ORAL ARGUMENT NOT YET SCHEDULED

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

HENRI MAALOUF; ESTATE OF ELIAS MAALOUF; ESTATE OF GABY MAALOUF; ESTATE OF OLGA AFTEMOOS,

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN; IRANIAN MINISTRY OF INFORMATION AND SECURITY,

Defendants-Appellees.

KENNETH MARK SALAZAR; KEVIN MICHAEL SALAZAR,

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN,

Defendant-Appellee.

On appeal from the United States District Court for the District of Columbia, Civil Action Nos. 16-cv-280 (JDB), 16-cv-1507 (JDB), Judge John D. Bates

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BRIEF OF PROFESSOR STEPHEN I. VLADECK AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Amicus curiae respectfully files this Certificate as to Parties, Rulings, and Related Cases, as required by Fed. R. App. P. 28(a)(1) and D.C. Cir. Rule 28(a)(1).

I. Parties.

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

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

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

Amicus curiae is a natural person. No party to this case is a corporation.

II. Rulings.

The complaints below were dismissed by the District Court *sua sponte*, after both sets of Plaintiffs had obtained defaults and had moved for default judgments. The single opinion of the court below (which combined the cases on its own motion for purposes of this ruling, but did not consolidate them), and the (separate) orders

dismissing the cases, were all dated March 30, 2018 and are reported at 306 F. Supp. 3d 203 (D.D.C. 2018).

III. Related Cases.

The following related case was recently decided in the U.S. District Court for the District of Columbia: *Bathiard v. Islamic Republic of Iran*, No. 16-1549, 2018 WL 3213294 (D.D.C. June 29, 2018). The following related cases are currently pending in the U.S. District Court for the District of Columbia:

Barry v. Islamic Republic of Iran, No. 16-cv-01625-RC;

Holladay v. Islamic Republic of Iran, No. 17-cv-915-RDM.

Respectfully submitted.

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STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29 of the Rules of this Court, Professor Stephen I. Vladeck respectfully submits this brief as *amicus curiae* in support of the plaintiffs-appellants in this case.[1]

Professor Vladeck is the A. Dalton Cross Professor in Law at the University of Texas School of Law. His teaching and research focus on national security law, federal jurisdiction, constitutional law, and military justice. He is a nationally recognized expert on the role of the federal courts in the war on terrorism and a co-author of Aspen Publishers' leading national security law and counterterrorism law casebooks NATIONAL SECURITY LAW (6th ed. 2016) (with Stephen Dycus, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen) and COUNTERTERRORISM LAW (3d ed. 2016) (with Stephen Dycus, William C. Banks, and Peter Raven-Hansen), which includes a sustained discussion of the Foreign Sovereign Immunities Act in general and the provisions waiving the immunity of designated state sponsors of

[1] No party's counsel authored this brief in whole or in part, nor has a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. Counsel for the plaintiffs in *Holladay v. Islamic Republic of Iran*, No. 17-cv-915-RDM (D.D.C.), contributed money that was intended to fund preparing and submitting this brief.

terrorism, specifically. Professor Vladeck frequently consults with parties on litigation concerning these issues, including counsel for the plaintiffs in *Holladay v. Islamic Republic of Iran*, No. 17-cv-915-RDM (D.D.C.).

CERTIFICATION OF COUNSEL PURSUANT TO RULE 29(d)

A separate *amicus* brief is necessary in this case because of the distinctive nature of the position taken by the *amicus curiae*. Although *amicus* agrees with the plaintiffs-appellants that the District Court decision below was wrong and should be reversed (including for some reasons not advanced by plaintiffs-appellants), *amicus* also believes that, if the judgment below is affirmed, it should be solely on the specific basis of what the District Court described as the "special circumstances" of this case. 306 F. Supp. 3d 203, 208-09 (D.D.C. 2018). Insofar as plaintiffs-appellants take no position on this point, a separate brief is appropriate.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court *sua sponte* invoked the statute of limitations codified at 28 U.S.C. § 1605A(b) of the Foreign Sovereign Immunities Act ("FSIA") to dismiss claims against Iran based upon its role in the 1983 and 1984 U.S. embassy bombings in Beirut. The court acknowledged that, "[g]enerally, it is up to the defendant to raise a timeliness defense," 306 F. Supp. 3d at 205, and "[i]n the mine run of cases, courts should refrain from exercising this discretion, relying on the adversarial process to raise any non-jurisdictional issues in dispute." *Id.* at 208. The court noted

