ORAL ARGUMENT NOT 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, No. 16-cv-49
Hon. Amy Berman Jackson

APPELLEES' BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Defendants-Appellees the State of Israel and its Ministries of Defense, Foreign Affairs, Justice, and Public Security hereby state as follows, pursuant to D.C. Circuit Rule 28(a)(1):

I. Parties, Intervenors & Amici

Plaintiffs-Appellants in this case are:

- David Schermerhorn
- Mary Ann Wright
- Huwaida Arraf, and
- Margriet Deknopper.

Defendants-Appellees in this case are:

- The State of Israel
- The Ministry of Defense of Israel
- The Ministry of Foreign Affairs of Israel
- The Ministry of Justice of Israel, and
- The Ministry of Public Security of Israel.

Defendants each are a foreign state within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a).

The United States, by the U.S. Department of Justice, also filed a Statement of Interest below.

No party in this case is a corporate entity.

II. Rulings

On January 25, 2017, the district court issued a Memorandum Opinion (JA46–64) and Order (JA65) dismissing Plaintiffs' complaint. Plaintiffs have appealed from that Memorandum Opinion and Order. The decision below also may be found at 2017 WL 384282.

III. Related Cases

Defendants are unaware of any related case before this Circuit or any other court within the meaning of Circuit Rule 28(a).

Dated: July 5, 2017

Respectfully submitted,

/s/ John B. Bellinger, III

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GLOSSARY

Br.	Appellants' Brief
IDF	Israel Defense Forces
FSIA	Foreign Sovereign Immunities Act
FTCA	Federal Tort Claims Act
JA	Joint Appendix
JASTA	Justice Against Sponsors of Terrorism Act

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

Other Authorities

STATEMENT CONCERNING ORAL ARGUMENT

Appellees the State of Israel and its Ministries do not believe oral argument is necessary and do not request it. If this Court determines oral argument could assist it in rendering a decision in this case, Israel requests 15 minutes per side.

INTRODUCTION

The district court correctly held that this dispute over Israel's military actions outside the United States does not belong in a U.S. court. Plaintiffs would have this Court second-guess actions by the State of Israel and several of its Ministries ("Israel") in maintaining Israel's naval blockade of the Gaza Strip when a flotilla of six vessels carrying Plaintiffs and 700 other individuals (the "Flotilla") tried unsuccessfully to breach the blockade on May 31, 2010. Plaintiffs urge this Court to intrude on fundamental aspects of Israel's national sovereignty—in this instance, its military operations to protect citizens from attacks that Hamas and other terrorist organizations launched from the Gaza Strip.

No U.S. court has entangled itself in such national security decisions of a sovereign nation. Indeed, courts have uniformly rejected challenges to Israeli military and security operations in Gaza and elsewhere. *See Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (dismissing suit for civilian deaths allegedly caused by Israeli military actions in Lebanon); *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (dismissing suit for bombing of apartment complex in Gaza occupied by Hamas leader); *Doe v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) (dismissing suit against Israel for alleged injuries to Palestinians in the West Bank). A California district court recently dismissed a parallel suit against Israel's former Defense Minister for planning and authorizing interception of the Flotilla. *Dogan v. Barak*,

No. 15-cv-8130, 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016), *appeal docketed*, No. 16-56704 (9th Cir. Nov. 14, 2016).

Under the plain language of the Foreign Sovereign Immunities Act ("FSIA"), the district court correctly decided that it lacked jurisdiction. The two exceptions to immunity Plaintiffs invoke are facially inapplicable. The FSIA's noncommercial tort exception applies only to acts "in the United States." The challenged acts here occurred on a ship in the Mediterranean Sea. Moreover, the noncommercial tort exception does not cover discretionary acts by foreign government officials. The other exception invoked by Plaintiffs confers jurisdiction only over actions by countries that the United States has designated "state sponsors of terrorism." That list does not include Israel. On the contrary, Israel has stood steadfastly with the United States in the battle against terrorism. The United States agrees, explaining in its Statement of Interest in the district court that "[n]either of the FSIA exceptions upon which plaintiffs rely provide a basis for jurisdiction over the claims asserted here." Amended Joint Appendix ("JA") 46.

Furthermore, the planning and execution of Israel's national security policies present paradigmatic political questions and non-justiciable acts of state. The Israeli Government has expressed regret for injuries to Flotilla participants and created an independent commission, headed by a former Israeli Supreme Court

justice, to investigate the Flotilla incident.[1] Were a U.S. court to examine Israel's military actions regarding an incident already investigated in Israel, it would impermissibly pass judgment on the actions and national security policies of a foreign ally, breach international comity, and risk conflict with the political branches of the U.S. Government. The act of state doctrine likewise bars Plaintiffs' claims, as they require the Court to adjudicate Israel's quintessentially sovereign acts in enforcing a maritime blockade to prevent weapons from entering the Hamas-controlled Gaza Strip.

These points rest on settled law in this Circuit, which the district court correctly applied. In a similar lawsuit against the United Kingdom arising from its role in an air strike on Libya, this Court sanctioned plaintiffs' counsel who "surely knew" that the political question and act of state doctrines left the complaint "no hope whatsoever of success." *Saltany v. Reagan*, 702 F. Supp. 319, 322 (D.D.C. 1988), *aff'd in part*, 886 F.2d 438 (D.C. Cir. 1989) (per curiam) (dismissing claims against the United Kingdom under the act of state doctrine). This Court had no patience for the use of litigation as political protest: "We do not conceive it a proper function of a federal court to serve as a forum for 'protests,' to the

[1] Immediately after the Flotilla incident, Prime Minister Netanyahu stated: "We regret this loss of life [on one of the Flotilla vessels, the *Mavi Marmara*]. We regret any of the violence." *See* Israel Ministry of Foreign Affairs, *Gaza Flotilla: Statement by PM Netanyahu*, May 31, 2010.

detriment of parties with serious disputes waiting to be heard." *Saltany*, 886 F.2d at 440. So too here. The appropriate forum for Plaintiffs to pursue their claims, if anywhere, is in Israel. The complaint was rightly dismissed, and this Court should affirm.

STATEMENT OF JURISDICTION

Israel concurs with Plaintiffs' statement of jurisdiction. The district court entered final judgment on January 25, 2017. Plaintiffs filed a notice of appeal on February 15, 2017.

STATEMENT OF THE ISSUES

1. The FSIA defines the "United States" as "all territory and waters, continental or insular, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c). Does a tort "occur in the United States"—and therefore abrogate a foreign state's immunity—if an injury is suffered on a boat flying the U.S. flag in international waters?

2. Is the "noncommercial tort exception" otherwise inapplicable because Plaintiffs' claims are based upon "the exercise or performance or failure to exercise or perform a discretionary function," 28 U.S.C. § 1605(a)(5)(A)?

3. Did the district court err in holding, in accord with all other courts to consider the issue, that the FSIA's "terrorism exception" applies only to foreign states designated by the State Department as "state sponsors of terror"?

4. Should this Court affirm the decision below on the alternative bases that Plaintiffs' allegations present non-justiciable political questions and turn on unreviewable acts of state?

STATUTES AND REGULATIONS

Except for 28 U.S.C. § 1604, all applicable statutes and regulations are contained in Appellants' Statutory Addendum. Section 1604 provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

STATEMENT OF THE CASE

Conflicts in the Middle East are among the most volatile and politically fraught in the world. Plaintiffs' statement of the case omits this context, which is critical to understanding Plaintiffs' allegations, though unnecessary to resolve Israel's immunity. The public record—including the materials from which Plaintiffs selectively quote—illuminates the circumstances precipitating Israel's interdiction of the unlawful Gaza Flotilla on May 31, 2010.

A. Factual background

1. Israel's blockade of the Gaza Strip

Israel has imposed a naval blockade of the Gaza Strip since 2009—a security measure to protect against the grave threats that Israel faces from militant groups in Gaza, including Hamas. *See* JA13–14 (Compl. ¶¶ 18, 22). The United States and numerous other countries have designated Hamas a terrorist organization.[2] Hamas forcibly seized control of the Gaza Strip in June 2007 and still controls the territory.

Israel's population has long lived under threat from indiscriminate rocket and mortar attacks originating in the Gaza Strip. Since 2001, such attacks, widely condemned by the international community, have killed or injured hundreds of civilians in Israel. After Hamas seized power in Gaza, however, rocket and mortar attacks on Israel increased dramatically. In 2007, there were 1,645 such attacks on Israel; in 2008, the number nearly doubled to 3,278.[3]

To protect against this increased security threat, Israel established a naval blockade of the Gaza Strip on January 3, 2009. The blockade was designed to

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[2] Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997); Review of Designation of Hamas, 77 Fed. Reg. 44,307 (July 27, 2012).

