07-2579-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RA'ED IBRAHIM MOHAMAD MATAR, on behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalia, MAHMOUD SUBHAI AL HUWEITI, on behalf of himself and his deceased wife Muna Fahmi Al Huweiti, their deceased sons Subhai and Mohammed and their injured children, Jihad, Tariq, Khamis, and Eman and MARWAN ZEINO, on his own behalf,

Plaintiffs-Appellants,

—against—

AVRAHAM DICHTER, former Director of Israel's General Security Service,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE AVRAHAM DICHTER

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PRELIMINARY STATEMENT

This is a political case by Palestinian plaintiffs challenging an Israeli attack on a Hamas leader in Gaza. Ostensibly a suit against a former Israeli official who appeared fleetingly in New York for a speech, it is one of a series of cases attacking the State of Israel's defense against terrorism. The Complaint names the defendant by his position, former Director of Israel's Security Agency ("ISA"). And it spotlights the official Israeli policy that purportedly gives rise to his liability, military action targeted at terrorist leaders. The State of Israel has formally advised the Department of State that Appellants' claims improperly involve "the U.S. courts in evaluating Israeli policies and operations in the context of an continuing armed conflict against terrorist operatives." A-044. Like every other court to consider these assaults by proxy on Israeli policy, the District Court correctly found that sovereign immunity barred the suit.

The District Court also rightly determined that Appellants' claims raise political questions. At the same time the President of the United States is urging the Palestinian people, in this "moment of choice," to embrace the more peaceful vision of President Abbas rather than the terrorism of Hamas,[1] Appellants ask a

[1] President Bush Discusses the Middle East, July 16, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/07/20070716-7.html. This Court may take judicial notice of the governmental pronouncements cited here. Fed. R. Evid. 201.

U.S. court to proclaim that Israel's military operation against a Hamas leader is a war crime. Israel has officially protested that such judicial intervention in foreign policy "risks complicating or undermining the important political and diplomatic avenues that are currently being pursued" to end terrorism and bring peace to the region. A-044. In its Statement of Interest filed below, the U.S. Department of State echoed that concern. In the Department's view, allowing this case to proceed "would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all." SA-017. Refusing to "ignore the potential impact of this litigation on the Middle East's delicate diplomacy," *id.*, the District Court prudently declined Appellants' invitation to enter this political realm.

STATEMENT OF FACTS

Since it was founded more than 50 years ago, Israel has weathered attacks threatening its very right to exist. The United States has stood with Israel through five declared wars and repeated terrorist assaults. With U.S. support, Israel has signed peace treaties with Egypt and Jordan and has established diplomatic relations with several other countries in the Middle East. Further, the United States has brokered many discussions to limit hostilities -- some successful, some not. With regard to the Israeli-Palestinian relationship, the United States has played a

key role in the diplomatic efforts, from the Declaration of Principles by Israel and the PLO at the White House in 1993 to this day.

But a comprehensive peace, an end to the violence, has proven elusive. Since September 2000, for example, terrorists have killed more than 1,136 Israelis[2] and injured more than 7,633, many critically.[3] With a population of only 7.1 million -- about that of Virginia -- Israel's casualties have been staggering. But the numbers of dead and injured do not convey the full impact of the terror – the children orphaned, the livelihoods lost, the fear aroused.

From 2000 to 2005, defendant Dichter headed the Israeli Security Agency ("ISA"), which provided intelligence for Israel's defense against terrorist attacks by Hamas and others. This suit is a political broadside against that defense. It assails what it terms Israel's "targeted assassinations" of terrorists, characterizing them as systematic extra-judicial executions. A-018 ¶ 17. The Complaint accuses Israel of "'preemptively' execut[ing] Palestinians it has alleged are involved in terrorism without bringing the victims before a fair legal process to examine the

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[2] *See* Israel Ministry of Foreign Affairs, *Victims of Palestinian Violence and Terrorism Since September 2000*, *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm (last updated Oct. 2007).

[3] *See* Israel Defense Forces, *Casualties Since September 29, 2000*, *available at* http://www1.idf.il/SIP_STORAGE/DOVER/files/7/21827.doc (last updated Jan. 2006).

allegations against them." *Id.* But Appellants do not claim themselves to have been targeted as terrorists. Rather, they claim to be civilians injured when an Israeli attack on the military leader of Hamas was allegedly indiscriminate. They assert that this attack constituted a war crime, a crime against humanity and extrajudicial killing, among other things. A-025-036 ¶¶ 64-128.

Rather than sue Israel directly, however, Appellants targeted Mr. Dichter. The fortuity of his brief presence in New York apparently was so enticing that Appellants sued him even though they could connect him to this attack at best indirectly, and only "on information and belief." A-021-023 ¶¶ 37-40, 42-45. And even on information and belief, Appellants could not allege that Mr. Dichter knew civilians were present at the time of the attack. A-022 ¶ 40 (alleging "actual and/or constructive notice"). Indeed, despite the hyperbole in Appellants' brief, the Complaint does not allege a single fact suggesting that Mr. Dichter -- not an officer of the IDF -- personally intended IDF forces to drop a one-ton bomb on a building in Gaza or knew that IDF was going to do so. The Complaint does not allege that Mr. Dichter was present at the scene, flew the plane, or gave the final order to proceed based on the conditions in Gaza. To the contrary, the Complaint acknowledges that others carried out the attack. A-013 ¶ 1. Nonetheless, Appellants misleadingly suggest to this Court that the key issue is whether Mr. Dichter was "lawfully authorized to drop a one-ton bomb." App. Br. at 5. Indeed,

it is telling that in his parallel suit in Israel, plaintiff Matar did not even name Mr. Dichter as a defendant, and instead sued only Israel and officers of the Israeli Defense Force.[4]

As tragic as this incident is, all States have a right and duty to protect their citizens against terrorism. *See* United Nations S.C. Res. 1373 (2001). Congress has formally recognized Israel's operations as "an effort to defend itself against the unspeakable horrors of ongoing terrorism . . . aimed only at dismantling the terrorist infrastructure in the Palestinian areas." H. Con. Res. 392, 107th Cong. (2002); *see also* H. Con. Res. 294, 108th Cong. (2003) (terrorist attacks on Israel "justif[y] Israeli counterterrorist operations as the response of a legitimate government defending its citizens"). As to this particular event, the Israeli government in 2002 defended it as a counterterrorist operation, took full responsibility and expressed regret for the loss of life.[5] In 2006, Israel reiterated that the attack was "approved by the Government of Israel" and ratified any actions Mr. Dichter undertook in connection with it. A-044.

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[4] *Matar Mohammed v. The Center District State Attorney*, Kfar Sava Court, Case No. A 7607/03.

[5] *See, e.g.*, Israel Ministry of Foreign Affairs, Statement by Prime Minister Sharon, July 23, 2002, *available at* http://www.mfa.gov.il/MFA/Government/Communiques/2002/Statement%20by%20PM%20Sharon%20-%20July%2023-%202002 ("Yesterday, we struck at the most senior member of Hamas' operational side. . . . This action, to my knowledge, is one of our major successes. . . .").

SUMMARY OF THE ARGUMENT

In appealing the District Court's rulings, Appellants first suggest that *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), effectively ruled out application of the Foreign Sovereign Immunities Act ("FSIA") to foreign officials. However, this Court recently observed that the issue is still open in this Circuit. *Kensington Int'l Ltd. v. Itoua*, --- F.3d ---, 2007 WL 3024817, at *10 (2d Cir. Oct. 18, 2007). Indeed, contrary to Appellants' claim that the language of the FSIA unequivocally denies sovereign immunity to employees of foreign governments, this Court found that the statute does not "expressly include or exclude individual officials." *Id.* Given that states can act only through their officials, extinguishing the immunity of individual officers for their official acts would have left a gaping loophole in the statute. Plaintiffs could evade sovereign immunity by the simple expedient of suing officials for allegedly objectionable policies. Common sense suggests that Congress was not so feckless as to enact an inoperative statute.

Appellants next assert that the right of a foreign official to invoke sovereign immunity for official actions in service of his government disappears the moment the official retires. Appellants failed to preserve this argument below, and therefore cannot advance it here. Appellants also overlook a fatal flaw in the argument: Mr. Dichter is not a former official. As Minister for Public Security, he is a current member of the Israeli Cabinet. These insurmountable barriers aside,

Appellants' legal premise is simply wrong. Appellants do not and cannot cite a single case holding that sovereign immunity is unavailable to former officials. If the law were as Appellants claim, the statute would be entitled the Foreign Stay of Prosecution Act, rather than the Foreign Sovereign Immunities Act.

