No. 15-1095

IN THE

Supreme Court of the United States

MARY NELL WYATT, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RONALD E. WYATT, *et al.*,

Petitioners,

v.

FRANCIS GATES, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF OLIN EUGENE ARMSTRONG, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents, the Gates Plaintiffs et al. (hereinafter "the Gates Plaintiffs"), respectfully submit that the petition for a writ of certiorari should be denied.

STATEMENT

A. Origins of *Wyatt* and Its Companion, *Gates*.

The Seventh Circuit's opinion in *Wyatt v. Syrian Arab Rep.*, 800 F.3d 331 (7th Cir. 2015), follows two other opinions by circuit courts involving the Gates Plaintiffs.[1] The first appeal—prosecuted by Syria in the D.C. Circuit Court of Appeal—dispensed with jurisdictional challenges to the Gates Plaintiffs' judgment. *Gates v. Syrian Arab Republic*, 646 F.3d 1 (D.C. Cir. 2011) (hereinafter, "the D.C. Action"). A different appeal—in 2014 in the Seventh Circuit—confirmed the Gates Plaintiffs' compliance with the FSIA's notice provisions and, as an alternative rationale, ruled the Gates Plaintiffs' enforcement efforts under § 1610(g) were exempt from § 1610(c). *Gates v. Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014).

More specifically, the 2014 decision in *Gates* affirmed the priority of the Gates Plaintiffs' liens (perfected in 2011

1. The Seventh Circuit aptly remarked that this case has "a complex procedural history and several jurisdictional challenges." *Wyatt*, 800 F.3d at 333. If substance matters more than nomenclature, the object of Petitioners' untimely action in the courts below was to expropriate money belonging to the Gates Plaintiffs. The district court below lacked jurisdiction and there was no viable claim against the Gates Plaintiffs as "defendants." Although presented to the district court, these issues were never decided.

and 2012) and upheld certain final turnover orders "to have Syrian assets turned over to the Gates Plaintiffs." *Id.* at 581. On remand, all that remained was the release of monies deposited into the court's registry for the benefit of the Gates Plaintiffs. Pursuant to 28 U.S.C. § 2042, an order from the district court was required for the clerk of court to disburse the monies.

Enter the Wyatts, the Petitioners. Over their objection, the district court entered an order in aid of executing the court's earlier final judgments and directed the court clerk to disburse the Gates Plaintiffs' funds. The order directing disbursement was appealed by Petitioners and affirmed by the Seventh Circuit in *Wyatt v. Syrian Arab Rep.*, 800 F.3d 331 (7th Cir. 2015).

The centerpiece of Petitioners' argument was an improper collateral attack against a 2011 order issued by the District Court for the District of Columbia pursuant to 28 U.S.C. § 1610(c). As the Seventh Circuit correctly held, "[t]he Wyatt plaintiffs' argument fails to deal with the structure and terms of the FSIA, and in particular with the special provisions for claims for state-sponsored terrorism." *Wyatt*, 800 F.3d at 342.[2] In effect, the Petition seeks to unravel not only *Wyatt* but *Gates* and a district court order from 2011 in the Gates' D.C. Action, a completely different proceeding.

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2. The Seventh Circuit flagged several issues that are addressed *infra* in section I.F. because there are alternative grounds for affirmance that would render any post-certiorari opinion merely advisory. *See Wyatt*, 800 F.3d at 343 (affirming "without needing to address several alternative arguments for affirmance").

B. Procedural History in the District of Columbia Courts

Petitioners allege a mistake was made in the District Court for the District of Columbia when a judge entered an order pursuant to 28 U.S.C. § 1610(c). According to Petitioners, the District of Columbia judge was too lax in policing Syria's rights under a procedural notice provision: 28 U.S.C. § 1608(e). For a proper understanding of what the Petition is about, one must wade into complicated legal proceedings spanning many years and several courts.[3]

To begin at the (procedurally relevant) beginning, by order of the District Court in the District of Columbia on September 26, 2008, a final judgment was entered in favor of the Gates Plaintiffs against the Syrian Arab Republic ("Syria"). Pet. App. 85a. A procedural rule, 28 U.S.C. § 1608(e), requires notice to foreign sovereigns of default judgments against them. The clerk of court certified service "pursuant to the provisions of 1608(a)(3)." Res. App. 60a. Upon delivery to Syria's foreign ministry in Damascus, the DHL delivery service agent was told "the shipment is no longer required," essentially a waiver by Syria of further notice. Pet. App. 103a. That waiver occurred mere days after

3. By necessity, the Gates Plaintiffs must recite the relevant procedural history of the Gates Plaintiffs in the District Court for the District of Columbia: *Gates v. Syrian Arab Republic*, No. 06-1500 (RMC). Relevant documents from the D.C. Action were included in the record below.

Because Petitioners' Appendix omits relevant documents essential for a full understanding of the matters at issue, Respondents were obliged to add their own. To avoid confusion, citations to the Appendixes of Petitioners and Respondents are denoted as Pet. App. __ and Res. App. __, respectively.

Syria's formal entry (through counsel) into the Gates' D.C. Action, giving context to the Syrian statement notice "was no longer required." Three years of post-judgment litigation in the D.C. Action ensued, pitting the Gates Plaintiffs against Syria.

With Syria now actively opposing enforcement of the judgment, the Gates Plaintiffs sought a judicial determination that § 1608(e) was met and that, pursuant to § 1610(c), enforcement proceedings against Syria could begin. Syria opposed the motion. The district court stayed enforcement pending disposition of Syria's appeal. *Wyatt*, 800 F.3d at 334.

