ORAL ARGUMENT SCHEDULED FOR FEBRUARY 8, 2019

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, J.)

Linked for purposes of briefing and argument with:
Nos. 18-7060, 18-7065, and 18-7090 (consolidated)

NASRIN SHEIKH, *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. 1:14-cv-02118; 1:14-cv-02090; and 1:15-cv-0951 (Hon. John D. Bates, J.)

and with:
No. 18-7122

RITA BATHIARD, *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 No. 1:16-cv-1549 (Hon. Christopher R. Cooper, J.)

RESPONSE OF THE MAALOUF AND SALAZAR APPELLANTS TO THE BRIEF OF THE COURT-APPOINTED AMICUS CURIAE

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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
M-S App. Br.	Maalouf-Salazar Appellants' opening brief, filed on July 31, 2018
VSSTF	U.S. Victims of State Sponsored Terrorism Fund

Introduction

This Brief is respectfully submitted on behalf of Plaintiffs-Appellants in the consolidated cases of *Maalouf, et al. v. Islamic Republic of Iran, et al.*, No. 18-7052, and *Salazar, et al., v. Islamic Republic of Iran*, No. 18-7053 ("the *Maalouf-Salazar* Appellants")

On October 1, 2018, this Court ordered that all of the cases whose designations appear in the caption, *supra*, be scheduled for subsequent briefing and argument together (including the already-consolidated *Maalouf* and *Salazar* appeals), and *sua sponte* appointed Professor Erica Hashimoto, of the Georgetown University Law Center, as Amicus Curiae to present arguments in support of the district court orders from which these appeals have been taken.

Amicus Professor Hashimoto submitted her Brief on December 19, 2018, and it is to the arguments presented therein that the *Maalouf-Salazar* Appellants now respond.

Before beginning their submission, the Maalouf and Salazar families have directed counsel to record their appreciation for Amicus's strong condemnation of the acts of terrorism that ripped their loved ones from them, and for her expression of sympathy for their losses. Brief of Court-Appointed Amicus Curiae (Doc. #1765021) ("Amicus Br."), p. 4. Similar sentiments have never been heard from Respondents, in whose favor the court below ruled in these cases.

The *Maalouf-Salazar* Appellants respectfully submit that the defenses of the decisions below offered by Amicus are insufficient to warrant affirmance of the

judgments dismissing their claims. Indeed, as is explained below, Amicus's submission provides additional reasons for which those decisions should be reversed, and these cases remanded for consideration of the motions for default judgments.

Argument

I. These Cases Are Not the Exceptional Ones in Which a Court Has Discretion to Raise the Limitations Defense *Sua Sponte*.

A. The Considerations Supporting the Exceptional *Sua Sponte* Invocation of the Defense Do Not Apply Here.

Amicus begins her argument on the *sua sponte* use of a statute of limitations to deny plaintiffs their day in court by reciting that "[t]he Supreme Court has **repeatedly** held that district courts may consider a forfeited affirmative defense *sua sponte* where the defense implicates values beyond the concerns of the parties." Amicus Br., pp. 10-11 (emphasis added). These "repeated" iterations of that alleged principle are, apparently, four: *Granberry v. Greer,* 481 U.S. 129 (1987); *Arizona v. California*, 530 U.S. 392, *supplemented*, 531 U.S. 1 (2000); *Day v. McDonough*, 547 U.S. 198 (2006); and *Wood v. Milyard*, 566 U.S. 463 (2012).

The *Maalouf-Salazar* Appellants discussed each of these cases in their opening Brief, filed on July 31, 2018 ("M-S App. Br."); none stands for so broad a claim as the one Amicus assigns to them. Indeed, three of the four focus specifically on the provisions of a particular federal statute governing habeas corpus proceedings. They do not purport to extend a general rule beyond the statutory context from which they arose.