Appellants' fallback arguments are no more plausible. Despite identifying Mr. Dichter in the Complaint by his official position and contending that he operated under color of Israeli law, despite alleging that Mr. Dichter -- though not a military officer -- had command responsibility for a military operation, and despite assailing Israel's "systematic" policy of targeted attacks on terrorist leaders, Appellants nonetheless assert that Mr. Dichter did not act in an official capacity. Their rationale is that Mr. Dichter's alleged acts could not have been official because they were illegal, and thus by definition were beyond his authority. But experience teaches that lawsuits are not a congratulatory exercise. Plaintiffs sue for conduct alleged to be wrongful. Appellants thus would leave the FSIA unavailable precisely where needed.

Maintaining this indifference to common sense, Appellants urge the Court to ignore what the *Government of Israel* says it authorized Mr. Dichter to do, and to rely instead on what *Appellants* say his authority *should* have been. Appellants thus brush off the confirmation of Israel's Ambassador that this suit "challenge[s] sovereign actions *of the State of Israel, approved by the government of Israel* in

defense of its citizens against terrorist attacks." A-044 (emphasis supplied). Moreover, while trumpeting the State Department's criticism of Israel in 2002, Appellants neglect the Department's contemporaneous affirmation that the Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq.*, required it to report any use of U.S. weapons other than in legitimate self-defense, and it had issued no report here.[6] Nor do Appellants address the Department's endorsement of Israel's conclusion that any actions Mr. Dichter took in connection with this attack were official acts on behalf of Israel. A-136. Appellants cannot override these governmental judgments by artful pleading. On the issue whether Israel authorized Mr. Dichter's actions, the position of the "authorizer" prevails. In the conflict between Appellants' foreign policy views and those of the President, the views of the Executive Branch have precedence.

The ramifications of Appellants' arguments to the contrary are startling. If Appellants were correct, then when Tony Blair came to New York, Iraqi plaintiffs could serve a complaint charging command responsibility for alleged British war crimes and extrajudicial killings in Iraq. After all, according to Appellants, as an individual official, Mr. Blair could not invoke the FSIA. Further, on Appellants' theory, even if he could, he ceded that immunity when he stepped down as Prime

[6] U.S. Department of State Daily Press Briefing, Jul. 23, 2002, *available at* http://www.state.gov/r/pa/prs/dpb/2002/12098.htm.

Minister. And in any event, sovereign immunity would not apply, in Appellants' view, because the complaint presupposed here alleged illegal conduct, which could not be an official act. Nor would the political question doctrine be available on Appellants' approach. If courts can second-guess the military policies of one democratic ally in an ongoing conflict, why not those of another?

This brief will refute each of Appellants' arguments in turn, but this particularized exercise should not obscure the overarching, common-sense point. Article III courts are not the appropriate place for plaintiffs from overseas, who allegedly were injured overseas, to challenge the way a democratic U.S. ally defends itself overseas, against terrorist attacks overseas. The District Court's judgment dismissing the Complaint should be affirmed.

ARGUMENT

As convenient a foil as Mr. Dichter may be by virtue of his short-lived presence in New York, suing him instead of Israel cannot avoid the line of cases refusing to nullify the FSIA and blocking efforts to drag U.S. courts into the Middle East conflict. The District Court for the District of Columbia, in another suit by Appellants' counsel, ruled that the FSIA protected a former Israeli military officer from claims parallel to those advanced here. *Belhas v. Ya'alon*, 466 F. Supp. 2d 127, 133 (D.D.C. 2006). That same Court had previously rejected a

similar suit alleging that Israel and current and former senior officials committed war crimes and genocide in the West Bank and Gaza. In addition to holding that the FSIA precluded those claims, the Court invoked the political question doctrine, finding that the claims, at their core, were "peculiarly volatile, undeniably political, and ultimately nonjusticiable." *Doe v. State of Israel,* 400 F. Supp. 2d 86, 112 (D.D.C. 2005). The Court of Appeals for the Ninth Circuit reached the same judgment, affirming dismissal of an effort, again by Appellants' counsel here, to bar Caterpillar from selling bulldozers to Israel for use in the war on terror. *Corrie v. Caterpillar, Inc.*, --- F.3d ---, 2007 WL 2694701 (9th Cir. Sept. 17, 2007). Any decision, the Court found, was beyond the role of the judiciary and should emanate from the political branches. *Id.* at *7.

The concerns expressed in those cases have the same, if not greater force here. As the District Court found, recognizing Appellants' claims "would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the [FSIA] barred them from doing directly." SA-006-007 (quoting *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990)). The District Court also properly took account of the political and diplomatic repercussions of this case. SA-015-019. The Court understood that accepting Appellants' arguments would conflict with the conclusions of Congress and the Executive Branch and override the position of the Israeli government. In addition,

it would set a precedent of individual liability for official government policies and military decisions that could jeopardize American soldiers and government officials.[7] Encouraging such suits is contrary to the stated policy of the United States.

I. THE DISTRICT COURT CORRECTLY FOUND THAT MR. DICHTER IS IMMUNE FROM SUIT

A. This Case is in Substance a Suit Against Israel, Subject to the Foreign Sovereign Immunities Act

The FSIA bars suits against foreign states and their "agencies and instrumentalities." 28 U.S.C. § 1603. Because of this statute, Appellants could not sue Israel. Thus, Appellants proceeded more obliquely, suing Mr. Dichter, former head of Israel's Security Agency and current Minister for Public Security, for actions on behalf of Israel. The law, however, turns on substance, not form.

Sovereign immunity extends to government officers for acts on behalf of the state, as opposed to private actions on their own behalf. The District Court marshaled persuasive authority that individuals acting in their official capacities are "agencies" or "instrumentalities" of a foreign state within the meaning of 28 U.S.C. § 1603. SA-006. The Court also reasoned that because a state can only act

[7] Indeed, the very counsel representing Appellants in this case sued former Secretary of Defense Rumsfeld, former Attorney General Gonzales and others in Germany -- again, unsuccessfully -- for actions relating to Iraq and the U.S. war on terror. *See* Center for Constitutional Rights website, http://www.democracy inaction.org/dia/organizations/ccr/campaign.jsp?campaign_KEY=325.

through its officials, "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Id.* (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005)).

Prior to the FSIA, foreign officials had immunity under common law for officials acts on behalf of their governments. As the Department of State pointed out in its Statement of Interest below, neither evidence nor logic supports the claim that Congress, in enacting the FSIA, intended to eliminate *sub silentio* that long-recognized immunity for foreign officials. A-123. In the Government's words, "[g]iven that Congress expressly sought to preserve the pre-existing immunity rule for foreign states, it would be incongruous to believe that Congress simultaneously abrogated the long-standing immunity of individual foreign officials." A-125.[8]

The State Department and Mr. Dichter agreed below, and the District Court found, that unless sovereign immunity protects individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA. The State Department reasoned that the FSIA left intact the pre-existing common law protection of foreign officials sued for acts on behalf of their government. A-123-26. Mr. Dichter did not dispute the Government's approach,

[8] The District Court recognized that "[w]ithdrawal of such immunity would constitute a deviation from the international norm." SA-010. As the State Department noted, customary international law has consistently recognized the immunity of foreign officials for their official acts. A-133-35.

but emphasized that a foreign officer sued for official acts stands in the shoes of his government, and thus falls within the protection of the FSIA for "foreign states" and their instrumentalities. 28 U.S.C. § 1603(a). Almost all the case law, including the decision below, follows this rationale. *See* SA-007 (citing cases from five Circuits and numerous district court decisions in this Circuit).[9] But on the critical substantive point, Mr. Dichter and the State Department are in complete accord: a suit against a foreign official for acts on behalf of his government is a suit against the foreign state. A-115. The only arguable shade of difference concerns derivation, not application -- whether, under the *statute* as under international law, a foreign state necessarily includes the individuals through whom it acts, *see* United Nations International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8 (2001) ("the conduct of a person . . . shall be considered the act of a State under international law if the person . . . is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"); or whether that principle derives from still extant *common law* in line with international law. In Defendant's view, there is no practical divergence. The result is the same either way.

[9] Appellants rely on the Seventh Circuit's lone decision to the contrary in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), which found that individuals did not fall within the FSIA's definitions of agencies or instrumentalities. The Court, however, had no occasion to address the Department of State's view that official immunity based on common law survived passage of the FSIA.

This Court's decision in *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), is consistent with both approaches to the statute and with the unitary result they yield -- extending immunity to foreign officials. But it is difficult to reconcile the decision with the elimination of immunity that Appellants urge. *Tachiona* suggested, but did not decide, that common law immunity for heads of state survived the FSIA, even though the statute was silent on the issue. *Id.* at 220-21. As implausible as it is to contend that Congress abrogated immunity for all foreign officials without saying so, it is even more implausible to argue that it intended to extinguish entirely the immunity of some officials but not others, drawing fine but wholly implicit lines. In any event, it would be odd to read a decision directed toward extending immunity to foreign officials as eliminating it and thereby leaving them vulnerable to political claims in U.S. courts.

