S. Law Governs Torts Committed on American Vessels on the High Seas.

The law of torts, as well as the statutory criminal law of the United States, applies in full force on board distant ships flying the flag of this nation. International law, as evidenced in such treaties as the Geneva Convention on the High Seas,[15] certainly affirms the exclusive, plenary jurisdiction of flag states over their ships when they are not in the waters of another nation.[16] The criminal laws of the United States generally

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venture had any right to jurisdiction over it, and if so, how much. *See*, for example, the opinion of Marshall, C.J., in *The Schooner "Exchange" v. M'Faddon*, 11 U.S. 116 (1812).

[15] Opened for signature April 29, 1958, [1962] 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

[16] The United Nations Convention on the Law of the Sea ("UNCLOS"), 1833 UNTS 3 (1982), which has 167 states parties, is completely in accord: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." *See* art. 92. And art. 94 imposes a range of affirmative duties on the flag state. Although it has not (yet) been ratified by the United States, UNCLOS is generally considered to be declaratory of contemporary customary international law, which is the law of the land. *See The Paquete Habana*, 175 U.S. 677, 700 (1900)

extend to U.S.-flagged ships on the high seas unless their reach is expressly limited, and this extension is consistent with and not a derogation from any presumption against construing statutes to apply extraterritorially. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (discussing the "canon of statutory interpretation known as the presumption against extraterritorial application"). And under another cardinal principle of statutory construction, deriving from *Murray v. Schooner "Charming Betsy*," 6 U.S. (2 Cranch) 64, 118 (1804), statutes should, where possible, be interpreted to be consistent with international law.

The consistency with which the extension of jurisdiction over U.S. vessels in international waters has been upheld by the courts provides powerful authority to decide this dispute in line with those precedents.

The *locus classicus* of the significance of "the law of the flag" is *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953):

> Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag.

("International law, is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

In *Lauritzen*, the Supreme Court concluded that Danish law would determine the legal consequences of a civil wrong allegedly committed on board a Danish-flagged vessel against a citizen of Denmark while the ship was in Cuban waters. This, Mr. Justice Jackson opined for the Court, was entirely consistent with, and was even mandated by, both U.S. and international law: "'This Court has said that the law of the flag supersedes the territorial principle, … because [a merchant ship] 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.'" 345 U.S. 571, 585, citing *Flores*, 289 U.S. 137, 155-59. The Court observed that while "[s]ome authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag state," **even they** would "apply the law of the flag on the pragmatic basis that **there must be some law on shipboard**, that it cannot change at every change of waters, and **no experience shows a better rule than that of the state that owns her.**" 345 U.S. 571, 585 (emphasis added, citations omitted).

Subsequent caselaw is entirely consistent with the premise that "the law of the flag" obtains onboard ocean-going vessels. "The law of the flag theory holds that a ship is constructively a floating part of the flag-state, that it is deemed to be part of the territory whose flag it flies and that the state has jurisdiction over offenses committed aboard the ship." *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *see also United States v. Jho*, 534 F.3d 398, 405–06 (5th Cir. 2008) ("The traditional statement of the doctrine provides that a merchant ship is part of the territory of the country whose flag

she flies, and that actions aboard that ship are subject to the laws of the flag state" (citation omitted)). Indeed, as the Eleventh Circuit observed,

> The principle that the law of the flag governs conduct aboard ship is a principle that antedates the Republic. *See* [*Flores*, *supra*, 289 U.S. 137, 150-51 (1933)]; cf. *The S.S. Lotus*, [*supra*] (law of the flag is a part of customary international law). The United States has power to define and punish criminal offenses aboard ship just as it has power to do so upon American territory.

United States v. Riker, 670 F.2d 987, 988 (11th Cir. 1982), citing *Lauritzen*, 345 U.S. 571, 585; *Flores*, 289 U.S. 137, 151-52; and *United States v. Reagan*, 453 F.2d 165, 170 & n.2 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972). *See also Rux v. Republic of Sudan*, 495 F.Supp.2d 541, 558 (E.D. Va. 2007), *rev'd on other grounds,* 2009 WL 9057606 (4th Cir.) (a case concerning the terrorist attack on *U.S.S. Cole*: "The law of the flag is of 'cardinal importance' and 'supersedes the territorial principle ... because [a ship] "is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.'" *Lauritzen*, [*supra*], 345 U.S. at 584–85" (other citations omitted)).