Each of these Supreme Court decisions, indeed, begins with an acknowledgment notably absent from the Amicus Brief. As formulated in one of them:

> "Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day*, 547 U.S. at 202 (citing Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a)). … An affirmative defense, once forfeited, is "exclu[ded] from the case," 5 C. Wright & A. Miller, Federal Practice and Procedure § 1278, pp. 644–645 (3d ed. 2004), and, as a rule, cannot be asserted on appeal. *See Day*, 547 U.S. at 217 (Scalia, J., dissenting).

Wood, 566 U.S. 463, 470. This is the so-called "principle of party presentation," which the Supreme Court described as "so basic to our system of adjudication." *Arizona*, 530 U.S. at 412–13. A "federal court does not have carte blanche to depart from that principle." *Wood*, 566 U.S. at 472.

None of the four cases relied on by Amicus can be read as stating or implying the proposition for which she cites it. In *Granberry*, for example, the Supreme Court recognized what it called "a modest exception to the rule that a federal court will not consider a forfeited defense." *Wood*, 566 U.S. at 470. The very specific context of *Granberry* concerned the exhaustion doctrine in federal judicial review of State habeas corpus cases, which the Court concluded was "**founded on concerns broader than those of the parties**; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries." *Granberry*, 481 U.S. at 133-135; *Wood*, 566 U.S. at 471 (emphasis added).

Amicus divorces the words "founded on concerns broader than those of the parties" from their context, suggesting that **anytime** a case may be said to meet that description, it is open to district court judges on their own initiative to assert affirmative defenses on behalf of defaulting defendants. But *Granberry* says no such thing, and the careful review of the *Granberry* decision in *Wood* says no such thing.

Amicus professes to find in the words "founded on concerns broader than those of the parties" an exception to the principle of party presentation. In her view, whenever a judge in her or his discretion might find such "concerns" in a case before the court in which an affirmative defense otherwise available was not raised, it is open to the court to step in and assert it. But in our venerable system of the common law relying on precedent, it is impossible to say of any case that it does not raise "concerns broader than those of the parties." And certainly the Court in *Granberry* provided no guidance as to how the qualification or disqualification of any case under that standard might be governed.

"Our 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." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008), citing *Castro v. United States*, 540 U.S. 375, 381-383 (2003) (Scalia, J., concurring in part and concurring in the judgment). Surely if the Supreme Court, deciding a narrow if very important issue concerning the interpretation of federal habeas corpus rules, wished to call into question a principle like that of party presentation, which it considers so

fundamental to the adversary system, it would have done so in language far clearer than the words it deployed in *Granberry*.

In *Day* – another case concerning the exhaustion requirement for federal habeas relief – after being denied the writ in State court, the prisoner filed his petition in a U.S. district court one day after the statutory deadline. For some reason, counsel for the State (of Florida) also miscalculated the deadline, and did not move to dismiss the petition on limitations grounds. The federal magistrate judge noticed the error, and entered an order to show cause why the case should not be dismissed as untimely. Apparently, the petitioner's proffered reasons for his late filing were not satisfactory. The case was then dismissed on limitations grounds, and the lawfulness of that outcome was the issue the Court reviewed on certiorari.

Day is distinguishable from the cases at Bar for many reasons. First, like *Granberry*, the focus of *Day* was the structure of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and in particular that statute's goal of reducing federal habeas litigation by requiring the prior exhaustion of claims in State courts. *See* 28 U.S.C. § 2254. The complexity of the AEDPA has led to an enormous amount of litigation, much of it specific to that act's unique features of which limitations periods are only one. Justice Ginsburg summed up her opinion for the Court this way:

> we hold that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition. We so hold, noting that it would make scant sense to distinguish in this regard AEDPA's time bar

> from other threshold constraints on federal habeas petitioners.

Day, 547 U.S. at 209. This was a very narrow decision interpreting a very convoluted provision of a specific federal statute (albeit one that had enormous potential consequences for petitioners, many facing capital punishment), with implications not for the invocation of affirmative defenses in civil litigation, but for habeas corpus claims brought by State prisoners before federal judges. The Court did not announce a new rule undermining the centuries of jurisprudence that established and refined the principle of party presentation.

