# 12-1318-cv(L),

12-1350-cv(CON), 12-1441-cv(CON), 12-1476-cv(CON),
12-1477-cv(CON), 12-1519-cv(CON),

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

---

IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

---

On Appeal from the United States District Court
for the Southern District of New York

---

**BRIEF OF DEFENDANTS-APPELLEES**
**THE KINGDOM OF SAUDI ARABIA AND**
**THE SAUDI HIGH COMMISSION FOR RELIEF**
**OF BOSNIA & HERZEGOVINA**

---

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
(202) 775-4510 (fax)

*Attorneys for the Saudi High Commission for Relief of Bosnia & Herzegovina*

MICHAEL K. KELLOGG
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
WILLIAM J. RINNER
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)

*Attorneys for the Kingdom of Saudi Arabia*

October 15, 2012

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### CASES

**STATUTES AND RULES**

**LEGISLATIVE MATERIALS**



**OTHER MATERIALS**

## JURISDICTIONAL STATEMENT

The district court originally dismissed these cases for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611. On March 16, 2012, the district court entered an order denying Plaintiffs' motions for relief from final judgments under Federal Rule of Civil Procedure 60(b). *See* SPA128. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## ISSUE PRESENTED

Whether the district court abused its discretion in denying Plaintiffs' motion to reopen final judgments in light of a change in decisional law issued years after the district court's decisions dismissing Plaintiffs' claims under the FSIA.

## STATEMENT OF THE CASE

In the wake of the terrorist attacks of September 11, 2001, Plaintiffs filed a series of actions seeking damages from hundreds of defendants, including foreign governments (such as the Kingdom of Saudi Arabia), individuals, banks, and humanitarian relief organizations established by foreign sovereigns (such as the Saudi High Commission for Relief of Bosnia & Herzegovina ("the SHC"), a Saudi agency that conducts humanitarian relief efforts abroad). Plaintiffs sought to link Saudi Arabia and the SHC to the hijackers responsible for the September 11 attacks by alleging that these two Defendants provided financial and other support

to terrorist groups and – in a blanket, conclusory allegation repeated verbatim with respect to dozens of other defendants – that "[t]he September 11th Attack was a direct, intended and foreseeable product of [Defendants'] participation in al Qaida's jihadist campaign."[1]

In 2005, the district court granted Saudi Arabia's and the SHC's motions to dismiss, concluding that foreign sovereign immunity under the FSIA barred Plaintiffs' claims. *See* 28 U.S.C. § 1604. The court's ruling rested solely on the ground that jurisdiction could not be based on the FSIA's exception to immunity for non-commercial tort claims because Plaintiffs' claims were "based upon the exercise or performance or the failure to exercise or perform a discretionary function." *Id.* § 1605(a)(5)(A).

In 2008, this Court affirmed without addressing the district court's reliance on discretionary-function immunity. Instead, it relied on the alternative ground that Plaintiffs could not invoke the non-commercial tort exception for "claims . . . expressly predicated on a state-sponsored terrorist act." *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008). The Court held that such claims could be brought solely under the exception for state-sponsored terrorism, 28 U.S.C. § 1605A. It was (and is) undisputed that Saudi Arabia has not been

[1] First Am. Compl. ¶¶ 189, 425, *Federal Ins. Co. v. al Qaida*, No. 03-CV-6978 (filed Sept. 30, 2005) ("*Fed. Ins.* Compl.") (JA1237, 1284).

designated as a state sponsor of terrorism, and that therefore neither the Kingdom nor its instrumentalities can be sued under § 1605A. *See* 538 F.3d at 89.

Plaintiffs then sought certiorari. The Supreme Court invited the Solicitor General to state the views of the United States. The Solicitor General's brief stated that "[t]he lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States."[2] The brief made clear that, even though the United States disagreed with this Court's interpretation of § 1605A, it agreed that the FSIA barred jurisdiction over Plaintiffs' claims for other reasons. The Supreme Court denied certiorari. *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009).

Two and a half years later, this Court issued its decision in *Doe v. Bin Laden*, 663 F.3d 64 (2d Cir. 2011) (per curiam), in which it revisited the narrow issue decided in *Terrorist Attacks* – whether the FSIA's torts exception to immunity can ever provide a basis for jurisdiction over a claim involving allegations of terrorism. *See id.* at 66. Partially overruling *Terrorist Attacks*, the Court held that "the terrorism exception, rather than limiting the jurisdiction conferred by the noncommercial tort exception, provides an additional basis for jurisdiction." *Id.* at 70. The *Doe* Court emphasized, however, that it was not

[2] Br. for the United States as Amicus Curiae at 3, No. 08-640 (U.S. filed May 29, 2009), 2009 WL 1539068 ("U.S. Amicus Br.").

deciding any other issue regarding the application of the FSIA even on the facts of that case, stating that it "ma[d]e no judgment as to whether the allegations in the complaint are sufficient to state a claim or even to provide jurisdiction." *Id.* at 70-71.

Following *Doe*, Plaintiffs asked the district court to reopen its final judgments dismissing the cases against Saudi Arabia and the SHC. *See* Fed. R. Civ. P. 60(b). Defendants opposed that motion, explaining that, under this Court's cases, a change in decisional law issued after a final judgment is not a basis for reopening that judgment, except in special circumstances not present here. After full briefing and oral argument, the district court denied Plaintiffs' motion.

## STATEMENT OF FACTS

### A. In 2006, the District Court Entered a Final Judgment Dismissing Cases Against Saudi Arabia and the SHC

#### 1. In January 2005, the district court granted Saudi Arabia's motion to dismiss

**a.** In August 2004, Saudi Arabia moved to dismiss the claims against it in *Federal Insurance* as barred by the FSIA. The complaint alleged that the Saudi government, acting through senior officials and various entities supposedly acting on Saudi Arabia's behalf, provided financial and material assistance to al Qaeda and thereby assisted that organization's "growth and development into a sophisticated global terrorist network" capable of perpetrating the attacks of

September 11, 2001. *Fed. Ins.* Compl. ¶ 398 (JA1278). Plaintiffs did not allege any direct involvement by Saudi Arabia in the September 11 attacks, but rather asserted (without any specific factual support) that those attacks were a "direct, intended and foreseeable product" of Saudi Arabia's purported support of al Qaeda. *Id.* ¶ 425 (JA1284).

Among other things, Saudi Arabia argued that the FSIA's exception for tort claims, 28 U.S.C. § 1605(a)(5), did not provide jurisdiction for four reasons: (1) claims involving alleged support for terrorism must be maintained, if at all, under the FSIA's separate terrorism exception, 28 U.S.C. § 1605A; (2) any decisions by Saudi Arabia about distributing its financial and material resources involved discretionary functions and were exempted from the torts exception; (3) for the torts exception to apply, the "entire tort" – including the alleged tortious act – must have occurred in the United States; and (4) Plaintiffs had not adequately alleged causation with respect to the Kingdom.[3] Saudi Arabia also observed that Plaintiffs' allegations against it had been directly rebutted by facts found by the United States government. Following an exhaustive and authoritative investigation, the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission") had concluded in its July 2004 report that the

[3] *See* Mem. of Law in Supp. of Mot. To Dismiss of the Kingdom of Saudi Arabia at 9-14 (filed Aug. 4, 2004) (MDL ECF No. 374) ("Saudi Arabia Mot. To Dismiss").

government of Saudi Arabia had no role in the attacks of September 11, 2001, declaring: "[W]e have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded" al Qaeda. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004) (the "9/11 Report"), *quoted in* Saudi Arabia Mot. To Dismiss at 1, 6. In opposing the motion to dismiss, Plaintiffs did not argue that there was any dispute regarding a fact material to the applicability of the torts exception that would require jurisdictional discovery.[4]

**b.** In January 2005, the district court granted Saudi Arabia's motion to dismiss. *See* Op. and Order (Jan. 18, 2005) ("Jan. 2005 Op.") (SPA1-62).[5] Because there was "no dispute that the Kingdom of Saudi Arabia is a foreign state within the meaning of the FSIA," *id*. at 26 (citing *Fed. Ins.* Compl. ¶ 63 (JA1196)) (SPA26), the court addressed the relevant FSIA exceptions to determine whether it could exercise jurisdiction.

[4] *See* Fed. Pls.' Mem. of Law in Opp. to Mot. To Dismiss at 21 (filed Oct. 1, 2004) (MDL ECF No. 471) ("Fed. Pls.' MTD Opp.").

[5] As the district court noted, the parties had agreed that the court's decision would also apply to *Vigilant Insurance Co. v. Kingdom of Saudi Arabia*, No. 03-CV-8591. *See* Jan. 2005 Op. 4 n.15 (SPA4).

The district court first addressed the FSIA's state-sponsor-of-terrorism exception, 28 U.S.C. § 1605A.[6] This exception did not apply because Saudi Arabia "has not been designated a state sponsor of terrorism." Jan. 2005 Op. 16 (SPA16).

The district court also addressed the FSIA's torts exception, 28 U.S.C. § 1605(a)(5). It rejected Saudi Arabia's contention that the torts exception could not apply to claims based on alleged support for terrorism. *See* Jan. 2005 Op. 19 (SPA19); *cf. Doe*, 663 F.3d at 70 (reaching the same conclusion).

Even so, the district court held that Plaintiffs' claims did not satisfy the torts exception to FSIA immunity. The court explained that Plaintiffs' allegations with respect to Saudi Arabia "ar[o]se 'predominantly'" from claims that the Saudi government "aided and abetted the terrorists" by supporting charities purportedly "'under the Kingdom's control.'" Jan. 2005 Op. 26 (quoting Fed. Pls.' MTD Opp. at 1) (SPA26). The court concluded that Saudi Arabia's alleged "treatment of and decisions to support Islamic charities are purely planning level 'decisions grounded in social, economic, and political policy'" and were therefore discretionary functions outside the scope of the torts exception. *Id.* at 27 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797,

[6] At the time, the state-sponsor-of-terrorism exception was codified at 28 U.S.C. § 1605(a)(7) (2000 & Supp. I 2001). Former § 1605(a)(7) has since been repealed and replaced with 28 U.S.C. § 1605A.