The jurisdiction of the United States as flag state to legislate over its ships on the high seas has been exercised on numerous occasions, and in numerous areas, by Congress. To cite one example among many, federal law lays out the safety obligations of shipowners, and provides a tort-based remedy to the survivors of seamen who die on board their vessels as a result of breach of those obligations. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970), applying the Death on High Seas Act, 46

U.S.C. § 30301 *et seq*. ("Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.").

Given, then, the plenary power of the Congress to apply the country's laws to vessels flying its flag, and given that U.S. civil and criminal law applies to U.S.-flagged vessels on the high seas, it necessarily follows that, absent any indication to the contrary, legislation regulating the immunity of certain tortfeasors – whose liability would certainly be subject to judicial determination were they private actors or had their misdeeds occurred within the territorial boundaries – would apply to U.S.-flagged ships as well. And no contrary policy would urge impunity for states or their agencies that violate the rights of passengers on vessels flying this country's colors.

There is no question but that Congress has the authority to extend the tort exception to immunity to U.S. ships on the high seas. The question before this Court is whether, in enacting the FSIA, it used that authority. As the Eleventh Circuit established in *Riker*, *supra*, the U.S. criminal statutes there in issue did reach the decks of an American-flag vessel in international waters, and nothing in the case or its reasoning would differentiate U.S. criminal law from tort law for these purposes. Certainly the district court in this case cited no precedent supporting such a distinction, and this Court has implicitly endorsed the contrary view, which would interpret § 1605(a)(5) as lifting the immunity of a foreign sovereign responsible for torts committed on a U.S. vessel on the high seas. *Perez v. The Bahamas*, 652 F.2d 186 (D.C. Cir. 1981).

There is no reason a ship flying the flag of the United States should be deemed part of the country's territory for the purposes of prosecuting criminal offenses, but not in the context of statutory language authorizing pursuit of actions in tort. In *Perez*, the conclusion that the § 1605(a)(5) tort exception did not remove The Bahamas' immunity from U.S. jurisdiction turned on the fact that the injuries allegedly suffered by a passenger of a U.S.-flagged fishing boat, the *Isabel*, "were **not** suffered **on the high seas** but, rather, were inflicted within Bahamian territorial waters," 652 F.2d 186, 189 (emphasis added). This Court affirmed the district court's conclusion that

> [i]n view of the fact that the Convention [on the High Seas] specifically excludes territorial waters from the definition of the "high seas," the United States does not have jurisdiction over either the waters themselves or vessels upon those waters. The injury complained of, then, did not occur "in the United States," and the exception in section 1605(a)(5) does not operate to remove The Bahamas' immunity from jurisdiction.

Perez v. The Bahamas, 482 F.Supp. 1208, 1210 (D.D.C. 1980).

This conclusion is mandated also by the notion that the state of the flag has jurisdiction to legislate over events occurring in places not otherwise subject to any nation's sovereignty. Justice Stevens stated the principle this way:

> As was well settled at English common law before our Republic was founded, a nation's personal sovereignty over its own citizens may support the exercise of civil jurisdiction in transitory actions arising in places not subject to any sovereign. *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1032 (K. B. 1774). *See also Dutton v. Howell*, 1 Eng. Rep. 17, 21 (H. L. 1693). This doctrine of personal sovereignty is well recognized in our cases. As Justice Holmes explained in

> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909), "No doubt in regions subject to no sovereign, like the high seas, … [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

Smith v. United States, 507 U.S. 197, 212 (1993) (Stevens, J., dissenting).

The inclusion of U.S.-flagged vessels on the high seas as within § 1605(a)(5) is thus consistent with the language, as well as the objects and purposes, of the FSIA. The reliance of the court below on judicial speculation concerning the specific goals that Congress had in mind in adopting the FSIA non-commercial tort exception, J.A. 57, amounts to nothing more than an unsupported assumption that the incorporated definition of "the United States," excludes, or was intended to exclude, torts committed on board U.S.-flagged vessels.

Such conduct is, however, "subject to the jurisdiction of the United States" not only insofar as Congress has the authority, for example, to establish working conditions, or to prohibit and punish criminal acts, but because the American common law of torts applies exclusively and full-force, to the exclusion of all others, on those vessels when they are on the high seas. They are, therefore, within the definition of "the United States" set out in § 1603(c).