Two other critical factors in *Day* make it distinguishable from the cases now on appeal. First, the error of the State in not asserting the limitations defense was clearly inadvertent. There was no suggestion that anyone had acted deliberately, or that the failure was some kind of gambit or ploy. The State's representative simply made an inadvertent arithmetic error. And the Court indicated that this was an important consideration: "nothing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211.

Here, by contrast, there was no error in Iran's failure to appear, or to assert a limitations (or any other) defense. As the *Maalouf-Salazar* Appellants demonstrated in their opening Brief (at pp. 27-28), Iran knows how to find both competent counsel and the federal courthouse in Washington: it has appeared here, and in other U.S. courts, on many occasions, as both plaintiff and defendant. *See In re Islamic Republic of*

Iran Terrorism Litig., 659 F.Supp.2d at 43 n.5 (listing cases in which Iran engaged counsel and appeared before 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. 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)).

Finally, in *Day*, before the magistrate judge dismissed the case, he gave the petitioner an opportunity, via an order to show cause, to present the reasons for his late filing. He did not ask only for briefs on whether the time-bar was iron-clad as a matter of law: he anticipated that there might be factual justification for the prisoner's delay. And indeed, Day apparently put before the court his claim that "the State public defenders withheld his trial transcript for 352 days [out of the 365-day statutory limit], and the delay cost him time in which he could have worked toward filing his appeals." *Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004), *aff'd sub nom. Day v. McDonough*, 547 U.S. 198 (2006). That claim was rejected as "inadequate" by the magistrate judge. *Day*, 547 U.S. at 202. But at least it was heard, evaluated, and considered, before it was denied.

The *Maalouf-Salazar* Appellants were given no such opportunity. While they were allowed a legal memorandum arguing that the limitations period set out in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A(b), is not a *per se* bar to proceeding, they were not asked to explain why so much time had elapsed between

the incident that took their loved ones and the initiation of their suits. They did include their proffered explanations in affidavits accompanying their motions for default judgment,[1] but Judge Bates denied those motions on purely legal grounds, without any evaluation of the facts, and certainly without taking testimony or otherwise assessing whether the passage of time was justified (indeed, the court below quite deliberately indicated that its ruling was not linked to the individual claims or merits of the plaintiffs before it).

Nor is *Arizona* helpful to Amicus, since it too does not suggest a general exception to the party presentation principle. There, the Court said, a "special circumstance" that could justify *sua sponte* consideration of an affirmative issue-preclusion (not limitations) defense may be found present "if a court is on notice that it has previously decided the issue presented." In that specific instance,

> "the court may dismiss the action *sua sponte*, even though the defense has not been raised. This result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *United States v.*

[1] Members of both families – the Maaloufs and the Salazars – did, in fact, file timely suits claiming damages for the loss of their loved ones. *See Estate of Doe v. Islamic Republic of Iran*, 808 F.Supp.2d 1 (D.D.C. 2011) (Maalouf), and *Salazar v. Islamic Republic of Iran*, 370 F.Supp.2d 105 (D.D.C. 2005) (Salazar). In both instances, the family members who initiated actions won judgments and were awarded damages, part of which they have now collected. The *Maalouf-Salazar* Appellants now before this Court assert that for very good reasons, they had no knowledge of the pending suits (in which they would surely have been entitled to intervene had they sought leave to do so), or of the very possibility that such suits against Iran might be prosecuted. *See* M-S App. Br., pp. 4-5, and its Appendix, pp. 56-67 (Maalouf) and 103-34 (Salazar).

> *Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting) (citations omitted).

Arizona, 530 U.S. at 412.