After Syria appealed, Petitioners applied to intervene in the Gates Plaintiffs' D.C. Action in 2009. Res. App. 61a. Petitioners had ample opportunity, therefore, to raise their argument about § 1608(e).[4] But, they did not. By failing to assert their § 1608(e) argument years ago, Petitioners waived it.

Syria actively litigated and lost its jurisdictional challenges. *Gates v. Syrian Arab Republic*, 646 F.3d 1, 5 (D.C. Cir. 2011). After prevailing against Syria in the D.C. Circuit, the Gates Plaintiffs renewed their earlier motion in the District of Columbia district court for a determination and order pursuant to § 1610(c). In support, the Gates Plaintiffs made two arguments: first, that § 1608(e) was met and, second, that Syria's actual notice of the default judgment mooted the notice requirement of § 1608(e). The district court in the D.C. Action ordered that, "pursuant to 28 U.S.C. § 1610(c), "a reasonable period of time had elapsed between entry of

4. The relevant procedural history regarding § 1608(e) was apparent on the face of the record at the time of the Petitioners' Motion to Intervene in the D.C. Action.

final judgment '*and notice to Syria thereof*' for attachment and execution to proceed." Pet. App. 87a (emphasis supplied). Although it had the greatest possible incentive and was represented by counsel experienced in litigating the relevant notice provisions, Syria never appealed the order authorizing the Gates Plaintiffs to begin enforcement proceedings.

C. Enforcement Proceedings in the Northern District of Illinois and the Seventh Circuit.

In reliance upon the district court's § 1610 determination in the D.C. Action, the Gates Plaintiffs began enforcement proceedings. Liens were perfected on certain Syrian assets in 2011 and 2012. The next three years were spent in a protracted dispute over priority of lien with a different group of plaintiffs, the Bakers. The final turnover orders that were appealed in *Gates* declared the Gates Plaintiffs the rightful owners of the funds, which were transferred to the court registry for security on appeal. But more importantly, these final orders explicitly reconfirmed compliance not only with § 1610(c) *but with § 1608(e)*, too. Pet. App. 73a.[5] Consequently, when the Seventh Circuit in *Gates*

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5. After listing in exhaustive detail the various and overlapping forms of notice provided to Syria, the district court below left no room for any lingering doubt as to the Gates Plaintiffs' compliance with §§ 1608(e) and 1610(c) of the FSIA:

> These forms of notice, together with the notice given to [Syria] in the D.C. case of the entry of the D.C. Judgment against it and the fact that [Syria] appeared by counsel in that case to oppose the entry of a section 1610(c) order, constituted sufficient notice of these proceedings to [Syria and its agency and instrumentality]. . . .
>
> Based on the service of the D.C. Judgment upon [Syria] through the Clerk of the D.C. Court via DHL in the

affirmed, it reconfirmed yet again their satisfaction of *both* § 1610(c) and § 1608(e).

> [T]he Gates plaintiffs complied with § 1610(c) in the District of Columbia before they sought attachment of the Syrian assets in the Northern District of Illinois. Section 1610(c) requires "the court" to determine "that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter."

Gates, *supra* at 577. "The Gates Plaintiffs have complied with the requirements of the FSIA and have established a priority lien on the Syrian funds at issue in these appeals. . . . [W]e AFFIRM both of the district court's orders to have Syrian assets turned over to the Gates plaintiffs." *Id.* at 580.

D. Petitioners' Appeal and the Seventh Circuit's Decision in *Wyatt*

Following remand of *Gates* from the Seventh Circuit to the district court, "the Gates plaintiffs promptly moved for an order directing the clerk . . . to release the assets to them." *Wyatt*, 800 F.3d at 336. Only then did the

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> D.C. case and the fact that [Syria] actually appeared by counsel to oppose the entry of an order authorizing the enforcement of the D.C. Judgment pursuant to FSIA § 1610(c), the *requirements of FSIA 1608(e) for service of the D.C. Judgment upon [Syria] have been satisfied*.

Pet. App. 73a (emphasis supplied).

Petitioners, the Wyatts, suddenly appear on the scene. Although Petitioners styled their maneuvering as an "enforcement action" against Syria, they were not seeking Syrian assets. The monies in the registry were no longer Syrian; they belonged to the Gates Plaintiffs and were held *in custodia legis* for them.

The Petitioners alleged a misstep regarding the procedural notice provision found in § 1608(e). The district court was unpersuaded. Pursuant to 28 U.S.C.A. § 2042, the district court directed the clerk to disburse the Gates Plaintiffs' funds to them. Affirming the disbursement of the Gates Plaintiffs' funds, the Seventh Circuit stepped over many alternative arguments for affirmance in order to reach the merits of the statutory interpretation argument. "The legal issue we decide on the merits is that plaintiffs who win judgments in state-sponsored terrorism cases against foreign governments under 28 U.S.C. § 1605A, and who seek to attach property under § 1610(g), are not required to comply with the notice requirement of § 1608(e) before executing their judgments." *Wyatt*, 800 F.3d at 333.[6]

6. Finding the statutory issue decisive, the Seventh Circuit did not decide whether the actions in the District of Columbia court met the notice requirement of § 1608(e). *Wyatt*, 800 F.3d at 342 n.5 ("We do not decide what § 1608(e) requires, nor whether the Gates plaintiffs have satisfied those requirements, because the Gates plaintiffs were entitled to execute their judgment against the Syrian assets without complying with § 1608(e)."). Even if Petitioners were authorized to pursue a collateral attack or had legal standing to assert Syria's rights under § 1608(e) (which is denied), the Gates Plaintiffs deny that § 1608(e) notice of the default to Syria was either insufficient or prejudiced Syria in any way.

