

## **APPENDIX**

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**APPENDIX A**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued May 3, 2023                      Decided March 8, 2024  
Reargued September 29,  
2023

No. 22-7058

ELI M. BOROCHOV, ET AL.,  
APPELLEES

SHARI MAYER BOROCHOV, ET AL.,  
APPELLANTS

v.

ISLAMIC REPUBLIC OF IRAN AND  
SYRIAN ARAB REPUBLIC,  
APPELLEES

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:19-cv-02855)

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*Michael Radine* argued the cause for appellants. On  
the supplemental briefs was *Robert J. Tolchin*.

*Steven R. Perles* and *Peter Raven-Hansen* were on the  
supplemental brief for *amici curiae* Robert Canine, et  
al. in support of appellants.

*Ben Buell*, Student Counsel, argued the cause as *amicus curiae* in support of the District Court’s judgment. With him on the supplemental brief was *Catherine E. Stetson*, appointed by the court.

*Brad Hinshelwood*, Attorney, U.S. Department of Justice, argued the cause for *amicus curiae* United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Sharon Swingle*, Attorney.

Before: MILLETT, PILLARD, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: Rotem and Yoav Golan, a married couple, were among fourteen people injured when a member of the terrorist group Hamas rammed his car into a crowd at a bus stop in Jerusalem. The attack failed to kill any of its intended victims; only the perpetrator died. Rotem and Yoav, along with their relatives, who suffered emotional trauma in the wake of the incident, sued Iran and Syria for the injuries resulting from the car attack. The district court denied a default judgment and any relief to several of the plaintiffs, who then filed this appeal.

We hold that the district court lacked subject-matter jurisdiction over this case. Congress granted federal courts jurisdiction to hear personal-injury claims arising from, as relevant here, “extrajudicial killings” committed or materially supported by state sponsors of terrorism. But because the attacker in this case (fortunately) did not kill anyone, the attack that caused Rotem and Yoav’s injuries was not an “extrajudicial *killing*” over which Congress has provided subject-matter jurisdiction. Nor have the plaintiffs

identified any other basis for our jurisdiction against the foreign-government defendants. We therefore vacate the judgment of the district court with respect to the plaintiffs before this court and remand for dismissal of those plaintiffs' claims.

## I

### A

The Foreign Sovereign Immunities Act of 1976 ("FSIA") codified a common-law rule that, for "more than a century and a half," had generally exempted foreign sovereigns from the reach of American courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); see Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. § 1602 *et seq.*).

This case concerns a statutory exception to that immunity. In 1996, Congress withdrew foreign sovereign immunity for lawsuits that seek money damages for personal injury or death from a state sponsor of terrorism that has engaged in an "act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources \* \* \* for such an act[.]" Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241. This provision, which is commonly referred to as the "terrorism exception," is now codified at 28 U.S.C. § 1605A(a)(1).

Congress also created a cause of action for U.S. citizens, members of the U.S. armed forces, and U.S. government employees who have been injured by foreign states' acts or sponsorship of terrorism. 28 U.S.C. § 1605A(c). All others suing under the terrorism ex-

ception must rely on state- or foreign-law causes of action. *Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348, 353 (D.C. Cir. 2018); see *Owens v. Republic of Sudan*, 864 F.3d 751, 809 (D.C. Cir. 2017), *vacated on other grounds*, *Opati v. Republic of Sudan*, 590 U.S. 418 (2020).

Three additional preconditions generally must be met for the terrorism exception to apply. First, the foreign state was designated a “state sponsor of terrorism at the time [of] the act \* \* \* or was so designated as a result of such act[.]” 28 U.S.C. § 1605A(a)(2)(A)(i)(I). Second, “at the time [of] the act,” either a victim of the act or the claimant in the suit was an American national, a member of the U.S. armed forces, or an employee or contractor for the U.S. government acting within the scope of their employment. *Id.* § 1605A(a)(2)(A)(ii). And third, if “the act occurred in the foreign state against which the claim has been brought,” the claimant gave the foreign state a “reasonable opportunity” to arbitrate prior to filing a lawsuit. *Id.* § 1605A(a)(2)(A)(iii).

## B

On December 14, 2015, Rotem Golan, an Israeli citizen, and her husband Yoav Golan, an American citizen, were waiting with others at a bus stop in Jerusalem when a terrorist deliberately rammed his car into the crowd. *Borochov v. Islamic Republic of Iran*, 589 F. Supp. 3d 15, 28–29 (D.D.C. 2022). The car’s impact “hurled” Rotem and Yoav into the bus stop’s glass wall. *Id.* at 29. The attacker had an axe in his car that he “likely intended to use” against those at the

bus stop, but an onlooker shot him before he could inflict any further harm. *Id.* The attacker was the only person who died in the terrorist incident. *Id.*<sup>1</sup>

Rotem and Yoav were both badly injured. *Borochov*, 589 F. Supp. 3d at 29. Rotem’s legs were lacerated, requiring stitches, and she suffered a sprained knee ligament. *Id.* The injuries caused her to miss two months of her teaching internship. *Id.* The car crushed Yoav’s leg and both dislocated and fractured his shoulder. *Id.* Yoav and Rotem also “suffered mental and emotional injuries” from the attack. *Id.* Several family members who witnessed their relatives’ pain and suffering in the aftermath of the attack themselves sustained mental and emotional injuries.

The district court found that the attacker was acting on behalf of the terrorist organization Hamas, which praised him in the wake of the attack as a “son of the Hamas movement.” *Borochov*, 589 F. Supp. 3d at 29. The court also found that Iran supported Hamas “for the past 30 years” through the provision of massive financial support, including weapons, training, and “suitcases of money.” *Id.* at 27–28. The district court further found that Syria gave Hamas “operational freedom, political legitimacy, protection, and training[,]” without which “Hamas could not have undertaken” the attack. *Id.* at 26–27.

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<sup>1</sup> For purposes of our jurisdictional analysis, we credit the district court’s unchallenged factual findings. See *Fraenkel*, 892 F.3d at 351.

## C

On September 24, 2019, Rotem, Yoav, and their family members sued Iran and Syria, alleging tort claims of, among other things, battery, assault, intentional infliction of emotional distress, and aiding and abetting the terrorist attack. *See* Second Am. Compl. ¶¶ 89–135. Several of the plaintiffs are American citizens, and they invoked 28 U.S.C. § 1605A(c). Others are not. Those Israeli-citizen plaintiffs instead brought common-law tort claims. Second Am. Compl. ¶¶ 102, 107, 112, 119, 129.

Neither Iran nor Syria appeared to defend against the action, so the Clerk entered defaults against them. *See* Dockets 20–24; *see also* FED. R. CIV. P. 55(a).

After entry of the defaults, each plaintiff was required to “establish[ ] his claim or right to relief by evidence satisfactory to the court” before the court could enter a default judgment. 28 U.S.C. § 1608(e); *see Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1113 (D.C. Cir. 2019). Entry of default is critical for FSIA plaintiffs because foreign state sponsors of terrorism are typically “unlikely to pay,” *Braun v. United States*, 31 F.4th 793, 795 (D.C. Cir. 2022), and a default judgment qualifies for payment through the U.S. Victims of State Sponsored Terrorism Fund, 34 U.S.C. §§ 20144(b)(2)(B), 20144(j)(4).

For the Israeli members of the Golan family bringing tort claims, District of Columbia choice-of-law rules required the application of Israeli law as to both liability and damages. *See Borochoy*, 589 F. Supp. 3d at 37–38; *see also Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 117 (2022) (“A foreign state or instrumentality in an FSIA suit is liable just



as a private party would be. That means the standard choice-of-law rule must apply.”) (citation omitted).

After the plaintiffs submitted evidence and expert reports, the district court denied damage awards to all of the Israeli-citizen plaintiffs except Rotem.

The court began its decision by holding that it had subject-matter jurisdiction under the FSIA’s terrorism exception for extrajudicial killings. *Borochoy*, 589 F. Supp. 3d at 34 (citing 28 U.S.C. § 1605A(a)(1)). The court found that two victims of the attack were U.S. citizens and both Syria and Iran were designated state sponsors of terrorism. *Id.* at 30. It then found that Iran and Syria had provided material support for extrajudicial killings by Hamas members. *Id.* at 32–33. The court acknowledged that the terrorist attack against Rotem and Yoav was not an “extrajudicial killing,” since nobody but the perpetrator died. *Id.* at 31–32. Nonetheless, the district court concluded that it had jurisdiction because Iran and Syria had provided material support *for the purpose* of conducting extrajudicial killing of Israelis. *Id.* at 32–33. Even though no killing resulted, the court held that jurisdiction attached so long as the material support was intended to cause an extrajudicial killing. *Id.*

On the merits, the district court held that Iran and Syria were liable for the plaintiffs’ injuries. *Borochoy*, 589 F. Supp. 3d at 35–40. The court noted that the plaintiffs had filed declarations from Israeli law professors that discussed some of the relevant bases for liability under Israeli law. *Id.* at 38–40. But as to damages, the district court found that the plaintiffs “fail[ed] to detail how and in what amount Israeli law

compensates the injuries allegedly suffered” by the Israeli-citizen plaintiffs. Order to Show Cause at 1; see *Borochov*, 589 F. Supp. 3d at 45–46. For that reason, the district court denied all the Israeli-citizen plaintiffs but Rotem any recovery. *Borochov*, 589 F. Supp. 3d at 47. The district court made an exception for Rotem because the court viewed “[h]er physical injuries and severe emotional trauma” as providing a sufficient basis for awarding damages. *Id.* at 46–47. The district court later denied the Israeli-citizen plaintiffs’ motion to amend the judgment. Order Denying Mot. Amend at 3–4.

Rotem and Yoav’s Israeli-citizen relatives, to whom we refer collectively as the Golans, timely appealed the district court’s denial of a default judgment for damages.

## II

We begin with our appellate jurisdiction. The Golans appeal the district court’s denial of damages. Under 28 U.S.C. § 1291, we have jurisdiction to review “all final decisions” of the district courts. Finality is “to be given a practical rather than a technical construction.” *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) (quotation marks omitted); see *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948) (There is “[n]o self-enforcing formula defining when a judgment is ‘final[.]’ ”).

The most important feature of final orders is that they “end[ ] the litigation on the merits[.]” *Catlin v. United States*, 324 U.S. 229, 233 (1945); see *Republic Nat. Gas Co.*, 334 U.S. at 68 (An order is final when “nothing more than a ministerial act remains to be done[.]”). The “district court’s intent is a significant factor” in

determining whether the litigation before it is at an end. *Attias v. Carefirst, Inc.*, 865 F.3d 620, 624 (D.C. Cir. 2017). So when a district court’s “order states the order of dismissal is final and appealable[,]” we take that as “[t]he clearest signal of finality[.]” *Wilcox v. Georgetown Univ.*, 987 F.3d 143, 147 (D.C. Cir. 2021).

Sometimes, the denial of default judgment “simply sets the stage for continued trial court proceedings[,]” as when a defendant is likely to appear for trial despite failing to respond at an earlier stage of the proceedings. See 15A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 3914.5 (3d ed.) (April 2023 Update). In that situation, a denial of default judgment is not an appealable final order under Section 1291. See, e.g., *Prince v. Ethiopian Airlines*, 646 F. App’x 45, 47 (2d Cir. 2016) (summary order) (denial of default judgment not final where district court “did not adjudicate all remaining claims”).

By contrast, in this case, there is every indication that the denial of default judgment marked the end of the district court litigation. To start, the district court called its order “final” and “appealable,” and requested that the Clerk of the Court close the case. Judgment at 3. The court also entered judgment consistent with Federal Rule of Civil Procedure 58(a), which is a clear signal to the plaintiffs that the court had “reached a ‘final decision’ within the meaning of § 1291[,]” such that it was “time to notice an appeal[.]” *Wilcox*, 987 F.3d at 146; FED. R. CIV. P. 58(a) (requiring that a “judgment \* \* \* be set out in a separate document”). Finally, the court entertained a post-judgment motion, which would be out of place if the proceeding were still ongoing. See generally Order Denying Mot. Amend.

Because this denial of default judgment bore clear indicia of finality, we have appellate jurisdiction under 28 U.S.C. § 1291 to review the district court’s order. *See also Monk v. Secretary of Navy*, 793 F.2d 364, 370 (D.C. Cir. 1986) (“We have jurisdiction to decide [our appellate] jurisdiction” even when the district court lacked statutory jurisdiction.).

### III

In addition to verifying our appellate jurisdiction, we have an “independent obligation” to assure ourselves both that we have, and the district court had, subject-matter jurisdiction. *National R.R. Passenger Corp. v. Southeastern Pa. Transp. Auth.*, 56 F.4th 129, 134 (D.C. Cir. 2022). Here, subject-matter jurisdiction exists only if the Golans’ claims fall within one of the FSIA’s exceptions to foreign sovereign immunity. These exceptions are the “sole bas[es] for obtaining jurisdiction over a foreign state in federal court” in a civil case. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)).

The Golans rely exclusively on the exception codified at 28 U.S.C. § 1605A, which, as relevant here, confers jurisdiction over a case

in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act[.]

28 U.S.C. § 1605A(a)(1).

The terrorist attack that caused the Golans' injuries did not involve torture, aircraft sabotage, or hostage taking. So to fall within the Section 1605A exception, their injuries must have been "caused by" either "an act of \* \* \* extrajudicial killing" or "the provision of material support or resources for such an act[.]" *Id.* Because the perpetrator did not kill anyone in the attack that injured the Golans, no extrajudicial killing occurred, and neither could there have been material support for "such an act." As a result, Section 1605A does not provide jurisdiction and the Golans' claims must be dismissed.

#### A

The Golans' injuries were not "caused by an act of \* \* \* extrajudicial killing" because the terrorist attack that injured them did not kill anyone. 28 U.S.C. § 1605A(a)(1); *see Borochoy*, 589 F. Supp. 3d at 31. At most, the perpetrator attempted, but failed, to commit an extrajudicial killing. That is not enough to confer jurisdiction under Section 1605A.

Our analysis begins and ends with the plain meaning of the statutory text. The word "killing" refers to an action resulting in the death of another. *See, e.g., Killing*, 6 THE OXFORD ENGLISH DICTIONARY 430 (2d ed. 1989) ("That kills or deprives of life."); *Kill*, BLACK'S LAW DICTIONARY 886 (8th ed. 2004) ("To end life; to cause physical death."); *Killing*, THE AMERICAN HERITAGE DICTIONARY 701 (2d ed. 1982) (def. 1) ("Murder; homicide."); *Kill*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 642 (10th ed. 1993) (def. 1a) ("to deprive of life"). The Golans have offered no ex-

ample in which the word “killing” or the phrase “extrajudicial killing” is used to refer to an act that did not result in a death. Nor can we think of one.

Nothing else in the FSIA hints that Congress had something other than a completed killing in mind. To the contrary, Congress gave the phrase “extrajudicial killing” the same meaning in Section 1605A as it bears in the Torture Victim Protection Act of 1991. *See* 28 U.S.C. § 1605A(h)(7); *id.* § 1350 note; Pub. L. No. 102–256, § 3(a), 106 Stat. 73, 73 (1992). The Torture Victim Protection Act defines an extrajudicial killing as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court[.]” 28 U.S.C. § 1350 note. By requiring an actual “killing,” Congress closed the door to attempted, but failed, killings.

The rest of the Torture Victim Protection Act confirms that “killing” carries its ordinary meaning. The only tort claim available on behalf of victims of extrajudicial killings is “an action for wrongful *death*.” *See* 28 U.S.C. § 1350 note. The Act does not allow any tort claim for injuries arising from an attempted killing. *See Mamani v. Sánchez Bustamante*, 968 F.3d 1216, 1233 (11th Cir. 2020) (The Torture Victim Protection Act’s extrajudicial killing provision “requires, at a minimum, that there be a considered, purposeful act that takes another’s life.”). In this way, Congress specifically incorporated into the FSIA a definition of “extrajudicial killing” that requires a death.

