ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-7052 and 18-7053 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENRI MAALOUF, *ET AL.*, and
KEVIN MICHAEL SALAZAR, *ET AL.*

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, *ET AL.*,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
Case Nos. 1:16-cv-280 and 1507 (Hon. John D. Bates)

APPELLANTS' BRIEF ON APPEAL

Steven M. Schneebaum
(D.C. Bar No. 956250)
Counsel of Record
STEVEN M. SCHNEEBAUM, P.C.
1776 K Street, N.W.; Suite #800
Washington, D.C. 20006
Tel: (202) 742-5900
E-mail: sms@smslawdc.com

Of Counsel:
Cynthia L. McCann
STEVEN M. SCHNEEBAUM, P.C.
Allan Gerson
Thomas J. West

July 31, 2018

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-7052 and 18-7053 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENRI MAALOUF, *ET AL.*, and
KEVIN MICHAEL SALAZAR, *ET AL.*

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, *ET AL.*,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
Case Nos. 1:16-cv-280 and 1507 (Hon. John D. Bates)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Orders of April 18, 2018 (Document No. 1727181), and April 20, 2018 (Document No. 1727494), and Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Henri Maalouf, *et al.*, and Kevin Mark Salazar and Kenneth Michael Salazar respectfully submit to the Court as follows:

I. **Parties**.

The Parties to the cases below, and to this Appeal, are:

a. In the *Maalouf* Case (No. 18-7052), Henri Maalouf, and the Estates of his late parents, Elias Maalouf and Olga Aftemoos, and of his late brother, Gaby Maalouf (all Plaintiffs below and Appellants before this Court); and The Islamic Republic of Iran, and the Iranian Ministry of Information and Security (both Defendants below and Appellees before this Court).

b. In the *Salazar* Case (No. 18-7053), Kevin Mark Salazar and Kenneth Michael Salazar (both Plaintiffs below and Appellants before this Court), and The Islamic Republic of Iran (Defendant below and Appellee before this Court).

In accordance with Rule 26.1, Federal Rules of Appellate Procedure, Appellants advise the Court that they are natural persons and/or the Estates of natural persons, and that Appellees are a foreign state and one of its agencies. No party to this case is a corporation.

II. **Rulings**.

The complaints below were dismissed *sua sponte* by the District Court, John D. Bates, Judge, after both sets of Plaintiffs had obtained defaults and had moved for default judgments. *See* 306 F.Supp.3d 203 (D.D.C. 2018). The single opinion of the court below (which combined the cases on its own motion for purposes of this ruling, but did not consolidate them), and the (separate) orders dismissing the cases, were all

dated March 30, 2018. The opinion may be found in the Appendix at pp. 137-149, and the orders are at pp. 68 and 135.

III. Related Cases.

The following case is currently pending in the District Court before District Judge Rudolph Contreras and involves claims by United States citizen plaintiffs injured in the terrorist bombing of the U.S. Embassy Annex in East Beirut, Lebanon, on September 20, 1984 and employees and contractors of the U.S. Government who were injured and/or killed in the terrorist attacks against the U.S. Embassy in Beirut, Lebanon on April 18, 1983 and/or September 20, 1984, and their family members: *Kevin Barry, et al. v. Islamic Republic of Iran*, No. 1:16-cv-01625-RC, filed August 10, 2016.

Respectfully submitted,

/s/ ***Steven M. Schneebaum***

Steven M. Schneebaum*/
(D.C. Bar No. 956250)
Cynthia L. McCann
(D.C. Bar No. 1046263)
STEVEN M. SCHNEEBAUM, P.C.
1776 K Street, N.W.; Suite #800
Washington, D.C. 20006
Tel: (202) 742-5900
Fax: (202) 449-3835
E-mail: sms@smslawdc.com

*/ Counsel of Record for Appellants

Dated: July 31, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

GLOSSARY

The following acronyms and abbreviations are used in this Brief:

App.	Appendix
AEDPA	Antiterrorism and Effective Death Penalty Act
FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611
JASTA	Justice Against Sponsors of Terrorism Act
NDAA	National Defense Authorization Act
VCF	Victim's Compensation Fund

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-7052 and 18-7053
(consolidated)

HENRI MAALOUF, *ET AL.*, and
KEVIN MICHAEL SALAZAR, *ET AL.*

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, *ET AL.*,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
Case Nos. 1:16-cv-280 and 1507 (Hon. John D. Bates)

APPELLANTS' BRIEF ON APPEAL

Appellants Henri Maalouf, and the Estates of his late brother, Gaby Maalouf, and of his late parents, Elias Maalouf and Olga Aftemoos (in No. 18-7052); and Kevin Michael Salazar and Kenneth Mark Salazar[1] (in No. 18-7053); appeal from the

[1] In some of the preliminary filings in these combined Appeals, undersigned counsel inadvertently reversed the first and middle names of the Salazar twins. Their correct names are Kevin Michael and Kenneth Mark.

decision and orders of the United States District Court for the District of Columbia entered on March 30, 2018, dismissing the complaints in the cases filed below. The decision is reported at 306 F.Supp.3d 203 (D.D.C. 2018), and is reproduced in the Appendix ("App."), pp. 137-49; the orders are at App., pp. 68 and 135.

Jurisdictional Statement

Appellants – Plaintiffs below – invoked the jurisdiction of the trial court based upon 28 U.S.C. §§ 1330 and 1605A. The court dismissed both actions, concluding that they were untimely. These consolidated Appeals are taken as of right from two final judgments of the district court, which dispose of all parties' claims. *See* 28 U.S.C. § 1291. The decision below was dated March 30, 2018. The notice of appeal was filed in the district court on April 11, 2018.

Statutes and Regulations

This appeal principally concerns 28 U.S.C. § 1605A, and § 1083(c) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Div. A, Title X (Jan. 28, 2008; 122 Stat. 342) ("NDAA"), both of which are reproduced in an Addendum to this Brief. *See* p. 53 *et seq*., *infra*.

Statement of Issues Presented for Review

Appellants respectfully submit that the following are the issues to be presented for this Court's review:

> 1. Whether the *sua sponte* dismissal of these cases on limitations grounds was consistent with precedent limiting judicial discretion to do so, and with this Court's holdings

that the limitations defense under the Foreign Sovereign Immunities Act (FSIA) is not jurisdictional and is therefore waived if it is not raised by the defendant?

2. Whether the district court was correct in holding that these cases were untimely and were not "related" to another timely-filed action?

3. Whether the speculation by the court below about potential effects on this country's foreign policy was justified in the circumstances, or whether it breached the wall of separation of powers set out in the Constitution?

4. Whether the district court was correct in its concern that permitting these cases to go forward would open "floodgates" that would permit "nearly endless litigation"?

Statement of the Cases

A. Introduction

These cases are about Iranian state-sponsored terrorist attacks against our country, and about accountability for murdering innocent individuals whose only offense was carrying out their duties in the civilian or military service of the United States. The court below appears to have determined, with little substantiation, that Iran has already been sanctioned sufficiently for its role in the deaths of Appellants' loved ones.

Appellants contend that the district court's conclusion is clearly inconsistent with the will of Congress, which has put in place a mechanism to provide some measure of justice for victims of terrorism and their survivors. Nor is the result reached below consistent with the Federal Rules of Civil Procedure and judicial precedent, including binding decisions of this Court. Considerations of comity,

correctly applied, mandate a conclusion diametrically opposite to the opinion of the district court. Finally, the trial court's speculation about potential foreign policy consequences or the possible proliferation of such litigation was inappropriate and constituted an independent ground for reversal.

B. Facts

1. The *Maalouf* case (No. 18-7052)

Edward Maalouf, a citizen of Lebanon, was employed as a security guard at the American Embassy[2] in Beirut when that building was attacked by Hezbollah terrorists organized, armed, trained, and financed by Respondent the Islamic Republic of Iran, a "state sponsor of terrorism" under U.S. law. He died in service to the United States of America on September 20, 1984, at the age of 26. Edward left behind a wife and baby son, three sisters, two brothers (Henri and Gaby), and both his parents. His brother Gaby died of natural causes in 2009; his father and mother died in 1986 and 2000, respectively. Edward's widow, son, and three sisters were plaintiffs in the litigation styled *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011), and were awarded damages; his brothers Henri and Gaby, and their parents, did not know about, and therefore did not participate in, the *Doe* case.

[2] Although originally intended to be used as an Annex to the Embassy, the building where Edward died became the Embassy for all practical purposes after the terrorist attack of April 1983 in which 63 people, including SSGT Mark Salazar, were killed.

The narrative of Edward's death, and its devastating impact on the entire Maalouf family, is set out in the Declaration of Henri Maalouf submitted in support of the motion for default judgment. *See* App., pp. 56-67.

2. The *Salazar* case (No. 18-7053)

Kevin and Kenneth Salazar are twins, now 42 years old. They are the only sons of Staff Sergeant Mark Eugene Salazar (U.S.A.), who was murdered in the April 1983 Hezbollah attack on the U.S. Embassy Beirut, SSGT Salazar's duty station. The terrorists who attacked the Embassy were organized, armed, trained, and financed by Respondent the Islamic Republic of Iran. He died at age 29 in the service, and in the uniform, of his country. Appellants were seven years old when their father was taken from them.

Appellants' parents had divorced by the time of his death. It appears, however, that, before divorcing Appellants' mother, Katherine Salazar, the Sergeant underwent a ceremony of marriage with a woman named Donna Koziol, who later changed her name to Donna Salazar. SSGT Salazar had one child, a daughter, with her. Donna Salazar was lead plaintiff in the earlier case styled *Salazar v. Islamic Republic of Iran*, reported at 370 F. Supp.2d 105 (D.D.C. 2005), in which Judge Bates awarded her and their daughter compensatory damages of $18,297,000. 370 F.Supp.2d 105, 117. She did not disclose to the court the existence of SSGT Salazar's twin sons.

The narrative of Mark Salazar's death, and its impact on his sons who grew up without their father, is set out in the Declarations and attached materials of Kevin and

Kenneth Salazar and their mother, submitted in support of the motion for default judgment. *See* App., pp. 103-34.