that, under *Owens v. Republic of Sudan*, 864 F.3d 751, 801 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-1236 (U.S. Mar. 2, 2018), the statute of limitations in § 1605A(b) is not jurisdictional. 306 F. Supp.3d at 208 & n.6. Instead, it is an affirmative defense that is necessarily waived if not properly raised by the defendant.

But the District Court opined that "*sua sponte* consideration 'might be appropriate in special circumstances,' particularly when an affirmative defense implicates the interests of the judiciary as well as the defendant." *Id.* at 208-09 (citation omitted). The court stressed that the *Maalouf* plaintiffs themselves conceded the untimeliness of their claims and noted "the facts supporting the statute of limitations defense are set forth in the papers plaintiff[s] [themselves] submitted." *Id.* at 212 (internal quotation marks and citation omitted; alterations in original). The court explained that, in such a situation, "respect for other sovereign nations, the Court's duty to independently assess claims of state-sponsored terrorism, and the practical effect of ignoring the statutory deadline weigh against granting default judgments against Iran on plainly untimely claims." *Id.* at 205.

Another 1983 Beirut bombing case, *Bathiard v. Islamic Republic of Iran*, No. 16-cv-1549, 2018 WL 3213294 (D.D.C. June 29, 2018) (Cooper, J.), also considered limitations *sua sponte*. Other Beirut bombing cases have reached contrary conclusions, holding that courts should not exercise whatever discretionary authority they may have to consider limitations for defaulting defendants. *See Worley v.*

Islamic Republic of Iran, 75 F. Supp. 3d 311, 331 (D.D.C. 2014); *Spaulding v. Islamic Republic of Iran*, No. 16-cv-1748, 2018 WL 3235556, at *3 (N.D. Ohio July 2, 2018).

Amicus submits that the decisions in *Worley* and *Spaulding* represent the better approach given the specific text, context, and background of the FSIA. This Court should hold that courts lack the authority in cases arising under the FSIA exception for state sponsors of terrorism to invoke § 1605A(b) *sua sponte*. Such a result would be consistent with this Court's decision in *Owens* holding that the FSIA limitations provision is a non-jurisdictional defense. It would be also be consistent with the Supreme Court's repeated emphasis on congressional primacy in the interpretation of the FSIA. Whatever may be true for other statutes, there is no room under the FSIA for a judge-made rule of "discretion" in deciding whether to *sua sponte* invoke the FSIA's limitations period.

If the judgment below is affirmed, however, it should be affirmed on the specific basis of what the District Court described as the "special circumstances" of this case. 306 F. Supp. 3d at 208-09. Chief among them was the *Maalouf* plaintiffs' concession in the District Court that their claims were "plainly untimely," so that the District Court did not need to consider evidence, hold a hearing, or undertake any meaningful legal analysis in order to decide whether the statute of limitations properly applied and barred the action. Further, the limitations defense is an all-or-

nothing issue in this case—such that the District Court's ruling terminated the actions completely. If the judgment below is affirmed — and, as discussed in Part I, *amicus* submits that it should not be — this Court should at the very least limit such an affirmance to those "special circumstances," and leave open for future cases whether, absent such circumstances, *sua sponte* invocation of § 1605A(b) is ever appropriate.

STATUTORY BACKGROUND

The FSIA creates a federal cause of action directly against foreign governments and waives the sovereign immunity of designated state sponsors of terrorism for (among other things) providing "material support or resources" for acts of "extrajudicial killing." 28 U.S.C. § 1605A(a)(1) ; *see also Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 819 (2018) ("[S]uch exception to jurisdictional immunity . . . applies where the foreign state is designated as a state sponsor of terrorism and the claims arise out of acts of terrorism.").

