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)

REPLY BRIEF OF APPELLANTS

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GLOSSARY

The following acronyms and abbreviations are used in this Brief:

App. Br.	Appellants' Opening Brief
App. D.C. Br.	Appellants' District Court Brief in Opposition to the Motion to Dismiss
FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611
IDF	Israeli Defense Forces
Israel Br.	Brief of Appellees
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

STATEMENT CONCERNING ORAL ARGUMENT

Appellants David Schermerhorn, *et al.*, respectfully submit that because this is a case of first impression regarding the interpretation of the Foreign Sovereign Immunities Act, and in particular, 28 U.S.C. §§1605(a)(5) and 1605A, oral argument would be beneficial to the Court in its deliberations. They request that each side be allocated 30 minutes.

STATUTES & REGULATIONS

All applicable statutes and regulations are contained in the Opening Brief of Appellants at pages 50-54.

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Appellants David Schermerhorn, Mary Ann Wright, Huwaida Arraf, and Margriet Deknopper hereby respectfully submit their Reply to the Brief of Appellees, the State of Israel and its agencies ("Israel Br.").

Introduction and Summary of Argument

This Court is tasked in this case with the interpretation of two exceptions to the presumption of immunity codified by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1330, 1601-1611. Appellants alleged in the court below that they were the victims of certain tortious acts committed by Appellees' agents on board a U.S.-flagged vessel sailing in international waters. They contend that Appellees are not entitled to

sovereign immunity for two independent reasons: first, because the torts were committed "in the United States," as required by 28 U.S.C. §1605(a)(5) ("the non-commercial tort exception"), in light of the definition set forth in §1603(c); and second, because the acts allegedly inflicted on them come within the scope of 28 U.S.C. §1605A ("the terrorism exception").

The district court – erroneously, in Appellants' submission – concluded that neither exception is applicable, that Appellees are immune from suit, and that it was therefore without jurisdiction to entertain evidence or argument on the merits. The court did not reach Appellees' alternative motion to dismiss for failure to state a claim. Nor did it consider Appellees' arguments – which they nevertheless reiterate in their Brief before this Court – that the alleged tortious acts were part of "the exercise or performance or failure to exercise or perform a discretionary function," within 28 U.S.C. §1605(a)(5)(A), were unreviewable as acts of state, or were political in character.

Appellees' submissions regarding the two FSIA exceptions do not support affirmance of the decision below. And the arguments presented by Appellees that did not feature in the district court opinion do not merit this Court's consideration on appeal.

The essence of Appellees' arguments, before this Court and the trial court, is that Appellants are asking the judicial branch to go where it is not welcome: to adjudicate what is essentially a political issue, which they are trying to disguise as a legal dispute.

But in fact, it is Appellees, not Appellants, who are painting this case with the colors of politics, asserting that tortious actions on board an American flagged vessel are unreviewable because they occurred in the context of what Appellees claim to have been a national security operation. Nothing in the record of this case would substantiate a defense of the brutality inflicted on Appellants as necessarily connected to national security.

Appellants do not seek a judicial determination of the legality of Israel's foreign policy or its "military actions outside the United States." Israel Br., 1. They do not ask this Court to classify Israel as a terrorist state, or to deny its role as an ally of the United States in addressing issues of terrorism in the Middle East and globally. Appellees' protestations concerning Israel's good faith as a geopolitical partner of this country (*see*, for example, *id.*, 2) are of no relevance, and the constant repetition of those claims is without legal consequence. Whether the blockade of the Gaza Strip was or was not a necessary response to attacks on civilian populations (*id.*, 6) is a distraction not raised by, and not germane to, this case. What Appellants do submit for judicial determination is whether they were the victims of torts committed in a place, and in a manner, disentitling the tortfeasors to the immunity that might shelter them under other circumstances.

