[ORAL ARGUMENT NOT YET SCHEDULED]
No. 19-7121

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DARIOUSH RADMANESH,
Appellant,

v.

ISLAMIC REPUBLIC OF IRAN,
Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF OF APPOINTED AMICUS CURIAE IN SUPPORT OF THE DISTRICT COURT'S JUDGMENT

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November 30, 2020

**Application for admission to the D.C. Circuit pending.*

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae Erica Hashimoto, appointed to present arguments in support of the portions of the district court's orders at issue on appeal, hereby submits the following certificate as to parties, rulings, and related cases.

I. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant: amicus curiae appointed in support of the portions of the district court's orders at issue on appeal is Erica Hashimoto, Director of the Appellate Litigation Clinic at Georgetown University Law Center.

II. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

III. Related Cases

This case was not previously on review by this Court or any other court. Amicus is not aware of any related cases.

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GLOSSARY

FSIA	Foreign Sovereign Immunities Act
IRGC	Iranian Revolutionary Guard Corps
PTSD	Post-traumatic stress disorder
TVPA	Torture Victim Protection Act
ICATH	International Convention Against the Taking of Hostages

STATEMENT OF JURISDICTION

Plaintiff-Appellant Darioush Radmanesh asserts that the court below had subject matter jurisdiction over this matter under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) and 28 U.S.C. § 1605A.

The court below issued a final judgment dismissing all claims on April 24, 2019, for lack of subject matter jurisdiction. JA127–46. Mr. Radmanesh then filed a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, which the court denied on September 3, 2019. JA158–73.

Mr. Radmanesh timely filed a notice of appeal as to both the order dismissing the claims and the order denying reconsideration on October 2, 2019. JA174. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 636(c)(3).

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Brief for Appellant.

Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, § 3(b), 106 Stat. 73 (Mar. 12, 1992), *codified at* 28 U.S.C. § 1350 (note).

Sec. 3. Definitions

(b) Torture.—For the purposes of this Act—

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or

application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Art. 1, International Convention Against the Taking of Hostages (ICATH), U.N. GAOR, Supp. No. 39, U.N. Doc. A/34/39 (1979).

Article 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage taking") within the meaning of this Convention.
2. Any person who:
    a. attempts to commit an act of hostage taking, or
    b. participates as an accomplice of anyone who commits or attempts to commit an act of hostage taking likewise commits an offence for the purposes of this Convention.

STATEMENT OF THE ISSUES

I. Did the district court properly dismiss Mr. Radmanesh's claims for lack of jurisdiction because he did not meet his burden of proving that he was subject to "torture" under the FSIA's terrorism exception to sovereign immunity?

II. Did the district court properly dismiss Mr. Radmanesh's claims for lack of jurisdiction because he did not meet his burden of proving that he was subject to "hostage taking" under the FSIA's terrorism exception to sovereign immunity?

STATEMENT OF THE CASE

Darioush Radmanesh is a United States citizen who lived in Iran between 1978 and approximately 1987. JA097, 104. He filed this action against the Islamic Republic of Iran in August 2017, alleging that during the years he lived there, the Iranian government committed the common-law torts of assault, battery, false imprisonment, and intentional infliction of emotional distress against him.[1] *See* JA011, 027–31. The district court referred the matter for all purposes to a magistrate judge pursuant to the consent of Mr. Radmanesh under Local Civil Rule 73.1 and 28 U.S.C. § 636(c).[2] *See Radmanesh v. Islamic Republic of Iran*, No. 17-CV-1708, Order of Referral, ECF No. 24 (Jan. 29, 2019); *see also* JA127, n.1.

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[1] Mr. Radmanesh's complaint included claims against both Iran and the Iranian Revolutionary Guard Corps (IRGC). After Mr. Radmanesh filed a Notice of Voluntary Dismissal of his claims against the IRGC, the district court dismissed those claims without prejudice. *See* JA127, n.2.

[2] A referral to a magistrate judge under § 636(c) "gives the magistrate judge full authority over dispositive motions . . . and entry of final judgment . . . without district court review." *Roell v. Withrow*, 538 U.S. 580, 585 (2003). This brief therefore refers to the court below as the district court.

Because Iran is a foreign sovereign, the Foreign Sovereign Immunities Act (FSIA) provides the exclusive basis for subject matter jurisdiction over this action. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989). The Act carves out "discrete and limited exceptions" to the general principle of sovereign immunity. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87–88 (D.C. Cir. 2002). Mr. Radmanesh seeks to invoke the state sponsor of terrorism exception. 28 U.S.C. § 1605A. The terrorism exception vests American courts with jurisdiction in cases where a foreign country designated by the State Department as a state sponsor of terrorism commits certain statutorily delineated acts that injure U.S. nationals, including torture and hostage taking. *See id.* § 1605A(a)(1).

I. Motion for Default Judgment

After Iran was properly served but failed to appear, Mr. Radmanesh moved for default judgment as to his underlying tort claims. *See* JA090–91, 096–105. In a sworn statement before the district court, Mr. Radmanesh asserted the following facts in support of the motion. *See* JA096–105.