I. REASONS TO DENY THE PETITION AS TO THE FIRST QUESTION PRESENTED

A. The Seventh Circuit's Decision in *Wyatt* Fits Neatly Within Developing yet Consistent Law Construing § 1610(g).

Much of the argument in the Petition leverages the concept of comity, the respect given by one country towards the laws or rights of another. It is startling for a victim of terrorism to invoke "international comity and rapport," (Petition 18), in reference to a state-sponsor of terror like Syria.[7] In *Wyatt*, the Seventh Circuit recognized that although the FSIA "contains extensive procedural protections for foreign sovereigns in United States courts, [ ] Congress has amended the Act to cut back some of those protections in cases of state-sponsored terrorism." 800 F.3d at 333. From that point of departure, the Seventh Circuit embarked upon a comprehensive analysis of the legal framework for sovereign immunity and the exceptions applicable to suits arising from state-sponsored terrorism.

The Seventh Circuit disagreed with Petitioners' argument because it "fails to deal with the structure and terms of the FSIA, and in particular with the special provisions for claims for state-sponsored terrorism." 800 F.3d at 334. "The statutory consequence of failing

7. By heavy reliance on generic FSIA cases involving respected countries and allies, the Petition promotes a false equivalence between Syria and legitimate nations like Austria, Nigeria, or Argentina. *See, e.g.*, Petition 16 (citing *Rep. of Austria v. Altmann*, *Verlindin B.V. v. Cent. Bank of Nigeria*, *Rep. of Argentine v. NML Capital, Ltd.*).

to satisfy the service requirement in § 1608(e) is that plaintiffs with a judgment against a foreign state cannot obtain authorization under § 1610(c) to proceed to attachment and execution of that judgment." *Wyatt*, 800 F.3d at 342. But, the court continued, "[t]he critical point here . . . is that the Gates plaintiffs are not executing their judgment under § 1610(c) or under § 1610(a) or (b), the provisions cross-referenced in § 1610(c)." *Id.* "The Gates plaintiffs obtained § 1610(c) authorization from the district court in the District of Columbia . . . [but] [t]hat order was unnecessary." *Id.* at 342-43. "The Gates plaintiffs are seeking to execute a judgment for state-sponsored terrorism, so they may proceed through the execution provision specifically enacted for terrorism judgments, § 1610(g)." *Wyatt*, *supra*, at 343.

The Seventh Circuit applied § 1610(c) according to its plain terms. Simply reading the statute reveals that nowhere does § 1610(c) mention enforcement under subsection (g).

> No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

28 U.S.C. § 1610(c). When it added subsection (g) to § 1610 in 2008, Congress left subjection (c) untouched and intact (i.e., still cross-referencing subsections (a) and (b) but *not* the newly-added subsection (g)). This justifies "the

inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (canon of construction *expressio unius est exclusio alterius* is most persuasive "when the items expressed are members of an 'associated group or series'"). "The decision to include references to § 1610(a) and § 1610(b) while not including a reference to § 1610(g) is a strong indication that § 1610(c)'s requirement applies only to attachments under § 1610(a) and (b), and not to attachments under § 1610(g)." *Gates*, 756 F.3d at 568 (citing *Walters v. Industrial and Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011)).

Further, there are self-evident differences between subsection (g) and subsections (a)-(b). These distinctions supply a rational basis for differentiating between them, as the Seventh Circuit reasoned in *Gates*:

> Section 1610(g) differs substantially from § 1610(a) and (b). Both § 1610(a) and (b) are available to all holders of FSIA judgments, not just to victims of state-sponsored terror. Sections 1610(a) and (b) are available to satisfy a wide variety of judgments, but they allow attachment of only specific categories of assets to satisfy those judgments. See, e.g., § 1610(a) (allowing attachment of foreign state property located in the United States and used for commercial activity there); § 1610(b) (allowing attachment of property of foreign state agency or instrumentality engaged in United States commercial activity).

> By contrast, § 1610(g) is available only to holders of judgments under the § 1605A exception for state-sponsored terrorism, but it allows attachment of a much broader range of assets to satisfy those judgments.

Gates, 755 F.3d at 576.

The Seventh Circuit based its decision upon two mutually-reinforcing grounds: the statutory text and legislative history. *Wyatt*, 800 F.3d at 343 (reiterating its reasoning in *Gates* as "based on the structure and language of the FSIA and its legislative history"). Although the Petition attacks the Seventh Circuit's decision for "fail[ing] to comply with the text of the FSIA," (Petition 16), it is remarkable that nowhere in its entire body does the Petition quote the actual text of § 1610(c). Nevertheless, the text matters.

Equally important to the Seventh Circuit was how its statutory construction was corroborated by the legislative history of the 2008 Amendments of which § 1610(g) is a part. "Exempting attachments under § 1610(g), that is, attachments stemming from terrorism-related judgments, from § 1610(c)'s solicitous notice requirements is entirely consistent with the liberalizing purpose of the 2008 Amendments." *Wyatt*, 800 F.3d at 343 (quoting *Gates*, 755 F.3d at 576-77); *see also In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 58-63 (D.D.C. 2009).[8] This legislative history reinforces the

8. Section 1610(g)'s legislative history received comprehensive attention in *Bennett*:

> Senator Lautenberg, one of the sponsors of the bill that became § 1610(g), stated that the provision would

Seventh Circuit's conclusion that any alleged "failure to comply with § 1608(e) does not render invalid [the Gates Plaintiffs'] attachment of assets and satisfaction of their judgment for state-sponsored terrorism." *Wyatt*, *supra*, at 343.