Appellants' Complaint (Joint Appendix ("J.A."), 8-28) sets out well-pleaded allegations of assaults, battery, trespasses, and other offenses of sufficient seriousness to rise to the level of torture, as defined in U.S. law. 28 U.S.C. §1350 note, incorporated

by reference in 28 U.S.C. §1605A. Those claims are fully actionable in a suit against Appellees, so long as one of the FSIA exceptions can be shown to obtain. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

Appellees tell this Court that evaluating the legality of the raid on the Flotilla, conducted on the high seas on May 31, 2010, is outside the proper scope of the judicial branch … and yet they go on to inform the Court, as if it were well-established, that the raid was legal and justified. *See* Israel Br., 8-9, 17-19. Appellees deny that they are selective in choosing the descriptions of the raid on which they rely … and yet they, like the court below, endorse the credibility of a report commissioned by the Israeli Government which concluded that there were no illegalities, *id.,* 8-9, while ignoring precisely the opposite conclusions of the Palmer Commission and the U.N. Human Rights Council (UNHRC). App. Br., 3-6. They claim that they were merely carrying out unreviewable discretionary functions connected with national security…and yet they tout the complete benevolence of their intentions, while impugning Appellants' motives, hinting, *inter alia* – without the slightest scintilla of evidence – that Appellants were engaged in smuggling arms to the terrorist group Hamas (no one has alleged that weapons were found on *Challenger I*). Israel Br., 1-3, 6.

There is no small amount of sanctimony in these arguments. Just to cite a single example, Appellees state as fact that, during the raid on the Flotilla, "IDF [Israeli Defense Forces] personnel acted professionally in the face of extensive and unanticipated violence." *Id.*, 9. But that was not the conclusion of the Palmer

Commission and the UNHRC Reports. The former, indeed, concluded that the use of force was excessive, even "unacceptable." *See* ¶264.[1]

In presenting their arguments, Appellants do not ask this Court to opine on the legality of Israel's defense policy or military operations, either in general or in this instance. They present a tort action, claiming that they were injured by the deliberate, unprovoked acts of Appellees' agents. And Israel and its Ministries are properly answerable for those injuries.

The court below erred in concluding that the non-commercial tort exception does not apply here because the acts at issue occurred on a ship flying the flag of the United States in international waters. And it erred in holding that the terrorism exception is inapplicable to a state like Israel because it has not been designated 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). The dismissal on those grounds was incorrect as a matter of law, and none of the arguments raised by Appellees below but not addressed by the trial court can rescue the decision from the reversal that is the proper disposition of the instant appeal.

[1] These sources are discussed in Appellants' Brief in Opposition to the Motion to Dismiss, Docket No. 22 in the court below ("App. D.C. Br."), 3-6.

Argument

I. The Non-Commercial Tort Exception in the FSIA Applies Here.

A. Cases Concerning Embassies and Aircraft Are Not on Point.

Notwithstanding the unsourced assertions put forward by Appellees, no reported decision of this or any other Court conclusively addresses the issue presented here: does the non-commercial tort exception apply to torts committed by agents of a foreign sovereign on a U.S.-flagged vessel in international waters? Surely, as Appellants argued in their opening Brief,[2] the matter is not resolved by decisions concluding that neither U.S. embassies on foreign soil, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), nor U.S.-flagged aircraft overflying the territory of another sovereign, *Smith v. Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996), are "in the United States."

Embassies may be deemed "extraterritorial" in some contexts (as this Court noted in *Persinger*, "the United States has **some** jurisdiction over its embassy in Iran," 729 F.2d 835, 839 (emphasis added)), but they are certainly not part of the territory of the states they represent.[3] And the *Smith* Court was careful to note the limited scope of its holding. It explicitly eschewed any determination of whether "an American flag aircraft is like an American flag vessel," concluding only that "the fact that a location is subject to an assertion of United States authority does not necessarily mean that it is

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[2] Appellants' "Amended Brief" (resubmitted to correct an error in the table of authorities), was filed on June 7, 2017 ("App. Br."). *See* 28-31.

[3] This is made clear, *inter alia*, by the Vienna Convention on Diplomatic Relations, T.S. 993, 59 Stat. 1031(entered into force December 13, 1972).

the 'territory' of the United States for purposes of the FSIA." 101 F.3d 239, 246. *See* App. Br., 30-31.

Challenger I was in international waters when it was attacked. The authority of a state over vessels flying its flag on the high seas is exclusive, and it is plenary. *U.S. v. Jho*, 534 F.3d 398, 405 (5th Cir. 2008). That is the key difference that distinguishes the embassy cases like *Persinger*, as well as *Smith* (apparently the sole reported decision addressing the applicability of the tort exception to aircraft). The district court's reliance **only** on those cases for the proposition that §1605(a)(5) does not apply was incorrect as a matter of law, and was reversible error.