In *Kensington Int'l Ltd. v. Itoua*, this Court reaffirmed that the question whether the FSIA applies to individual officials remains open in this Circuit. 2007 WL 3024817, at *10. If the statute were as pellucid as Appellants claim, the Court would likely have noted its clear command. To the contrary, the Court held that the statute on its face did not "expressly include or exclude individual officials." *Id.* Because the District Court in *Kensington* had not addressed whether the defendant there fell within the immunity the statute extends to foreign states, the Court remanded for that determination, observing that the burden was on the

defendant to make a *prima facie* case.[10] In this case, the District Court did address the issue, and found that Appellants' attacks on Israeli policy were in substance advanced against the state. SA-011. That finding was correct. It accords with the stated position of the Israeli Government, *see* A-044 (this action is a "a suit against Israel itself"), and of the Department of State. A-148. There was not merely *prima facie* evidence, but definitive confirmation that this action is in substance a suit against Israel.

This Court therefore should resolve the issue left open in *Kensington* and hold that sovereign immunity protects foreign officials acting on behalf of their governments, just as it protects those governments from suit based on the officials' acts. *See, e.g.*, *In re Terrorist Attacks*, 392 F. Supp. 2d at 551 ("a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly"); *Leutwyler v. Office of her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001) ("individuals . . . are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities"); *cf. Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996). Logic compels this result.

[10] The defendant in *Kensington* had not claimed he was entitled to immunity under common law if the FSIA did not apply. Here, Mr. Dichter argued below that sovereign immunity bars this suit whether the protection is rooted in the FSIA or in pre-existing common law.

Sovereign immunity would offer foreign states scant protection if plaintiffs could evade it by suing a senior government official. When a lawsuit challenges conduct of the state, the plaintiff cannot evade sovereign immunity by procedural artifice.

Because this case is effectively against a foreign sovereign, the Court lacks subject matter jurisdiction unless one of the exceptions in the FSIA applies. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). As nothing in the Complaint touches on those exceptions, Appellants invent new ones. First, they claim that sovereign immunity extends only to current, not former officials. Second, they assert that Mr. Dichter did not act in an official capacity because Appellants alleged that he acted illegally. And third, they contend that the Torture Victim Protection Act ("TVPA") preempts the Foreign Sovereign Immunities Act. None of these arguments has the slightest merit.

B. Mr. Dichter, as a Former Head of the ISA and a Current Cabinet Minister, is Immune from Suit for His Official Acts

1. Appellants Failed Properly to Raise Below the Argument that the FSIA Does Not Apply to Former Officials

For the first time on this appeal, Appellants assert that Mr. Dichter cannot invoke the FSIA because he was not a government employee at the time they filed their Complaint. As a general rule, parties cannot raise issues on appeal that they failed to raise in the District Court. *See First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 52 (2d Cir. 2002); *Kraebel v. New York City Dep't of Housing*

Pres. And Dev., 959 F.2d 395, 401 (2d Cir. 1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it."). Indeed, this Court has required not just that appellants raise an issue below, but that they do so with sufficient clarity to allow the District Court to consider and rule on it. *See Caiola v. Citibank, N.A.*, 295 F.3d 312, 327 (2d Cir. 2002).[11] In their extensive filings below, the only arguable reference to this argument was in a footnote in the Appellants' response to the Department of State. Pl. Response to the Statement of Interest of the United States, at 16 n.15. As Appellants themselves argued below, "[a]n argument raised solely in footnote is improper and should not be considered. *See, e.g., United States v. Restrepo,* 986 F.2d 1462, 1463 (2d Cir. 1993); *Associated Press v. U.S. Department of Defense*, 410 F. Supp. 2d 147, 153 (S.D.N.Y. 2006)." Pl. Mem. of Law in Support of Opposition to Mot. to Dismiss, at 2 n.2. Having neglected to advance the point with the requisite clarity, Appellants have waived it.

[11] Neither of the exceptions to the general rule applies. With no excuse for foregoing this issue, Appellants cannot claim that considering it is "necessary to avoid manifest injustice." *Caiola*, 295 F.2d at 327 (quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996)). Nor can Appellants claim that this issue is "purely legal," *id.*, while complaining that the District Court made factual findings intertwined with it.

2. The FSIA Applies to Former Government Officials

Passing up this argument in the District Court was the right call. Appellants cite no case, nor have we found one, holding that the FSIA is unavailable to former officials. Appellants seek instead to argue by analogy from *Dole Food Co. v. Patrickson,* 538 U.S. 468 (2003). The analogy is inapt. The Court in *Dole Food* had to determine whether a corporation was an instrumentality of the state under 28 U.S.C. § 1603 because a "majority of [its] shares or other ownership interest is owned by a foreign state." The question presented was whether, in making that determination, the Court should consider the stock ownership as of the time of the lawsuit or of the conduct challenged. The Court held that the foreign government must own a majority of the stock at the time of the lawsuit, because immunity extends to an entity that "is" an instrumentality of the foreign state. Appellants seek to extend this analysis to foreign officials, arguing that immunity turns on whether they are government officials at the time of the suit. The argument misses the point of *Dole.*

In assessing stock ownership and control by foreign governments, the Court emphasized that "[i]n issues of corporate law structure often matters." 538 U.S. at 474. Under accepted principles of corporate law, current shareholders are insulated from direct liability for a judgment against a corporation, but may ultimately bear the burden through diminished value of their stock. Former

shareholders are not liable directly or indirectly. And because they are not liable, sovereign immunity is unnecessary to protect a former shareholder that is a sovereign state. There is no doctrine of *respondeat superior* for former shareholders. If the *current* shareholders are not sovereign states, then the lawsuit is not in substance one against a state entity.

Foreign officials sued for implementing the policy of the foreign state present a different situation. Corporate structure and formality are irrelevant. Although Appellants assert that the state does not bear potential liability for a suit against a former official, they cite nothing to support that assertion. In fact, the black letter law is that an employer is generally liable for the acts of employees undertaken on its behalf. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."); Restatement (Third) of Agency § 7.07. The same rule applies in international law: as the State Department explained below, the principles of state responsibility for the acts of officials "are not in any way affected by the change or termination of the official functions of the representatives concerned." A-135 (quoting 1991 Report of the International Law Commission to the United Nations General Assembly).

Corporate formality aside, the point here is that a case against a former government employee for official acts on behalf of the foreign state is a suit against the state itself. The Court in *Dole* recognized the importance of substance over form in discussing the immunity of U.S. officials from suit for their official acts, which is necessary to "prevent the threat of suit from 'crippl[ing] the proper and effective administration of public affairs.'" *Dole*, 538 U.S. at 479. In suggesting that foreign sovereign immunity is not meant to avoid chilling the conduct of foreign states, the Court was speaking in the context of a corporate entity in commerce. The Court in no sense blessed a cavalcade of lawsuits against former officials for carrying out critical foreign and military policies of their governments, where lawsuits could potentially cripple the administration of public affairs.

The focus in *Dole* on the conduct of business was not surprising, given that the analysis whether an entity is an "instrumentality" of a foreign state has generally occurred in the commercial arena. Where the defendant performs a core governmental function, this Court has treated the suit as equivalent to one against the foreign state itself, rather than against an instrumentality. *See Garb v. Republic of Poland*, 440 F.3d 579, 595 (2d Cir. 2006). Mr. Dichter, as head of the ISA, performed core governmental functions. Thus, Appellants' disquisition on the meaning of "is" in Section 1603 is beside the point.

Not surprisingly, Appellants cite no case holding that sovereign immunity is unavailable to former government officials. The one court that considered the argument rejected it. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 788-89 (S.D.N.Y. 2005) (relevant inquiry is "whether the acts in question were undertaken at a time when the individual was acting in an official capacity"). Many other cases have recognized sovereign immunity for former officials, with no intimation that their current employment status was an obstacle. *See, e.g.*, *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Belhas*, 466 F. Supp. 2d at 130; *Doe*, 400 F. Supp. 2d at 104-105.

Were the law otherwise, foreign sovereign immunity would be largely useless. To attack the official policies of a foreign nation, a plaintiff could simply wait for some official tangentially linked to those policies to retire or lose an election. Democratic governments cannot bind employees to lifetime servitude, yet a state's immunity from challenges to its official policies would evaporate the moment the officials through whom it necessarily acts left government service. As this case illustrates, plaintiffs would claim free rein to target some former official, no matter how remote his or her connection with the offending policy, so long as they could obtain personal service. Sovereign immunity would be a misnomer, for the FSIA would no longer provide immunity for foreign states. At best it would afford a stay of prosecution, and not much of one at that.