Mr. Radmanesh was born in Missouri in 1969 to an American citizen mother and Iranian father. JA097. In 1978, he moved with his family to Isfahan, Iran, where his father had obtained an engineering position at a U.S.-Iranian joint venture. *Id.*

Shortly after their arrival, Iran's political situation rapidly destabilized. JA098. In November 1979, after the Shah of Iran was overthrown in the Iranian Revolution, soldiers from the Iranian Revolutionary Guard Corps (IRGC) appeared at Mr. Radmanesh's home and accused his father of being an American agent. *Id.* The soldiers abducted Mr. Radmanesh's father from the family home. *Id.* When the IRGC returned his father two days later, the soldiers proclaimed that his father had been found guilty of treason and that Mr. Radmanesh and his family "would be executed as spies" unless they remained in Iran, and his father trained Iranian citizens to be engineers. JA098–99.

In the years that followed, Mr. Radmanesh suffered consequences of post-Revolutionary anti-American sentiment. At the school he was required to attend, students chanted "[d]eath to Americans" as they physically abused him, sometimes under the approving eye of the

principal. JA099. The Basaji,[3] a paramilitary youth organization operating under the IRGC, similarly subjected Mr. Radmanesh to "abhorrent treatment." JA142. Mr. Radmanesh recounted that they broke his ribs and drenched him with urine. JA100. He also witnessed violence in the streets. On one occasion, he saw a pregnant woman stoned to death. *Id.* On other occasions, he witnessed his mother being beaten by the IRGC because of her Christian faith. *Id.*

In 1984, Mr. Radmanesh, age fifteen, was expelled from school for refusing to step on the American flag. JA100–01. He then secured an apprenticeship at a machine shop in the small industrial town of Shaheen-Shahr. JA101. In August 1986, Iraqi jets bombed the machine shop, injuring Mr. Radmanesh and killing some of his colleagues. *Id.* Following the attack, he quit his apprenticeship. *Id.*

Around September 1986, Mr. Radmanesh, then sixteen years old, "was grabbed by the neck, dragged into a truck, and transported" to an Iranian military base. JA102. There, he was told that he had been

[3] In referring to this group, this brief adopts the terminology used by Mr. Radmanesh and the district court. Other sources refer to this group as "Basij." *See, e.g.*, CIA, *The World Factbook – Iran, Military and Security*, https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html (last visited Nov. 29, 2020).

conscripted into the Iranian military to serve in the Iran-Iraq War. *Id.* As part of his military training, his head was shaved, and he was forced to run for hours in the "extreme heat" as well as to undergo training on deadly weapons and stealth tactics. *Id.* After a month of training, Mr. Radmanesh was transferred to a military base close to the Iran-Iraq border where "he and other similarly-aged soldiers were assigned to the artillery unit . . . though they had no training or instruction in artillery." *Id.*

On the battlefield, Mr. Radmanesh was "regularly told to rush the enemy," and he "and the other peer soldiers[] were given small golden keys so that they would be able to unlock the gates of heaven upon Martyrdom." JA103. Mr. Radmanesh also witnessed members of his unit be injured or killed, JA102, and saw other atrocities, such as the use of children to clear minefields. JA103. Forced to fight through some of those minefields, he was "continually surrounded by bodies of adults and children so badly injured that their remains were unrecognizable." *Id.*

At some point, a military commander informed Mr. Radmanesh that he would be "sent to [his] death" on a mission in Iraqi territory so that the government of Iran's Supreme Leader, Ayatollah Khomeini,

"could proclaim him as an American [m]artyr for Islam." *Id.* During this mission, Mr. Radmanesh was "forced by his commander, at gunpoint, to shoot a sleeping Iraqi soldier in the head at point blank range." *Id.* After surviving the assignment, he was sent back to the front lines. JA104.

In December 1986, IRGC soldiers found Mr. Radmanesh delirious in a trench. *Id.* Consequently, he was hospitalized and diagnosed with post-traumatic stress disorder (PTSD). *Id.* As a result, his military commanders sent him back home to Isfahan for two weeks in order to recover. *Id.* During that leave, Mr. Radmanesh's family paid to have him smuggled out of Iran. *Id.*

After arriving in the United States and for the following six years, Mr. Radmanesh continued to suffer from PTSD. *Id.* During that time, he "could not bring himself to leave his room, preferring to stay in the dark with the blinds closed." *Id.* He was also unable to attend school or keep a job for any meaningful length of time and sought psychological and psychiatric treatment. *Id.* Mr. Radmanesh continues to suffer from some PTSD-related symptoms as well as pain and discomfort throughout his body. JA104–05.

In his complaint and motion for default judgment, Mr. Radmanesh argued that those facts demonstrate that Iran committed acts of torture as defined by the FSIA. Specifically, he asserted that the following events constitute torture: the abuse he suffered at the hands of the Basaji and his schoolmates, the fact that he witnessed violence, including the abuse of his own mother, and his forcible conscription into the Iranian military to fight in the Iran-Iraq war. *See* JA099–101. He also argued that by prohibiting him and his family from leaving Iran, Iran took him hostage as defined under the FSIA's terrorism exception. JA098–99.

The district court denied the motion for default judgment. JA127–46. Taking the uncontroverted factual allegations in Mr. Radmanesh's sworn declaration as true, it nevertheless determined that none of those incidents rose to the level of torture or hostage taking as the FSIA defines those terms. *See id.* Specifically, the court held that Iran prohibiting Mr. Radmanesh's family from leaving the country was not hostage-taking because a bar on international travel does not constitute seizure or detention under "any ordinary understanding of those terms" and because Mr. Radmanesh's freedom was not conditioned on any third-party action. JA138–39. The court also held that the acts prior to

conscription were not torture because there was no evidence that Mr. Radmanesh was in Iran's custody or control at the time he was abused by the Basaji or his schoolmates, and in any event, such abuse was not "sufficiently extreme and outrageous to warrant . . . universal condemnation." JA142–43 (quoting *Price*, 294 F.3d at 92). As for the violence Mr. Radmanesh witnessed in the streets, it was not torture under the FSIA because there was no evidence that he was the intended target. *Id.* Finally, the court determined that his conscription was not torture because Iranian agents who conscripted him did not act with a purpose condemned by the FSIA, but rather with the purpose of requiring Mr. Radmanesh to serve in the military. JA144–45.