[3] U.S. Dep't of State, Country Reports on Terrorism, ch. 2: Middle East and North Africa Overview (2008). The table of authorities contains URLs for sources available online.

prevent weapons, ammunition, and terrorist operatives from reaching Gaza by sea. A blockade is a well-recognized strategy often employed in international armed conflicts at sea.[4] As Plaintiffs concede, Israel undertook a variety of measures to warn all vessels about its naval blockade. JA12 (Compl. ¶ 23) (citing "announcements and advisories on the implementation of the blockade").

2. Israel's interception of the Flotilla

Plaintiffs were four participants in the "Gaza Freedom Flotilla" in May 2010 that sailed from Turkey to "break the blockade" and to "draw international public attention to the situation in the Gaza Strip and the effect of the blockade." JA13 (Compl. ¶ 24). Israel worked tirelessly to resolve the Flotilla organizers' humanitarian objectives and avoid confrontation. *See* U.N. Rpt. ¶ 99. Those efforts were unsuccessful. On May 30, six vessels carrying about 700 passengers sailed toward Gaza. *See* JA8–9 (Compl. ¶ 2). Plaintiffs were aboard the *Challenger I*, a U.S.-flagged vessel. JA9 (Compl. ¶ 7).

When the Flotilla, including the *Challenger I*, came within 70 miles of the coast and ignored numerous warnings to avoid the blockaded area, the Israel Defense Forces ("IDF") intercepted the Flotilla. JA14, 16–17 (Compl. ¶¶ 28, 41–

[4] *See* Sir Geoffrey Palmer et al., *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*: Appendix ¶¶ 16, 20 (Sept. 2011), ("U.N. Rpt.").

44). The *Challenger I* performed evasive maneuvers and "accelerated out of the formation," attempting to delay the IDF from boarding the vessel. Amended Appellants' Br. ("Br.") 5.

Plaintiffs allege that IDF soldiers boarding the *Challenger I* unlawfully injured them. Plaintiffs claim that a stun grenade "exploded one foot from Plaintiff Schermerhorn's face, leaving him partly blinded in one eye." JA17 (Compl. ¶ 41). They allege that IDF soldiers fired paintball and rubber bullets, one of which struck Plaintiff Deknopper, breaking her nose. JA10 (Compl. ¶ 11). Once the IDF soldiers boarded the *Challenger I*, Plaintiff Arraf claims that she was "forcefully pulled off the stairs and forced to the deck," and her "head was slammed against the deck and a soldier then stood on it." JA17 (Compl. ¶ 43). Plaintiffs contend that Israel "planned, approved, prepared for, ordered, and executed" the interception of the Flotilla. JA10 (Compl. ¶ 13).

The events that precipitated the Gaza Flotilla and Israel's response have been the subject of exhaustive international investigations. Israel established the Public Commission to Examine the Maritime Incident of 31 May 2010 (the "Turkel Commission")—chaired by former Israeli Supreme Court Justice Jacob Turkel. The Commission published a 300-page report, concluding that "Israeli armed forces were … justified in capturing [the vessels] in order to enforce the

blockade," and that "IDF personnel acted professionally in the face of extensive and unanticipated violence."[5]

The U.N. Secretary General established a separate "Panel of Inquiry" (the "Palmer Commission") that likewise investigated the incident, reviewed prior investigations by Israel and Turkey, and produced a substantial report. Among other findings, the Palmer Commission concluded that Israel's "naval blockade was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea," that "the flotilla acted recklessly in attempting to breach the naval blockade," and that Israel's "implementation [of the blockade] complied with the requirements of international law." U.N. Rpt. ¶¶ 72, 81, 82, 95.

B. Proceedings below

On January 11, 2016, Plaintiffs sued Israel for claims arising from the interception of the *Challenger I*. Plaintiffs conceded that Israel and its Ministries are presumptively immune from suit. However, Plaintiffs argued that Israel's conduct fell under either the "noncommercial tort exception" or the "terrorism exception" to immunity. *See* JA47. Plaintiffs' assertion of jurisdiction under the noncommercial tort exception rested on the novel premise that the IDF's acts aboard the *Challenger I* actually occurred "in the United States," as the FSIA

[5] Ret. Justice Jacob Turkel et al., *The Public Commission to Examine the Maritime Incident of 31 May 2010* ¶¶ 183, 239(c) (Jan. 2010).

requires, solely because the vessel, while in international waters, flew the U.S. flag.

Israel moved to dismiss the complaint on multiple grounds, including for lack of subject-matter jurisdiction, and the district court invited the United States to share its views. JA6 (Dist. Dkt. No. 21). The United States filed a Statement of Interest, concluding that the court should dismiss for lack of jurisdiction because "neither exception to immunity invoked by plaintiffs removes Israel's immunity under FSIA in this case." JA30. With regard to the noncommercial tort exception, the United States determined that the plain meaning of "the United States" "is limited to U.S. land areas and does not extend to the various locations of all U.S.-flagged vessels at any given moment." JA34. The United States concluded that "[t]here is no indication that Congress intended to adopt a figurative or metaphorical meaning of 'territory' when it enacted FSIA," as Plaintiffs' interpretation would require. JA36. The United States further explained that the "terrorism exception" did not apply because "designation as a state sponsor of terrorism is a prerequisite to establishing jurisdiction under FSIA's terrorism exception," as "courts, including the D.C. Circuit, repeatedly and uniformly have held." JA41.

The district court granted Israel's motion to dismiss, holding that Plaintiffs could not establish either exception to Israel's immunity. The court held that the

noncommercial tort exception "only applies to personal injury or other harm 'occurring in the United States,'" and that, under this Circuit's precedents, "a tort committed on a U.S.-flagged vessel in international waters is not committed 'in the United States.'" JA57. Next, "[b]ecause Israel has not been designated as a 'state sponsor of terrorism,'" the court held, "the terrorism exception does not apply" either. JA60. Dismissal of the complaint rested solely on this straightforward, textual application of the FSIA to the undisputed facts. JA47. The court did not reach Israel's other arguments. *Id*.[6]

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal for lack of subject matter jurisdiction, *Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 9 (D.C. Cir. 2017), and its rulings on statutory interpretation, *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 367 (D.C. Cir. 2008). This Court can affirm on grounds not reached by the district court. *Radtke v. Caschetta*, 822 F.3d 571, 573 n.2 (D.C. Cir. 2016).

[6] The district court did not "take the conclusions of the Turkel Report as established fact" or "wholly disregard[] the Palmer Panel and [United Nations Human Rights Council] Reports." Br. 7 n.4; *id.* at 6, 8. Plaintiffs' suggestion is baseless. The court emphasized that it had "assume[d] the truth of plaintiffs' allegations for purposes of [the] motion"; "[t]he Court must decide this matter based on the facts alleged by plaintiffs in the complaint." JA48–49 nn.2–3. Even so, the court did not have to blindly accept Plaintiffs' allegations on a Rule 12(b)(1) motion.

SUMMARY OF ARGUMENT

The district court properly held that the FSIA does not provide jurisdiction over Plaintiffs' claims, which arise from Israel's military and national security decisions to intercept the Flotilla as it tried to break through Israel's blockade of the Gaza Strip. Neither the noncommercial tort exception nor the terrorism exception permits adjudication of Plaintiffs' claims.

The noncommercial tort exception does not apply because Plaintiffs' claims concern alleged acts that took place aboard a boat in the Mediterranean Sea, not "in the United States," as the FSIA requires. Plaintiffs cannot circumvent the plain statutory text or the uniform precedent refusing to extend the definition of "the United States" beyond physical territory and waters. Plaintiffs invoke the "law of the flag," contending that because the *Challenger I* was flying the U.S. flag, it was a "floating island" and thus part of U.S. territory. But the "floating island" theory is a legal fiction that U.S. courts and commentators have roundly rejected and cannot override the plain text of the statute. Similar arguments have uniformly failed with respect to U.S. embassies and U.S. aircraft because "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." *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996).

Even if Plaintiffs could overcome this insurmountable hurdle, this Court can affirm on the alternative ground that Israel's planning and execution of the operation constitute paradigmatic "discretionary functions" of Israeli officials and soldiers, and therefore fall squarely within the FSIA's "discretionary function exclusion" to this exception from immunity.

Plaintiffs also invoke the FSIA's "terrorism exception." As this Court has recognized, this exception applies only to designated state sponsors of terrorism. Israel is not a designated state sponsor of terrorism. Israel is a longstanding partner of the United States in combatting international terrorism. The terrorism exception supplies no basis for jurisdiction over Plaintiffs' claims.