3. Mr. Dichter is a Current Official of the Israeli Government

In any event, Mr. Dichter is not a former official. He is currently Minister for Public Security, a Cabinet position in the Israeli government.[12] Appellants cannot claim that Mr. Dichter's status as a private citizen when the Complaint was filed is determinative. As flimsy as the rationale is for denying sovereign immunity to former officials, it would make even less sense to freeze time at the filing of a complaint and ignore the defendant's subsequent ascension to high public office. On that assumption, a state, absent immunity, could be held responsible for a current employee's actions, but if the employee left her job on Tuesday, was sued on Wednesday, and returned on Thursday, the state would not be responsible for those same actions. That result lacks support in law or logic.

4. Appellants Sued Mr. Dichter in his Official Capacity

The District Court did have the opportunity to consider -- and reject -- Appellants' argument that the Complaint does not name Mr. Dichter in his official capacity because it alleges that he acted illegally. As the District Court found, "[t]he caption in this action identifies Dichter as 'former Director of Israel's General Security Service,' and the body of the Complaint alleges that Dichter participated in formulating and implementing Israel's official anti-terrorist

[12] *See* State of Israel, Ministry of Public Security, *available at* http://www.mops.gov.il/BPEng/About+MOPS/TheMinister/.

strategy." SA-011. Moreover, Appellants alleged that Mr. Dichter, though not a military officer, "had command responsibility" for the attack by Israel's military, A-014 ¶ 2, and "participated . . . in the decision" to drop the bomb on an apartment building in Gaza, *id.*, a military decision implemented by military personnel in the course of a military operation. These allegations led the District Court to conclude that, "[n]othing in the Complaint permits an inference that Dichter's alleged conduct was 'personal and private in nature.'" SA-011. On the contrary, the Complaint alleges that Mr. Dichter acted "under color of law of the State of Israel." A-025, A-029 ¶¶ 62, 84.

Nor can Appellants claim that Mr. Dichter's actions were somehow "unratified" by his government. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995). In fact, the government of Israel took full responsibility for the Gaza attack at the time. *See* footnote 5, *supra*. Thereafter, as noted, in formal communications with the Department of State, Israel confirmed that any actions Mr. Dichter took were "in the course of [his] official duties, and in furtherance of official policies of the State of Israel." A-044. As a matter of policy, comity, and common sense, the District Court properly accorded "'great weight' to the opinion of a sovereign state regarding whether one of its officials was acting within his official scope." SA-011. *Accord In re Terrorist Attacks*, 392 F. Supp. 2d at 551; *Leutwyler*, 184 F. Supp. 2d at 287; *Rein v. Rein*, No. 95 Civ. 4030 (SHS), 1996 WL 273993, at *2

(S.D.N.Y. May 23, 1996). Added to that weight are the conclusions of the State Department, which has agreed that the view of the Israeli government as to what it authorized and ratified receives great weight. A-139.

Alleging illegality does not defeat immunity for official acts. Foreign states themselves can claim immunity for alleged violations of national or international law. *Smith*, 101 F.3d at 245; *Hirsch v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997), *aff'd*, 133 F.3d 907 (2d Cir. 1997); *accord Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989) ("[I]mmunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.").[13] As for foreign officials, the legality of their conduct may be one piece of evidence in determining whether an official acted on behalf of the government, but the more significant -- potentially definitive

[13] Appellants ignore this line of cases in invoking Nuremberg to argue that "consideration of international law . . . confirms the principle that former officials are not immune for *jus cogens* violations." App. Br. at 23-25. Apart from the offensiveness of invoking Nuremberg in a case involving Israel, the reference is entirely inapt. The issue at Nuremberg was not whether Nazi war criminals were immune from private lawsuits under the FSIA, but whether they should answer to a world tribunal. *Cf. Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001) ("although *jus cogens* norms may address sovereign immunity in contexts where the question is whether international law itself provides immunity, e.g., the Nuremberg proceedings," they "do not require Congress (or any government) to create jurisdiction" in its own courts). The U.S. courts have repeatedly confirmed that sovereign immunity under the FSIA survives even *jus cogens* allegations. *Id.*; *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173, 1174 n.1 (D.C. Cir. 1994).

-- evidence is the position of that government itself. Its view as to what it authorized is authoritative.

In this regard, Appellants miscite *Jungquist v. Al Nayhan*, 115 F.3d 1020 (D.C. Cir. 1997). The Court found there that the defendant was not entitled to immunity precisely because, in contrast to the Israeli government here, Abu Dhabi "would have no part" in the actions at issue, that is, the government neither authorized nor ratified them. 115 F.3d at 1028. It followed that the acts were not in furtherance of the interests of the sovereign but were "personal and private action." *Id.* Nowhere does the case state, imply, or even hint that an allegation of illegality nullifies sovereign immunity for actions authorized and ratified by foreign governments.

Likewise, in *Doe v. Qi*, on which Appellants rely, the Court quoted the statement in the Senate Report on the Torture Victim Protection Act ("TVPA") that "FSIA immunity would extend to an individual if the state 'admit[ted] some knowledge or authorization of relevant acts.'" 349 F. Supp. 2d 1258, 1288 n.20 (N.D. Cal. 2004) (quoting S. Rep. No. 102-249, at 8 (1991)). In that case, as well as the others Appellants cite, the government of the defendant official either denied that he acted within his authority, *see id.* at 1287; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994), or the government was silent, *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 n.10 (D. Mass. 1995), sometimes because the official did

not advance the claim, *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996); *see also Kadic*, 70 F.3d at 250 (finding that defendant's actions were "wholly unratified" by his government). If official capacity vanished when plaintiffs allege a lack of legal authority, these Courts would have had no reason even to consider the foreign state's position.

The judicial focus on substance over form, on whether the case against a foreign official is merely "a disguised action against the nation that he or she represents," *Park v. Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002), is consistent with the treatment of immunity under the Eleventh Amendment. The Supreme Court has recognized that if actions of a state official were deemed to fall outside official capacity simply because they violate the law, as Appellants urge, "a plaintiff would need only to claim a denial of rights protected or provided by statute in order to override sovereign immunity. Except in rare cases it would make the constitutional doctrine of sovereign immunity a nullity." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984). This Court has agreed. As Judge Learned Hand stated: "It can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine." *Gregoire v. Biddle*, 177

F.2d 579, 581 (2d Cir. 1949); *see Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (if official capacity was "coextensive with the official's lawful conduct, then immunity would be available only when it is not needed; in effect, the immunity doctrine would be completely abrogated"). As is the case under the Eleventh Amendment, conduct is in an official capacity under the FSIA if the actions were neither "personal nor private," but were undertaken only on behalf of the sovereign. SA-007; *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Ya'alon*, 466 F. Supp. 2d at 130-31.[14]

In particular, courts have confirmed that decisions authorizing military action to combat terrorist threats, and the intelligence underlying those decisions, are inherently official. Individual government employees are not personally liable even when civilians are harmed. In *El-Shifa Pharmaceutical Industries Co. v. United States*, 402 F. Supp. 2d 267, 275 (D.D.C. 2005), for example, the Court dismissed claims arising out of the President's decision to destroy a Sudanese pharmaceutical plant with cruise missiles, based on intelligence indicating it was a

[14] This approach is consistent with international law, which holds States responsible for actions of officials taken in their governmental rather than personal capacities, even if the officials exceeded their mandate or violated State law. *See* United Nations International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 7 (2001) ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*.") (emphasis added).

chemical weapons-related facility. The Court found that even though the President's conclusion may have been erroneous and the intelligence faulty, his decision nonetheless was a "policy judgment" fully within his authority as Commander in Chief of the armed forces, for which he enjoyed absolute immunity from suit. *Id.* at 271.

Similarly, in *Saltany v. Reagan,* 702 F. Supp. 319 (D.D.C. 1988), *aff'd in relevant part, rev'd in part,* 886 F.2d 438 (D.C. Cir. 1989), the Court rejected claims for civilian deaths and injuries resulting from U.S. military air strikes in Libya. Unfortunate as it was there -- and here -- that civilians were harmed, the Court found it "manifest" that "civilian or military officials of the United States government who are alleged to have planned and/or executed the air strikes [on Libya] ordered by the President . . . did so in their official capacities," and thus were entitled to immunity. *Id.* at 321. Under these principles, military and civilian leaders of our allies, when acting comparably on behalf of *their* states against terrorist threats, are engaged in official conduct and are entitled to immunity under the FSIA.

The District Court thus applied the proper test -- whether, based on the allegations of the Complaint, Mr. Dichter acted on behalf of Israel. The Court's conclusion that he did is unassailable.