3. The liability of Iran for the terrorist attacks (both cases)

The responsibility of Iran for the two Beirut Embassy bombings has been established by the district court on numerous occasions: in *Salazar*, 370 F.Supp.2d 105; *Doe*; *Wagner v. Iran*, 172 F.Supp.2d 128 (D.D.C. 2001); *Dammarell v. Iran*, 281 F.Supp.2d 105 (D.D.C. 2003); *Brewer v. Iran*, 664 F. Supp.2d 43 (D.D.C. 2009); and *Welch v. Iran*, 2007 U.S. Dist. LEXIS 99191 (D.D.C. 2007). In *Doe*, Judge Bates found as a matter of fact that Appellee Iran "provided 'material support and resources' to Hizbollah in carrying out both the April 18, 1983 and the September 20, 1984 attacks" on U.S. diplomatic properties in Beirut. 808 F.Supp.2d 1, 16 (D.D.C. 2011). These conclusions constitute *res judicata*, according to the teachings of this Court: "Under the issue preclusion aspect of *res judicata*, a final judgment on the merits in a prior suit precludes subsequent re-litigation of issues actually litigated and determined in the prior suit, regardless of whether the subsequent suit is based on the same cause of action." *I.A.M. Nat. Pension Fund, Ben. Plan A v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 947 (D.C. Cir. 1983), citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

C. Procedural history

1. The *Maalouf* case (No. 18-7052)[3]

Henri Maalouf brought his action on February 17, 2016 (App., pp. 6-12. He was the sole party plaintiff, and he filed suit against both the Islamic Republic of Iran and its Ministry of Information and Security (MOIS), an agency or instrumentality of Iran within 28 U.S.C. § 1603(b). Service was effected pursuant to 28 U.S.C. § 1608(a)(4) on May 17, 2016. *See* App., p. 2 (Doc. No. 11).

On March 24, 2016, Judge Bates *sua sponte* issued an Order to Show Cause why the case should not be dismissed as untimely, attaching the memorandum opinion issued that day in *Sheikh, et al. v. Sudan*, Nos. 14-2090 and 2118. App., pp. 16-32. Undersigned counsel responded to the Order, and on April 27, in light of that response, the court decided "not to dismiss Plaintiff's claims at this juncture." App., p. 33.

On July 21, 2016, Plaintiff Henri Maalouf amended his complaint to bring in as parties Plaintiff the Estates of his mother, father, and brother, all of whom had survived Edward's murder.[4] App., pp. 34-43. There was no change to the underlying claims: all of the parties were asserting their standing to sue based on the terrorist

[3] The docket of the *Maalouf* case, No. 1:16-cv-00280-JDB in the court below, may be found at Appendix (App.), pp. 1-5.

[4] The amendment was permitted as of right, and did not require the permission of the court, because no answer to the original complaint had been filed. *See* Rule 15(a)(1)(B), Federal Rules of Civil Procedure.

killing of Edward Maalouf at the U.S. Embassy Beirut on September 20, 1984. When Iran failed to appear or to plead more than the statutory 60 days after service of the original complaint, Plaintiffs asked the Clerk of the district court to enter a notice of default, which was done on August 4, 2016. *See* App., p. 3 (Docket No. 14).

A few days later, however, Judge Bates vacated the default, on the grounds that the amended complaint superseded the original and had to be re-served. App., p. 44. Plaintiffs asked the Judge to reconsider that decision,[5] arguing that the amendment did not "substantially" change the underlying case, and relying (*inter alia*) on *Shoham v. Islamic Republic of Iran*, 922 F.Supp.2d 44, 47 (D.D.C. 2013) ("Where a plaintiff serves a complaint on a foreign state defendant under the FSIA, the foreign state defaults, and then the plaintiff files an amended complaint, service of the new complaint is only necessary if the changes are 'substantial'"). The court denied the motion, declining to follow *Shoham*, on September 8, 2016. App., p. 3 (Docket No. 17).

Service of the amended complaint was then completed, through the Department of State under 28 U.S.C. § 1605(a)(4), on August 9, 2017. App., p. 4 (Docket No. 28). No responsive pleading having been filed within the statutory deadline, Plaintiffs again sought a default, which was entered on October 16, 2017. App., p. 45.

[5] Diplomatic service through the Department of State, including delivery, translation, and other ancillary matters, costs over $2,500, and can delay proceedings by as much as five months.

Plaintiffs then filed a motion for default judgment on November 21, 2017, supported by a declaration of Plaintiff Henri Maalouf. App., pp. 46-67. Without a hearing, briefing, or other proceedings, Judge Bates *sua sponte* denied the motion, vacated the default, and dismissed the case in the Order appealed from on March 30, 2018. App., p. 68. This appeal followed. App., p. 69.

2. The *Salazar* case (No. 18-7053)

Kevin and Kenneth Salazar filed suit against Iran on July 22, 2016. App., pp. 72-78. They indicated that their case was related to an earlier case also styled *Salazar v. Iran*, No. 02-cv-558-JDB, 370 F.Supp.2d 105 (D.D.C. 2005). App., pp. 79-81. Service was made on Iran via the Department of State on January 17, 2017. App., p. 71 (Docket No. 6). No responsive pleading having been received within the statutory 60-day period, a default was entered by the Clerk on March 22, 2017. App., p. 82.

Plaintiffs then filed a motion for default judgment on July 10, 2017, supported by declarations from both and other documentary evidence. App., pp. 83-134. Without a hearing, briefing, or other proceedings, Judge Bates *sua sponte* denied the motion, vacated the default, and dismissed the case in the Order appealed from on March 30, 2018. App., p. 135. This appeal followed. App., p. 136.

The court below explained its orders of dismissal in a single opinion addressing both cases. App., pp. 137-49.

Standard of Review

The decision of the court below was not entered in response to any motion, opposition, or request from Appellees. It comprises only rulings of law, which are subject to *de novo* review, and no findings of fact. The Fourth Circuit has expressly "characterized a district court's *sua sponte* consideration of a statute of limitations affirmative defense as a question of law befitting *de novo* review." *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 208 (4th Cir. 2013), citing *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 (4th Cir. 2006).

Summary of Argument

The statute of limitations is not a jurisdictional bar, but rather an affirmative defense which must be pleaded, or it is forfeited. Such is the teaching of the United States Supreme Court, and it was applied by this Court specifically to cases arising under the Foreign Sovereign Immunities Act in *Owens v. Republic of Sudan*, 864 F.3d 751, 799-801 (D.C. Cir. 2017). No authority conferred upon the trial court, either by statute or under the Federal Rules of Civil Procedure, permits it to undermine the *Owens* result by imposing an automatic disqualification under the guise of judicial discretion. Appellants, moreover, in their filings in the district court identified "related actions" that were timely filed under 28 U.S.C. § 1605(a)(7), which would have defeated a limitations defense even had one been mounted.

The speculation of the court below about the potential foreign policy implications of permitting the cases to proceed was unwarranted under our

constitutional system of separation of powers. No consideration of comity requires or permits saving a contumacious state sponsor of terrorism from the consequences of its own decisions. Nor should the judge below have been swayed by his concern that adjudication of these cases would open floodgates to meritless claims that would inundate the court.

Argument

I. THE COURT BELOW SHOULD NOT HAVE RAISED THE LIMITATIONS DEFENSE *SUA SPONTE* ON BEHALF OF A DEFAULTING DEFENDANT.

A. Limitations Is an Affirmative Defense That Is Waived If Not Pleaded.

In our system of justice, the role of the courts is to decide between the positions espoused by the litigants before it, not to perform its own investigation of the facts, or to ground rulings in arguments that could have been raised by the parties, but were not. As Justice Scalia put it, "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

A (non-jurisdictional) affirmative defense is one that must be asserted by a defendant, or it is forfeited. A defaulting defendant, like Respondents here, loses its opportunity to raise affirmative (or, for that matter, any) defenses. The statute of limitations is such an affirmative defense. *See* Federal Rules of Civil Procedure, Rule

8(c)(1). If it is not invoked, it is lost. While there are rare circumstances in which a trial court may on its own initiative raise the issue, they are the exception, and not the rule. The starting point of analysis is what is sometimes called "the principle of party presentation," which means that "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment). *See also Greenlaw v. United States*, 554 U.S. 237, 244 (2008).

1. No exception authorizing *sua sponte* dismissals applies here.

"The Supreme Court has cautioned that *sua sponte* consideration of a statute of limitations defense should be done sparingly by the trial courts, even in those narrow circumstances where it is authorized." *Eriline*, 440 F.3d at 654, citing *Arizona v. California*, 530 U.S. 392, 412-13 (2000). Review of cases in which such self-initiated application of limitations defenses is permitted demonstrates that the instant matter does not come within those exceptional "narrow circumstances."

In *Eriline* itself, the Fourth Circuit concluded that *pro se* prisoner habeas corpus petitions, as well as petitions to proceed *in forma pauperis*, may qualify as exceptional, mainly for reasons of judicial economy:

> First, both habeas corpus and *in forma pauperis* proceedings, like failure to prosecute, abuse of process, and *res judicata*, implicate important judicial and public concerns not present in the circumstances of ordinary civil litigation. Second, in both habeas corpus and *in forma pauperis*

> proceedings, the district courts are charged with the unusual duty of independently screening initial filings, and dismissing those actions that plainly lack merit.

Id., at 656. The Court did **not** list statute of limitations issues as on a par with those it discussed in *Eriline*. Nor did it discuss the unique circumstances presented by FSIA cases against state sponsors of terrorism. Indeed, if anything, the "important judicial and public concerns" presented by such litigation militate **against** *sua sponte* dismissals, and in favor of providing the victims of terrorist acts an opportunity to redress their injuries, and against allowing terrorist regimes to attack Americans with impunity.

The district court relied substantially, in the decision appealed from, on the opinion of the U.S. Court of Appeals for the Fourth Circuit in *Clodfelter*, 720 F.3d 199, 209. App., pp. 143-44, 146, 148; 306 F.Supp.3d 203, 209-11. There, the Court held that a trial court may on its own initiative raise and consider a ***res judicata*** (**not** a timeliness) defense that could have been (but was not) mounted by a defaulting sovereign defendant. But for several reasons, such a conclusion does not support the notion that it is open to trial judges to raise on behalf of defaulting parties **any and all** of the affirmative defenses listed in Rule 8. *Clodfelter* most assuredly is not authority for the proposition that a limitations defense may be raised unbidden by a court in FSIA cases.