Finally, this Court can affirm dismissal on the alternative grounds that this suit raises political questions and challenges quintessential acts of state.

ARGUMENT

The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The Court "begins with a presumption of foreign sovereign immunity." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002); 28 U.S.C. § 1604. Plaintiffs can overcome this "broad grant of immunity" only by establishing that one of the FSIA's "narrowly drawn exceptions" applies. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066,

1075 (D.C. Cir. 2012); *accord Price*, 294 F.3d at 87–88. "[U]nless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

Plaintiffs asserted jurisdiction under the "noncommercial tort exception," 28 U.S.C. § 1605(a)(5), and the "terrorism exception," 28 U.S.C. § 1605A. The district court correctly held that neither exception applies.

I. The FSIA's "noncommercial tort exception" does not apply.

The noncommercial tort exception allows a court to exercise jurisdiction over a case involving:

> 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). However, the statute excludes from jurisdiction "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." *Id.* § 1605(a)(5)(A) (the "discretionary function exclusion").

The noncommercial tort exception does not apply for two reasons. First, the alleged acts underlying Plaintiffs' claims did not occur in "the United States." Second, Plaintiffs' claims are predicated on acts that fall within the discretionary function exclusion.

A. Injuries sustained on a U.S.-flagged ship sailing on the high seas do not occur "in the United States."

The noncommercial tort exception withdraws immunity only where the alleged injuries "occurr[ed] in the United States." 28 U.S.C. § 1605(a)(5). For purposes of the FSIA, "[t]he 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id*. at § 1603(c).

Plaintiffs concede that their alleged injuries did not occur in continental or insular territory or waters of the United States. Instead, Plaintiffs invite this Court to expand the statutory definition of "the United States" to include a U.S.-flagged ship on the high seas. This interpretation is unmoored from the text, history, and purpose of the FSIA. Plaintiffs' argument relies on an outdated legal construct analogizing U.S.-flagged vessels to "floating islands." But U.S. courts and commentators have long recognized that this metaphor does not redefine the United States' boundaries. Plaintiffs' interpretation also defies longstanding Supreme Court and Circuit precedent rejecting theories that seek to expand the noncommercial tort exception beyond U.S. borders.

If Plaintiffs were correct, then the "United States" would include a dispersed and inconstant archipelago of ships of all shapes and sizes (currently numbering

around 40,000) plying the seas.[7] No court has ever adopted Plaintiffs' fanciful theory. Br. 11. The district court correctly rejected it.

1. The definition of "the United States" does not encompass a U.S.-flagged ship on the high seas.

"[A]ny claim to a FSIA exception must stand on the Act's text. Or it must fail." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 42 (D.C. Cir. 2014). The text provides no support for Plaintiffs' elastic interpretation of "the United States."

1. The FSIA's definition of "the United States" does not refer to U.S.-flagged vessels on the high seas. On the contrary, the words "all territory and waters, continental or insular," 28 U.S.C. § 1603(c), presuppose a physical definition of "the United States," not an abstract concept pushing the outermost limits of U.S. jurisdiction. A boat is neither "territory" nor "waters."

The Supreme Court applied this territorial interpretation of "the United States" in *Amerada Hess*. The Court rejected the argument that the FSIA permitted subject-matter jurisdiction over claims brought by a Liberian corporation against Argentina for damage to a Liberian-owned ship in international waters. As the Court explained, "the modifying phrase 'continental or insular' [in § 1603(c)] … restrict[s] the definition of United States to the continental United States and those

[7] Table 1-34: U.S. Flag Vessels by Type and Age (Number of Vessels), Bureau of Transportation Statistics.

islands that are part of the United States or its possessions; any other reading would render this phrase nugatory." 488 U.S. at 440; *see also Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839 (D.C. Cir. 1984) (similar). The Court likewise declined to read "waters" to "cover all waters over which United States courts might exercise jurisdiction," including the high seas. *Amerada Hess*, 488 U.S. at 440. "Congress knows how to place the high seas within the jurisdictional reach of a statute," but did not do so in the FSIA. *Id*. (collecting examples).

Construing similar language in other statutes, the Supreme Court has consistently held that a U.S.-flagged vessel on the high seas is not within the United States. In *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923), the Court rejected the government's argument that the National Prohibition Act, applicable to "the United States and all territory subject to the jurisdiction thereof," covered domestic ships in international or foreign waters. *Id.* at 123. The Court explained that "territory" "refers to areas or districts having fixity of location and recognized boundaries." *Id.* at 122. The Court continued:

> It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. This, we hold, is the territory which the amendment designates as its field of operation; and the designation is not of a part of this territory, but of "all" of it.

Id. at 122–23.

Plaintiffs attempt to confine *Cunard* to its facts, Br. 18–19, but the Court's reasoning is not so easily cabined. Plaintiffs claim that *Cunard* relied on the "language, history, and context" of the National Prohibition Act. But the language, history, and context of the FSIA indicate that it, too, uses "territory" in a "physical and not a metaphorical sense." *Cunard*, 262 U.S. at 122; *see infra* pp. 19–26.

The Supreme Court reached a similar conclusion in *United States ex rel. Claussen v. Day*, 279 U.S. 398 (1929). There, the Court explained that the term "in the United States" in the Immigration Act of 1917, which is defined in language nearly identical to § 1603(c), did not encompass "a[n] [American] vessel outside the United States whether on the high seas or in foreign waters." *Id.* at 401. Boarding an American ship outside the United States did not amount to an "entry" into the United States, because "[s]uch a vessel outside the United States … is not a place included within the United States as defined by the act." *Id*. Likewise, in *Scharrenberg v. Dollar S.S. Co.*, 245 U.S. 122 (1917), the Court, interpreting a statute that prohibited the importation of laborers "into the United States" to "perform labor in this country," rejected the notion that "a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country.'" *Id*. at 127.

2. Plaintiffs argue that this Court should expand the statutory definition of "the United States" beyond its plain text to include U.S.-flagged vessels on the high seas because the definition uses the word "includes" rather than "means." This construction, Plaintiffs posit, makes the definition non-exhaustive. Br. 13–16. But while "[t]he word 'includes' is *usually* a term of enlargement, and not of limitation," *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (emphasis added), the meaning and effect of "includes" depend on context. *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 (1934) ("[T]he term 'includes' may sometimes be taken as synonymous with 'means' … ."); *Frame v. Nehls*, 550 N.W.2d 739, 742 (Mich. 1996) ("[T]he word 'includes can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used."); *cf. State ex rel. Pearson v. Prob. Court of Ramsey Cty.*, 309 U.S. 270, 273–74 (1940) ("[W]e accept the view … that the court used the word 'include' as defining the entire class of persons to whom the statute applies and not as describing merely a portion of a larger class."). "Includes" sometimes introduces an illustrative, non-exhaustive list, *e.g.*, *Am. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 25 (D.C. Cir. 2015), but other times, the

word clarifies that the definition encompasses specific items whose inclusion might otherwise be in doubt.[8]

Congress regularly uses "includes" in this second way—to supplement and clarify a definition, not just to illustrate it. "Includes" can amplify the common understanding of a term, as when Congress provides that "'State' includes the District of Columbia." 4 U.S.C. § 113. This provision means that the District of Columbia *specifically* is a "State"—in addition to the 50 States—for purposes of the statute, not that "additional entities, such as the District of Columbia and other entities with similar attributes" can also count as States. *Cf. Advocate Health Care Network v. Stapleton*, Nos. 16-74, 16-86, 16-258, 2017 WL 2407476 (U.S. June 5, 2017) ("includes" "tells readers that a different type of [retirement] plan should receive the same treatment … as the type described in the [original] definition").[9]

Section 1603(c) clarifies that "*all* territory and waters, continental or insular, subject to the jurisdiction of the United States," are "[t]he United States" for

[8] Plaintiffs rely on cases interpreting statutes that use the word "means," not "includes." *See Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). These cases do not hold that the word "includes" must be rigidly understood as always signifying a non-exhaustive list.

[9] *See also* 49 U.S.C. § 80101(6) ("'purchase' includes taking by mortgage or pledge"); 18 U.S.C. § 3673(1) ("'found guilty' includes acceptance by a court of a plea of guilty or nolo contendere"); 18 U.S.C. § 1028(d)(9) ("'produce' includes alter, authenticate, or assemble").

purposes of the FSIA, dispelling any doubt that the FSIA covers the continental United States as well as the territorial seas and off-shore territories and possessions. It does not mean that "the United States" may be expanded generally to include other locations that share characteristics with territory and waters subject to the jurisdiction of the United States. Congress used a similar technique in other definitions in the FSIA. Section 1603(a) defines a "foreign state" to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state … ." As the Supreme Court recently explained, this structure "establishes that 'foreign state' has a broader meaning [than its usual definition], by mandating the inclusion of the state's political subdivisions, agencies, and instrumentalities." *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010). But, the Court cautioned, the supplemented definition is not open-ended and cannot be read to cover government officials. *Id*. at 314–15. The word "includes" clarifies the definition; it does not open the term to further expansion beyond the statutory text.