The caselaw, in other words – including the decision which, according to Amicus, teach that trial courts may raise affirmative defenses on their own initiative, even when defendants have not chosen to raise them, so long as the cases may have wider implications – does not support such a broadly-defined exception to or derogation from the principle of party presentation. Nothing in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"), including its internal statute of limitations in terrorism cases, § 1605A(b), implicates a congressional intent to avoid the party presentation principle, which has been endorsed by the Supreme Court on numerous occasions, and which is codified in Rule 8 of the Federal Rules of Civil Procedure. An "affirmative defense" is just that: it must be affirmatively asserted by the defendant, or it is forfeited. It is not to be raised by judges on their own initiative, except in the rarest of circumstances.

"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 Co. S.A. v. Johnson*, 440 F.3d 648, 654 (4th Cir. 2006), citing *Arizona*, 530 U.S. at 412-13. Here, neither the trial court nor Amicus points to any legitimate "authorization" for this deviation from standard practice. Even if the Supreme Court's decision in *Day* might be read as extending

beyond habeas corpus petitions under the AEDPA – a reading that would be unwarranted – the exception would require, *inter alia*, that the trial court "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred. *Day*, 547 U.S. at 210, citing *Granberry*, 481 U.S. at 136.

There is no basis on which any court could reasonably conclude that "the interests of justice would be better served" by dismissing, rather than hearing, the claims of the relatives of individuals murdered by terrorists in cold blood while they were serving the United States. Nothing in the United States Code, and nothing in the precedents of this Court or the Supreme Court, has ever been interpreted to align "the interests of justice" with impunity for state sponsors of terrorism, or to deny justice to those for whom Congress has opened the doors of the federal courts. This is all the more apparent here, given that, in both the *Maalouf* and *Salazar* cases, relatives of the **same** decedents have already successfully brought suit against the **same** defendants arising from the **same** incident, and have already collected a portion of their judgments.

B. Comity Considerations Do Not Mandate Affirmance.

Both Judge Bates in the court below, and Amicus Hashimoto in her defense of Judge Bates, contend that this case is not subject to the principle of party participation, or that it qualifies for an exemption from that principle, because of some notion of comity owed to the Islamic Republic of Iran. The *Maalouf-Salazar*

Appellants have already debunked this claim, in pages 40-44 of their opening Brief. But nothing in Amicus's submission buttresses Judge Bates's deeply flawed conclusions concerning comity.

Of course it is true, as Amicus suggests, that "[l]awsuits against foreign sovereigns implicate comity concerns." Amicus Br., p. 21. That is true of every suit brought under the FSIA, whether the date of filing presents limitations issues or not. But the entire purpose of the FSIA was to remove from the Executive branch, and assign to the judiciary, the question of whether or when a foreign sovereign defendant is entitled to immunity. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602.

In enacting the FSIA, Congress instructed the judiciary that sovereigns may not hide behind the cloak of immunity when certain conditions are satisfied. Over the years since the FSIA was adopted (in 1976) that list has changed from time to time, but at present, there is an exception to immunity, *inter alia*, when foreign states engage in acts of terrorism. 28 U.S.C. § 1605A. Comity does not dictate any contraction of that exception. So while it is true, as this Court has observed, that "the federal judiciary has relied on principles of comity and international law to protect foreign governments in the American legal system," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002), it is also true that "nothing in the Constitution limits congressional authority to modify or remove the sovereign

immunity that foreign states otherwise enjoy. Instead, … such immunity is 'a matter of grace … on the part of the United States, and not a restriction imposed by the Constitution.'" *Id.*, 294 F.3d at 99, citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

In construing whether a foreign nation is amenable to suit in the United States, courts have recourse not only to the language of the FSIA, but to other statutes and common law principles that may present themselves. In this instance, the party presentation principle is part of the common law, and is enshrined in the description of "affirmative defenses" (including limitations) in Rule 8 of the Federal Rules of Civil Procedure. If a sovereign is not entitled to immunity, it is to be treated by the judiciary like any other defendant, except to the extent that Congress has expressly provided otherwise. The Executive is precluded from intervening to immunize the foreign state from the U.S. judicial process, even if it is motivated by serious foreign policy concerns, and the courts may not usurp the executive function by trying to anticipate impacts on foreign relations, or attempting to predict how other nations might respond.