Including the phrase “act of” before “extrajudicial killing” changes nothing. *Contra Roberts v. Islamic Republic of Iran*, 581 F. Supp. 3d 152, 169–170 (D.D.C. 2022). The primary meaning of an “act” is “something

done voluntarily” or a “deed.” *Act*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 11 (10th ed. 1993) (defs. 1a, b) (capitalization modified); *Act*, 1 THE OXFORD ENGLISH DICTIONARY 123 (2d ed. 1989) (def. 1a) (“A thing done; a deed[.]”). That too connotes completion.

True, the word “act” sometimes refers to the “process of doing[.]” *Act*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 20 (2002) (def. 4). When used in that sense, however, it typically appears as part of the phrase “the act,” as in “in the act” or “the act of.” *Id.* (“process of doing: action—now chiefly used in the phrase *in the act* <caught in the [act]>”) (capitalization modified); *see* 1 THE OXFORD ENGLISH DICTIONARY 123 (2d ed. 1989) (def. 4a) (listing as “arch[aic]” the definition of act as “[t]he process of doing; acting; action,” except as used in the phrase “Act of God”) (emphases omitted); *see also* Mem. Op. & Order at 20, *Burks v. Islamic Republic of Iran*, No. 16-cv-1102 (D.D.C. Sept. 30, 2022), ECF No. 65 (“The primary, and most intuitive, understanding of the word ‘act’ is ‘[s]omething done or performed’ or ‘a deed.’”) (alteration in original; quoting *Act*, BLACK’S LAW DICTIONARY (11th ed. 2019)); *Cabrera v. Islamic Republic of Iran*, Nos. 19-cv-3835, 18-cv-2065, 2023 WL 1975091, at \*10 (D.D.C. Jan. 27, 2023) (“[I]n common parlance, one uses the construction ‘in *the* act of’ to connote the process of doing something, while ‘*an* act of’ typically references an act or occurrence.”).

That the perpetrator died does not suffice. An onlooker shot the perpetrator in self-defense, *Borochov*, 589 F. Supp. 3d at 28–29, a killing that was not undertaken, much less “deliberated,” by Syria, Iran, or their confederates. Nor did the shooting cause Yoav

and Rotem’s injuries. *See id.*; *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128 (D.C. Cir. 2004) (proximate causation required).

To be sure, in applying the FSIA’s terrorism exception, this court gives significant weight to Congress’s purpose “to bring state sponsors of terrorism \* \* \* to account for their repressive practices” by preventing them “from escaping liability for their sins.” *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014); *id.* (Congress’s goal was “punish[ing] foreign states who have committed or sponsored [terrorist] acts and deter[ring] them from doing so in the future.”) (quoting *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 88 (D.C. Cir. 2002)). Because of the terrorism exception’s broad purpose, we have interpreted ambiguities in its statute of limitations “flexibly and capaciously.” *Van Beneden v. Al-Sanusi*, 709 F.3d 1165, 1167 (D.C. Cir. 2013).

Here, though, there is no relevant ambiguity that would allow us to hold that “killing” means “no killing.” While the attack on Rotem and Yoav was indisputably heinous, it was not an “extrajudicial killing” within the meaning of Section 1605A(a)(1).

Given that plain text, we must hew to the terrorism exception’s ordinary meaning. “[E]xplicit waivers of sovereign immunity are narrowly construed ‘in favor of the sovereign’ and are not enlarged ‘beyond what the [statutory] language requires.’” *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986)); *see McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C.



Cir. 2012) (“The FSIA established a broad grant of immunity for foreign sovereigns that can only be abrogated by one of the statute’s narrowly drawn exceptions.”). Faithful adherence to the text is critical because waivers of foreign sovereign immunity involve complex and delicate foreign-policy judgments—decisions that fall outside the judicial wheelhouse. See *Opati*, 590 U.S. at 421 (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004)). The courts, in other words, should not open the door to litigation against foreign governments that the Political Branches have not clearly authorized. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–116 (2013) (interpreting the Alien Tort Statute to avoid “adopt[ing] an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches”).

## B

In exercising jurisdiction, the district court relied on Section 1605A’s waiver of sovereign immunity for designated foreign governments that provide “material support or resources for” an extrajudicial killing. 28 U.S.C. § 1605A(a)(1); see *Borochov*, 589 F. Supp. 3d 32–34. The court reasoned that, even if no killing ultimately results, a foreign state could still be held responsible if it provided material resources intended for an attempted killing. That reading is foreclosed by a full reading of the statutory text and context.

## 1

Section 1605A’s text does not support expanding the material-support provision to cover attempted but uncompleted extrajudicial killings. Remember that Sec-

tion 1605A(a)(1) waives immunity from suit for injuries resulting from “the provision of material support or resources *for such an act*.” 28 U.S.C. § 1605A(a)(1) (emphasis added). In that way, the provision creates secondary liability for governments that aid “such an act” listed earlier in the sentence—that is, a completed act of torture, extrajudicial killing, aircraft sabotage, or hostage taking.

After all, “support” just means “assist[ance]” or “help” in an action; it does not change what the baseline action is. *Support*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1184 (def. 2b) (10th ed. 1997) (capitalization modified); *see Support*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2297 (def. 2a) (2002) (“[t]o uphold by aid or countenance”); 17 THE OXFORD ENGLISH DICTIONARY 258 (def. 1a) (2d ed. 1989) (“assistance, countenance, backing”).

The provision of “resources” means the same thing: A resource is a “source of supply or *support*.” *Resource*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1934 (def. 1a) (2002) (emphasis added); *see Resource*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 997 (def. 1a) (10th ed. 1997) (“a source of supply or support”); *Resource*, 13 THE OXFORD ENGLISH DICTIONARY 731 (def. 2a) (2d ed. 1989) (“Possibility of aid or assistance.”).

The law has long held persons liable for assisting or supporting another’s unlawful act under the rubric of aiding-and-abetting liability. And when, as here, Congress draws on a common-law concept like aiding-and-abetting liability, we presume that the statutory term “share[s] fundamental attributes of common law torts” absent an indication to the contrary. *United*

*States v. Honeywell Int'l, Inc.*, 47 F.4th 805, 814 (D.C. Cir. 2022).

“[A]iding and abetting is an ancient criminal law doctrine that has substantially influenced its analog in tort.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 488 (2023) (quotation marks omitted). “[T]he basic ‘view of culpability’ that animates the doctrine is straightforward: ‘A person may be responsible for a crime he has not personally carried out if he helps another to complete its commission.’” *Id.* (quoting *Rosemond v. United States*, 572 U.S. 65, 70 (2014)).

As *Taamneh* and *Rosemond* established, a *completed* crime is necessary for aiding-and-abetting liability to attach. *Taamneh*, 598 U.S. at 488; *Rosemond*, 572 U.S. at 70; accord *United States v. Hansen*, 599 U.S. 762, 771 (2023) (“[L]iability for aiding and abetting requires that a wrongful act be carried out[.]”). That is, a defendant can be found guilty of aiding and abetting a crime only if someone else actually committed the underlying crime. See W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.3(c) (Oct. 2023 Update) (“[T]he guilt of the principal must be established at the trial of the accomplice as a part of the proof on the charge against the accomplice. If the acts of the principal of the first degree are found not to be criminal, then the accomplice may not be convicted.”); *Gray v. United States*, 260 F.2d 483, 484 (D.C. Cir. 1958) (holding that, in an aiding-and-abetting trial, it must “be established that the act constituting the offense was in fact committed by someone”).

The requirement of a completed crime dates back centuries to the common law, which provided that “an ac-

cessory could not be convicted without the prior conviction of the principal offender.” *Standefer v. United States*, 447 U.S. 10, 15 (1980) (citing 1 M. HALE, PLEAS OF THE CROWN \*623–624); W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.1(d)(3) (“[A]t common law, \* \* \* conviction of the principal was an absolute prerequisite[.]”).

Civil aiding-and-abetting liability follows the same rule: an accomplice is liable only if the principal actually completes the tort. *See Taamneh*, 598 U.S. at 494 (“[T]ort law imposes liability only when someone commits an actual tort; merely agreeing to commit a tort or suggesting a tortious act is not, without more, tortious.”); *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (Liability arises only if the defendant “knowingly gave substantial assistance to someone who performed wrongful conduct[.]”) (quotation marks omitted); *id.* at 487–488 (“[T]he party the defendant aids must perform a wrongful act that causes an injury[.]”); *see also* Restatement (Second) of Torts § 876 (AMERICAN LAW INST. 1976). For instance, we have held that aiding-and-abetting liability for civil violations of securities laws requires that “another party has committed a securities law violation.” *Investors Res. Corp. v. Securities & Exchange Comm’n*, 628 F.2d 168, 178 (D.C. Cir. 1980). There is no established aiding-and-abetting liability for uncompleted torts at common law. Nor is there liability for attempted but failed torts. *See* DOBBS’ LAW OF TORTS § 4 (May 2023 Update) (“Tort law \* \* \* would impose liability only if harm results.”); *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982) (Posner, J.) (“[T]here is no concept of an inchoate tort[.]”).

Throughout the history of this Nation, the common law has been settled that liability attaches only if a defendant “aided and abetted \* \* \* another \* \* \* in the commission of the actionable wrong—here, an act of \* \* \* terrorism.” *Taamneh*, 598 U.S. at 495. And Section 1605A is explicit that the only actionable wrongs are completed instances of the four enumerated terrorist acts. 28 U.S.C. § 1605A(a)(1).

So understood, the words “material support and resources for such an act” predicate the sovereign immunity waiver on one of the four principal acts having occurred. But none did in this case. Therefore, Section 1605A(a)(1)’s material-support provision does not apply.

## 2

To bolster their broader reading of Section 1605A(a)(1), the Golans, like the district court below, rely entirely on the word “for.” *See* Golan Supp. Br. 3–4; *Borochov*, 589 F. Supp. 3d at 32. They claim that providing “material support or resources *for* such an act[.]” 28 U.S.C. § 1605A(a)(1) (emphasis added), refers to the “intent” behind the provision of resources, rather than the result, Golan Supp. Br. 4.

The word “for,” by itself, cannot bear the weight the Golans place on it. That is because “for” does not necessarily refer to intent; it can instead refer to the cause or instigation of an act, or something contributing to the act’s occurrence. *See For*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 886 (2002) (def. 8a) (“because of” or “on account of”); *For*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 454 (10th ed. 1993) (second entry) (similar); *For*, 2 THE OXFORD ENGLISH DICTIONARY 23–24 (2d ed. 1989) (def.

9a) (similar). That causal understanding applies equally when speaking of material support for *an act* of terrorism. Remember, an “act” is “[a] thing done.” *Act*, 1 OXFORD ENGLISH DICTIONARY 123 (2d ed. 1989) (def. 1a). Because the word “act” commonly indicates a deed that is complete, the word “for” naturally refers to support that causes or facilitates that terrorist act, rather than just the intent behind a monetary or resource contribution.

To be sure, “for” can denote an “intended goal,” as in saving for college. *For*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 454 (10th ed. 1993) (defs. 1a, 1b); *see For*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 886 (2002) (defs. 2a, 2e) (“as a preparation toward” or “with the purpose or object of”); *For*, 2 THE OXFORD ENGLISH DICTIONARY 23–24 (2d ed. 1989) (def. 8a) (“With a view to; with the object or purpose of; as preparatory to.”).

Some district courts, including the district court in this case, have recognized this ambiguity and relied on *Van Beneden* to construe it in favor of plaintiffs. *See, e.g., Borochov*, 589 F. Supp. 3d at 32; *Cabrera v. Islamic Republic of Iran*, No. 18-cv-2065-JDB, 2023 WL 1975091, at \*7 (D.D.C. Jan. 27, 2023).

But *Van Beneden* concerned Section 1605A(b), a non-jurisdictional statute of limitations. *See* 709 F.3d at 1166–1177; *Owens*, 864 F.3d at 804 (“We therefore hold that the limitation period in § 1605A(b) is not jurisdictional.”); *Maalouf*, 923 F.3d at 1108 (same). We have never interpreted the FSIA’s jurisdictional requirements so flexibly. *See World Wide Minerals*, 296 F.3d at 1162 (“In general, explicit waivers of sovereign immunity are narrowly construed[.]”); *see also Federal*

*Republic of Germany v. Philipp*, 592 U.S. 169, 184 (2021) (“We interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, producing friction in our relations with [other] nations[.]”) (quotation marks omitted).

In that regard, the district court’s reading would broadly expand Congress’s waiver of sovereign immunity to include not just attempted-but-failed killings, but also providing advance funding for attacks that never occur at all. *See* Oral Arg. Tr. 26:10–27:2 (the court noting that a state could give money to a terrorist for a particular attack, yet the terrorist could use it for something else). Whatever the ambiguities of “for,” the tiebreaker for any ambiguity in an FSIA jurisdictional requirement is “in favor of the sovereign[.]” *World Wide Minerals*, 296 F.3d at 1162.

Statutory context also forecloses finding jurisdiction based on material support provided for an attempted, but failed, extrajudicial killing.

To start, the Golans’ reading would write an illogical asymmetry into Section 1605A. A foreign sovereign could be sued if it supported someone else’s attempted extrajudicial killing. But it would be immune from suit if it directly attempted the extrajudicial killing itself. The Golans offer no reason why Congress would have wanted to encourage terrorist states to keep their extrajudicial killings in-house. Neither have they identified any other reason Congress would have desired such a lopsided liability regime.

Furthermore, the Golans’ reading of Section 1605A would place challenging factual inquiries at the threshold of every material support case. For example, if “for” requires proof of intent, then district courts

would have to determine a foreign government's subjective intent in providing weapons or money to terrorist groups. That is a step our cases have repeatedly eschewed. *See Owens*, 864 F.3d at 799; *Kilburn*, 376 F.3d at 1130. Money is fungible, and “material support ‘is difficult to trace.’” *Owens*, 864 F.3d at 799 (quoting *Kilburn*, 376 F.3d at 1128). Making our jurisdiction contingent on the intent behind a particular payment, shipment, or transfer “would as a practical matter eliminate \* \* \* liability except in cases in which the [defendant] was foolish enough to admit [its] true intent” or specifically tie its support to a single pre-planned terrorist act. *Id.* (quoting *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698–699 (7th Cir. 2008)).

By contrast, if “for” speaks to causation of the completed act, district courts need only determine whether a foreign government's material support was a proximate cause of a completed killing. *See Owens*, 864 F.3d at 799.

In addition, Section 1605A requires a district court to hear a claim if it finds that:

- The foreign state was designated as a state sponsor of terrorism “at the time the act described in paragraph (1) occurred,” or that the government was so designated “as a result of such act,” 28 U.S.C. § 1605A(a)(2)(A)(i);
- “[T]he claimant or the victim was, at the time the act described in paragraph (1) occurred,” a U.S. national, a member of the U.S. armed forces, or an employee of the U.S. government, *id.* § 1605A(a)(2)(A)(ii); and



- If “the act occurred in the foreign state against which the claim has been brought,” the claimant gave the foreign government a chance to arbitrate before filing suit, *id.* § 1605A(a)(2)(A)(iii).

Each of these findings requires a threshold factual determination as of the time an “act described in paragraph (1) occurred[.]” 28 U.S.C. § 1605A(a)(2)(A)(i)–(iii); *see Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 13–14 (D.C. Cir. 2015) (factual findings are jurisdictional).