Regardless, any ambiguity is resolved by the canon that "a word is known by the company it keeps." *Amgen, Inc. v. Smith*, 357 F.3d 107, 112 (D.C. Cir. 2004); Br. 15. Assuming the definition of "the United States" can be expanded through analogies, Plaintiffs fail to explain how, for purposes of the FSIA, a U.S.-flagged vessel is sufficiently similar to "territory and waters, continental or insular," to fall within the definition. *Cf. Samantar*, 560 U.S. at 317. In fact, this

canon undermines Plaintiffs' interpretation. The words "territory and waters, continental or insular" all have a quality that Plaintiffs' proposed add-on lacks—a physical expression of the scope of "the United States." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012) (associated-words canon applies when terms have "some quality in common").

Plaintiffs proclaim that U.S.-flagged ships are sufficiently similar "as a matter of law and fact" to territory and waters to come within the definition. Br. 15. They suggest that U.S.-flagged vessels and territory "share a comparable degree of U.S. sovereign control." *Id*. These bare assertions ignore fundamental differences between a vessel and physical territory. Territory is fixed; a ship is mobile. Territory carries with it a belt of territorial sea, a contiguous zone, and an exclusive economic zone; a ship does not.

U.S. territory does not suddenly acquire new juridical status whenever anyone raises a new flag upon it. The United States acquires sovereign control over physical territory through affirmative acts indicating an intent to govern, *see generally* Ian Brownlie, *Principles of Public International Law* 220–29 (James Crawford ed., 8th ed. 2012), whereas the flag of a vessel reflects no comparable sovereign act. The United States sets the general terms to register ships and to fly the U.S. flag, 46 U.S.C. § 12103, but the determinant of U.S. nationality for the vessel is the owner's registration of the ship in the United States, rather than an

affirmative act by the United States itself, *see* H. Meyers, *The Nationality of Ships* 147 (1967). A ship owner may deregister a vessel upon request, 46 C.F.R. § 67.171(a)(4), and a U.S.-registered ship becomes ineligible for U.S. registration if it is placed under foreign flag, *id.* § 67.171(a)(1); 46 U.S.C. § 12103(a)(3). It is highly improbable that in the FSIA Congress intended to cede to third parties—private actors and foreign governments alike—the ability to expand or contract the metes and bounds of "the United States" (and thus the immunity afforded to foreign sovereigns) by creating drifting patches of U.S. territory around the world through the ship registration process.

3. Legislative history confirms the district court's straightforward reading of "the United States." Congress's principal concern was to ensure plaintiffs could sue for torts committed by foreign states within the United States. *See Persinger*, 729 F.2d at 840. The House Report explains that "the purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law." H.R. Rep. No. 94-1487, at 21 (1976). Thus, "[s]ection 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms." *Id*. at 20.

Witnesses emphasized the noncommercial tort exception's territorial application. For example, Michael Cohen, the Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States,

testified that § 1605(a)(5) "removes [immunity] for most tort suits *arising here*, which would include among other cases, automobile accidents involving diplomatic personnel and collisions involving State-owned merchant vessels or even foreign warships in *U.S. territorial waters*." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 94th Cong. 95–96 (1976) (emphases added). Nowhere does the legislative history indicate that § 1605(a)(5) would permit jurisdiction over foreign sovereigns for acts on a U.S.-flagged vessel in international waters.

Relying on this history, this Court in *Persinger* refused to extend the definition of "the United States" to U.S. embassies. *See* 729 F.2d at 841. This Court observed that an overly broad reading of the definition of "the United States" in § 1603(c) could have the "unhappy consequence[]" of causing foreign states to "hesitate" before assisting U.S. embassies for fear they could be sued in U.S. courts. *Id*. The same risk would attach if U.S.-flagged ships suddenly became "the United States." And withdrawing foreign sovereign immunity for acts on U.S.-flagged ships in the high seas also could prompt other countries to adopt a reciprocal rule, potentially exposing the United States to suits for interactions with foreign ships in international waters. *Id.*; *see also* JA39 n.5 (U.S. Statement of Interest) ("Evading the statute's careful geographic limitations in this manner

could lead to foreign relations problems or reciprocal exposure for the United States in foreign courts."). In light of "all of the potential for international discord and for foreign government retaliation" that Plaintiffs' interpretation would involve, "it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country." *Persinger*, 729 F.2d at 841.

4. Background principles of international law further support the noncommercial tort exception's application only to injuries occurring in the territory of the United States. In the FSIA, Congress intended to create "a statutory regime which incorporates standards recognized under international law." H.R. Rep. No. 1487, 94th Cong., 2d Sess. at 14 (1976); *see* Restatement (Third) of the Foreign Relations Law of the United States, introductory note to subchapter IV.5.A. Therefore, any ambiguity should be interpreted in a manner consistent with international law. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Extending the noncommercial tort exception to U.S.-flagged ships on the high seas would be out of step with international practice, which abrogates foreign sovereign immunity for tortious acts only when they occur in the forum state's territory. *See* European Convention on State Immunity art. 11, May 16, 1972, ETS No. 74 (entered into force June 11, 1976) (no immunity from jurisdiction from proceedings regarding personal injury or property damage if the underlying facts

"occurred in the territory of the State of the forum"); U.N. Convention on Jurisdictional Immunities of States and Their Property art. 12, *adopted* Dec. 2, 2004, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (not in force); *see also McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (describing "prevailing practice in international law").

2. The "floating island" fiction does not transform U.S.-flagged ships into U.S. territory.

The district court correctly rejected Plaintiffs' argument that a ship is a "floating island" of the State whose flag it flies. Plaintiffs claim that in characterizing the term "floating island" as "a figure of speech, a metaphor," JA59, 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 (Sept. 7). Br. 19. But the district court simply quoted the Supreme Court's opinion in *Cunard*, 262 U.S. 100, which accurately reflects the modern understanding that the "floating island" theory is an outmoded legal fiction. To be sure, the PCIJ treated two ships on the high seas as territory of the states whose flags they flew. 1927 P.C.I.J. at 25. Under that decision, a French lieutenant aboard a French vessel that collided with a Turkish ship on the high seas could be subject to criminal prosecution in Turkey, absent a contrary rule of international law, because the effects of his actions were felt on Turkish "territory." *Id.* at 25, 30. That specific

holding, highly controversial at the time, has been superseded by treaty. *See* U.N. Convention on the Law of the Sea art. 97, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

Courts long recognized the limits of the floating island concept. Registering a ship in the United States does not transform it into U.S. soil. Plaintiffs' contrary argument ignores substantial precedent explaining that the "floating island" concept is an often-misused legal fiction. A century ago, the Supreme Court in *Dollar S.S. Co.*, 245 U.S. 122, rejected as "fanciful and unsound" the contention that "a ship of American registry … is part of the territory of the United States." *Id.* at 127.

> It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.

Id. Similarly, the Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), noted that "[s]ome authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag state." *Id.* at 585. The Court recognized that the law of the flag was merely a matter of practical convenience, since "there must be some law on shipboard, [and] it cannot change at every change of waters."

Id.; *see also, e.g.*, *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 72 (2d Cir. 1994) (a ship is not "a kind of floating United States territory").

This distinction has real-world consequences. For example, a child born to non-U.S. citizen parents aboard a U.S.-flagged ship in international waters does not acquire U.S. citizenship by birth; the ship is not "the United States" for purposes of the Fourteenth Amendment. *Lam Mow v. Nagle*, 24 F.2d 316, 317–18 (9th Cir. 1928); *see also In the Matter of A---*, 3 I. & N. Dec. 677 (BIA) (July 21, 1949) (same). In so holding, the Ninth Circuit explained that the theory that "a vessel upon the high seas is deemed to be a part of the territory of the nation whose flag she flies, must be understood as having a qualified or figurative meaning." *Lam Mow*, 24 F.2d at 317. The court quoted the analysis of the Supreme Court in *Cunard*, distinguishing this legal fiction from physical reality:

> The jurisdiction which [the floating island concept] is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty… . The defendants … contend that the Amendment covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail. But, *as that is a fiction*, we think the contention is right.