So, for example, when Argentina was sued on a commercial debt and was found liable, it was subject to the rather free-wheeling post-judgment discovery rules that are generally applicable in federal courts. The country's government objected, the Second Circuit agreed, and the case went to the Supreme Court. The United States

took the side of Argentina. But the Court rejected the argument for an exception to the rules of judicial procedure, based on comity:

> Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty," Brief for United States as Amicus Curiae 18, and will "[u]ndermin[e] international comity," *id.*, at 19. Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts," *id.*, at 20, and will "threaten harm to the United States' foreign relations more generally," *id.*, at 21. These apprehensions are better directed to that branch of government with authority to amend the Act – which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.

Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 146 (2014). A foreign state, in other words, once properly served and properly subjected to the rules of American jurisprudence, must obey those rules, and is not entitled to claim any kind of exemption from them based on comity, unless and until Congress dictates otherwise.

Surely Iran – or anyone charged with defending a decision in favor of Iran – as a designated state sponsor of terrorism could hardly be heard to claim that comity entitles it to be generally exempt from the jurisdiction of our courts. Such defenses would be incompatible with the FSIA. But in Judge Bates's view, endorsed by Amicus, Iran would have no right to seek a free pass if it were sued nine years and 364 days after it brutally murdered Americans at their government duty stations; yet comity concerns would spring forth to provide a cloak against suit two days later.

It is true that there is a statute of limitations in 28 U.S.C. § 1605A. Perhaps the Iranian regime is aware of that. But it should also be aware that limitations is an affirmative defense, and under the Federal Rules of Civil Procedure defendants must appear to defend themselves if they want to take advantage of such defenses. Surely if Iran had U.S. counsel – as it had before this Court as recently as 2014, *see Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013) – it would have been advised of the obligation to assert a limitations defense, or to risk forfeiting it.

Moreover, the invocation of comity below, now endorsed by Amicus, transports the judicial branch into an area where the Constitution does not intend it to go. Amicus is quite right when she says that "litigation against foreign states in U.S. courts can affect the federal government's foreign affairs interests and its reciprocal treatment in foreign courts." Amicus Br., p. 11. But that argument seeks to prove far too much. Congress has already legislated for the governance of "litigation against foreign states in U.S. courts," and it has done nothing to suggest that such litigation is subject to special rules or considerations, or to special exceptions from principles applying to other litigation in the federal courts.

Nor is the judiciary equipped to determine whether this, or any, "litigation against foreign states in U.S. courts" will lead to consequences in foreign affairs, diplomacy, or threatened retaliation of some kind. Such concerns, if they exist, should be "directed to that branch of government with authority to amend the Act,"

which is to say Congress," *Republic of Argentina, supra*, or to the branch tasked with executing our country's foreign policy.

Amicus reiterates Judge Bates's claim that the district court "had no interest in protecting Iran" ("None of this is to defend the indefensible nations who defy both the laws of mankind and the authority of American courts," M-S App. Br., Appendix, p. 152). Amicus Br., p. 31. But that is precisely what the court below did: it extended to Iran, behind the curtain of comity, a benefit unavailable to any other defendant: the opportunity to thumb its nose at U.S. courts with jurisdiction over it and over claims against it, to decline to participate in or even to acknowledge litigation properly brought pursuant to a jurisdictional grant enacted by Congress, and then to enjoy the defenses that it did not deign to assert on its own behalf.

C. The Existence of the Victims Compensation Fund Further Erodes the Applicability of Comity.

In her effort to have this case qualify for what she argues is a general exception to the party presentation principle, Amicus Hashimoto invests considerable effort in attempts to show that the cases at Bar "implicate values beyond the concerns of the parties." Of course, as has been demonstrated, there is no such exception, nor has the Supreme Court ever alluded to its existence.