The Petition bends over backwards to avoid a direct confrontation with the Seventh Circuit's rationale. One searches the Petition in vain for a quote of the relevant

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> "allow[ ] attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." 154 Cong. Rec. S54–01 (Jan. 22, 2008) (statement of Sen. Lautenberg). The House Conference Report for a substantially similar earlier version of the bill noted that the provision "would ... expand the ability of claimants to seek recourse against the property of that foreign state," in part "by permitting any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment." H.R. Rep. No. 11–447, at 1001 (2007) (Conf. Rep.). The bill, it continued, "is written to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Id.* We have already noted that the basic purpose of adding § 1610(g) was to enable plaintiffs who have established a foreign state's liability under § 1605A and its predecessor, for terrorist acts, to collect on their judgments. As Senator Lautenberg put it, the bill was meant "to facilitate victims' collection of their damages from state sponsors of terrorism." 154 Cong. Rec. S54–01 (Jan. 22, 2008) (statement of Sen. Lautenberg). Our interpretation of § 1610(g) more fully furthers that fundamental aim.

Bennett v. Islamic Republic of Iran, 2016 WL 697604, *7 (9th Cir. Feb. 22, 2016).

statutory text from § 1610(c). The legislative history behind § 1610(g) is ignored entirely. The Seventh Circuit did not make those mistakes.

B. Recent Ninth Circuit Precedent Approves *Wyatt*.

Last month, the Seventh Circuit's reasoning in *Wyatt* and *Gates* received a strong endorsement from the Ninth Circuit. *See Bennett v. Islamic Republic of Iran*, 2016 WL 697604 (9th Cir. Feb. 22, 2016). The Petition strains to portray *Wyatt* as a departure from precedent of other courts of appeal. Petition 20 (claiming Seventh Circuit's decision is contrary to the Ninth, Second, and D.C. Circuits). The Petition even feigns a non-existent "conflict" with legal authority from the Ninth Circuit. The Petition's misstatements are grossly incorrect.

On February 22, 2016, the Ninth Circuit issued an opinion that, while arguably broader in scope than *Gates* or *Wyatt*, cited both decisions with approval. *Bennett*, at *5. In *Bennett*, an Iranian bank was resisting efforts by victims of terrorism to enforce their judgment under § 1610(g). The Iranian bank made the same arguments as the Petition. The Ninth Circuit was unpersuaded:

> We hold that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities. *Subsection (g) covers a different subject than § 1610(a) through (e)*: by its express terms, it applies only to "certain actions," specifically, judgments "entered under section 1605A."

Id., at *5 (emphasis supplied). Regarding the "as provided in this section" language argued in the Petition, the Ninth Circuit wrote, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)." *Id.*, at *6.

Like the Seventh Circuit in *Gates* and *Wyatt*, the Ninth Circuit attributed its decision to "both the text of the statute and Congress' intention to make it easier for victims of terrorism to recover judgments." *Id.* The Ninth Circuit cited approvingly from both *Gates* and *Wyatt* in its opinion. *Id.* ("Two Seventh Circuit cases support our conclusion in this regard."). Indeed, the Ninth Circuit quoted chapter-and-verse from the Seventh Circuit's opinions in both cases. *See, e.g*, *id.*, at *6-7.

The Petition would have this Court believe the Ninth Circuit stands apart from the Seventh Circuit's decisions in *Wyatt* (and *Gates*). But saying that "[t]wo Seventh Circuit cases support our conclusion," (*Id.*, at * 6), seems an unconventional way for the Ninth Circuit to express dissent. In reality, *Bennett* exposes the Petition's assertion of a "conflict" as pure fiction.

C. The Petition's Misplaced Reliance on Comity and Generic FSIA Law.

1. Cases Involving State-Sponsored Terrorism are Special.

The Petition errs in diminishing the energetic legislative efforts of Congress in recent years to augment FSIA's terrorism exception with significant amendments

like § 1605A, § 1610(g) and TRIA § 201.[9] With the 2008 Amendments, Congress enhanced § 1605A enforcement by setting it apart from generic FSIA rules like §§ 1608(e) and 1610(c). The Petition claims that § 1610(c) shields foreign sovereigns, (including those sued under § 1605A), from enforcement until after § 1608(e) notice. But cases involving state-sponsored terrorism are special.

For example, as part of the "sweeping changes in the law with respect to civil actions against state sponsors of terrorism," *Estate of Heiser v. Islamic Republic of Iran*, 605 F. Supp. 2d 248, 249 (D.D.C. 2009), Congress promulgated a *lis pendens* procedure exclusively for terrorism victims and empowered them to use it *even prior to the entry of a final judgment*. *See* 28 U.S.C. § 1605A(g).[10] There is no comparable provision available to generic plaintiffs under the FSIA. The unique ability of terrorism victims to restrain the alienability of property belonging to state-sponsors of terrorism even prior to finalized judgment or a § 1610(c) determination reflects Congress's intent to set terrorism cases apart from prosaic FSIA litigation.

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9. Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107–297, 116 Stat. 2322, codified as statutory note to 28 U.S.C. § 1610 on "Treatment of Terrorist Assets."

10. While not technically a lien, the *lis pendens* was an unprecedented legal innovation because it "severely undermines the alienability of property." *Heiser*, 650 F. Supp. 3d at 250.

2. Petitioners' Own Example Shows Why Terrorism Cases are Exempt from Generic FSIA Provisions Like § 1608(e) and § 1610(c).