814 (1984)) (SPA27).[7] In addition, the court concluded that "no jurisdictional discovery [was] necessary" because "there were no factual disputes raised in the Court's resolution of" Saudi Arabia's motion to dismiss. *Id.*

Having determined that Plaintiffs could not meet the requirements of the torts exception (or any other FSIA exception), the district court granted Saudi Arabia's motion to dismiss. *See id.*

**c.** Following the district court's decision granting Saudi Arabia's motion to dismiss, the parties agreed that the court's ruling would apply to all actions naming Saudi Arabia as a defendant, on the ground that "the allegations and evidence" presented in the cases still pending did "not materially differ" from the allegations and evidence presented in the cases already dismissed. The parties prepared a stipulated order to that effect, which the district court signed on May 5, 2005. *See* Order of Dismissal (May 5, 2005) (SPA63-66). That order applied to all of the cases against Saudi Arabia that are at issue here.[8]

---

[7] The court also recognized that "the presidentially-appointed September 11 commission found no evidence of the Kingdom's funding or support for the September 11 terrorists." Jan. 2005 Op. 27 (citing 9/11 Report 171) (SPA27).

[8] *Compare* Order of Dismissal at 1-2 (SPA63-64) *with* Pls.' Mem. of Law in Supp. of Their Mot. for Relief of the Final Judgments at 1 n.1 (filed Dec. 21, 2011) (MDL ECF No. 2508) ("Pls.' 2011 Final Judgments Mem.") (identifying judgments to be reopened) *and* Notice of Joinder (filed Feb. 1, 2012) (MDL ECF No. 2543). Although the *Euro Brokers* plaintiffs sought to join in Plaintiffs' Rule 60(b) motion, they did not name Saudi Arabia as a defendant in their complaint.

**2. In September 2005, the district court granted the SHC's motion to dismiss**

**a.** In June 2004, the SHC moved to dismiss the complaints against it in several cases, including (as relevant here) *Federal Insurance*, *Burnett v. Al Baraka Investment & Development Corp.*, No. 03-CV-9849, and *Ashton v. al Qaeda Islamic Army*, No. 02-CV-6977. *See* Op. and Order 2 n.1 (Sept. 21, 2005) ("Sept. 2005 Op.") (SPA71). Those complaints alleged that the SHC provided funding and logistical support for al Qaeda. *See id.* at 2-3 (describing allegations) (SPA71-72).

Like Saudi Arabia, the SHC argued in its motion that the FSIA barred the claims against it because Plaintiffs could not satisfy the terrorism exception to FSIA immunity and because, even if the torts exception could apply, Plaintiffs had not overcome the SHC's immunity under the discretionary-function exclusion, had not satisfied the "entire tort" rule, and had not adequately alleged causation.[9]

It is settled law in this Circuit that in reviewing a Rule 12(b)(1) motion in an FSIA case – unlike a Rule 12(b)(6) motion – a district court may (and sometimes must) consult evidence and not merely accept the allegations of the complaint as true. *See Robinson v. Government of Malaysia*, 269 F.3d 133, 140-41 & n.6 (2d Cir. 2001). Therefore, in support of its motion, the SHC submitted, among other

---

*See* Compl., *Euro Brokers Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 04-CV-7279 (S.D.N.Y. filed Sept. 10, 2004) (ECF No. 1).

[9] *See* Mem. of Law in Supp. of Def. SHC's Mot. To Dismiss at 14-16, 20-22 (filed June 25, 2004) (MDL ECF No. 262-2).

evidence, the declaration of Saud bin Mohammad Al-Roshood, the Director of the Executive Office of the SHC.[10] Mr. Al-Roshood provided uncontradicted testimony that the SHC is a legitimate humanitarian organization and that, contrary to Plaintiffs' wholly unsupported allegation that SHC funds were diverted to al Qaeda, Bosnian authorities audited the disbursements of funds by the SHC in 1998, 1999, 2000, and 2001, and found nothing amiss.[11] In opposing the SHC's motion to dismiss, Plaintiffs did not identify any dispute regarding a fact material to the applicability of the torts exception that would require jurisdictional discovery.[12]

**b.** In September 2005, the district court granted the SHC's motion to dismiss. *See* Sept. 2005 Op. (SPA70-101).[13] The court first determined that the SHC is an "organ, agency, or instrumentality" of Saudi Arabia and is therefore

[10] *See* Decl. of Max Huffman in Supp. of Def. SHC's Mot. To Dismiss, Ex. A (filed June 25, 2004) (MDL ECF No. 262-3).

[11] *See id.*

[12] *See* Pls.' Consol. Mem. of Law in Opp. to Mot. To Dismiss of Def. SHC at 12-22 (filed Aug. 24, 2004) (MDL ECF No. 397) ("Pls.' Consol. Opp. to SHC MTD").

[13] Before the district court's ruling, the SHC and the plaintiffs in *Continental Casualty Co. v. Al Qaeda Islamic Army*, No. 04-CV-5970, entered into a stipulation, which the court signed, providing that they would be bound by all decisions of the district court and this Court on the SHC's motion to dismiss. *See* Stip. with Regard to Rulings on Mot. To Dismiss of Def. SHC in Related Cases (filed May 19, 2005) (SPA67-69).

entitled to assert sovereign immunity under the FSIA. *See id.* at 6-8 (SPA75-77); 28 U.S.C. § 1603(b).

Turning to the FSIA's exceptions, the district court concluded that Plaintiffs' allegations were insufficient to overcome discretionary-function immunity. *See* Sept. 2005 Op. 10 (SPA79). Relying on "undisputed evidence" submitted by the SHC, the court held that the SHC's decisions regarding the distribution of humanitarian funds were discretionary and that the SHC was guided by Saudi Arabia's official governmental policies toward Bosnia-Herzegovina. *Id.* The court accordingly held that "[the] SHC is immune from suit in this litigation" and granted its motion to dismiss. *Id.*[14]

**c.** Following the district court's ruling, the SHC and the plaintiffs in *Cantor Fitzgerald Associates v. Akida Investment Co.*, No. 04-CV-7065, and *Euro Brokers Inc. v. Al Baraka Investment & Development Corp.*, No. 04-CV-7279, entered into stipulations, which the district court signed, providing that they would be bound by all decisions of the district court and this Court on the SHC's motion

[14] Judge Casey correctly stated in 2005 that the SHC's evidence was "undisputed." Plaintiffs' brief in the current appeal tells a factual story very different from the evidence before the district court at that time. To do so, Plaintiffs not only treat this case as if it arose on a Rule 12(b)(6) motion (in which allegations without supporting evidence would suffice), but also rely heavily on purported evidence that was not submitted to the district court until *2012* – years after the grant of the SHC's Rule 12(b)(1) motion, this Court's affirmance, and the Supreme Court's denial of certiorari. The impropriety of reliance on such evidence is discussed in Part II.B.3 of the Argument, *infra*.

to dismiss.[15] Accordingly, by February 2006, all of the cases against the SHC that are at issue here were either dismissed by order of the district court or subject to binding stipulations signed by the court.[16]

**3. The entry of final judgments**

On May 20, 2005, Plaintiffs moved for entry of a final judgment dismissing the cases against Saudi Arabia. Plaintiffs argued to the court that "considerations of fairness to the dismissed part[y]" – Saudi Arabia – "weigh[ed] heavily in favor of early appeal and swift, final dismissal from protracted litigation."[17] They explained that entering a final judgment was appropriate to enable immediate appellate review because, "should [the district court's] order of dismissal ultimately be sustained, [Saudi Arabia is] entitled to the finality that such relief promises as soon as possible, not years in the future, and without the substantial costs and uncertainty of being forced to monitor this litigation until an appeal finally ripens."[18]

---

[15] *See* Stip. with Regard to Rulings on Motions To Dismiss of Defs. in Related Cases (filed Nov. 28, 2005) (*Cantor Fitzgerald*) (SPA102-04); Stip. with Regard to Rulings on Motions To Dismiss of Defs. in Related Cases (filed Feb. 8, 2006) (*Euro Brokers*) (SPA115-18).

[16] *Compare supra* p. 9 & nn.13, 15, *with* Pls.' 2011 Final Judgments Mem. at 1 n.1 *and* Notice of Joinder.

[17] Pls.' Mem. of Law in Supp. of Mot. for Entry of Final Judgments at 11 (filed May 20, 2005) (MDL ECF No. 919-1) ("Pls.' 2005 Final Judgments Mem.").

[18] *Id.*

In December 2005, the district court entered an order directing the Clerk of Court to enter a final judgment in favor of Saudi Arabia and the SHC, among others, pursuant to Federal Rule of Civil Procedure 54(b). *See* Order (Dec. 16, 2005) (SPA106-08). That order applied to all pending cases against Saudi Arabia, as well as to the claims against the SHC in *Federal Insurance*, *Burnett*, and *Ashton*. *See id.* at 1-2 (SPA106-07). The district court clerk entered a judgment in favor of Saudi Arabia and the SHC on January 10, 2006. *See* Judgment (Jan. 10, 2006) (SPA109-10); *see also* Order (Jan. 18, 2006) (SPA111).

Accordingly, by no later than January 10, 2006 – approximately six years before the filing of Plaintiffs' Rule 60(b) motion – all of Plaintiffs' cases against Saudi Arabia, and three of their cases against the SHC, were subject to a judgment of the district court. An additional three cases against the SHC (the *Continental Casualty*, *Cantor Fitzgerald*, and *Euro Brokers* cases) were subject to binding stipulations entered in 2005 and 2006, *see supra* p. 11 & n.13, and awaited only the ministerial entry of final judgment.[19]

[19] Judgment ultimately was entered on July 14, 2011, without further substantive proceedings. *See* Order (July 13, 2011) (SPA119-23); Rule 54(b) Judgment (July 14, 2011) (SPA124-27).

