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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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. INTRODUCTION AND SUMMARY.

Defendants' opposition repeatedly sidesteps the central points at issue and fails to address the core elements of plaintiffs' factual claims – confirming, through its omissions, the strength of plaintiffs' showing of defendants' culpability. Defendants' arguments regarding plaintiffs' burden, in the face of a factual challenge to FSIA jurisdiction, contradict the rationale and key elements of the cases defendants invoke and ignore defendants' own failure to present such a challenge. Their arguments regarding the "entire tort" limitation on jurisdiction unduly narrow this Court's decisions, which contemplate that jurisdiction can be grounded in an entire course of conduct that includes a defendant's actions in the U.S. and abroad.

Likewise, defendants avoid confronting the core defects of the two principal bases of the decision below. First, as to whether the Kingdom's employees who facilitated the attacks within the United States acted within the scope of their employment, defendants never address the relevant legal standard, which readily attributes such actions to an employer, or the core set of facts presented and documented to establish that the relevant

employment was furthering the anti-Western objectives of an office of the Kingdom. Instead, defendants point to the absence of evidence of senior government official involvement, which may be politically salient but is completely irrelevant to the legal issue of attribution. They also fail to join issue with the principal record points concerning other U.S.-based Saudi officials. Second, as to the affiliation of the Kingdom and its "charities," which acted in a coordinated fashion both within the U.S. and abroad, defendants do not acknowledge this Court's prior reasoning on the point, the dispositive admissions of the charities and their officials, or other documents confirming their intertwined nature. For much of their brief, defendants address evidentiary issues that the court below did not assess and which are ill-suited for this Court to address in the first instance.

Contrary to defendants' argument that plaintiffs effectively waived discovery, plaintiffs in fact specifically requested discovery on the two points central to the district court's decision, and this Court's decisions confirm that discovery is essential if plaintiffs are to meet any higher factual burden required in the FSIA context. And, there is no basis – as a matter of procedure or substance – for this Court to address the two alternative grounds that the district court did not consider.

II. PLAINTIFFS DO NOT BEAR A BURDEN OF PROVING ALL JURISDICTIONAL FACTS THROUGH SUBMISSION OF ADMISSIBLE EVIDENCE EXTRINSIC TO THEIR PLEADINGS.

Defendants argue that a stringent and unique burden applies to FSIA claims against a sovereign whose counsel simply denies the facts at issue and that plaintiffs must satisfy that burden without the benefit of discovery. Opp. 27-34. In this case, plaintiffs meet any applicable standard with respect to the points determined by the district court, *see infra* 13-41, or, at a minimum, are entitled to discovery, *see infra* 42-46. Even so, defendants misstate the applicable burdens borne by the parties.

Contrary to defendants' assertion that special rules and defenses apply to claims against sovereigns, the Supreme Court recently clarified that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Arg. v. NML Capital Ltd.*, 134 S. Ct. 2250, 2256 (2014). Nothing in the FSIA's text heightens plaintiffs' production and evidentiary burdens or lessens their entitlement to discovery. Therefore, under *NML Capital*, the relevant burdens must instead be the ordinary, flexible standards applicable to assessments of jurisdictional facts for claims made against non-sovereigns. *See, e.g.*, 5B Wright & Miller, Federal Practice and Procedure § 1350, 245-46

(3d ed. 2004) (resolution of jurisdictional fact bound up in merits determination should be resolved at merits or summary judgment stage).

Nor do relevant cases support defendants' particular arguments, and *NML Capital* means (at least) that any doubt must be resolved against application of FSIA-specific standards. Defendants assert that, simply because they are sovereigns, (i) they can invoke rules applicable to a "factual challenge" without actually challenging any particular facts, through a simple denial by counsel; (ii) plaintiffs must submit "evidence" distinct from well-supported claims of fact in the complaints and averments; (iii) plaintiffs' statements of fact cannot be accepted as true even if uncontested; and (iv) plaintiffs can be held to this unusually high standard without the benefit of discovery. Opp. 27-34. None of these points is correct.

Defendants have not, as an initial matter, presented a "factual challenge" triggering any heightened burden on plaintiffs. The district court treated defendants' arguments as presenting both a legal and factual challenge to the complaints, SPA104, but provided no reasoning for this conclusion. In fact, *Robinson v. Government of Malaysia*, 269 F.3d 133, 140-41 (2d Cir. 2001), indicates that a factual challenge exists only to the extent

that "evidence relevant to the jurisdictional question is before the court," and *Robinson*'s core holding is that for "factual disputes" and "factual issues … presented to it," a district court cannot "fail[] to look beyond the pleadings to factual submissions … submitted to the court in order to resolve a factual dispute" regarding a jurisdictional issue. The requirement to look to "factual submissions" and "resolve disputed issues of fact" presumes that such submissions by the defendant have generated such disputes. *See id.*; *see also Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (defendant "makes a factual attack" by "introduc[ing] testimony, affidavits or other evidence to dispute the truth of the allegations that, by themselves, would otherwise invoke Federal jurisdiction"); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (a factual challenge must "controvert[] the accuracy" of asserted jurisdictional facts by "proffering materials of evidentiary quality in support of that position").

Here, defendants' motion did not identify any factual dispute, and in defendants' brief, counsel generally asserts that plaintiffs' showing is insufficient and refers principally to isolated statements in government reports that are inapposite. *See infra* 19-22, 29-30; Pl. Br. 90-95. No "factual

challenge" arises where, as here, a sovereign has "submitted no affirmative evidence whatsoever to show that they fall outside the [FSIA] exception," such as "fil[ing] an affidavit denying that their agents" undertook relevant acts of terrorism or "proffer[ing] testimony denying that they had provided material support for those acts." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1132 (D.C. Cir. 2004) (Garland, J.); *see Terenkian*, 694 F.3d at 1131. The early "opportunity" provided to a sovereign defendant "to obtain an authoritative determination of its amenability to suit," *Robinson*, 269 F.3d at 142, is the opportunity to present materials that contest particular alleged jurisdictional facts. Otherwise, a sovereign's counsel could and would always impose the heightened production burden upon plaintiffs.

Contrary to defendants' assertion, plaintiffs are not required to meet their burden through "evidence" different in kind from facts alleged in a complaint or contained in plaintiffs' averments, cited affidavits, and government documents – much less limited to that presented in a form sufficient to survive a summary judgment motion. *See* Opp. 32. Instead, "[i]n the context of a Rule 12(b)(1) challenge to jurisdiction under the FSIA, … the district court 'must look to the substance of the *allegations*'" and,

"[i]n doing so, the court 'must review the *pleadings* and *any* evidence before it.'" *Robinson*, 269 F.3d at 140 (quoting *Cargill Int'l, S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993)) (emphases added). The "evidence" required to meet the plaintiff's burden can be "the allegations in the complaint [or] the undisputed facts, if any, placed before [the court] by the parties." *Id.* at 141; *see also id*. (the court assesses "whether a plaintiff has sufficiently alleged or proffered evidence"). These formulations indicate that a plaintiff can meet its burden by pointing to facts, alleged in the complaint or otherwise, and the courts use the term "evidence" in just this standard sense as applied for evaluating challenges to jurisdiction. *Cf. Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). Indeed, in *In re Terrorist Attacks on Sept. 11 2001*, 538 F.3d 71, 76-77 (2d Cir. 2008) (*Terrorist Attacks III*), this Court accepted for jurisdictional purposes plaintiffs' allegations of fact, supported by "a wealth of detail" from "published and unpublished sources," concerning the "charities." Similarly, *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers*, 12 F.3d 317, 324 (2d. Cir. 1993), "involve[d] the application of the FSIA to essentially undisputed facts" set out in the complaint and addressed whether those facts, accepted as true, established jurisdiction.