Nor is *Amerada Hess*, *supra*, remotely to the contrary. As Appellees themselves observed, Israel Br., 17, the Court in *Amerada Hess* was dispatching an untenable argument Appellants have never made: that the high seas in all their vastness are within "the United States" for purposes of the FSIA tort exception. Appellants' position, as was made clear in their opening Brief, is that U.S.-registered ships in international waters,[4] and not those waters themselves, come within that definition.

B. Congress Defined the Term "the United States" by What It "Includes," Not What It "Means."

Appellants argue that Congress's decision to define the term "the United States" in 28 U.S.C. §1603(c) by what it "includes," not what it "means," shows that it intended

[4] The owner of the vessel whose attack gave rise to the *Amerada Hess* litigation was Liberian. *See* 488 U.S. 428, 431.

expansion, not limitation. This is especially apparent in light of the statutory context: five terms are defined in §1603, three by what they "mean," and the other two by what they "include."

Appellees cite *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) for the proposition that "includes" is "usually" – but implicitly not always – "a term of enlargement." Israel Br., 19. After quoting that language from 2A N. Singer & J. Singer, Sutherland on Statutory Construction (7th ed. 2007), however, the Court in that very same footnote went on to cite with approval its decision in *Groman v. Commissioner*, 302 U.S. 82, 86 (1937): "[W]hen an exclusive definition is intended the word 'means' is employed, ... whereas here the word used is 'includes.'" 553 U.S. 124, 131 n.3. Appellees argue that "Congress knows how to place the high seas within the jurisdictional reach of a statute," *Amerada Hess*, 488 U.S. 428, 440 "but did not do so in the FSIA." Israel Br., 17. By the same token, it knows how to express a definition as limited to the examples provided (and indeed did exactly that three times in the very same section), but did not do so in §1603(c).

Appellees also rely on *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 (1934), which suggests that "sometimes" the words "means" and includes" are used interchangeably. But again, Appellees are somewhat arbitrary in their citation to parts of judicial opinions that they like. After the sentence that Appellees quote, the *Helvering* Court went on to observe that context had to be considered. The Court found most significant in establishing context the fact that, just as in §1603, other definitions could be found in

the statute it was construing. The Court looked at one section that presented 10 defined terms, of which "three are stated to 'include' designated particular instances, the remaining seven are stated to 'mean' the definitions subsequently given." Another section had four defined terms, two using "includes," and the other two "means." From this, the Court concluded:

> That the draftsman used these words in a different sense seems clear. The natural distinction would be that **where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition.**

293 U.S. 121, 126 n.1 (emphasis added).[5]

The approach taken by this Court in *Am. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 796 F.3d 18, 25-26 (D.C. Cir. 2015), is entirely consistent with the High Court's teachings. The definition of "the United States" in 28 U.S.C. §1603(c) is not limited to the listed items – "all territory and waters, continental or insular, subject to the jurisdiction of the United States" – but embraces also places that share with those listed the quality of being "subject to the jurisdiction of the United States" in relevant respects.

[5] In *State ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 273-74 (1940), Israel Br., p. 19, the Supreme Court was constrained to accept the State's courts interpretation of a State statute; it did not offer its own opinion concerning the proper way to construe the statutory definition.

C. Appellants Do Not Argue That U.S.-Flagged Vessels Are Part of the United States for All Purposes.

Appellants readily acknowledge that there are some circumstances, some statutes, and some contexts in which it would make no sense to treat U.S.-flagged vessels as part of "the United States." The Supreme Court held that the Eighteenth Amendment and its implementing legislation were not intended to prohibit the consumption of alcoholic beverages on board ships outside U.S. territorial waters. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923). However, the statute under review in *Cunard* was quite different from the FSIA provision at issue here: the scope of the law that the Court interpreted in *Cunard* was "the United States and all territory subject to the jurisdiction thereof." 262 U.S. 100, 121. The National Prohibition Act did not define "the United States," and certainly not in terms of what it "included."