Lam Mow, 24 F.2d at 317–18 (quoting *Cunard S.S. Co.*, 262 U.S. at 123–24) (emphasis added). The State Department's Foreign Affairs Manual reaches the same conclusion: "A U.S. registered … ship on the high seas … is not considered

to be part of the United States … . A child born on such a vessel does not acquire U.S. citizenship by reason of the place of birth." 7 Foreign Affairs Manual 1113(a).

Against this weight of precedent, Plaintiffs cite a handful of cases they describe as "referring to U.S.-flagged ships … actually as part of the territory of the United States." Br. 20. Even these cases treat the "floating island" concept as a legal construct. In *Ross v. McIntyre*, 140 U.S. 453 (1891), the Supreme Court acknowledged that "[t]he deck of a private American vessel … is *considered*, for many purposes, *constructively* as territory of the United States." *Id.* at 464 (emphasis added). The Court went on to point out that "persons on board of such vessels … cannot invoke the protection of the provisions referred to until brought within the *actual territorial boundaries* of the United States." *Id.* (emphasis added).

Similarly, while the Supreme Court in *Patterson v. Bark Eudora*, 190 U.S. 169 (1903), recognized that "for some purposes, a foreign ship is to be *treated as* foreign territory" because "[a] ship is a kind of floating island," *id.* at 176 (emphasis added), the Court highlighted the limits of that fiction: "when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country." *Id*. And the Court in *United States v. Flores*, 289 U.S. 137 (1933), stated that "*for purposes of* the jurisdiction of the courts of the sovereignty whose flag it flies to punish *crimes*

committed upon it, [a vessel] is *deemed* to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty." *Id.* at 155–56 (emphasis added). Contrary to Plaintiffs' suggestion, the Court did not hold that a U.S.-flagged vessel is "actually … part of the territory of the United States." Br. 20.[10]

Plaintiffs also argue that, because U.S. tort law applies aboard U.S. ships on the high seas, "legislation regulating the immunity of certain tortfeasors … would apply to U.S. flagged ships as well." Br. 25; *see also* Br. 21–24. But even if, under conflict-of-laws principles, "the law of the flag" applies to acts that occur aboard a ship in international waters, Plaintiffs themselves admit that "[t]he question before this Court is whether, in enacting the FSIA, [Congress] used" its "authority to extend the tort exception to immunity to U.S. ships on the high seas." Br. 25. Conflict-of-laws principles do not answer that jurisdictional question, which turns on the FSIA's text.

[10] Plaintiffs cite *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982), and *United States v. Carvajal*, 924 F. Supp. 2d 219 (D.D.C. 2013), as examples where "[t]he floating island meme has been upheld and expressly cited by U.S. courts." Br. 20. Those cases do not even mention the notion of the floating island. At most, they recognize that "vessels are normally considered within the exclusive jurisdiction of the country whose flag they fly." *Marino-Garcia*, 679 F.2d at 1380; *Carvajal*, 924 F. Supp. 2d at 243 n.11. That is quite different from finding that a ship is the *territory* of the flag State.

Plaintiffs contend that this Court in *Perez v. The Bahamas*, 652 F.2d 186 (D.C. Cir. 1981), "implicitly endorsed" an interpretation of § 1605(a)(5) "as lifting the immunity of a foreign sovereign responsible for torts committed on a U.S. vessel on the high seas." Br. 25. Not so. In *Perez*, this Court held that the noncommercial tort exception did *not* apply to acts on a U.S. ship within Bahamian territorial waters. This Court did not suggest that the outcome would have been any different had the ship been located on the high seas. *Cf.* 652 F.2d at 188 n.1. Thus, *Perez* teaches that a U.S. flag alone is insufficient to constitute "the United States," and *Amerada Hess* instructs that the "high seas" are insufficient, too. Nothing supports Plaintiffs' conjecture that merging two wrongs can make jurisdiction right.

3. Courts interpreting the noncommercial tort exception have uniformly refused to expand its reach beyond U.S. territory.

While Plaintiffs' position, at the most granular level, is superficially one of first impression, Br. 11, it is not the first attempt to stretch the noncommercial tort exception beyond U.S. borders. Plaintiffs in other cases have likewise tried, unsuccessfully, to argue that "the United States" should include U.S. embassies and U.S.-flagged aircraft because such locations are within the United States' jurisdictional reach. The same logic that compelled this Court to reject that argument dooms Plaintiffs' case here.

Plaintiffs' argument—that a location subject to U.S. jurisdiction is "in the United States" for purposes of the FSIA—rests on an erroneous conflation of prescriptive and enforcement jurisdiction on the one hand, and adjudicative jurisdiction on the other. Congress has "prescriptive" jurisdiction to regulate extraterritorial conduct—including conduct occurring on U.S.-flagged vessels outside U.S. territory, *Flores*, 289 U.S. 137—and "enforcement" jurisdiction to compel compliance with those regulations. But Congress's exercise of that authority does not answer the separate question whether Congress intended to grant federal courts *adjudicative* (subject-matter) jurisdiction over civil claims brought against foreign sovereigns in U.S. court. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); Restatement (Third) of the Foreign Relations Law of the United States § 401.

Courts have repeatedly rejected the conflation of these distinct inquiries. In *Persinger*, the question was whether the noncommercial tort exception permitted suit against Iran for torts committed at the U.S. embassy in Tehran. This Court explained that Congress has the undisputed authority to exercise jurisdiction over certain activities occurring in U.S. embassies overseas. 729 F.2d at 839. But "whether Congress, in enacting the FSIA, intended to exercise its jurisdiction to give courts in this country competence to hear suits against foreign states for torts committed on United States embassy premises abroad" was a separate question,

and the answer was, "No." *Id.* at 839–42; *see also McKeel*, 722 F.2d at 587–89 ("section 1603(c) … [does not] embrace 'all territory and waters' with respect to which the United States exercises any form of jurisdiction").

The Supreme Court in *Amerada Hess* echoed this reasoning, rejecting the position that "the high seas, which is within the admiralty jurisdiction of the United States," fit the "statutory definition" of "the United States." 488 U.S. at 440. Section 1603(c) "cannot reasonably be read to cover all waters over which United States courts might exercise jurisdiction." *Id*. The Second Circuit followed suit in *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996). The court held that the noncommercial tort exception did not apply to tortious acts committed aboard flight Pan Am 103 over Lockerbie, Scotland. Citing *Amerada Hess*, *Persinger*, and *McKeel*, the court explained, "[e]ven 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." *Id.* at 246.

Plaintiffs hasten to distance themselves from the "fanciful" position taken by the plaintiffs in these cases. Br. 17, 29. But the distinction Plaintiffs draw between "U.S. ships on the high seas [and] the seas themselves," Br. 17, cannot obscure Plaintiffs' reliance on the same faulty logic as the petitioners in *Amerada Hess*:

that a location "subject to the jurisdiction of the United States" is "the United States" under the FSIA. *See* Br. 18 n.12 ("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."); *id*. at 26, 27, 29.

Plaintiffs argue that *Persinger* and *McKeel* are distinguishable because, as a matter of international law, embassies are not territory of the sending state. Br. 28–29. The same is true of U.S.-flagged vessels. Ships are not part of the territory of the flag state, also as a matter of international law. *See supra* pp. 22–23, 26–27. As for *Smith*, Plaintiffs attribute to the Second Circuit the ostensible "observ[ation] that a plane flying over the sovereign territory of another state … is more akin to an embassy than to a ship on the high seas." Br. 30. Plaintiffs misunderstand the implication of that point. The Second Circuit reasoned that "[i]f FSIA immunity prevails with respect to torts in United States embassies"—which are more likely to be considered territory of "the United States" than a U.S.-flagged ship—the exception certainly "cannot be displaced with respect to United States aircraft flying over a foreign land." 101 F.3d at 246.

* * *

In sum, the text and history of the FSIA, cases interpreting it, and international law principles all compel the same conclusion: the phrase "in the United States" in the FSIA does not mean "on a boat in the Mediterranean sea."

Israel's interception of *Challenger I*, and Plaintiffs' alleged injuries, did not "occur[] in the United States," and the noncommercial tort exception thus does not permit jurisdiction over Plaintiffs' claims.

B. The discretionary function exclusion provides an additional basis to affirm.

The noncommercial tort exception does not apply for the additional reason that Plaintiffs' lawsuit challenges discretionary acts by Israel, triggering the "discretionary function" exclusion. The FSIA bars jurisdiction under the noncommercial tort exception over "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." 28 U.S.C. § 1605(a)(5)(A). Plaintiffs try to ignore this exclusion, but it was fully briefed below. Although the district court did not reach the issue, JA57 n.7, it provides an additional reason to affirm.