D. The Cases Cited by the Court Below Are Not to the Contrary.

The court below relied heavily on this Court's decision in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), which held that the non-commercial torts

exception does not apply to acts committed in U.S. diplomatic premises abroad. But there is no inconsistency between that decision and the interpretation of § 1605(a)(5) urged here. International law has long dictated that embassies and their personnel are subject to the laws of the sending state for some purposes and of the receiving state for others. U.S. statutes governing embassies respect that tradition. There is no such overlap in jurisdictional claims with respect to ships on the high seas.

While international law dictates that "[t]he premises of the [diplomatic] mission shall be inviolable," and "[t]he agents of the receiving state may not enter them, except with the consent of the head of the mission," Vienna Convention on Diplomatic Relations,[17] art. 22, it is not and has never been the case that an embassy is "part of the territory" of the sending state. And indeed, as Judge Bork made clear for the majority in *Persinger*, the U.S. Embassy in Tehran, even in the throes of the hostage crisis of 1979-81, was indisputably the territory of Iran, not of the United States. 729 F.2d 835, 842.[18]

After noting that the legislative history of the provision offers little by way of guidance, this Court correctly observed in *Persinger* that some consequences of extending § 1605(a)(5) to embassies abroad could be, for example, that

[17] T.S. 993, 59 Stat. 1031 (entered into force December 13, 1972).

[18] The Ninth Circuit reached the same result in *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), citing the Restatement (Second) of the Foreign Relations Law of the United States, § 77, cmt. A, for the propositions that "A United States embassy, however, remains the territory of the receiving state … United States embassies are not within the territorial jurisdiction of the United States." 722 F.2d 582, 588, *citing Meredith v. United States*, 330 F.2d 9, 10–11 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964).

> the French government [would] be subject to suit in the United States if a French government vehicle were involved in an automobile accident on the U.S. embassy grounds in West Germany. Furthermore, foreign states "might hesitate in providing services to U.S. embassies or consulates" were they to be subject to suit in U.S. courts for negligent acts or omissions on those premises. In addition, since some foreign states base their sovereign immunity decisions on reciprocity, or parity of reasoning, it is possible that a decision to exercise jurisdiction in this case would subject the United States to suits abroad for torts committed on the premises of embassies located here.

Persinger, 729 F.2d 835, 841 (citations omitted)

Appellants do not argue that U.S.-flagged vessels on the high seas are part of U.S. territory simply because the United States exercises "some form of jurisdiction" over them, as the unsuccessful plaintiffs contended with respect to Embassies in *Persinger* and *McKeel*. Rather, embassies do not share the unique status of ships deriving from centuries of legal evolution, and according to a line of precedent tracing back at least to the nineteenth century. While "[t]he deck of a private American vessel … is considered, for many purposes, constructively as territory of the United States," *Ross v. McIntyre*, *supra*, 140 U.S. 453, 464, this has never been true of a U.S. Embassy.

Judge Jackson focused on another portion of the *Persinger* decision, in which this Court wrote that if the definition of the term "the United States" in § 1603(c) meant

> all territory subject to any form of United States jurisdiction, the words 'continental or insular' would be surplusage: all territory is continental or insular. The modifying phrase is rather clearly intended to restrict the definition of the United States to the continental United States and such islands that are part of the United States or are its possessions.

729 F.2d 835, 839; J.A. 58. But reliance on this citation misses the mark, for at least two reasons. First, Appellants do not argue that the definition of "the United States" in the FSIA should be read to include "**all** territory subject to **any form** of United States jurisdiction." And second, the words chosen by Judge Bork for this Court in *Persinger* should not be stretched beyond the facts of that case. It was sufficient, in *Persinger*, to determine that the U.S. Embassy in Tehran was not "in the United States," as it obviously was not. The expression of views concerning other hypothetical situations, and their generalization to matters not before the Court, certainly define the term "*obiter dictum*," and are not binding here.

The other case on which the district court placed considerable reliance concerned an aircraft, rather than a ship, registered in the United States, and in particular, an airplane in the airspace of another country. Both differences are of critical significance. In *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), the Second Circuit correctly observed that a plane flying over the sovereign territory of another state – the United Kingdom, in the case of the doomed PanAm 103 – is more akin to an embassy than to a ship on the high seas. The Court was not asked to decide, and did not decide, whether the situation might have been different had PanAm 103 been destroyed over the Atlantic Ocean. And indeed, the Second Circuit made the limitations of its holding clear, in the very passage cited by the district judge:

> **Even if we assume, without deciding,** that for some purposes an American flag aircraft is like an American flag vessel, the fact that a location is subject to an assertion of United States authority does not necessarily mean that it is the "territory" of the United States for purposes of the FSIA…. If FSIA immunity prevails in United States embassies, it cannot be displaced **with respect to United States aircraft flying over a foreign land**.