One need look no further than the Petitioners' aggressive attempts to enforce their default judgment even before they acquired a § 1610(c) order. In 2009, Petitioners tried to intervene in the Gates Plaintiffs' D.C. Action, asserting legal rights via a *lis pendens* and § 1605A(g)(1). Res. App. 61a. Having taken advantage of § 1605A(g)'s enhanced pre-judgment procedures, for Petitioners to now deny Congress intended to exempt terrorism victims from provisions like § 1608(e) and § 1610(c) smells of hypocrisy. Petitioners' own actions suggest they do not sincerely believe the legal argument espoused in their Petition.

D. The Notice Provision of Section 1608(e) Is Not "Jurisdictional."

1. Procedural deficiency does not necessarily equal "jurisdictional defect."

Petitioners seek to raise a post-judgment, procedural notice provision to the level of a jurisdictional requirement. Petition 34 (contending § 1608(e) "creates a jurisdictional limitation on the enforcement of default judgments."). Congress promulgated § 1608(e) to provide foreign sovereigns with protections from default judgments similar to those enjoyed by the federal government. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994) (citing, *inter alia*, House Report 1487 at 26, 1976 U.S.C.C.A.N. at 6625). Procedural notice

requirements regarding the entry of a default judgment are concerned primarily with whether a party is made aware that a default judgment may be entered against him. Charles A. Wright, Arthur R. Miller & Mary K. Kane, 10A *Federal Practice & Procedure* § 2687 (3d ed. 2015). "[L]ack of notice does not *ipso facto* mean that a judgment must, can or should be reopened." *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963). Failure to give notice of a default judgment is merely a procedural, not jurisdictional, defect. *See, e.g.*, *United States v. Martin*, 396 F. Supp. 954, 960 (S.D.N.Y. 1975). *See also Winfield Assocs., Inc. v. Stonecipher*, 429 F.2d 1087 (10th Cir. 1970); *United States v. Manos*, 56 F.R.D. 655 (S.D. Ohio 1972).

The Petition exhorts this Court to impose a harsh "penalty" for alleged noncompliance with § 1608(e). Petition 33. However, in the absence of a specified consequence for noncompliance with § 1608(e), it is not for Petitioners—or federal courts for that matter—to impose their own coercive sanction. *Barnhart v. Peabody Coal Co.*, 537 U.S. at 159 ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction") (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)). The Petition insists the word "shall" in § 1608(e) is meaningless if this Court does not invalidate the Gates Plaintiffs' enforcement efforts and hand over the Gates' money to Petitioners. But even assuming § 1608(e) applied (which the Seventh Circuit denied), the Petition beckons a level of judicial activism that draws no support either from the relevant statutory scheme or this Court's jurisprudence.

Petitioners leap to the conclusion that every statute bearing the word "shall" signifies a "jurisdictional limitation." Petition 34. Petitioners are heedless to this Court's admonitions to "bring some discipline to the use" of the term "jurisdictional" in connection with procedural rules. *Sebelius v. Auburn Regional Medical Center*, __ U.S. __, 133 S.Ct. 817, 824 (2013) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011)). Not every statute or procedural rule ascends to "jurisdictional" altitude. *United States v. Kwai Fun Wong*, __ U.S. __, 135 S.Ct. 1625, 1632 (2015) ("traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences"). Simply because a statute contains the word "shall" does not elevate it to jurisdictional status. *Barnhart*, 537 U.S. at 159; *see also United States v. Montalvo Murillo*, 495 U.S. 711, 714 (1990); *Regions Hospital v. Shalala*, 522 U.S. 448, 459, n.3 (1998).

Not everything written in the FSIA is jurisdictional. *Worley v. Republic of Iran*, 75 F. Supp. 3d 311, 331 (D.D.C. 2014) (limitations provision in FSIA's state-sponsored terrorism exception to foreign sovereign immunity is not jurisdictional) (J. Lamberth). No court has ruled that the notice requirement of § 1608(e) is "jurisdictional." The Petition's refrain that § 1608(e) "creates a jurisdictional limitation on the enforcement of default judgments," (Petition 34), lacks any citation to legal authority. The novel attempt to elevate § 1608(e) to a "jurisdictional limitation" threatens to upset the legal landscape by granting certiorari when there is no controversy to quell.

2. Alleged Non-Compliance with § 1608(e) Neither Voids a Judgment, Nor Makes It "Unenforceable."

FSIA's jurisdictional service requirements are a condition precedent to achieving a valid judgment, whether by default or otherwise. *See, e.g.*, 28 U.S.C. § 1608(a). The procedural notice provision of § 1608(e), however, is different from the initial service of summons and complaint. It is a post-judgment notice. It has no impact whatsoever upon the jurisdictional validity of the antecedent judgment.

Assuming actual notice by a FSIA defendant of a default judgment, not one court in the country has used § 1608(e) to void a FSIA default judgment. *See Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010); *General Star Nat'l Ins. Co. v. Adminstratia Asigurarilor de Stat*, 289 F.3d 434 (6th Cir. 2002); *Antoine v. Atlas Turner*, 66 F.3d 105 (6th Cir. 1995). The following quote from *Antoine* is representative of the unanimous judicial consensus:

> We find no authority to aid our determination of whether a judgment is void or merely voidable when copies of the default judgments are not served in accordance with § 1608(e). We hold that such a default judgment is voidable rather than void because the requirement of service is a condition subsequent to the entry of the judgment. *Failure to serve copies of a judgment does not change the propriety of entry of the judgment itself if it was otherwise properly entered*. Whether or not the judgments here

> were voidable because Atlas was not served turns on whether Atlas had actual notice of them. . . . Thus, if Atlas *did have actual notice, the judgments could not be vacated on § 1608(e) grounds*.