The discretionary function exclusion "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323 (1991).[11] The exclusion covers acts and decisions that "involve

[11] Like the FSIA, the Federal Tort Claims Act ("FTCA") has a discretionary function exception applicable to claims against the U.S. government, 28 U.S.C.

an element of judgment or choice"—that is, decisions "based on considerations of public policy." *Id.* at 322–23; *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987). It shields foreign sovereigns from liability not only "for those decisions that involve a measure of policy judgment," but also for "the execution of such decisions in specific instances by subordinates, even at the operational level, if they must exercise such judgment too." *MacArthur*, 809 F.2d at 922; *accord Gaubert*, 499 U.S. at 325 (FTCA exclusion covers "decisions made at the operational or management level").

Plaintiffs' claims fall squarely within the discretionary function exclusion. "All military engagements involve discretionary decisions by military commanders of all ranks—choices that have to be made quickly during moments of pronounced pressure." *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 185 (4th Cir. 2015). Here, Plaintiffs challenge Israel's decisions to conduct a military operation to prevent the approaching Flotilla from breaching Israel's blockade of the Gaza Strip, JA10–11, 15, 25, decisions that require "a great element of judgment or choice," *see Gaubert*, 499 U.S. at 329.

Israel's conduct—planning, ordering, and executing enforcement of its naval blockade, JA15 (Compl. ¶ 34)—also is fundamentally "governmental" in nature,

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§ 2680(a)—a provision that offers "guidance" regarding "what acts should be deemed discretionary for FSIA purposes." *MacArthur*, 809 F.2d at 921.

precisely the sort of conduct Congress does not want courts to "second-guess." *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984); *accord Wu Tien Li-Shou*, 777 F.3d at 185 (the "discretion inherent in sovereignty to conduct military operations free of judicial oversight or hindsight"). Courts applying this doctrine under the FTCA have dismissed challenges to "military policy judgments,"[12] decisions regarding "numbers of military personnel to be utilized, their deployment, and the kinds of orders that should be issued in furtherance thereof,"[13] decisions on the timing of arrests,[14] and border security decisions.[15] Any of these grounds would render Israel's conduct discretionary. Plaintiffs' claims implicate all of them.

The Fourth Circuit recently rejected a similar challenge to military judgments and tactical decisions in *Wu Tien Li-Shou*. A Taiwanese plaintiff sued the U.S. Navy for "the accidental killing of her husband and the intentional sinking of her husband's fishing vessel during a NATO counter-piracy mission." 777 F.3d

[12] *Boyle v. United Tech. Corp.*, 487 U.S. 500, 511 (1988) (exclusion met where decision involves "judgment as to the balancing of many technical, military, and even social considerations"); *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1158 (D.D.C. 1991) ("[I]t is clear that the discretionary function exception protects military policy judgments."), *aff'd*, 957 F.2d 886 (D.C. Cir. 1992).

[13] *Industria Panificadora*, 763 F. Supp. at 1158.

[14] *Shuler v. United States*, 531 F.3d 930, 934 (D.C. Cir. 2008).

[15] *Gringo Pass, Inc. v. United States*, 542 F. App'x 642, 643 (9th Cir. 2013).

at 178. The court found that the "suit relies on questioning the wisdom of a series of discretionary decisions," second-guessing what warnings should have been given to the vessel, "[w]hat weapons should have been used," "[a]t what range" should they have been fired, "[w]here precisely should the fire have been directed," and similar questions. *Id*. at 185. The Fourth Circuit held that "[t]he conduct of a military engagement is the very essence of a discretionary function," which should be "free of judicial oversight or hindsight." *Id*. at 184–85.

The same is true here. The discretionary function exclusion shields Israel's "policy judgments" at the Ministry level and the "implementing decisions" by IDF forces, who were charged with enforcing Israel's blockade of Gaza when diplomatic and other measures failed. *MacArthur*, 809 F.2d at 922–23.

II. The FSIA's "terrorism exception" does not apply.

The district court also correctly held that the FSIA's terrorism exception does not provide jurisdiction over Plaintiffs' "torture" claim. JA47, 63; *see also* JA9, 19 (Compl. ¶¶ 5, 49 (Count 1)). By its express terms, the terrorism exception abrogates immunity only when, among other requirements, the foreign country is designated a "state sponsor of terrorism at the time [of] the act … or was so designated as a result of such act." 28 U.S.C. § 1605A(a)(2)(A). Courts, commentators, and Congress uniformly agree that the state-sponsor designation is a jurisdictional prerequisite to suit. *See, e.g.*, *Mohammadi v. Islamic Republic of*

Iran, 782 F.3d 9, 14 (D.C. Cir. 2015). As the United States has never designated Israel a state sponsor of terrorism, the exception does not apply.

Plaintiffs' interpretation of § 1605A would abrogate the FSIA's "broad grant of immunity for foreign sovereigns," *McKesson Corp.*, 672 F.3d at 1075, and expose all sovereigns to suit whether or not the Executive Branch designated them a state sponsor of terror. The United States' closest allies in the fight against terrorism—allies like Israel—would be vulnerable to terrorism claims in U.S. courts, contrary to Congress's intent. Statutory text, legislative history, and judicial precedent all foreclose such an extraordinary expansion of the terrorism exception.

A. The terrorism exception applies only to claims against designated state sponsors of terrorism.

As relevant here, the terrorism exception removes a foreign state's immunity in actions "for personal injury or death that was caused by an act of torture … 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." 28 U.S.C. § 1605A(a)(1). This provision—in the same subsection—further specifies that "[t]he court shall hear a claim under this section if" certain additional requirements are met, *id.* § 1605A(a)(2), including that "the foreign state was designated as a state sponsor of terrorism at the time the act occurred, or was so designated as a

result of such act," *id*. § 1605A(a)(2)(A)(i)(I).[16] The same provision limits potential claimants to U.S. nationals, members of the U.S. armed forces, or individuals working for the U.S. government. *Id*. § 1605A(a)(2)(A)(ii). And the statute provides that when the terrorist act occurred within the territory of the foreign state, "the claimant [must] afford[] the foreign state a reasonable opportunity to arbitrate the claim." *Id*. § 1605A(a)(2)(A)(iii).

Plaintiffs 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. Br. 35. Plaintiffs contend that if a foreign state commits the "predicate acts" in subsection (a)(1), the court has jurisdiction, even if the remaining factors in (a)(2) are absent. This Court and every other court to consider § 1605A's jurisdictional requirements have foreclosed that argument. In *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9 (D.C. Cir. 2015), this Court held that *all* of the elements in § 1605A(a)(2) are jurisdictional, not optional. *Id*. at 14. Every decision in this Circuit that has addressed the issue has reached the same conclusion. *See, e.g.*, *Gill v. Islamic Republic of Iran*, No. CV 15-2272, 2017 WL 1289938, at *3 (D.D.C. Apr. 6, 2017); *Stansell v. Republic of Cuba*, 217 F. Supp.

[16] A "state sponsor of terrorism" is "a country the government of which the Secretary of State has determined [pursuant to law] … is a government that has repeatedly provided support for acts of international terrorism." 28 U.S.C. § 1605A(h)(6).

3d 320, 337 (D.D.C. 2016) ("A plaintiff relying upon this statutory provision to abrogate sovereign immunity and, thus, establish subject matter jurisdiction, must prove four elements: (1) the foreign country was designated a state-sponsor of terrorism at the time of the act … ."); *Thuneibat v. Syrian Arab Republic*, 167 F. Supp. 3d 22, 34 (D.D.C. 2016); *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 63 (D.D.C. 2013).