The foregoing cases also make clear that the plaintiffs' allegations and other presentations of fact are accepted as true unless contradicted by the defendant's evidence. *Robinson, Virtual Countries*, and cases applying them contemplate that the plaintiffs can meet their burden through facts alleged in the complaint. *Robinson*, 269 F.3d at 140-41, 146; *Virtual Countries v. Republic of S. Afr.*, 300 F.3d 230, 241-42 (2d Cir. 2002). Plaintiffs cannot meet their burden through "bare" or "conclusory" allegations, *Robinson*, 269 F.3d at 146; *Virtual Countries*, 300 F.3d at 242, but the district court has no basis, other than defendants' submissions, to decline to accept well-pleaded allegations as true. *See* 5B Wright & Miller, *supra* § 1350, at 202 ("If the jurisdictional allegations of the complaint are complete, uncontradicted, and sufficient, the district court must overrule a Rule 12(b)(1) motion directed merely at the language of the pleading and allow the action to proceed.").

And that is just how this Court and lower courts have understood the standard. *See, e.g.*, *Virtual Countries*, 300 F.3d at 242 (district court properly accepted plaintiffs' "allegations as factually correct," even as it found those facts insufficient); *Terrorist Attacks III*, 538 F.3d at 76-77; *Drexel Burnham*, 12 F.3d at 324; *Skanga Energy & Marine, Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d

264, 270 (S.D.N.Y. 2012); *see also Price v. Socialist People's Libyan Arab Janahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2000) (plaintiffs' "unchallenged factual allegations" accepted as true). Indeed, *Robinson* does not distinguish between legal and factual challenges for these purposes, and instead simply provides the sovereign defendant with an early opportunity to present evidence bearing on the jurisdictional determination and directs district courts to consider those submissions (and any submitted by plaintiffs) in resolving a Rule 12(b)(1) motion. 269 F.3d at 140-41. Cases that limit jurisdictional discovery to matters put into dispute by defendants' submissions are in accord. *See, e.g.*, *Hansen v. PT Bank Negara Indon. (Persero), TBK*, 601 F.3d 1059, 1061-62 (10th Cir. 2010); *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 713 (9th Cir. 1992).

Finally, decisions of this Court and other courts make clear that when faced with a factual challenge to jurisdictional facts, a plaintiff must be allowed discovery to satisfy even the limited burden established by *Cargill* and *Robinson*. A plaintiff's entitlement to discovery must at least be coextensive with its burden of production, especially where, as here, the relevant evidence is uniquely within the sovereign's control. *See First City, Tex.-Hous., N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998)

("[G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue … ."); *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332-33 (2d Cir. 1990); *see infra* 42-46. Under *NML Capital*, it is doubtful that a greater production burden can be placed upon a plaintiff to establish jurisdiction over a sovereign, but the decision at least precludes affording the sovereign any special protection from discovery. 134 S. Ct. at 2254-55, 2258.

III. THE DISTRICT COURT'S INTERPRETATION OF THE "ENTIRE TORT" RULE IS UNDULY NARROW.

The district court's narrow construction of the "entire tort" limitation to 28 U.S.C. § 1605(a)(5) led it to disregard allegations and evidence establishing that an ongoing course of conduct, here and abroad, resulted in the September 11th attacks, an "entire tort" committed in the United States – and thus also forming the basis for establishing jurisdiction over defendants. *See* Pl. Br. 97-104.

Defendants do not dispute plaintiffs' detailed allegations and evidence establishing a direct connection between the defendants' acts abroad and the attacks, but instead claim that this theory of liability is foreclosed by a footnote in *O'Neill v. SJRC*, 714 F.3d 109, 117 n.10 (2d Cir.

2013). However, defendants ignore plaintiffs' showing (Pl. Br. 100-01) that the allegations against them are materially different than those against the two charities in *O'Neill*. In *O'Neill*, this Court concluded that the two charities' alleged monetary support was *unrelated* to plans to attack the American homeland, making the tort of the September 11th attacks "distinct and separate from the 'torts' allegedly committed by [defendants]." 714 F.3d at 117 n.10. Here, by contrast, plaintiffs claim that defendants, through ostensible charities, directly supported the camps used to train the September 11th attackers and provided other support necessary to al Qaeda's achieving the capabilities used to execute the September 11th attacks. *See* Pl. Br. 85, 96-97, 104.

Plaintiffs further showed (Pl. Br. 101-02) that their allegations against defendants are equivalent to those made against Afghanistan in *Doe v. Bin Laden*, 580 F. Supp. 2d 93, 98-99 (D.D.C. 2008), *aff'd*, 663 F.3d 64 (2d Cir. 2011), where this Court concluded that the plaintiff's allegations were sufficient to satisfy the elements of Section 1605(a)(5). Defendants (Opp. 36-37) claim that *Doe* did not address the "entire tort" rule, but that is incorrect. After setting forth the requirements for satisfying the FSIA's torts exception, this Court found that "[t]here is no question that the first

five requirements are present" – one of which is that an alleged tort "occur[red] in the United States" – and that the *Doe* plaintiff's claim therefore "appears to fit within the noncommercial tort exception." *Doe*, 663 F.3d at 66-67. This Court's ruling that the *Doe* plaintiff's claims against Afghanistan could proceed beyond the pleading stage cannot be reconciled with the district court's ruling that plaintiffs' claims here cannot proceed.

Plaintiffs also claimed that state law principles of secondary liability supported attributing the September 11th attacks, an "entire tort" committed in the United States, to defendants. *See* Pl. Br. 102-05. In response, defendants argue only that this Court implicitly rejected this basis of liability in *O'Neill v. SJRC*. Opp. 37 (this argument "failed to persuade" the panel). This Court, however, did not address plaintiffs' theories of secondary liability in *O'Neill*. Nor do defendants even address the fact that the district court in *Doe* concluded that the "entire tort" rule could support a claim under Section 1605(a)(5) based on allegations that Afghanistan conspired with the September 11th hijackers – including (as here) through the provision of training camps – and that this Court did not disturb that ruling on appeal. *See* Pl. Br. 104-05. Accordingly, the district

court erred in concluding that the "entire tort" rule cannot be satisfied through principles of secondary liability.

IV. PLAINTIFFS' FACTUAL SHOWINGS SATISFY THE ENTIRE TORT RULE.

A. Plaintiffs Have Established that Saudi Employees Acted Within the United States.

1. Omar al Bayoumi.

The district court found that plaintiffs had not sufficiently established that four individual employees and agents of the Saudi government aided the September 11th hijackers from within the United States. Two of them, Omar al Bayoumi and Fahad al Thumairy, were both acknowledged to be Saudi government employees, but the court narrowly concluded that plaintiffs had not established that they had acted "within the scope of their employment." SPA112. Defendants' arguments with respect to Bayoumi in particular extend far beyond this narrow holding to matters the district court did not address, and their other arguments do not confront the core facts and evidence underlying plaintiffs' central claim that Bayoumi's precise function – his employment task – was the performance of anti-Western duties assigned to him by the Islamic Affairs offices of the Kingdom's embassies and consulates. S*ee* Pl. Br. 19-23, 47-50 (describing,

surveying and citing factual allegations and evidence on these points). Defendants' arguments also ignore the larger and controlling question of whether the record supports a conclusion that Bayoumi was engaged in some work for the Kingdom when he committed his tortious acts, regardless of his precise job title.

a. Nature and Scope of Employment.

The Kingdom acknowledges that the record below establishes that Bayoumi was an employee of the Saudi government, which paid his salary; performed no work for the company to which he was allegedly seconded by the government; was in regular contact with the Kingdom's embassies and consulates; traveled from San Diego to Los Angeles and met with Thumairy at the Saudi consulate for an hour on February 1, 2000; met September 11th hijackers Khalid al Mihdhar and Nawaf al Hazmi, who had arrived in the United States just two weeks earlier, at a nearby restaurant immediately after his meeting with Thumairy; offered at that meeting to help the two hijackers settle in San Diego and in other respects; and thereafter did in fact assist the two hijackers in material ways. Opp. 38-39.