101 F.3d 239, 246 (emphasis added); *see* J.A. 59.

The jurisdiction of the flag state over ships in international waters is plenary, and it is exclusive. "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." Geneva Convention on the High Seas *supra*, art. 6.1. A sending state's embassies abroad, and an airplane in another country's territory, do not come within such exclusive authority.

Appellants respectfully submit that in enacting the tort exception as part of the FSIA, 28 U.S.C. § 1605(a)(5), Congress denied immunity from suit to foreign sovereigns whose agents commit torts against passengers on board U.S.-flagged ships in international waters. Without that immunity, Appellees the State of Israel and its agencies are answerable before the district court for the tortious acts of which they stand accused in the Complaint.

II. The "Terrorism Exception" in the FSIA Lifts the Sovereign Immunity of a State Even If It Has Not Been Designated a "State Sponsor of Terrorism."

A. The District Court Committed Reversible Error In Ignoring the Plain Meaning of the 2008 Amendments to the FSIA.

By its terms, the FSIA provides an exception to the presumption of immunity for certain acts deemed "terrorist" by Congress. 28 U.S.C. § 1605A. Prior to 2008, suits complaining of such acts could be maintained only against a state that had been designated as a "state sponsor of terrorism" under 50 U.S.C. App. § 4605(j), 22 U.S.C. § 2371, or 22 U.S.C. § 2780(d). Appellants readily concede that this action would be barred under this old version of the law, because – unlike Syria, North Korea, and Iran among others – Israel has never been designated a state sponsor of terrorism by the Government of the United States.

Congress, however, amended the statute in 2008, explicitly abandoning the designation prerequisite. Inexplicably, the district court treated the amendment as though it preserved the old standard. Neither the rules of statutory interpretation nor the separation of powers allows such cavalier treatment of a legislative mandate. The district court was not free to ignore the plain language of the statute as amended, or to derive some reconstructed intent to fit its notion of what Congress could or should have done. *Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 145 (2003); *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

B. The 2008 Amendments Explicitly Abandoned the Designation Requirement.

In 1996, in the Antiterrorism and Effective Death Penalty Act ("the AEDPA"), Congress adopted an exception to the presumption of sovereign immunity for any nation officially designated by the Department of State as a terrorist state, if that state committed a terrorist act, or provided material support and resources to an individual or entity that committed such an act, resulting in death or injury to a United States citizen. *See* 28 U.S.C. § 1605(a)(7) (1996). Section 221 of the AEDPA, entitled "Jurisdiction for Lawsuits Against Terrorist States," was unambiguous about the requirement of a terrorist designation:

> **the court shall decline to hear a claim** under this paragraph – (A) **if the foreign state was not designated as a state sponsor of terrorism** under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred, unless later so designated as a result of such act.

Pub.L. No. 104-132, 110 Stat. 1214 (emphasis added). Absent its formal designation as a sponsor of terrorism, therefore, a state retained its entitlement to immunity under the § 1605(a)(7) exception, even if it engaged in the predicate acts.

After this Court held in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), that § 1605(a)(7) did not provide a private cause of action, Congress repealed the old provision and replaced it with what is now § 1605A. In § 1083 of the National Defense Authorization Act for Fiscal Year 2008, captioned "Terrorism Exception to

Immunity,"[19] Congress explicitly deleted all of the old § 1605(a)(7) – including the requirement that the state be designated a sponsor of terrorism, basing the applicability *vel non* of immunity on the nature of the act, not of the state that allegedly committed or paid for it. Pub.L. 110-181, Div. A, 1083(b)(1)(A)(iii), 122 Stat. 341. Specifically, the revised law provides:

> (1) No immunity. -- A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in **any** case not otherwise covered by this chapter in which money damages are sought against **a foreign state** for personal injury or death that was caused by **an act of torture, extrajudicial killing, aircraft sabotage, hostage taking,** or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