Accordingly, the district court dismissed the case for want of jurisdiction.

II. Rule 59(e) Motion

Mr. Radmanesh then filed a "Motion for New Trial," JA147–54, which the court construed as a timely motion to alter or amend a judgment under Rule 59(e),[4] *see* JA158, n.1. In support of his motion, he

[4] Rule 59(a) allows motions for new trials and Rule 59(e) allows motions to alter or amend judgments. *See* FED. R. CIV. P. 59. Mr. Radmanesh did

submitted a supplemental declaration that contained additional allegations in support of jurisdiction under the FSIA's terrorism exception. *See* JA155–57.

As to torture, Mr. Radmanesh newly alleged that his military supervisors treated him differently from Iranian soldiers, placing American citizens "in more dangerous and precarious situations" and subjecting them to harsher punishments. JA156–57. By way of example, he explained that while an Iranian soldier who spoke out of turn or failed to follow orders "might only be responded to with a rebuke, an American soldier . . . would be killed or placed in solitary confinement." *Id.*

As to hostage taking, he newly stated that, between November 1979 and his conscription in September 1986, he and his family were on "house arrest," under "constant and continuous scrutiny," and "watched by Iranian officials." JA156. Describing the house arrest, Mr. Radmanesh explained that Iran required his mother to notify government officials of his whereabouts unless he was at home or at school. *See id.* According to Mr. Radmanesh, this surveillance scheme kept him and his family

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not specify which of the two Rule 59 provisions he invoked, but since there was no trial in the case, the court construed his motion as seeking relief under Rule 59(e). *See* JA158, n.1.

"from freely moving about or living [their] lives free of fear and intimidation." *Id.*

The district court held that these additional allegations did not justify granting relief from the order dismissing the case because a Rule 59(e) motion may only rely on additional proffers of evidence if such evidence was newly discovered or otherwise previously unavailable. JA163. Here, the additional information in the supplemental declaration consisted solely of Mr. Radmanesh's own personal recollections and, accordingly, did not constitute "new evidence" that the court could examine on reconsideration. JA163–64.

But the court nonetheless proceeded to consider whether the new allegations satisfied the FSIA's definitions of torture and hostage taking. Holding that they did not, the court reasoned that the additional allegations, like his prior allegations, did not "evince[] the degree of cruelty necessary to reach a level of torture." JA169. And Mr. Radmanesh's house arrest assertion still "fail[ed] to address the [c]ourt's principal reason for finding his allegations of hostage taking inadequate: his failure to allege conditions for his release." JA172. Finding his arguments unavailing, the court thus denied the motion on September 3,

2019. JA158–73. Mr. Radmanesh filed a timely notice of appeal from both orders on October 2, 2019. JA174–75.

STANDARD OF REVIEW

This Court reviews de novo a district court's order dismissing a case for lack of subject matter jurisdiction. *See Price,* 294 F.3d at 91 (citing *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1105 (D.C. Cir. 2001), *vacated in part on other grounds*, 320 F.3d 280 (D.C. Cir. 2003)). It reviews "the denial of a Rule 59(e) motion only for an abuse of discretion." *Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006) (quoting *Ciralsky v. CIA*, 355 F.3d 661, 672 (D.C. Cir. 2004)).

SUMMARY OF THE ARGUMENT

The district court properly dismissed this case for lack of subject matter jurisdiction because Mr. Radmanesh did not present evidence satisfactory to the court that Iran committed acts of torture or hostage taking as defined by the plain language of the FSIA's terrorism exception and the judicial decisions interpreting that language.

First, a plaintiff seeking to prove that he was tortured under the FSIA must provide evidence (1) that he was in custody of the foreign sovereign, (2) that the acts taken against him were so severe as to be unusually cruel or extreme and outrageous, and (3) that the acts were undertaken for a purpose delineated by the statute, such as obtaining information or a confession, punishing or discriminating against that individual, or a similar motivation.

The record fails to establish that Mr. Radmanesh was in Iran's custody before his conscription. Accordingly, none of the events prior to his conscription can constitute torture. And at no point, before or after Mr. Radmanesh's conscription, did Iran act with such unusual cruelty as to meet the level of severity contemplated by the FSIA's definition of

torture. Nor is there any evidence that Iran acted with the requisite purpose.

Second, the district court correctly determined that Iran's conduct did not amount to hostage taking as defined by the terrorism exception. Under the FSIA, an act does not constitute hostage taking unless the sovereign seizes or detains an individual *with the purpose of* conditioning his or her release on some third-party concession. But nothing in the record suggests that Mr. Radmanesh was ever seized or detained for such a purpose.

Mr. Radmanesh's failure to present satisfactory evidence of torture or hostage taking led the court below to correctly deny his motion for default judgment and to dismiss the case for lack of subject matter jurisdiction. This Court should affirm.