When considered under the applicable legal standards, which defendants conspicuously fail to address, these undisputed facts confirm the sufficiency of plaintiffs' showing that Bayoumi acted within the scope of his employment. As previously established, Pl. Br. 67-69, an employee's torts are imputable to the employer if done "in the course of carrying out the employer's business," *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995), even if they "violate the employer's express rules and confer no benefit on the employer." *McLachlan v. Bell*, 261 F.3d 908, 911 (9th Cir. 2001); *see also Swarna v. Al-Awadi*, 622 F.3d 123, 144 (2d Cir. 2010) (under New York law, "an employee's tortious acts are imputable to the employer if done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions").

Here, Bayoumi's admitted status as an employee of the Saudi government and pattern of reporting to the Saudi diplomatic missions readily support a conclusion that he worked under the direction of officials of the embassies and consulates.[1] Further, the fact that he met with

[1] This conclusion is reinforced by Dallah Avco's assertion that Bayoumi did not report to it, JA7444-45, the absence of any indication that Bayoumi communicated with any component of the Saudi government other than the embassies and consulates, and the logical expectation that an employee

Thumairy at Thumairy's office *in the consulate* indicates that their meeting concerned Bayoumi's work for the Kingdom, as further confirmed by Bayoumi's proceeding immediately from that meeting to his meeting with the hijackers, where he offered to assist them. These events give rise at least to an inference that Bayoumi was performing functions assigned to him by Thumairy when he initiated contact with the two hijackers and then provided support to them. That plausibly establishes that Bayoumi was acting within the scope of his employment. *Billings*, 57 F.3d at 800.

Plaintiffs' showing below was not, however, limited to those facts defendants credit in their brief; instead, plaintiffs' extensive presentation of additional facts and evidence readily demonstrated that Bayoumi's core functions involved the advancement of the Ministry of Islamic Affairs' work and agenda, including the Ministry's intimate dealings with jihadists and efforts to advance jihadist causes. *See* Pl. Br. 16-23, 46-50, 52-66 (describing, surveying and citing allegations and evidence on these points). Only by dismissing this evidence as nothing more than "colorful

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would report to and receive direction from his employer concerning his work.

descriptions" (Opp. 38) can the Kingdom declare it "not plausible" to conclude that Bayoumi was an operative reporting to the Ministry.

The materials establishing Bayoumi's true functions and role for the Saudi government describe specific actors, transactions and events, reference the dates on which relevant activities occurred, and cite particularized details from identified documents and reports resulting from investigations into the September 11th attacks. *See* Pl. Br. 16-23, 46-50, 52-66 (citing factual allegations and supporting evidence).[2] In addition, Congress released this month a substantially unredacted copy of Part Four of the *Report of the Joint Inquiry Into the Terrorist Attacks of September 11, 2001, available at* http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/declasspart4.pdf. That publicly available document lends further support to plaintiffs' already sufficient showing that

[2] This Court has already credited plaintiffs' evidence establishing the cover employment provided to Bayoumi by Dallah Avco, *In re Terrorist Attacks on Sept. 11, 2001,* 714 F.3d 659, 678-79 (2d Cir. 2013) (*Terrorist Attacks V*), and defendants err in claiming that the decision "neither considered nor addressed whether Plaintiffs had plausibly alleged" Bayoumi to be a covert Saudi agent. Opp. 44. As this Court plainly stated, its determination involved an assessment of the adequacy of plaintiffs' allegations that Dallah Avco provided a "ghost job" and "cover employment" to Bayoumi, *Terrorist Attacks V*, 714 F.3d at 671, 679, theories tied to the associated allegation that he was a covert employee of the Saudi government. Pl. Br. 50-52.

Bayoumi, Thumairy, Basnan, and Hussayen provided assistance to the hijackers while acting within the scope of their employment for the Kingdom. Among other significant aspects, it includes further factual detail that: (1) Saudi Arabia maintained a network of covert government employees in the United States, who reported to the Saudi embassies and consulates; (2) Bayoumi and Basnan were members of that network, and both provided support to the hijackers; (3) Hussayen was "apparently a 'Saudi Interior Ministry employee/official'" and FBI field agents who interviewed Hussayen "believed he was being deceptive" when he "claimed not to know the hijackers." More generally, it demonstrates a multiplicity of supportive dealings between individuals associated with the Saudi government and al Qaeda.[3]

The sufficiency of the record evidence is especially clear in light of the absence of any submissions by defendants contesting these facts: they never submitted any affidavits or other materials offering a contrary account of Bayoumi's dealings with the Ministry or his actual employment

[3] If this Court does not find that plaintiffs' showing reflected in the record establishes jurisdiction, this newly-released report would independently support a remand for further consideration by the district court.

– or even denied through counsel plaintiffs' allegations concerning the nature of Bayoumi's work and functions.

Apart from failing to grapple with the substance of plaintiffs' showing, defendants' arguments mostly take issue with the weight or consistency of a few of the many FBI, intelligence, and other government reports relied upon by plaintiffs in making their showing. Defendants generally contend that the many FBI reports presenting facts and assessments are "immaterial" and warrant no consideration, Opp. 41-44, but *Turkmen v. Hasty*, 789 F.3d 218, 226 (2d. Cir. 2015) (*petition for cert. filed*), is to the contrary and confirms that supporting facts and details in government reports directly reinforce the plausibility of corresponding allegations. Pl. Br. 43-44, 50, 54. The Kingdom asserts that *Turkmen* "did not involve foreign sovereign immunity," Opp. 31 n.16, but *Turkmen* addressed what types of evidence support and make plausible a plaintiff's claims. Furthermore, the authorities defendants invoke also do not involve immunity and do not even concern how to evaluate a plaintiff's showing or pleadings. Instead, they deal only with the admissibility of consent decrees and similar settlement agreements with state or federal agencies, and with the standards for evaluating motions to strike references to such

agreements in pleadings under Fed. R. Civ. P. 12(f). *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2d Cir. 1976) (motion to strike references to SEC consent decree); *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 593 (S.D.N.Y 2011) (motion to strike references to CFTC settlement order). Those inapposite rulings have no relevance to whether plaintiffs meet their burden here.[4]

Defendants claim that there are inconsistencies in a handful of selected documents, Opp. 41-43, but these points are not incompatible with plaintiffs' claims and would not, in any event, remotely call into question the great weight of plaintiffs' other documents and overall showing. For example, defendants claim that an FBI official determined that Bayoumi was not a Saudi *intelligence* officer, citing a statement by a single FBI agent to Senator Graham recounted in the Senator's book. Opp. 41. That statement cannot be credited as a final determination of the FBI in this context, and if credited it would at most indicate that Bayoumi was not an officer of Saudi Arabia's external intelligence agency, the General

[4] Defendants (Opp. 43) invoke a footnote in the amicus brief filed by the United States seven years ago, but that statement reflected only a non-binding legal opinion about a single, isolated allegation in the complaints and has no bearing on the sufficiency of the entirely different and expansive factual allegations and evidence which form the present record.