§ 1605A(a)(1) (emphasis added). Then, instead of simply adopting or re-enacting the AEDPA language requiring the dismissal of any suit under this exception against a non-designated state, Congress provided in the new statute:

> Claim heard. – The court **shall hear** a claim under this section **if** —
> (A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and,

[19] Statutory captions and section headings "can be 'a useful aid in resolving' a statutory text's 'ambiguity.'" *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014), citing *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-389 (1959). And it is telling to observe that Congress changed the focus of this inquiry from "Jurisdiction for Lawsuits **Against Terrorist States**," to the "**Terrorism** Exception to Immunity" (emphasis added). This underscores the point that under the 2008 law, immunity would turn on the characteristics of the act(s) at issue, and no longer on those of the defendant state.

> … either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section.

§ 1605A(a)(2) (emphasis added). Congress **could have** framed this new law in ways that would have preserved the notion that designation was a prerequisite for a loss of immunity, for example by simply reiterating the language of the AEDPA, or by providing that "the court **may** hear a claim under this section **only if** … the foreign state was designated …" **But it did not.** Instead, it provided that cases against designated state sponsors of terrorism must be heard, but also denied immunity to states engaging in the cited conduct whether or not they were designated as sponsors.

The decision of the court below ignores the fact that Congress expressly abandoned the designation requirement set by the AEDPA, and thereby allowed a complaint against a non-designated state to survive a motion to dismiss, assuming that the other statutory requirements were satisfied. But neither the trial court nor this Court may overlook the actual words Congress chose, or the intent that those words were meant to reflect. To phrase the 2008 change in the law metaphorically, Congress took out the old mandatory "red light" when the defendant state is not designated and inserted a mandatory "green light" when it is.

The "real and substantial effect" of this amendment, *Stone v. INS*, *supra*, 514 U.S. 386, 397, is twofold. After 2008: (1) in suits against a designated state, discretionary doctrines of abstention or justiciability – including for example *forum non conveniens*, the act of state doctrine, or the political question doctrine – would be foreclosed by the

requirement that the "court shall hear [the] claim"; (2) by contrast, hearing a suit against a non-designated state is not mandatory (that is, the proceeding could in principle be blocked on various discretionary grounds), although dismissal for failure of subject matter jurisdiction is precluded.

These consequences of the 2008 amendments reaffirmed the transfer of authority over invocations of sovereign immunity from the executive branch to the judiciary: a primary purpose of the FSIA. They are entirely of a piece with the congressional decision in 1976 to abandon the regime of mechanical deference to executive suggestion, replacing it with a comprehensive legislative framework governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities. *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

In the FSIA, Congress announced its finding "that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. "A primary purpose of that Act was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch of government, thereby assuring litigants that such decisions would be made on legal rather than political grounds." *Nat'l Airmotive Corp. v. Gov't & State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980). By eliminating the "red light" requirement that states be designated sponsors of terrorism by the Executive

before they are stripped of immunity in suits for damages, Congress empowered the courts to determine claims to immunity consistently with the standards of the FSIA and principles of international law, and without regard to political or foreign-policy decisions made by the Department of State in the designation process.

C. The District Court's Disposition of This Case Violates Foundational Principles of Statutory Construction and the Separation of Powers.

1. On Its Own Terms, the District Court's Analysis Fails.

The district court held simply that "[b]ecause Israel has not been designated as a 'state sponsor of terrorism,' the terrorism exception does not apply." J.A. 60-63. But the court was obliged to interpret the language of a statute as it **is** – not as it **was** – and to honor the plain meaning of the words that Congress actually used – as well as those it removed – in 2008. "The question … is not what Congress 'would have wanted,' but what Congress enacted in the FSIA." *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

"What Congress enacted in [§ 1605A]" was summarized by the Supreme Court last term, *per* Justice Ginsburg:

> American nationals may file suit against state sponsors of terrorism in the courts of the United States. Specifically, they may seek "money damages ... against a foreign state for personal injury or death that was caused by" acts of terrorism, including "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" to terrorist activities. This authorization – known as the "terrorism exception" – is among enumerated exceptions prescribed in the [FSIA] to the general rule of sovereign immunity.

Bank Markazi v. Peterson, 136 S. Ct. 1310, 1317 (2016) (citations and footnote omitted). Notably, designation does not appear *in haec verba* in the *Bank Markazi* summary of the pleading requirements. Contrary to the district court's straw-man version of Appellants' argument below, J.A. 62-63 and n.9, however, Appellants rest their argument on the language of the 2008 amendments itself, not the Supreme Court's interpretation of it in *Bank Markazi*.