ARGUMENT

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602 et seq., provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. . . or [its] instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA "begins with a presumption of foreign sovereign immunity" qualified only by a small number of "discrete and limited exceptions," *Price*, 294 F.3d at 87–88. It provides the "sole basis for obtaining jurisdiction over a foreign state in [domestic] courts." *Argentine Republic*, 488 U.S. at 434.

Mr. Radmanesh seeks to invoke one of those exceptions: the terrorism exception in § 1605A. This exception vests American courts with jurisdiction over suits against foreign states designated as state sponsors of terrorism when U.S. nationals are injured by certain terroristic acts. *See* § 1605A(a)(1). These include acts of torture and hostage taking. *Id.*

Because Mr. Radmanesh seeks default judgment against Iran, he bears the burden of proving, "by evidence satisfactory to the court," 28 U.S.C. § 1608(e), that agents of the Iranian government committed such

acts after January 1984 when Iran was designated as a state sponsor of terrorism, *see Mohammadi v. Islamic Republic of Iran,* 947 F. Supp. 2d 48, 61 (D.D.C. 2013) (citing *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008)). The district court correctly determined that Mr. Radmanesh did not meet that burden.[5] As a result, American courts do not have jurisdiction to hear Mr. Radmanesh's claims against Iran.

I. The District Court Correctly Determined that the Evidence Does Not Establish that Iran's Actions Constitute Torture Under the FSIA's Terrorism Exception to Sovereign Immunity.

Mr. Radmanesh describes awful events, but those events do not constitute torture within the meaning of the FSIA. The FSIA adopts the definition of "torture" in the Torture Victim Protection Act of 1991

[5] The district court also correctly noted that the record was "unclear" as to whether all of the relevant events took place after Iran was designated a state sponsor of terrorism in January 1984. JA136–37; U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/state-sponsors-of-terrorism/ (last visited Nov. 29, 2020). Designation as a state sponsor of terrorism by the U.S. State Department is "a jurisdictional prerequisite to invoking the terrorism exception," so a court may only consider those acts that occurred after such designation. *Schermerhorn v. State of Israel*, 876 F.3d 351, 359 (D.C. Cir. 2017). But the district court proceeded on the "assumption" that all of the alleged acts took place after the designation, JA136–37, so Amicus makes no argument as to whether the uncertainty surrounding the timing of those acts also creates a jurisdictional barrier.

(TVPA). 28 U.S.C. § 1605A(h)(7); *see also, e.g., Price* 294 F.3d at 91–92. The TVPA, in turn, requires that (1) the targeted "individual [be] in the offender's custody or physical control," (2) the "pain or suffering" intended and actually inflicted on the victim be "severe," and (3) the pain or suffering be administered for one of the "purposes" listed in the statute—such as obtaining information or a confession, punishment, or discrimination—or for a similar purpose. TVPA § 3(b), 28 U.S.C. § 1350 (note).

None of the events Mr. Radmanesh describes as occurring prior to his conscription into the military meet any of the three requirements. And for the events following Mr. Radmanesh's conscription, the record before the district court establishes the custody requirement but establishes neither the severity nor the purpose requirements contemplated by the FSIA.

A. The Evidence Does Not Establish that Iran Had Physical Control or Custody of Mr. Radmanesh Before Conscripting Him.

Before he was forcibly conscripted, Iran did not have custody or physical control over Mr. Radmanesh, as the FSIA requires. *See* TVPA § 3(b) (requiring that the "[i]ndividual [be] in the offender's custody or

physical control . . . ."); *see also Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 74 (D.D.C. 2010). Therefore, the events prior to his conscription—however trying they may have been—cannot constitute torture under the FSIA.

Courts have routinely interpreted the custody requirement to mean that the victim was incarcerated or otherwise held captive, which—prior to his conscription in 1986—Mr. Radmanesh was not. *See Azadeh v. Islamic Republic of Iran,* No. 16-1467, 2018 WL 4232913, at *11–12 (D.D.C. Sept. 5, 2018); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 71 (D.D.C. 2010); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001). Mr. Radmanesh undoubtedly suffered a great deal before he was conscripted into the Iranian military: he was abused by his schoolmates, he was abused by the Basaji, and he witnessed violence against his mother and others. *See* JA015–18, 098–100. But it is undisputed that Mr. Radmanesh was not incarcerated or otherwise physically confined during any of those events. *See* JA 142.

To the extent he lived in fear of the Basaji and his schoolmates, that

too is insufficient to meet the custody requirement.[6] Psychological control—as opposed to physical custody—does not rise to the level of "custody or control" contemplated by the statute. *See Mohammadi*, 947 F. Supp. 2d at 68 (rejecting the argument that Iran's "ongoing monitoring and harassment" of plaintiffs created a custodial relationship because the "plain language of the statute contemplates only *physical,* as opposed to constructive or psychological, custody or control"). And it is for that same reason that the state surveillance scheme he describes does not constitute custody: Mr. Radmanesh does not present satisfactory evidence to demonstrate that he was ever placed in a confined setting or that his freedom of movement within Iran was substantially curtailed. *See* JA138; *see also* Part II, *infra* (explaining that Mr. Radmanesh was not "seized" or "detained" under the hostage taking provision of the FSIA).

The events Mr. Radmanesh describes cannot meet the custody requirement for another reason: they appear to have been temporally brief. *See* JA100 (describing instances in which the Basaji cornered Mr.

[6] The district court also correctly observed that Mr. Radmanesh did not establish that the conduct of the Basaji and his schoolmates was attributable to Iran. *See* JA142, n.8.