First, as the *Clodfelter* Court expressly recognized following *Eriline*, *res judicata* is a substantively different kind of affirmative defense from limitations:

> our case law recognizes *res judicata* as a special category of affirmative defense: one which implicates "important institutional interests of the courts" in addition to the interests of the litigants. *Eriline*, 440 F.3d at 654. **As such, it is appropriate to distinguish the discretion vested in a district court's *sua sponte* consideration of *res judicata* from the *de novo* review we apply to a district court's *sua sponte* consideration of a statute of limitations affirmative defense.** *Id.* at 653. We therefore review the district court's *sua sponte* decision to consider whether *res judicata* bars a plaintiff's claims for abuse of discretion.

Clodfelter, 720 F.3d 199, 208 (emphasis added). The invocation of limitations, in other words, is not a matter consigned to judicial discretion: it is a legal ruling to be treated and reviewed as such.

Second, the Fourth Circuit in *Clodfelter* was very mindful of its own decision in *Eriline*, that, "as a general matter, a district court should **not** *sua sponte* consider an affirmative defense that the defendant has the burden of raising." *Clodfelter*, 720 F.3d 199, 208-09, citing *Eriline*, 440 F.3d at 653–54.

The Court found that the record before it **did** reveal "special circumstances." Those had to do – as the district court noted in its order of dismissal – with the comity owed an absent foreign sovereign. App., pp. 143-44; 306 F.Supp.3d 203, 209, citing *Clodfelter*, 720 F.3d 199, 209. But the relevance of those considerations was far from self-explanatory. Certainly, the Fourth Circuit did **not** say or suggest that the *sua*

sponte invocation of a preclusive defense by the trial court in an FSIA case (which by definition **always** involves a sovereign defendant that might claim entitlement to "comity") is *ipso facto* permissible.

Comity is a discretionary doctrine, having to do with the respect that independent nations owe to one another. "Comity is not a rule of law, but one of practice, convenience, and expediency." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900). It reflects nothing more or less than "'a proper respect for [a sovereign's] functions,'" *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77, 134 S.Ct. 584, 591 (2013), [which] fosters 'respectful, harmonious relations' between governments, *Wood v. Milyard*, 566 U.S. 463, 471, 132 S.Ct. 1826, 1832-1833 (2012)." *Michigan v. Bay Mills Indian Cmty.*, ___ U.S. ___, 143 S.Ct. 2024, 2041 (2014).

In *Clodfelter*, considerations of comity were found pertinent in light of the facts of the case, and although the Court did not use this term, of a balancing of the equities. Sudan had had "neither 'ample opportunity' nor 'cause' to raise a *res judicata* defense." *Clodfelter*, 720 F.3d 199, 209, citing *Arizona*, 530 U.S. at 413. Comity – indeed, fairness – demanded that it not be punished for failing to cure a problem not of its own making. But here, by contrast, Iran has had many opportunities, in many different cases, to appear in this Court and to defend itself against the charge that it had financed and sponsored attacks on American diplomatic premises in Beirut. It has deliberately abstained from doing so.

> As Chief Judge Lamberth observed with respect to Iran, it 'strains credulity' to suppose that a foreign state sponsor of terrorism 'has any reliance interests or settled expectations with respect to prior civil actions litigated against it under § 1605(a)(7),' particularly where – as here – that foreign sovereign has failed to appear in the terrorism action filed against it.

Clodfelter, 720 F.3d 199, 211, citing *In re Islamic Republic of Iran Terrorism Litigation*, 659 F.Supp.2d 31, 85 (D.D.C. 2009). To read *Clodfelter* as expansively as did the district court would be to present Iran with an after-the-fact grant of immunity – that is, impunity – for the murder of Americans and the local nationals who loyally served them in Beirut.

The decision below was not based on the conclusion that the claims presented "plainly lack merit." *Eriline*, 440 F.3d at 656. It did not consider whether Iran had "ample opportunity" or "cause" to raise the limitations defense, as was decisive in *Clodfelter*. It did not canvass the criteria suggested in *Arizona*, or any other precedent setting out the proper considerations to take into account before *sua sponte* invocation of the limitations defense. It certainly did not abide by the Supreme Court's direction in *Arizona* that "[w]here no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication." 530 U.S. 392, 412–13.

Instead, the decision below was based on one criterion and one criterion only: the fact that the cases were filed more than ten years after the incidents that gave rise to them. Neither *Eriline* nor *Clodfelter* stands as authority for, nor is either consistent with, the opinion of the district court. The Supreme Court has explained that *sua sponte* invocation of preclusive defenses is a highly exceptional step to be taken cautiously, rarely, and only after deliberation. It was not justified in these cases.

2. The caselaw cited by the district court does not support its conclusion.

The district court cited voluminous caselaw in support of its decision, but none is on point, and all is easily distinguishable. The court's reasoning seems to have rested largely on the premise that "in default judgment proceedings, the affirmative defense at issue has not actually been waived, and the normal adversarial model upon which the concept of affirmative defenses is based has broken down." App., p. 144, 306 F.Supp.3d 203, 209-10.

In Appellants' submission, however, in cases where a defendant thumbs its nose at a court with jurisdiction over it, it is simply inaccurate to say that the "adversarial model … has broken down," as if it had been the victim of a natural disaster or inadvertent human error. The "breakdown," even if that is a proper descriptor, came about because one of the parties to this litigation chose to ignore it. There is neither case support nor public policy rationale for rewarding that behavior

by granting the absent party the rights it would have had if it had appeared to defend itself.

The trial court cited in support *Taiwan Civil Rights Litig. Org. v. Kuomintang Bus. Mgmt. Comm.*, 486 F. App'x 671, 671–72 (9th Cir. 2012) (*per curiam*), and *De Santis v. City of New York*, 2014 WL 228659, at *5 (S.D.N.Y. Jan. 22, 2014). But these cases are not binding, and are facially inapposite. *Taiwan Civil Rights Litig. Org.* is an unpublished opinion that cannot be cited as precedent even in the Circuit Court that issued it. *See* Ninth Circuit Rule 36-3(a). Moreover, the entire reasoning of the *Taiwan per curiam* opinion turns on two cases that do not actually support it: *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686–87 (9th Cir. 1993) (in which the defendant had **not** waived the limitations defense), and *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986) (which stands for the uncontroversial proposition that a district court addressing a motion for default judgment must evaluate the "sufficiency of the complaint"). 486 F. App'x 671, 672. That case is of no relevance, and no persuasive authority.

De Santis is an outlier district court decision, certainly not binding on this Court or the court below, which has been relied on precisely once (in *Deswal v. U.S. Nat. Ass'n,* 2014 WL 4273336, at *1 (E.D.N.Y. 2014)) for the proposition for which Judge Bates cited it. Its broad-brush assertion of unlimited power for district judges to dismiss cases on their own initiative regardless of the facts and circumstances is simply wrong. The *De Santis* court observed that the facts alleged in the complaint

"firmly establish the statute of limitations defense," and on that basis inferred, "**[t]herefore**, under the standard set forth by the Second Circuit, this case presents the possibility of s*ua sponte* dismissal on statute of limitations grounds." *De Santis*, 2014 WL 228659, at *5 (emphasis added). That reasoning cannot be reconciled with such binding Supreme Court precedents as *U.S. v. Burke* and *Arizona v. California*.

So while undoubtedly default judgments are, as the court below held, "disfavored," *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980), that is hardly the point at issue. It is not Appellants who were responsible for this case being subject to default proceedings. And in any event, cases like *Jackson* demonstrate only the courts' flexibility in setting aside defaults attributable to attorney error, or in which a defendant mends its recalcitrant ways and belatedly resolves to cooperate with the judicial process.[6]

Iran has done nothing to merit such a concession here. It murdered Americans in cold blood, and then snubbed efforts by the victims' survivors to obtain partial compensation for their losses. Iran has not appeared and is not going to appear, and only if default proceedings are allowed to go forward do Appellants have any hope of achieving a measure of justice.

[6] In most cases in which a defendant moves to set aside a default, only if the motion is granted may the court hear the merits of the case: the preferred outcome. Here, it is **Appellants** who sought to present the merits of their cases for adjudication, under 28 U.S.C. § 1608(e). The ruling of the district court has prevented them from doing so.

B. The Decision Below Is Inconsistent with This Court's Opinion in *Owens.*

1. The FSIA limitations provision is not jurisdictional.

"Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day v. McDonough*, 547 U.S. 198, 202 (2006). Subject matter jurisdiction questions, by contrast, may always be raised on the court's own initiative, even for the first time on appeal or on certiorari review, and if the court concludes that it lacks subject matter jurisdiction, it must dismiss the action. *See* Federal Rules of Civil Procedure, Rule 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). By contrast, statutory limitations provisions are generally not jurisdictional. As the Supreme Court has taught, and as this Court has held, "a limitation period is not jurisdictional 'unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction.'" *Owens,* 864 F.3d 751, 801, citing *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). *See also Kaplan v. Central Bank of Iran*, No. 16-7142 (D.C. Cir. July 20, 2018).

The sovereign defendant in *Owens* asked this Court to conclude that the situation is otherwise in the unique context of the FSIA.[7] That matter derived from the terrorist bombings of U.S. Embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, in 1998. The plaintiffs alleged that Sudan had participated in the financing

[7] A petition for certiorari is pending in the *Owens* matter, *sub nom. Opati v. Republic of Sudan*, No. 17-1406. The Court has asked the United States to file a statement of interest, which has not yet been received.

and carrying out of the terrorist operations, and the question presented was whether, although Sudan defaulted, the court could raise the limitations defense on its own initiative.

Sudan sought to persuade this Court that Congress had explicitly removed the need for affirmative assertion of the defense in FSIA cases by making it jurisdictional. This, they claimed, followed from the language of 28 U.S.C. § 1605A(b): "An action may be brought or maintained under this section if the action is commenced, . . . not later than the latter of (1) [April 24, 2006]; or (2) 10 years after the date on which the cause of action arose." There was no doubt that three of the cases consolidated in *Owens* had been brought more than ten years after the African Embassy bombings.