The simple fact is that *Bank Markazi*, like every other case involving § 1605A, proceeded without observing, much less deciding, that designation is in all instances required (of course, much of the reported jurisprudence in § 1605A cases concerns Iran, which is and has at all relevant times been designated as a state sponsor). Indeed, the issue of statutory interpretation at the heart of this claim has never been briefed, argued, addressed, or resolved by any court. This case of first impression requires this Court to interpret the text of § 1605A by comparing it to the original version of the terrorist exception and assessing the significance of what is no longer there, and what has replaced it.

The erroneous premise that the courts have already decided this issue infects the district court's analysis and requires reversal.

First, the district court, citing a footnote in a recent decision of this Court, *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 482 n.22 (D.C. Cir. 2016), said that "the D.C. Circuit has grappled with the new language, and it observed that former section 1605(a)(7) 'is materially identical to current section 1605A.'" J.A. 62. But the quoted

footnote cannot possibly bear the weight that the district court placed on it, for several reasons.

In *Weinstein*, this Court was dealing with the narrow issues of (i) immunity from execution of a judgment (ii) under the commercial activity exception. Neither is presented in this case. Indeed, the footnote attaches to a block quotation of the text of 28 U.S.C. § 1610(a)(7), which could not be less relevant here. The conclusion that the AEDPA language is "materially identical" to the statute by which Congress repealed and replaced it is simply unwarranted. Nor is it appropriate, using selective quotation at its most obvious, to pretend that the *Weinstein* Court was answering a broad question about pleading requirements under § 1605A, instead of a narrow question of execution immunity under § 1610. This Court may of course decide to expand or limit its *Weinstein* footnote in light of the issue now presented, but it is clearly erroneous for the district court to have concluded that this Circuit had already done so.

Second, the district court concluded that:

> the D.C. Circuit has joined its sister circuits around the country in concluding that any assertion of immunity based on 28 U.S.C. § 1605A 'requires that … the foreign country was designated a state sponsor of terrorism at the time [of] the act.' *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 14 (D.C. Cir. 2015).

J.A. 62-63, also citing *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 955 (9th Cir. 2016); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 115 n.7 (2d Cir. 2013); and *Lubian v. Republic of Cuba*, 440 Fed.Appx. 866, 868 (11th Cir. 2011). Here too the district court

overinterpreted prior decisions in a way that led it into reversible error: the "sister circuits around the country" could have "conclud[ed]" nothing on the central issue here, because the impact of the 2008 amendments on the designation requirement was simply not addressed in any of their opinions. Undersigned counsel have undertaken a thorough examination of the filings in each of the cited cases (and all other cases under § 1605A since 2008), including the transcripts of oral argument where available. The decisions cannot be taken as even persuasive authority on the question presented here, because none of those cases provided the opportunity to consider it.

For example, in *Mohammadi v. Islamic Republic of Iran* – the only decision of this Circuit cited by the district court on this issue – this Court was tasked with determining the meaning of the term "national of the United States" for purposes of § 1605A(h)(5), and found that "none of the plaintiffs was a United States citizen between 1999 and 2006, when the central alleged acts of torture and extrajudicial killing occurred in Iran." 782 F.3d 9, 14. The case was therefore rightly dismissed, and the dismissal correctly affirmed, since the complaint failed to satisfy one of the statutory pleading requirements – a requirement of no relevance to this case. Because Iran is a designated state sponsor of terrorism, the Court did not, and could not, consider whether a state **not** so designated would lose its immunity under § 1605A.

For the same reason, in *Bennett*, the Ninth Circuit had no occasion to address the impact of the 2008 amendment on the designation requirement: again, the case was brought against Iran, which was and is designated a state sponsor. The Second Circuit's

decision in *In re Terrorist Attacks on Sept. 11, 2001*, and the Eleventh Circuit's opinion in *Lubian v. Republic of Cuba*, also stand for nothing more than the obvious conclusion that **designated states** fall within the mandatory hearing requirement of the 2008 statute. None of these offers the slightest support for ignoring the changes in the law adopted by Congress and approved by the President, as those changes might apply to states that are not designated sponsors of terrorism.