Similarly, a foreign merchant seaman joining the crew of a U.S. vessel in a foreign port has not "entered" the country within the meaning of its immigration laws. *United States ex rel. Claussen v. Day*, 279 U.S. 398 (1929), Israel Br., 18. Again, the statutory provision relevant to that case was that "the United States" "shall be construed to mean [not 'to include'] the United States and any waters, territory or other place subject to the jurisdiction thereof …" As the Supreme Court noted in that context, "[a]n entry into the United States is not effected by embarking on an American vessel in a foreign port. Such a vessel outside the United States whether on the high seas or in foreign waters is not a place included within the United States as defined by the act." *Id.*, 279

U.S. 398, 401 (1929), citing *Cunard* 262 U. S. 101, 122, and *Scharrenberg v. Dollar S. S. Co.*, 245 U. S. 122, 127 (1917). It seems quite clear that "neither any treaty nor statute suggests the notion that, upon boarding an American vessel, either in foreign waters or upon the high seas, an alien is deemed to have entered the United States." *Wong Ock Jee v. Weedin*, 24 F.2d 962, 963 (9th Cir. 1928)

Nor is there an anomaly or a contradiction in the conclusion that a child born to foreigners on a U.S.-flagged vessel is not a native-born citizen of the United States. In *Lam Mow v. Nagle*, 24 F.2d 316, 317 (9th Cir. 1928), the Ninth Circuit held that a child born to "parents of the Chinese race and subjects of China, but domicile[d] in the United States, to which country they [were] returning from China at the time of the child's birth," is a not a U.S. citizen. To acquire that status, the Court held, "the party must be born within a place where the sovereign is, at the time, in full possession and exercise of his power, and … must also, at his birth, derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such de facto." *Id.*, 24 F.2d 316, 318. Appellants' argument here in no way undermines that conclusion.

D. The Assimilation of Ships to "Floating Islands" May Be a Legal Fiction, but It Is an Authoritative Guide to Interpretation of the Law.

Appellees, and also the court below, describe the characterization of ships as "floating islands" of the nations whose flags they fly as nothing more than "a figure of speech, a metaphor," *Cunard*, 262 U.S. 100, 123. Appellees therefore disparage it as a "fiction," Israel Br., 26-28. But "legal fiction" is not to be understood as a pejorative,

indicating something valueless except perhaps as a kind of historical relic. To the contrary, there can be great value in legal fictions, which "have an appropriate place in the administration of the law when they are required by the demands of convenience and justice." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 92 (1934). Thus it is that we speak of "constructive evictions," in which no tenant was actually evicted, and "constructive terminations" in which no employee was dismissed. That corporations are to be treated for some purposes as persons is another useful and common legal fiction. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2755 (2014).

Moreover, Appellees' contention that somehow international law has moved beyond the "floating island" metaphor is simply incorrect. The relevant portion of *The S.S. Lotus Case* [*Fr. v. Turk.*], (1927) P.C.I.J., ser. A, No. 10, has not, in fact, "been superseded by treaty." Israel Br., 26-27. To the contrary, Article 94(1) of the U.N. Convention on the Law of the Sea ("UNCLOS") reinforces the exclusive jurisdiction of flag states over their ships in international waters, and in proceedings before the European Court of Human Rights this language was described as "enshrin[ing]" the *Lotus* principle, "an irrefutable assertion of international law." *Hirsi Jamaa v. Italy*, Applic. No. 27765/09 (23 Feb. 2012) (Pinto de Albuquerque, J., concurring), at 77-78. Nor is Appellees' invocation of the European Convention on State Immunity, ETS No. 74 (entered into force June 11, 1976), art. 11, Israel Br., 25-26, availing, not least because that Convention has not been accepted as an articulation of international law even

among the member states of the Council of Europe. *See McElhinney v. Ireland*, Applic. No. 31253/96 (Eur. Ct. H.R. 21 November 2001), ¶27.

The metaphor of the floating island illustrates the exclusivity of a flag state's jurisdiction over its ships while on the high seas: a proposition with very significant legal consequences in many contexts,[6] and obviously not to be cast aside lightly. From these authorities, this Court should conclude that Congress had the power to enact a tort exception to sovereign immunity that would reach the deck of *Challenger I*, and by adopting 28 U.S.C. §§1603(c) and 1605(a)(5), it did precisely that.