This Court engaged in an extensive analysis of the language and history of the FSIA, concluding that "[n]othing in the [limitations] section refers to the 'court's power' to hear a case. Nothing in § 1605A(a) 'conditions its jurisdictional grant on compliance with [the] statute of limitations' in § 1605A(b)." *Owens*, 864 F.3d at 802, citing *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 165 (2010)). To the contrary, said this Court:

> Having reviewed the text, structure, or history of the FSIA terrorism exception, we see "no authority suggesting the Congress intended courts to read [§ 1605A(b)] any more narrowly than its terms suggest." [*Simon v. Republic of Iraq,* 529 F.3d 1187, 1194-95 (D.C. Cir. 2008); *rev'd on other grounds sub nom. Republic of Iraq v. Beaty,* 556 U.S. 848 (2009)]. Sudan's arguments to the contrary fail. **We therefore hold that the limitation period in § 1605A(b) is not jurisdictional. It follows** that Sudan has forfeited

> its affirmative defense to [three of the consolidated] actions by failing to raise it in the district court.

Owens, 864 F.3d at 804 (emphasis added), citing *Musacchio* and *Harris v. Sec'y, U.S. Dept. of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997).

The Court's holding was not only that the statute of limitations defense is not jurisdictional and therefore must be raised by the defense. It significantly included the deduction that flows from that conclusion: "[i]t follows" that a defendant, having failed to raise the issue, has forfeited it.

Owens is controlling on this question.[8] Iran has by its contumacy lost its right to assert the limitations defense, and no court should remedy the forfeiture when Iran itself has chosen not to cooperate.

2. The district court should not exercise "discretion" to override *Owens*.

In the decision below, Judge Bates acknowledged the binding force of *Owens*, but read that decision as affirming his **discretion** to dismiss cases on limitations grounds, even if he was not **required** to do so. Appellants respectfully submit that there is no such "discretion," under either the common law as articulated in the caselaw cited in Part A, *supra*, or in the FSIA.[9] Indeed, the court's exercise of what it

[8] "One three-judge panel … does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). Only the Court sitting *en banc*, or the Supreme Court, may do so.

[9] Section 1605A(a)(2) does not leave room for discretion. It provides that "the court shall hear a claim under this section if the foreign state was designated as a state sponsor of terrorism…."

classified as "discretion" to dismiss cases based on an immutable characteristic (the time elapsed between the day the cause of action arose and the day the complaint was filed) effectively makes that simple fact a jurisdictional bar: precisely the conclusion that this Court rejected in *Owens*.

The district court found a statutory grant of discretion in 28 U.S.C. § 1608(e), which provides that in FSIA litigation, "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state … **unless the claimant establishes his claim or right to relief by evidence satisfactory to the court**." Emphasis added. That the district courts must be "satisf[ied] by the "evidence" presented to support the claim, however, is not a grant of blanket power to invoke legal (not evidentiary) bars to claims based on affirmative defenses not asserted.

The "evidence satisfactory to the court" language of § 1608(e) is identical to the statutory provision regulating default judgments against the United States. *See* Rule 55(e), Federal Rules of Civil Procedure; *see also Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 537 F. Supp. 2d 85, 91 (D.D.C. 2008). Surely it permits judges to exercise "discretion" to deem evidence sufficient, or insufficient, to carry applicable burdens of proof. But the provision requires an evaluation of the **evidence** on which the plaintiffs rely to establish both liability and damages. The FSIA default provision does not create a mechanism for district judges in their "discretion" to interpret the governing statute in a manner inconsistent with the teachings of this Court, or to decide that certain cases are simply inadmissible as a matter of law.

In reviewing the scope of the authority vested in him by § 1608(e), Judge Lamberth explained:

> In considering whether to enter default judgment, courts in FSIA cases look to various sources of **evidence** to satisfy their statutory obligation. Courts may, for example, rely upon plaintiffs' uncontroverted factual allegations, which are supported by ... documentary and affidavit **evidence**. … In addition to more traditional forms of **evidence** – testimony and documentation – plaintiffs in FSIA cases may also submit **evidence** in the form of affidavits. Finally, a FSIA court may take judicial notice of related proceedings and records in cases before the same court.

Fain v. Islamic Republic of Iran, 856 F. Supp. 2d 109, 115 (D.D.C. 2012) (emphasis added; citations and internal quotations omitted). It is the **evidence**, and the application of the law to the evidence, which the courts are given discretion to consider under the FSIA. But the decisions now on appeal were not made on the basis of **evidence**.

Nor can this objection to the decision of the district court be finessed by the argument that the judge was simply declaring that **any** evidence that might be presented to him would not be "satisfactory" under § 1608(e). That the decision was independent of the actual evidence shows that it was a conclusion of law, not an exercise of discretion. This argument is consistent with the conclusions of the Fourth Circuit in *Clodfelter*: the *de novo* standard of review is applicable to the instant Appeal precisely because the dismissal below was an interpretation of substantive and procedural statutory law. Appellants respectfully submit that the court's interpretation

was legally erroneous and requires reversal for that reason, not because it was an abuse of judicial discretion.

3. Any discretion granted by the FSIA should be withheld on these facts.

To the extent that the Rules of Civil Procedure and cases like *Arizona* (but not 28 U.S.C. § 1608(e)) recognize judicial discretion to raise affirmative defenses for defaulting defendants, it is to be used sparingly. It should be reserved for instances in which a default was inadvertent, or a defendant had good reason for having failed to respond to a validly-filed lawsuit. To permit more expansive use of such discretion would be to undermine the very principle of "party presentation," as both the Supreme Court and this Court have pointed out.

In *Day*, *supra*, 547 U.S. 198, the question of *sua sponte* invocation of a limitations defense arose in the context of a prisoner's habeas corpus petition, filed after the statutory deadline, although the State for some reason failed to assert the defense. The Court provided this guidance for trial and appellate courts confronting this issue:

> Of course, before acting on its own initiative, [1] a court must accord the parties fair notice and an opportunity to present their positions. *See*, *e.g.*, *Acosta* [*v. Artuz*, 221 F.3d 117], 124-125 [(2d Cir. 2000)]; *McMillan v. Jarvis*, 332 F.3d 244, 250 (4th Cir. 2003). Further, [2] the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and [3] "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred. *See Granberry* [*v. Greer*, 481 U.S. 129], 136 [(1987)].

Day, 547 U.S. at 210. The Court went on to make clear that judges have no flexibility to expand these strictures: "A district court's discretion is **confined** within these limits. As earlier noted, should a [defendant] State intelligently choose to waive a statute of limitations defense, **a district court would not be at liberty to disregard that choice**." *Id.*, at 211 n.11 (emphasis added). This position has been reiterated by the Court: "[A] federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system." *Wood*, *supra,* 566 U.S. at 472, citing *Greenlaw*, 554 U.S. at 243–244, as well as *Day*. "[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." *Day*, 547 U.S. at 202.

Adhering to the Supreme Court's teaching in *Day*, therefore, the court below should have reviewed three factors. First, it should have provided Appellants fair notice and an opportunity to be heard; it did not do so. It seems clear that the "opportunity to present their positions" referenced in *Day* meant the chance to proffer facts and circumstances of the particular situation that might be taken into account in exercising discretion. But no such facts were educed: the court below dismissed the cases without regard to any individualized considerations. Without seeing or hearing a witness, the Judge concluded that the sworn representations by Henri Maalouf and the Salazar brothers that they were unaware of the possibility of filing suit to recover damages for the deaths of their brothers were worthy of no

special consideration,[10] but that the "sovereignty" of Iran, and "comity" obligations allegedly owed to that state sponsor of terrorism, were entitled to deference.

Second, the district court should have addressed the question whether Appellants were "significantly prejudiced by the delayed focus on the limitation issue." No such question is addressed in the order of dismissal. And finally, the High Court directed that a trial judge take into account "whether the interests of justice would be better served" by dismissing the case or hearing it.

Here, there is every reason to believe that Iran's failure to appear in these and other terrorism cases was deliberate and strategic. The Islamic Republic has been described by the district court as "an "experienced litigant in the United States Federal Court System generally and in this Circuit." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d at 43 n.5 (listing cases in which Iran has engaged counsel and has appeared as of 2009, including *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir.1994), *cert. den.*, 513 U.S. 1078 (1995); *Foremost–McKesson v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir.1990); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C.

[10] Anticipating that they might be asked to explain the delays in filing their lawsuits, the Salazar brothers and Henri Maalouf included statements in their declarations setting out when and how they first became aware of the possibility of initiating litigation. Both had family members who were involved in earlier lawsuits, but those individuals for their own reasons did not disclose their participation to Appellants. There is no conceivable justification for suggesting that somehow they were "exploiting" anyone by seeking to be treated equally with other members of their families.

Cir.1984); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.1984); and *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983)).[11]

The simple fact is that Iran knows how to defend itself in U.S. courts when it chooses to do so. It did not choose to do so here. It does not appear in cases presenting claims by survivors of the Americans it has attacked or murdered. There is no evidence of the kind of "inadvertence" that the Supreme Court was prepared to credit in *Day* and its *sequellae*. Absent such excusable neglect, there is no other basis on which to conclude that "the interests of justice" required dismissal.

C. The District Court's Opinion in *Worley* Correctly States the Law.

In *Worley v. Islamic Republic of Iran*, 75 F.Supp.3d 311 (D.D.C. 2014), the district court concluded – correctly, in Appellants' submission – that the limitations defense is forfeited if not waived, and that Iran, of all parties defendant, is certainly not entitled to any concessions or the exercise of discretion in its favor. As Judge Lamberth wrote, Iran and its agencies "have chosen not to appear in this litigation and they must take the consequences that attend that decision, including waiver of potentially legitimate defenses." 75 F.Supp.3d 311, 331, citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008), and *Day*, 547 U.S. at 210-11.

[11] There have been other appearances since then. *See*, *e.g.*, *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 221 (D.D.C. 2012), *aff'd*, 734 F.3d 1175 (D.C. Cir. 2013).

Judge Bates, by contrast, did not feel it appropriate to make Iran live with the consequences of its own contumacy. To the contrary: he declared the playing field level, with the two sides in essential parity, in that "plaintiffs in FSIA cases are making conscious strategic decisions as well." App., p. 146-47; 306 F.3d 203, 211. He even went so far – without evidence, without testimony, without a trial – to suggest that the sons of a U.S. Army Staff Sergeant, and the family of a Lebanese local employee of a U.S. Embassy, both of whom were killed at their duty stations, might be "exploiting" the system by filing these claims. App., p. 146; 306 F.Supp.3d 203, 211. He expressed no such suspicion of the state sponsor of terrorism that was responsible for murdering Appellants' decedents.