C. The TVPA Does Not Preempt the Foreign Sovereign Immunities Act

The District Court properly held that the Torture Victim Protection Act does not strip sovereign immunity from foreign officials acting on behalf of their governments. The TVPA allows suits against certain officials who, acting with "actual authority," commit torture or extrajudicial killing. Therefore, Appellants assert, Congress must have intended to override sovereign immunity for such officials even if they did their government's bidding, or else no one could ever be liable. Seeking once again to put blinders on the Court, Appellants urge it to disregard the express statements in the legislative history of the TVPA that the statute did not displace sovereign immunity for foreign officials. Those statements are off-limits, Appellants say, because the statutory language purportedly makes clear that the TVPA preempts sovereign immunity. To hold otherwise, they claim, would emasculate the TVPA.

These arguments are overwrought. Leaving the FSIA intact does not doom all TVPA claims against foreign officials acting with "actual authority." To begin with, foreign governments can, and do, waive sovereign immunity or disavow the acts of their officials. *See, e.g.*, *Hilao*, 25 F.3d at 1472; *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992); *Doe v. Qi*, 349 F. Supp. 2d at 1287. As this Court stated in *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988), "[b]ecause it is the state that

gives the power to lead and the ensuing trappings of power – including immunity – the state may therefore take back that which it bestowed upon its erstwhile leaders." Moreover, the FSIA has important exceptions. For instance, it denies immunity to designated state sponsors of terror. As the Supreme Court has held, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The two statutes here can co-exist.

If Congress intended the uncommon result of overriding another statute, it would have said so in clear and unmistakable terms. But the language of the TVPA that Appellants deem unequivocal in fact says nothing at all about sovereign immunity. Nor have the courts discerned the clarity that Appellants herald. The TVPA has been on the books for 15 years, yet Appellants cite not a single case holding that it abrogates the FSIA. To the contrary, cases decided since the TVPA have recognized that sovereign immunity applies. *Belhas v. Ya'alon*, on which the District Court here relied, rejected the same argument, advanced by the same counsel, that the TVPA deprived an Israeli General of sovereign immunity for his official acts. 466 F. Supp. 2d at 131-32. Similarly, in *Doe v. Israel*, the Court held that sovereign immunity protected Israeli officials accused of violations of the TVPA. 400 F. Supp. 2d at 104. In *In re Terrorist Attacks*, the Court upheld

sovereign immunity for two Saudi princes accused of financing, conspiring to commit, and aiding and abetting terrorism in violation of the TVPA. 392 F. Supp. 2d at 553-54. And *Doe v. Qi* held that sovereign immunity would bar a claim against a foreign official under the TVPA if, as the Senate Report on the TVPA concluded, the official's government "admit[ted] some knowledge or authorization of relevant acts." 349 F. Supp. 2d at 1288 n.20 (quoting S. Rep. No. 102-249, at 8).

The Court in *Doe v. Qi* correctly read the legislative history. Congress made clear in enacting the TVPA that the Foreign Sovereign Immunities Act would provide official immunity in the rare cases where foreign states *did* invoke sovereign immunity on behalf of their officials and expressly confirmed authorization or ratification of the officials' acts. The House Report explained that "the TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976," H.R. Rep. No. 102-367(1), at 5, restrictions that could only relate to official immunity, since the Report also confirmed that the TVPA did not authorize suits against states themselves. *Id.* ("Only 'individuals,' not foreign states, can be sued under the bill."). The Senate Report was even more explicit, stating that "to avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state," which, as the *Qi* Court recognized, would require the state to affirm its "knowledge or authorization" of the acts at issue. S. Rep. No. 102-256

(1991). That is precisely what Israel did in this case, A-044, and precisely what distinguishes this case from those Appellants (and their proposed *amici*) cite.

Enactment of the Anti-Terrorism Act in October 1992, six months after adoption of the TVPA, further illuminates Congress's intent to preserve the FSIA. *See* Pub. L. 102-572, 106 Stat. 4506 (1992). The Anti-Terrorism Act provided U.S. citizens a remedy for terrorist acts. But the Act did not allow claims against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337. The Congressional reports on the Anti-Terrorism Act made clear that this restriction did not distinguish it from the TVPA or other laws. Rather, the Reports affirmed, "[t]his provision maintains the status quo, in accordance with the Foreign Sovereign Immunities Act, with respect to sovereign states and their officials." S. Rep. No. 102-342, at 47 (1992); H.R. Rep. No. 102-1040, at 7 (1992). Indeed, accepting Appellants' argument that the TVPA overrides sovereign immunity would mean that Congress gave foreign plaintiffs greater remedies under the TVPA than it gave U.S. plaintiffs under the Anti-Terrorism Act. That, too, offends common sense.

The claim of Appellants (and their proposed *amici*) that the District Court's opinion would have precluded other cases under the TVPA shortchanges the Court's careful reasoning. Indeed, in none of the cases Appellants (and their

proposed *amici*) assert the District Court's interpretation would have barred (App. Br. at 29-31, CJA Br. at 12-16) did a former official attempt to invoke sovereign immunity, as Mr. Dichter did here. In none did a foreign state clearly assert sovereign immunity to protect the former official. And in none did the foreign government confirm that it authorized the challenged conduct, that the individual acted in his official capacity in furtherance of governmental policy, and that the government ratified and accepted responsibility for those acts. *See, e.g., Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (sovereign immunity not claimed and government of El Salvador did not suggest it had authorized or ratified defendant's acts); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (same as to Chile); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (same as to Haiti); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (same as to Ethiopia); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) (same as to El Salvador); *see also Hilao*, 25 F.3d at 1472 (government of Philippines denied that official acted within his authority or was entitled to share the state's sovereign immunity).

At the head of the parade of TVPA claims the District Court's opinion supposedly bars is *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007). In that case, the plaintiffs alleged that a former Somalian defense minister and prime minister tortured and executed prisoners. Whatever the merits of those claims or the Court's disposition of them, it is not clear that the

result here dictated the result there. To be sure, the "Transitional Federal Institutions" (TFI) governing Somalia informed the Court that the defendant acted in his official capacity. *Id.* at *11. And the Court found that factor compelling in distinguishing cases where foreign states had disclaimed authorization or ratification. *Id.* at *13. But the TFI was, as described by the CIA, a "transitional governing entity with a five-year mandate . . . [which] continues to struggle to establish effective governance in the country."[15] *See also* U.S. Dep't of State, Consular Information Sheet, Oct. 4, 2007 (TFI established to guide country "through a transitional process" and "lacks governance capacity.").[16] However this issue might have affected the result in *Samantar*, this case -- involving a stable, democratically elected government of a U.S. ally -- is a far cry from that one. Upholding the District Court's decision here will not unleash the predicted legal apocalypse.

Beneath all Appellants' rhetorical excess, the fact remains that no reported case under the TVPA has proceeded against a foreign official where the official's government supported the invocation of sovereign immunity and took "ownership"

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[15] CIA World Fact Book, Somalia, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/so.html#Govt transitional.

[16] *Available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_1023.html. *See also* U.S. Dep't of State, Background Note, Somalia ("Although the U.S. never formally severed diplomatic relations with Somalia, the U.S. Embassy in Somalia has been closed since the collapse of the Siad Barre government in 1991") (*available at* http://www.state.gov/r/pa/ei/bgn/2863.htm).

of the acts alleged. Yet far from being "gutted" by this limitation, the TVPA has spawned substantial litigation, and, according to Appellants, the "majority of cases brought under the TVPA have permitted claims against former foreign officials to proceed." App. Br. at 29. To borrow a phrase from Mark Twain, Appellants' reports of the TVPA's "death are greatly exaggerated."

D. The District Court Did Not Abuse its Discretion in Denying Jurisdictional Discovery

Appellants assert they were entitled to jurisdictional discovery because the District Court considered the Israeli Ambassador's statement that Israel approved the military action in question "in defense of its citizens against terrorist attacks," that it was "undertaken by the State of Israel,"and that any actions of Mr. Dichter were "in the course of [his] official duties, and in furtherance of official policies of the State of Israel." A-043-044. Appellants argue that the Ambassador's letter was not qualified as a legal opinion, but was simply an assertion of fact, and therefore they were entitled to discovery.

The Ambassador's letter, however, was offered not as a legal opinion or as the statement of a fact witness, but as the official position of the State of Israel. Within the United States, Ambassadors are entitled to convey the official positions of the states they represent. *See*, *e.g.*, *Jota v. Texaco Inc.*, 157 F.3d 153, 163 (2d Cir. 1998) ("traditional authority of ambassadors [is] to represent the state's

position before foreign courts"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295-96 (11th Cir. 1999) (ambassadors represent "the sending State in the receiving State") (citation omitted). The Ambassador did what the Senate Report on the TVPA invited. On behalf of Israel, he confirmed the Government's knowledge and authorization of any relevant acts by Mr. Dichter. *See* S. Rep. 102-256, *supra*.