In the FSIA, Congress provided that "[t]he court ***shall*** hear a claim under this section" under certain conditions, including when (i) the foreign state was a designated sponsor of terrorism when the act of terrorism occurred and when the claim was brought; (ii) the victim or claimant was a national of the United States, a member of the armed forces, or an employee or contractor of the Government; and (iii) the act did not occur in the foreign state's own territory (or, if it did, the claimant

has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration). *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I), (ii)(I, II, III), (iii) . The FSIA therefore creates a mandatory obligation on federal courts to resolve disputes brought under the statute.

In a different section of the Act, Congress provided a 10-year limitations period, as follows:

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

Id. § 1605A(b) .[2]

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[2] The term "related action" is defined in § 1083(c)(3) of the Fiscal Year 2008 National Defense Authorization Act ("NDAA") (the Act that created § 1605A), which provides in relevant part:

> Related actions.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, ... any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—
>
> (A) the date of the entry of judgment in the original action; or
>
> (B) the date of the enactment of this Act [Jan. 28, 2008].

Pub. L. No. 110-181, § 1083(c)(3), Jan. 28, 2008, 122 Stat. 3, 338 (codified at 28 U.S.C. § 1605A note).

Sen. Frank Lautenberg, a co-sponsor of the 2008 amendments adding the exception for state sponsors of terrorism, explained that the legislation was intended "to provide justice for victims of state-sponsored terrorism, which has strong bipartisan support. I believe this legislation is essential to providing justice to those who have suffered at the hands of terrorists and is an important tool designed to deter future state-sponsored terrorism." 154 Cong. Rec. S54-01 (daily ed., Jan. 22, 2008). In fact, he singled out victims of Iranian terrorism as the intended beneficiaries of the bill: "Congress's support of my provision will now empower these victims to pursue Iranian assets to obtain this just compensation for their suffering. This is true justice through American rule of law." *Id.* at S55.

The 2008 amendments strengthened the 1996 Flatow Amendment, codified at 28 U.S.C. § 1605 note, which had created an initial version of the state-sponsored terrorism exception to the FSIA. However, Sen. Lautenberg explained, "Congress's original intent behind the 1996 legislation has been muddied by numerous court decisions," and the Flatow Amendment had been frustrated by "overly mechanistic" judicial interpretations. 154 Cong. Rec. at S54-55. He pointed to the statute of limitations in particular as one doctrine through which courts had frustrated Congress's intent:

> Another problem is that courts have mistakenly interpreted the statute of limitations provision that Congress created in 1996. In cases such as *Vine v. Republic of Iraq* and later *Buonocore v. Socialist People's Libyan Arab Jamahiriya*, the court interpreted the statute to begin to

> run at the time of the attack, contrary to our intent. It was our intent to provide a 10-year period from the date of enactment of the legislation for all acts that had occurred at any time prior to its passage in 1996. We also intended to provide a period of 10 years from the time of any attack which might occur after 1996. My provision clarifies this intent.

Id. at S55. In short, the 2008 amendments were intended to facilitate redress against foreign governments designated as state sponsors of terrorism and to eliminate "overly mechanistic" judicial interpretations that were inhibiting victim recoveries. More recently, Congress passed legislation, signed into law in December 2015, to create a "Victims' Compensation Fund" ("VCF") from which victims and their families may receive partial payments of judgments against Iran and other sponsors of international terrorism. *See* Justice for United States Victims of State Sponsored Terrorism Act, Pub. L. 114-113, § 404, 129 Stat. 2242, 3007 (codified at 34 U.S.C. § 20144).[3]

[3] Congress provided that the VCF will not sunset until January 2026, Pub. L. No. 114-113, § 404(e)(6)(A), 129 Stat. at 3015 (codified at 34 U.S.C. § 20144(e)(6)(A)), further demonstrating its understanding that an ongoing stream of terror victims will continue to seek compensation. There is no limitation in the Act excluding claimants like Plaintiffs. For example, Congress could have limited eligibility for the VCF to those with judgments already in place as of the date of its enactment. Again, it did not.