But what counts as an “act described in paragraph (1)”? If the immunity exception in paragraph (1) is triggered only by completed “act[s] of torture, extrajudicial killing, aircraft sabotage, [or] hostage-taking,” then even when a plaintiff’s claim is based on a state’s “material support” for such a completed act, the plaintiff will ordinarily have to identify only the time and location of the completed terrorist activity. And it will not be hard for the plaintiff to specify her own nationality at that time, whether the defendant state was designated as a state sponsor of terrorism, and so on.

But if Section 1605A(a)(1)’s immunity waiver can be triggered not just by completed “acts” of killing, torture, aircraft sabotage, or hostage taking, but also by a foreign state’s material support for such acts even when those acts never occur, then that “material support” would by itself have to constitute the relevant “act” for purposes of Section 1605A(a)(2)(A). In that case, the district court would need to focus at the outset of the case on the “material support” for terrorist acts, rather than the acts themselves. Yet proving the time and place at which money, weapons, or other forms of support changed hands, perhaps over the

course of years or decades, would be an onerous and unwieldy task. The plaintiffs' proposed reading, in other words, would ensure that "few suits like this could ever proceed[.]" *Han Kim*, 774 F.3d at 1048.

Treating material support itself as the relevant "act" for waiving sovereign immunity would be especially knotty when it comes to the requirement that a plaintiff "afford[] the foreign state a reasonable opportunity to arbitrate the claim" in "a case in which the act occurred in the foreign state against which the claim has been brought[.]" 28 U.S.C. § 1605A(a)(2)(A)(iii). If "act" refers to a completed act of terrorism, then all this requirement means is that a plaintiff must first seek to arbitrate with a foreign state before suing based on terrorist acts committed within its own territory. That is a plausible accommodation by Congress of foreign states' interests in territorial integrity that are not implicated if the act of terrorism occurs in another state (as in this case).

But if "act" includes that foreign state's "material support," then plaintiffs suing under Section 1605A would have to go to the foreign state they seek to sue and ask to arbitrate. That is because *some* of that state's material support would almost inevitably occur within the state's own territory. For example, the district court found in this case that Syria "host[ed]" Hamas in its capital of Damascus, giving it "an operational base" from which Hamas "carried out its most lethal suicide bombings through Syrian operatives[.]" *Borochov*, 589 F. Supp. 2d at 26. The district court also found that Hamas operatives "received training in Iran[.]" and that Iran sent Hamas "arms and funding[.]" including some weapons that were manufac-

tured in Iran. *Id.* at 27–28. As a result, under the Golans’ reading, the statute required them to seek to arbitrate their claims with Syria and Iran. Yet we see nothing in Section 1605A’s text, structure, or purpose that remotely suggests that Congress intended to compel terrorism victims like the Golans to seek arbitration with foreign states that footed the bill for attacks outside those states’ borders.

#### IV

No one can deny the pain and suffering that the terrorist attack visited on Rotem, Yoav, and their family members, or the depravity of the terrorist act itself. But Congress and the President—those whom the Constitution charges with the conduct of foreign relations—chose to extend the power of the federal courts to claims against the perpetrators of just four terrorist acts, and to foreign governments that aided the execution of those acts. None of those four acts occurred here. As a matter of text and context, the Golans’ claims fall outside of Section 1605A’s scope. When it comes to waivers of foreign sovereign immunity, courts can go only where the Political Branches have trod. If Congress wishes more expansive coverage for acts of terrorism, it can amend the statute to permit it. But we cannot make that call.

Because there has been no waiver of sovereign immunity in this context, we lack jurisdiction. We there-

fore vacate the judgment of the district court with respect to the Golans and remand for dismissal of the Golans' claims.<sup>2</sup>

*So ordered.*

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<sup>2</sup> This court appointed Catherine E. Stetson as *amicus curiae* to defend the district court's judgment. She was assisted by student counsel Samuel Gerstemeier, Riley Segars, and Walker Fortenberry in briefing the case, and by Andrew Nell and Ben Buell in briefing and arguing it. Ms. Stetson has ably discharged her duty, and the court greatly appreciates Ms. Stetson's and the student counsel's service.

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**APPENDIX B**

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA****ELI M. BOROCHOV,**  
*et al.,*

Plaintiffs,

v.

**ISLAMIC REPUBLIC  
OF IRAN, *et al.,***

Defendants.

Case No.  
1:19-cv-02855 (TNM)

Mar. 4, 2022

**MEMORANDUM OPINION**

This action for compensatory and punitive damages arises under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605A. It concerns two 2015 terrorist attacks in Israel perpetrated by Hamas. Nineteen Plaintiffs—some U.S. citizens, some Israeli—sue the States of Iran and Syria (together, the States) for injuries suffered by the victims of the attacks and the emotional injuries suffered by the victims' immediate families. Plaintiffs allege that the States provided material support and resources to Hamas.

The States did not respond or appear, and Plaintiffs now move for default judgment. The Court finds that Plaintiffs successfully established personal and subject matter jurisdiction under 28 U.S.C. § 1605A. They have also proved that the States are liable under federal and Israeli law. The U.S. Plaintiffs have supported their request for compensatory and punitive damages. The Israeli Plaintiffs have not. The Court

thus will grant in part and deny in part the motion for default judgment.

## I. BACKGROUND

The terrorist attacks at issue occurred in Israel in 2015. *See* Amended Compl. (Compl.) ¶¶ 53, 67, ECF No. 6. Plaintiffs allege that Hamas, an Islamic organization committed to the “destruction of the State of Israel,” *id.* ¶ 30, perpetrated the attacks with “material support and resources” from the States, *id.* ¶ 2.

The Foreign Sovereign Immunities Act (FSIA) generally immunizes foreign sovereigns from suits in federal courts, but “that grant of immunity is subject to a number of exceptions.” *Mohammadi v. Islamic Repub. of Iran*, 782 F.3d 9, 13–14 (D.C. Cir. 2015). Once an exception applies, the foreign state loses its immunity. *See Bell Helicopter Textron, Inc. v. Islamic Repub. of Iran*, 734 F.3d 1175, 1182–83 (D.C. Cir. 2013). One such exception, known as the “terrorism exception,” waives sovereign immunity for countries providing material support to terrorist organizations. *See* 28 U.S.C. § 1605A. Plaintiffs bring their case under this exception. *See* Compl. ¶¶ 28–29.

Because Iran and Syria did not respond, Plaintiffs move for default judgment. *See* Plaintiffs’ Mot. for Default J. (Pls.’ Mot.), ECF No. 55-1. Entry of default judgment is “not automatic.” *Mwani v. Bin Laden*, 417 F.3d 1, 6 (D.C. Cir. 2005). Before the Court can enter default judgment, Plaintiffs must establish subject matter jurisdiction and personal jurisdiction. *See Jerez v. Repub. of Cuba*, 775 F.3d 419, 422 (D.C. Cir. 2014) (“A default judgment rendered in excess of a court’s jurisdiction is void.”). Section 1605A provides

a mechanism for Plaintiffs to show both types of jurisdiction over a non-responsive sovereign.

The Court's analysis thus focuses on whether Plaintiffs have properly pled all elements of a claim under § 1605A. To do so, Plaintiffs must show that the States supported the terrorist groups responsible for the attacks at issue. Plaintiffs have submitted expert declarations to make those showings. *See* Expert Reports of Rael Strous, ECF Nos. 50, 51; Expert Declaration of Dr. Alan Friedman (Friedman Decl.), ECF No. 53; Expert Declaration of Arieh Spitzen (Spitzen Decl.), ECF No. 54. Plaintiffs also rely on expert declarations from an earlier case in this district. *See* Declaration of Benedetta Berti (Berti Decl.), ECF No. 29, *Force v. Islamic Repub. of Iran*, No. 16-cv-1468 (D.D.C.); Declaration of Dr. Marius Deeb (Deeb Decl.), ECF No. 30, *Force v. Islamic Repub. of Iran*, No. 16-cv-1468 (D.D.C.); Declaration of Patrick Clawson (Clawson Decl.), ECF No. 32, *Force v. Islamic Repub. of Iran*, No. 16-cv-1468 (D.D.C.).<sup>1</sup>

The Court assesses this evidence and makes findings of fact before proceeding to findings of law. *See Selig v. Islamic Repub. of Iran*, — F. Supp. 3d —, No. 19-cv-2889 (TNM), 2021 WL 5446870, at \*1 (D.D.C. Nov. 22,

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<sup>1</sup> The Court can review evidence considered in a previous decision with no re-presentation of that evidence. *See Lee v. Islamic Repub. of Iran*, 518 F. Supp. 3d 475, 480 (D.D.C. 2021). The Court still must reach its “own[] independent findings of fact.” *Id.* The Court here has independently reviewed these *Force* declarations. The Court has also reviewed the qualifications of Plaintiffs' experts and is satisfied that each is qualified to offer the opinions discussed below.

2021) (accepting expert declarations as sufficient to meet plaintiffs' evidentiary burden).

## II. FINDINGS OF FACT

### A. Hamas

Members of the Muslim Brotherhood founded Hamas in 1987–88. *See* Berti Decl. ¶ 11. Hamas intends to liberate Palestine through jihad and to “create an Islamic state” in Israel. Deeb Decl. ¶ 11. Hamas advocates “direct and indirect attacks” on Israeli civilians and military personnel to advance these goals. Berti Decl. ¶ 11. In the years since Hamas's founding, those attacks have come as kidnappings, rocket attacks, and other bombings. *See generally id.* ¶¶ 15–16.

Hamas combines its military and terror activities with political and social efforts. *See* Spietzen Decl. ¶ 25. Hamas has even achieved political success, winning in 2006 a plurality of seats in the Palestinian parliament. *See id.* ¶ 28. One year later, Hamas seized power in the Gaza Strip, a Palestinian-majority area in the southwest of Israel. *See id.* Beyond that political influence, Hamas seeks to dominate Palestinian society through several social institutions and ostensibly charitable bodies. *See id.* ¶ 29. Dr. Spietzen testifies that these efforts allow Hamas to appear reliable to Palestinians, thereby encouraging more of them to support Hamas's activities, including ones focused on terrorism. *See id.* ¶ 29–30.

### B. Syrian Support for Hamas

Hamas's leadership resided in Syria from about 2000–2012. *See* Deeb Decl. ¶ 22. Although that residency predates the attacks here, Plaintiffs' experts assert



that Hamas would not have the capacity for such attacks without Syria's support. *See* Berti Decl. ¶ 50 (“[W]ithout the support of a prominent Arab state like Syria to lend it legitimacy, [Hamas] would be more isolated and unable to grow, develop, expand, and solidify itself as a major player on the Palestinian political and military scene, as Hamas has done.”). The experts identify four ways in which Syria supported Hamas.

*First*, safe haven. The organization moved its political headquarters to Damascus in 2000, *see id.* ¶ 25, and Syria's support gave Hamas a “public platform,” *id.* ¶ 26. Hamas's leaders, all designated as terrorists by the United States, could freely meet in Damascus. *See id.* ¶ 34. By hosting Hamas, Syria gave it “symbolic validation, political support, [and] legitimacy” through which Hamas could boost its credibility and stature. *Id.* ¶ 37.

*Second*, an operational base. Hamas used the friendly confines of Damascus to orchestrate military efforts on the ground in Israel. Hamas carried out its most lethal suicide bombings through Syrian operatives, *see id.* ¶ 41, and Hamas's top military commander even moved to Damascus, *see id.* ¶ 42. Dr. Berti confirms that Hamas's political leaders in Gaza needed approval from Damascus before they could ratify an Israeli offer for a prisoner exchange. *See id.* ¶ 43. Instructions for various attacks in Israel also came directly from Damascus. *See* Deeb Decl. ¶ 15. The Syrian government did nothing to “forcefully or systematically” crack down on Hamas's military planning. Berti Decl. ¶ 44. Indeed, Syria once offered aid “as an incentive” for *more* suicide attacks in Israel. *Id.* ¶ 45.

*Third*, a political hub. Through Syria’s generosity, Damascus became Hamas’s “diplomatic and public relations base.” *Id.* ¶ 47. Hamas used that base to organize political events and to influence Palestinian politics. *See id.* In Damascus, Hamas hosted strategic discussions with other Palestinian factions, and those discussions often allowed greater coordination between the groups’ activities in Israel. *See id.* ¶ 48. This political visibility made Hamas more popular and influential. *See id.* ¶ 50.

*Fourth*, equipment, funding, and logistical support. Plaintiffs’ experts provide less detail on this point but assert that Iran routed weapons shipments to Hamas through Syria. *See id.* ¶ 53. And the Jordanian government claimed that some Hamas weapons originated in Syria. *See id.* ¶ 54. Syria also provided training grounds where Hamas fighters learned “essential tactical skills” for future attacks. *Id.* ¶ 55; *see* Deeb Decl. ¶ 19. Plaintiffs’ experts conclude that the “tactical know-how” learned during Syria’s protection allowed Hamas to “transform itself into a leading terrorist group with solid infrastructure and the power” to disrupt the Israeli-Palestinian peace process. Deeb Decl. ¶ 23.

Based on the above un rebutted expert testimony, the Court finds that Syria provided material support in the form of operational freedom, political legitimacy, protection, and training to Hamas. Although that support apparently ended before the attacks at issue, the expert testimony confirms that without it, Hamas could not have undertaken these attacks. On identical evidence, Judge Moss reached the same conclusion. *See Force v. Islamic Repub. of Iran*, 464 F. Supp. 3d 323, 367–68 (D.D.C. 2020).

### C. Iranian Support for Hamas

Plaintiffs rely on Dr. Patrick Clawson to make their case against Iran. As he explains, the U.S. State Department has long known that Iran uses its intelligence services “to facilitate and conduct terrorist attacks.” Clawson Decl. ¶ 25. Supporting terrorist groups “is an official policy of the Iranian government.” *Id.* ¶ 26. Those groups include “anti-Israel terrorism of all sorts,” and Iran has supported Hamas for the past 30 years. *Id.* ¶¶ 28, 30.

Dr. Clawson discusses three specific ways Iran supports Hamas. *First*, financially. Starting in the 1990s, Iran paid Hamas “millions of dollars,” allowing Hamas to establish front businesses. *Id.* ¶ 38. After Hamas won a plurality in the Palestinian parliament, Iran pledged \$250 million to the group. *See id.* ¶ 42. Hamas publicly acknowledged this financial support when its political chairman in 2012 thanked Iran for “arms and funding.” *Id.* ¶ 56. And even during low periods in the Iran-Hamas relationship, Iran gave suitcases of money directly to Hamas operatives in Gaza. *See id.* ¶ 60.

*Second*, through weapons. In 2008, Secretary of State Condoleezza Rice said that “Hamas is being armed and it’s very clear that they are being armed, in part, by the Iranians.” *Id.* ¶ 45. Earlier that year, Israeli investigators learned that a mortar shell fired by Hamas had been manufactured in Iran and that Iran had provided input into the design of other Hamas rockets. *See id.* ¶ 47. And according to Dr. Clawson, Iran smuggles weapons to Hamas through tunnels on the Egypt-Gaza border and sometimes via the Mediterranean Sea. *See id.* ¶¶ 50–52. Israel has intercepted

some of those shipments. *See id.* ¶ 53. As with Iran’s financial donations, Hamas has publicly acknowledged Iran’s weapons support. A representative for Hamas’s military thanked Iran in 2014 for “providing it with rockets and anti-tank missiles.” *Id.* ¶ 59.

*Third*, by training Hamas soldiers over many years. As early as 1996, Hamas operatives received training in Iran before they bombed a bus in Jerusalem. *See id.* ¶ 35. And since 2003, the State Department has annually reported to Congress that Hamas receives training from Iran. *See id.* ¶ 27. Dr. Clawson excerpts a British article claiming 150 members of Hamas’s military wing had “passed through training in Tehran, where they stud[ied] for between 45 days and six months at a closed military base[ ]” under Iranian supervision. *Id.* ¶ 46.