E. Appellants Do Not Challenge a "Discretionary Function."

Finally, Appellees would have this Court affirm the decision below on alternative grounds that the district court did not reach. The relevant exception in the FSIA does not permit tort suits against foreign sovereigns "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. §1605(a)(5)(A). Appellees allege that on the scanty record before it, the trial court should have concluded – and this Court should now conclude – that this provision is satisfied. The district court expressly declined to reach this submission: "Because the Court concludes that the alleged torts did not occur 'in the United States,' it need not reach defendants' alternative argument

[6] It is true that these consequences are dependent on where private shipowners, in their discretion, decide to register or deregister their vessels. Israel Br., 22-23. But the extension of the non-commercial tort exception to U.S.-flagged ships in international waters is but one of the many consequences of such registration.

that the discretionary function exception would be an additional bar to plaintiffs' claims." *See* J.A., 57, n.7.

At the outset, it would be inappropriate for this Court to affirm the decision below on grounds that the court below did not address. This is not a case like *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012), in which the complaint facially failed to "contain sufficient factual matter, accepted as true, to 'state a claim to relief [under the relevant statute] that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Nor is this Court's decision in *Radtke v. Caschetta*, 822 F.3d 571, 573 n.2 (D.C. Cir. 2016), on which Appellees rely, to the contrary. In *Radke*, this Court affirmed a dismissal for mootness, although it substituted its reasoning to sustain that conclusion for the reasoning of the trial court.

Here, by contrast, while Appellees presented their argument on the discretionary function exception below (and repeated it here)[7], an evaluation of that argument would obviously have required determinations that the court could not make at the outset of litigation, especially because when considering a motion to dismiss it had to "accept[] as true all of the factual allegations contained in the complaint and draw[ ] all inferences in favor of the nonmoving party." *Bowman v. Iddon*, 848 F.3d 1034, 1039 (D.C. Cir. 2017), citing *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014). At the very least,

[7] A full refutation of Appellees' claims on this point is set out in App. D.C. Br. at 19-22.

Appellants' contention that the acts complained of violated international law would, if proved, trigger the principle articulated in *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980), to the effect that there is "no 'discretion' within the meaning of §1605(a)(5)(A) to order or to aid in" illegal acts.

II. The "Terrorism Exception" Also Applies on This Record.

In their opening Brief, Appellants presented their contention that the 2008 amendments to the FSIA – the transformation of the former §1605(a)(7) into the current §1605A – changed the analysis to be applied by trial courts in determining whether the exception to sovereign immunity applies. Appellees apparently contend that the amendments were of no practical effect at all. Appellants' argument under 28 U.S.C. §1605A can be summarized in five essential steps, none of which is directly rebutted in Appellees' Brief.

1. "When Congress acts to amend a statute, [the courts] presume it intends its amendment to have real and substantial effect." *Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 145 (2003); *Stone v. INS*, 514 U.S. 386, 397 (1995). This Court is not free to assume that an amended statutory text means precisely the same thing that it meant before the amendment, as Appellees urge here. They certainly cite no case in which ignoring a substantive amendment was countenanced.

2. All parties agree that under the version of the terrorism exception formerly codified at §1605(a)(7), sovereign immunity could be denied only if the defendant had been designated by the U.S. Government as a state sponsor of terrorism. The issue on

appeal is the meaning of the amendments repealing §1605(a)(7) and replacing it with § 1605A. Appellants ask only that this Court interpret the language of a statute as it now is – not as it was – honoring the plain meaning of the words that Congress actually used, and those that it removed.

In 2008, Congress deleted all of the old §1605(a)(7) – including its unambiguous requirement of a terrorist designation before the state's immunity is overcome – and replaced it with the requirement of a hearing when the defendant state is designated. *See* National Defense Authorization Act for Fiscal Year 2008, Pub.L. 110-181, Div. A, 122 Stat. 341, §1083(b)(1)(A)(iii). Appellees offer the fanciful theory that all that happened to the statute in 2008 was the pruning of a double negative, Israel Br., 45. But, of course, if that had been Congress's objective, it could have been achieved in a far more direct manner, simply by providing that "the court **may** hear a claim under this section **only** if … the foreign state was designated …" Nothing like that appears in the new version. A proceeding could in principle be blocked on various discretionary, non-jurisdictional grounds, such as act of state or *forum non conveniens*. Appellees also ignore the plain implication of the new mandatory hearing provision as an override of the very justiciability doctrines that they raise elsewhere in their Brief.