ARGUMENT

I. The FSIA Does Not Confer Discretion Upon District Courts To Raise Affirmative Defenses *Sua Sponte*.

A. The Political Branches, Not The Courts, Have Primary Responsibility In Regulating Liability Under Section 1605A.

The FSIA is a finely reticulated statutory scheme leaving no room for judicial freelancing in deciding whether to apply the statute of limitations as a matter of discretion. The District Court properly acknowledged that the FSIA's statute of limitations is not jurisdictional, as this Court held in *Owens*, 864 F.3d at 801, but the District Court failed to recognize the primacy of Congress—and its clear intent—in defining the metes and bounds of the specific cause of action added by Section 1605A.

This Court has explained that "[i]t is well understood that, over the years, Congress has amended the FSIA to allow 'massive judgments of civil liability against nations that sponsor terrorism.'" *Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348, 352 (D.C. Cir. 2018) (citation omitted). Further, and importantly, "[t]he courts are not authorized to craft a body of federal common law in deciding FSIA terrorism exception claims." *Id*. at 353.

As capaciously as this Court has interpreted the FSIA in general, the provisions authorizing claims against state sponsors of terrorism are even broader. "Congress intended to deter state support for terrorism," *Owens*, 864 F.3d at 764, by "provid[ing] a cause of action against officials, employees, or agents of a designated

state sponsor of terrorism" and "authoriz[ing] the award of punitive damages against such a defendant." *Id.* "These two changes marked a departure from the other FSIA exceptions, none of which provided a cause of action or allowed for punitive damages." *Id.* In 2008, Congress extended the cause of action to "'claimants or victims'" who were U.S. nationals, and for the first time, to members of the armed forces and to government employees or contractors acting within the scope of their employment." *Id.* at 765.

In addition, Congress eliminated foreign sovereign immunity for such a claim and declined to make the statute of limitations jurisdictional or otherwise to require federal courts to apply it. To the contrary, Congress specifically provided that "[t]he court ***shall*** hear a claim under this section if" certain conditions were met, *not* including satisfaction of a statute of limitations. 28 U.S.C. § 1605A(a)(2) (emphasis added) . And Congress created the Victims' Compensation Fund to help ensure that successful plaintiffs would recover more than just a piece of paper.[4]

[4] The District Court cited *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277 n.14 (2010), but that decision demonstrates the court's mistake. *Espinosa* involved a provision of the Bankruptcy Code in which Congress expressly required bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raised the issue. *Espinosa* makes clear that Congress' decisions are controlling. Congress could have adopted a similar provision here (mandating *sua sponte* consideration of limitations) but did not. Instead of making limitations jurisdictional, it did the opposite.

This Court has instructed that "the statute's text and purpose" should guide courts to "interpret its ambiguities flexibly and capaciously." *Van Beneden v. Al-Sanusi*, 709 F.3d 1165, 1167 (D.C. Cir. 2013). As Sen. Lautenberg explained (*see* pp. 6-8, *supra*), the 2008 amendments were aimed at facilitating recoveries by U.S. nationals, members of the armed services, and Government employees and contractors against foreign governments designated as state sponsors of terrorism. Congress sought to eliminate unintended barriers to redress under the Flatow Amendment that had created by the courts, including excessive reliance upon ***statutes of limitations***. In this case, *sua sponte* invocation of the statute of limitations to preclude plaintiffs' claims would be precisely the kind of judicial interference that Congress attempted to override in enacting the 2008 amendments to the FSIA. Sen. Lautenberg further explained that curbing Iranian-sponsored terrorism was a primary objective of the 2008 amendments and singled out the statute of limitations as one of the examples of "overly mechanistic" judicial interpretations that had frustrated congressional intent. 154 Cong. Rec. at S55.