Given, however, the open disagreement between two Judges of our district court – Judge Lamberth, who in *Worley* concluded that it would be inappropriate to use the statute of limitations to help defaulting terrorist states to evade liability in FSIA cases, and Judge Bates, who in these cases came to the opposite conclusion – it is essential that this Court provide the definitive law of this Circuit. Meanwhile, in *Sheikh v. Islamic Republic of Iran*, 308 F. Supp. 3d 46 (D.D.C. 2018), *reconsideration denied sub nom. Kinyua v. Republic of Sudan*, 2018 WL 2272779 (D.D.C. May 17, 2018,), Judge Bates issued an opinion substantially identical to the opinion on appeal here.[12] In *Bathiard v. Islamic Republic of Iran,* 2018 WL 3213294 (D.D.C. June 29, 2018), Judge

[12] A notice of appeal to this Court in *Sheikh* has been assigned Docket No. 18-7060 (filed on April 30, 2018).

Cooper adopted Judge Bates's approach, while a Federal Judge in the Northern District of Ohio, in *Spaulding v. Islamic Republic of Iran*, 2018 WL 3235556 (July 2, 2018), endorsed Judge Lamberth's analysis.[13]

District judges, of course, often come to different conclusions concerning the evaluation of evidence in cases where they have a substantial measure of discretion. But here, the divergences are not based on facts and circumstances. They are not driven by whether a particular plaintiff has made a credible case that failure to file within the limitations period was inadvertent or excusable. The issue separating the two positions is one of law, not fact.

Appellants respectfully submit that a correct interpretation of the law requires defendants who want to rely on statutes of limitations to assert those defenses. If they do not do so, the defenses are forfeited. Entities familiar with the U.S. judicial system – like the Government of Iran, which has taken part in it as both plaintiff and defendant – can retain counsel to advise them on the potential consequences of their failure to appear. There is no consideration of equity by which Iran deserves the concessions extended to it by the district court below. Nor is there persuasive logic by which "the interests of justice would be better served" were these Appellants

[13] Earlier this year, Judge Lamberth issued a default judgment and an award of damages to the plaintiffs in *Relvas v. Islamic Republic of Iran,* 2018 WL 1092445 (D.D.C. Feb. 28, 2018), a case concerning the 1983 Marine Corps barracks in Beirut, which was brought in 2014. He did not even mention timeliness issues. And in open court on June 26, Judge Friedrich asked the plaintiffs to brief the *sua sponte* limitations issue in *Doe v. Democratic People's Republic of Korea*, No. 1:18-cv-00252-DLF.

deprived of their day in court, when Congress has by statute provided a mechanism for them to seek at least some measure of remedy from the regime that murdered their loved ones.

II. THESE CASES WERE "RELATED" TO TIMELY-FILED ACTIONS.

A. This Argument Is Not Waived, Since the District Court Addressed It.

Judge Bates correctly observed that Appellants did not argue before him that their cases were timely, as linked to "related cases" within 28 U.S.C. § 1605A(b). Appellants did, however, identify in their respective complaints the related cases of *Wagner v. Islamic Republic of Iran*, *supra*, 172 F. Supp.2d 128, *Dammarell*, 281 F.Supp.2d 105, and *Doe*, in the *Maalouf* case, and *Dammarell*, *Salazar*, and *Doe* in the *Salazar* case. *See* App., pp. 6, 72.

After noting that the argument was not part of Appellants' submission in their response to the Order to Show Cause, App., pp. 16-17, the court nevertheless decided that the cases could not be considered timely. Because the court discussed the issue of "related cases" for statute of limitations purposes, and resolved it against Appellants, it is open to them to raise it here on appeal.

B. The *Maalouf* and *Salazar* Actions Were Timely Because Related Actions Had Been Commenced Under § 1605(a)(7), So That The Limitations Defense Need Not Have Been Considered at All.

Citing *Owens*, the court below concluded that Appellants' actions were untimely, holding that the last day to file was April 18, 1993 for the Salazars, and September 20, 1994 in Maalouf (ten years after each of the Embassy bombings). The

court opined that neither case "related to another timely action." App.141. But in so doing the district court misconstrued the "related action" provision of § 1605A(b).

The limitation period contained in the § 1605A terrorism exception to foreign sovereign immunity provides in subsection (b) as follows:

> An action may be brought or maintained under this section if the action is commenced, **or a related action was commenced under section 1605(a)(7)** (before the date of the enaction of this section) … not later than the latter of-
>
> (1) 10 years after April 24, 1996; or
>
> (2) 10 years after the date on which the cause of action arose.

28 U.S.C. § 1605A(b) (emphasis added).

Appellants' actions were not brought within ten years after the Beirut Embassy bombings. But they were nevertheless timely in their own right, because related actions involving the same Embassy bombings, alleging the same facts concerning liability, featuring the same defendants, and making the same claims concerning the prerequisites for denial of sovereign immunity to Iran, were commenced under § 1605(a)(7), enacted in 1996 as part of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

All of the cases identified Appellants as "related actions," filed under § 1605(a)(7), were brought by victims, and survivors of victims, of the 1983 and 1984 terrorist bombings of the U.S. Embassy in Beirut. That is all that the law requires. In the recent case of *Relvas v. Islamic Republic of Iran*, *supra*, p. 29, n.12, for example, Judge

Lamberth entered default judgments against Iran, awarding $920,068,552.81 in compensatory and punitive damages to victims of the October 1983 terrorist bombing of the U.S. Marine barracks in Beirut. The *Relvas* plaintiffs brought their action 31 years after the attack, in 2014, identifying 18 "related actions" raising the same issues and arising from the same incident. The court nevertheless proceeded to hear and to adjudicate the claims, concluding that "defendants must be punished to the fullest extent legally possible for the bombing in Beirut on October 23, 1983 – a depraved act that devastated the lives of countless individuals and their families, including the nearly 80 plaintiffs who are parties to this lawsuit." 2018 WL 1092445, at *5.

In *Owens*, this Court considered the application of § 1605A(b) to actions brought more than ten years after the terrorist incidents in East Africa. In reviewing Sudan's challenge to the timeliness of the actions brought by a certain subset of plaintiffs, the Court noted that the § 1605A(b) limitation periods would not apply if a "related action" commenced under § 1605(a)(7) could be identified. "**[U]nless** plaintiffs can identify a 'related action … commenced under section 1605(a)(7)' … the last day to file a new action under § 1605A was August 7, 2008, ten years after the bombing." *Owens*, 864 F.3d at 799 (emphasis added). In the end, this Court did not decide the timeliness issue because it held that § 1605A(b) is not jurisdictional, and that Sudan had therefore forfeited its affirmative defense by failing to raise it in the district court.

Appellants' actions here are not subject to the § 1605A(b) limitations period because the complaints identified "a related action … commenced under section 1605(a)(7) …," as required by § 1605A(b)'s plain language.

Nor are the actions barred by the limitation periods under § 1083 of the NDAA – entitled "Application to Pending Cases," set out in the Historical and Statutory Notes to § 1605A (*see* the Statutory Addendum, *infra*) ("the NDAA"), as the district court held. Section 1083(c) of the NDAA contains detailed provisions governing the application of § 1605A to **pending cases**, which is to say, cases that were pending at the time of the Act's enactment in 2008. That provision "determines if plaintiffs in cases filed before the addition of the federal terrorism cause of action can rely on the new cause of action when filing a new action under § 1605A that would otherwise by barred by the statute of limitations in 28 U.S.C. § 1605A(b)." *Roeder v. Iran*, 646 F.3d 56, 60 (D.C. Cir. 2011). "The D.C. Circuit has read [the language of § 1083(c)(3)] 'to refer only to those cases timely commenced under § 1605(a)(7) that were still pending when [§ 1605A] was passed.'" *Kapar v. Iran*, 105 F.Supp.3d 99, 103 (D.D.C. 2015), *citing Roeder*, 646 F.3d at 61. Therefore, 1083(c)(3) does not operate as a bar to the actions now before the Court because the actions identified by Appellants as related were no longer pending when the NDAA was enacted in 2008.

III. THE DISTRICT COURT'S DISMISSAL WAS NOT MANDATED BY FOREIGN RELATIONS CONCERNS.

The court below cited an additional reason for dismissing these cases: that performing its constitutionally-assigned function would somehow trench on the Executive's ability to conduct foreign affairs. *See* 306 F.Supp.3d 203, 212; App., pp. 143, 147-48. After declaring that it did not mean to defend "the indefensible nations who defy both the laws of mankind and the authority of American courts," 306 F.Supp.3d 203, 212; App., p. 148, the court opined that "long experience reminds us that judgments against other nations or their citizens often have serious import for American foreign relations." It citied, among other things, the Treaty of Paris that ended the Revolutionary War, and *Rubin v. Islamic Republic of Iran,* 138 S. Ct. 816, 822 (2018), which noted that there might be "reciprocity and other foreign-relations repercussions" were plaintiffs in that case permitted to execute judgments against Iran by seizing Persian artifacts that had been loaned to American museums.[14]

The district court observed that "[t]he few countries subject to the FSIA's terrorism exception [such as Iran] are also those with whom the United States has some of its most delicate diplomatic relationships." App., p. 148, 306 F.Supp.3d 203, 212. But Congress has already addressed and resolved the question whether the

[14] Appellants do not propose to seize foreign property that by happenstance may be found in the United States, although in *Rubin* the specific nature of those proposed executions, rather than the underlying judgments, was the perceived cause of potential foreign affairs complications.

courts should be involved in adjudicating cases against those "few countries," notwithstanding whatever diplomatic delicacy might appear to the judicial branch. The 2008 amendments to the FSIA – now codified at 28 U.S.C. § 1605A – make it clear that **only** those states designated as "state sponsors of terrorism"[15] are by virtue of that designation denied immunity for certain acts of violence committed against Americans and those who serve America abroad.[16] *See Schermerhorn v. Israel*, 876 F.3d 351, 359 (D.C. Cir. 2017) ("cases in this Circuit and elsewhere have continued to treat the state-sponsor requirement as a jurisdictional prerequisite to invoking the terrorism exception").