Antoine, 66 F.3d at 109 (internal citations omitted) (emphasis supplied). "[A] plaintiff's failure to properly serve a foreign state defendant [under § 1608(e)] will not result in dismissal if the plaintiff substantially complied with the FSIA's notice requirements and the defendant had actual notice." *Peterson v. Islamic Rep. of Iran*, 627 F.3d at 1129; *Accord General Star Nat. Ins. Co. v. Adminstratia Asigurarilor de Stat*, 289 F.3d at 441 ("even if Astra did not receive a copy of the default judgment [in compliance with § 1608(e)], the judgment is not automatically void, but only voidable upon proof of no actual notice"). Petitioners have not, and cannot, show proof Syria failed to receive actual notice of the default judgment.

According to the Petitioners, § 1608(e) must be policed with a zeal that deems any infraction fatal no matter how harmless or inconsequential. But that oversimplification has been rejected by every circuit court of appeal to consider it. There is no excuse for failing to cite directly relevant and adverse circuit-level decisions interpreting § 1608(e) like *Antoine*, *General Star Nat'l Ins. Co.* and *Peterson*.[11] In addition, the Petition's hyper-technical argument sidesteps the fact Syria suffered no prejudice whatsoever.

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11. The precedent from the Sixth and Ninth Circuits regarding § 1608(e) was cited extensively by the Gates Plaintiffs in the district court and in the court of appeal.

By framing its "question presented" the way it does, the Petition tries to divert attention from the utter absence of any harm to Syria. Courts, including the Second Circuit, have declined to use § 1608(e) to vacate judgments where lack of notice did not "prejudice a substantial right or remedy that would otherwise be available." *See, e.g.*, *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 462 (2d Cir. 1994).

This case arises in a procedural posture that makes "harmless error" especially fraught. The Petition exacerbates that problem by choosing to be misleading by omission. By purposefully skirting the procedural thicket of the Gates Plaintiffs' litigation in the D.C. Action with Syria, the Petition leaves to Respondents the burden of explanation. But any force "the § 1608(e) compliance argument" might have evaporates when one considers the absence of prejudice to Syria. Because Syria undeniably had actual notice, the fact Syria suffered no harm that is traceable to the notice provision of § 1608(e) leaves the argument for certiorari that much more impoverished.

E. There is No Decisional Conflict on the Same Important Matter that Warrants a Writ of Certiorari.

It is a misstatement for Petitioners to claim "the Seventh Circuit created a conflict with every court that has considered the matter." *See* Petition 15. There is no controversy whatsoever to justify the extraordinary intervention of this Court.

1. The Ninth Circuit

The Petition's suggestion of a "conflict" between the Seventh and Ninth Circuit is specious. In *Peterson*, the interaction between § 1610(g) and § 1608(e) was not addressed. Furthermore, when the Ninth Circuit did address this interaction last month in *Bennett*, it made no mention whatsoever of any "conflict" between *Wyatt* and any of its precedent. *Bennett*, at *2 (citing *Peterson*). If *Wyatt* posed such a risk of legal confusion with any of the Ninth Circuit's opinions—be it *Bennett* or *Peterson*—it strains credulity to think the Ninth Circuit would have stayed silent instead of giving voice to some clarifying language.

The same is true for the Second Circuit case that receives cursory mention in the Petition, *Harrison v. Rep. of Sudan*, 802 F.3d 399 (2d Cir. 2015). Again, the case did not reach the issues developed in *Wyatt*. Judicial silence on an issue never raised by the parties is hardly a "conflict."

The supposition of a "conflict" is no more substantial than the rank speculation of Petitioners' counsel that, were the same question presented, another court might disagree at some time in the future. *See, e.g.*, Petition 20 ("the Ninth Circuit made clear that *if* service had been inadequate, it *would have* prohibited enforcement.") (emphasis supplied). But this Court should not grant certiorari to address "conflicts" that are merely conjectural.

2. None of the Faux "Conflicts" Claimed by the Petition Warrant the Extraordinary Intervention of this Court.

The Petition cites *Byrd v. Honduras*, 613 F. App'x 31 (2d Cir. 2015) and *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280 (2d Cir. 2011). *Byrd* is not even a published opinion, placing its worth as precedent somewhat in the shade. But more importantly, neither *Byrd*, nor *Walters* were terrorism cases regarding enforcement under § 1610(g). What was decisive in *Gates* and *Wyatt* (as well as the Ninth Circuit's recent decision in *Bennett*), was subsection (g), a recently-enacted amendment to § 1610 focused specifically on state-sponsored terrorism. It is therefore spurious for the Petition to cite inapposite cases involving China or Honduras that are not state-sponsors of terrorism as proof of an inter-circuit "conflict" with terrorism cases like *Wyatt*.

The next case thrust forward as a "conflict" meriting certiorari is an unpublished opinion from the Southern District of New York: *Levin v. Bank of New York*, No. 09 CV 5900 RPP, 2011 WL 812032 (S.D.N.Y. 2011). *Levin* does not conflict with *Wyatt* for one elementary reason: "There are distinctions between actions brought under section 1605A and those brought under 1605(a)(7)." *Levin*, at *8. Enforcement under the more advantageous provision of § 1610(g) is reserved for plaintiffs with judgments under § 1605A. Because they acquired a judgment under § 1605(a)(7), the Levins were not authorized to use § 1610(g). The Seventh Circuit recognized this when it distinguished *Levin* expressly:

> [S]ince the Levins had obtained their judgment under § 1605(a)(7), not § 1605A, they were not pursuing attachment under § 1610(g), which is available only to holders of judgments under § 1605A. See *Levin,* 2011 WL 812032, at *8.

Gates, 755 F.3d at 577. *Levin* does not, therefore, directly conflict with either *Gates* or *Wyatt*.