There is no room in the FSIA for a judge-made rule of "discretion" in deciding whether to trigger *sua sponte* the FSIA limitations provision. The Supreme Court has repeatedly held that the FSIA is a comprehensive statutory scheme that supplants just such judicial discretion. In *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), for example, the Court upheld (over Argentina's strenuous

objections) the enforcement of subpoenas served by a private party on banks for records relating to Argentina's global financial transactions. The Court stressed that the FSIA's comprehensive framework eliminated judge-made rules for deciding questions of foreign sovereign immunity:

> Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." The key word there—which goes a long way toward deciding this case—is comprehensive. We have used that term often and advisedly to describe the Act's sweep: "Congress established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity." The Act "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." This means that "[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts ... in conformity with the principles *set forth in this [Act]*." 28 U.S.C. § 1602 (emphasis added). Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

Id. at 2255-56 (citations omitted). The Court noted that "Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court," including the concern that discovery orders "will '[u]ndermin[e] international comity,'" "provoke 'reciprocal adverse treatment of the United States in foreign courts,'" or "'threaten harm to the United States' foreign relations more generally.'" *Id.* at 2258. But the Court responded that "[t]hese 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." *Id.*

Similarly, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court upheld a district court's refusal to provide international judicial assistance and opined that comity concerns could not be inserted into a comparable statutory scheme created by Congress for the production of documents from foreign jurisdictions. *Id*. at 260 ("While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).").

Hence, this case should be governed by the familiar principle that, where Congress has enacted a comprehensive statutory scheme, courts lack the authority to create discretionary judge-made law at odds with the legislature's unambiguous purpose. Thus, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), the Supreme Court held in the copyright context that courts may not invoke a judge-made rule (there, laches) to bar legal relief otherwise available under a statute of limitations because "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *Id*. at 1967. In *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), the Court again invoked the separation

of powers to hold that courts cannot apply laches as a defense against a damages claim for infringement available under the Patent Act's limitations period:

> When Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief. The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. Therefore, applying laches within a limitations period specified by Congress would give judges a "legislation-overriding" role that is beyond the Judiciary's power.

Id. at 960 (citations omitted). The District Court below committed the same separation-of-powers mistake that the Supreme Court condemned in *Petrella* and *SCA Hygiene Products*.

The fact that a foreign sovereign is involved does not change the analysis. The Supreme Court has explained that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Scarborough v. Principi*, 541 U.S. 401, 421 (2004) (refusing to adopt special limitations rules in cases against the Government) (quoting *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002)). If anything, plaintiffs here have sued a foreign sovereign under a statute that expressly contemplates relief against a foreign sovereign on the terms plaintiffs have sought it, reflecting *Congress*'s resolution, for better or worse, of the very foreign relations concerns invoked to the contrary by the District Court.

The District Court also ignored the role of the Executive Branch in controlling the scope of liability under the FSIA's terrorism exception. The Executive Branch plays two important roles in that process. First, the FSIA's exception applies only to those nations designated as state sponsors of terrorism by the Department of State. Second, the President may issue directives limiting liability even of those states so designated. For example, the President has issued an Executive Order with respect to Libya and a Presidential Determination with respect to Iraq, limiting the liabilities of those foreign governments under the state-sponsor-of-terrorism exception. *See* 28 U.S.C. § 1605A note. No such Executive Order or Presidential Determination has been issued with respect to Iran. Thus, both of the political branches have exercised their authority to allow claims like plaintiffs to go forward—not just against *a* foreign sovereign, but against Iran, specifically. *See United States v. Pink*, 315 U.S. 203, 230 (1942) (pointing to "the judgment of the [U.S.] political department" and warning that "[w]e would usurp the executive function if we held that that decision was not final and conclusive in the courts").

Instead of weighing international comity concerns — which are first and foremost the responsibility of the political branches — the District Court should have confined itself to the traditional role of the judiciary. "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc.*

v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990). By *sua sponte* invoking an affirmative defense that Congress did not make mandatory or jurisdictional, the District Court below failed to fulfill the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given").

This Court should therefore hold that the FSIA itself precludes district courts from invoking a § 1605A(b) limitations defense *sua sponte* when a defendant has defaulted particularly when it has done so consciously and purposefully -- and thereby waived that affirmative defense.