### B. This Court Affirmed the District Court's Judgment in 2008, and the Supreme Court Denied Review in 2009

Plaintiffs appealed the district court's judgment dismissing the cases against Saudi Arabia and the SHC. On appeal, they did not argue that jurisdictional discovery was necessary to resolve the discretionary-function issue.[20]

This Court affirmed on the ground that the FSIA's torts exception is categorically inapplicable to claims based on alleged involvement in terrorist activities. *See Terrorist Attacks*, 538 F.3d at 89-90. This Court also noted that Defendants had raised "three other challenges to the application of the Torts Exception": that, "since the Torts Exception is limited to torts that are both committed and felt within the United States, it does not concern a tortious act committed abroad, even if it has effects on United States soil," that "the 'discretionary function' exclusion to the Torts Exception reinstates sovereign immunity," and that Plaintiffs' claims fail "for lack of causation." *Id*. at 90 n.15. The Court found it "unnecessary to reach these additional arguments." *Id.*

Plaintiffs sought review in the Supreme Court, which asked for the views of the United States. *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 555 U.S. 1168 (2009). In a brief submitted on behalf of the State Department as well as the

[20] *See* Br. of the *Federal Insurance* Pls.-Appellants at 22-33, No. 06-0319-cv (filed Jan. 5, 2007); Br. of the *Burnett* Pls.-Appellants at 48-54, No. 06-0319-cv (filed Jan. 5, 2007).

Justice Department, the United States recommended that the Court deny the petition. Although it *disagreed* with the Second Circuit's specific conclusion that the torts exception does not apply to acts of terrorism, the United States told the Supreme Court that this Court properly upheld the dismissal of Saudi Arabia and the SHC under the FSIA:

> The lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States. Although the United States disagrees in certain respects with the analysis of the court of appeals, further review by this Court to determine the best legal basis for that immunity is unwarranted.

U.S. Amicus Br. 3-4. The Supreme Court accepted the recommendation of the United States and denied the petition. 129 S. Ct. 2859 (2009).

### C. In 2012, the District Court Denied Plaintiffs' Rule 60(b) Motion

**1.** In November 2011, this Court issued its decision in *Doe v. Bin Laden*, 663 F.3d 64. Partially overruling *Terrorist Attacks*, the Court held that "the terrorism exception, rather than limiting the jurisdiction conferred by the noncommercial tort exception, provides an additional basis for jurisdiction." *Id.* at 70. It emphasized its desire to "be clear" that it "ma[d]e no judgment as to whether the allegations in the complaint are sufficient to state a claim or even to provide jurisdiction" under the FSIA. *Id.* at 70-71.

**2.** Following *Doe*, Plaintiffs moved in the district court for relief from that court's final judgments in favor of Saudi Arabia and the SHC. *See* Fed. R.

Civ. P. 60(b). Defendants opposed that motion, explaining that, under this Court's cases, a change in decisional law issued years after a final judgment is not a basis for reopening that judgment, except in special circumstances not present here. Defendants also explained that reopening the judgments in light of *Doe* was particularly unjustified because that decision cast no doubt on the correctness of the district court's discretionary-function rulings.

Plaintiffs' Rule 60(b) motion and opening memorandum ignored entirely the discretionary-function basis for the district court's original decisions. On reply, Plaintiffs filed 156 pages of purported "evidence," including declarations by two former members of the 9/11 Commission, which they argued supported their assertions that Saudi Arabia and the SHC bore responsibility for the September 11 attacks. Plaintiffs did not then contend, and have not since contended, that they meet the standard set forth in Rule 60(b)(2) for seeking relief based on newly discovered evidence or the requirement of Rule 60(c)(1) that any such motion be made "no more than a year after the entry of the judgment."[21]

[21] Defendants moved to strike Plaintiffs' new evidence on the ground that it was improperly presented for the first time on reply and was years untimely under Rule 60(c)(1). *See* Defs.' Mem. of Law in Supp. of Mot. To Strike at 1-4 (filed Feb. 28, 2012) (MDL ECF No. 2561). The district court denied the motion to strike, but it also stated that "simply to say that it would give the plaintiff some opportunity to now try to determine if there are a different set of facts that they could allege after . . . all of these years" would not be an "appropriate" reason to

The district court denied Plaintiffs' motion, for the reasons stated on the record in open court. *See* Hr'g Tr. 52-59 (JA2223-30); Order (Mar. 16, 2012) (SPA128). The court explained that Plaintiffs had not identified any factor that would "take [these cases] out of the area of any standard case in which the [Second] Circuit may have changed its decision with regard to the basis [for] . . . affirming a determination by the [district] [c]ourt." Hr'g Tr. 55-56 (JA2226-27).

The district court also reasoned that reopening the final judgments would be particularly unwarranted here because the change in law on which Plaintiffs relied does not affect the basis for that court's original decisions dismissing Defendants. *See id.* at 52 (JA2223). In addition, the court found that "[t]he facts do not indicate that there is the possibility of such inconsistent determinations" that might warrant Rule 60(b) relief, because *Doe* and these cases involved "different defendants with different sets of allegations regarding their activities." *Id.* at 54, 56 (JA2225, 2227).

---

exercise its discretion under Rule 60(b). Hr'g Tr. 55, 58 (Mar. 15, 2012) (JA2226, 2229).

## SUMMARY OF ARGUMENT

**I.** The district court did not abuse its discretion in denying Plaintiffs' motion to vacate the final judgments in these cases in light of *Doe*. "[I]t is well settled that a change in decisional law is not grounds for relief under Rule 60(b)(6)." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir. 1986). Under that rule, Plaintiffs have offered no acceptable reason for reopening a long-closed case, and the district court acted well within its discretion in refusing to give Plaintiffs a second chance to litigate the sovereign immunity of Saudi Arabia and the SHC after that issue was resolved years ago.

Additional factors confirm the propriety of declining to disturb the district court's six-year-old rulings. *Doe* casts no doubt on the correctness of the district court's decisions in these cases. In granting Defendants' motions to dismiss, the district court *agreed* with the legal conclusion that this Court would ultimately reach in *Doe*. Even so, it held that the FSIA's immunity for discretionary functions barred Plaintiffs' claims. That independent reason for the conclusion that the torts exception does not provide jurisdiction for Plaintiffs' claims confirms the absence of any "'extraordinary circumstances' justifying the reopening of a final judgment" here. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

Moreover, reopening these judgments would conflict with Congress's purpose in the FSIA to promote the early resolution of suits against foreign sovereigns. Plaintiffs themselves stressed the importance of an early – and final – resolution of the question of foreign sovereign immunity when they moved the district court to enter a final judgment. They were right then and are wrong now.

**II.** Plaintiffs' criticisms of the district court's discretionary denial of Rule 60(b) relief lack merit. Contrary to Plaintiffs' assertions, the change in law made by *Doe* does not affect "the very basis" of the judgments in these cases, because *Doe* did not disturb the district court's holdings that Plaintiffs had failed to overcome Defendants' discretionary-function immunity.

Nor is Rule 60(b) relief warranted to avoid inconsistent outcomes in these cases and *Doe*. Avoiding a risk of inconsistent results is not a ground for reopening final judgments in this Circuit; the allegations in *Doe* are not "virtually identical" to the allegations in these cases, as Plaintiffs claim; and Plaintiffs forfeited any claim that they were entitled to jurisdictional discovery on the applicability of the discretionary-function exclusion.

In addition, Plaintiffs' reliance on factors that this Court has used to evaluate the propriety of recalling its mandate is misplaced. Even if those factors are considered here, they do not support reopening the judgments.

Finally, although this Court need not (and should not) review the district court's original discretionary-function rulings in this appeal, Plaintiffs' criticism of those rulings is unfounded. The district court properly concluded that all of the acts purportedly committed by Saudi Arabia and the SHC involve discretionary functions, which are excluded from the torts exception by 28 U.S.C. § 1605(a)(5)(A). That exclusion protects foreign sovereigns from being forced to defend in U.S. courts decisions grounded in political, social, and economic policy. The claims at issue here all involve discretionary decisions regarding the distribution of humanitarian funds, taking into account the foreign policy of Saudi Arabia. They therefore fall squarely within the discretionary-function exclusion.

**III.** The torts exception also does not provide jurisdiction here for two additional reasons: because Plaintiffs do not allege that the entire torts (including Defendants' alleged actions) occurred within the United States, and because their allegations that Defendants' acts caused the September 11 attacks are conclusory.

## STANDARD OF REVIEW

"Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). "The decision whether to grant a party's Rule 60(b) motion is committed to the 'sound discretion' of the district court, and appellate review is confined to determining whether the district court abused that discretion." *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012) (citation omitted).

## ARGUMENT

### I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' RULE 60(b) MOTION

#### A. A Change in Decisional Law Is Not a Ground for Relief Under Rule 60(b)

Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of [its] case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6), the provision on which Plaintiffs rely, provides for relief based on "any other reason" – that is, one not listed in parts (b)(1) through (b)(5) – "that justifies relief." Fed. R. Civ. P. 60(b)(6); *see Gonzalez*, 545 U.S. at 529. As the Supreme Court explained in *Gonzalez*, "a movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S.

193, 199 (1950)). This Court's cases have recognized the same requirement. *See, e.g.*, *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012).

Plaintiffs' motion in the district court asserted that the change in decisional law made by the Second Circuit in *Doe* constituted an extraordinary circumstance justifying relief from the final judgments in these cases under Rule 60(b)(6). But "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). In this Circuit, "it is well settled that a change in decisional law is *not* grounds for relief under Rule 60(b)(6)" – even when a new decision overturns a legal ruling on which the judgment was based. *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir. 1986) (emphasis added).[22] That rule requires affirmance here.

*DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994), is illustrative. There, the plaintiff's suit to recover a painting she believed had been stolen from her was dismissed as barred by the statute of limitations, based on this Court's conclusion

[22] *Accord, e.g.*, *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012); *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007); *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (collecting cases); *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922, 925 (8th Cir. 1999); *see also Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997) ("Decisions constantly are being made by judges which, if reassessed in light of *later* precedent, might have been made differently; but a final judgment normally ends the quarrel.").

that New York law required a showing of "reasonable diligence" in seeking to locate the painting (a showing she had not made). *See id.* at 1269. Approximately three years after the dismissal of her action, the New York Court of Appeals issued a decision holding that New York law does not require a showing of "reasonable diligence" in cases such as the plaintiff's. *See id.* at 1270 (citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991)). The New York Court of Appeals rejected contrary Second Circuit authority and "expressly stated that the conception of New York law that [this Court] reached three years earlier in *DeWeerth* was wrong." *Id*. at 1272. The plaintiff accordingly sought relief from the final judgment in her case under Rule 60(b)(6), and the district court granted her motion. *See id*. at 1270.

Citing "the important interest in the finality of the judgment in this case," this Court reversed, holding that the district court had *abused its discretion* by granting Rule 60(b)(6) relief. *Id*. at 1275. The change in law did "not constitute an 'extraordinary circumstance' that would justify reopening this case." *Id.* at 1274. "Attempting to obtain such a result through Rule 60(b)(6) is simply an improvident course that would encourage countless attacks on federal judgments long since closed." *Id*.[23]

[23] The principle against reopening final judgments because of a mere change in decisional law, this Court added, applies even "in federal cases where the

Here, as in *DeWeerth*, the cases that Plaintiffs seek to reopen have been "fully litigated" and, as a general matter, "long since closed." *Id.* at 1272. The district court granted Defendants' motions to dismiss in 2005, and it entered a final judgment dismissing cases against them – including all of the cases against Saudi Arabia – in January 2006. *See supra* pp. 8, 10, 11-13. Three cases against the SHC awaited the ministerial entry of final judgment (which ultimately occurred in July 2011), but those cases were subject to binding stipulations entered in 2005 and 2006. *See supra* p. 13. Those cases too were therefore functionally "closed" with respect to the SHC by early 2006.

What is more, the case for Rule 60(b) relief is in fact far *weaker* here than it was in *DeWeerth*, for three reasons. *First*, the standard of review for both grants and denials of Rule 60(b) relief is abuse of discretion, *see* 38 F.3d at 1272, which means that the defendant in *DeWeerth* faced a heavy burden in persuading this Court to reverse after the district court granted relief. This Court held that the principle favoring finality and disfavoring relief based on a change in decisional law was so strong that defendants met that heavy burden. Here, by contrast, the district court denied relief, and Plaintiffs must show that the same principle is so *weak* that it was an abuse of discretion to follow it.

---

Supreme Court has changed the applicable rule of law." *DeWeerth*, 38 F.3d at 1273 (citing *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990), and *Travelers Indem.*, 794 F.2d at 757).

*Second*, as the district court recognized in denying Plaintiffs' Rule 60(b) motion, the change in law on which Plaintiffs rely does not affect the district court's reasoning in dismissing Plaintiffs' claims against Defendants. *See* Hr'g Tr. 52-54 (JA2223-25). Even though the district court *agreed* with the legal principle that this Court ultimately would adopt in *Doe*, it dismissed Plaintiffs' cases against Defendants based on discretionary-function immunity. The Solicitor General's brief urging the Supreme Court to deny certiorari in 2009 took the same position: the judgments against Plaintiffs were correct even if the holding of *Terrorist Attacks* was not.

Further, neither *Terrorist Attacks* nor *Doe* calls into question the ground on which the district court ruled in 2005. *Terrorist Attacks* noted the district court's conclusion that discretionary-function immunity barred Plaintiffs' claims, but in no way suggested that it was wrong. *See* 538 F.3d at 90 n.15. Nor is *Doe* in any tension with the district court's discretionary-function ruling; the *Doe* court emphasized that its holding was limited to the scope of the torts exception and did not resolve any other issue. *See* 663 F.3d at 70-71 ("Let us be clear: we make no judgment as to whether the allegations in the complaint are sufficient to state a claim or even to provide jurisdiction.").

*Third*, important policies underlying the FSIA weigh heavily in favor of preserving the finality of these judgments. Sovereign immunity under the FSIA is

immunity not just from liability, but also from "the attendant burdens of litigation." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998) (internal quotation marks omitted). This Court has therefore emphasized the "necessity of resolving th[e] issue" of sovereign immunity "early on if possible." *Robinson v. Government of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001). To require Saudi Arabia and the SHC to again bear the "burdens of litigation" with respect to cases that have been closed for years would disserve these policies. Plaintiffs themselves recognized that point in their motion for entry of a final judgment, noting that "considerations of fairness to the dismissed parties weigh[ed] heavily in favor of . . . swift, *final* dismissal from protracted litigation" and that Saudi Arabia is "entitled to . . . finality . . . as soon as possible, not years in the future."[24] They cannot now plausibly argue that the district court abused its discretion by protecting the same interest in finality.

### B. The Cases on Which Plaintiffs Rely Involved Special Circumstances Not Present Here

Plaintiffs acknowledge that even a change in law going to "the very basis" of a judgment does not warrant relief under Rule 60(b) without "some other special circumstance[s]." Pls.' Br. 36 (internal quotation marks omitted; alteration in original). Unlike the cases on which Plaintiffs rely, *see id.* at 36 & n.6, these cases

[24] Pls.' 2005 Final Judgments Mem. at 11.

involve no "other special circumstance," *Blue Diamond*, 249 F.3d at 524, justifying relief under Rule 60(b)(6). The district court was well within its discretion in so concluding. *E.g.*, Hr'g Tr. 54-55 (JA2225-26).

In *Marrero Pichardo v. Ashcroft*, 374 F.3d 46 (2d Cir. 2004), *overruled in part on other grounds by Grullon v. Mukasey*, 509 F.3d 107, 109, 115 (2d Cir. 2007), the plaintiff sought to reopen a habeas corpus action to seek relief from a deportation order based on a recent decision undermining the correctness of that order. *See* 374 F.3d at 49-50. The decision announcing the change in law on which the plaintiff relied had been on the books when he filed his original habeas petition, but had not been brought to the habeas court's attention due to his counsel's negligence. *See id.* at 50, 55. This Court reaffirmed that, "as a general matter, a mere change in decisional law does not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6)." *Id*. at 56 (citing *Travelers Indem.*, 794 F.2d at 757). But it reasoned that denying the plaintiff's motion (which was filed only three months after the judgment dismissing his habeas petition) would result in "manifest injustice" because the "order of deportation [had been] undermined [by] dramatic changes to governing law, a fact that existed at the time [the plaintiff's original] habeas petition was pending before the district court" but that had not been brought to the district court's attention "in large part . . . due to incompetent lawyering." *Id*. None of those special circumstances is

present here. The change in law announced in *Doe* came long after the judgment against Plaintiffs became final, and Plaintiffs' counsel were not incompetent in 2005 – they simply did not prevail after their very able counsel presented their case to the district court, this Court, and the Supreme Court.

*Devino v. Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002), addressed a different issue – an *unfavorable* change in decisional law that rendered a pro se prisoner's habeas petition untimely. The petitioner was "guided by" an order of the district court in voluntarily dismissing his habeas original petition so that he could exhaust administrative remedies. *Id.* at 414. His re-filed petition was untimely "principally because of" an intervening Supreme Court decision interpreting the federal statute of limitations for habeas petitions. *Id.* at 414-15. Reasoning that the petitioner "was entitled to rely on" the district court's "statement of his options," the court refused "to deprive him in such circumstances of one fair opportunity for [the district] court to hear his petition." *Id.* at 418-19. Here, Plaintiffs had a fair opportunity to litigate their original claims. The mere facts that they lost and that the law has since changed provide no basis for relief under Rule 60(b). *See id.* at 417 (recognizing the "principle" that changes in law do not warrant reopening a judgment except "[i]n the exceptional case").[25]

[25] Plaintiffs also cite two unpublished district court decisions: *Pasquino v. Lev Parkview Developers, LLC*, No. 09-CV-4255(LMM), 2011 WL 4502205

Plaintiffs' reliance (at 36 n.6) on cases from other circuits is similarly misplaced. *Blue Diamond* actually refutes their position. There, the Sixth Circuit held that "the district court abused its discretion in granting [Rule 60(b)(6)] relief" based on a change in decisional law. 249 F.3d at 529.[26] The remaining cases are inapposite. In *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), the district court

---

(S.D.N.Y. Sept. 29, 2011), and *Tal v. Miller*, No. 97-CV-2275(JGK), 1999 WL 38254 (S.D.N.Y. Jan. 27, 1999). Neither helps them. *Pasquino* relied primarily on Rule 60(b)(1), not Rule 60(b)(6), and involved a motion filed at a time when the plaintiffs had a right to reinstate their appeal under a stipulation pursuant to this Court's Rule 42.1 – not, as here, years after the judgment was final. *See* 2011 WL 4502205, at *2. *Tal* is contrary to the Supreme Court's more recent decision in *Gonzalez*. *Compare Tal*, 1999 WL 38254, at *2-*4, *with Gonzalez*, 545 U.S. at 536. Moreover, *Gonzalez* indicates the strength of the principle against reopening judgments based on a change in decisional law. The Rule 60(b) movant was serving a 99-year term in Florida prison, the federal courts had rejected his habeas petition as time-barred without reaching the merits, the Supreme Court later issued an opinion inconsistent with that procedural determination, and he had "at least … a colorable claim of a constitutional violation" in his original criminal proceeding. 545 U.S. at 527, 536; *id*. at 542 (Stevens, J., dissenting). Nevertheless, a seven-Justice majority rejected his Rule 60(b) motion, *id*. at 536-38, and the two dissenting Justices observed that "it would be within a district court's judgment to leave . . . a judgment in repose" if "significant time has elapsed between a habeas judgment and the relevant change in procedural law," *id*. at 542 n.4 (Stevens, J., dissenting). Thus, even the *Gonzalez* dissent (let alone the majority opinion) supports affirmance here.