Radmanesh "on his way home from school" and shouted at him while physically attacking him). There is no bright-line rule as to how long an individual must be detained by a state apparatus before a fleeting encounter becomes a custodial relationship. But it is well-established that the types of encounters that Mr. Radmanesh describes do not, without more, establish the level of physical control that the FSIA contemplates. *See Murphy,* 740 F. Supp. 2d at 70–71 (holding that terrorist bombing was not "torture" under the FSIA because the perpetrators "did not kidnap or imprison" the victims, but rather "the contact between Iranian agents and the victims in this case was fleeting"); *Valore*, 770 F. Supp. 2d at 74 (holding that the custody requirement was not met because short-lived contact—only the time it took to drive an explosives-laden truck into a building—does not meet the definition of physical control). Thus, as a matter of law, none of the events Mr. Radmanesh endured prior to his forcible conscription constitute torture.

B. The Evidence Does Not Establish that Iran's Actions Were at Any Point Sufficiently Severe to Constitute Torture Under the FSIA.

Mr. Radmanesh was in Iran's custody from the time of his

conscription into the Iranian military in September 1986 until he returned to his family in December 1986. *See* JA104. But, as the district court rightly concluded, at no point—either before or after his conscription—were Iran's actions severe enough to constitute torture under the statute. *See* JA143.

For an act to rise to the level of torture, it must be intended to cause—and in fact cause—a degree of pain and suffering that is "sufficiently extreme and outrageous" as to "warrant . . . universal condemnation . . . ." *Price*, 294 F.3d at 92. Enforcement of the severity requirement may, at times, deprive American courts of jurisdiction to hear claims from sympathetic plaintiffs because their suffering, though undeniable, is not sufficiently extreme. But that result is by design: Congress purposefully made the terrorism exception narrow in order to mitigate concerns over "potentially subjecting the American government to suits in foreign countries for actions taken in the United States." *Price*, 294 F.3d 82 at 89; *see also* The Foreign Sovereign Immunities Act: Hearings on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Comm. on the Judiciary, 103rd Cong. 23–25 (1994) (Prepared Statement of Senator Arlen Specter) ("This legislation is very

narrowly crafted to create a slight breach in the immunity enjoyed by foreign governments."). Consequently, this Court has warned against stripping a foreign state of its sovereign immunity unless the state is "charged with actual torture, and not mere police brutality." *Price*, 294 F.3d at 93. Strict enforcement of the FSIA's severity requirement is important for another reason: the pool of assets available to compensate torture victims is finite. *See Martinez v. Republic of Cuba*, 221 F. Supp. 3d 279, 289 (N.D.N.Y. 2016) (observing that to enforce a "jurisdictionally defective" FSIA judgment "would reduce the pool of . . . assets available to plaintiffs who have suffered wrongs at the hands of [a foreign sovereign] that are cognizable under the FSIA").

Taking these considerations into account, the severity inquiry is a delicate one that is not susceptible to clear line-drawing. But this Court has given some guidance: "The more intense, lasting, or heinous the agony, the more likely it is to be torture." *Price*, 294 F.3d at 93; *see also id.* ("[I]n order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." (quoting S. Exec. Rep. No. 101–30, at 15 (1990))). And the

events Mr. Radmanesh describes, though undoubtedly harrowing, do not rise to the level of severity that courts have demanded before depriving a foreign state of immunity.

Courts have, for example, found state action to be severe enough to constitute torture when state agents subject a victim to sustained and systematic beatings, unsanitary conditions that threaten disease or death, inadequate food and medical care, and mock executions, among other unusually inhumane circumstances. *See, e.g.*, *Kilburn v. Islamic Republic of Iran,* 699 F. Supp. 2d 136, 152 (D.D.C. 2010) (describing a victim who endured all of the aforementioned abuses); *see also*, *e.g.*, *Abedini v. Islamic Republic of Iran*, 422 F. Supp. 3d 118, 129-30 (D.D.C. 2019) (finding torture where Iranian guards repeatedly beat, shocked, and whipped plaintiff, kept him in "stress positions"—hung from the ceiling by handcuffs or forced into a "drawer" with "no space to move"—and repeatedly denied him medical treatment); *Rezaian v. Islamic Republic of Iran*, 422 F. Supp. 3d 164, 176–77 (D.D.C. 2019) (finding that Iran committed torture by subjecting imprisoned plaintiff to "squalid living conditions, solitary confinement, malnutrition, physical ailments, and tenth-rate medical care"); *Stansell v. Republic of Cuba*, 217 F. Supp.

3d 320, 338–39 (D.D.C. 2016) (finding torture where hostages were denied food and necessary medical attention, forced to march for long periods while suffering illness and injury, and repeatedly threatened with death through mock executions). This list is not exhaustive. But these acts reflect the kind of acute and appalling measures that meet the severity requirement.