Based on this information, Dr. Clawson concludes that Iran provided material support to Hamas during the 2008–2017 timeframe. After assessing his testimony, the Court agrees. Iran provided money, weapons, and training to Hamas for decades. And Iran gave support during the period when the attacks at issue took place.

#### **D. The Attacks**

On a November afternoon in 2015, Akram and Nasr Badawi nested a rifle in a window overlooking the courtyard of the Cave of the Patriarchs<sup>2</sup> in Hebron, Israel. *See Spietzen Decl.* ¶ 71. The brothers had been members of a four-man Hamas cell since 2015 and had

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<sup>2</sup> Tradition says the Cave holds the graves of many Old Testament figures, and thus many Jews and Muslims pray there. *Id.* n.25.

specifically obtained a rifle for the ensuing attack. *See id.* ¶ 94. They admitted later that they intended to kill Jews. *See id.* ¶ 73. Nasr was the lookout, Akram was the sniper.<sup>3</sup> *See id.* ¶ 71. At around 4 p.m., Akram fired multiple shots. *See id.* ¶ 71.

He hit two people. *See* Friedman Decl., Ex. B at 1, ECF No. 53-2.<sup>4</sup> One bullet struck Plaintiff Eli Borochoy in the groin as he walked to the Cave. *See id.*; Declaration of Eli Borochoy ¶ 2 (Eli Decl.), ECF No. 32. Eli had traveled to Israel from his home in New York. *See* Eli Decl. ¶ 2. His father and brother accompanied him that day to the Cave. *See id.* Emergency personnel evacuated Eli to a nearby hospital, where he underwent immediate surgery. *See* Friedman Decl., Ex. B at 1. Surgery went well, and the hospital discharged him two days later. *Id.* But as a result of his injuries, Eli could not walk for two months. *See id.* According to the Complaint, nobody died in the attack.<sup>5</sup>

Law enforcement arrested Akram and Nasr at the scene. Once Israeli authorities publicized the arrest—something they did not do until almost a year later—

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<sup>3</sup> Because this case involves multiple persons with shared family names, the Court will introduce individuals by first and last name and afterward refer to them by first name only.

<sup>4</sup> All page citations refer to the pagination generated by the Court's CM/ECF system and all exhibit numbers refer to the numbered attachments to the CM/ECF filings.

<sup>5</sup> Israeli media reports of the attack similarly do not discuss any deaths. *See* Judah Ari Gross, *Hebron brothers get life in prison for sniper spree*, The Times of Israel (Nov. 12, 2017, 7:18 PM), <https://www.timesofisrael.com/hebron-brothers-get-life-in-prison-for-sniper-sprees>.

an official Hamas website identified the brothers as members of Hamas's terrorist wing. *See* Spietzen Decl. ¶ 113. The Court thus agrees with Dr. Spietzen that Hamas conducted the attack.

One month after the attack in Hebron, on the anniversary of Hamas's founding, *see id.* ¶ 119, Abd al-Mushin Shaher Hasouna drove from Hebron to Jerusalem, *see id.* ¶ 121. The night before, he told his mother that he would "intercede for her in[] Paradise." *Id.* ¶ 124. Hasouna raced his car into a bus stop in central Jerusalem, ramming 14 people. *See id.* ¶ 119, 122. An onlooker saw the attack, drew his own firearm, and shot Hasouna before he could do more damage. *See id.* ¶ 119. That action probably saved lives; Hasouna had an axe in his car and likely intended to use it against the crowd. *See id.* ¶ 126.

Among the injured were Yoav Golan, a U.S. citizen living in Israel, and his wife, Rotem. *See* Compl. ¶ 9–10. The car's impact hurled them into the bus stop's glass wall. *See* Declaration of Yoav Golan ¶ 6 (Yoav Decl.), ECF No. 38. Yoav felt sharp pain in his shoulder and in his leg. *See id.* ¶¶ 12, 14. The fall had dislocated and fractured his shoulder, and he had a crush injury on his leg from where the car had struck him. *See id.* ¶¶ 16, 19. Although released from the hospital the next day, Yoav could not walk for a month and was confined to a wheelchair. *See id.* ¶ 24. Rotem suffered cuts on her legs, requiring stitches, and sprained a ligament in her knee. *See* Declaration of Rotem Golan ¶ 20 (Rotem Decl.), ECF No. 46. Because of her injuries, Rotem could neither drive for a month nor attend school for two months. *See id.* ¶ 28. Both Yoav and Rotem also suffered mental and emotional injuries from the attack. *See id.* ¶¶ 29–64; Yoav Decl. ¶¶ 24,

42–54, 58, 60–63. Plaintiffs suggest that only Hasouna died in the incident.<sup>6</sup>

The next day, Hamas websites praised Hasouna. *See* Spietzen Decl. ¶ 128. Online forums and radio stations connected to Hamas called him a “son of the Hamas movement.” *Id.* Hamas’s radio station published a poster calling Hasouna “one of the sons of the Islamic resistance movement Hamas, whose heroic operation, carried out on the 28<sup>th</sup> anniversary of the founding of the resistance movement, has ensured the continuation of resistance.” *Id.* ¶ 130. Given these actions, the Court finds that Yoav and Rotem suffered their injuries at Hamas’s hands.

Eli and his family sue for physical and emotional injuries from the attack. Ditto for Yoav, Rotem, and their immediate families.<sup>7</sup> The latter group contains both U.S. and Israeli nationals.

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<sup>6</sup> Israeli news sources likewise mention no other deaths. *See Fourteen injured in Jerusalem car-ramming attack*, i24 News (Dec. 14, 2015, 3:52 PM), <https://www.i24news.tv/en/news/israel/diplomacy-defense/95622-151214-at-least-9-people-injured-in-car-ramming-attack-in-jerusalem>.

<sup>7</sup> The Complaint lists as Plaintiffs Yoav’s and Rotem’s grandparents, *see* Compl. ¶¶ 20–27, but Plaintiffs’ Proposed Order disclaims any pursuit of those claims, *see* Proposed Findings of Fact and Conclusion of Law (Proposed Order) at 1, ECF No. 55-4. The identity of Plaintiffs matters not to the Court’s analysis, but the Court assumes based on that proposed language that the grandparents have abandoned their claims.

### III. LEGAL STANDARDS

Under Federal Rule of Civil Procedure 55(b)(2), a court may enter default judgment when a party applies for it. But entry of a default judgment “is not automatic.” *Mwani*, 417 F.3d at 6. A court must assure itself of its subject matter jurisdiction, *see Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996), and of its personal jurisdiction over an absent defendant, *see Mwani*, 417 F.3d at 6–7.

Extra procedures govern entry of default when the defendant is a sovereign state. The FSIA “affords the sole basis for obtaining jurisdiction over a foreign state in United States courts.” *Mohammadi*, 782 F.3d at 13. The FSIA generally immunizes foreign states, but that grant of immunity “is subject to a number of exceptions.” *Id.* at 14. Relevant here is the so-called terrorism exception found in 28 U.S.C. § 1605A. Section 1605A confers subject matter jurisdiction, recognizes a federal cause of action against foreign states subject to the exception, and addresses personal jurisdiction by specifying procedures that a plaintiff must follow to effect service on a foreign state. *See Schwartz v. Islamic Repub. of Iran*, No. 18-cv-1349 (RDM), 2020 WL 7042842 at \*9 (D.D.C. Nov. 30, 2020).

Different standards of proof govern federal courts’ personal jurisdiction and subject matter jurisdiction inquiries. Plaintiffs need only make a “prima facie showing” of personal jurisdiction. *Mwani*, 417 F.3d at 6–7. But for a court to exercise subject matter jurisdiction, plaintiffs must “establish[] [their] claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). The statute does not specify what



constitutes “evidence satisfactory to the court,” so courts determine “how much and what kinds of evidence the plaintiff must provide.” *Han Kim v. Dem. People’s Repub. of Korea*, 774 F.3d 1044, 1046–51 (D.C. Cir. 2014). The evidence must consist of “admissible testimony in accordance with the Federal Rules of Evidence,” *id.* at 1049 (cleaned up), and it must be sufficient for a court to come to the “logical conclusion” that the defendant is responsible for the plaintiffs’ injuries, *id.* at 1051.

#### IV. ANALYSIS

The Court’s analysis proceeds as follows: First, the Court will determine whether it has subject matter jurisdiction. Then the Court considers whether it has personal jurisdiction over the States. Next, the Court evaluates whether Plaintiffs have pled a federal cause of action and whether they have proven a theory or theories of liability. Finally, the Court assesses Plaintiffs’ claims for monetary damages.

##### A. Subject Matter Jurisdiction

To invoke the terrorism exception, Plaintiffs must make two threshold showings. *First*, the claimant or victim must be a U.S. national, a U.S. servicemember, or a U.S. government employee. *See* 28 U.S.C. § 1605A(a)(2)(A)(ii). Plaintiffs easily meet the requirement because two direct victims of the attacks, Eli and Yoav, are U.S. citizens. *See* Compl. ¶¶ 4, 9. True, some Plaintiffs are not U.S. nationals. But “this fact is non-consequential” for jurisdictional purposes because some *victims* are U.S. nationals. *Force*, 464 F. Supp. 3d at 369.

*Second*, the State Department must have designated the foreign government as a state sponsor of terrorism

at the time of the attack and when Plaintiffs filed their lawsuit. *See* 28 U.S.C. § 1605A(a)(2)(A)(i). Plaintiffs again easily clear this hurdle: The State Department has designated Syria and Iran as state sponsors of terrorism since 1979 and 1984, respectively. *See* Dep’t of State, Bureau of Counterterrorism, *State Sponsors of Terrorism* (last accessed Feb. 4, 2022), <https://www.state.gov/state-sponsors-of-terrorism>.

Once past those thresholds, Plaintiffs must show that their claims fit within the terrorism exception’s narrow waiver of sovereign immunity. The waiver contains five requirements:

[1] money damages are sought against a foreign state [2] for personal injury or death [3] that was caused by [4] an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is [5] engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1). The Complaint establishes the first two requirements. Plaintiffs seek money damages, *see* Compl. ¶ 136(a)-(b), for suffering after the attacks in Israel, *see id.* ¶¶ 94–97. The Court’s analysis thus focuses on the latter three requirements, though in a different sequence.

*The States provided Hamas with “material support” to carry out the attacks.* Recall the resources that Iran and Syria supplied to Hamas. *See supra* II.B, II.C. Syria gave Hamas a safe base from which to organize

its terrorist and diplomatic activities. Iran gave Hamas money, weapons, and training for Hamas fighters. Plaintiffs have thus provided evidence “satisfactory to the court,” 28 U.S.C. § 1608(e), that the States materially supported Hamas and that this support came from the States’ officials and agents “while acting within the scope of [their] office, employment, or agency,” *id.* § 1605A(a)(1).

*The States gave material support “for” an extrajudicial killing.* The definition of “extrajudicial killing” comes from the Torture Victim Protection Act of 1991 (TVPA), which defines the term as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *See* 28 U.S.C. § 1350 note.

Plaintiffs assume that the attacks were “an act of extrajudicial killing” because the attackers “deliberated” killing people, even though they ultimately failed to do so. *See* Pls.’ Mot. at 15–16. They offer paltry support for this assertion, citing only one case in which terrorists *did* kill someone. *See id.* at 16 (citing *Campuzano v. Islamic Repub. of Iran*, 281 F. Supp. 2d 258, 270–71 (D.D.C. 2003)). And Plaintiffs do not suggest that the attacks were acts of torture, aircraft sabotage, or hostage taking. The Court therefore must decide (without briefing) whether support for an attack that killed nobody can still qualify as support for an extrajudicial killing.

The Court begins, as it must, with the text of the definition for an extrajudicial killing. *See Jackson v.*

*Modly*, 949 F.3d 763, 768 (D.C. Cir. 2020). The definition refers to a “killing.” That word denotes a fatality. See *Killing*, Black’s Law Dictionary (11th ed. 2019) (“The act of causing the end of an animate thing’s life.”). Other courts agree. In *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 840 (D.C. Cir. 2009), the D.C. Circuit found that the assassination of an Iranian citizen in France “clearly qualifies as an extrajudicial killing.” The Eleventh Circuit likewise reads the TVPA to require, “at a minimum,” some act “that takes another’s life.” *Mamani v. Sanchez Bustamante*, 968 F.3d 1216, 1233 (11th Cir. 2020). Thus, an attack cannot be a “killing,” deliberated or otherwise, if nobody dies.<sup>8</sup>

Nor does the text suggest that the definition’s limitation to a “deliberated killing” includes an “attempted killing.” That suggestion defies the usual meanings of “deliberated” and “attempted.”<sup>9</sup> A deliberated action is one in which the actor “consider[s] or discuss[es] [it] carefully.” *Deliberate*, Am. Heritage Dictionary 227 (3d ed. 1994). An attempted action, on the other hand, is one where the actor “make[s] an effort to do” that action. *Id.* at 54. Thus, the adjectives “deliberated”

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<sup>8</sup> True, a bystander shot and killed Hasouna after he rammed into the bus stop. That would constitute a “killing.” But Plaintiffs do not allege that Hasouna’s death suffices, and it is hard to see how anyone “deliberated” his death. In any event, Hasouna’s actions, not his death, “cause[d]” the injuries to Yoav and Rotem. 28 U.S.C. § 1605A(a)(1). Thus, a suit premised on Hasouna’s death as an extrajudicial killing would fail to meet the exception’s plain terms.

<sup>9</sup> “Deliberated” and “attempted” are the past participle forms of the verbs “to deliberate” and “to attempt.” The Court therefore cites definitions for those verbs.

and “attempted” speak to different aspects of an act. Whether an act is deliberated depends on the consideration given to it ahead of time. *See Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011) (defining “deliberate” under the TVPA as “undertaken with studied consideration and purpose”). Whether an act is attempted turns on efforts made by the actor to accomplish the act. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (“‘[A]ttempt’ as used in common parlance connote[s] action rather than mere intent . . .”).

A deliberated killing would appear to be a murder accomplished with what the common law described as “malice aforethought,” while an attempted killing is an inchoate crime. The Court therefore cannot include attempted killings in the phrase “deliberated killings” without being unfaithful to the statutory text. This the Court will not do. *See Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (“We thus begin and end our inquiry with the text, giving each word its ordinary, contemporary, [and] common meaning.”) (cleaned up).<sup>10</sup> The Court must respectfully disagree with other judges in this

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<sup>10</sup> More, *Owens v. Republic of Sudan* militates against interpreting “deliberated killing” to include attempted killings. 864 F.3d 751, 770 (D.C. Cir. 2017), *vacated and remanded on other grounds sub nom. Opati v. Repub. of Sudan*, 140 S. Ct. 1601 (2020). There, the Circuit read the TVPA’s definition to “contain[] three elements(1) a killing; (2) that is deliberated; and (3) is not authorized by a previous judgment pronounced by a regularly constituted court.” *Id.* at 770. The Court has already explained why a “killing” requires a fatality. Thus, an attempted killing that, by definition, causes no deaths would not meet the Circuit’s first element, even if it were a “deliberated” action under the second element.

district who have held that attempted killings fall within the TVPA's definition of an extrajudicial killing. *See, e.g., Lee*, 518 F. Supp. 3d at 491; *Gill v. Islamic Repub. of Iran*, 249 F. Supp. 3d 88, 99 (D.D.C. 2017).

That said, those decisions also present another, more compelling textual argument that ultimately saves Plaintiffs. *See, e.g., Karcher v. Islamic Repub. of Iran*, 396 F. Supp. 3d 12, 57 (D.D.C. 2019). The FSIA waives sovereign immunity for injuries caused by "material support *for*" an extrajudicial killing. 28 U.S.C. § 1605A(a)(1) (emphasis added). The word "for" matters.