[26] The Sixth Circuit's non-precedential decision in *Jackson v. Sok*, 65 F. App'x 46 (6th Cir. 2003), determined that the district court did not abuse its discretion in granting a plaintiff's motion to reopen a default judgment in his favor so that he could pursue a new claim against an additional defendant that was not involved in the original action. *See id.* at 47-48. Here, by contrast, Plaintiffs seek to relitigate claims that were already adjudicated to a final judgment against these very Defendants, and the abuse-of-discretion standard favors affirming the district court's *denial* of relief.

granted habeas relief and required the State to resentence a prisoner; before the time for resentencing expired, the Supreme Court overruled the constitutional holding on which the original judgment was based. The Eleventh Circuit recognized that "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," but concluded that "[s]everal factors" supported the district court's discretionary decision to grant the State's Rule 60(b) motion. *Id.* at 1401. Those factors included in particular the timing of the intervening decision, coming just months after the entry of the district court's original judgment and before resentencing, as well as the practical point that, under the intervening precedent, nothing would have prevented the State from simply reinstituting the original sentence. *See id.* at 1402-03 & n.8.[27]

## II. PLAINTIFFS' CRITICISMS OF THE DISTRICT COURT'S DECISION LACK MERIT

### A. *Doe* Did Not Affect the Basis for the District Court's Original Decisions

Plaintiffs contend (at 31, 33-39) that *Doe* affects "the very basis" of the judgments. As we have shown, even a change in law that *does* affect the basis for a

[27] In *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), the Ninth Circuit expressly limited its analysis to cases "applying Rule 60(b)(6) to rejected petitions for *habeas corpus*," *id.* at 1135 n.19, and the Ninth Circuit has never applied that analysis outside of the habeas context. *See also infra* Part II.B.1 (addressing *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc)) and Part II.C (addressing *Sargent v. Columbia Forest Products, Inc.*, 75 F.3d 86 (2d Cir. 1996)).

judgment does not justify reopening that judgment, except in special circumstances not present here. *See supra* Part I. In any event, Plaintiffs are incorrect.

**1.** *Doe* left the basis for the district court's original judgments – discretionary-function immunity – undisturbed. *See supra* p. 25; *infra* Part II.A.4. In the cases that Plaintiffs cite (at 31, 33), by contrast, no alternative basis for the judgment existed, meaning that the intervening decision required a different outcome from that reached in the original judgment. For example, the change in law in *Marrero Pichardo* required vacatur of the underlying deportation order. *See* 374 F.3d at 56 (remanding to the district court "with directions to grant the petition for habeas corpus and to vacate Pichardo's order of removal"). In this case, unlike that one, there remains an undisturbed ground supporting the dismissal of Plaintiffs' claims against Defendants.

Plaintiffs argue (at 33-35) that the district court's discretionary-function determination did not "remain the basis of the order of dismissal" once this Court declined to reach that determination in affirming the judgments. They cite no authority for that proposition.[28] Instead, they reason by analogy, observing that

[28] Plaintiffs' reliance (at 35, 47, 52 n.14) on *Gonzalez* and *Agostini* is misplaced. *Gonzalez*'s holding that "Rule 60(b)(6) was a proper mechanism for challenging a 'jurisdictional' or 'preliminary' matter," Pls.' Br. 35 (citing 545 U.S. at 534), meant only that the federal bar on successive habeas petitions did not automatically preclude the prisoner's Rule 60(b) motion. *See* 545 U.S. at 530-35; *see also supra* n.25 (discussing *Gonzalez*). In *Agostini*, the Supreme Court held

an unreviewed district court holding ordinarily has no issue-preclusive effect in a subsequent proceeding. But that analogy is inapt. The rule that an unreviewed determination in a prior case cannot foreclose full litigation of that issue in a *later and different case* in which there has never been a final judgment sheds no light on the question here – whether the extraordinary step of reopening long-final judgments should be taken based on a change in decisional law that affects only an alternative ground for affirmance.

**2.** Plaintiffs argue (at 48-51) that the district court erred as a matter of law by adhering to Judge Casey's 2005 discretionary-function rulings. They insist (*id.*) that the court effectively granted Plaintiffs' Rule 60(b)(6) relief, reopened the discretionary-function issue, and decided it against Plaintiffs. That is a mischaracterization of what the district court decided.

The district court refused to grant Plaintiffs a second bite at the apple – a second chance to argue the discretionary-function issue that Plaintiffs previously had a full and fair opportunity to litigate. The court observed that, "[t]o reargue [the discretionary-function issue], to bring back a defendant, any defendant years later simply to reargue that based on the same facts, the same law that applies is

---

that a different provision of Rule 60(b) – Rule 60(b)*(5)* – was an appropriate vehicle for seeking "to vacate a continuing injunction . . . in light of a bona fide, significant change in subsequent law." 521 U.S. at 238-39. The Court expressly distinguished cases such as this one, where the judgment has no prospective application. *See id.*

not appropriate." Hr'g Tr. 55 (JA2226). It concluded by refusing "to relitigate the same issue twice in the same case when that determination has been . . . already made by the district court in this case. So, considering all of the factors it is not appropriate to grant the relief that the plaintiffs are requesting." *Id.* at 57 (JA2228).

The district court did not abuse its discretion by recognizing that litigants do not get do-overs whenever the law changes. Litigants deserve finality – the confidence that, after all parties have had a full and fair opportunity to litigate issues in the trial court and on appeal, the case is over and they can move on unless extraordinary circumstances arise. Here, the district court found no such circumstances, and the law and facts amply support that finding. Far from failing to apply the proper standard, the court properly exercised its discretion to preclude Plaintiffs from airing again issues that were closed years ago.

**3.** Plaintiffs also claim (at 48-52) that, because this Court did not address the district court's discretionary-function rulings in its 2008 decision affirming the dismissals of Saudi Arabia and the SHC, the change in law made by *Doe* entitles them to reconsideration of those discretionary-function rulings now. They assert that this Court should either engage in a *de novo* review of the discretionary-function rulings or reverse the district court's denial of Rule 60(b) relief and remand for the lower court to engage in that reconsideration.

Plaintiffs' argument turns the controlling principles on their head. Under settled precedent, the fact that an intervening decision renders the basis for a prior final judgment "wrong" "does not constitute an 'extraordinary circumstance'" that would "warrant relief under Rule 60(b)(6)." *DeWeerth*, 38 F.3d at 1272, 1274; *see supra* p. 22 & n.22. The fact that Rule 60(b) does not require reopening a judgment even when the change in law would require a different result means that there is even less reason to consider reopening a judgment when (as here) there are independent legal bases for that judgment. It certainly does not mean that, when one or more alternative bases for the judgment exist, the judgment must be vacated simply to reconsider those alternative grounds.

The authority that Plaintiffs cite (at 49-50) does not suggest that Rule 60(b) requires a district court to reopen a six-year-old final judgment to reconsider an alternative ground for dismissal. In *LeBlanc v. Cleveland*, 248 F.3d 95 (2d Cir. 2001), less than 60 days after the district court dismissed the case for lack of admiralty jurisdiction, the plaintiff moved to vacate the judgment and to permit her to drop a non-diverse defendant from the suit so that she could proceed on the basis of diversity jurisdiction. *See id.* at 98. This Court concluded that Rule 60(b) relief was warranted, given that the case was trial-ready, the defendants would suffer no

prejudice, and the statute of limitations would bar re-filing in state court. *See id.* at 100-01. This case is not remotely similar.[29]

**4.** Plaintiffs suggest (at 47, 53-54, 62) that this Court's decision in *Doe* not only abrogated this Court's holding in *Terrorist Attacks* but also overruled the district court's discretionary-function holdings in these cases. That is incorrect. In *Doe*, Afghanistan raised a single argument in its appeal – that, under the Court's prior decision in *Terrorist Attacks*, the torts exception could not provide jurisdiction in cases involving alleged support for terrorism.[30] In rejecting that argument and overruling its prior decision in *Terrorist Attacks*, the *Doe* Court emphasized that its holding was limited to the relationship between the torts and terrorism exceptions and did not resolve any other issue, including whether Plaintiffs would ultimately be able to establish jurisdiction under the torts exception for their claims against Afghanistan. *See* 663 F.3d at 70-71.

Plaintiffs point (at 53) to the *Doe* Court's statement that "the complaint alleged nondiscretionary acts by employees of [Afghanistan] within the scope of

---

[29] Although, as Plaintiff suggests (at 50), courts have used Rule 60(b)(6) to justify vacating and re-entering a final judgment to restart the time for filing an appeal "when the losing party fails to receive notice of the entry of judgment in time to file an appeal," 11 Charles A. Wright et al., *Federal Practice and Procedure* § 2864, at 353 (2d ed. 1995), that practice provides no support for their position here.

[30] *See* Br. of Def.-Appellant, *Doe v. Bin Laden*, No. 09-4958-cv (2d Cir. filed June 4, 2010).

their employment," 663 F.3d at 67. Although for purposes of appeal Afghanistan did not dispute that the plaintiff there had alleged that it had engaged in non-discretionary conduct, Afghanistan had requested the opportunity to submit evidence showing that its acts were strictly discretionary if its argument that the torts exception was categorically inapplicable to terrorism claims was not accepted. *See Doe v. Bin Laden*, 580 F. Supp. 2d 93, 99 (D.D.C. 2008) (noting that "limited jurisdictional discovery is warranted" because "Afghanistan has asked to present evidence concerning subject matter jurisdiction if the court determines that the noncommercial tort exception applies"), *aff'd and remanded*, 663 F.3d 64 (2d Cir. 2011). The statement that Plaintiffs quote was thus an assumption, not a holding – consistent with the *Doe* Court's later clarification that the *only* issue it resolved was the interaction of the terrorism exception with the torts exception.[31]

### B. Rule 60(b) Relief Is Not Warranted To Avoid Inconsistent Outcomes

Plaintiffs also assert (at 31, 39-42) that Rule 60(b) relief is required to avoid "inconsistent judgments in related proceedings arising from the same incident."