Intelligence Presidency. But plaintiffs do not claim that Bayoumi was an employee of that agency. Instead, they specifically allege that he worked in a covert capacity for the Ministry of Islamic Affairs, and in particular its offices in the United States – a claim amply supported by the record facts and evidence. *See* Pl. Br. 16-23, 46-50, 52-66 (citing factual allegations and supporting evidence).[5]

Defendants' reliance on the 2015 report of the 9/11 Review Commission, Opp. 8, in fact undermines their arguments about plaintiffs' claims in two critical respects. First, the *Report* notes "ongoing internal debate within the FBI between the original PENTTBOM team and the [separate] subfile team regarding the potential significance of" evidence surrounding the assistance provided to the two hijackers (Hazmi and Mihdhar) and that the investigation remains open. 9/11 Review Commission, *The FBI: Protecting the Homeland in the 21st Century,* p. 103 (Mar. 2015) (*Review Commission Report*). This statement confirms, contrary to the Kingdom's central claim, that the 9/11 Commission did not conduct

[5] Plaintiffs' evidence is, on the other hand, wholly *inconsistent* with, and thus thoroughly refutes, any notion that Bayoumi was simply a "well-connected Saudi expatriate pursuing an education in the United States." *See* Opp. 39-40.

an exhaustive investigation into the support network that aided Hazmi and Mihdhar or reach any final determinations as to the activities of Bayoumi. *See* Pl. Br. 90-95; JA2283-2288 (Kerrey Aff.) (explaining limitations of 9/11 Commission investigation and that Commission did not exonerate Saudis or rebut plaintiffs' theories); JA 2278-2281 (Lehman Aff.) (same). It also shows that, even now, plaintiffs' claims enjoy support among members of the U.S. intelligence community who are participating in the ongoing investigation, confirming their plausibility. Second, the *Review Commission Report* also notes that a 2012 FBI report summarizing the findings of the continuing investigation states that "al-Thumairy 'immediately assigned an individual to take care of al-Hazmi and al-Mihdhar during their time in the Los Angeles area.'" *Id.* at 102 n.330. This finding provides further evidence supporting plaintiffs' claims regarding Bayoumi and Thumairy's interactions. *See* Pl. Br. 52-64. Indeed, this more recent finding, combined with the totality of the other evidence, establishes that the meeting between Bayoumi and Thumairy, and the following events leading to Bayoumi providing the hijackers with the precise support they needed were not mere "coinciden[ce]." *See* JA2280-81 (Lehman Aff. ¶ 8).

Similarly, defendants fail in their attempts to minimize and discredit the affidavit testimony of Secretary Lehman and Senators Graham and Kerrey—which directly supports plaintiffs' factual allegations on these points—as "politicians' affirmations" that are "conclusory" and "made without personal knowledge." Opp. 41. The affidavits do not offer only "conclusions" without "facts." *Id.* For instance, when Secretary Lehman attests that "[b]y the time our Commission started our work, it was already well known in intelligence circles that the Islamic Affairs Departments of Saudi Arabia's diplomatic missions were deeply involved in providing support to Islamic extremists," JA2280 (Lehman Aff. ¶ 7), he is making a statement of fact concerning a consensus within the intelligence community, known to Lehman from his work on the Commission, that directly supports plaintiffs' claims on a key point. Likewise, when Secretary Lehman and Senator Kerrey explain that the 9/11 Commission did not exonerate Saudi Arabia for the events of September 11th or in any way refute plaintiffs' claims, they are offering statements of fact concerning their own Commission's investigation and the Kingdom's misunderstanding of it. JA2283-88 (Kerrey Aff.); JA2278-81 (Lehman Aff.). As to personal knowledge, the affidavits plainly state that the affiants are

testifying on the basis of their personal involvement in the investigations they headed and familiarity with the evidence developed in those investigations, which the affiants expressly invoke in support of their testimony. JA2272 (Graham Aff. ¶ 2); JA2278 (Lehman Aff. ¶¶ 1-2); JA2283 (Kerrey Aff. ¶¶ 1-2). Much of that evidence was, in turn, submitted to the district court, and set forth the particular factual detail informing and supporting the affiants' testimony. The affidavits, together with the submission of this underlying evidence, were a mechanism for assessing and presenting the massive record the affiants' testimony was based upon, and for presenting how their testimony would be more fully developed in the setting of a formal hearing (and be admissible under Fed. R. Evid. 702). The district court plainly erred in declining even to consider their affidavits under those circumstances, and defendants offer no defense of that error.

b. Substantial Assistance and State of Mind.

Defendants also press two issues that the district court did not address and the evidence for which this Court is poorly positioned to assess in the first instance: they argue that plaintiffs have not sufficiently shown that Bayoumi provided "any material assistance" to the hijackers,

Opp. 46, and that plaintiffs failed to demonstrate that Bayoumi acted with the requisite state of mind when he assisted the hijackers. Addressing these issues would require considering them in the first instance and be especially problematic because they are so intertwined with the merits of the alleged tort. *See Robinson*, 269 F.3d at 148 (Sotomayor, J., concurring). Even if the arguments were ripe for resolution, they misapprehend plaintiffs' claims and the legal principles governing them. They also would require this Court to repudiate several of the 9/11 Commission's most unambiguous assessments.

Regarding Bayoumi's provision of material assistance, the Commission observed that Hazmi and Mihdhar were "ill-prepared for a mission in the United States," particularly given that "[n]either had spent any time in the West, and neither spoke much, if any, English." JA2149 (Aver. ¶¶ 145-46) (quoting *9/11 Commission Report*). For these and other reasons, it concluded that it was "unlikely that Hazmi and Mihdhar…would have come to the United States without arranging to receive assistance from one or more individuals informed in advance of their arrival." JA2150 (Aver. ¶ 147) (quoting *9/11 Commission Report*). These findings confirm that the assistance Hazmi and Mihdhar needed

most in preparing for the attacks was help in acclimating in the United States upon their arrival without detection, and initiating preparatory activities such as their flight lessons. Bayoumi provided just this essential assistance, both directly and through Mohdar Abdullah, whom he assigned to "assist [Hazmi and Mihdhar] in any way in their affairs." JA3372 (FBI Report).

Under *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), the seminal decision on secondary liability, evaluating whether assistance is "substantial" in a particular case involves an intensely fact-sensitive evaluation of several factors.[6] *Id.* at 477. Within this framework, the nature of the act encouraged often "dictates what aid might matter" and therefore be "substantial." *Id.* at 484. Here, Hazmi's and Mihdhar's acute need for the assistance Bayoumi provided readily confirms the substantiality of Bayoumi's assistance. Further, where the wrongful act encouraged is "particularly bad or opprobrious" even minimal assistance will be regarded as substantial. *Id.* For obvious reasons, this rule applies with

[6] Defendants claim that proximate cause is required and that that standard is unmet here, but where the assistance provided is "substantial" under the analytical framework outlined in *Halberstam,* liability extends to all acts and injuries that are "foreseeable." *Id.* at 483.

special force to plaintiffs' claims arising from the September 11th attacks, and further undermines any suggestion that Bayoumi's assistance can be regarded as insubstantial.[7]

Similarly, defendants' argument that plaintiffs have failed to show that Bayoumi acted with the requisite mental state in assisting the hijackers rests on an incorrect legal standard. Defendants claim that plaintiffs are required to show that Bayoumi knew "the two men were planning a terrorist attack on the United States" and "inten[ded] to assist them in doing so." Opp. 49. Instead, the governing standard requires only that plaintiffs set forth facts giving rise to a reasonable inference that Bayoumi was "generally aware of his role as part of an overall illegal or tortious activity." *Halberstam,* 705 F.2d at 477. Where criminal or covert activities are involved, the defendant's mental state "must generally be inferred from circumstantial evidence." *Id.* at 480.

Plaintiffs' factual allegations and evidence satisfy this requirement in several ways. For instance, they demonstrate that Bayoumi was closely associated with numerous terrorists and terrorist supporters (in addition to

[7] Defendants do not even address plaintiffs' theories of conspiracy liability, which turn on the agreement to participate in the tortious endeavor, and not on the substantiality of the assistance provided.

the two hijackers), including Thumairy, Anwar al Aulaqi, Basnan, and Abdullah. His provision of assistance to the hijackers, in turn, immediately followed his meeting at the consulate with Thumairy, whom the FBI has confirmed initiated efforts to establish a support network for the hijackers immediately upon their arrival in the United States, and included immediate coordination with Aulaqi once Bayoumi helped them settle in San Diego. *See* Pl. Br. 16-17, 19-20, 46-49, 54-56, 58-59, 65-66. These associations and events plausibly establish Bayoumi's awareness of his role in an overall tortious endeavor (especially where no competing facts have been presented).