The District Court carefully considered the "evidence presented by [Mr. Dichter] to show that [he] acted only in [his] official capacit[y] and the absence of factual allegations presented by plaintiff[s] to indicate otherwise." SA-012 n.3 (internal quotations and citations omitted). Based on its review, the Court concluded that Appellants were "not entitled to discovery on this issue because such discovery would frustrate the significance and benefit of entitlement to immunity from suit." *Id.* (quoting *Rein*, 1996 WL 273993, at *2); *see also Rafidain Bank*, 150 F.3d at 176 (courts must be mindful to "protect[] a sovereign's or sovereign's agency's legitimate claim to immunity from discovery," so discovery "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination") (citation omitted); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) ("[A] district court authorizing discovery to determine whether immunity bars jurisdiction must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the

benefits the immunity was to ensure."); *In re Terrorist Attacks*, 392 F. Supp. 2d at 575. Indeed, even limited discovery in this case would have infringed on core areas of any government's operations -- military strategy and tactics, intelligence, weapons capability and defense policy. Israel made clear when this suit was filed that such intrusions on its sovereignty could have serious repercussions. A-044.

Thus discovery to establish that Israel was wrong about its own policy, mistaken that it approved the attack, or ineffectual in ratifying Mr. Dichter's actions would have been futile. Denying such discovery was well within the Court's discretion. *See, e.g.*, *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005) (no abuse of discretion in denying FSIA discovery where lower court did "not see what facts additional discovery could produce that would affect our jurisdictional analysis"); *Rein*, 1996 WL 273993, at *2.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE POLITICAL QUESTION DOCTRINE ALSO BARS ADJUDICATION OF THIS CASE

Apart from sovereign immunity, this case fails because it is a political exhibition, not a justiciable controversy. It poses a clear and present danger of conflicting with determinations of the Executive Branch, interfering with U.S. foreign policy, and infringing on the sovereignty of a close ally. The District Court correctly held that the case poses political questions.

In cases involving foreign relations, this Court has analyzed whether the issue before it presents political questions committed to the Executive and Legislative Branches. In so doing, the Court has "consistently employed one or more of the 'six independent tests' identified by the Supreme Court" in *Baker v. Carr*, 369 U.S. 186 (1982). *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 70 (2d Cir. 2005). In particular, the Court has sought to determine whether there is:

> . . . [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving [the issue]; or [3] the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. *See also Kadic*, 70 F.3d at 249; *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994). The *Baker* test does not *balance* these factors. Rather, it assesses whether *any* factor is present. If so, the case should not proceed. *Whiteman*, 431 F.3d at 72; *see also El-Shifa Pharm.*, 402 F. Supp. 2d at 274.

A. The Complaint Raises Nonjusticiable Political Questions Reserved to the Executive Branch

The first *Baker* factor -- a textually demonstrable constitutional commitment of the issue to a coordinate political department -- applies because this matter involves political judgments about foreign policy, committed by the Constitution to the Executive. To be sure, not every case touching on foreign relations raises nonjusticiable political questions. *Baker*, 369 U.S. at 211. But Appellants illogically inflate this truism into an axiom beyond what courts have accepted -- that cases touching on foreign relations do not raise political questions. In fact, courts have been particularly sensitive in this arena, where "many . . . questions uniquely demand a single-voiced statement of the Government's views." *Id.* The Supreme Court long ago explained why judges should tread cautiously:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). This Court has agreed. *See, e.g.*, *Whiteman*, 431 F.3d at 72; *Can*, 14 F.3d at 163.

In analyzing claims against Israel and Israeli officials very much like the allegations Appellants advance in this case, the Court in *Doe v. Israel* found that

> The first *Baker* factor is undeniably implicated here. It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades. The region of the Middle East specifically, and the entire global community generally, is sharply divided concerning these tensions; American foreign policy has come under attack as a result. This Court has previously observed that "foreign policy is constitutionally committed to the political branches, and disputes over foreign policy are nonjusticiable political questions."

400 F. Supp. 2d at 111-12 (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)). In *Doe*, as here, plaintiffs asked the Court to declare that actions Israel took in self-defense in fact were illegal. The Court declined, because "[w]hether plaintiffs dress their claims in the garb of RICO or other federal statutes, or the tort laws of various states, the character of those claims is, at its core, the same: peculiarly volatile, undeniably political, and ultimately nonjusticiable. A ruling on any of these issues would draw the Court into the foreign affairs of the United States, thereby interfering with the sole province of the Executive Branch." *Id.* at 112.

B. The Complaint Raises Nonjusticiable Political Questions Beyond the Competence of the Judiciary and at Odds with Policy Decisions of the Executive Branch

The second and third *Baker* factors also apply to this case because it presents issues beyond the competence of the judiciary and risks countermanding policy determinations of the Executive Branch. Appellants dispute the military targeting decisions of a foreign ally. Although this Court has not considered a challenge to such decisions by a foreign government, it has articulated the applicable principles in cases involving U.S. military actions. In *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), for example, the plaintiffs disputed the legality of U.S. military decisions regarding Cambodia during the Vietnam war. The Court held that "[t]hese are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of that court or this court to determine." 484 F.2d at 1310. While the Court might "agonize and bewail the horror of this or any war," the propriety of military decisions was a "bluntly political and not a judicial question." *Id.* at 1311.

In *Schlesinger*, concerns underlying the second *Baker* factor, the absence of judicially discoverable and manageable standards, were acute. 484 F.2d at 1312 (inquiry into developments in Cambodia "involves diplomatic and military intelligence which is totally absent in the record before us, and its digestion in any

even its beyond judicial management"). For similar reasons, in *DaCosta v. Laird*, 471 F.2d 1146, 1156 (2d Cir. 1973), the Court found that a challenge to President Nixon's decision to mine North Vietnam harbors created a non-justiciable political question. The Court stated that "[j]udges, deficient in military knowledge, lacking vital information upon which to access the nature of battlefield decisions, and sitting thousands of miles from the field of action" lacked the "discoverable and manageable judicial standards" to second-guess the President's military decisions. *Id.* at 1155.

Similarly, in *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985), a British group challenged deployment of U.S. missiles in the United Kingdom. This Court found that the complaint raised "issues which have been committed by the Constitution to coordinate political departments . . . and request[ed] relief which cannot be granted absent an initial policy determination of a kind clearly for nonjudicial discretion," implicating the third *Baker* factor. *Id.* at 37.

C. The Complaint Raises Nonjusticiable Political Questions That Threaten to Entangle the Court in Foreign Policy and Military Decisions by the United States and Israel

A decision in this case would also bring to bear the fourth, fifth and sixth *Baker* factors. The District Court, in determining that this case presents a political question, found that:

> The *Baker* factors -- and particularly factors four and six -- strongly suggest that this action involves a political question. The defendant is a high-ranking official of Israel, a United States ally. The Complaint criticizes military actions that were coordinated by Defendant on behalf of Israel and in furtherance of Israeli foreign policy. For this reason, both Israel and the State Department, whose opinions are entitled to consideration, urge dismissal of this action.

SA-016.

The Court noted the politically perilous political situation in the Middle East, which heightened the risks and amplified the consequences of any judicial missteps. Thus, the Court found it significant that "the Israeli policy criticized in the Complaint involves the response to terrorism in a uniquely volatile region. This Court cannot ignore the potential impact of this litigation on the Middle East's delicate diplomacy." SA-017. This Court cannot ignore that impact either.

In reaching its conclusion, the District Court considered the views of the Department of State that Appellants' attack on Israel's defense against terrorism "threaten[s] to enmesh the courts in policing armed conflicts across the globe -- a

charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs," and that allowing the case to proceed "would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all." *Id.* (quoting U.S. Gov't Statement of Interest at 3, 45).[17] The Court was also cognizant of the protest of the Israeli government and its concern that adjudication of these cases "runs counter to the ongoing Israel-US dialogue and the key diplomatic role of the US in the region" and "risks complicating or undermining the important political and diplomatic avenues that are currently being pursued." A-044. Against this "unique backdrop," the Court concluded, consideration of the case "would impede the Executive's diplomatic efforts and, particularly in light of the Statement of

[17] Appellants claim that the State Department's concerns do not warrant deference because they are "generic." App. Br. at 6, 40. This mischaracterizes the Department's position. The State Department's reference to a potential political question in "this *particular* case" is hardly generic. A-164 n.36 (emphasis in original); *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (statements by the Executive concerning "the implications of exercising jurisdiction over particular [foreign governments] in connection with their alleged conduct . . . might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) ("federal courts should give serious weight to the Executive Branch's view of [an ATCA] case's impact on foreign policy," and should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"). If anything, the Government's position is subjunctive, not generic. The Government worried that the interference with foreign policy and the overstepping of judicial competence would occur *if* sovereign immunity were denied and *if* a cause of action were recognized. The Government argued that neither should happen, and therefore those consequences should not ensue. Considering one dispositive bar before the other does not denigrate the second. *See Belhas*, 466 F. Supp. 2d at 133.