In 2008, Congress also explicitly altered the caption of the section from "Jurisdiction for Lawsuits Against **Terrorist States**," to the "**Terrorism** Exception to Immunity." *Id.* (emphasis added). The focus, in other words, shifted from the nature of the party defendant to the type of conduct that gave rise to the underlying lawsuit.

The Supreme Court has recognized the relevance of captions and headings in statutory interpretation. *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). Appellees' Brief is utterly silent on this change of emphasis from designated **states** to designated **conduct**.

The 2008 amendments are fully consistent with one of the animating purposes of the FSIA: to transfer authority from the executive branch to the judiciary in determining the availability of foreign sovereign immunity. In a strategic mischaracterization, Appellees contend that Appellants "attempt to skirt the plain meaning of this text by transforming the limitations on jurisdiction in §1605A(a)(2) into conditions mandating the exercise of jurisdiction." Israel Br., 40. Appellees have it exactly backwards: the hearing requirement applies to designated states, but, by eliminating the "red light" requirement of terrorist designation, Congress empowered the courts to determine **all** states' claims to immunity consistently with the standards of the FSIA and principles of international law.

3. As shown in Appellants' Opening Brief, many §1605A cases since 2008 have assumed without deciding that state-sponsor designation remains a requirement for jurisdiction. But Appellees, string-citing these and additional cases at length, commit the cardinal error of taking *obiter dicta* for holdings. Israel Br., 40-42. That approach will not work in this Court, which rightly rejects any reliance on prior cases for the resolution of arguments never advanced there. *Radtke*, *supra*, 822 F.3d 571, 574 (citing *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998) (even if an earlier opinion could

be read to reach the relevant issue, because "that issue was not before the court, its overly broad language would be *obiter dicta* and not entitled to deference"). *See also Lawson v. United States,* 176 F.2d 49, 51 (D.C. Cir. 1949) (defining *obiter dicta* as "ruling[s] on an issue not raised," or "opinion[s] of a judge which [do] not embody the resolution or determination of the court, and made without argument or full consideration of the point.").

Appellees never address – let alone rebut – the fact that no party in any of these cases contended that the 2008 amendments significantly altered the designation requirement. No case brought against a listed state sponsor of terrorism – cited repeatedly by Appellees – can be relevant here, where the defendant state is not so designated. *See*, *e.g.*, *Mohammadi v. Islamic Republic of Iran*, 82 F.3d 9 (D.C. Cir. 2015) (against Iran, a designated state); *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57 (D.D.C. 2015) (same); *Gill v. Islamic Republic of Iran*, 2017 WL 1289938 (D.D.C. Apr. 6, 2017) (same); *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016) (same); *Thuneibat v. Syrian Arab Republic*, 167 F. Supp. 3d 22 (D.D.C. 2016) (against Syria, a designated state); *Stansell v. Republic of Cuba*, 217 F. Supp.3d 320 (D.D.C. 2016) (against Cuba, designated); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002 (against Libya, yet another designated sponsor of terrorism).

Even when the terrorism exception was argued and decided, no party made the text-based submission raised here. For example, in the decision cited most prominently by Appellees, *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 89 (2d Cir. 2008),

reversed on other grounds, *Samantar v. Yousuf*, 560 U.S. 305 (2010), the Second Circuit did indeed note that Saudi Arabia was not designated a sponsor of terrorism, and "[a]s a consequence, the Terrorism Exception is inapplicable here." *Id.*, at 89. Appellees artfully quote that conclusion, but leave out the next sentence: "No plaintiff argues otherwise." *Id.*