But one of her cited illustrations of these "values" supposedly supporting the VIP treatment that Iran seeks deserves particular attention, because it in fact militates in exactly the opposite direction. Amicus points out that judgments in terrorism cases

against Iran are not paid by Iran, which has continued its policy of contumacy toward U.S. courts, but draw from a fund created by Congress to bring some measure of relief to parties like the *Maalouf-Salazar* Appellants. This is "the U.S. Victims of State Sponsored Terrorism Fund" ("VSSTF"), established to compensate American victims of state-sponsored terrorism "who otherwise have been unable to satisfy their judgments against a state sponsor of terror." Amicus Br., pp. 25-26; 34 U.S.C. § 20144.[2]

The existence of the VSSTF, however, and the fact that judgments are being paid from it, reduce the potential impact of a judicial decision in these cases on foreign affairs (even were it proper for the judiciary to assess such possible impacts). To put the point in the vernacular, Iran will not pay these Appellants a dime, regardless of the outcome of the litigation in the district court. There is no financial reason, at least, for Iran to care in the slightest how these cases turn out. There is little reason, therefore, to believe that default judgments against Iran would have any impact whatsoever on that country.

[2] Amicus suggests that, because the total amount of the VSSTF is determined by events outside the parties' control (the fund is replenished by certain fines and penalties paid to the Treasury by parties found to have done business, *inter alia* with Iran, prohibited under U.S. sanctions regulations, permitting these Appellants their day in court might diminish the shares available to others who have won final judgments against Iran in terrorism cases. But Congress intended that the VSSTF to be shared among all who have obtained judgments, and so the potential impact on those who already have them should have no consequence for those who are entitled to them but, because of the actions of the district court, do not (yet) have them.

II. In the Decisions Below, the Court Applied a Precluded Jurisdictional Rule, and Did Not Exercise Judicial Discretion.

Judge Bates of the district court, and Amicus Hashimoto who is tasked with defending his reasoning here, both seem to rely on the notion that while a trial court is not required to invoke limitations defenses on behalf of absent defendants, it has a broad and general "discretion" to do so if it so wishes. This Court, however, has concluded that the limitations provisions of the FSIA are not jurisdictional, which means that like other affirmative defenses if they are not asserted they are lost: "Nothing in [28 U.S.C.] § 1605A(a) 'conditions its jurisdictional grant on compliance with [the] statute of limitations' in § 1605A(b)." *Owens v. Republic of Sudan*, 864 F.3d 751, 802 (D.C. Cir. 2017), citing *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 165 (2010)).

Contrary to Amicus's characterization of their position, the *Maalouf-Salazar* Appellants did not argue below, and do not argue here, that "a forfeited timeliness defense can **never** be raised by a district court *sua sponte*," Amicus Br., p. 41, or that "district courts are **forbidden** from considering whether their claims were untimely." *Id.*, p. 11 (both emphases added). The first of these portrayals would fly in the face of the very cases on which Appellants rely, including the Supreme Court's decisions in *Arizona* and *Day*, and the Fourth Circuit's discussion of the issue in *Clodfelter v. Republic of Sudan*, 720 F.3d 199 (4th Cir. 2013), and *Eriline*, *supra*, in which judges have

concluded that there are certain circumstances in which courts of first instance **may** raise limitations defenses. But as the Fourth Circuit cautioned, "*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*, 530 U.S. 392 at 412-13.

The second claim put forward by Amicus – that Appellants would deny the trial court even the power to determine whether their claims were untimely – is undermined by virtually all of the submissions made to the court below. Appellants hardly concealed from the court the dates on which the murders of their loved ones took place. Both were stated in the respective complaints and amended complaints: September 20, 1984, in the case of Maalouf (M-S App. Br., Appendix, p. 10, ¶ 14), and April 18, 1983, for the Salazars (*id.*, p. 77, ¶ 11). And of course the trial court was aware of the dates of initial filings: February 17, 2016 (Maalouf) (*id.*, p. 4), and July 22, 2016 (Salazar) (*id.*, p. 73). So this straw-man argument of Amicus has no persuasive force.