Bayoumi's choice of Abdullah to assist the hijackers, and his directive that Abdullah help them "in any way in their affairs," JA3370-76, further reinforce this conclusion. As the 9/11 Commission noted, Abdullah was "perfectly suited to help the hijackers in pursuing their mission" as he "clearly was sympathetic to [their] extremist views" and shared their "hatred for the U.S. government." *9/11 Commission Report*, p. 219. Bayoumi's selection of such a perfect attendant and aid for two terrorists deployed to attack the United States could not have been simply coincidental and innocent, particularly given the other facts pointing

unanimously to a contrary conclusion. Indeed, these facts much more than plausibly establish, as Secretary Lehman concluded, that "Fahad al Thumairy and Omar al Bayoumi knew Hazmi and Mihdhar were bad actors who intended to do harm to the United States." JA2280-81 (Lehman Aff. ¶ 8).

The statements defendants extract from the *9/11 Commission Report* and certain of the FBI reports indicating that investigators had (at the time of those reports) "found no evidence" that Bayoumi "had advance knowledge of the terrorist attacks," provided "witting" assistance for the attacks, or "believed in violent extremism," Opp. 49, do not undermine this conclusion. None speaks with any force to whether Bayoumi knew he was participating in an "overall illegal or tortious" endeavor, and, more fundamentally, they do not carry the meaning or conclusiveness defendants suggest. Again, the preface to the *9/11 Commission Report*, affidavits of 9/11 Commission members, the *Review Commission Report*, and many recent public statements of numerous 9/11 Commission members confirm that the 9/11 Commission and preceding FBI investigations did not exonerate Saudi Arabia or reach any conclusive determinations with respect to the involvement of Bayoumi (or for that matter Thumairy and

Basnan) in the September 11th attacks.[8] Pl. Br. 15-16, 20-23, 64-66. Further, even if Bayoumi were somehow completely oblivious to involvement in any wrongful conduct, the record clearly establishes that Thumairy, who directed Bayoumi to aid the hijackers, possessed the requisite mental state in doing so.

2. Fahad al Thumairy.

The district court concluded that plaintiffs had not established that Thumairy, as well, acted within the scope of his employment. Defendants largely ignore the actual basis of the district court's decision. They cite no legal standards addressing scope of employment and do not address plaintiffs' detailed arguments demonstrating the clear linkage between the functions and activities of the Ministry of Islamic Affairs and the advancement of jihadist causes. *See* Opp. 51-52. In fact, Thumairy was the

[8] Such statements that the 9/11 Commission "found no evidence" are only properly understood as indicating that the Commission found no *direct evidence* establishing a proposition with certainty, as reflected by the political determination of the Commission's senior staff that no allegation of Saudi involvement should be included that could not be demonstrated by "100 percent proof of guilt." JA3282-83. That standard bears no relationship to the standards and rules applicable to evaluating facts and evidence in a civil proceeding.

central figure in the Saudi support network for Hazmi and Mihdhar. *See* Pl. Br. 16-17, 19-20, 46-49, 54-56, 58-59, 65-66.

Instead, defendants focus on whether plaintiffs have alleged that Thumairy provided support to the hijackers, a showing the district court also did not question in its decision. Defendants rely upon a single sentence in the *9/11 Commission Report* indicating that the Commission "found [no] evidence that Thumairy provided assistance to the two operatives." Opp. 51. Once again, a claim of no evidence found does not suggest that none exists, and does not negate the substance, logic and import of plaintiffs' extensive factual allegations and evidence. The Commission's *Report* confirms as much and supports rather than undermines plaintiffs' claims, through its additional statements that it was "unlikely that Hazmi and Mihdhar…would have come to the United States without arranging to receive assistance from one or more individuals informed in advance of their arrival" and that "the circumstantial evidence makes Thumairy a logical person to consider as a possible point of contact for the hijackers." *9/11 Commission Report*, p. 217.

Even more directly, the *Review Commission Report* indicates that the FBI more recently determined that Thumairy in fact assisted Hazmi and

Mihdhar, as reflected by the FBI's 2012 finding that Thumairy "immediately assigned an individual to take care of al-Hazmi and al-Mihdhar during their time in the Los Angeles area." *Review Commission Report*, p. 102 n.330. This more recent determination provides additional evidentiary support for plaintiffs' claims and further confirms that the 9/11 Commission did not repudiate plaintiffs' theories of Saudi liability.

Defendants also dismiss the extensive evidence of Thumairy's terrorist ties, radical beliefs and jihadist sermons, and demonstrably dishonest and deceptive statements to 9/11 Commission staffers as merely "attacks on Al Thumairy's character." Opp. 51-52. But those terrorist affiliations and violent jihadist beliefs directly support plaintiffs' claims that Thumairy orchestrated a support network for terrorists,[9] and Thumairy's dishonesty with respect to material issues provides affirmative evidence sufficient to establish the points about which Thumairy lied. *See*

[9] Plaintiffs' claims are further reinforced by the facts and evidence concerning Mohammed Fakihi's involvement in supporting the plot. Fakihi was also a Saudi cleric who held a position identical to that of Thumairy in the Saudi Embassy in Berlin, and from that post aided the Hamburg al Qaeda September 11th plot team. Pl. Br. 26-27. The direct linkages of clerics holding identical positions in the Islamic Affairs offices of diplomatic missions on separate continents to principal al Qaeda September 11th plot members directly support plaintiffs' claim. JA2279-81 (Lehman Aff. ¶¶ 5-9).

Tatum v. City of N.Y., 668 F. Supp. 2d 584, 593 (S.D.N.Y. 2009) (in a civil proceeding, it is a "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt").[10]

3. Osama Basnan.

Defendants fault the factual claims and evidence indicating Basnan's involvement in the support network for Hazmi and Mihdhar, relying only on the 9/11 Commission's narrow statement that it "found no evidence that Hazmi or Mihdhar received money" from Basnan. Opp. 52. For the reasons previously discussed, *see supra* 17-18, 21-22, 29-30, this narrow finding of no evidence carries no weight and cannot rebut evidence submitted to the contrary. In fact, the record provides ample factual and evidentiary support for plaintiffs' allegations that Basnan was also an undisclosed Saudi employee working under the Ministry of Islamic Affairs and performing the same functions as Bayoumi, and that Basnan provided material assistance for the September 11th plot from within the U.S.,

[10] The 9/11 Commission confirmed Thumairy's deceitfulness, as well as that of Bayoumi and Basnan, JA2155-56, 2164-65, but declined to express any conclusions related to those findings.

including as part of the support network for Hazmi and Mihdhar. *See* Pl. Br. 24-25, 69-73. And for the reasons previously discussed, *see supra* 21-24, 29-30, the Kingdom cannot avoid the weight and import of all of this evidence based on a single statement in the *9/11 Commission Report* that the Commission did not find evidence. Opp. 52.

4. Saleh al Hussayen.

Despite this Court's prior determination that plaintiffs' earlier and less detailed pleadings alleged that Saleh al Hussayen "provided direct aid to the hijackers" with enough sufficiency to entitle plaintiffs to discovery concerning his role in the attacks, *Terrorist Attacks V*, 714 F.3d at 678-79, the Kingdom urges this Court to conclude otherwise here and to find that plaintiffs have not established that Hussayen was a government employee or agent when he precipitously switched hotels to stay in the same hotel as the hijackers the night prior to the attacks—even though Hussayen sought sovereign immunity protection as a Saudi official for the claims arising from those precise activities earlier in the case. *See* Pl. Br. 23-24, 73-75.