In particular, courts uniformly hold that a case cannot proceed under § 1605A unless the defendant is a designated state sponsor of terror. In *Mohammadi*, this Court declared that § 1605A(a)(2) "*requires* that … the foreign country was designated a 'state sponsor of terrorism at the time of the act,'" in order to establish jurisdiction. 782 F.3d at 14 (emphasis added); *accord Patchak v. Jewell*, 828 F.3d 995, 1002–03 (D.C. Cir. 2016) (describing § 1605A as a provision "which allows American nationals to file suit against state sponsors of terrorism in United States courts"). Other courts, again uniformly, agree. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 115 n.7 (2d Cir. 2013) (Section 1605A "is only available against a nation that has been designated by the United States government as a state sponsor of terrorism at the time of, or due to, a terrorist act"); *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57, 65 (D.D.C. 2015) ("All of the conditions necessary to establish this Court's jurisdiction to hear

plaintiffs' claims have been satisfied," including the "requirement[]" that Iran be designated a state sponsor of terrorism).[17]

Consistent with this textual limitation, courts have rejected every attempt, like this one, to apply the terrorism exception to a defendant not designated as a state sponsor of terrorism. *Doe v. Bin Laden*, 663 F.3d 64, 66 (2d Cir. 2011) (section 1605A "is not available against Afghanistan, all agree, because the State Department has not designated Afghanistan as a state sponsor of terrorism"); *Embassy of Nigeria v. Ugwuonye*, 901 F. Supp. 2d 136, 140 (D.D.C. 2012) ("Since Nigeria is not a designated state sponsor of terrorism, this exception is also inapplicable."); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 89 (2d Cir. 2008) ("The State Department has never designated [Saudi Arabia] a state sponsor of terrorism. As a consequence, the Terrorism Exception is inapplicable here."), *abrogated on other grounds*, *Samantar v. Yousuf*, 560 U.S. 305 (2010).

Plaintiffs undercut their own textual argument by acknowledging that *some* of the elements in § 1605A(a)(2) are, in fact, necessary for subject-matter jurisdiction. Plaintiffs admit that a victim's U.S. nationality is a "statutory pleading requirement[]" under § 1605A(a)(2). Br. 40. Accordingly, they advance the

[17] Plaintiffs' reliance on *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), is baffling because § 1605A was not at issue. But even so, the passage quoted in Plaintiffs' brief shows that § 1605A is limited to "state sponsors of terrorism." Br. 37.

terrorism exception only on behalf of Plaintiff Arraf, noting that she is "a citizen of the United States." JA19 (Compl. ¶ 49). They do not assert the exception on behalf of Plaintiff Deknopper, a Belgian citizen. But Plaintiffs cannot slice the statute so thin. If, as all parties agree, the nationality requirement in § 1605A(a)(2)(A)(ii) limits the district court's jurisdiction, *see Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 570 (7th Cir. 2012) ("the plain text and plain meaning of § 1605A(a)(2)(A)(ii) extends jurisdiction to cases where either 'the claimant or the victim was, at the time of the [terrorist] act' a United States citizen"), it logically follows that the state-sponsor requirement in § 1605(a)(2)(A)(i) is also a jurisdictional prerequisite. The two provisions fit identically in the statute's structure and require identical treatment.

Plaintiffs assert, incorrectly, that no court has addressed the issue of statutory interpretation they present here. Br. 38. In fact, one federal court has considered and rejected Plaintiffs' construction of the statute. *Carpenter v. Republic of Chile*, No. 07-cv-5290, 2009 WL 5255327 (E.D.N.Y. July 29, 2009). The court concluded that extending jurisdiction under § 1605A to sovereigns not designated as state sponsors of terrorism would produce "utterly absurd results." *Id.* at *7. The Second Circuit agreed and affirmed dismissal. *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010) ("The Republic of Chile has not been designated a state sponsor of terrorism, so this exception does not apply.").

At bottom, Plaintiffs' interpretation would inflate § 1605A into a universal grant of jurisdiction over foreign sovereigns for injuries to American *and* foreign nationals caused by acts of terrorism anywhere in the world. It would sweep in even "committed counterterrorism partner[s]" of the United States, like Israel[18]—which Plaintiffs concede has never been designated a state sponsor of terrorism. Br. 32. The absurd results of Plaintiffs' position should end the inquiry. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998).

B. The 2008 amendment did not remove the "state sponsor" requirement.

Plaintiffs draw significance from the evolution of language Congress has used to delineate the terrorism exception. As a starting point, Plaintiffs concede that the pre-2008 version of the terrorism exception (28 U.S.C. § 1605(a)(7)) applied only to designated "state sponsor[s] of terrorism." Br. 33; *accord Price*, 294 F.3d at 89 ("only a defendant that has been specifically designated by the State Department as a 'state sponsor of terrorism' is subject to the loss of its sovereign immunity"). Plaintiffs argue, however, that in 2008 Congress "expressly abandoned the designation requirement." Br. 35. Congress did no such thing.

[18] U.S. Dep't of State, Country Reports on Terrorism, ch. 2: Middle East and North Africa Overview (2015).

The relevant portions of the pre- and post-2008 statutes are materially identical, and "[t]he new statute imports the original grant of jurisdiction from § 1605(a)(7) largely unchanged." *Leibovitch*, 697 F.3d at 567 (citing 1605A(a)(1)–(2)). Both statutes begin with the same description of the cases where the exception applies—"any case … 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." *Compare* 28 U.S.C. § 1605(a)(7) *with* 28 U.S.C. § 1605A(a)(1).

The only linguistic difference between the two statutes is that the pre-2008 statute formulated immunity using a double negative: a "court shall *decline* to hear a claim under this paragraph if the foreign state was *not* designated as a state sponsor of terrorism." 28 U.S.C. § 1605(a)(7). The current statute simply replaces the double negative with an affirmative: a court "*shall* hear a claim under this section if the foreign state *was* designated as a state sponsor of terrorism." *Id*. at § 1605A(a)(2).

Plaintiffs place far too much weight on this superficial alteration. The two provisions are "materially identical," *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 482 n.22 (D.C. Cir. 2016), with the new formulation arguably clearer from a grammatical perspective, *cf. Sweeney v. Pence*, 767 F.3d 654, 667 (7th Cir. 2014) ("a double negative … would be more comprehensible if drafted in the

positive"). *See* Wright & Miller, 14A Federal Practice & Procedure § 3662.3 (4th ed. 2014) ("The jurisdictional analysis of when the terrorism exception applies … was not affected by the 2008 amendments."). Plaintiffs conclude otherwise only by overlooking the baseline rule—that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States" unless an exception expressly provides otherwise. 28 U.S.C. § 1604. Section 1605A(a)(2) now affirmatively provides otherwise.

Unsurprisingly, courts have interpreted the state-sponsorship designation as jurisdictional both pre- and post-2008. *See supra*. Plaintiffs posit that the unbroken chain of authority limiting § 1605A to designated state sponsors of terrorism results from inadequate briefing in those cases. Br. 40. But such a seismic shift in sovereign immunity would not have gone unnoticed for nearly a decade. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Plaintiffs try to instill meaning into the 2008 amendment by speculating that Congress used the affirmative "shall" to eliminate courts' discretion to dismiss claims against state sponsors of terrorism on grounds like *forum non conveniens* or the act of state doctrine. Br. 35–36. Even if that were correct, it does not establish jurisdiction here. Language about what courts "shall" do in cases involving designated countries says nothing about what courts "may" do in other cases. The

argument also fails on its merits. Although "'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). Congress knows how to explicitly preclude dismissal on specific grounds. *See* 18 U.S.C. § 2334(d) ("[t]he district court shall not dismiss any action brought under [the Antiterrorism Act] on the grounds of the inconvenience or inappropriateness of the forum chosen"); 22 U.S.C. § 2370 (similar, with respect to the act of state doctrine in expropriation cases). Had Congress wished to do so here, it is highly improbable that Congress would have accomplished that goal through as subtle a technique as using the word "shall" instead of "may."

C. Legislative history unequivocally supports the conclusion that Congress retained the "state sponsor" requirement.

The legislative history of the 2008 amendment also proves that Plaintiffs' interpretation is incorrect. Courts have chronicled the primary purposes of the 2008 amendments—to create a federal right of action against state sponsors of terrorism and to authorize punitive damages, among other enhancements. *Hegna v. Islamic Revolutionary Guard Corps*, 908 F. Supp. 2d 116, 122 (D.D.C. 2012); *Leibovitch*, 697 F.3d at 567 (detailing terrorism exception's legislative and judicial history). The legislative history also shows that Congress never wavered in its intent to limit the exception to designated state sponsors of terrorism.

The House Report states that "[c]ourts would have jurisdiction to hear a claim brought against a foreign state that was designated as a state sponsor of terrorism at the time of the terrorist act, or was so designated as a result of the act, and which remains designated as a state sponsor of terrorism at the time a claim is filed." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.); *see also* 154 Cong. Rec. 499–501 (Jan. 22, 2008). When the House Judiciary Committee held a hearing on victims of terrorism just months after enacting § 1605A, Congressman Braley testified that Iraq faced "no threat of future claims since Iraq is no longer designated as a state sponsor of terrorism."[19] Congressman Cohen said that this provision "reaffirms the right of an American victim to sue a foreign state sponsor of terrorism in a U.S. court." *Id.* These remarks would make no sense if § 1605A implicitly stripped immunity from foreign nations that were *not* designated state sponsors of terrorism.