[31] Contrary to Plaintiffs' assertion (at 53, 62), *Doe* did not "f[i]nd that Congress had implicitly adopted" statements about discretionary-function immunity in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), or *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). Rather, the Court refused to accept that Congress, in enacting the terrorism exception, had intended to effect "a partial repeal by implication" of the torts exception insofar as that exception had been interpreted in cases such as *Liu* and *Letelier* to "allow[ ]" claims for "arguably 'terrorist' . . . acts occurring in the United States." 663 F.3d at 68.

According to Plaintiffs, the district court's original judgments dismissing Saudi Arabia and the SHC are inconsistent with this Court's decision in *Doe*, which affirmed the denial of Afghanistan's motion to dismiss claims relating to the September 11 attacks. That argument is legally and factually erroneous.

**1. A risk of inconsistent outcomes is not a basis for reopening a judgment in this Circuit**

In *United Airlines, Inc. v. Brien*, 588 F.3d 158 (2d Cir. 2009), this Court *reversed* the district court's grant of a Rule 60(b)(6) motion based on a change in decisional authority, specifically a district court decision disavowing the same court's earlier decision in one of "'an interconnected trilogy of cases' that had all once been part of the same case." *Id.* at 176. In no uncertain terms, this Court made it clear that a new precedent handed down after a decision has become final is not a sufficient basis for Rule 60(b)(6) relief, even in interconnected cases (*id.*):

> The conflict between [the first decision] and [the second] was not, by itself, sufficiently "extraordinary" to justify reopening the judgment in [the first case], especially given that such conflict resulting from a subsequent Circuit Court or Supreme Court decision would very likely not suffice to grant Rule 60(b)(6) relief. *See Batts [v. Tow-Motor Forklift Co.]*, 66 F.3d [743,] 749 [(5th Cir. 1995)] ("A circuit court's announcement of a new rule of federal law, like a Supreme Court pronouncement, is similarly insufficient without more to justify Rule 60(b)(6) relief."). Thus, if this Court had issued an opinion in [the second case] on appeal, that opinion would likely not, by itself, provide a basis for revisiting the [first] decision.

In an earlier section of the opinion devoted only to the *timeliness* of the motion, the Court held that a motion claiming that the district court has issued

"conflicting decisions" in related actions "with substantial overlap in parties and substantial similarity in subject matter" could be brought within the time period allowed by Rule 60(b)(6) rather than the shorter period for Rule 60(b)(1). *Id*. at 175. To support that *timeliness* conclusion, the Court parenthetically quoted a footnote from the Fifth Circuit's decision in *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 n.6 (5th Cir. 1995). But neither the holding of *Batts* nor the quoted language supports Plaintiffs here. The Fifth Circuit in *Batts*, like this Court in *United Airlines*, *reversed* the grant of a Rule 60(b)(6) motion. *See id*. at 748 (because a change in decisional law "did not constitute an extraordinary circumstance sufficient to justify Rule 60(b)(6) relief, we hold that the district court *abused its discretion* when it granted Batts' motion and vacated the judgment") (emphasis added).

In footnoted dicta, the court added that it did "not hold that a change in decisional law can *never* be an extraordinary circumstance" and string-cited six cases, one of which was a Tenth Circuit decision (*Pierce*) granting relief to prevent a single auto accident from producing different results in cases litigated in state court and federal court. *Id.* at 748 n.6.[32] Neither the Tenth Circuit's *Pierce*

[32] *DeWeerth* seems to suggest that this Court places less weight on the need to reconcile results in state and federal court than the Tenth Circuit's *Pierce* decision did. *Compare DeWeerth*, 38 F.3d at 1275 (holding that the district court abused its discretion by ruling that "the important interest in the finality of the judgment in this case . . . was outweighed by any injustice DeWeerth believes she has suffered by litigating her case in the federal as opposed to the state forum"),

decision, nor the Fifth Circuit's *Batts* decision, nor this Court's quotation of dicta from *Batts* in addressing a timeliness question creates a general principle that Rule 60(b)(6) relief is appropriate to avoid inconsistent outcomes. On the contrary, the clear holdings of *Batts* and *United Airlines* reject that exact argument.

Plaintiffs also cite (at 31-32, 39) *DeWeerth* to support their "inconsistent judgments" theory, but this Court there explicitly *declined* to address whether relief would be warranted in such a case. *See* 38 F.3d at 1275 ("Whatever the merits of this rationale, as to which we express no opinion, it cannot justify the district court's decision in this case since *DeWeerth* and *Guggenheim* do not arise out of the same facts."). *United Airlines* has since made clear that a concern about conflicting decisions does not by itself justify reopening a judgment.

**2. The allegations in *Doe* are different from the allegations in these cases**

In any event, there is no inconsistency between the result in *Doe* and the result here. Contrary to Plaintiffs' assertion (at 44, 54-55), the allegations of misconduct in *Doe* are far from "virtually identical" to the allegations in these cases. Instead, as the district court found in denying Plaintiffs' Rule 60(b) motion, Saudi Arabia and the SHC, on the one hand, and Afghanistan, on the other, "are

---

*with Pierce*, 518 F.2d at 723 (granting Rule 60(b)(6) relief because "the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence"). In any event, that concern – which drove the *Pierce* decision – is wholly absent here.

different defendants with different sets of allegations regarding their activities." Hr'g Tr. 56 (JA2227). That conclusion – and the court's refusal to grant relief based on purported similarities between the cases – had ample support and was not an abuse of discretion.

The misconduct alleged in *Doe* involved, for example, permitting al Qaeda to operate the terrorist training camps in which the September 11 attacks were planned. *See* Compl. ¶ 21, *Doe v. Bin Laden*, No. 01-2516 (D.D.C. filed Jan. 4, 2002) ("*Doe* Compl."), *cited in* 663 F.3d at 67. The *Doe* plaintiff also pleaded an actual "agree[ment]" between Afghanistan and al Qaeda "to conduct illegal and unlawful terrorist attacks on the United States, including . . . the terrorist attacks of September 11, 2001." *Doe* Compl. ¶ 60; *see* 580 F. Supp. 2d at 95, 98 (citing allegations that Afghanistan "unlawfully conspired with the Taliban and Iraq to conduct the September 11, 2001 attacks" and that Afghanistan "expressly agreed to conduct illegal and unlawful terrorist attacks on the United States") (internal quotation marks and brackets omitted).

By contrast, Plaintiffs do not allege that Saudi Arabia or the SHC planned, participated in, or approved of the events of September 11. Plaintiffs provide only conclusory allegations attempting to link Saudi Arabia's and the SHC's actions to the terrorist attacks themselves. Even if accepted as true (which they should not

be, *see infra* Part III.B), those allegations do not establish that Saudi Arabia or the SHC made any decisions other than discretionary decisions about funding.

Plaintiffs claim (at 54) to have alleged that Defendants engaged in "support and facilitation of al-Qaeda's base of operations and terrorist training camps in Afghanistan," but the only allegation they cite pertains to the International Islamic Relief Organization ("IIRO"), not Saudi Arabia or the SHC. *See* Pls.' Br. 54 (quoting JA1224); *see also id.* at 18-22, 56-59 (discussing and citing other allegations involving charities); JA1218-42, 1278-81, 1855-63 (allegations involving charities), *cited in* Pls.' Br. 54-55. As the United States explained in its *amicus* brief in the Supreme Court, "jurisdiction under the tort exception must be based entirely on acts *of the foreign state* within the United States"; it cannot be based on "the tortious acts of third parties, even if the applicable substantive law would permit holding the foreign state liable for those acts under a theory of secondary liability." U.S. Amicus Br. 14-16 (emphasis added).

In addition, Plaintiffs have not properly alleged that the IIRO – or any of the other charities discussed in their brief – is an agent of Saudi Arabia, such that its acts could be attributable to Saudi Arabia itself. As the United States also explained, "[e]specially in light of the law's respect for corporate personality, which the FSIA recognizes, see *Dole Food[ Co. v. Patrickson]*, 538 U.S. [468,] 474-476 [(2003)], the complaint's 'formulaic recitation,' *[Ashcroft v. ]Iqbal*, [556

U.S. 662, 681 (2009)] (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007)), of incidents of control by Saudi Arabia – repeated verbatim with respect to eight charities, see [*Fed. Ins.* Compl.] (¶¶ 85, 114, 131, 151, 168, 181, 191, 208) – provides an insufficient basis for deeming the acts of the charities to be those of Saudi Arabia." *Id.* at 17 n.4; *see also Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848-52 (D.C. Cir. 2000).[33]

Plaintiffs also rely (at 22, 54-55, 56, 58) on conclusory allegations that "a Saudi intelligence official named Omar al Bayoumi provided direct assistance" to September 11 hijackers and that, "[a]ccording to various sources, Al-Bayoumi is an intelligence agent of the Kingdom of Saudi Arabia." *Fed. Ins.* Compl. ¶¶ 411, 414 (JA1281-82). As the United States explained, such allegations are plainly

[33] The cases that Plaintiffs cite (at 57 n.15) are not to the contrary. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) ("foreign entities are presumed to be separate" unless the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or "treating the entities separately would work fraud or injustice") (internal quotation marks omitted); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 199 F.3d 94, 98 (2d Cir. 1999) (same); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446-47 (D.C. Cir. 1990) ("the court lacks subject matter jurisdiction over the foreign state for the acts of its instrumentality" unless the plaintiff carries its "burden" of showing that the state and the instrumentality had "a relationship of principal to agent").