Finally, the district court concluded that "plaintiffs misread the statute as a whole." J.A. 63. But Appellants are not the ones who are overlooking the text of the 2008 amendments. The court noted that it "must begin with the presumption that Israel is immune from suit." *Id.* Appellants have never contested that proposition. It then recited the mandatory hearing requirement when defendants **are** designated state sponsors of terrorism. *Id.* Again, Appellants have never contended that § 1605A(a)(2)(A)(i)(I) says anything different: indeed, under it, the courts "shall hear" claims under this exception if the defendant is a state sponsor. "Israel," the court then noted, "is not, and has never been, designated as a state sponsor of terrorism." *Id.* No one could possibly disagree with that proposition, and Appellants have not only not contested it, but they have repeatedly pointed out that this is what makes this case one of first impression.

From these undisputed premises, the district court went on to conclude that "the presumption of immunity has not been overcome in this case. Therefore, the Court

lacks jurisdiction over plaintiffs' claim of torture in Count 1 to the extent that Count 1 is premised on the terrorism exception." *Id.*

With respect, this is a textbook example of begging the question. The whole issue presented in this case is whether the explicit elimination in 2008 of the designation prerequisite adopted in 1996, combined with the "upgrading" of cases against listed state sponsors into the mandatory hearing category, is to be respected by the courts, or not. The district court simply ignored this issue, relying on inapposite cases to find precedent for a question that no Circuit Court has had to resolve.

2. No Grounds for Ignoring the Plain Language of a Statute Apply Here.

Appellants do not claim that what Congress enacted in 2008 was merely an implied repeal or an implied amendment, which are routinely disfavored in this Circuit. *Howard v. Pritzker*, 775 F.3d 430, 437 (D.C. Cir. 2015). To the contrary, § 1083 of the National Defense Authorization Act for Fiscal Year 2008, *supra*, was clear: Congress said that its new language explicitly "strikes" the entirety of the old § 1605(a)(7), including its dismiss-absent-designation mandate, and replaces it with the new structure. Section 1083 is, in short, an explicit "repeal and replace" enactment.

Nor is this a case in which Appellants are obliged to "make a fortress out of the dictionary." *Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 129 (D.C. Cir. 1999) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.)). To the contrary, an explicit direction requiring courts to hear a case if a particular condition

is satisfied is logically distinct from – and cannot in good faith be equated with – an explicit requirement that a case be dismissed in the absence of that condition.

There are certainly situations in which a court may justify ignoring the actual language used by Congress, such as when its literal meaning is "absurd," according to the Supreme Court's decision in *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892). But this case does not come within the rule in *Holy Trinity*, which the Court has said applies only in "rare and exceptional circumstances. … there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Such evidence is notably absent here.

Finally, this is not a case in which resort to legislative history is necessary, helpful, or appropriate: the legislative history of a statute cannot be used to create an ambiguity when there is none in the text itself. *See*, *e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."). The burden therefore rests on those who would invoke legislative history to find the ambiguity first – a burden that cannot be satisfied here. What legislative history exists for the 2008 enactment establishes that suits against designated states must be heard, not that cases against non-designated states must be dismissed as under the old, now "stricken," law.

In a recent sequence of decisions notable for their relevance to this case, this Circuit has consistently held that "the authoritative statement is the statutory text, **not the legislative history or any other extrinsic material,**" *Johnson v. Interstate Mgmt. Co.,*

LLC, 849 F.3d 1093, 1098 (D.C. Cir. 2017) (*quoting Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005)) (emphasis added). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Navajo Nation v. United States Dep't of Interior*, 852 F.3d 1124, 1128 (D.C. Cir. 2017) (*quoting Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252, 529 (2004) (internal quotation marks omitted). *Accord N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

In sum, this case offers this Circuit an opportunity to remain resolute in assuring that legislative text is respected by "presum[ing] that, in a statute, Congress meant what it said and said what it meant." *Maine v. Fed. Energy Regulatory Comm'n*, 2017 WL 1364988, at *8 (D.C. Cir. Apr. 14, 2017). It falls to some hypothetical Congress in the future, not this Court, to put words in § 1605A where none now exist.

3. Recent Amendments to the FSIA Do Not Mandate a Different Result.

Although the court below did not discuss the 2016 amendments to the FSIA now codified at 28 U.S.C. § 1605B, "the Justice Against Sponsors of Terrorism Act" ("JASTA"), Pub. L. 114-222, Appellees argued that if Appellants' reading of 28 U.S.C. § 1605A were correct, JASTA would have been unnecessary. JASTA creates an exception to sovereign immunity purportedly to allow the Kingdom of Saudi Arabia –

not a designated state sponsor of terrorism – to be sued for its alleged role in sponsoring the attacks on September 11, 2001.