As used in the provision, "for" "indicate[s] the object or purpose of an action or activity." *For*, Am. Heritage Dictionary 329 (3d ed. 1994). One dresses "for" dinner or studies "for" an exam even if the dinner or exam never occurs. Thus, a foreign state's support with the object or purpose of an extrajudicial killing constitutes support "for such an act" under the statute. 28 U.S.C. § 1605A(a)(1); *accord Force*, 464 F. Supp. 3d at 360–61. And support with that intention or objective can therefore cause "personal injury," even if a resulting attack is not deadly. 28 U.S.C. § 1605A(a)(1). This interpretation faithfully considers Congress's inclusion of "for" in the statute and abides by the D.C. Circuit's guidance to "interpret [the FSIA's] ambiguities flexibly and capaciously." *Van Beneden v. Al-Sanusi*, 709 F.3d 1165, 1167 (D.C. Cir. 2013).

Plaintiffs have sufficiently alleged that the States supported Hamas with that objective. Syria has long sought to "derail any [Israeli-Palestinian] peace process or negotiations that it considers unfavorably."

Berti Decl. ¶ 21. Dr. Deeb testifies that Syria continued to give Hamas a base in Damascus even as Hamas kidnapped Israelis. *See* Deeb Decl. ¶ 21a. Israeli newspapers reported that Syria offered aid in 2002 for Hamas to resume suicide bombings against Israel. *See* Berti Decl. ¶ 45. And Syria facilitated advantageous political meetings between Hamas and foreign leaders, *see id.* ¶ 47 (the Iranian president), and granted Hamas a presence in Lebanon, where Syria held de facto control for years, *see id.* ¶ 46. The Court finds that Syria supplied this aid with the objective of furthering Hamas’s activities, which included “deliberated killings” not sanctioned by applicable law. 28 U.S.C. 1350 note. Syria could not have provided its support without that awareness.

As to Iran, Plaintiffs’ evidence is even stronger. An Iranian ambassador publicly promised to compensate families of those who died attacking Israelis. *See* Clawson Decl. ¶ 28. According to Dr. Clawson, Iran also “paid generously for results” in the form of bombings in Israel. *Id.* ¶ 38. And Iran manufactured weapons for Hamas, with Hamas leadership’s public thanks. *See id.* ¶¶ 47, 56. Finally, Iran publicly supported Hamas during a rash of kidnappings and bombings that it conducted in 2014. *See id.* ¶ 58. Plaintiffs’ evidence thus shows that Iran knew of Hamas’s violent activities, yet still provided support.

And the evidence shows that the Hamas operatives intended the attacks here to be deadly. In Nasr’s statement to Israeli police, he said that “the purpose of the gunfire was to kill a Jew.” Spietzen Decl. ¶ 73. Akram likewise told police that the shooting’s purpose “was to murder and injure Israelis as revenge for the deaths of” Palestinian martyrs. *Id.* The two brothers

clearly contemplated a killing when they entered that room overlooking the Cave.

So too for Hasouna. Israeli investigators found no sign that Hasouna braked before barreling into the bus stop. *See* Spietzen Decl. ¶ 122. He sped into a crowd, an action that any driver knows could be lethal. *Accord Sines v. Kessler*, 324 F. Supp. 3d 765, 796 (W.D. Va. 2018) (reviewing statements from alleged coconspirators discussing the possibility that a car could run over and kill counterprotestors at the 2017 Unite the Right rally in Charlottesville). That Hasouna’s car only injured others was luck, not intentional. And even if he planned only to injure with his car, Hasouna brought an axe for use afterwards, *see id.* ¶ 120, probably to imitate the “ramming and stabbing” attacks that occurred widely across Israel in 2014–15, *id.* ¶ 120 n.82. These facts, particularly when combined with Hasouna’s pre-attack promise to intercede for his mother in Paradise, *see id.* ¶ 124, show that Hasouna planned to kill those gathered at the bus stop. And he was willing to die doing so.

In sum, Hamas undertook both attacks with an intent to kill and with material support from the States. Thus, the States gave material support for an extrajudicial killing.

*The States’ support to Hamas caused Plaintiffs’ injuries.* The FSIA requires Plaintiffs to show proximate cause, meaning “some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.” *Owens*, 864 F.3d at 794 (cleaned up). To establish a “reasonable connection,” Plaintiffs must show both that “the defendant’s actions [were] a substantial factor in the sequence of



events that led to [their] injury” and that their injury “must have been reasonably foreseeable or anticipated as a natural consequence of the defendant’s conduct.” *Id.* (cleaned up).

As to Syria, Dr. Deeb concludes that Syrian support “enabled [ Hamas ] to transform itself” from a fledgling cell to a terror group “with a solid infrastructure and the power to wreak devastation against Israel.” Deeb Decl. ¶ 23. He also concludes that Syrian support “is directly responsible for the Hamas terrorist attacks we see today.” *Id.* ¶ 24. Dr. Berti likewise testifies that “without the support of a prominent Arab state like Syria to lend it legitimacy, [ Hamas ] would be more isolated and unable to” solidify itself as a major player. Berti Decl. ¶ 50. Plaintiffs have thus persuaded the Court that Syrian support was key to the attacks at issue.

As for Iran, Dr. Clawson discusses the “substantial financial and military support” given to Hamas. Clawson Decl. ¶ 34. This included “advanced weapons” for attacks in Israel, *id.* ¶ 50, and direct infusions of cash, *see id.* ¶ 48. Hamas has publicly acknowledged Iran’s assistance to Hamas’s efforts. *See id.* ¶ 59. The Court is persuaded that Iranian support was instrumental to the attacks in Hebron and Jerusalem.

The Court also finds that these attacks caused reasonably foreseeable suffering. Hamas has a long history of planning and conducting attacks in Israel. Dr. Spietzen describes a wave of such attacks in 2015–16, which corresponded to the two attacks. *See Spietzen Decl.* ¶¶ 52–69. Although Syria’s support predates these attacks, Syria gave Hamas safe haven during previous years of similar attacks. Syria knew then

about Hamas’s efforts. *See, e.g.*, Deeb Decl. ¶ 21a. Iran likewise supported Hamas during 2008–2017, *see* Clawson Decl. ¶ 61, and it did so with full awareness of how Hamas used that support.

For these reasons, the Court finds that the terrorism exception applies and that the States have no sovereign immunity. This case falls therefore within the Court’s subject matter jurisdiction. *See* 28 U.S.C. §§ 1330(a), 1605A(a)(1).

### **B. Personal Jurisdiction**

A court has personal jurisdiction over a foreign state when it has subject matter jurisdiction and the plaintiff has made service as required in 28 U.S.C. § 1608. *See* 28 U.S.C. § 1330(b).

Section 1608 “provides four methods of service in descending order of preference.” *Barot v. Emb. of the Repub. of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015). The first is “by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision.” 28 U.S.C. § 1608(a)(1). The second is “by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents.” *Id.* § 1608(a)(2). Next, a plaintiff can effect service “by sending a copy of the summons and complaint and a notice of suit . . . by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” *Id.* § 1608(a)(3). And finally, if none of the first three methods works, a plaintiff can serve the documents through the Department of State. *Id.* § 1608(a)(4).

Here, neither Iran nor Syria made a special arrangement, nor are they party to an international convention on the service of judicial documents. *See Braun v. Islamic Repub. of Iran*, 228 F. Supp. 3d 64, 78 (D.D.C. 2017). Plaintiffs next attempted an international mailing by the Clerk of Court, but the Clerk was unable to effect service. *See* Status Report at 2–3, ECF No. 12. So Plaintiffs requested the State Department to complete service under § 1608(a)(4). *See id.* at 3. This last route was ultimately successful. According to letters from the Department, it served Iran, *see* ECF No. 15, and Syria, *see* ECF No. 18, by diplomatic note.

Because the Court has subject matter jurisdiction and Plaintiffs made proper service, the Court has personal jurisdiction over the States.

### **C. Causes of Action**

The FSIA creates a private cause of action against foreign state sponsors of terrorism liable for “personal injury or death.” *See* 28 U.S.C. § 1605A(c). The elements of this cause of action overlap with the terrorism exception to sovereign immunity, so the Court’s subject matter jurisdiction analysis shows that the exception’s cause of action is available here. *See Foley v. Syrian Arab Repub.*, 249 F. Supp. 3d 186, 205 (D.D.C. 2017).

But that availability does not extend to all Plaintiffs. Only U.S. nationals, U.S. servicemembers, employees of the U.S. Government, or their legal representative may bring claims under the federal cause of action. *See* 28 U.S.C. § 1605A(c)(1)-(3). Ten Plaintiffs are U.S. citizens—Eli and his family; Yoav; Yoav’s mother, Yehudit Golan; and Yoav’s brother, Matan

Golan (collectively, U.S. Plaintiffs). *See* Compl. ¶¶ 4–9, 12–13. Based on their citizenship, these Plaintiffs may use the cause of action found in § 1605A(c).

The other nine Plaintiffs (collectively, Israeli Plaintiffs) are Israeli citizens. *See id.* ¶¶ 10–11, 13–19. Recall that the presence of foreign plaintiffs does not deprive the Court of jurisdiction over their claims because the victims of the attacks were U.S. nationals, as required by § 1605A(a)(2)(A)(ii)(I). *Accord Thuneibat v. Syrian Arab Repub.*, 167 F. Supp. 3d 22, 35 (D.D.C. 2016). But Israeli Plaintiffs cannot proceed under § 1605A’s cause of action. Instead, they may “pursue claims under applicable state or foreign law.” *Fraenkel v. Islamic Repub. of Iran, et al.*, 892 F.3d 348, 353 (D.C. Cir. 2018) (cleaned up). For their claims, the Court must conduct a choice-of-law analysis. *See Oveissi*, 573 F.3d at 841.

The Court will analyze the States’ liability first to U.S. Plaintiffs and then to Israeli Plaintiffs.

### 1. U.S. Plaintiffs

Although the FSIA provides a private cause of action, it does not provide the substantive basis for Plaintiffs’ claims. *See Selig*, 2021 WL 5446870, at \*12. Plaintiffs must instead “prove a theory of liability” to justify holding the States liable. *Roth v. Islamic Repub. of Iran*, 78 F. Supp. 3d 379, 399 (D.D.C. 2015). When adjudicating those theories, the Court cannot “fashion a complete body of law.” *Bettis v. Islamic Repub. of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003). Instead, the Court relies “on well-established statements of common law, found in state reporters, the Restatement of Torts, and other respected treatises.” *Fraenkel*, 892 F.3d at 353.

**a. Battery**

As survivors of the attacks, Eli and Yoav allege that the States committed battery. The States are liable for battery if they (1) acted “intending to cause a harmful or offensive contact with . . . , or an imminent apprehension of such a contact” by those attacked and (2) “a harmful contact” with those attacked “directly or indirectly result[ed].” Restatement (Second) of Torts § 13; *see Roth*, 78 F. Supp. 3d at 400. Harmful contact occurs when “any physical impairment” or “physical pain or illness” results from an incident. Restatement (Second) of Torts § 15.

Iran and Syria supported Hamas with the intent to cause harmful contact; “acts of terrorism are, by their very nature, intended to harm and to terrify by instilling fear.” *Valore v. Islamic Repub. of Iran*, 700 F. Supp. 2d 52, 77 (D.D.C. 2010). And Eli and Yoav suffered physical harm. Eli suffered a gunshot wound that required immediate surgery, *see Friedman Decl.*, Ex. B at 1, and he testified to the “excruciating pain” that the wound caused him, *see Eli Decl.* ¶ 7. Yoav suffered a fractured shoulder and a crushed leg. *See Yoav Decl.* ¶¶ 16–19. So Eli and Yoav have shown the States’ liability under the FSIA for battery and for the physical injuries resulting from that battery.

**b. Assault**

Eli’s father, Ronen, and brother, Josef, were also present for the Hebron shooting. *See Declaration of Josef Barachov* (Josef Decl.) ¶ 5, ECF No. 34; *Declaration of Ronen Barachov* (Ronen Decl.) ¶¶ 4–5, ECF No. 35. They assert that Iran and Syria committed an assault, causing them “fear and apprehension of death.” Compl. ¶ 112. The States are liable for assault if,

when they provided material support and resources for the attack, (1) they acted “intending to cause a harmful or offensive contact with” or an imminent apprehension of such a contact by Ronen and Josef; and (2) Ronen and Josef were “put in such imminent apprehension.” *Akins v. Islamic Repub. of Iran*, 332 F. Supp. 3d 1, 35–36 (D.D.C. 2018) (quoting Restatement (Second) of Torts § 21(1)).

As discussed above, the States supported Hamas with the intent to cause harmful contact and the immediate apprehension of that contact. Acts of terrorism are “intended to harm and to terrify by instilling fear of further harm.” *Murphy v. Islamic Repub. of Iran*, 740 F. Supp. 2d 51, 73 (D.D.C. 2010). And both men feared further harm after the attack. Josef told Dr. Strous that the entire attack was “extremely frightening” and that, for the next months, he grew scared whenever he saw workers in buildings. Strous Expert Report on Josef Borochoy at 2, ECF No. 50-5. “He thought they were snipers in windows waiting to target him.” *Id.* Ronen similarly “freaked out” from shock and felt “immense fear, terror, agitation, dread, and distress” immediately following the shooting. Strous Expert Report on Ronen Borochoy at 2, ECF No. 50-6. For months afterwards, Ronen would think “about what could have happened” and suffered severe anxiety as a result. *Id.* at 3.

Plaintiffs have accordingly shown that the States are liable to Rotem and Josef for assault.

**c. Solatium/Intentional Infliction  
of Emotional Distress**

All U.S. family members sue for “loss of solatium,” *see* Compl. ¶¶ 95, 97, which is “the mental anguish, bereavement, and grief” experienced by those with a close relationship to the victim. *Est. of Hirshfeld v. Islamic Repub. of Iran*, 330 F. Supp. 3d 107, 140 (D.D.C. 2018) (cleaned up). Under the FSIA, a solatium claim “is indistinguishable” from an intentional infliction of emotional distress (IIED) claim. *Id.* Courts apply the Restatement (Second) of Torts to these claims. *See, e.g., Abedini*, 422 F. Supp. 3d at 133.

The States are liable for IIED if they “by extreme and outrageous conduct intentionally or recklessly cause[] severe emotional distress to another.” Restatement (Second) of Torts § 46(1). The Restatement permits recovery by (1) members of the victim’s immediate family (2) who were present at the time of the conduct. *See id.* § 46(2); *Est. of Hirshfeld*, 330 F. Supp. 3d at 141.

Here, the States provided material support to Hamas with the understanding and intent that Hamas would carry out attacks in Israel. Those acts of terrorism “are inherently extreme and outrageous.” *Abedini*, 422 F. Supp. 3d at 135. And because of the outrageousness of an act of terrorism, courts have waived the Restatement’s presence requirement for family members so long as they “suffer[] mental anguish and trauma as a result of” the attack. *Cohen v. Islamic Repub. of Iran*, 238 F. Supp. 3d 71, 85 (D.D.C. 2017); *see also Est. of Hirshfeld*, 330 F. Supp. 3d at 141.

Thus, all family members can recover for IIED regardless of their presence at the attack.<sup>11</sup> *Accord Akins*, 332 F. Supp. 3d at 37–38. The Court has reviewed the declarations submitted by each U.S. family member and is persuaded that all of them suffered “severe emotional distress” from the injuries suffered by Eli and Yoav. Restatement (Second) of Torts § 46(2).

The U.S. Plaintiffs have thus established Iran’s and Syria’s liability under the federal private right of action for their solatium claims.