B. Comity Does Not Support The District Court's Decision.

The decision below invades the prerogatives of the political branches in another respect: it requires courts to make discretionary assessments balancing the interests of foreign sovereigns, and such case-by-case judicial determinations putatively based upon comity are more likely to trigger foreign policy concerns than the bright-line rule *amicus* respectfully submits that the FSIA itself requires. In ruling to the contrary, the District Court effectively reintroduced the case-by-case judicial determinations of immunity that the FSIA was meant to displace. *See NML*

Capital, 134 S. Ct. at 2255-56. Thus, even if the FSIA does not foreclose the discretion exercised by the District Court, principles of comity do not support it.

The decision below flies in the face of the Supreme Court's repeated warning that a case-by-case judicial approach to comity is "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); *see also RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2108 (2016) (rejecting "case-by-case inquiry"); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 259 (2010) (criticizing the "methodology of balancing interests"). The Court has cautioned that foreign policy concerns (as reflected in the act of state doctrine) do not represent "some vague doctrine of abstention." *Kirkpatrick*, 493 U.S. at 406. The District Court's ruling represents such a prohibited approach.

Moreover, even apart from the FSIA's legislative scheme, which by itself should have a dispositive impact on any judicial comity analysis in this case, the Supreme Court has long held that comity must be applied with due regard for the rights of U.S. citizens — here, U.S. nationals, government employees and contractors, members of the U.S. military, and their families, for whom Congress expressly created a cause of action against state sponsors of terrorism. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Supreme Court explained that that the doctrine of international comity requires a nation to balance "international duty and convenience" with "the rights of its own citizens, or of other persons who are under

the protections of its laws." *Id.* at 163-64; *see also Oakey v. Bennett*, 52 U.S. (11 How.) 33, 44 (1850) ("[N]ational comity does not require any government to give effect to such assignment [of property], when it shall impair the remedies or lessen the securities of its own citizens.").

Accordingly, the Supreme Court frequently refuses to apply comity where it would prejudice the rights and interests of U.S. citizens. In *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016), *vacated*, 138 S. Ct. 1865 (2018), for example, the Second Circuit had vacated an antitrust award, opining that "because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad, and because Defendants could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case." *Id.* at 179. The Supreme Court unanimously reversed. *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865 (2018). It recognized that, "[i]n the spirit of 'international comity,' a federal court should carefully consider a foreign state's views about the meaning of its own laws." *Id.* at 1868 (citation omitted). But it warned that "the appropriate weight in each case will depend upon the circumstances," and it held that comity did not require the judiciary to accept the Chinese government's statement of its own laws. *Id.* at 1873.

Similarly, in *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 622, 632 (1983), the Supreme Court declined to defer to the Cuban government's view of Cuban law as a matter of comity, where that view threatened the property rights of U.S. citizens. In *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578-79 (1908), the Court noted that "international comity does not require the enforcement of judgments" that would prejudice the rights of local creditors. In *Second Russian Ins. Corp. v. Miller*, 268 U.S. 552, 560-61 (1925), the Court found that "adoption of foreign law by comity" would be "much beyond its limits as at present defined" and there was "no basis for the contention that the principle of comity would require" such a result. *See Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (comity is "inadmissible when contrary to [a nation's] policy, or prejudicial to its interests"); Joseph Story, Commentaries on the Conflict of Laws § 25, at 31 (2d ed. 1841) ("No nation can . . . be required to sacrifice its own interests in favor of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscientious regard for justice and duty.").

The District Court cited the Supreme Court's decision in *Day v. McDonough*, 547 U.S. 198 (2006) (cited at 306 F. Supp. 3d at 208), as an example where *sua sponte* invocation of the statute of limitations would be appropriate. But *Day* illustrates exactly why comity does not support such an exercise of discretion on

these facts. In *Day*, the defendant failed to raise the limitations defense due to a clerical mistake regarding the computation of time: "[N]othing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it. From all that appears in the record, there was merely an inadvertent error, a miscalculation that was plain under Circuit precedent." *Id.* at 211.