The Kingdom principally argues that a portion of plaintiffs' showing (Hussayen's assertion below that "[f]rom 1961 to the present, Sheikh Al-

Hussayen has held positions in the Saudi government and its affiliated organizations") appeared in the legal brief submitted in support of his bid for sovereign immunity, rather than as an explicit statement in his affidavit. Opp. 55 n.44. This technical discrepancy is insignificant, however, as Rule 11 required that his counsel certify that the brief's "factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(3). And, the recently declassified materials further support plaintiffs on this point. *See supra* 17-18.

Nor can defendants explain away this Court's earlier ruling confirming that the allegations and evidence concerning Hussayen's remarkable relocation to the hijackers' hotel, coupled with the evidence of his other terrorist connections and efforts to avoid interrogation by the FBI by feigning a seizure, make plausible the claim that Hussayen directly assisted the hijackers, or at a minimum warranted discovery on the issue.[11] *See Terrorist Attacks V*, 714 F.3d at 679. The record at issue in this appeal is

[11] Defendants also argue that plaintiffs have failed to specify what kind of assistance Hussayen provided. Opp. 56. However, the record plainly demonstrates that Hazmi and Mihdhar closely associated themselves with Wahhabi religious scholars with terrorist ties from the moment they arrived in the U.S. (Thumairy), during their preparations for the attacks (Aulaqi) and on the eve of their jihadist undertaking (Hussayen).

even more detailed and robust, and fully supports the inference that Hussayen precipitously switched hotels to aid the hijackers. *See* Pl. Br. 23-24, 73-75.

B. Plaintiffs Demonstrated that the Charities' Conduct was Attributable to Saudi Arabia.

Plaintiffs also argued that the entire tort rule had separately been satisfied by their allegations and evidence relating to the Kingdom's government "charities" and their extensive support closely related to the September 11th attacks, including in several cases from offices in the United States. Pl. Br. 95-105. Those tortious activities were attributable to the Kingdom on two grounds: (1) the charities were controlled alter-egos of the Saudi government; and (2) the charities were engaged in the performance of core functions of the Saudi State. *Id.* at 76-81. The district court concluded that "plaintiffs fail[ed] to implicate Saudi Arabia under an alter ego theory" because they "failed to allege facts that sufficiently show that Saudi Arabia controlled the day-to-day operations of these charities." SPA110.

Defendants object (Opp. 66-67) to plaintiffs' claim that this Court already resolved this issue by crediting plaintiffs' alter-ego allegations in

Terrorist Attacks III, but the defendants' argument does not account for the plain language of that decision. In a procedural setting identical to that presented here, the *Terrorist Attacks III* Court observed at the outset that "we accept as true [the complaints] at the pleading stage." 538 F.3d at 76. The Court noted specifically plaintiffs' allegation that "the Kingdom exercises complete oversight and control over the charities, making the charities alter-egos and agents whose deeds can be imputed to the Kingdom," *id.* at 77, and observed that "the allegations about the charities provide the necessary background for the issues here." *Id.* at 76. These statements can only properly be understood as crediting the alter-ego allegations of the complaints for purposes of the FSIA immunity analysis.

Defendants err in arguing that the actions of foreign state instrumentalities can be imputed to the foreign state only by showing that they are alter-egos under *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 629 (1983). To the contrary, "the *Bancec* presumption [of juridical separateness] does not apply where the entity asserting independence operates as a political organ of the state." *SerVaas Inc. v. Republic of Iraq*, No. 10-828-cv, 2011 U.S. App. LEXIS 2709, at *5 (2d Cir. 2011) (citing *Garb v. Republic of Poland*, 440 F.3d 579, 592 (2d Cir.

2006)). "[I]n making this inquiry [the Second Circuit] follow[s] the 'core functions' test" which "turns on whether the core functions of the [entity] are predominantly governmental or commercial." *Id.* at *5-6; *see also Garb*, 440 F.3d at 593-94. As discussed in plaintiffs' opening brief, plaintiffs' entirely uncontested allegations and evidence, which included a lengthy expert affidavit, readily demonstrate that the charities were government arms engaged in the performance of core government functions and obligations. *See* Pl. Br. 81-83 (discussing and citing facts and evidence demonstrating that charities performed core functions); JA2417-61 (Kohlmann Aff.).

Defendants, however, dismiss the charities' undisputed role in performing core functions of the Kingdom, noting that just because the U.S. Constitution requires the U.S. government to "provide for the common defence" does not make "defense contractor[s] such as Lockheed Martin" alter-egos of the United States. Opp. 67. This argument ignores that the core functions test determines whether a *governmental* entity is properly treated as a separate juridical entity, or part of the state itself. *See Garb,* 441 F.3d at 591. Defense contractors like Lockheed Martin are not governmental entities, so the core functions test is irrelevant to them. The

charities, on the other hand, are Saudi governmental entities, headed by government officials, JA2182-2266 (Aver. ¶¶ 286-580), and therefore subject to the core functions imputation rule.[12]

Further, even under *Bancec*'s separate imputation test for alter-egos, plaintiffs' showing as to the Kingdom's control over the charities went well beyond any that can reasonably be imposed on a plaintiff seeking to establish jurisdiction under an alter-ego theory in a pre-discovery setting. This conclusion is especially clear given defendants' failure to challenge plaintiffs' alter-ego allegations or supporting facts and evidence through an affidavit of their own. *Supra* Part IV.A.1.a.

In this respect, plaintiffs offered factual allegations and evidence – never contested – showing significant government influence and control in each of the five areas identified as defining "extensive control" for this purpose in *EM Ltd. v. Banco Cent. de la República Arg.*, 800 F.3d 78, 91

[12] Contrary to defendants' claim (Opp. 67-68) that the core functions test turns entirely on the structural integration of the entity as part of the state itself, courts applying the test should not "rely[] mechanically on the legal status of the foreign entity .... Rather, the issue is, what function does the entity perform?" *Aurelius Capital Partners, LP v. Republic of Arg.*, No. 07 Civ. 2715, 2008 U.S. Dist. LEXIS 101764, at *30 (S.D.N.Y. Dec. 11, 2008) (citing *Garb*, 440 F.3d at 592), *rev'd on other grounds*, 584 F.3d 120 (2d Cir. 2009). In any case, because Saudi Arabia's political system is based upon Islam, the government's Islamic institutions are closely integrated into the state itself.

(2d Cir. 2015). *See* Pl. Br. 77-81 (discussing allegations and evidence of control and collecting citations); JA2417-61 (Kohlmann Aff.). In most instances, plaintiffs' factual allegations concerning the charities' alter-ego status were supported by statements and testimony of the charities and the Saudi government itself. Pl. Br. 28, n.6 (collecting citations). This uncontested record of concessions by the relevant parties was more than sufficient to meet plaintiffs' burden, *supra* 3-10, and at a minimum met any applicable threshold for undertaking discovery on the issue. This is especially so because information and evidence concerning the dealings between a foreign state and its associated instrumentalities typically is not available in the public domain, but instead often resides in the exclusive possession of the foreign state defendant.

Contrary to defendants' claims made in the absence of introducing any evidence on the point, plaintiffs' factual allegations and evidence also were sufficient to show that the charities' imputable tortious acts satisfied the entire tort rule—both because the charities' tortious acts were closely related to, and thus formed part of the same tort as, the September 11th attacks, and because several of the charities provided support to al Qaeda from offices in the United States. *See supra,* Part III; Pl. Br. 75-90, 95-105.