## 2. Israeli Plaintiffs

Now consider the nine Israeli Plaintiffs—all family members of Yoav and Rotem. They bring various state-law claims against the States.<sup>12</sup> Recall that they can rely only on state tort law to supply the requisite cause of action. That approach requires the Court to first determine “which jurisdiction’s substantive law to apply.” *Oveissi*, 573 F.3d at 841. For that

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<sup>11</sup> This includes Ronen and Josef, despite their successful assault allegation. They suffered psychological injuries from being present for the shooting that wounded Eli. The Court’s assault analysis above accounts for those injuries. Solatium damages, on the other hand, compensates Ronen and Josef for their grief at seeing Eli shot and at seeing him struggle over the next months. See *Braun*, 228 F. Supp. 3d at 85–86 (awarding damages for assault and solatium to parents who were present for terrorist attack that killed their child).

<sup>12</sup> According to the Complaint, the U.S. Plaintiffs also bring these claims. But U.S. Plaintiffs have already shown liability for their injuries under the federal cause of action. These state law claims thus provide no “additional right to recover.” *Force*, 464 F. Supp. 3d at 371; see also *Barry v. Islamic Repub. of Iran*, 410 F. Supp. 3d 161, 178 n.8 (D.D.C. 2019) (declining to consider a state-law claim arising from same predicate acts when plaintiff had shown liability under the federal cause of action).



determination, the Court applies choice-of-law rules from its forum, the District of Columbia. *See id.*<sup>13</sup>

**a. Choice of Law**

The District combines a “governmental interest analysis” with a “most significant relationship test.” *W.A. v. Islamic Repub. of Iran*, 427 F. Supp. 3d 117, 139 (D.D.C. 2019). Under the first analysis, “the Court evaluates the governmental policies underlying the applicable laws and determines which jurisdiction’s policy would be most advanced by having its law applied” to the case. *Id.* (cleaned up). Under the second portion—the most significant relationship test—the Court must consider four factors from the Restatement (Second) of Conflict of Laws: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the parties’ domicile, residence, and nationality; and (4) “the place where the relationship, if any, between the parties is centered.” *Id.* (quoting Restatement (Second) of Conflict of Laws § 145(2)).

Here, two sources of law could apply: D.C. law as law of the forum state, or Israeli law as law of Plaintiffs’ domiciles and law where the attacks occurred. Plaintiffs contend that Israeli law is the better fit. *See Proposed Order at 69.* The Court agrees.

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<sup>13</sup> Recently, the Supreme Court heard arguments in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 20-1566 (U.S., *cert. granted* Sep. 30, 2021), to decide what choice-of-law rules govern in FSIA cases. Because no opinion in that case has been yet issued, this Court abides by current D.C. Circuit precedent and applies the forum’s choice-of-law rules.

Israel has a strong interest in “both deterring attacks within its sovereign borders and ensuring compensation for injuries to its domiciliaries.” *Oveissi*, 573 F.3d at 842. Here, both attacks occurred in Israel, and all nine Israeli Plaintiffs live there. The interest of the United States is slight by comparison. No evidence suggests that any victim “was targeted because of [their] relationship to the United States government.” *W.A.*, 427 F. Supp. 3d at 139; *see also Est. of Doe v. Islamic Repub. of Iran*, 808 F. Supp. 2d 1, 22 (D.D.C. 2011) (applying domestic law to claims arising from terrorist attack “on a United States embassy and diplomatic personnel”). The governmental interest analysis favors application of Israeli law.

So does the most significant relationship test. The injury occurred in Israel; the conduct causing the injury occurred in Israel, the Palestinian territories, Iran, and Syria; all Israeli Plaintiffs are Israeli citizens; and no legal relationship exists between them and either the States or Hamas. *Accord Force*, 464 F. Supp. 3d at 373–74 (applying Israeli law for claims by non-U.S. plaintiffs arising from attacks in Israel). The Court will accordingly apply Israeli law to the claims of Israeli Plaintiffs.

#### **b. Liability Under Israeli Law**

When applying foreign law, the Court “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed. R. Civ. P. 44.1. Plaintiffs here rely on declarations from two professors of Israeli law: (1) Dr. Boaz Shnoor, *see* Declaration of Boaz Shnoor (Shnoor Decl.), ECF No. 34, *Force v. Islamic Repub. of Iran*, No. 16-cv-1468

(D.D.C.); and (2) Israel Gilead, *see* Declaration of Prof. Israel Gilead (Gilead Decl.), ECF No. 56-2, *Henkin v. Islamic Repub. of Iran*, No. 19-cv-1184 (D.D.C.). The Court considers physical injuries and then emotional injuries.

### **i. Physical Injuries**

Among the Israeli Plaintiffs, only Rotem suffered physical injuries. But the Complaint does not explain her theory of liability. Counts II and III allege battery and assault, *see* Compl. ¶¶ 103–15, but under Israeli law those torts require *direct* harm or attempted harm by a defendant, *see* Shnoor Decl. ¶¶ 26, 28. Dr. Shnoor himself analyzes assault and battery as applied to Hasouna, the direct tortfeasor, not to Iran and Syria. *See id.* ¶ 31 (“[T]here is not a doubt in my mind that any Israeli court would have found *the Hamas terrorists*, sponsored and supported by the Defendants, liable for . . . battery and assault under Article 23 of the CWO.”) (emphasis added). So Rotem could not succeed against *the States* for those torts.

To remedy this and other deficiencies, the Court asked Plaintiffs to provide more information about their theory of liability. *See* Show Cause Order, ECF No. 56. Plaintiffs responded that they had shown that the States “aided and abetted Hamas’s tortious acts” under Israeli law. *See* Show Cause Response at 12, ECF No. 57. This theory follows the Complaint: Count VII alleges that the States aided and abetted Hamas’s “acts of international terrorism, extrajudicial killing[,] and personal injury.” *See* Compl. ¶ 129.

According to Plaintiffs’ experts, Article 12 of Israel’s Civil Wrongs Ordinance (CWO) holds liable “anyone who helps another or encourages him to perform a

civil wrong” as if the helper had “committed the wrong himself.” Shnoor Decl. ¶ 45; *see also* Gilead Decl. ¶ 36 (noting that the “first requirement” for aiding and abetting liability is a primary tortfeasor). Dr. Shnoor reports that Israeli courts impose aiding and abetting liability if a defendant’s actions “significantly contributed to the tortious actions of the direct tortfeasor.” *Id.* ¶ 46. The Court has already determined that the States’ actions significantly contributed to the attackers’ efforts. *See supra* IV.A. The only remaining question is whether those efforts were “tortious.” Shnoor Decl. ¶ 46.

They were for Rotem’s physical injuries. Battery under Israeli law requires that a defendant (1) knowingly (2) use force (3) against the body of another (4) without that person’s consent. *See* Shnoor Decl. ¶ 28. Hasouna drove his car into Rotem’s body, throwing her against a glass wall at the bus stop. *See* Rotem Decl. ¶ 5. He thus used force against her body without her consent. And he did so knowingly. He chose the anniversary of Hamas’s founding as the date for the attack and brought with him an axe painted in a green shade associated with Hamas. *See id.* ¶¶ 125–26. These actions show planning of the attack and support an inference that Hasouna knowingly rammed Rotem with his car.

Thus, Hasouna committed a battery against Rotem. And the States, through their material support to Hamas, significantly contributed to that battery. The States are thus liable under Israeli law for aiding and

abetting a battery.<sup>14</sup> See Shnoor Decl. ¶ 46. Rotem may recover for her physical injuries.

## ii. Emotional Injuries

All other Israeli Plaintiffs seek recovery for their emotional damages (essentially, for solatium) resulting from the attack on Yoav and Rotem. Based on Plaintiffs' aiding and abetting theory in their Show Cause Response, the Court follows a similar approach as for Rotem's battery. The Court will first analyze whether Hamas committed an underlying tort and then whether the States aided and abetted that tort.

First, the underlying tort. Plaintiffs insist that the Court should analyze Hamas's actions under the Israeli tort of negligence. But the word negligence never appears in the Complaint. Even so, Plaintiffs' experts have established that Israeli negligence covers both negligent and intentional acts. See Shnoor Decl. ¶ 13; Gilead Decl. ¶ 25. And the Complaint includes allegations of multiple intentional actions, including intentional infliction of emotional distress and civil conspiracy. See Compl. ¶¶ 116–20; 125–27. The Court also notes Judge Lamberth's opinion in *Henkin v. Islamic Republic of Iran*, no. 10-cv-1184 (RCL), 2021 WL 2914036 (D.D.C. Jul. 12, 2021). The plaintiffs there likewise did not separately allege negligence but included many of the same claims as Plaintiffs here. See

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<sup>14</sup> The Court need not analyze whether Rotem has successfully alleged aiding and abetting of an assault. Her successful battery pleading assures her of recovery for her injuries. See *Braun*, 228 F. Supp. 3d at 80 (“[R]ecovery for the same injury under more than one theory of liability is forbidden.”) (citing *Kassman v. Am. Univ.*, 546 F.2d 1029, 1034 (D.C. Cir. 1976)).

*id.* at \*3. Yet Judge Lamberth analyzed whether Israeli negligence law applied. *See id.* at \*8. The Court will follow his example. *See also Est. of Botvin v. Islamic Repub. of Iran*, 873 F. Supp. 2d 232, 242–43 (D.D.C. 2012) (determining that terrorists committed negligence and that foreign state sponsors aided and abetted that negligence).

Articles 35–36 of the CWO set forth the tort of negligence. *See* Shnoor Decl. ¶ 13. It consists of four elements: (1) duty of care; (2) breach of that duty; (3) causation; and (4) harm. *See id.* ¶ 15.

The Court has little difficulty concluding that Hamas’s actions amounted to negligence. A duty of care under Israeli law arises “whenever a reasonable person could have foreseen” that their conduct “could cause the harm alleged.” *Id.* ¶ 17. Hasouna could have reasonably foreseen that driving a car into a crowded bus stop would physically harm those bystanders and emotionally damage their family members. So a duty arose. And Hasouna breached that duty. A breach occurs when the party with the duty fails to take “reasonable precautionary measures.” *Id.* Far from taking precautionary measures, Hasouna never braked as he drove into the bus stop. *See* Spietzen Decl. ¶ 122. Under Israeli law, he breached his duty.

The causation element requires “both causation in fact and legal causation (proximate cause).” Shnoor Decl. ¶ 20. “Cause in fact is generally determined in Israel according to the ‘but for’ test.” *Id.* ¶ 21. And legal causation is met “[i]f a reasonable person could have foreseen that harm of the kind that happened might happen.” *Id.* ¶ 22. Hasouna’s actions fulfill

both types of causation. His vehicular rampage was the but for cause of Rotem and Yoav's injuries. Without his choice to ram into the bus stop, they would not be hurt, and their families would not have suffered. And as discussed in the duty element, Hasouna could have reasonably foreseen that driving a car into a crowded bus stop would cause those injuries.

Finally, the CWO defines harm as "loss of life, or loss of, or detriment to, any property, comfort, bodily welfare, reputation, or other similar loss or detriment." Shnoor Decl. ¶ 23. That definition of harm includes emotional and psychological damages. Israeli Plaintiffs' own declarations and Dr. Strous's reports attest to the mental and emotional harms suffered because of Yoav's and Rotem's injuries. The Court thus concludes that Israeli Plaintiffs have adequately alleged harm and that Hamas committed Israeli negligence.

Plaintiffs also show that the States aided and abetted that negligence. That analysis is largely set forth above. The Court has already determined that the States' actions significantly contributed to Hamas's efforts, which in turn caused Hasouna's attack. *See supra* IV.A. The States knew of Hamas's violent intentions and "nonetheless provided support in spite of them." *Est. of Botvin*, 873 F. Supp. 2d at 242. And the States' funding and support coincided with and allowed Hamas to conduct terrorist attacks, "including the [bus stop attack] at issue here." *Id.* The material support from the States thus "significantly contributed" to Hamas's negligence. Shnoor Decl. ¶ 46. The States are therefore liable for aiding and abetting that tort. Israeli Plaintiffs may recover for their emotional injuries from the attack on Yoav and Rotem.

### **D. Individual Damages**

The Court moves next to damages. To obtain damages in an FSIA suit, “a plaintiff must prove that the consequences of the defendants’ acts were reasonably certain to occur, and he must prove the amount of damages by a reasonable estimate.” *Abedini*, 422 F. Supp. 3d at 136 (cleaned up). Recall that physical injuries and emotional suffering were a foreseeable result of the States’ actions. *See supra* IV.A. So the Court must determine whether each Plaintiff’s claim for damages is supported by a “reasonable estimate.” *Abedini*, 422 F. Supp. 3d at 136.

#### **1. U.S. Plaintiffs**

Assessing damages “is an imperfect science.” *Goldstein v. Islamic Repub. of Iran*, 383 F. Supp. 3d 15, 19 (D.D.C. 2019). No amount of money can compensate a victim and his family for suffering after a terrorist attack. “In the interest of fairness, however, courts strive to maintain consistency of awards” between plaintiffs in comparable situations. *Id.* To achieve consistency, courts in this district have adopted standard amounts for each type of plaintiff. Those figures originate from *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006). *Heiser* is a useful reference point, “not binding precedent.” *Fraenkel*, 892 F.3d at 351. Courts vary from these standards depending on the facts of each case. *See Selig*, 2021 WL 5446870, at \*13 (collecting cases); *see also Fraenkel*, 892 F.3d at 361 (“District Court judges invariably must exercise discretion in determining damages awards under the FSIA.”). Thus, the Court will treat them as a guide only.



The relevant standards for damages are as follows. For pain and suffering, courts generally assume that “persons suffering substantial injuries in terrorist attacks” should receive \$5 million in damages. *Barry*, 410 F. Supp. 3d at 180; see *Cohen v. Islamic Repub. of Iran*, 268 F. Supp. 3d 19, 24 (D.D.C. 2017). Substantial injuries include “compound fractures, severe flesh wounds, and wounds and scars from shrapnel, as well as lasting and severe psychological pain.” *Valore*, 700 F. Supp. 2d at 84 (cleaned up). Victims who suffer “severe emotional injury accompanied by relatively minor physical injuries” receive \$1.5–\$3 million. *Barry*, 410 F. Supp. 3d at 180 (cleaned up). Awarding damages for physical injuries “assumes severe psychological injuries.” *Id.* (cleaned up).

For solatium damages, the standard amount “depends in part on the nature of the relationship between the family member and the victim, and the severity of the pain suffered by the family member.” *Bathiard v. Islamic Repub. of Iran*, 2020 WL 1975672 at \*5 (D.D.C. Apr. 24, 2020) (cleaned up). When the victim suffers a nonfatal injury, courts have applied a framework under which “[s]pouses receive \$4 million, parents receive \$2.5 million, and siblings receive \$1.25 million.” *Moradi v. Islamic Repub. of Iran*, 77 F. Supp. 3d 57, 72 (D.D.C. 2015); see *Cohen*, 268 F. Supp. 3d at 26.

The Court will apply this framework to the U.S. Plaintiffs, starting with Eli’s family and then moving to Yoav’s.

*Eli Borochov*. Eli seeks \$5 million in pain and suffering. See Proposed Order at 76. The Court has already referenced Eli’s injuries. After striking his thigh, the bullet traveled into his genital area before exiting his

body. *See* Friedman Decl. Ex. B at 1. As a “serious flesh wound,” the damage to Eli’s leg and genitals constitutes a “substantial” physical injury. *Braun*, 228 F. Supp. 3d at 84. The wound caused “excruciating pain” that did not dissipate as medics transported Eli to the hospital. Eli Decl. ¶ 7. And the months after surgery were not easy. Eli’s stitches often came apart, requiring replacements and more pain. *See id.* ¶ 32. Eli developed a limp, which caused him back pain. *See id.* ¶ 35. Adding to his discomfort, the area around Eli’s wound is often sensitive, making it hard to sit down or sleep. *See id.* ¶ 40–42. Eli missed three months of college because of his injuries, *see id.* ¶ 45, and he feels anxious in large crowds, *see id.* ¶ 47. Because Eli suffered “substantial injuries” in the shooting, the Court will award him \$5 million in keeping with the *Heiser* framework.