It is not the proper function of the courts to decide whether exercising jurisdiction over "state sponsors of terrorism" in cases like the ones at Bar might, while doing the same in other cases might not, affect "delicate diplomatic relationships" in unspecified ways. Such speculation is, simply put, not the province of the judicial branch, and in any event, it is not supported by the facts particular to these matters. The FSIA permits the American victims of terrorism to sue Iran, despite its status as a sovereign nation, for its role in offshore murders. And in these

[15] At present, there are only four countries so designated: Syria (since 1979), Iran (since 1984, in response to the Beirut bombings), Sudan (since 1993), and North Korea (reinstated to the list in November 2017). *See* the Department of State's website, https://www.state.gov/j/ct/list/c14151.htm (visited July 19, 2018).

[16] The recently-enacted Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. 114-222, 28 U.S.C. § 1605B, may expand the list of states denied sovereign immunity in certain situations not relevant here.

cases, the exercise of jurisdiction to adjudicate is fully consistent with notions of international comity, as correctly interpreted by the courts.

The constitutional separation-of-powers question triggered by the decision of the district court has recently been addressed by the U.S. Supreme Court, in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Like the immigration restrictions at issue in that case, overseeing diplomatic relations with states that sponsor terrorist attacks on Americans is outside the proper remit of the judicial branch. "Because decisions in these matters may implicate relations with foreign powers, or involve classifications defined in the light of changing political and economic circumstances, such judgments are frequently of a character more appropriate to either the Legislature or the Executive." *Id.*, 2418-19.

A. Allowing Default Judgments in These Cases Would Not Disrespect Iran's Sovereignty.

Judge Bates opined that "[w]hatever Iran's misdeeds, it remains a foreign country equal in juridical stature to the United States, and the federal courts must respect 'the independence, the equality, and dignity of the sovereign.'" App., pp. 143-44; 306 F.Supp.3d 203, 209, citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 123 (1812). No one doubts that Iran is entitled to be treated with all of the dignity of a sovereign, whatever one might think of whether it deserves that treatment. But the FSIA does not compromise or disrespect the sovereignty to which all states, friends and foes alike, may lay claim. To the contrary, it recognizes that,

unless certain exceptions apply, foreign states are not amenable to suit in our courts. The law denies immunity from suit in domestic courts, however, to sovereigns that engage in specified kinds of conduct, including (*inter alia*) certain commercial activities, 28 U.S.C. § 1605(a)(2), certain kinds of torts, 28 U.S.C. § 1605(a)(5), and acts of terrorism if committed by states designated by the Executive as "states sponsors of terrorism." 28 U.S.C. § 1605A. And once one of the statutory exceptions applies, with a caveat not relevant here, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

Denying immunity to a foreign state engaging in certain kinds of behavior is in no way incompatible with the recognition of its sovereignty. Indeed, the Supreme Court has made clear that the FSIA is entirely of a piece with international legal principles regarding the respect due to foreign sovereigns: "one of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law. *See* [28 U.S.C.] § 1602. We have observed that a related purpose was codification of international law at the time of the FSIA's enactment." *Samantar v. Yousuf*, 560 U.S. 305, 319-20 (2010) (citations and internal quotations omitted).

Thus even if "[d]efault judgments are generally disfavored, … in light of our strong policy of determining cases on the merits, *Estate of Faull by Jacobus v. McAfee*, 727 F. App'x 548, 552 (11th Cir. 2018), Congress has established in the FSIA, at 28

U.S.C. § 1608(e), a mechanism regulating the award of default judgments in cases like this one. That device has been fine-tuned by the legislature through amendment, and has been the subject of numerous cases brought, as Congress intended, by victims of those terrorist attacks and their survivors, against the states that perpetrated them.

The court below seems to suggest that simply haling a sovereign into court *per se* constitutes a threat to foreign relations. But the FSIA addresses that. If by enacting that statute in 1976 the legislative branch committed some kind of offense against the law of nations, that is not for the courts to rectify. *See United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (the courts are not to decide whether an extraterritorial kidnapping by U.S. agents violated government-to-government obligations owed to Mexico). These are quintessentially political questions, and "[p]roperly understood, the political question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'" *Goldwater v. Carter*, 444 U. S. 996, 1007 (Brennan, J., dissenting), citing *Baker v. Carr*, 369 U.S. 211-213 (1962).

Appellants did not ask the courts to set, or to interfere in, foreign policy. Iran has already been designated a state sponsor of terrorism: that is not open to question. If that designation proves offensive to Iran, both the reaction and any response are for the Executive branch to evaluate. Congress, meanwhile, adopted legislation, signed into law by the President, permitting suits against Iran and certain other terrorist states for their involvement in just such acts as the ones that took the lives of

Appellants' decedents. And such suits have proceeded to adjudication in any number of instances, with no measurable foreign policy fallout that courts have considered it appropriate to take into account.

For those reasons, it is not immediately apparent how or why deciding these cases on their merits would somehow, to use the language that Judge Bates borrowed from *The Schooner Exchange*, be an affront to "the independence, the equality, and dignity" of Iran, while other decisions of the district court – including decisions by Judge Bates himself[17] deriving from the **same incidents**, against the **same defendants**, and brought by loved ones of the **same decedents** – did not.

B. Considerations of Comity Do Not Justify the Decision Below.

Instead of considering the prejudicial impact on Appellants of the dismissal of their cases, Judge Bates inexplicably focused on the inconveniences supposedly faced by Iran. But "comity" does not require – indeed, in Appellants' submission it does not permit – courts to avoid their constitutional responsibilities to decide cases properly brought before them. This is all the more persuasive with respect to cases arising under the FSIA. After all, regardless of whether it has become a rule of customary international law (s*ee Jurisdictional Immunities of the State (Ger. v. Italy)* [2012] I.C.J. Rpts. 99), from a domestic perspective foreign sovereign immunity is, from the

[17] *See*, for example, *Doe* and *Salazar*: the two cases involving Appellants' decedents. In those cases, and in many others, the court even awarded massive punitive damages, aimed at deterrence and public castigation: if anything, a far more flagrant insult to the sovereign defendant than the compensatory damages sought in the cases at Bar.

outset, "a matter of grace and comity on the part of the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

Before the FSIA was enacted in 1976, the judiciary would request of the Department of State a determination whether a particular sovereign defendant was entitled to immunity in a particular case, to which it would mechanically defer. "In determining whether to exercise jurisdiction over suits against foreign sovereigns, courts traditionally 'deferred to the decisions of the political branches ... on whether to take jurisdiction over actions against foreign sovereigns.'" *Rubin*, *supra*, 138 S. Ct. at 821, citing *Verlinden*, 461 U.S. 480, 486. But the FSIA changed all that. No longer do the courts seek or the Executive offer a case-specific evaluation of an immunity claim. Instead, the guidance of the political branches is expressed by statutory language, which it is role of the courts to interpret and apply.

"A primary purpose of that Act was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch of government, thereby assuring litigants that such decisions would be made on legal rather than political grounds." *Nat'l Airmotive Corp. v. Gov't & State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980). Here, with respect to the eligibility of terrorist states for sovereign immunity, the political branches have spoken, in this instance through 28 U.S.C. § 1605A.

Thus, in cases in which an FSIA exception denies a foreign state immunity, considerations of comity have already been taken into account and resolved. The

political branches have declared that states that sponsor terrorism and engage in the kinds of conduct of which Iran was guilty here are not entitled to deploy sovereign immunity as a barrier to block the path of terrorism victims and their families in their pursuit of justice.

Judge Bates correctly noted, in the decision below (App., p. 143-44, 306 F.Supp.3d 203, 209-10), that in any event comity is not a rule of law: it is a guideline to follow, based on considerations of sovereign equality and deference. The Supreme Court "has called 'comity' in the legal sense 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964), citing *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895).

Hilton remains, 123 years later, the *locus classicus* on the concept of comity. The definition offered by Mr. Justice Gray for the Court is this: comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Id.*, at 164. That definition surely has nothing to do with the appeals now before this Court. Comity might, for example, shield a foreign nation from being forced to submit to another state's courts (the act of state doctrine), *see*, *e.g.*, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory").

It might be reflected in the deference of our judiciary in declining to exercise jurisdiction when there is a genuine conflict of laws with another state's legal regime, as in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 (1993) (the trial court had "declined to exercise [its] jurisdiction under the principle of international comity," deferring to the courts of England and Wales).

But "comity" is not a synonym for "diplomacy." It does not license judicial anticipation of how a foreign state might react to a court decision concerning it, especially one with which our country is not on friendly terms. It is not a code word for a radical judicial abstention doctrine, authorizing the courts to decline to hear cases the outcome of which they believe, rightly or wrongly, might provoke irritation, or diplomatic (or even military) retaliation.

Indeed, under the separation of powers doctrine, these considerations are not the proper concern of the courts. Appellants again respectfully invite the Court's attention to classic jurisprudence, here the landmark decision in *Baker v. Carr*, 369 U.S. 186, 211–12. The resolution of foreign policy issues "frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, but many such questions uniquely demand single-voiced statement of the Government's views." While the Court went on to rule that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," it counseled "a discriminating analysis of

the particular question posed," among other things in light of "the history of its management by the political branches." *Id.*

Here there would seem little room for judicial intervention, since the Executive has deemed Iran a state sponsor of terrorism, and the Legislative and Executive branches together have placed in the U.S. Code express language denying such states eligibility for a sovereign immunity defense. The posture of the political branches on this question seems unmistakably clear. And there is no mandate for the courts to "correct" that posture out of their concern for what they deem in their own estimation to be the potential diplomatic or international-relations results of their decisions.

There is no basis for judicial speculation into possible foreign affairs consequences of cases over which the courts have statutory jurisdiction. Whether the word "comity" is invoked to cloak it or not, such conjecture violates the constitutional separation of powers, and should not be countenanced.

C. The District Court Erred in Its Suppositions About The Potential Effects of Its Decision on This Country's Foreign Policy.

Even if, however, the district court might have properly have offered its views on the "delicate diplomatic relationship" (App., p. 148, 306 F.Supp.3d 203, 212) between the United States and Iran, and how it might be affected by a decision concerning the authority of trial courts to raise preclusive defenses *sua sponte* for absent sovereign defendants, the court's speculation was substantively erroneous.

There is no reason to believe that applying the law as it has consistently been understood would have the slightest effect on U.S.-Iran relations. In no other terrorism case has a party reported to the court that a determination of liability or an award of damages should be denied because of its possible impact on those relations, nor has any judge determined the outcome of such a case on that basis. That is because, among other reasons, any compensatory damages to be awarded in favor of terrorism victims by the district court will not be paid by Iran.