The district court, however, treated any support for al Qaeda provided from outside of the United States, no matter how closely related to the September 11th attacks, as categorically incapable of satisfying the entire tort rule. And because it declined to impute the charities' actions to the Kingdom at all, the court also did not address the nature of the tortious conduct carried out through U.S. offices of certain of the relevant charities. However, in prior decisions, the district court held that plaintiffs had sufficiently alleged that several of those charities' U.S. offices had aided and abetted and materially supported the September 11th attacks.[13] Defendants' attempts to claim that the allegations relating to the tortious acts of those charities' U.S. offices are deficient, Opp. 68-69, are at odds with those prior holdings and not supported by the record. Pl. Br. 84-85 (discussing allegations and evidence of charities' U.S.-based support for al Qaeda and attacks).

[13] *See In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 569 (S.D.N.Y. 2005) (denying motion to dismiss of U.S. branch of IIRO); *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 519-20 (S.D.N.Y. 2010) (denying motions to dismiss of U.S. branches of WAMY and al Haramain).

V. PLAINTIFFS ARE, AT A MINIMUM, ENTITLED TO DISCOVERY.

Defendants also wrongly contend that dismissal was proper even though plaintiffs were afforded no opportunity to conduct jurisdictional discovery, based on the theory that plaintiffs "failed in the district court and fail again now to identify 'specific facts' into which limited discovery might be appropriate." Opp. 84.

Defendants acknowledge that plaintiffs requested an opportunity to conduct "discovery as to any fact the Court deems to be in dispute and material to the FSIA analysis"—but contend that the request was insufficient to preserve an entitlement to discovery. Opp. 84-85. Although even that request would suffice, plaintiffs also requested more specific discovery, including discovery to address the key issues that ultimately underlay the district court's decision. Asked by the district court to identify specific areas where discovery might develop the record, plaintiffs' counsel explained that the depositions of Thumairy, Bayoumi and Basnan would be appropriate if there were "any concern in the Court's mind about whether Bayoumi and Thumairy knew one another and were working in concert with one another to support the hijackers." JA7437. As to

plaintiffs' alter-ego theories, counsel similarly requested that "[i]f Your Honor feels there is any discrepancy in the record on that point, discovery concerning the nature of the relationship with the charities to the government, how money flowed between them, the role of the government in appointing employees to the charities, the role of the government in directing how they carry out their activities would certainly fill up any potential gaps in that question." JA7439.

Access to jurisdictional discovery is especially important in the FSIA context, *see supra* 9-10, and plaintiffs' requests focused on the critical jurisdictional facts. As even the authorities cited by defendants recognize, "in the FSIA context, 'discovery *should* be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'" *EM Ltd.*, 473 F.3d at 486 (quoting *First City*, 150 F.3d at 176) (emphasis added). Typically, the areas where such discovery is necessary are identified through a competent factual challenge by the defendant, which places a fact critical to the immunity determination in dispute, *supra* 4-6, or through a determination by the court that plaintiffs' allegations are insufficient to establish a necessary fact for purposes of the jurisdictional analysis. *See Gabay v. Mostazafan Found. of Iran*, 151 F.R.D.

250, 256 (S.D.N.Y. 1993) (holding dismissal inappropriate where court found plaintiffs' alter-ego showing insufficient but "suggest[ed] that admissible evidence might be obtained if discovery were permitted").

In such circumstances, courts consistently have held that the plaintiff must be afforded an opportunity to conduct discovery. *See Filus*, 907 F.2d at 1332 ("generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue"); *First City*, 150 F.3d at 176-77 (same); *see also Gabay*, 151 F.R.D. at 256 ("the issue of subject matter jurisdiction under the FSIA should not be resolved without adequate development of the factual record"). Thus, where "plaintiffs set forth non-conclusory allegations that, if supplemented with additional evidence, would materially affect the court's analysis vis-a-vis the FSIA, then the Court should permit limited discovery." *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, No. 96-315, 1997 U.S. Dist. LEXIS 12622, at *4, *12 (D.D.C. Aug. 18, 1997).

Plaintiffs' request for discovery below was entirely consistent with these authorities and principles. Plaintiffs sought discovery concerning any facts the court deemed insufficiently established in the record and material to the FSIA analysis, and explained that "in keeping with the

authorities that discovery should be limited to disputed facts the Court deems material to the FSIA analysis, it is appropriate for plaintiffs in FSIA cases to wait until the Court has defined such areas of relevant dispute, before serving discovery." R.2926 at p. 9, n.10 (Opp. to KSA MTD). In contrast, the rule defendants urge would require plaintiffs in FSIA cases to demand discovery as to every fact raised in their pleadings, to avoid later being accused of having failed to preserve their entitlement to discovery as to a matter deemed insufficiently pled and critical to the jurisdictional analysis. That result would undermine the goals of the FSIA, by subjecting foreign sovereigns to broad discovery requests and motions to compel at the outset of cases. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990) (explaining that unnecessary jurisdictional discovery should be avoided in FSIA case).

Doe further confirms that plaintiffs' approach to seeking discovery was appropriate. There, this Court concluded that the plaintiff's nonconclusory allegations presented a claim that, at the pleading stage, "appears to fit within the noncommercial tort exception." *Doe,* 663 F.3d at 67. However, the Court determined that the factual record was insufficient to determine whether the acts at issue were attributable to Afghanistan and

nondiscretionary. *Id.* at 71. Observing that Afghanistan had made a request in the district court for jurisdictional discovery "if its motion to dismiss were denied," *id.* at 66, the Court remanded the case for discovery to further develop the factual record on those matters. *Id.* at 71. *Doe* thus confirms the routine practice in FSIA cases of allowing the court to make the threshold determination as to jurisdictional facts that are inadequately developed, and proceeding with discovery thereafter.

VI. THE DISMISSALS BELOW CANNOT BE AFFIRMED BASED ON DEFENDANTS' ALTERNATIVE ARGUMENTS FOR FSIA IMMUNITY.

A. Addressing the Alternative Grounds for Affirmance Would Be Inconsistent with this Court's Settled Practice.

Defendants (Opp. 75-83) press two alternative grounds for affirmance but do not dispute that the district court never addressed either argument and that this Court's established practice dictates that it not reach these arguments in the first instance. *Farricielli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000) (this Court's "settled practice" is "to allow the district court to address arguments in the first instance").

Defendants (Opp. 75), citing *O'Neill v. SJRC,* argue that this Court should depart from its established practice because affirmance would be

consistent with a "central purpose" of the statute – enabling the foreign government to obtain an early dismissal when the claim lacks foundation. However, the Supreme Court has since indicated that the FSIA does not establish special procedural or substantive preferences for sovereigns that are not reflected in the statute's text, *see NML Capital*, 134 S. Ct. at 2255-56; *supra* 3-4, and the FSIA's text does not provide for accelerated dismissal or alternative rules for addressing claims on appeal in the first instance. The text does, however, indicate that the FSIA's purpose is to "serve the interests of justice" and "protect the rights of both foreign states *and litigants*." *See* 28 U.S.C. § 1602 (emphasis added). In any event, the conditions prompting the consideration of alternative grounds in *O'Neill v. SJRC* (the parties agreed that the grounds on which the district court had originally dismissed the case were no longer valid, and the relevant facts were undisputed), *see* 714 F.3d at 113-14, 117, are absent here.

B. The Discretionary Function Exception Does Not Apply.

Defendants err in claiming (Opp. 76-81) that the FSIA's discretionary function exception bars plaintiffs' claims because they are "based on" defendants' "policy decisions."

On its face, this is a shocking argument: that defendants' material support for terrorism, undertaken in contravention of U.S. and international law by individual Saudi officials here and abroad in support of the hijackers and through "charitable" components of the government that directly supported al Qaeda's training camps and acquisition of international terrorism capabilities, is somehow official government policy.