Carpenter v. Republic of Chile, 2009 WL 5255327 (E.D.N.Y. July 29, 2009), though also cited in Appellees' Brief, exemplifies the broader problem with their argument. In *Carpenter* the plaintiff, proceeding *pro se*, attempted to invoke a variety of FSIA exceptions. The district court dismissed the complaint in an unpublished opinion, relying entirely on *In re Terrorist Attacks on Sept. 11, 2001*. *Id.*, at *7. That disposition was affirmed in relevant part in *Carpenter v. Republic of Chile*, 610 F.3d 776 (2d Cir. 2010) (*per curiam*). Quite apart from the question of how much weight this Circuit should attach to a *per curiam* disposition by another Circuit of an unpublished opinion, neither the district court nor the Court of Appeals addressed the 2008 amendments to the statute or the change to the designation requirement. Appellees nonetheless quote the Second Circuit's opinion, Israel Br., 43, as though it were a conclusive disposition of the merits of this case, when in reality it could have been nothing of the sort. *Radtke*, *supra*, 882 F.3d 571, 574; *see also Embassy of Nigeria v. Ugwuonye*, 901 F. Supp. 2d 136 (D.D.C. 2012) (decided on the basis of the commercial activity exception, not the terrorism exception).

4. Appellees cite the legislative history of the 2008 amendments to prove what no one disputes: that cases against designated state sponsors of terrorism not only fall within the subject matter jurisdiction of the federal courts, but are subject to a mandatory hearing. Beyond that, however, Appellees simply ignore the recent jurisprudence of this Court, repeatedly reaffirming that 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)); *Navajo Nation v. United States Dep't of Interior*, 852 F.3d 1124, 1128 (D.C. Cir. 2017). The legislative history may be ambiguous, but the statutory language is not. And the statutory language governs.

5. Appellants' interpretation of §1605A is unaffected by the recent enactment of the Justice Against Sponsors of Terrorism Act ("JASTA"), codified at 28 U.S.C. §1605B. Appellees contend that Appellants' interpretation of §1605A somehow renders JASTA superfluous, Israel Br., 50-51. But that conclusion is supportable only by ignoring the differences between §1605A and §1605B in text and scope. JASTA allows – in a way that §1605A does not – a cause of action against agents of a state that support organizations "engag[ing] in terrorist activities against the United States."

Appellants here ground their claims only in predicate acts explicitly identified in §1605A (*e.g.*, torture and hostage taking). Neither §1605A nor §1605B requires that the defendant state be designated a sponsor of terrorism, except with respect to the mandatory hearing under the former. Given the fundamental difference in the types of

claims allowed and the kind of attacks that Congress had in mind in 2016, that may reflect redundancy, but not superfluity.

III. Appellees' Other Proffered Defenses of the Decision Below Do Not Withstand Scrutiny.

A. The Act of State Doctrine Does Not Apply.

Appellees' sensitivity concerning issues raised by this case is insufficient to implicate the act of state doctrine. The Supreme Court, *per* Justice Scalia, unanimously declared that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments…." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990). To the contrary, the doctrine applies only if certain substantive criteria are satisfied, and this case fails to meet three of them. *See* App. D.C. Br., 33-36.

1. As Appellees concede, Israel Br., 55, the doctrine does not shield from judicial scrutiny conduct outside the foreign state's territory. *Kirkpatrick*, 493 U.S. 400, 405 ("In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."). *Accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964) (the doctrine applies

only to "the public acts of a recognized foreign sovereign power committed within its own territory.").[8]

Appellees ask this Court to characterize wrongs committed on the high seas and on the deck of a U.S.-flagged vessel as occurring on Israeli soil because the Government made some decisions on dry land. Israel Br., 55. This novel but unsupportable "headquarters doctrine" would convert every alleged extraterritorial wrong undertaken pursuant to a determination in a foreign capital into an act of state, thereby eviscerating the geographical limitation traceable to the 19th century. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

2. Regardless of where the challenged conduct occurred, the act of state doctrine applies only "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles…. [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Sabbatino*, 376 U.S. 398, 428; *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1540 (D.C. Cir. 1984), *cert. granted, judgment vacated*

[8] This Court has strictly applied the territoriality requirement. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012); *Riggs Nat'l Corp. & Subsidiaries v. Commissioner of IRS*, 163 F.3d 1363, 1367 (D.C. Cir. 1999); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2002). While the Court in *Hourani v. Mirtchev*, 796 F.3d 1 (D.C. Cir. 2015), considered in *dicta* the possibility of a non-territorial application, it concluded that "the alleged conduct here is rooted, in all relevant respects, **within foreign sovereign territory**…." *Id.*, at 13 (emphasis added).

on other grounds, 471 U.S. 1113 (1985) ("[T]he doctrine was never intended to apply when an applicable bilateral treaty governs the legal merits of the controversy.").