At best, the caselaw provides trial court judges with a small measure of discretion to determine whether, in a particular case, the failure of a plaintiff to initiate a case within the statutory limitations period was justified, or not. That is precisely what the court in Florida did in the *Day* case (*see* p. 9, *supra*). "Judicial discretion," properly understood, is the power of the courts to assess the facts and circumstances of the parties before them, and to reach a decision tailored to those facts. Basing a

decision on a hard-and-fast formula, applicable to any and all cases regardless of their particular aspects, is not an exercise of discretion: it is the application of a rule.

That is precisely what Judge Bates did here.

Had this Court concluded, in *Owens*, that the FSIA statute of limitations **was** jurisdictional, a trial judge confronted with a case filed 10 years and two days after the event giving rise to the action would have issued a decision along these lines:

> All the court needs to know to decide this matter is two things: when was the terrorist attack, and when was the complaint filed. The defendant has failed to appear. But this case was initiated after the expiration of the limitations period. Since the limitations provision of the statute is jurisdictional, no matter the particular explanation proffered by the plaintiff, I cannot and will not proceed to entertain this action. Case dismissed.

Of course, that is not how this Court decided *Owens*. To the contrary, the Court concluded that

> [h]aving 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).

Nevertheless, Judge Bates's disposition of the *Maalouf* and *Salazar* cases is a virtually-identical paraphrase of the hypothetical jurisdictional dismissal cited above. In essence, his determination was:

> All the court needs to know to decide this matter is two things: when was the terrorist attack, and when was the complaint filed. The defendant has failed to appear. But this case was initiated after the expiration of the limitations period. Since I have discretion to assert the limitations defense on my own initiative, no matter the particular explanation proffered by the plaintiff, I choose not to proceed to entertain this action. Case dismissed.

That is not an exercise of judicial discretion. It is the application of a rule. And this Court concluded in *Owens* that there is no rule barring FSIA lawsuits when sovereign defendants have forfeited their affirmative limitations defenses. Just as in statutory interpretation "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion," *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), cited in *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018), there is no "discretion" if the presence of a particular characteristic permits a court to hear a case, but the absence of that characteristic forbids it. When, for example, a case filed later than before Date X is allowed to proceed while a case initiated before that is not, then the date of filing has been transformed into a jurisdictional prerequisite.

That is precisely the effect of Judge Bates's decision. And it is directly inconsistent with this Court's holding in *Owens*.

III. Like Those of the District Court, Amicus's Concerns About "Floodgates" and "Endless Litigation" Are Misplaced.

Like the district court below, Amicus claims that permitting these Appellants to proceed to seek justice would be risking opening floodgates, and inviting "nearly endless litigation." Amicus Br., p. 12. But there is no such specter, as the *Maalouf-Salazar* Appellants explained in their opening Brief. *See* M-S App. Br., pp. 47-49.

These cases turn on sets of circumstances that are highly unusual, and extremely unlikely to be broadly replicated. First, the defendant state will be entitled to immunity unless it is a state sponsor of terrorism, duly so certified by the Executive branch (there are currently only four nations in the world that bear this opprobrium, of which of course Iran is one[3]). *Schermerhorn v. Israel*, 876 F.3d 351 (D.C. Cir. 2017) The defendant must have been properly served with process under the special rules of the FSIA, 28 U.S.C. § 1608. And the defendant state must fail to appear.

These situations are rare in the extreme, hardly suggesting the opening of floodgates. But even if the reversal of the decisions below did encourage a handful of lawsuits that would otherwise not have been brought, the net result would be a measure of justice for innocent victims, and punishment and/or deterrence of those states that underwrite or perpetrate terrorist acts against American victims. Since

[3] Another one of the four designated state sponsors (the remaining two are Syria and Iraq) has appeared in the district court and this Court to defend itself against charges that it has engaged in terrorism, and in fact has submitted a Brief Amicus Curiae in this very case. *See* note 4, *infra*.