In December 2015, President Obama signed into law a mechanism to create the "Victims' Compensation Fund" ("the VCF"), from which victims and families may receive partial[18] payments of judgments against Iran and other international terrorist regimes that would otherwise be uncollectible. Justice for United States Victims of State Sponsored Terrorism Act, Pub. Law 114-113, 42 U.S.C. § 10609.

As this Court is well aware, Congress has hardly been silent on the question of compensating victims and the families of victims of state sponsors of terrorism like the Iranian regime. Its amendment to the FSIA, repealing the former 28 U.S.C. § 1605(a)(7) and replacing it with 28 U.S.C. § 1605A, was intended to facilitate the bringing of civil suits against such defendants, *inter alia* by expanding the class of potential plaintiffs. This has obviously created a motivation for potential claimants to

[18] The VCF enabling act limits recovery to compensatory damages, excluding punitive damages and interest.

come forward, no longer needing to feel that the only reward for reliving the worst times of their lives would be some kind of psychic vindication.

Nor is there anything venal or unprincipled about this. While there have been many instances of individuals pursuing claims against human rights abusers under, for example, the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 note, even when they had absolutely no prospect of ever receiving monetary compensation, it does not follow that the (deliberate or unwitting) failure to engage in what may seem a purely symbolic gesture should bar a victim from asserting his or her rights once doing so would have more practical consequences.

The right to participate in distribution of the contents of the VCF is not limited to individuals with judgments already in place as of the date of enactment of the Act. Congress contemplated that there would be other victims and family members coming forward, who also satisfy the statutory criteria of eligibility. *See*, for example, 42 U.S.C. § 10609(c)(3)(A)(ii), permitting an applicant to submit his or her claim "not later than 90 days after the date of obtaining a final judgment, with regard to a final judgment obtained on or after" the date of publication of the official announcement that the VCF is open for business, which took place in 2016. Moreover, the VCF will not sunset until January 2026 (*see* § 10609(e)(6)(A)), demonstrating further Congress's understanding that there will be other plaintiffs pursuing claims against state sponsors of terrorism. There is no limitation in the Act excluding individuals whose situations are like Appellants'. It is well-documented that there were many more victims of the

1983 and 1984 Beirut Embassy bombings than there were plaintiffs in the *Doe* and *Salazar* cases, and other litigation deriving from those attacks.

Congress could have made the timeliness provision jurisdictional when it adopted what is now 28 U.S.C. § 1605A; but it did not. Congress could have limited eligibility for the Victims Compensation Fund to those with judgments already in place as of the date of its enactment (with or without including potential plaintiffs whose cases were already before the courts); but it did not. It is fair to infer that Congress contemplated and did not discourage applications to participate in the VCF from people like Appellants: people who were victims, or whose family members were victims, of terrorist attacks on United States diplomatic premises organized or financed by rogue regimes. And it is reasonable to anticipate that there will be other plaintiffs – including Foreign Service Officers, military personnel including Marine guards, and relatives of Lebanese nationals killed or injured – whose demands for justice and accountability have not yet been, but should be, heard by the courts.

IV. DECIDING THIS CASE WOULD NEITHER "OPEN FLOODGATES" NOR PERMIT "NEARLY ENDLESS LITIGATION"

In its decision dismissing these cases, the district court expressed concern that entertaining them would open uncontrollable "floodgates," permitting suits to be brought "forty, fifty, and more years after the fact. The claimants could easily glean evidence of a defendant's culpability by dusting off old volumes of the Federal

Supplement." App., p. 147, 306 F.Supp.3d 203, 211 (footnote omitted). But there is no "floodgates" threat here, for at least three reasons.

1. First, "culpability" is not at issue in this case: Iran's responsibility for the murders of Appellants' decedents in the 1983 and 1984 terrorist attacks on the Beirut Embassy buildings has been expressly decided. *See* p. 6, *supra*. There is no need to prove it again. The issue of liability is closed.

2. As the Judge noted, for a suit to be lodged successfully, "the perpetrator would have to remain a state sponsor of terrorism." App, p. 147 n.8, 306 F.Supp.3d 203, 211 n.8; *see* this Court's decision in *Schermerhorn*, *supra* (only such states lose entitlement to immunity under § 1605A). At present, there are precisely four such countries. The tools for ending any feared flood of lawsuits remain in the hands of those states that continue to engage in terrorist acts.

So long as Iran, Syria, Sudan, and North Korea do in fact remain so designated, the prospects of endless litigation against them will be limited to instances in which they finance or perpetrate vicious attacks on American citizens and interests, and then refuse to acknowledge the jurisdiction of U.S. courts. It is hard to see why there is anything unjust about that result, or why it would lead to a proliferation of litigation. Congress expressly stated its desire to permit victims of state-sponsored terrorism to seek to recover compensation when it added § 1605(a)(7) to the FSIA in 1996, and reiterated its intent by replacing that section with § 1605A(1)(a) in 2008.

3. It is open to Congress at any time to prevent or to stanch any eventual cascade of litigation, simply by making the limitations provisions of § 1605A jurisdictional. In addition, it would be open to trial courts to weigh the facts and circumstances of any action filed long after the event giving rise to it, determining, along the lines of cases in which *sua sponte* invocation of the limitations defense by courts has been upheld, that the plaintiffs have or have not justified their delay. Here, however, where in both cases Appellants have explained to the court the reasons for their failing to join in earlier actions, the district court did not assess the substance of those explanations, but rather applied an automatic, arbitrary, and all-encompassing criterion, which for all practical purposes constitutes a jurisdictional bar in violation of this Court's teaching in *Owens*. *See* pp. 20-24, *supra*.

Conclusion and Prayer for Relief

For all of the reasons set out in this Brief, Appellants respectfully submit that the opinion and orders denying their motions for default judgments and dismissing their complaints were erroneous as a matter of law, and should be reversed. The cases should be remanded to the district court with an instruction for that court to rule on the merits of Appellants' motions for default judgments.

Respectfully submitted,

/s/ ***Steven M. Schneebaum***

Steven M. Schneebaum*/
(D.C. Bar No. 956250)
Cynthia L. McCann
(D.C. Bar No. 1046263)
STEVEN M. SCHNEEBAUM, P.C.
1776 K Street, N.W.; Suite #800
Washington, D.C. 20006
Tel: (202) 742-5900
Fax: (202) 449-3835
E-mail: sms@smslawdc.com

*/ Counsel of Record for Appellants

Of Counsel:

Allan Gerson, Esq.
4221 Lenore Lane
Washington, D.C. 20008

Thomas J. West, Esq.
524 Tacoma Ave. S.
Tacoma, WA 98402

Dated: July 31, 2018

Statement Regarding Oral Argument

Although Appellees have not appeared in this case, before either the district court or this Court, Appellants respectfully suggest that oral argument on issues in which this Court's guidance is so sorely needed might be helpful to the Court in its deliberations.

Respectfully submitted,

/s/ ***Steven M. Schneebaum***

Steven M. Schneebaum

Certificate of Compliance with Type-Volume Limit

I hereby certify that this document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) in that, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,643 words according to the "Word Count" tool of Microsoft Office, and it 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 2016, in 14-point Garamond font.

Respectfully submitted,

/s/ ***Steven M. Schneebaum***

Steven M. Schneebaum

STATUTORY ADDENDUM

28 U.S.C. § 1605A

National Defense Authorization Act for Fiscal Year 2008
Pub. L. 110-181, Div. A, Title X, § 1083(c)
(Jan. 28, 2008; 122 Stat. 342)

for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [former] section 1605(a)(7) of title 28, United States Code [subsec. (a)(7) of this section] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [former] section 1605(a)(7) [subsec. (a)(7) of this section.

"(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) [subsecs. (f) and (g) of this section] shall also apply to actions brought under this section.

No action shall be maintained under this action [SIC] if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States."

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

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

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

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

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

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

(I) a national of the United States;

(II) a member of the armed forces; or

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

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

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

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

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

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

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

(1) a national of the United States,

(2) a member of the armed forces,

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

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

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

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

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

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

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

(g) Property disposition.—

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

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

(B) located within that judicial district; and

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

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

(3) Enforceability.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

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

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

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

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

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

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

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

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

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

HISTORICAL AND STATUTORY NOTES

References in Text

Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008, referred to in subsec. (a)(2)(A)(II), is Pub.L. 110–181, Div. A, Title X, § 1083(c), Jan. 28, 2008, 122 Stat. 342, which is set out as a note under this section.

The enactment of this section, and the date of the enactment of this section, referred to in subsecs. (a)(2)(A)(II), (b), is Jan. 28, 2008, the approval date of Pub.L. 110–181, 122 Stat. 3, which enacted this section.

The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, referred to in subsecs. (a)(2)(A)(II), (b), is Pub.L. 104–208, Div. A, Title I, § 101(c), [Title I to V], Sept. 30, 1996, 110 Stat. 3009. Section 589 of the Act is not classified to the Code; see Tables for complete classification.

The Victims of Crime Act of 1984, referred to in subsec. (e)(2), is Pub.L. 98–473, Title II, ch. XIV, Oct. 12, 1984, 98 Stat. 2170, which is principally classified to Chapter 112 of Title 42, 42 U.S.C.A. § 10601 et seq. Section 1404C of the Act is classified to 42 U.S.C.A. § 10603c. For complete classification, see Short Title note set out under 42 U.S.C.A. § 10601 and Tables.

Chapter 111 of this title, referred to in subsec. (g)(3), is 28 U.S.C.A. § 1651 et seq.

The Immigration and Nationality Act, referred to in subsec. (h)(5), is Act June 27, 1952, c. 477, 66 Stat. 163, as amended, also known as the INA, the McCarran Act, and the McCarran-Walter Act, which is classified principally to chapter 12 of Title 8, 8 U.S.C.A. § 1101 et seq. Section 101 of the Act is classified to 8 U.S.C.A. § 1101. For complete classification, see Short Title note set out under 8 U.S.C.A. § 1101 and Tables.

The Export Administration Act of 1979, referred to in subsec. (h)(6), is Pub.L. 96-72, Sept. 29, 1979, 93 Stat. 503, which is classified principally to chapter 56 of Title 50, 50 U.S.C.A. § 4601 et seq. Section 6 of the Act was classified to section 2405 of the former Appendix to Title 50, prior to editorial reclassification as 50 U.S.C.A. § 4605. See Tables for complete classification.