The doctrine is inapplicable in this case because the Complaint alleges violations of numerous treaties binding both the United States and Israel, including *inter alia* the Geneva Conventions of 1949 relative to the law of war; the U.N. Convention against Torture; and the Geneva Convention on the High Seas of 1958.

3. Finally, all creatures of the common law, like the act of state doctrine, bend to the will of the legislature. It would eviscerate the FSIA's statutory regime if every case alleging a state-sponsored act of terrorism within the meaning of 28 U.S.C. §1605A were derailed by the act of state doctrine, based on the claim that the sponsoring state was acting in its sovereign capacity.

B. This Case Does Not Present a Non-Reviewable Political Question.

1. Uniform precedent in the Supreme Court and in this Circuit leaves no room for the political question doctrine to operate when the FSIA is satisfied. *Hourani v. Mirtchev*, *supra,* 796 F.3d 1, 8-9 (collecting authorities); *Simon v. Republic of Hungary*, 812 F.3d 127, 150 (D.C. Cir. 2016) ("[t]here is no across-the-board constitutional bar preventing the Judiciary's consideration of actions arising out of the wartime conduct of a foreign sovereign") (citations omitted). This consideration alone distinguishes the instant case from every one of those cited by Appellee, Israel Br., 53, including *Doe v. State of Israel*, 400 F.Supp.2d 86 (D.D.C. 2005), which found that the political question doctrine was relevant **precisely** because **none** of the FSIA exceptions applied. If

Hourani were not the rule, a judge-made policy of abstention would supersede the legislative judgments of Congress, in violation of the very separation of powers principles that lie at the heart of the political question doctrine itself. Thus, if Appellants are right that the attack on *Challenger I* fells within at least one of the FSIA's exceptions, its legality *vel non* would not be removed from judicial determination by the political question doctrine. Appellees fail to cite, let alone distinguish, this Court's decisions in *Hourani* or *Simon*. *See* App. D.C. Br., 28-30.

2. Appellees demand that this court should short-circuit the required "discriminating inquiry into the precise facts and posture of the particular case" before applying the political question doctrine. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (rejecting the application of the political question doctrine in a case arising from the Israeli-Palestinian conflict). In *El–Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (*en banc*), this Court insisted that "the presence of a political question … turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action." *Id.*, at 842 (citation omitted); *Bin Ali Jaber v. United States*, 2017 WL 2818645, at *3 (D.C. Cir. June 30, 2017). As a consequence, Appellees' assertion that Appellants "challenge military and security decisions of Israel," Israel Br., 53, even were it an accurate portrayal of the Complaint, would be insufficient to trigger the doctrine. Indeed, it is just such a summary invocation – blowing past the precise

claims in the Complaint – that the Supreme Court has directed the lower courts to reject.

The "discriminating inquiry" required in this case would assess not some standardless political or strategic judgment by a foreign government, but the legality of actions taken against U.S. citizens and others on a U.S.-flagged vessel transiting international waters. Like the petitioners in *Hamdan v. Rumsfeld*,[9] which also rejected the applicability of the political question doctrine, Appellants here seek to have this conduct assessed under treaties to which the United States and Israel are both parties. Despite Appellees' alarmist rhetoric, the legality of the Gaza blockade, set against the long crisis in the Middle East, is no more relevant here than was the legality of the wars in Afghanistan and Iraq in *Hamdan*. The United States could not deploy the political question doctrine there to shield the legality of the military commissions in Guantanamo Bay from judicial scrutiny, even at the height of the war on terrorism. *A fortiori*, such impunity should not be extended to Israel in the circumstances of this case.

Conclusion

For all of these reasons, as well as those set out in Appellants' opening Brief, the decision below should be reversed, and this case remanded to the district court for further proceedings.

[9] *Hamdan v. Rumsfeld*, 548 U.S. 557, 561 (2006), *superseded by statute on other grounds*, Military Commissions Act of 2006, Pub.L. No. 109–366, §7(b), 120 Stat. 2600, 2636 (2006).

Respectfully submitted,

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