Conversely, courts have determined that state action is insufficiently severe to establish FSIA jurisdiction where such action does not reflect extreme or unusual cruelty. *See Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (*Simpson I)* (finding a lack of severity even where the plaintiff was interrogated, held incommunicado, threatened with death, and forcibly separated from her husband). In fact, "torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault." *Price*, 294 F.3d at 93. This is so because the inquiry is not whether assault occurred, but rather "[t]he degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim." *Id.*

This body of precedent illustrates how Mr. Radmanesh's

experiences—though daunting—nevertheless fall short of the statutory severity requirement. He was mistreated and abused when he was pushed to the ground, spat on, and kicked by his fellow students while his school principal watched and laughed. JA099. Although harsh, these acts are not akin to the intense physical and mental pain that the statute contemplates. *Cf. Moradi v. Islamic Republic of Iran,* 77 F. Supp. 3d 57, 61, 68–69 (D.D.C. 2015) (finding severity to be satisfied where interrogators kept victim in painful positions for hours at a time and subjected him to threats of death and dismemberment, lengthy beatings that caused him to pass out, and sexual assault). Even the verbal and physical abuse Mr. Radmanesh suffered at the hands of the Basaji, including being cornered on his way home from school, having anti-American language shouted at him, and being beaten, is not sufficiently sustained, systematic, and extreme. As this Court has made clear, "excessive force" alone cannot constitute torture under the FSIA unless such force is of the kind that warrants "universal condemnation." *Price*, 294 F.3d at 92–93 (demanding that the plaintiffs allege with specificity that their suffering was not merely abuse, which is distinct from torture, a term reserved for conduct that "violates standards accepted by virtually

every nation" (internal alteration omitted) (quoting S. Rep. No. 102-249, at 3 (1991))); *see also id.* at 93-93 (listing examples of such conduct, including "sustained, systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain" (quoting S. Exec. Rep. No. 101–30, at 14 (1990))).

The conscription itself also cannot meet the severity requirement because military drafts are not universally condemned. *See* JA168 (explaining that conscription is not an uncommon practice among nation-states). It makes no difference that Mr. Radmanesh was not an Iranian citizen because other countries, including the United States, deem non-citizen immigrant males to be draft-eligible. *See* United States Selective Service System, *Immigrants & Dual Nationals*, https://www.sss.gov/register/immigrants/ (last visited Nov. 29, 2020). And Mr. Radmanesh did not otherwise present evidence "suggesting that conscription of non-citizen residents is 'sufficiently extreme or outrageous to warrant . . . universal condemnation.'" JA168 (quoting *Price*, 294 F.3d at 92–93).

Each of Mr. Radmanesh's experiences following his conscription also fall short of the severity the FSIA contemplates. Mr. Radmanesh

was forced to train under difficult circumstances, watch people die from land mines, and engage in dangerous missions. *See* JA102–03. He was required to shave his head, run for hours in the heat, learn hand-to-hand combat, and kill Iraqi soldiers. *See id.* These experiences are grim. But they are not so different from the demands that any country with compulsory military service places on its soldiers. The wartime horrors that he recounts are therefore different, both in degree and type, from the "[e]xcruciating and agonizing" pain that "the term 'torture' both connotes and invokes." *See Price*, 294 F.3d at 92–93.

Another indicator that Iran's treatment of Mr. Radmanesh was not so severe as to constitute torture is that he was never denied the medical care he required during his time in the military. Because torture involves the deliberate infliction of pain, torturers often deliberately withhold medical care so as to maximize agony. *See, e.g.*, *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 32 (D.D.C. 2001); *Sutherland,* 151 F. Supp. 2d at 45. Here, when Mr. Radmanesh suffered a nervous breakdown while in battle, he was immediately hospitalized and then sent home to his family to recuperate. JA104. That Iran provided Mr. Radmanesh medical care and the opportunity to rehabilitate his health at home with

his family is at odds with the notion that the state intended to torture him by requiring him to serve in the Iranian military.

Accordingly, Iran's actions do not constitute the sort of "extreme, deliberate and unusually cruel practices" that rise to the level of torture under the FSIA. *See Price*, 294 F.3d at 92–93.

C. The Evidence Does Not Establish that Iran Acted with the Purpose of Torturing Mr. Radmanesh.

The district court also correctly determined that Iran's actions do not constitute torture for the purposes of FSIA jurisdiction because they were not conducted with the requisite intent or motivation. The torture provision contemplates that pain or suffering be intentionally inflicted for such purposes as:

> [O]btaining . . . information or a confession, punishing that individual for an act that individual committed or is suspected of having committed, intimidating or coercing that individual . . . or for any reason based on discrimination of any kind.

28 U.S.C. § 1605A (incorporating by reference the TVPA § 3(b)).[7] For a foreign state to lose its sovereign immunity, the state must "impose

[7] The list of purposes in the statute is not exhaustive, but "[t]he 'for such purposes' language . . . suggests that any non-enumerated purpose would have to be similar in nature to those mentioned in order to elevate an act of violence into an act of torture." *Price*, 294 F.3d at 93.

suffering cruelly and deliberately, rather than as the unforeseen or unavoidable incident of some legitimate end." *Price,* 294 F.3d at 93.

No evidence suggests that Iranian agents, at any point, acted with the purpose of torturing Mr. Radmanesh. Some of the acts that Mr. Radmanesh argues amount to torture—such as abuse by his schoolmates and the Basaji and witnessing violence against his mother and others, *see* Appellant's Br. 31–32—were isolated incidents that do not, in themselves, permit the inference that Iranian agents intended to systematically inflict pain upon him. Because this pain was inflicted in a "haphazard" rather than "purposive" manner, it cannot constitute torture. *Price*, 294 F.3d at 93.

The acts Mr. Radmanesh describes as occurring after his conscription are similarly troubling. He no doubt suffered. But the suffering was not targeted at Mr. Radmanesh in particular so was not "both intentional and malicious." *Id.*; *see also Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1050 (D.C. Cir. 2014) ("[S]uffering alone is insufficient to establish a claim under the FSIA's terrorism exception."). His suffering instead was chiefly due to the horrors of war, so "does not appear to have been imposed for a purpose

'similar in nature' to those expressly condemned by the FSIA." JA144–45.