*Ronen Borochoy*. Ronen seeks \$1.5 million in pain and suffering. *See* Proposed Order at 76. Once he saw Eli shot on the ground, Ronen went into a “state of shock.” Ronen Decl. ¶ 15. He reported to Dr. Strous that he felt “immense fear, terror, agitation, dread, and distress.” Strous Expert Report on Ronen Borochoy at 2. He felt “helpless” as emergency responders transported Eli to the hospital, Ronen Decl. ¶ 22, and Ronen was “shaking and agitated” from the stress of seeing his son in an ambulance, Strous Expert Report on Ronen Borochoy at 2. After the attack, Ronen could not sleep for months and calmed himself by eating. *See id.* at 3. Dr. Strous diagnosed Ronen as suffering from post-traumatic stress disorder because of the shooting. Strous Expert Report on Ronen Borochoy at 6.

The Court will award Ronen \$1 million for his pain and suffering. To be clear, Ronen experienced no physical injury. True, some cases grant \$1.5 million for those who, like him, suffer only emotional injuries. *See Valore*, 700 F. Supp. 2d at 84–85. But those cases are not binding on this Court, and they compensate emotional experiences more traumatic than Ronen’s. *See id.* (awarding \$1.5 million to victim who saw up close the back of a man’s head shot off and had the leg of a dead body detach in his arms). Ronen’s experience, while painful, does not merit the same damage award. *See Fraenkel*, 892 F.3d at 362 (“[D]ifferent plaintiffs (even under [the] FSIA) will prove different facts that may well (and should) result in different damage awards.”) (cleaned up).

Ronen also seeks solatium damages. *See Proposed Order* at 92. Once he and Eli returned to the United States, Ronen “was consumed with thoughts of Eli’s physical and emotional injuries.” Ronen Decl. ¶ 36. Ronen’s sleep woes during that time stemmed from nightmares about losing a child. *See id.* ¶ 40. He cut his work hours considerably so that he could take Eli to various doctors’ appointments. Strous Expert Report on Ronen Borochoy at 3. According to Dr. Strous, Ronen needed about a year to return to his pre-attack level of activity and function. *See id.* Ronen is much more nervous now. He always needs to know where his children are and remains overly fragile and emotional. *See id.* at 3–4. “These harms are consistent with those suffered by many parents of victims of terrorism.” *Christie v. Islamic Repub. of Iran*, No. 19-1289 (BAH), 2020 WL 3606273, at \*26 (D.D.C. July 2, 2020). For his anguish at seeing the pain of his son,

the Court will award Ronen the *Heiser* standard \$2.5 million in solatium damages.<sup>15</sup> *See id.*

*Josef Borochoy.* Eli's brother Josef seeks \$1.5 million in pain and suffering. *See Proposed Order at 77.* Once Josef heard a gunshot, he saw Eli on the ground screaming in pain. Strous Expert Report on Josef Borochoy at 2. Josef thought Eli would die and knew that if the bullet had traveled on a different path it could have hit and killed Josef himself. *See id.* at 2. And the attack took a mental toll on Josef. In the months afterwards, he felt unable to walk around in public areas. *See id.* He felt depressed during that time and avoided interactions with others. *See id.* at 3. The attack has also changed his life plans—Josef had planned to emigrate to Israel, but after the shooting he does not think he could live there in a “relaxed manner.” *Id.* He thus no longer intends to emigrate. *See id.* For the same reasons that the Court will

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<sup>15</sup> This award is higher than Ronen's damages for his own pain and suffering. The Court acknowledges that solatium damages generally must be proportionate to pain and suffering damages awarded to direct victims. *See Spencer v. Islamic Repub. of Iran*, 71 F. Supp. 3d 23, 28 (D.D.C. 2014). But Eli is the direct victim whose injuries matter for Plaintiffs' solatium claims. Thus, Ronen's solatium award for Eli's injuries can exceed Ronen's award for his own pain and suffering. In analogous situations when a parent is present for the attack that injures their child, courts typically award the parent more in solatium damages than for their own pain and suffering. *See, e.g., Cohen*, 268 F. Supp. 3d at 25–26 (awarding mother of injured children \$5 million for her own pain and \$7.95 million for solatium); *Braun*, 228 F. Supp. 3d at 84–86 (awarding mother and father who were present at suicide bombing that killed their child \$2.5 million each for their own pain and suffering and \$6.25 million in solatium damages).

award Ronen \$1 million in pain and suffering, the Court will grant Josef the same amount.

Josef also seeks solatium damages. He calls Eli his “best friend” and someone he “admired.” Josef Decl. ¶ 14. Once medics evacuated Eli to a hospital, Josef feared for the worst and thought that Eli was dead. Strous Expert Report on Josef Borochoy at 2. Over the next hours and days, Josef could not think about anything else and “thought he was going crazy.” *Id.* As already mentioned, the trauma of what happened to his brother caused depression in Josef. And whenever he discusses Eli’s shooting, Josef cries and has heart palpitations. *See id.* at 3. These symptoms match the suffering of “many siblings of victims of terrorism.” *Akins*, 332 F. Supp. 3d at 45. Thus, the Court will award Josef \$1.25 million in keeping with a *Heiser* standard award for siblings. *See id.*

*Shari Borochoy.* Eli’s wife Shari seeks solatium damages. She did not know Eli at the time of the shooting. The couple met in 2017 and married in 2019. *See* Strous Expert Report on Shari Borochoy at 1, ECF No. 50-7. She asserts that Eli could not commit to a relationship with her until he could “recount the full story” of the attack. *Id.* at 2. Once Shari learned of his injuries, she feared that they would affect his fertility. *See* Declaration of Shari Borochoy ¶ 20, ECF No. 36. The couple still do not know what effect those injuries will have on their life together. *See id.*

Shari requests \$2.5 million in solatium damages. The Court acknowledges her pain but cannot award her damages. Courts in this district consistently refuse damages to plaintiffs unassociated with the victim at the time of the attack. *See Bova v. Islamic Repub. of*

*Iran*, No. 15-cv-1074 (RCL), 2020 WL 2838582 at \*10 (D.D.C. May 31, 2020) (denying solatium damages to victim’s sister who was born after attack). Those uncompensated plaintiffs include “[c]urrent spouses who were not yet married” to the victim. *Est. of Bland v. Islamic Repub. of Iran*, 831 F. Supp. 2d 150, 157 (D.D.C. 2011); see *Davis v. Islamic Repub. of Iran*, 882 F. Supp. 2d 7, 17 (D.D.C. 2012). This limitation makes sense. Without it, the class of future spouses able to recover “could remain open for decades after a terrorist attack.” *Davis*, 882 F. Supp. 2d at 15. Courts must draw a line to avoid “such an expansive and indefinite scope of liability.”<sup>16</sup> *Id.*

More, Shari, unlike other recipients of solatium damages, never feared that a loved one had died. See *Christie*, 2020 WL 3606273, at \*26 (awarding solatium in part for “panic upon learning about” an attack on a family member). Nor did she “fear for her spouse’s physical well-being in the immediate aftermath” of the attack. *Id.* Shari learned about the attack on Eli two years later and never saw the immediate effects of his wounds. The Court recognizes her pain at seeing those effects now. But her injuries, suffered years after the shooting, do not entitle her to solatium damages.

*The Rest of Eli’s Family.* Eli’s mother Devora seeks solatium damages. When she heard about the attack, Devora “quickly broke down, weeping and wailing.” Declaration of Devora Borochoy ¶ 16, ECF No. 31. That day “felt like it lasted forever” as she waited for

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<sup>16</sup> The D.C. Circuit relied on similar logic to exclude victims’ nieces and nephews from solatium damages. See *Bettis*, 315 F.3d at 337.

news on Eli's condition. *Id.* ¶ 26. And when she told the other children about the attack, Devora had to comfort them in their shock. *See id.* ¶¶ 31–33. Devora fought back tears when she first saw Eli in his wheelchair, *see id.* ¶ 38, and during the early stages of his recovery she would often “go into the bathroom, look in the mirror, and just start crying,” *id.* ¶ 46. Devora also worried that the wounds would damage Eli's fertility. *See id.* ¶ 44. “Due to these worries, even after he returned, she struggled to sleep for days and weeks.” Strous Expert Report on Devora Borochoy at 3, ECF No. 50-3. As a result of the shooting, Devora became more anxious and has become “much more protective of her children.” *Id.* For her grief after the shooting of her son, the Court will award Devora the *Heiser* standard of \$2.5 million in solatium damages.

Eli's brother Avraham seeks solatium damages. He was in middle school when Eli was shot. *See* Declaration of Avraham Borochoy ¶ 5, ECF No. 33. Avraham was “terrified and in shock” when he learned of the shooting, *id.* ¶ 10, and “cried for hours” into his pillow that night, *id.* ¶ 11. “For weeks after the attack, [Avraham] could not sleep or think normally.” *Id.* ¶ 18. He found it hard to concentrate in school knowing that Eli was at home in pain. *See id.* ¶ 15. Avraham also grew fearful—he “no longer feel[s] safe the way that [he used] to.” *Id.* ¶ 22. He has become a “worrier” and shows a fear of public places. Strous Expert Report on Avraham Borochoy at 2–3, ECF No. 50-2. Because of this emotional suffering after his sibling's injuries, the Court will award Avraham \$1.25 million in solatium damages.

Eli's sister, Shira, also requests solatium damages. When Shira heard about his shooting, she immediately began to cry. Declaration of Shira Borochov ¶ 7, ECF No. 37. Shira told Dr. Storus that she felt "agony" at seeing Eli in a wheelchair and in so much pain. Strous Expert Report on Shira Borochov at 2, ECF No. 50-8. At school, Shira's classmates pestered her with questions about her brother. "She felt overwhelmed" and left school for some time. *Id.* at 2. Thoughts about Eli and his condition "preoccupied her," affecting "her focus and concentration for many months." *Id.* at 3. Shira also felt that, because of the attention at school on her brother's shooting, she could not "develop her own persona and identity." *Id.* at 2. For her emotional suffering from the injury to a sibling, the Court will award Shira \$1.25 million in solatium damages.

*Yoav Golan.* Yoav seeks \$5 million in pain and suffering. *See* Proposed Order at 82. Recall that the impact with the car dislocated Yoav's shoulder, fractured it, and created a crush injury on his leg. *See* Yoav Decl. ¶¶ 16, 20. Yoav was in "a lot of pain" and remembers his entire body shaking after impact. *Id.* ¶ 21. Because of his injuries, Yoav could not walk and was confined to a wheelchair for a month. *See id.* ¶ 23. This temporary disability prevented Yoav and Rotem from returning to their own home, which is "only accessible by stairs"; instead, they lived with Rotem's family for multiple months. *Id.* ¶ 26. Yoav needed help performing basic functions and often could not sleep because of the pain. *See id.* ¶¶ 24, 25. He experiences leg pain even now. *See id.* ¶ 30.

The attack also took a mental toll. Yoav "never feel[s] secure," especially when walking near the scene of the attack. *Id.* ¶ 41. He has troubling flashbacks of the



crash and immediately tenses up when he sees a car drive too close to a sidewalk. *See id.* ¶¶ 45, 47. He and his wife no longer feel safe taking walks in the evening, and he refuses to drive his car at night. *See id.* ¶¶ 54, 57. Yoav’s physical injuries resemble the “compound fractures, severe flesh wounds, and wounds and scars from shrapnel” that cause “severe psychological pain” in victims of terrorist attacks. *Valore*, 700 F. Supp. 2d at 84. The Court thus will award him the standard amount of \$5 million in pain and suffering.

*Yoav’s American Family.* Yoav’s mother Yehudit and his brother Matan are American citizens. *See Compl.* ¶¶ 12, 13. They both seek solatium damages.

Yehudit received a call from Yoav shortly after the attack, but the call got disconnected. *See Declaration of Yehudit Golan* ¶¶ 6-7. She tried to reconnect with him for 30 minutes, but it “felt like many hours” because of her worry for her son. *Id.* ¶ 8. She was unable to sleep that night, both out of concern for Yoav but also because she took care of Yoav’s baby, who would not eat. *See id.* ¶ 15. Over the next months, Yehudit took time off work to accompany Yoav to various appointments and to help him around the house. *See id.* ¶ 17. She also “frequently woke up at night with horrible nightmares,” *id.* ¶ 23, and could not concentrate on her work, *see id.* ¶ 24. She reports being fearful and anxious “by the thought [Yoav and Rotem] could have died.” *Id.* ¶ 28. That thought “is in [her] mind all the time.” *Id.* For her emotional suffering after the injury to her child, the Court will award her \$2.5 million in solatium damages. *Accord Blank v. Islamic Repub. of Iran*, No. 19-cv-3645 (BAH), 2021 WL 3021450 at \*12 (D.D.C. July 17, 2021).

Once Matan heard about the attack and injuries to Yoav, he traveled to Jerusalem and spent the night in the hospital with Yoav and Rotem. *See* Declaration of Matan Golan ¶¶ 10, 13, ECF No. 43. The “vision of [their] suffering” continues “to follow [Matan] until this day and appear[s] in [his] mind unbidden and for no apparent reason.” *Id.* ¶ 13. Matan found it “very difficult” to see his brother traumatized and in a wheelchair. *Id.* ¶ 16. He also felt a personal impact from the attack. Now he is “suspicious of each passing car” and “examine[s] every person who walks behind” him. *Id.* ¶ 17. Matan had trouble sleeping “[f]or a long time after the attack.” *Id.* ¶ 18. And as Matan told Dr. Strous, “[h]e is still bothered to see the extent to which his brother is still affected from his physical and emotional injuries.” Strous Expert Report on Matan Golan at 3, ECF No. 51-3. For Matan’s emotional pain and suffering consistent with seeing his brother’s injuries, the Court will award him \$1.25 million. *See Blank*, 2021 WL 3021450, at \*13.

## 2. Israeli Plaintiffs

In their Proposed Order, Israeli Plaintiffs follow the U.S. Plaintiffs and request damages in line with *Heiser*. *See* Proposed Order at 114. This presents a conundrum—the *Heiser* figures apply to damages awards under the *federal* cause of action. Because Israeli Plaintiffs prevail under Israeli law, that law determines their damages. *See Thuneibat*, 167 F. Supp. 3d at 47 (“Normally, damages would be calculated pursuant to the law under which liability was found . . . .”); *Est. of Botvin*, 873 F. Supp. 2d at 243 (same). Indeed, they argued that Israeli—not local—law applies. Because Israeli Plaintiffs seemed to disregard Israeli damages law in their motion, the Court later

asked them to specify “[w]hether and in what amounts Israeli law awards damages” for Rotem’s physical injuries and the emotional injuries of the Israeli family members. Order at 2.

Israeli Plaintiffs answered the first part of that question. Israeli law does award damages for the suffered injuries. *See* Show Cause Response at 18–20. But beyond saying that Israeli damages “are typically lower than awards in the United States,” Israeli Plaintiffs give no amounts. *Id.* at 20. Instead, they again urge the Court to award the same amounts as provided in the *Heiser* framework.<sup>17</sup> *See id.* at 21. This suggestion ignores the Court’s instruction that Plaintiffs provide more information on *amounts* under *Israeli* law.