Congress in enacting the terrorism exception to the FSIA, 28 U.S.C. § 1605A, proclaimed to the world that our courts were open to provide some measure of justice for victims of barbarities, such an outcome might well be welcomed, not feared.

Any sovereign defendant at risk of a belatedly-filed suit under 28 U.S.C. § 1605A may put an end to that jeopardy quite simply. It can submit to the jurisdiction of the courts of the United States, and file an answer to the complaint, or a motion arguing that the complaint was filed out of time. Of course, another option would be abandoning the course of terrorist conduct or support that was responsible for placing that nation on the list of state sponsors of terrorism. The failure to do those things – that is, the failure to acknowledge an allegedly untimely suit even for the purposes of seeking to have it dismissed – is hardly conduct that the courts should condone, much less encourage.

IV. The *Maalouf-Salazar* Appellants Associate Themselves with the Arguments of Other Appellants and Amici Regarding Timeliness.

Much of the Brief of Amicus concerns itself with the particularities of the *Sheikh* Appellants' claim that their complaints were not untimely at all, because they were filed within 10 years of "the date on which the cause of action arose." 28 U.S.C. § 1605A(b). Their argument is that, because the FSIA was amended to permit non-citizen Government employees to file claims under the Act, their cause of action "arose" on the date of that amendment, January 28, 2008. Their suits were initiated within 10 years of that date.

This argument is relevant to Maalouf Appellants, but not to the Salazars. The Maalouf Appellants support and endorse the argument, for the reasons stated in the Brief of the *Sheikh* Appellants.

Likewise, the *Maalouf-Salazar* Appellants endorse the arguments made by several other Appellants, and by Amicus Professor Vladeck and the *Smith* group of Amici, concerning the definition of "related cases" in the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, Div. A, Title X (Jan. 28, 2008); 122 Stat. 342, § 1083.[4] In this connection, they respectfully remind the Court that their cases are related to *Doe*, *supra* (for the Maalouf Appellants), and *Salazar*, *supra* (for the Salazars), in that those earlier cases included plaintiffs who were related to (or claimed by virtue of) the same decedents, were brought against the same defendants, and involved the same terrorist attack as the cases now on appeal.

Conclusion

For all of the reasons set out in their opening Brief, the *Maalouf-Salazar* Appellants respectfully submit that the decisions of the court below are unjustified and incorrect as a matter of law. The arguments of Amicus Curiae appointed by the Court to defend those decisions are insufficient to provide any exception to the proposition that the statute of limitations contained in the Foreign Sovereign

[4] The entirety of the Amicus Brief filed on behalf of Amicus The Republic of Sudan addresses the "related case issue and § 1083. Sudan makes no argument concerning the issue of whether the affirmative defense of limitations may be raised by a judge on her or his own initiative.

Immunities Act, 28 U.S.C. § 1605A(b) is not jurisdictional but an affirmative defense, which is forfeited if it is not asserted.

The Islamic Republic of Iran, Appellee in these cases, has not responded to the complaints, and has not raised limitations or any other defenses. The district court has already (and repeatedly) determined that Iran was legally responsible for the cold-blooded murders of Edward Maalouf, a Lebanese citizen serving the United States as a guard at its Embassy in Beirut, and of Mark D. Salazar, a Staff Sergeant in the United States Army whose duty station was that Embassy. To affirm the decisions below dismissing these cases, without trial and without considering their facts and circumstances, would be no less than to deny justice to the parents, siblings, and children of those two men. It would undermine the will of Congress that victims of terrorism and their survivors are entitled to a measure of compensation for their losses. And it would broadcast to the world that the United States is equivocal in condemning acts of terrorist violence that target Americans and those who serve our nation's interests abroad.

The decisions below should be reversed, and these cases remanded to the district court for rulings on the merits of the motions for default judgment.

Respectfully submitted,

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Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that, on January 9, 2019, I filed the foregoing Appellants' Brief on Appeal with the Office of this Court's Clerk, thereby serving all parties and amici under the Court's ECF system.

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

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