The argument is also precluded by this Court's decisions. Whether characterized as a "policy" or not, government officials' provision of assistance to terrorists that forms the core of plaintiffs' claims is a criminal offense under U.S. law. *See, e.g.*, 18 U.S.C. §§ 2339B, 2339C, 2339D. Courts interpreting the discretionary function exception have consistently held that foreign sovereigns have no "discretion" to engage in conduct that is illegal or contravenes international law, even if the decision involves some element of policy judgment. *See, e.g., USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namib.*, 681 F.3d 103, 113 (2d Cir. 2012) (defendant's conduct was not "discretionary" because it violated city ordinance); *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989) (exception is inapplicable because defendant had no discretion to violate law that prohibits murder); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C.

1980) ("there is no discretion to commit, or to have one's officers or agents commit, an illegal act").

Defendants do not argue that illegal acts can fall within the discretionary function exception but instead claim (Opp. 78) that plaintiffs' claims focus on "Saudi Arabia's discretionary choice to pursue its policy of supporting Islam by extending financial support to governmental and nongovernmental charity organizations" and that "the funding of charities is at the core of [plaintiffs'] case."[14] That is incorrect. The discretionary function test is designed to evaluate the precise governmental acts giving rise to injury, and as detailed above the particular acts at issue are not general funding determinations. Pl. Br. 16-31. Moreover, as plaintiffs' complaints make clear, the "gravamen" of those complaints is defendants' provision of material assistance to the September 11th hijackers and the September 11th plotters with knowledge that the assistance would be used

[14] Defendants base their "gravamen" argument on a single paragraph in the Averment, selectively and misleadingly quoting testimony by Lee S. Wolosky (not plaintiffs' allegations) before a Senate Committee. Opp. 80. Specifically, Mr. Wolosky testified only that "[a]s a core tenet of its foreign policy, Saudi Arabia funds the global propagation of Wahabism, *a brand of Islam* that, *in some instances,* supports militancy by encouraging divisiveness and violent acts against Muslims and non-Muslims alike." JA2194 (Aver. ¶ 316) (emphasis added).

to support the September 11th attacks. Specifically, plaintiffs' claims are based upon (1) the acts of Saudi agents and officials in knowingly and directly providing assistance to the September 11th hijackers; (2) the acts of the Kingdom's *alter ego* "charities" in directly providing funds and support to al Qaeda, including funding for training camps and facilities used for the September 11th attacks; and (3) the torts of the hijackers themselves. Those claims cannot reasonably be construed as "put[ting] on trial the policies of Saudi Arabia [of supporting religion] and the religion it supports." Opp. 78. Defendants cannot invoke the FSIA to avoid accountability for violations of domestic and international law simply by pointing to policies that, in themselves, have nothing to do with advancing terrorism.

Nor is defendants' argument consistent with *Doe v. Bin Laden,* 663 F.3d 64 (2d Cir. 2011). *Doe* involved allegations that Afghanistan provided material support to and conspired with al Qaeda in furtherance of the September 11th attacks, and this Court found that the complaint adequately "alleged nondiscretionary acts by employees of the foreign state within the scope of their employment," and thus held that "at the pleading stage, the claim appears to fit within the noncommercial tort exception." *Id.* at 67. In this case, plaintiffs made detailed allegations that

defendants provided material support to al Qaeda, including through supporting al Qaeda training camps, and conspired with al Qaeda to harm the United States – which closely parallel the allegations in *Doe*. *See* Complaint ¶ 21, *Doe v. Afghanistan, et al.*, Civil Action No. 01-2516 (D.D.C., Jan. 4, 2002) (ECF No. 2). The question in *Doe* – as here – was whether the complaint was legally sufficient to avoid dismissal under the torts exception without permitting discovery, and this Court found that the acts of material support alleged in the *Doe* complaint fit within the torts exception. The Court therefore declined to dismiss the complaint and found that the plaintiffs were entitled to jurisdictional discovery concerning application of the discretionary function exception. *Doe*, 663 F.3d at 66-67, 71. Indistinguishable allegations should yield the same result here.[15]

[15] Nor, contrary to defendants' claim (Opp. 80), does Judge Casey's determination on the discretionary function exception assist them. That decision was based on a less-developed record, did not mention the tortious acts of the individual Saudi employees or attribution theories, ignored the record evidence identifying the defendants' support for terrorism, did not address *Doe* or cases establishing that unlawful conduct is excluded from the scope of the exception, and, because it was not addressed or affirmed on appeal, does not have the continuing effect defendants claim, *see, e.g., Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d. Cir. 1986).

C. Plaintiffs Have Sufficiently Alleged Causation.

The torts exception applies to claims asserting injuries "caused by" the tortious act of a foreign state, 28 U.S.C. § 1605(a)(5). Defendants assert that the phrase "caused by" requires "but-for" causation, because the phrase is similar to phrases that the Supreme Court has interpreted as imposing a "but-for" standard. Opp. 81 (citing *Burrage v. United States,* 134 S. Ct. 881, 889 (2014)). However, *Burrage* addressed the causation language of a substantive criminal statute, not the FSIA jurisdictional provisions, and did not even involve interpretation of the phrase "caused by."

In contrast, when the Supreme Court interpreted the phrase "caused by" in another jurisdictional statute, it found that statute to require a "less stringent" showing of proximate cause. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 536-38 (1995) (addressing the Extension of Admiralty Jurisdiction Act). Citing *Great Lakes,* the D.C. Circuit and the Fourth Circuit have held that the "caused by" language of the FSIA does not require a showing of "but-for" causation. *See Rux v. Republic of Sudan*, 461 F.3d 461, 472-73 (4th Cir. 2006); *Kilburn*, 376 F.3d at 1128-30.

In *Kilburn,* the D.C. Circuit held that "there is no textual warrant" for a "but-for" causation requirement because "the words 'but for' simply do not appear [in the statute]." 376 F.3d at 1128. The court interpreted the indistinguishable "caused by" language of 28 U.S.C. § 1605(a)(7) (2007) as requiring a showing of proximate cause, *i.e.,* "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." 376 F.3d at 1128. A more restrictive standard, the court stated, would "run[] afoul of the FSIA's injunction that a non-immune 'foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" *Id.* at 1129 (quoting 28 U.S.C. § 1606). In *Rux,* the Fourth Circuit agreed with *Kilburn*'s "reasonable connection" standard, noting that the FSIA is a jurisdictional statute, and "[j]urisdictional causation under [the FSIA] is distinct from the substantive causation of a claim." *Rux*, 461 F.3d at 472-73.

Plaintiffs' allegations and evidence more than satisfy the modest "reasonable connection" standard and, if defendants' various actions here and abroad are properly considered as a whole rather than in isolation, would meet a higher standard as well. As shown above, *supra* 13-36, 40-41, plaintiffs' allegations and evidence allege a reasonable connection between

defendants' conduct and the September 11th attacks. *See also* Pl. Br. 45-89. *Doe* confirms this result. This Court found that there was "no question" that the *Doe* plaintiffs' injuries were "caused by" a tortious act (the September 11th attacks) and that the allegations that Afghanistan conspired with al Qaeda adequately pled a FSIA claim. *Doe*, 663 F.3d at 66-67. This Court's holding in *Doe* applies equally to plaintiffs' similar showing here.

VII. CONCLUSION.

For the foregoing reasons and those set out in plaintiffs' initial brief, this Court should find that jurisdiction has been established (or, in the alternative, that discovery is warranted), reverse the decision below, and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)

I, Sean P. Carter, attorney for plaintiffs-appellants, hereby certify that the preceding brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B) and this Court's order issued on June 6, 2016. As indicated by the word-count function of Microsoft Word 2010, this brief contains 10,942 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

Dated: July 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I electronically filed with the Clerk's Office of the U.S. Court of Appeals for the Second Circuit this brief of plaintiffs-appellants, and further certify that the parties' counsel will be notified of, and receive, this filing through the Notice of Docket Activity generated by this electronic filing.

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