Here, Iran's decision not to appear and not to raise limitations as an affirmative defense must be treated as a knowing and intelligent strategic choice. As the District Court noted, "Iran is perfectly happy to litigate cases that do not involve terrorism charges." 306 F. Supp. 3d at 211. Iran routinely appears through counsel when it is a plaintiff in U.S. courts, and in other capacities as well. *See, e.g.*, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (2009); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003); *Islamic Republic of Iran v. Boeing Co.*, 716 F.2d 910 (9th Cir. 1983) (table). Conversely, Iran has repeatedly declined to appear in terrorism-related cases in this District.[5]

[5] *See, e.g.*, *Burks v. Islamic Republic of Iran*, No.16-cv-01102-CRC; *Hake v. Bank Markazi*, No. 17-cv-00114-TJK; *Martinez v. Islamic Republic of Iran*, No. 16-cv-02193-EGS; *Brooks v. Bank Markazi*, No. 17-cv-00737-TJK; *Field v. Bank Markazi*, No. 17-cv-02126-TJK; *Karcher v. Islamic Republic of Iran*, No. 16-cv-00232-CKK; *Holladay v. Islamic Republic of Iran*, No. 17-cv-915-RDM.

Hence, there would be a deep irony in citing "comity" as the basis for *sua sponte* considering an affirmative defense in this case — when Iran has ***deliberately*** declined to assert that defense. In effect, the Court would be second-guessing Iran's litigation strategy and granting Iran precisely what it has intentionally decided to forgo. That is the opposite of comity. Further, *sua sponte* consideration of limitations would reward Iran for its selective participation in the U.S. legal system and encourage Iran (and other state sponsors of terrorism) to not participate in other FSIA cases going forward.

II. If The Judgment Below Is Affirmed, This Court's Decision Should Be Limited To The "Special Circumstances" Of This Case.

The District Court properly acknowledged that, "[g]enerally, it is up to the defendant to raise a timeliness defense," 306 F. Supp. 3d at 205, and "[i]n the mine run of cases," courts should rely "on the adversarial process to raise any non-jurisdictional issues in dispute." *Id.* at 208. But the District Court opined that *sua sponte* invocation of limitations could be warranted in certain "special circumstances." *Id.* at 208-09. If this Court affirms the judgment below — and, as Part I explains, it should not — this Court should make clear that *sua sponte* invocation of limitations is the exception, not the rule, in cases under the FSIA exception for state sponsors of terrorism, and is appropriate only in the kind of "special circumstances" identified by the District Court in this case. Even if the

FSIA does not foreclose such exercises of discretion, it should be exercised sparingly lest district courts frustrate the unambiguous purposes of the statute.

Chief among the "special circumstances" here was the *Maalouf* plaintiffs' concession in the District Court that their claims were "plainly untimely," so that the District Court did not need to consider evidence, hold a hearing, or undertake any meaningful legal analysis in order to decide whether the statute of limitations barred the action. *Id.* at 210-11. *Maalouf* involved two follow-on 2016 lawsuits regarding the 1983 and 1984 Beirut Embassy bombings. The lawsuits were nearly identical to two predecessor cases filed eight and fourteen years previously. *See Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011) (filed in 2008); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105 (D.D.C. 2005) (filed in 2002). Final judgments had been entered in the *Salazar* and *Doe* cases in May 2005 and May 2013. The suits in *Maalouf* were not filed until over three decades after the Beirut bombings and more than two decades after the expiration of the limitations period. Further, as follow-on cases, the suits in *Maalouf* relied for most of their allegations on prior litigation rather than newly discovered evidence. 306 F. Supp. 3d at 211. The District Court opined that "where 'the facts supporting the statute of limitations defense are set forth in the papers plaintiff[s] [themselves] submitted,'" it would "not grant default judgments because of the patent untimeliness of these actions." *Id.* at 212 (citations and internal quotation marks omitted).