Finally, Mr. Radmanesh conveyed in his complaint and motion for default judgment that, after he was conscripted into the Iranian military, he was targeted to be an "American martyr." JA021, 103. But nowhere in either of those documents does he demonstrate that he was actually treated any differently from Iranian peer soldiers. To the contrary, Mr. Radmanesh described that "he and other similarly-aged soldiers were assigned to the artillery unit . . . though they had no training or instruction in artillery," that "[m]any of the others in his training unit were severely injured," and that he "and the *other peer soldiers*" were provided with "small golden keys so that they would be able to unlock the gates of heaven upon Martyrdom." JA020, 114–15 (emphasis added). By his own account, then, his experience was not markedly dissimilar to that of the other soldiers. Accordingly, the evidence does not demonstrate that he was discriminated against or singled out for some specific reason that would satisfy the purpose requirement. *Cf. Han Kim*, 774 F.3d at 1050 (observing that the purpose requirement is satisfied where expert testimony established that an American plaintiff was singled out for

"exceptionally painful, brutal, and outrageous treatment," and is probably dead "as a result of his torture and malnutrition").

Contrary to his factual presentations in the complaint and motion for default judgment, Mr. Radmanesh argued for the first time in his Rule 59(e) motion that his experience actually *was* markedly dissimilar to that of the other soldiers. He asserted that Iranian military officials made it clear that he and other Americans "were placed in more dangerous and precarious situations" because the perception of having an "American martyr" die in military service to Iran "would serve Iran's interests." JA156. He further stated that punishments were harsher for American soldiers than for Iranian soldiers, explaining that while an Iranian soldier who spoke out of turn or failed to follow orders "might only be responded to with a rebuke, an American soldier . . . would be killed or placed in solitary confinement." JA156–57.

The district court properly determined that this is not "new evidence [that] demonstrate[s] the need for a rehearing" under Rule 59(e) because it was not newly discovered or previously unavailable, *see* JA163, so it rightly concluded that the argument was forfeited. JA167 (citing *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014)). Accordingly, it is

not properly preserved for appellate review. *See District of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010) ("It is well settled that an issue presented for the first time in a [Rule 59(e)] motion . . . generally is not timely raised" so is "not preserved for appellate review . . . ." (internal quotation marks omitted) (quoting *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999))). Because the court did not abuse its discretion in declining to revisit Mr. Radmanesh's "recently-recalled, conclusory allegations," JA169, this Court should not disturb that ruling here. *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012) (declining to consider arguments first made in a Rule 59(e) motion because such a "motion may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment" (alteration in original) (quoting 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2810.10, at 127–28 (2d ed. 1995))). Further, the district court correctly observed that these new "sparse allegations provide 'no useful details' that could 'reasonably support a finding that the [conditions during his conscription] evinced the degree of cruelty necessary to reach a level of torture." JA167–69 (quoting *Price*, 294 F.3d at 93).

As such, the evidence before the district court failed to establish one, let alone all three, of the custody, severity, and purpose requirements contemplated by the FSIA's definition of torture.

II. The District Court Correctly Determined that the Evidence Does Not Establish that Iran Committed Hostage Taking Under the FSIA's Terrorism Exception.

Iran's conduct also does not amount to "hostage taking" as defined by the FSIA's terrorism exception. The FSIA draws its definition of "hostage taking" from Article 1 of the International Convention Against the Taking of Hostages (ICATH). 28 U.S.C. § 1605A(h)(2). The Convention, in turn, explains that a foreign sovereign takes a hostage when it:

> seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

Art. 1, ICATH, U.N. GAOR, Supp. No. 39, U.N. Doc. A/34/39 (1979). Thus, to establish hostage taking, Mr. Radmanesh must provide evidence of two elements: "the abduction or detention, and the purpose behind it." *Frost v. Islamic Republic of Iran*, 383 F. Supp. 3d 33, 46 (D.D.C. 2019) (citing *Simpson I,* 326 F.3d at 234–35).

With respect to detention, Mr. Radmanesh made two arguments before the district court.[8] First, he argued in his complaint and motion for default judgment that Iran "seized or detained" him when it prohibited him and his family from leaving Iran so that his father would train Iranian engineers. JA098–99. Second, in his Rule 59(e) motion, Mr. Radmanesh stated that he was effectively on house arrest until he left the country in 1986. JA156, 159.

To the extent that Mr. Radmanesh and his family could not leave Iran, this Court has made clear that restrictions on international travel do not amount to being "seized or detained . . . under any ordinary understanding of those terms." *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 16 (D.C. Cir. 2015) (rejecting plaintiffs' argument "that Iran has engaged in 'hostage taking' . . . because the Iranian regime refuse[d] to permit their parents to leave Iran").

[8] Citing a 2013 remark by a Member of Congress, Mr. Radmanesh also argues that the U.S. government "deemed" him as having been held hostage in Iran. *See* Appellant Br. at 32 (citing 159 Cong. Rec. E1319 (daily ed., Sept. 17, 2013) (statement of Rep. Graves)). But the remark does no such thing. The statement also lacks evidentiary value. *See* FED. R. EVID. 801.