Interest, would cause the sort of intragovernmental dissonance and embarrassment that gives rise to a political question." SA-017.

Other courts have reached the same conclusion in cases directly parallel to this one. The U.S. Court of Appeals for the Ninth Circuit recently invoked the political question doctrine in dismissing another case attacking Israeli policies. The plaintiffs, represented by Appellants' counsel here, sought to enjoin Caterpillar from selling bulldozers to Israel under U.S. defense programs, because the bulldozers allegedly were used, among other things, to violate the Geneva Convention and to commit extrajudicial killings. The District Court declined, and the Court of Appeals affirmed. *Corrie v. Caterpillar Inc.*, --- F.3d ---, 2007 WL 2694701 (9th Cir. Sept. 17, 2007). The Court of Appeals observed that, "[i]t is not the role of the courts to indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide. 'Any such policy condemning the [Israeli government] must first emanate from the political branches. . . .' Plaintiffs may purport to look no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and toward the foreign policy interests and judgments of the United States government itself." *Id.* at *7.

The Court in *Doe v. Israel* also found that the similar claims presented there implicated the third, fourth and fifth *Baker* factors. To determine the legality of

Israel's conduct in the West Bank and Gaza would, in the *Doe* Court's view, usurp the roles of other branches of government. It "would also implicitly condemn American foreign policy by suggesting that the support of Israel is wrongful. Conclusions like these present a potential for discord between the branches that further demonstrates the impropriety of a judicial decision on these quintessential political issues." *Id.* at 112. To answer the question, that Court found, would require it to assess whether Israel's actions were appropriate "self-defense." *Id.* Again, "[s]uch a predicate policy determination is plainly reserved to the political branches of government, and the Court is simply not equipped with 'judicially discoverable or manageable standards' for resolving a question of this nature." *Id.* at 112-113.

This Court has also recognized that claims involving foreign nations can "implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches," *Kadic*, 70 F.3d at 249, though in the particular case at bar, the claims did not do so. In *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), for example, the Court found the *Baker* factors inapplicable in a suit against the Palestine Liberation Organization for the hijacking of a passenger liner. The case did not involve the military decisions of a sovereign state allied with the United States, but rather a tort claim against a non-sovereign deemed by statute a "terrorist organization." 22 U.S.C. § 5201. No political judgments

reserved to the Executive Branch were necessary to assess acts that, the defendant admitted, constituted piracy. And there was no interference with foreign policy because Congress and the Executive had expressly endorsed such suits against terrorist organizations. *Klinghoffer*, 937 F.2d at 50. *Kadic*, too, was a faithful application of the principles that dictate dismissal of this case. That suit involved an ongoing program of murder, torture and rape directed by a self-proclaimed president of a "state" the United States did not recognize. The Department of State had "expressly disclaimed any concern that the political question doctrine should be invoked." 70 F.3d at 250. *Kadic* is thus far afield from this case, which focuses on a military targeting decision by a U.S. ally against a leader of an organization the U.S. has designated as terrorist, in a war on terror the U.S. supports, where the U.S. has expressed concern about the consequences of adjudicating the Appellants' claims.

Appellants surmise that adjudicating this case would not interfere with U.S. foreign policy because the State Department "condemned" the attack at issue in 2002. App. Br. at 38. This supposition overstates the record, conflicts with the law, and offends common sense. It is at odds with the public record because the Department made clear in July 2002 -- and in its Statement of Interest below -- that it did not challenge the *legality* of Israel's attack, the issue Appellants seek to litigate, but rather its prudence and utility in furthering the peace process.

Addressing the attack on Shehadeh on July 25, 2002, the State Department spokesman stated, "We're not seeing this as a legal issue. . . . We're looking for ways of contributing to Israel's security and trying to help Israel achieve what it wants, and trying to help the Palestinians achieve their legitimate aspirations as well."[18]

The State Department has consistently taken this approach, focusing on practical diplomatic goals while affirming that Israel's so-called "targeted killings" fall within its right of self defense:

> [Israel] is a democratic state. *It has a right to defend itself in the way that it sees fit and appropriate.* But we have felt that targeted assassinations, however much the state of Israel believes they are appropriate and uses their forces to conduct such activities, we believe that those kinds of activities are hurtful to the overall process.[19]

Indeed, in this case, the State Department was required by law to determine whether Israel's use of weapons supplied by the United States was for other than legitimate self-defense, and it did not report any violation. *See* footnote 6, *supra*.

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[18] U.S. Dep't of State Daily Press Briefing (July 25, 2002), at http://www.state.gov/r/pa/prs/dpb/2002/12187.htm.

[19] "U.S. Diplomatic Efforts in the War Against Terrorism," Hearing before the Committee on International Relations of the House of Representatives, 107th Cong., 1st Sess., Oct. 24, 2001, at http://commdocs.house.gov/committees/intlrel/hfa75843.000/hfa75843_0.HTM (Secretary of State Colin Powell) (emphasis added).

Congress likewise has supported Israel's policies. In May 2002, the House of Representatives reaffirmed its "solidarity with Israel as it takes necessary steps to provide security to its people by dismantling the terrorist infrastructure in the Palestinian areas." H.R. Res. 392, 107th Cong. (2002). Just weeks after the attack at issue here, Congress appropriated $200 million to assist Israel in combating international terrorism. Pub. L. 107-206, 116 Stat. 820 (2002). Congress has since reiterated its support for Israel in the war on terror at least 14 times.[20]

Specifically as regards the legality of attacks on terrorist leaders, the United States would be hard-pressed to take a different view, as it follows the same approach.[21] Thus, Appellants ask this Court to adopt a position different from that of the Executive Branch on an issue of foreign policy, precisely what the sixth

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[20] *See* Pub L. 110-5, 121 Stat. 8 (2007); S. Res. 175, 110th Cong. (2007); S. Res. 463, 109th Cong. (2006); Pub. L. 109-102, 119 Stat. 21 (2005); Pub. L. 109-13, 119 Stat. 23 (2005); S. Res. 27, 109th Cong. (2005); H.R. Res. 575, 109th Cong. (2005); Pub. L. 108-447, 118 Stat. 2809 (2004); Pub. L. 108-199, 118 Stat. 3 (2004); H.R. Res. 713, 108th Cong. (2004); H. Con. Res. 460, 108th Cong. (2004); Pub. L. 108-11, 117 Stat. 559 (2003); Pub. L. 108-7, 117 Stat. 11 (2003): H.R. Res. 294, 108th Cong. (2003).

[21] *See, e.g.*, White House Press Briefing, Jan. 4, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/01/20060104-1.html (family of 12 in Iraq killed by U.S. pilots who targeted a house where they believed insurgents had taken shelter); "Pakistan Protests Airstrike," CNN, *available at* http://www.cnn.com/2006/WORLD/asiapcf/01/15/alqaeda.strike/index.html (18 people killed in U.S. air strike in Pakistan aimed at Al Qaeda's number two leader, Ayman Al-Zawahiri). Indeed, according to Appellants' declarant below, international law would allow the U.S. to attack Osama bin Laden only when he was actively shooting at or bombing civilians, appeared to be carrying concealed weapons, or ignored a summons to show he is not planning an imminent terrorist assault. That, most definitely, is not the position of the U.S. government.

Baker factor seeks to avoid. Moreover, Appellants' position would expose U.S. military officers to liability. For example, in September 2007, a U.S. air strike targeted a senior Al Qaeda leader in Iraq, Abu Usama al-Tunisi, but reportedly also killed 13 civilians in the building he was visiting.[22] On Appellants' theory, relatives of those civilians could sue senior U.S. intelligence officials who "participated" in the political and military decision to strike. A-022 ¶ 39.

Appellants' position also could expose senior U.S. officials to suits in foreign courts arising out of their official acts. In Germany, Appellants' counsel here sued then-Secretary Rumsfeld and other U.S. officials for human rights violations in Iraq.[23] And in Belgium, the U.S. exerted great diplomatic pressure for repeal of a law under which General Tommy Franks, President Bush, the Secretary of Defense and other top U.S. officials faced lawsuits for "war crimes" in Iraq or Afghanistan arising out of U.S. military operations or ongoing security sweeps in

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[22] *See* Agence France-Presse, *Iraqi Civilian Deaths Part of War on Terror*, September 29, 2007, *available at* http://www.abc.net.au/news/stories/2007/09/29/2047069.htm.