The Petition cites another case from the Southern District of New York: *Hausler v. JPMorgan Chase Bank*, 845 F. Supp. 2d 553, 569 (S.D.N.Y. 2012), *rev'd on other grounds*, 770 F.3d 207 (2d Cir. 2014). But this suggestion of a controversy depends on artful drafting at the expense of *Hausler's* actual holding. The Petition takes the liberty of inserting the word "under" in brackets and the editorial splice slants the meaning. *See* Petition 23 (attributing to *Hausler* the holding that those seeking to enforce their judgment under TRIA must "obtain writs of execution [under] 28 U.S.C. 1610(c)."). But that incision of the word "under" implies *Hausler* arrived at a conclusion contrary to the Seventh Circuit that a § 1610(c) order is a prerequisite. In reality, the unadulterated passage from *Hausler* proves the district court was merely mentioning the fact that § 1610(c) references writs of execution. Nothing in *Hausler* stands on all fours with the reasoning discussed explicitly by either *Gates* or *Wyatt*.

Next, the Petitioners turn to their own case: *Wyatt v. Syrian Arab Republic*, 554 F. App'x. 16 (D.C. Cir. 2014). Here again, the alleged "conflict" fails to live up to the billing. In a tersely-worded three-page memo, the circuit court devoted almost as much time to the FSIA as it did to upbraiding Petitioners' counsel (then and now) for their

lack of professionalism and frivolous filings.[12] Reading between the lines, it appears the Wyatts asked judicial permission to be excused from even beginning to comply with § 1608(e). The district court refused and the Wyatts cross-appealed.

The D.C. Circuit issued an unpublished memo opinion because it saw "no precedential value in that disposition." D.C. Cir. R. 36(e)(2). Notably absent is the thoughtful and comprehensive analysis of statutory text and legislative history found in either the Ninth Circuit's opinion in *Bennett* or the Seventh Circuit's opinions in *Gates* and *Wyatt*. The D.C. Circuit did not reach the questions relevant to a case like this one, such as whether harmless non-compliance with § 1608(e) voids an antecedent default judgment or nullifies an authorization previously given under § 1610(c).

Finally, the Petition turns to a lone opinion from a district court: *Owens v. Rep. of Sudan*, Nos. 01–2244 (JDB), 10–356 (JDB), 2015 WL 6530582 (D.D.C. Oct. 28, 2015). *Owens* illustrates precisely the misreading of statutory text and blindness to legislative history that failed to persuade the Seventh Circuit and the Ninth Circuit (in *Bennett*). Petitioners make the self-serving statement that the district court's opinion in *Owens* "is likely to become highly influential and carry more weight

12. "[W]e note with regret an impropriety on the part of [Petitioners'] counsel. Their counsel filed what can only be described as a frivolous 'notice of waiver of reply.' The filing consisted of six lines of doggerel—silly and unprofessional at the least. While we do not fault counsel or their clients for filing no reply, none having been necessary, we do not countenance frivolous filings with this court." *Wyatt v. Syrian Arab Republic*, 554 F. App'x 16, 17-18 (D.C. Cir. 2014).

in determining the fate of future cases than the Seventh Circuit's decision." Petition 26. Time will tell. But an objective observer would place more weight on the Ninth Circuit's decision in *Bennett* that so closely tracks and approves both *Gates* and *Wyatt*. When weighed against circuit courts of appeal, one district court's opinion looks more like an aberration and less like a controversy that merits this Court's attention.

F. Multiple Alternative Grounds for Affirmance Disqualify This Case as a Clean Presentation of the Petition's First Question.

Although it did not decide them, the Seventh Circuit flagged several alternative arguments for affirmance. *Wyatt*, 800 F.3d at 343. The Petition makes no attempt to explain away any of these alternative grounds. That lapse implicitly concedes that even if the Court were interested in the "question presented," this particular case is not a proper vehicle to decide it.

1. The Mandate Rule Prevents the Petition from Squarely Presenting its Putative Issues.

The mandate doctrine is fundamental to the orderly system of justice. "Under the mandate rule, a district court cannot reconsider issues the parties failed to raise on appeal; the court must attempt to implement the spirit of the mandate; and the court may not alter rulings impliedly made by the appellate court." *S. Atlantic Ltd. P'ship of Tenn., LP v. Riese*, 356 F.3d 576 (4th Cir. 2004). *Accord Matter of Cont'l Ill. Secs. Litig.*, 985 F.2d 867, 869 (7th Cir. 1993). The Petition's arguments fly in the

teeth of what the Seventh Circuit concluded in *Gates*: the Gates Plaintiffs satisfied FSIA's requirements. Pet. App. 34a ("The Wyatt Plaintiffs attack directly a § 1610(c) requirement about which the Seventh Circuit was clear that there is to be no lingering doubt."). The "Seventh Circuit's mandate conclusively puts to rest any doubts as to the Gates Plaintiffs' compliance with 1608(e)." *Id.*

Any issue that could have been raised on appeal in *Gates* but was not was waived and thus not remanded. *See Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 891 (7th Cir. 2013). Absent the sort of circumstance that justified modification under Fed. R. Civ. P. 60(b), the district judge was obliged to respect the appellate decision in *Gates* as conclusive and to disburse the funds to the Gates Plaintiffs. Although this alternative ground for affirmance was not decided by the Seventh Circuit in *Wyatt*, it still prevents the Petition from squarely presenting the statutory issue it purports to raise.