In other words, *sua sponte* invocation of § 1605A(b) was appropriate only because the untimeliness of the entire litigation was manifestly apparent on the face of plaintiffs' complaint. Thus, if upheld, the District Court's ruling should be taken to stand for a limited proposition: that *sua sponte* consideration of the statute of limitations is permissible only when there is no reasonable argument against invoking limitations. By analogy, in other contexts federal courts exercise discretion to dismiss *sua sponte* patently frivolous claims (subject to a right to be heard and to contest the dismissal), as the District Court noted. *See* 306 F. Supp. 3d at 210 (citing *Buchanan v. Manley*, 145 F.3d 386, 388 n.4 (D.C. Cir. 1998) (*per curiam*) ("Several circuits nevertheless have allowed the *sua sponte* dismissal of a complaint as frivolous based on an affirmative defense that appears on the face of the complaint.")).

If this Court affirms the judgment below, it should do at most on those narrow grounds, and leave for another day whether it will ever be appropriate for a district court to invoke § 1605A(b) 's affirmative defense *sua sponte* without those "special circumstances." After all, the "interests of the judiciary" relied upon in *Maalouf*, 306 F. Supp. 3d at 209, could hardly justify such an unnecessary (and potentially burdensome) exercise of discretion when it would consume scarce judicial resources, particularly to benefit a defaulting defendant that is a designated state sponsor of terrorism and has deliberately chosen not to appear.

To that end, some of the "special circumstances" present in *Maalouf* that may not exist in other cases include:

● In *Maalouf*, the plaintiffs sought to "piggyback" on the stale *Doe* and *Salazar* judgments and rely on those cases for most of their evidence. The District Court reasons that such an approach was contrary to the FSIA's requirement that plaintiffs establish their "claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). *See* 306 F. Supp. 3d at 210 (this "independent screening requirement" cuts against the plaintiffs in *Maalouf* because it "places the burden on the plaintiff to establish her claim even in the case of a default"). But an entirely different conclusion is warranted where plaintiffs do not rely simply on stale prior judgments, but rather seek to introduce new evidence of their own, in new cases involving new terrorist attacks. What the District Court described as "strong policies favoring the resolution of genuine disputes on their merits" (*id.* at 210) (internal quotation marks and citation omitted) weigh in favor of allowing such plaintiffs' claims to proceed, rather than invoking limitations *sua sponte*. Judicial time and resources are better spent, and any comity appropriately provided, weighing the evidence on the substantive issues in the case.

● In *Maalouf*, the limitations defense was a dispositive issue for all claims. The "interests of the judiciary" (*id.* at 209-10) do not warrant *sua sponte* consideration of limitations where that question will not terminate the litigation

before the court. Nor do comity concerns justify *sua sponte* consideration where limitations is merely a question of ***incremental*** liability on the part of the foreign state.

● Finally, unlike in *Maalouf*, plaintiffs in other cases may be entitled to pursue statutory and non-statutory tolling claims that would require a district court to engage in detailed factual analysis to ascertain whether claims that appear to be untimely are indeed barred by § 1605A(b) . In such circumstances, there would be far less justification for a district court to *sua sponte* raise an affirmative defense that would itself require extensive fact-finding before it could properly be resolved.

For all these reasons, this case presents unique and special circumstances that are not necessarily common to all cases in which district courts might *sua sponte* consider the limitations period created by § 1605A(b). If, contra the analysis in Part I and the arguments offered by plaintiffs-appellants, the judgment below is affirmed, this Court should limit such a ruling to the "special circumstances" identified by the District Court in this case, and should emphasize that *sua sponte* invocation of § 1605A(b)'s limitations period may not necessarily be appropriate otherwise.

CONCLUSION

The judgment below should be reversed. If the judgment below is affirmed, this Court should make clear that its decision is limited to the "special circumstances" identified by the District Court in this case.

Dated: August 7, 2018

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,241 words, excluding the exempted parts of the brief.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: August 7, 2018

/s/ Jonathan S. Massey
Jonathan S. Massey

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 7th day of August 2018, a copy of the foregoing was filed electronically through the Court's CM/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. DHL delivery to the Foreign Ministry of Iran of the summonses and complaints in these cases in the district court was refused.

Dated: August 7, 2018

/s/ Jonathan S. Massey
Jonathan S. Massey