"inadequate to sustain [Plaintiffs'] burden" under the FSIA. U.S. Amicus Br. 16 n.4 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).[34]

With respect to the SHC, Plaintiffs point (at 24-25, 58) to snippets of their complaint asserting, in the most general terms, that the SHC "funneled millions of dollars to al Qaida operations in Bosnia," as well as to assertions that supposedly suspicious material, most notably before and after pictures of the World Trade Center, were found on a computer located in offices used by the SHC in Bosnia in a raid conducted in October 2001, and that, in October 2001, the Financial Police of the Federation of Bosnia Herzegovina Ministry of Finance described the SHC as a "front for radical and terrorism-related activities." But those allegations fall far short of supporting Plaintiffs' claims that the SHC is somehow responsible for the September 11 attacks.[35] Even taken at face value, they are not comparable to the

[34] The U.S. government noted further that the 9/11 Commission "found, after considering that connection and others, that al Bayoumi was 'an unlikely candidate for clandestine involvement with Islamic extremists.'" U.S. Amicus Br. 16 n.4 (quoting 9/11 Report 218). Plaintiffs' allegations regarding Fahad Al Thumairy and Muhammed Fakihi, *see* Pls.' Br. 22, are even more conclusory and inadequate.

[35] Given the dramatic nature and historic importance of the destruction of the World Trade Center, before and after pictures could likely be found on the hard drives of many computers all around the world. Many of those who viewed such pictures undoubtedly felt horror at the terrorist attacks and sympathy for the victims. Plaintiffs offer nothing but baseless speculation about the attitude (let alone the actions) of those who allegedly saved such images (let alone about that person's employer).

training-camp allegations in *Doe*, and the district court did not abuse its discretion by finding that the two cases had materially different facts.

### 3. Plaintiffs improperly rely on new evidence

Plaintiffs also rely (at 21-24, 25-26) on new evidentiary materials submitted for the first time with their reply in support of their Rule 60(b) motion. *See supra* p. 16; JA2005-171. These submissions include declarations by two former Senators who served on the 9/11 Commission that purport to characterize the findings of that body, along with an assortment of reports that Plaintiffs claim support their allegations. The submissions were improper. A motion for relief from a final judgment based on "newly discovered evidence" must establish that the evidence "could not have been discovered in time to move for a new trial" through the exercise of "reasonable diligence," and must also be brought "no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(b)(2), 60(c)(1). Plaintiffs do not and cannot argue that they have met these requirements.

Before the district court, Plaintiffs characterized their new materials as necessary to "rebut[]" reliance by Saudi Arabia and the SHC on the 9/11 Commission's report and their arguments that Plaintiffs' factual allegations lacked "credibility."[36] But Saudi Arabia's and the SHC's arguments properly relied on

[36] Pls.' Mem. of Law in Opp. to Mot. To Strike at 4 (filed Mar. 13, 2012) (MDL ECF No. 2572).

the contents of the district court record when it made its decisions in 2005, including the citations to the Commission's report. *See supra* pp. 5-6 & n.7. Plaintiffs' characterization of their evidence as a rebuttal does not entitle them to reopen that closed record. Accordingly, the district court was fully within its discretion to decline to permit Plaintiffs "to determine if there are a different set of facts that they could allege after . . . all of these years." Hr'g Tr. 55 (JA2226). Indeed, it would have abused its discretion had it done otherwise.[37]

#### 4. Plaintiffs forfeited their argument that jurisdictional discovery was required

Plaintiffs also contend (at 40-41, 65-66) that the outcomes in this case and in *Doe* were inconsistent because in *Doe* this Court remanded for jurisdictional discovery on the discretionary-function exclusion, yet no discovery was conducted in these cases. But Plaintiffs long ago forfeited any argument that jurisdictional discovery was required in these cases. In their 2004-2005 oppositions to Defendants' motions to dismiss, they failed to identify any supposed dispute of fact regarding the applicability of the discretionary-function exclusion as to which discovery would be appropriate. *See supra* pp. 6, 10; *Virtual Countries, Inc. v.*

[37] Also, as Defendants explained in support of their Motion To Strike in the district court, the new material was not competent evidence of anything and did nothing to bolster Plaintiffs' claims. *See* Defs.' Mem. in Supp. of Mot. To Strike at 4-7 & n.5 (MDL ECF No. 2561).

*Republic of South Africa*, 300 F.3d 230, 242 (2d Cir. 2002) ("[T]he district court had no obligation to order . . . discovery when [Plaintiff] had requested none.").

Plaintiffs assert (without citation) that they "requested the opportunity to conduct discovery" in their oppositions to Defendants' motions to dismiss. Pls.' Br. 9. This assertion appears to refer to footnotes in their district court briefs requesting "discovery as to any disputed fact the Court deems material to the FSIA jurisdictional analysis."[38] But, "in the FSIA context, discovery should be ordered circumspectly and only to verify allegations of *specific facts* crucial to an immunity determination." *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007) (internal quotation marks omitted; emphasis added). Plaintiffs' nonspecific requests were not enough. Further, on appeal from the district court's original decisions, Plaintiffs did not challenge the district court's determinations that jurisdictional discovery was unnecessary. *See supra* p. 14.

By contrast, in *Doe*, the district court had already determined that there were "factual disputes" regarding the applicability of the discretionary-function exclusion, and Afghanistan "had requested [discovery] if its motion to dismiss were denied" on the issue of discretionary-function immunity. 663 F.3d at 66;

[38] Fed. Pls.' MTD Opp. at 7 n.3 (MDL ECF No. 471); Pls.' Consol. Opp. to SHC MTD at 5 n.5 (MDL ECF No. 397).

*see Doe*, 580 F. Supp. 2d at 99.[39] That very different procedural posture further supports the district court's determination that the different outcomes in *Doe* and here are not extraordinary.

### C. The *Sargent* Factors Do Not Support Reopening the Judgments

Plaintiffs' heavy reliance (at 31-32, 36, 42-46) on this Court's decision in *Sargent* is misplaced. At the outset, *Sargent* involved not a Rule 60(b) motion, but a motion to recall this Court's mandate. *See* 75 F.3d at 88. This Court has since (in *Stevens*) rejected a party's reliance on *Sargent* to support Rule 60(b)(6) relief based on a change in law by observing that "*Sargent* is not a Rule 60(b) case." 676 F.3d at 69.

The *Sargent* Court identified four factors that led it to conclude that recalling the mandate was appropriate. *See* 75 F.3d at 90-91. Although noting that "no Second Circuit case . . . ha[d] employed" the *Sargent* factors "in the context of a Rule 60(b)(6) motion," the *Stevens* court suggested that "in some cases *Sargent's* framework *may* be helpful in determining whether a change in decisional law . . . *may* constitute the 'extraordinary circumstances' needed to warrant Rule 60(b)(6)

[39] *See* Reply to Opp. to Mot. To Vacate Default Judgment and Dismiss Claims Against Afghanistan at 7 n.3, *Doe v. Bin Laden*, No. 01-2516 (D.D.C. filed Apr. 8, 2004) (requesting "the opportunity to present evidence on [discretionary-function immunity] . . . if the Court determines that [the] noncommercial tort exception applies").

relief." 676 F.3d at 70 n.7 (emphases added). The district court was thus not required to consider those factors – which, in any event, do not favor Plaintiffs.

First, *Sargent* noted that the intervening decision was "beyond any question inconsistent with [the Court's] earlier decision." 75 F.3d at 90. Although *Doe* is "inconsistent with" *Terrorist Attacks*, it is *not* (as the district court correctly found) inconsistent with that court's original decisions granting Defendants' motions to dismiss based on discretionary-function immunity. *See supra* Part II.A.

Second, *Sargent* observed that the appellant had "brought to [this Court's] attention the fact that *Murray*" – the case that changed the relevant decisional law – "was pending in the Vermont Supreme Court." 75 F.3d at 90 (citing *Murray v. St. Michael's College*, 667 A.2d 294 (Vt. 1995)). That fact mattered in *Sargent* because this Court acknowledged that it could – and "perhaps should" – have "delayed" its decision "until *Murray* was decided." *Id.* Here, the district court obviously could not have been expected to delay its decision for *Doe* (and, moreover, agreed with *Doe*'s eventual statutory holding).[40]

[40] Plaintiffs assert (at 43 & n.8) that the district court was "on notice of the proceedings that led to the *Doe* decision" because it "received" the order transferring *Doe* to that court from the U.S. District Court for the District of Columbia. Not so. That transfer order was entered in August 2009 – approximately a year *after* this Court affirmed the district court's judgments. *See* Transfer Order (J.P.M.L. Aug. 10, 2009) (MDL ECF No. 2188).

Third, *Sargent* compared the absence of any "substantial lapse of time between issuance of [this Court's] mandate and the present motion" to *DeWeerth*, in which three years had passed between the Supreme Court's denial of certiorari and the change in decisional law, and concluded that "[r]ecall of the mandate would . . . not reopen a stale claim." *Id.* This case is much closer to *DeWeerth* than to *Sargent*. *Doe* was decided on November 7, 2011, *see* 663 F.3d 64 – more than two years and four months after the Supreme Court denied Plaintiffs' certiorari petition on June 29, 2009, *see* 129 S. Ct. 2859. Granting relief here *would* "reopen a stale claim." *Sargent*, 75 F.3d at 90.

Fourth, *Sargent* concluded that "the equities" favored recalling the mandate because the plaintiff originally brought suit in state court and, had the case not been removed to federal court, the plaintiff would "surely" have benefited from the intervening decision of the Vermont Supreme Court. *Id*. No similar equitable factor supports Plaintiffs here. On the contrary, the congressional policy favoring early determination of foreign sovereign immunity weighs heavily against them. *See supra* Part I.A.

### D. Plaintiffs' Criticism of the District Court's Discretionary-Function Rulings Provides No Basis for Relief

Although, as explained above, this Court need not review the correctness of the district court's original discretionary-function rulings to affirm its denial of Rule 60(b) relief, *see supra* Part II.A.3, Plaintiffs' criticism of those rulings lacks

merit. Plaintiffs do not dispute that their allegations against Defendants implicate discretionary decisions. *See* Pls.' Br. 60 ("The discretionary function exception . . . does not extend to every act that involves some element of choice.").[41] Instead, they contend (at 61-64) that some such decisions are sufficiently "illegal, malevolent, or extraordinary" as to deprive governments and their agencies of sovereign immunity, even in the exercise of discretion, citing *Liu* and *Letelier*.