To be sure, some judges in this district have, when faced with imperfect information on foreign damages law, defaulted to the *Heiser* framework when doing so is “in the interests of justice.” *Thuneibat*, 167 F. Supp. 3d at 47. Those precedents persuade the Court that the *Heiser* framework is appropriate for Rotem’s pain and suffering, given that the Court is already applying American law to her situation. Recall that impact with Hasouna’s car threw her into a glass wall at the bus stop. *See* Rotem Decl. ¶ 5. Once the bystander had shot Hasouna, Rotem felt pain in her back and noticed a wound on her knee. *See id.* ¶ 13. Her knees felt like they “were burning.” *Id.* At the hospital, Rotem received eight stitches in one knee and learned that she had sprained a ligament in her other knee.

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<sup>17</sup> Indeed, Israeli Plaintiffs’ requested figures, even in their Show Cause Response, are equal to awards in the United States, not lower as they suggest earlier in the Response.

*See id.* ¶ 20. She was in shock and remembers vomiting while there. *See id.* ¶ 22. Once at her parents' house, Rotem needed assistance because of her pain to lift her baby from his crib and to nurse him while sitting down. *See id.* ¶ 27. Rotem's pain also prevented her from driving for at least a month and she missed over two months of her internship as a drama teacher. *See id.* ¶ 28. Rotem did not return to her pre-attack physical shape until "at least ten months" later. *See id.* ¶ 60.

Like the other victims, Rotem suffered emotionally after the attack. She thought "constantly and obsessively" about it, *id.* ¶ 30, wondering what might have occurred if her baby had been there, *see id.* ¶ 35. Rotem's feelings grew so intense that she attended "psychotherapy" sessions, *id.* ¶ 43, and she struggled to care for her child after the attack, *see id.* ¶ 47. She suffers from nightmares in which she and her family are involved in a terrorist attack. *See id.* ¶ 49. She is afraid of the dark, *see id.* ¶ 51, and feels unsafe in her own home, *see id.* ¶ 52. She "no longer feel[s] confident or safe" and does not know if she can overcome her post-attack anxiety. *Id.* ¶ 63.

To compensate Rotem's injuries, the Court will consult the *Heiser* amounts. Her physical injuries and severe emotional trauma both suggest that applying the *Heiser* standards serves the "interests of justice." *Thuneibat*, 167 F. Supp. 3d at 47.

Rotem seeks \$5 million in pain and suffering. Courts typically award that amount, however, to victims who suffer *substantial* physical injuries from a terrorist attack. *See Schertzman Cohen v. Iran*, No. 17-cv-1214 (JEB), 2019 WL 3037868 at \*6 (D.D.C. July 11, 2019).

Victims suffering minor injuries “such as lacerations and contusions caused by shrapnel, accompanied by severe emotional damages” receive less. *Id.* (cleaned up). Rotem’s physical injuries largely match that description; she had cuts on her knees and sprained a ligament. For similar injuries, many courts award \$2 million. *See, e.g., Bova*, 2020 WL 2838582, at \*5 (awarding \$2 million to victim of explosion for cuts on his head and forearms and for the formation of a mass on his leg). The Court recognizes, however, Rotem’s heightened emotional trauma after the attack, including her worries about the safety of her child. Dr. Strous says that she suffers from “moderate to severe” post-traumatic stress disorder that will “affect her for a long period of time.” Strous Expert Report on Rotem Golan at 8–9, ECF No. 51-8. Based on that diagnosis, the Court finds that Rotem was “minimally injured” in the attack but “experienced some enduring physical and emotional pain.” *Bathiard*, 2020 WL 1975672, at \*5. The Court will award her \$3 million in pain and suffering.

For the other Israeli Plaintiffs, however, the Court cannot award damages. When faced with a defaulting defendant, a plaintiff must prove the requested amount of damages “by a reasonable estimate,” *Abedini*, 422 F. Supp. 3d at 136, or to a “reasonable certainty,” *Sanchez v. Devashish Hop., LLC*, 322 F.R.D. 32, 37 (D.D.C. 2017). And recall that when a sovereign defaults, FSIA requires plaintiffs to establish their “right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). Under any of these formulations, the burden lies with Israeli Plaintiffs to prove the amount of damages.

They have not met that burden—they provide no estimate for damages allowable under the substantive law that they admit governs their claims. *See* Proposed Order at 68–71. The Court gave Israeli Plaintiffs an opportunity to remedy that gap in their original filings and reminded Israeli Plaintiffs that the Court can “insist on a complete presentation by counsel” on the substance of foreign law. *See* Order at 2 (quoting Fed. R. Civ. P. 44.1, advisory comm’s note to 1966 amendment).

The Show Cause Response makes clear that Israeli Plaintiffs understood that Order. Indeed, their response clarified how far Israeli law “awards punitive damages” for their injuries. *Id.* But for compensatory damages, they simply reiterated their request for *Heiser* figures. “This Court is [ ] disinclined to conduct a detailed independent study of Israeli damages law” when the Israeli Plaintiffs have not, even after prodding from the Court. *Est. of Botvin*, 873 F. Supp. 2d at 245.

No authority requires a different conclusion. Plaintiffs cite *Leibovitch v. Syrian Arab Republic*, 25 F. Supp. 3d 1071, 1087–88 (N.D. Ill. 2014), where the court awarded to Israeli plaintiffs amounts slightly below the *Heiser* figures. The court based this departure on the proposition—also stated by Israeli Plaintiffs here—that Israel awards fewer damages than the United States. *See id.* at 1087; Show Cause Response at 20. That proposition, however, originates from another out-of-district decision which dealt with a non-FSIA case and which noted simply that the defendant there had not contested the proposition about Israeli law. *See Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 423 (E.D.N.Y. 2009). The decision did not describe or

explore in detail this facet of Israeli law. In short, Plaintiffs' arguments are based on non-precedential, largely untested and unsupported claims about Israeli law. This Court will not award millions of dollars in damages against a foreign sovereign based on such dubious out-of-circuit authority. *Accord Est. of Botvin*, 873 F. Supp. 2d at 245.

Israeli Plaintiffs also cite the D.C. Circuit's opinion in *Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348 (D.C. Cir. 2018). There, the court overturned a damages award to an Israel plaintiff because the lower court had improperly limited his award based on assumption-of-risk principles. *See id.* at 361. In doing so, the Circuit noted that although Israeli law governed that plaintiff's damages calculation, "we default to the application of federal law when there is a lack of information regarding the proper calculation of damages under foreign law, as there is here." *Id.* at 358 (citing *Thuneibat*, 167 F. Supp. 3d at 47). Israeli Plaintiffs say that this line from the Circuit requires this Court to apply the *Heiser* framework.

The Court disagrees. *Fraenkel* teaches that, when facing a dearth of information about a substantive legal question like assumption of risk, lower courts should default to federal law. But that default does not apply to damages amounts in general or to the *Heiser* framework in particular. *Fraenkel* says so. After analyzing assumption of risk through the lens of federal law, the Circuit affirmatively denied that lower courts must adhere to the *Heiser* framework. *See id.* at 361 ("[T]he District Court in this case was not *required* to follow *Heiser* for the simple reason that *Heiser* is not controlling precedent."). And the FSIA requires that plain-

tiffs establish their right to relief “by evidence satisfactory to the court.” *Id.* (quoting 28 U.S.C. § 1608(e)). Thus, district courts “invariably must exercise discretion in determining damages awards under the FSIA.” *Id.*

So *Fraenkel* does not require the Court to default to the *Heiser* framework or any other damages amount. And Israeli Plaintiffs cannot rely on one sentence in that opinion to avoid their burden on default judgment. The *Fraenkel* court specifically reiterated that plaintiffs under the FSIA must establish their “right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). Simply put, the Court in its discretion—also recognized in *Fraenkel*—asked Israeli Plaintiffs to provide satisfactory evidence to justify the damages they seek. They failed to do so. The Court will not independently remedy that failure and will therefore deny the Israeli Plaintiffs’ request for compensatory damages.

\* \* \*

The Court pauses to note that, in distinguishing between Plaintiffs, it does not minimize or denigrate the pain and suffering each Plaintiff has endured. No one should experience the trauma that Plaintiffs undoubtedly experienced. The Court’s awards are driven by a recognition that most—if not all—people eligible for damages from a terrorist attack have suffered the unimaginable. *Accord Selig*, 2021 WL 5446870, at \*23. Nor, for that matter, does the Court doubt the suffering felt by those Plaintiffs not awarded damages here. In the end, a court’s rulings must be grounded in the law, not sympathy or instinct.



### **E. Punitive Damages and Costs**

Plaintiffs also seek punitive damages, which apply not to compensate victims but to “punish outrageous behavior and deter such outrageous conduct in the future.” *Kim v. Dem. People’s Repub. of Korea*, 87 F. Supp. 3d 286, 290 (D.D.C. 2015) (cleaned up). Four factors are relevant in deciding the appropriate level of punitive damages: “(1) the character of the defendants’ act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants.” *Est. of Steinberg v. Islamic Repub. of Iran*, No. 17-cv-1910 (RCL) 2019 WL 6117722 at \*9 (D.D.C. Nov. 18, 2019) (cleaned up).

These factors support an award of punitive damages here. The States’ acts were heinous. Their acts were intended to—and did—cause unconscionable pain and suffering. Deterrence is necessary because, time and again, courts in this district have been confronted with families shattered by Iran- and Syria-backed terrorists. *See, e.g., Wultz v. Islamic Repub. of Iran*, 864 F. Supp. 2d 24, 42 (D.D.C. 2012) (awarding punitive damages based on “the extreme reprehensibility of Iran and Syria’s acts). Plaintiffs ask for \$150 million in punitive damages each for the Borochov family and the Golan family. *See Proposed Order at 96.*

Plaintiffs’ request has some basis in precedent. Courts in this district have awarded \$150 million in punitive damages to the family of an attack victim. *See, e.g., Est. of Steinberg*, 2019 WL 6117722, at \*10; *Est. of Hirshfeld*, 330 F. Supp. 3d at 150; *Gates v. Syrian Arab Repub.*, 508 F. Supp. 2d 53, 75 (D.D.C. 2008). This flat-award approach promotes consistency and

predictability in punitive damages, features that the Supreme Court has endorsed. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008). But a flat-award method also “limits a judge’s discretion to tailor a punitive award appropriate to the magnitude of the underlying injury.” *Abedini*, 422 F. Supp. 3d at 142.

The details of the attacks here do not support such an indiscriminate award of punitive damages. In other cases in which courts awarded \$150 million per family, the attacks killed members of the families. *See Est. of Hirshfeld*, 330 F. Supp. 3d at 150 ( Hamas attack killed eight Israeli students); *Thuneibat*, 167 F. Supp. 3d at 54 (suicide bombers killed 60 people); *Est. of Steinberg*, 2019 WL 6117722, at \*10 ( Hamas attack killed six Israeli soldiers). In contrast, nobody died in these attacks. The Court thus declines to award \$150 million per family.

Instead, the Court will award punitive damages equal to compensatory damages—\$27.5 million.<sup>18</sup> Several judges in this district have employed the same approach to punitive damages for FSIA cases. *See, e.g., Hekmati v. Islamic Repub. of Iran*, 278 F. Supp. 3d 145, 167 (D.D.C. 2017); *Flanagan v. Islamic Repub. of*

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<sup>18</sup> The Court awards no punitive damages to the Israeli Plaintiffs besides Rotem. Their Show Cause Response says that Israeli law awards punitive damages to the victims of terrorist attacks at an amount three times the award of compensatory damages. *See* Show Cause Response at 21. Because the Court awards most Israeli Plaintiffs no compensatory damages, it has no figure to multiply by three and thus cannot award punitive damages. As for Rotem, she received the benefit of federal standards for her compensatory damages. Like other Plaintiffs subject to those standards, the Court will award her punitive damages in the same amount as her compensatory damages.

*Iran*, 87 F. Supp. 3d 93, 124-25 (D.D.C. 2015); *Moradi*, 77 F. Supp. 3d at 73. This Court has awarded punitive damages equal to compensatory ones to accommodate the unique characteristics of a terrorist attack. See *Selig*, 2021 WL 5446870, at \*24–\*25 (“This case is not like those involving hundreds of decedents murdered in a bombing. The deaths here, while no less tragic, were fewer in number.” (cleaned up)).

This approach accounts for the character of the States’ acts, which though heinous did not lead to any victim’s death. And a large award of \$300 million “is not likely to have a meaningful deterrent effect” when both Syria and Iran face billions in punitive damages awards. See *Christie*, 2020 WL 3606273, at \*29. The Court therefore sees no need for such a large award, especially when setting punitive damages equal to compensatory ones can more accurately account for Plaintiffs’ suffering.

Thus, the Court awards punitive damages of \$27.5 million, to be apportioned among Plaintiffs according to their compensatory damages, for the reasons more fully discussed in *Selig*, 2021 WL 5446870, at \*23–\*25 (apportioning punitive damages in this way).

*Prejudgment Interest.* Plaintiffs seek prejudgment interest. See Compl. ¶ 136(e). “[W]hether pre-judgment interest is to be awarded is subject to the discretion of the court and equitable considerations.” *Motion Picture Ass’n of Am., Inc. v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992). “[T]he overarching tide of persuasive precedent . . . plainly weighs against awarding prejudgment interest.” *Akins v. Islamic Repub. of Iran*, No. CV 17-675 (BAH), 2021 WL 3021445, at \*11 (D.D.C. July 16, 2021). This is because “[w]hen an

award without pre-judgment interest fully compensates a plaintiff, an award of pre-judgment interest no longer has the intended compensatory purpose and should be denied.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 135 (D.D.C. 2005). The Court has carefully considered the pain and suffering of the decedents and each Plaintiff, and its awards are intended to be fully compensatory. Pre-judgment interest is therefore improper.

*Costs, Expenses, and Attorneys’ Fees.* The last category of damages sought by Plaintiffs is their “costs and expenses” and their “attorneys’ fees.” Compl. ¶ 136(c) and (d). But Plaintiffs cite no basis for the award of these fees. *See Kinyua v. Repub. of Sudan*, 466 F. Supp. 3d 1, 13 (D.D.C. 2020) (“[T]he Court is not aware of any statutory or other basis for the award of attorney’s fees[.]”). More, “plaintiffs have not provided any information regarding the fees and costs sought.” *Aceto v. Islamic Repub. of Iran*, No. CV 19-464 (BAH), 2020 WL 619925, at \*23 (D.D.C. Feb. 7, 2020) (denying plaintiffs’ request for “reasonable costs and expenses” because “plaintiffs have not provided any information regarding the fees and costs sought”) (cleaned up). The Court therefore declines to award any fees or expenses.

## V. CONCLUSION

For these reasons, Plaintiffs’ Motion for Default Judgment will be granted in part and denied in part. A separate Order will issue.

Dated: March 4, 2022 /s/ Trevor N. McFadden  
TREVOR N. McFADDEN,  
U.S.D.J.

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**APPENDIX C**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 22-7058**

**September Term, 2023**

**1:19-cv-02855-TNM**

**Filed On: April 25, 2024**

Eli M Borochoy, et al.,

Appellees

Shari Mayer Borochoy, et al.,

Appellants

v.

Islamic Republic of Iran and Syrian Arab  
Republic,

Appellees

**BEFORE:** Srinivasan, Chief Judge; Henderson,  
Millett, Pillard, Wilkins, Katsas, Rao,  
Walker, Childs, Pan, and Garcia,  
Circuit Judges

**ORDER**

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

84a

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

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**APPENDIX D**

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**28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state**

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action

under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropria-



tions Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be

brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c),<sup>1</sup> to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a

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<sup>1</sup> See References in Text note below.

lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term “aircraft sabotage” has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term “hostage taking” has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term “material support or resources” has the meaning given that term in section 2339A of title 18;

(4) the term “armed forces” has the meaning given that term in section 101 of title 10;

(5) the term “national of the United States” has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term “state sponsor of terrorism” means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)),<sup>1</sup> section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms “torture” and “extrajudicial killing” have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).