JASTA now provides an additional exception to immunity for acts of terrorism carried out in the United States, and applies that exception to civil actions alleging "a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, **regardless of where the tortious act or acts of the foreign state occurred**" (emphasis added). This gave expression to the sense of Congress that

> persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, **necessarily direct their conduct at the United States**, and should reasonably anticipate being brought to court in the United States to answer for such activities.

JASTA, § 2(a)(6) (emphasis added).

The new § 1605B does not require that a defendant state be designated a "state sponsor of terrorism" to be denied immunity, just as the 2008 amendment to the FSIA had already done. But the significant change brought into the Code by JASTA is the expansion, not of the set of states that would not be entitled to immunity, but of the categories of the acts that may form the basis of civil actions against those states. And in particular, tortious acts of terrorism become actionable against sovereign defendants

"regardless of where [they] occurred," which is to say, they do not need to have taken place "in the United States."

It was precisely to permit the families of victims of the terrorist attacks of September 11, 2001, to file suits against Saudi Arabia – accused not of direct or command responsibility for the attacks themselves, but of providing indirect support whether deliberately or not – that Congress identified as the purpose of the Act. JASTA allows the Courts to grant "relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA, § 2(b).

Saudi Arabia's absence from the list of designated state sponsors of terrorism, in other words, is not the impediment to suit that JASTA was designed to overcome. Rather, JASTA permits suits to go forward based on the allegation that a sovereign defendant "[1] knowingly or recklessly contribute[d] material support or resources, directly or indirectly, [and 2] to persons or organizations … committing acts of terrorism" against the United States. *Id.*, § 2(a)(6). **Those** expansions, **not** the omission of a requirement that a defendant state be designated a sponsor of terrorism, reflected the legislative intent behind JASTA. Appellants' reading of the FSIA "terrorism exception" is in no way undermined by the 2016 enactment of JASTA, nor does the statute require a different interpretation of existing law.

Conclusion

For all of the foregoing reasons, Appellants David Schermerhorn, *et al.*, respectfully submit that the decision of the United States District Court should be reversed, and the case remanded to that court for further proceedings.

Respectfully submitted,

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STATUTORY ADDENDUM

28 U.S.C. §§ 1603, 1605(a), and 1605A

(emphases added)

28 U.S. Code § 1603 - Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub. L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub. L. 109–2, § 4(b)(2), Feb. 18, 2005, 119 Stat. 12.)

28 U.S. Code § 1605 - General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any

differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(Added Pub. L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub. L. 100–640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub. L. 100–669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101–650, title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub. L. 104–132, title II, § 221(a), Apr. 24, 1996, 110 Stat. 1241; Pub. L. 105–11, Apr. 25, 1997, 111 Stat. 22; Pub. L. 107–77, title VI, § 626(c), Nov. 28, 2001, 115 Stat. 803; Pub. L. 107–117, div. B, § 208, Jan. 10, 2002, 115 Stat. 2299; Pub. L. 109–304, § 17(f)(2), Oct. 6, 2006, 120 Stat. 1708; Pub. L. 110–181, div. A, title X, § 1083(b)(1), Jan. 28, 2008, 122 Stat. 341; Pub. L. 114–222, § 3(b)(2), Sept. 28, 2016, 130 Stat. 853; Pub. L. 114–319, § 2(a), Dec. 16, 2016, 130 Stat. 1618.)

28 U.S. Code § 1605A - Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general

(1) No immunity. —

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard. — The court shall hear a claim under this section if—

(A) (i)

(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations. — An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private Right of Action. — A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering,

and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional Damages. — After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special Masters. —

(1) In general. —

The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds. —

The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal. — In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property Disposition. —

(1) In general. — In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice. —

A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability. —

Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions. — For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

(Added Pub. L. 110–181, div. A, title X, § 1083(a)(1), Jan. 28, 2008, 122 Stat. 338)

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2017, I served the foregoing Opening Brief of Appellants David Schermerhorn, *et al.*, upon the following counsel of record for Appellees by email, and also by first-class mail, postage prepaid, addressed to:

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