The Foreign Assistance Act of 1961, referred to in subsec. (h)(6), is Pub.L. 87–195, Sept. 4, 1961, 75 Stat. 424, as amended, also known as the Act for International Development of 1961 and the FAA, which is classified principally to chapter 32 of Title 22, 22 U.S.C.A. § 2151 et seq. Section 620A of the Act is classified to 22 U.S.C.A. § 2371. For complete classification, see Short Title note set out under 22 U.S.C.A. § 2151 and Tables.

The Arms Export Control Act, referred to in subsec. (h)(6), is Pub.L. 90–629, Oct. 22, 1968, 82 Stat. 1320, as amended, also known as the AECA and the Foreign Military Sales Act, which is classified principally to chapter 39 of Title 22, 22 U.S.C.A. § 2751 et seq. Section 40 of the Act is classified to 22 U.S.C.A. § 2780. For complete classification, see Short Title note set out under 22 U.S.C.A. § 2751 and Tables.

Section 3 of the Torture Victim Protection Act of 1991, referred to in subsec. (h)(7), is section 3 of Pub.L. 102–256, Mar. 12, 1992, 106 Stat. 73, set out in a note under section 28 U.S.C.A. § 1350.

Libyan Claims Resolution Act

Pub.L. 110–301, Aug. 4, 2008, 122 Stat. 2999, provided that:

"Section 1. Short title.

"This Act [enacting this note] may be cited as the 'Libyan Claims Resolution Act'.

"Sec. 2. Definitions.

"In this Act—

"(1) the term 'appropriate congressional committees' means the Committee on Foreign Relations and the Committee on the Judiciary of the Senate and the Committee on Foreign Affairs and the Committee on the Judiciary of the House of Representatives;

"(2) the term 'claims agreement' means an international agreement between the United States and Libya, binding under international law, that provides for the settlement of terrorism-related claims of nationals of the United States against Libya through fair compensation;

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

"(4) the term 'Secretary' means the Secretary of State; and

"(5) the term 'state sponsor of terrorism' means a country the government of which the Secretary has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) [now 50 U.S.C.A. § 4605(j)], section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.

"Sec. 3. Sense of Congress.

"Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against Libya through a comprehensive settlement of claims by such nationals against Libya pursuant to an international agreement between the United States and Libya as a part of the process of restoring normal relations between Libya and the United States.

"Sec. 4. Entity to assist in implementation of claims agreement.

"(a) Designation of entity.—

"(1) Designation.—The Secretary, by publication in the Federal Register, may, after consultation with the appropriate congressional committees, designate 1 or more entities to assist in providing compensation to nationals of the United States, pursuant to a claims agreement.

"(2) Authority of the Secretary.—The designation of an entity under paragraph (1) is within the sole discretion of the Secretary, and may not be delegated. The designation shall not be subject to judicial review.

"(b) Immunity.—

"(1) Property.—

"(A) In general.—Notwithstanding any other provision of law, if the Secretary designates any entity under subsection (a)(1), any property described in subparagraph (B) of this paragraph shall be immune from attachment or any other judicial process. Such immunity shall be in addition to any other applicable immunity.

"(B) Property described.—The property described in this subparagraph is any property that—

"(i) relates to the claims agreement; and

"(ii) For the purpose of implementing the claims agreement, is—

"(I) held by an entity designated by the Secretary under subsection (a)(1);

"(II) transferred to the entity; or

"(III) transferred from the entity.

"(2) Other acts.—An entity designated by the Secretary under subsection (a)(1), and any person acting through or on behalf of such entity, shall not be liable in any Federal or State court for any action taken to implement a claims agreement.

"(c) Nonapplicability of the Government Corporation Control Act.—An entity designated by the Secretary under subsection (a)(1) shall not be subject to chapter 91 of title 31, United States Code [31 U.S.C.A. § 9101 et seq.] (commonly known as the 'Government Corporation Control Act').

"Sec. 5. Receipt of adequate funds; immunities of Libya.

"(a) Immunity.—

"(1) In general.—Notwithstanding any other provision of law, upon submission of a certification described in paragraph (2)—

"(A) Libya, an agency or instrumentality of Libya, and the property of Libya or an agency or instrumentality of Libya, shall not be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution contained in section 1605A, 1605(a)(7), or 1610 (insofar as section 1610 relates to a judgment under such section 1605A or 1605(a)(7)) of title 28, United States Code;

"(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 342; 28 U.S.C. 1605A note), section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), and any other private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Libya, or any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court; and

"(C) any attachment, decree, lien, execution, garnishment, or other judicial process brought against property of Libya, or property of any agency, instrumentality, official, employee, or agent of Libya, in connection with an action that would be precluded by subparagraph (A) or (B) shall be void.

"(2) Certification.—A certification described in this paragraph is a certification—

"(A) by the Secretary to the appropriate congressional committees; and

"(B) Stating that the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—

"(i) payment of the settlements referred to in section 654(b) of division J of the Consolidated Appropriations Act, 2008 (Public Law 110–161; 121 Stat. 2342); and

"(ii) fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya arising under section 1605A of title 28, United States Code (including any action brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), that has been given effect as if the action had originally been filed under 1605A(c) of title 28, United States Code, pursuant to section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 342; 28 U.S.C. 1605A note)).

"(b) Temporal scope.—Subsection (a) shall apply only with respect to any conduct or event occurring before June 30, 2006, regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date.

"(c) Authority of the Secretary.—The certification by the Secretary referred to in subsection (a)(2) may not be delegated, and shall not be subject to judicial review."

Application of Pub.L. 110–181, Div. A, § 1083 to Pending Cases

Pub.L. 110–181, Div. A, Title X, § 1083(c), Jan. 28, 2008, 122 Stat. 342, provided that:

"(1) In general.—The amendments made by this section [enacting this section and amending 28 U.S.C.A. §§ 1605, 1607, 1610, and 42 U.S.C.A. § 10603c] shall apply to any claim arising under section 1605A of title 28, United States Code [this section].

"(2) Prior actions.—

"(A) In general.—With respect to any action that—

"(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) [not classified to the Code], before the date of the enactment of this Act [Jan. 28, 2008],

"(ii) relied upon either such provision as creating a cause of action,

"(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

"(iv) as of such date of enactment [Jan. 28, 2008], is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code [subsec. (c) of this section].

"(B) **Defenses waived.**—The defenses of res judicata, collateral estoppel, and limitation period are waived—

"(i) in any action with respect to which a motion is made under subparagraph (A), or

"(ii) in any action that was originally brought, before the date of the enactment of this Act [Jan. 28, 2008], under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) [not classified to the Code], and is refiled under section 1605A(c) of title 28, United States Code [subsec. (c) of this section],

to the extent such defenses are based on the claim in the action.

"(C) **Time limitations.**—A motion may be made or an action may be refiled under subparagraph (A) only—

"(i) If the original action was commenced not later than the latter of—

"(I) 10 years after April 24, 1996; or

"(II) 10 years after the cause of action arose; and

"(ii) within the 60-day period beginning on the date of the enactment of this Act [Jan. 28, 2008].

"(3) **Related actions.**—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code [this section], if the action is commenced not later than the latter of 60 days after—

"(A) the date of the entry of judgment in the original action; or

"(B) the date of the enactment of this Act [Jan. 28, 2008].

"(4) **Preserving the jurisdiction of the courts.**—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108–11, 117 Stat. 579 [not classified to the Code]) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code [28 U.S.C.A. § 1602 et seq.], or the removal of the jurisdiction of any court of the United States."

[If any provision of Pub.L. 110–181, Div. A, § 1083, or the amendments made by that section, or the application of such provision to any person or circumstance, is held invalid, the remainder of that section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation, see Pub.L. 110–181, Div. A, § 1083(e), set out as a note under this section.]

Application of Pub.L. 110–181, Div. A, § 1083 to Iraq

Pub.L. 110–181, Div. A, Title X, § 1083(d), Jan. 28, 2008, 122 Stat. 343, provided that:

"(1) **Applicability.**—The President may waive any provision of this section [enacting this section, amending 28 U.S.C.A. §§ 1605, 1607, 1610, and 42 U.S.C.A. § 10603c, and enacting provisions set out as notes under this section] with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

"(A) the waiver is in the national security interest of the United States;

"(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

"(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

"(2) **Temporal scope.**—The authority under paragraph (1) shall apply—

"(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act [Jan. 28, 2008];

"(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

"(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act [Jan. 28, 2008].

"(3) **Notification to Congress.**—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

"(4) **Sense of Congress.**—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1)."

[If any provision of Pub.L. 110–181, Div. A, § 1083, or the amendments made by that section, or the application of such provision to any person or circumstance, is held invalid, the remainder of that section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation, see Pub.L. 110–181, Div. A, § 1083(e), set out as a note under this section.]

Severability

Pub.L. 110–181, Div. A, Title X, § 1083(e), Jan. 28, 2008, 122 Stat. 344, provided that: "If any provision of this section or the amendments made by this section [enacting this section, amending 28 U.S.C.A. §§ 1605, 1607, 1610, and 42 U.S.C.A. § 10603c, and enacting provisions set out as notes under this section], or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation."

§ 1605B. Responsibility of foreign states for international terrorism against the United States

(a) Definition.—In this section, the term "international terrorism"—

(1) has the meaning given the term in section 2331 of title 18, United States Code; and

(2) does not include any act of war (as defined in that section).

(b) Responsibility of foreign states.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against

Certificate of Service

I HEREBY CERTIFY that, on July 31, 2018, I filed the foregoing Appellants' Brief on Appeal with the Office of this Court's Clerk.

Efforts to serve Appellees in these cases (and in other cases raising similar issues) have been unavailing. Iran did not appear in the court below, and no counsel entered an appearance. The case proceeded in the absence of Appellees. The United States Postal Service will not deliver mail to Iran, and the Iranian Interests Section of the Embassy of Pakistan (which is Iran's only diplomatic presence in Washington) will not accept legal mail. The only private courier with a license to deliver packages to Iran, DHL, reports that deliveries are routinely refused by the Foreign Ministry (and indeed attempted DHL delivery of the summonses and complaints in these cases in the district court was refused).

Respectfully submitted,

/s/ ***Steven M. Schneebaum***

Steven M. Schneebaum