His contention in his Rule 59(e) motion and appellate brief that he was on house arrest fares no better. *See* JA149; Appellant Br. at 33. As the district court noted, Mr. Radmanesh first raised this argument in his Rule 59(e) motion, and it was supported only by the new allegations in the supplemental declaration. *See* JA170 (noting that the Rule 59(e) motion was "the first time Plaintiff ha[d] alleged that he was held under house arrest"). Accordingly, it was well within the district court's discretion to decline to treat statements in the supplemental declaration as "new evidence" that could support reconsideration of the order dismissing the case. *See Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Further, the house arrest argument was not properly preserved for appellate review. *See* Part I.C. *supra*; *see also GSS Grp. Ltd.*, 680 F.3d at 813 ("A district court does not open the door to further consideration of a forfeited claim by giving an alternative, merits-based reason for rejecting it.").[9]

[9] Additionally, Mr. Radmanesh avers for the first time on appeal that not only did he have to notify the government of his whereabouts, but also that he was "unable to do the most mundane task *without specific permission* from the government." Appellant Br. at 22 (emphasis added). As the order denying the Rule 59(e) motion reveals, the district court did not have the opportunity to consider that issue. *See* JA170 (observing

In any event, the argument lacks merit. Cases implicating the hostage taking exception to sovereign immunity have repeatedly made clear that a touchstone of "detention" under the FSIA is a certain level of "physical capture and confinement." *Mohammadi*, 782 F.3d at 16; *see also Fritz v. Islamic Republic of Iran*, 320 F. Supp. 3d 48, 78–79 (D.D.C. 2018) (finding an act of "hostage taking" under the FSIA's terrorism exception where the individual was held "captive for an extended, if unknown, period of time"). As the district court correctly observed, the record does not reflect that "*any* restrictions *at all* [were imposed] on his travel within the country" so as to amount to the physical confinement contemplated by the FSIA's hostage taking definition. JA170. Indeed, Mr. Radmanesh "attended school, was free to move about his community, [and] even volitionally moved to another city for a job." JA138.

Moreover, ICATH "does not proscribe all detentions, but instead focuses on the intended purpose of the detention." *Price*, 294 F.3d at 94.

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that Mr. Radmanesh "does not allege that he had to request permission to leave his house"). Accordingly, this Court ought not consider it. *See Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." (quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984))).

Specifically, there must be "some 'quid pro quo' arrangement" such that Mr. Radmanesh "would have been released 'upon performance or non-performance of any action by [a] third party.'" *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 360 (D.C. Cir. 2006) (*Simpson II*) (quoting *Price*, 294 F.3d at 94). Put differently, Iran "must have made [Mr. Radmanesh's] release conditional—explicitly or implicitly—on the actions or inactions of someone other than himself." *Abedini,* 422 F. Supp. 3d at 130.

In his Rule 59(e) motion, Mr. Radmanesh argued that the government compelled him to remain in Iran in order "to force a third party—namely [his] father—to continue to comply with the forced training of engineers." JA152. But this arrangement does not "speak[] in terms of conditions of release"—a requirement under the FSIA's hostage taking definition. *Simpson II*, 470 F.3d at 360 (quoting *Price*, 294 F.3d at 94). In other words, the evidence does not suggest that Mr. Radmanesh would have been *released* from the detention he alleges upon any action or inaction by a third party, including his father.

The absence of evidence demonstrating a condition that would ensure Mr. Radmanesh's freedom distinguishes this case from ones in

which courts have found hostage taking. In *Daliberti v. Republic of Iraq*, for example, the district court found hostage taking because the plaintiff's release was "conditione[d] . . . on the receipt of humanitarian aid and/or the lifting of sanctions or [a] United Nations embargo." 146 F. Supp. 2d at 25. Similarly, in *Hekmati v. Islamic Republic of Iran*, the district court held that Iran committed hostage taking when the IRGC expressly told plaintiff that the United States "needed to cooperate if he was to be released." 278 F. Supp. 3d 145, 152 (D.D.C. 2017); *see also Fraenkel v. Islamic Republic of Iran*, 248 F. Supp. 3d 21, 37 (D.D.C. 2017) (finding hostage taking where Hamas members abducted victims "as part of an intentional [] plan to . . . negotiate for their release in return for the release of Hamas members in Israeli jails"); *Wyatt v. Syrian Arab Republic*, 362 F. Supp. 2d 103, 112–13 (D.D.C. 2005) (finding hostage taking where a Kurdish militant group abducted plaintiffs and "placed certain demands and conditions on the[ir] release"). Here, as the district court correctly noted, "there is no way to read the facts as conditioning [Mr. Radmanesh's] release on Iran extracting a concession." JA138.[10]

[10] Mr. Radmanesh also argues that he is entitled to relief because his allegations as to hostage taking were "specifically pleaded, with

Because Mr. Radmanesh makes no showing that Iran conditioned his release—either from the country or the reporting requirements—on his father's compliance with Iran's demands, the district court correctly concluded that Iran did not commit hostage taking as defined by the FSIA's terrorism exception.

CONCLUSION

The district court correctly determined that it lacked jurisdiction because the record does not establish that Iran's actions constitute torture or hostage taking and that, accordingly, the FSIA's terrorism exception to sovereign immunity does not apply. This Court should affirm and dismiss the case.

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satisfactory evidence." Appellant Br. 36. But the district court never held otherwise. To the contrary, it took the uncontroverted allegations in his sworn statement accompanying the motion for default judgment as true. JA 128–29.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,229 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on November 30, 2020, a copy of Amicus Curiae's Brief was served on counsel for Appellant via the Court's ECF system.

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