In *Liu* and *Letelier*, however, the tortious acts in question were committed in the United States by alleged *agents* of foreign governments, acting on orders from those foreign states or their officials. *See Liu*, 892 F.2d at 1422-23; *Letelier*, 488 F. Supp. at 665-66. Here, Plaintiffs do not allege that Saudi Arabia or the SHC ordered the September 11 attacks or that the September 11 hijackers were Defendants' agents. *See* U.S. Amicus Br. 17 (distinguishing *Liu* and *Letelier* because "they involved acts in the United States *directly attributable* to the foreign governments") (emphasis added).

Moreover, the discretionary-function limitation applies to "*any* claim" grounded in a policy decision "*regardless of whether the discretion be abused*." 28 U.S.C. § 1605(a)(5)(A) (emphases added). It would rob that language of all

[41] Plaintiffs' reliance on *USAA Casualty Insurance Co. v. Permanent Mission of Republic of Namibia*, 681 F.3d 103 (2d Cir. 2012), is therefore misplaced; the defendant in that case violated a "mandatory regulation" and therefore its conduct was "not discretionary." *Id.* at 112 (internal quotation marks omitted).

meaning if plaintiffs could circumvent it merely by claiming that a particular alleged abuse of discretion was "illegal, malevolent, or extraordinary." As the D.C. Circuit has explained in a related context, the alleged "heinousness" of a discretionary decision "is not sufficient to give [courts] jurisdiction," because "[n]either the substantive basis of the tort, nor the seriousness of the crime, is relevant to the question of jurisdiction" under the FSIA. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 n.12 (D.C. Cir. 1984).

## III. TWO ADDITIONAL REASONS INDEPENDENTLY PRECLUDE JURISDICTION UNDER THE FSIA'S TORTS EXCEPTION

In all events, Plaintiffs cannot satisfy the torts exception for two additional, independent reasons. *First*, all of the actions that Defendants supposedly took to support al Qaeda occurred outside the United States, so that Plaintiffs' claims cannot satisfy the settled "entire tort" rule. *Second*, Plaintiffs have not adequately alleged that Defendants' actions caused the September 11 attacks.

### A. Plaintiffs' Allegations Cannot Satisfy the Entire-Tort Rule

To fall within the torts exception, the "entire tort" – that is, the allegedly tortious activity itself, not just the injury that results from it – must occur in the United States. *See* U.S. Amicus Br. 11. The D.C. and Sixth Circuits have so held, *see Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (Scalia, J.); *Persinger*, 729 F.2d at 842; *O'Bryan v. Holy See*, 556 F.3d 361, 382 (6th Cir. 2009), and this Court has recognized the proposition:

"Although cast in terms that may be read to require that only the injury rather than the tortious acts occur in the United States, the Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States.'" *Cabiri v. Government of Ghana*, 165 F.3d 193, 200 n.3 (2d Cir. 1999) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989)).[42]

For example, in *Persinger*, the D.C. Circuit found that the plaintiff could not recover for "mental and emotional distress suffered within the continental United States" as a result of being held hostage by a foreign government overseas because none of the defendant's acts occurred within the United States. 729 F.2d at 842-43. Likewise, in *O'Bryan*, the Sixth Circuit found the plaintiffs' injuries arising from abuse by members of the Roman Catholic clergy insufficient to maintain a claim against the Vatican, whose alleged wrongdoing was outside the United States. *See* 556 F.3d at 369-70, 381-82.

The United States made exactly this point in recommending to the Supreme Court that it deny certiorari in 2009. *See* U.S. Amicus Br. 14 ("The domestic tort exception . . . requires . . . that 'the tortious act or omission of th[e] foreign state or

[42] *See also Hirsh v. State of Israel*, 962 F. Supp. 377, 383-84 (S.D.N.Y.) ("The noncommercial tort exception applies only where both the tort and injury take place within the territorial jurisdiction of the United States."), *aff'd*, No. 97-7465, 1997 WL 796153 (2d Cir. Dec. 31, 1997) (judgment noted at 133 F.3d 907 (table)).

of any official or employee' be committed within the United States.") (quoting 28 U.S.C. § 1605(a)(5)). The views of the State Department on FSIA issues, though not dispositive, "are of considerable interest" to courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004); *see also First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality) (the Supreme Court "has recognized the primacy of the Executive in the conduct of foreign relations").

As *Persinger* recognized, "the briefest consideration of the purposes of the statute shows that . . . both the tort and the injury must occur in the United States." 729 F.2d at 842. First, the purpose of the Act is to state principles of sovereign immunity that can be applied by courts in this country when the acts of foreign sovereigns are at issue, and that would be equally appropriate when courts of other nations question the acts of the United States Government and its agencies and instrumentalities. "The tort exception's territorial limitation protects against conflict that would arise from asserting jurisdiction over a foreign government's actions taken in its own territory, and also serves to deter foreign courts from exercising jurisdiction over the United States for actions taken in the United States." U.S. Amicus Br. 15.

Second, "Congress' principal concern" in enacting the torts exception "was with torts committed in this country" – primarily "'traffic accidents.'" *Persinger*, 729 F.2d at 840 (quoting H.R. Rep. No. 94-1487, at 20-21 (1976), *reprinted in*

1976 U.S.C.C.A.N. 6604, 6619) (emphasis omitted); *see O'Bryan*, 556 F.3d at 382. By contrast, "[i]f Congress had meant to remove sovereign immunity for governments acting [in] their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in *this* country." *Persinger*, 729 F.2d at 841 (emphasis added).

That reading also accords with the statutory structure. In the commercial-activities exception, Congress withheld immunity for "a foreign sovereign's commercial activities 'outside the territory of the United States' having a 'direct effect' inside the United States." *Id.* at 843 (quoting 28 U.S.C. § 1605(a)(2)). By contrast, "[a]ny mention of 'direct effect[s]' is noticeably lacking from the noncommercial tort exception." *Id*. (second alteration in original). "When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *Id.* That inference compels the conclusion that Congress did not intend to subject foreign states to United States jurisdiction for allegedly tortious activity committed outside the United States. *See id.* Plaintiffs have not alleged that Saudi Arabia or

the SHC committed any act, much less any tortious act, in the United States. Instead, all of Defendants' alleged actions occurred in foreign countries.

It is no answer for Plaintiffs to assert that the September 11 attacks occurred in the United States. A "tort" encompasses not only the plaintiff's injury but also the defendant's tortious act. *See, e.g.*, *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 470 (3d Cir. 1950). As the United States also explained in its *amicus* brief in the Supreme Court, "jurisdiction under the tort exception must be based entirely on acts *of the foreign state* within the United States"; it cannot be based on a "foreign state's extraterritorial conduct" that allegedly had "some causal connection to tortious injury in the United States." U.S. Amicus Br. 14-16 (emphasis added). If mere allegations of "material support" occurring abroad "were permitted to satisfy the domestic tort exception, '[a]n important procedural safeguard [of the terrorism exception] – that the foreign state be designated a state sponsor of terrorism – would in effect be vitiated.'" *Id.* at 12, 14 (quoting *Terrorist Attacks*, 538 F.3d at 89) (alterations in original).

Nothing in *Doe* is inconsistent with the "entire tort" rule. Afghanistan did not raise the "entire tort" issue – or any variant thereof – on appeal.[43] And this Court went out of its way to "be clear" that it was not deciding any issue other than whether the FSIA's torts and terrorism exceptions are mutually exclusive,

[43] *See* Br. of Def.-Appellant, *Doe*.

including "whether the allegations in the complaint are sufficient . . . to provide jurisdiction" under the FSIA. 663 F.3d at 70-71. Any other reading of *Doe* would mean that this Court, without a word of analysis, created a conflict with the D.C. and Sixth Circuits, disregarded the Supreme Court's views in *Amerada Hess*, disavowed its own prior support for the entire-tort rule in *Cabiri*, and rejected the position of the United States in this very case. That is not plausible.

### B. Plaintiffs Have Failed To Allege Causation

Finally, the torts exception applies only to claims for injuries "*caused by* the tortious act or omission" of a foreign sovereign. 28 U.S.C. § 1605(a)(5) (emphasis added). The words "caused by" in § 1605(a)(5) incorporate traditional common-law principles of tort causation. *Cf., e.g., Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005) (incorporating common-law tort principles into securities-fraud statute, including but-for causation). Further, in light of the purpose of the torts exception – and, again, its focus on traffic accidents, *see supra* pp. 53-54 – courts have held that § 1605(a)(5) " 'should be narrowly construed so as not to encompass the farthest reaches of common law.' " *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 19 (D.D.C. 2003) (quoting *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987)) (emphasis omitted).

Here, Plaintiffs' allegations of causation are based on boilerplate, conclusory assertions that the September 11 attacks were a "direct, intended and foreseeable

product of [Defendants'] participation in al Qaida's jihadist campaign." *See supra* p. 5 (quoting *Fed. Ins.* Compl. ¶ 425 (JA1284)). Ultimately, as the *Burnett* court remarked, Plaintiffs' claims are based on the allegation that "(i) [Defendants] funded (ii) those who funded (iii) those who carried out the September 11th attacks." 292 F. Supp. 2d at 20. These tenuous and attenuated claims were never enough to justify the assertion of jurisdiction over a foreign sovereign by a United States court. They certainly do not justify reopening for that purpose judgments that have been final for years.

## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

/s/ *Michael K. Kellogg*

MICHAEL K. KELLOGG
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
WILLIAM J. RINNER
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)

*Attorneys for the Kingdom of Saudi Arabia*

/s/ *Roy T. Englert, Jr.*

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
(202) 775-4510 (fax)

*Attorneys for the Saudi High Commission for Relief of Bosnia & Herzegovina*

Dated: October 15, 2012

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,988 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

October 15, 2012

## CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of October 2012, I electronically filed the foregoing Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Michael K. Kellogg*
Michael K. Kellogg