In short, "nothing in the legislative history even remotely suggests that Congress intended to remove the sovereign immunity of all foreign states—including close U.S. allies in the fight against terrorism." *Carpenter*, 2009 WL 5255327, at *7 (a contrary reading of 1605A "would lead to such utterly absurd

[19] *Ensuring Legal Redress for American Victims of State-Sponsored Terrorism: Hearing on Victims of State-Sponsored Terrorism Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2008), *available at* 2008 WL 2441390.

results"). There is no evidence in the text or legislative history that Congress intended to upend "the delicate legislative compromise" embodied in the terrorism exception. *Price*, 294 F.3d at 89.

Had Congress decided to topple long-standing precedents and subject the United States' committed counterterrorism partners like Israel to suit, one would expect some discussion of Plaintiffs' theory in the legislative record. It is inconceivable that Congress made such a drastic change in sovereign immunity *sub silentio*. *See Kellogg Brown & Root Servs. Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1977 (2015) ("Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move."); *cf. Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("[T]his Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code … to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.").[20]

[20] Scholars also recognize that § 1605A applies only to designated state sponsors of terror. *E.g.*, Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 Duke J. Comp. & Int'l L. 307, 330 (2009) ("the law retains the condition that the foreign state be designated by the State Department as a 'state sponsor of terrorism'"); Eric A. Posner, *Human Welfare, Not Human Rights*, 108 Colum. L. Rev. 1758, 1759 n.3 (2008) (similar).

D. Plaintiffs' interpretation would render § 1605B superfluous.

Plaintiffs' interpretation of § 1605A is further undermined by the recently enacted Justice Against Sponsors of Terrorism Act ("JASTA"), which creates a new exception to sovereign immunity, 28 U.S.C. § 1605B, that allows Saudi Arabia to be sued in U.S. courts for terrorist attacks on U.S. soil. *See* Pub. L. No. 114-222, 130 Stat. 852. This new exception would have been unnecessary if § 1605A already permitted suit against Saudi Arabia, which is not a designated by the United States as a state sponsor of terrorism.

Plaintiffs argue that "Saudi Arabia's absence from the list of designated state sponsors of terrorism … is not the impediment to suit that JASTA was designed to overcome." Br. 46. Rather, Plaintiffs theorize that JASTA simply expanded jurisdiction to terrorism-related acts that took place outside the United States. Br. 45–46. But Plaintiffs fail to explain how § 1605A would not already have covered such acts under their interpretation. Section 1605A does not contain a geographic nexus requirement. If § 1605A also contains no designation requirement, as Plaintiffs argue, then § 1605A would already have permitted suit against non-designated states for material support of terrorism that occurred outside the United States.

Contrary to Plaintiffs' position that § 1605A already permitted suits against foreign states not designated as state sponsors of terror, the debate surrounding

JASTA reflects two relevant points. First, pre-existing law (i.e., § 1605A) *did not* allow suit against foreign states that were not designated as state sponsors of terrorism. The State Department Legal Adviser testified that the "carefully crafted" immunity framework "restrict[ed] the ability to sue foreign governments in U.S. courts for acts undertaken abroad to those states that have been designated by the executive branch as states sponsors of terrorism."[21] Second, JASTA's supporters wanted a new FSIA exception that eliminated the designation requirement to permit claims against Saudi Arabia for terrorist attacks on U.S. soil. *See* 162 Cong. Rec. S2140 (Apr. 19, 2016) (Sen. Cornyn) (JASTA would "allow victims of terrorist attacks on our homeland to sue even if the sponsor of the terrorist activity was not a State Department designated state sponsor of terrorism.").

Of course, this Court cannot interpret § 1605A in a manner that would render § 1605B meaningless. To avoid that result, the Court should simply apply the plain text of § 1605A and Circuit precedent to hold that § 1605A only applies to foreign sovereigns designated as state sponsors of terrorism.

[21] *Justice Against Sponsors of Terrorism Act: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution and Civil Justice*, *Panel I*, 114th Cong. 23 (2016).

E. Plaintiffs have not, in any event, plausibly alleged torture.

Finally, Plaintiffs' invocation of this exception fails because they have not made a colorable claim that Israel committed "torture" under § 1605A(a)(1). As the Supreme Court recently held, a court cannot exercise jurisdiction under the FSIA unless "the relevant factual allegations … make out a legally valid claim … . A good argument to that effect is not sufficient." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017). This rule ensures that sovereign immunity shields a foreign state from suit, not just from liability. *Id*. at 1317.

Plaintiffs have not plausibly alleged a claim for torture. Plaintiffs allege that the IDF's use of force—the restraint of Plaintiff Arraf—was torture. JA18–19 (Compl. ¶¶ 47–51). But "torture can occur under the FSIA only when the production of pain is purposive," inflicted "cruelly and deliberately," not merely an "unforeseen or unavoidable incident of some legitimate end." *Price*, 294 F.3d at 93. "Torture is a label that is 'usually reserved for extreme, deliberate, and unusually cruel practices—for example, sustained systemic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.'" *Id.* at 92–93 (citation omitted). Plaintiff's characterization of the IDF's actions in intercepting the *Challenger I* as "torture" is sensationalism, not a valid claim that abrogates sovereign immunity.

III. Plaintiffs' allegations implicate non-justiciable political questions and foreign acts of state.

The political question doctrine and the act of state doctrine also preclude adjudication of Plaintiffs' suit, because Plaintiffs challenge the military and security decisions of Israel. *See* Dist. Dkt. No. 17-1 at 28–37 (motion to dismiss).

Courts have repeatedly dismissed lawsuits challenging Israel's security actions in Gaza and the West Bank as presenting non-justiciable political questions. *E.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007); *Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007), *aff'd on other grounds*, 563 F.3d 9 (2d Cir. 2009); *Doe v. State of Israel*, 400 F. Supp. 2d 86, 111 (D.D.C. 2005). As in those cases, the political question doctrine bars jurisdiction over this dispute. "[N]ational security, military matters and foreign relations are 'quintessential sources of political questions'" that warrant dismissal of cases like this one. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc)). As this Court recently explained, "[i]n matters of political and military strategy, courts lack the competence necessary to determine whether the use of force was justified." *Ali Jaber v. United States*, No. 16-5093, 2017 WL 2818645, at *4 (D. C. Cir. June 30, 2017).

This case implicates numerous *Baker v. Carr* factors that govern whether a case involves a non-justiciable political question. 369 U.S. 186, 217 (1962). First, adjudicating a challenge to Israel's security policies enforcing the blockade would interfere with sensitive policy decisions reserved to the Executive branch and Congress. *Id.* ("textually demonstrable constitutional commitment of the issue to a coordinate political department"). Such questions include the legality of that blockade under international law, the international law standards applicable to the conflict between Israel and Hamas, and whether Israel acted in self-defense. *See Doe*, 400 F. Supp. 2d at 112. Second, adjudicating Plaintiffs' claims would require a court to wade into tactical and strategic issues—including the seriousness of the threat to Israel's national security; the optimal response to the threat; and the viability of alternatives to enforcing the blockade—for which no "judicially discoverable standards" exist. *Baker*, 369 U.S. at 217; *Wu Tien Li-Shou*, 777 F.3d at 181. Third, it would risk conflict with the coordinate branches, which have already expressed views on these politically fraught issues. *Baker*, 369 U.S. at 217 ("respect due coordinate branches of government" and "potentiality of embarrassment from multifarious pronouncements by various departments on one question").[22]

[22] *See, e.g.*, U.S. Dep't of State, Daily Press Briefing (June 2, 2010) (recognizing

The act of state doctrine also bars Plaintiffs' claims. That doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed [within] its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998). Acts of foreign military commanders "are not properly the subject of adjudication in the courts of another government." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Most of the challenged conduct (planning, ordering, and authorizing the interception) occurred on Israeli territory, as did all of Plaintiffs' claims arising in the port of Ashdod. Thus, because Israeli officials, military officers, law enforcement and other personnel acted within Israeli territory and Plaintiffs seek a determination of the lawfulness of those acts, the act of state doctrine bars Plaintiffs' claims. *Doe*, 400 F. Supp. 2d at 114 (barring challenge to acts "of the Israeli state, through individual actors carrying out the mandate of the state for its benefit").

Israel's "legitimate security concerns"); S. Res. 548, 111th Cong. (2010) (Senate resolution recognizing Israel's right to self-defense and "condem[ning]" the "destabilizing" actions of the passengers aboard the *Mavi Marmara*).

CONCLUSION

This Court should affirm the decision below.

Dated: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Appellees' Brief contains12,925 words and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

Dated: July 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017, I caused the foregoing document to be electronically filed using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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