[23] *See* Center for Constitutional Rights website, http://www.democracyinaction.org/dia/organizations/ccr/campaign.jsp?campaign_KEY=325. In this country, Appellants' counsel filed an ATCA complaint in the District of Columbia against former Secretary Rumsfeld and military leaders attacking the treatment of prisoners at Guantanamo Bay. *Id.*, *available at* http://ccrjustice.org/ourcases/current-cases/celikgogus-v.-rumsfeld. Advocacy groups have filed additional suits against former Secretary Rumsfeld, former director of the CIA George Tenet, and military leaders in various federal courts.

the midst of civilian populations.[24] Indeed, then-National Security Advisor Condoleezza Rice said that it could not be countenanced for an "ally" to permit such charges against "freely and democratically elected leaders."[25] Moreover, as noted, U.S. military operations sometimes result in unfortunate deaths or injuries of civilians, just as Israel's operation against Hamas did here.[26] The Administration has sought to protect American officials from liability for such events.[27] Congress has agreed, with a finding in federal legislation that "senior

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[24] The State Department condemned the Belgian suit (which has since been dismissed) as an "abuse of [Belgium's] legal system for political ends." Statement of Philip T. Reeker, Deputy State Department Spokesman, May 14, 2003, *available at* http://www.state.gov/r/pa/prs/dpb/2003/20584.htm. The United States Government expressed similar views of the impropriety of suits in Belgium against former President George H.W. Bush and other senior U.S. officials arising out of the 1991 Gulf War. *See* Statement of State Department Spokesman Richard Boucher, April 28, 2003, *available at* http://www.state.gov/r/pa/prs/dpb/2003/20025.htm. The Belgian suits ultimately were dismissed after Belgium amended its war crimes law, under significant pressure from the United States.

[25] Condoleezza Rice, National Security Advisor, Remarks at Town Hall Los Angeles, June 12, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/06/20030612-12.html.

[26] *See, e.g.*, Carlotta Gall, *Airstrike by U.S. Draws Protests from Pakistanis*, N.Y. Times, Jan. 15, 2006 (U.S. airstrike in Pakistan aimed at Al Qaeda leader Ayman al-Zawahiri kills 18 civilians); White House Press Briefing, Jan. 4, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/01/20060104-1.html (family of 12 killed by U.S. pilots who targeted a house where they believed insurgents had taken shelter). Given Appellants' attack on Israel's actions here, the Administration's justification of the strikes in Pakistan and Iraq are noteworthy. The U.S. military, the White House said of the Iraq strike, "target[s] the terrorists and the Saddam loyalists who are seeking to kill innocent civilians and disrupt the transition to democracy." *Id.*

[27] *See, e.g.*, Marc Grossman, Under Secretary of State for Political Affairs. Remarks to the Center for Strategic & Int'l Studies, May 6, 2002, *available at* http://www.state.gov/p/us/rm/9949.htm ("We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our President is committed to a robust American engagement

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officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States." 22 U.S.C. § 7421(9). The Department of State underscored the same concern in this case, stating that "[g]iven the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad-including damages suits arising for alleged war crimes." SA-010 (quoting Statement of Interest at 22).

In any event, Appellants' basic argument regarding the Department of State's pronouncements about the attack here is a *non sequitur*. Even if the State Department *had* challenged the legality of the Shehadeh attack -- which it did not -- intervention by the judiciary still would interfere with U.S. foreign policy. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Court refused to consider a challenge to the validity of a Cuban expropriation decree even where the State Department had "asserted that the relevant act violated international law." *Id.* at 432. Given the exclusive prerogative of the Executive to "undertake negotiations with an expropriating country," the Court found that the dangers of

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in the world to defend freedom and defeat terror; we cannot permit the [International Criminal Court] to disrupt that vital mission.").

judicial interference "are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law." *Id.* The Court therefore dismissed the case as a consequence of domestic separation of powers under the act of state doctrine.

Whether under the political question doctrine or the act of state doctrine, the question here is not what position the Executive Branch took, but the exclusive right of the Executive Branch to take it. The Executive Branch conducts foreign policy not merely by making such press statements as Appellants cite, but also by negotiation and persuasion in the political arena. Here, the State Department addressed the issue in that arena, as part of the U.S. diplomatic efforts to achieve peace in the Middle East, and has asked that the Court not to address it here.

The political perils this case presents would multiply as it progressed. Appellants filed a declaration below asserting that the legality of the attack on the Hamas leader here depends upon "the relationship between the means used to achieve the objective and the established purpose of the action," "the choice of means which are the least injurious to individual rights," and "the balance between the damages caused and benefits gained." A-053-054. If that were so, how would the Court determine the relationship between the "objective and the established purpose of the action"? Would Appellants be allowed to explore the discussions in the inner councils of the Israeli government for this purpose, or, for the

jurisdictional discovery they seek? Could they inquire about Mr. Dichter's discussions with the Prime Minister? With military leaders? Would the Court allow discovery into the means the Israeli military had available to conduct the attack, the weapons it could have employed, the accuracy of that weaponry, the troops available, and any other assets it had in the vicinity? Would the Appellants be entitled to explore Israel's assessment of the risks to its troops of trying to arrest Mr. Shehadeh? In determining whether the means employed were the "least injurious to individual rights," would Appellants be allowed to inquire into Israeli intelligence regarding the bombing site? Would Mr. Dichter be expected to reveal evidence allowing Appellants to assess the reliability of the intelligence? Could Appellants ask about satellite imagery? The gathering, decryption, and analysis of data? And to assess the benefits gained from the action, would Appellants be able to depose Mr. Dichter on any terrorist plans by Hamas that Israeli intelligence uncovered? On the evaluation by intelligence operatives of whether the assault on Shehadeh would disrupt or prevent specific terrorist attacks? Would Mr. Dichter be required to expound on the information Israel had collected on Shehadeh and how it was collected? Would Appellants be allowed to explore the discussions in the inner councils of the Israeli government, either for this purpose or as part of the virtually identical jurisdictional discovery they seek?

Even minimal foresight shows that this case does not involve merely routine application of settled legal principles. Even a glancing preview lays bare the potential infringement on Israel's sovereignty, the interference with U.S. foreign policy, and the entanglement in issues beyond judicial competence. It defies reality to pretend that a case against a high official of a close ally raises no serious foreign policy issues. Nor is it is credible to suggest that the inquiry calls on conventional judicial skills. That is why, as discussed above, courts consistently have refused to intercede in similar cases involving actions by the U.S. military. Appellants have articulated no reason why inquiries into military targeting decisions of foreign allies would be *more* appropriate for U.S. courts than identical inquiries into U.S. military targeting decisions, which courts repeatedly have declined to hear.

D. The Political Question Doctrine Bars Adjudication of this Case

This suit thus implicates all the factors set forth in *Baker*. It focuses on

— a military targeting decision,

— by a key U.S. ally,

— against a leader of an organization the U.S. has designated as terrorist,

— where Israel has protested the potential interference in its sovereignty and Middle East diplomacy, and

— where the U.S. has expressed concern about judicial interference as it seeks to mediate a resolution of decades of conflict.

This is a time of both turmoil and opportunity in the Middle East. Hamas has taken over Gaza, vowing terror, while President Abbas controls the West Bank, advocating peace talks. Hamas continues to launch missiles at Israel and seeks to undermine President Abbas. The United States, Israel, and others continue to pursue diplomatic avenues to peace. Pronouncements by the Court in these areas could complicate, if not thwart, the initiatives by the Executive Branch throughout the region. Israel has formally objected to this suit on that basis. On the other side of the ledger we have only Appellants' bare assertions that no adverse consequences would follow.

The last thing that this Court, any court, would wish to do is interfere with the foreign policy of the United States and in particular with the search for peace in one of the most difficult areas of the world. *See* SA-015-019; *Doe*, 400 F. Supp. 2d at 111-12. This case -- from its overheated allegations of war crimes to its hyperbolic assault on Israel's efforts to defend itself against terrorist attacks -- poses that risk. It seeks to embroil the Court not only in foreign policy decisions of the United States, but also in second-guessing the security policy and military intelligence practices of one its closest allies. The District Court refused to leap

into that thicket. That was the right decision. Plaintiffs should pursue their political goals in political forums, not in a federal court.

CONCLUSION

For the reasons stated above, the District Court's order of dismissal should be affirmed.

Dated: November 7, 2007.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In making this certification, the undersigned has relied upon the word count of the word-processing system used to prepare this brief.

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/s/ Robert N. Weiner

Dated: November 7, 2007.
Washington, D.C.

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ANTI-VIRUS CERTIFICATION

Case Name: Matar v. Dichter

Docket Number: 07-2579-cv

I, Samantha Collins, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/7/2007) and found to be VIRUS FREE.

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