2. Petitioners' Argument is an Improper Collateral Attack.

Petitioners have no legal basis to collaterally attack the § 1610(c) order issued to the Gates Plaintiffs in 2011. Petitioners asked the district court and the Seventh Circuit below to rule that the District of Columbia district court made a mistake. "[W]hether these appeals amount to improper collateral challenges to the District of Columbia court's issuance of a § 1610(c) order to the Gates plaintiffs" was yet another "alternative argument for affirmance" that the Seventh Circuit recognized, but did not reach. *Wyatt*, 800 F.3d at 343.

The only avenue for relief from a final judgment is contained in Fed. R. Civ. P. Rule 60(b) and subject to strict requirements. The following is a direct quote from one of the Petitioners' briefs: "The Wyatt Plaintiffs do not suggest that the Gates Plaintiffs' underlying monetary judgment against Syria is either void or voidable." Res. App. 40a-41a. The admission is important because, having conceded the Gates' judgment is not void, Petitioners cannot sensibly describe it as "unenforceable."

"A judgment is not void . . . simply because it is or may have been erroneous." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (quoting *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995); 12 J. Moore et al., *Moore's Federal Practice* 60.44[1][a], at 60-150 to 60-151 (3d ed. 2007)). The procedural notice requirements of § 1608(e) are "self-executing," meaning that a court need only satisfy itself the requirement is met. *See, e.g., United Student Aid Funds*, 559 U.S. at 274-75.[13] Assuming, arguendo, the district court judge in the District of Columbia was "mistakenly satisfied," that does not subject the Gates Plaintiffs' judgment to a collateral attack years later in a new proceeding, especially in the absence of substantial harm or denial of due process to Syria.

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13. Although it did not arise under the FSIA, this Court's opinion in *United Student Aid Funds, Inc. v. Espinosa* disapproved arguments resembling the Petition's in the context of a "self-executing" procedural notice requirement that restricted the discharge of student loan debt in bankruptcy proceedings. The Supreme Court upheld the "enforceability" of the confirmation order discharging the debt because any error was merely procedural, not jurisdictional, and the relevant party had notice of the error and failed to object.

3. Waiver by Petitioners Precludes the Petition from Squarely Presenting the Putative Issue.

As the Seventh Circuit recognized, waiver of any challenge to the Gates Plaintiffs' compliance with § 1608(e) offers a potential alternative ground for affirmance. *Wyatt*, 800 F.3d 343. The Gates Plaintiffs claim two separate waivers.

First, a party that has had an opportunity to litigate a question may not later reopen that question in a collateral attack upon an adverse judgment. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). As putative intervenors in the D.C. Action, Petitioners had ample opportunity to allege any infirmity regarding the "enforceability" of the Gates Plaintiffs' judgment because of alleged non-compliance with § 1608(e). "[B]y not pursuing their unsuccessful effort to intervene in the *Gates* case in the District of Columbia" many years ago, *Wyatt*, 800 F.3d at 343, Petitioners waived the argument now asserted in the Petition regarding § 1608(e).

Second, Petitioners expressly waived the argument that alleged noncompliance with § 1608(e) is a "jurisdictional" defect by express disavowal in the courts below. *Compare* Petition 34 ("1608(e) creates a jurisdictional limitation on the enforcement of default judgments") *with* Res. App. 40a-41a ("The Wyatt Plaintiffs do *not* suggest that the Gates Plaintiffs' underlying monetary judgment against Syria is either void or voidable.") (emphasis supplied). In the district court below, Petitioners conceded the Gates Plaintiffs' judgment from the D.C. Action was not void and explicitly disavowed relief under Fed. R. Civ. P. 60(b)

(4). Petitioners forfeited any contention that alleged non-compliance with § 1608(e) is a jurisdictional defect.

4. Petitioners Lack Prudential Standing.

Prudential standing exists when the party's asserted injury "arguably falls within the zone of interests to be protected or regulated by the statute in question." *FEC v. Akins*, 524 U.S. 11, 20 (1998) (quotations and citations omitted). The desire to see other people comply with one's view of the law is insufficient. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982). Petitioners are not proper proponents of the legal rights they are asserting.

Any failure to serve Syria properly under § 1608(e) would, at most, deprive Syria (not Petitioners) of a notice promised by a procedural rule. The right to notice under § 1608(e) was personal to Syria, not a general right of all the world. Had Syria been harmed because it was denied procedural notice under § 1608(e), it could have appealed in the federal courts of the District of Columbia. Syria did not and, therefore, waived the issue. When Syria, itself, could not now be heard to complain of any harm under § 1608(e), there is no sensible complaint to be asserted by Petitioners.

The prudential standing doctrine prevents mere strangers from piggybacking upon the legal rights of others. Petitioners suffered no injury that is "fairly traceable" to an alleged lack of notice to Syria under § 1608(e). *Valley Forge*, 454 U.S. at 472. Nor do Petitioners' interests as judgment creditors of Syria fall within the

"zone of interests" protected by § 1608(e). This is yet another argument that would warrant affirmance short of reaching the issues presented by the Petition.

II. REASONS TO DENY THE PETITION AS TO THE SECOND QUESTION PRESENTED

A. The District Court Retained Jurisdiction to Enter an Order In Aid of Execution.

The second question presented asserts that a notice of appeal deprived the district court of jurisdiction and, essentially, blocked the district court from entering an order in aid of execution. The principle often referred to as "jurisdictional transfer"—that a district court and court of appeals should not attempt to assert jurisdiction over a case simultaneously—is not absolute. Several exceptions have been carved out from that general rule, such as for (1) matters that are collateral to those under appeal; (2) actions taken by the district court in aid of the appeal (such as preserving the status quo); (3) correcting mere clerical mistakes; and (4) actions in aid of execution of a judgment that has not been either superseded or stayed. The fourth exception—for orders in aid of execution on a judgment "that has not been stayed or superseded," *Wyatt*, 800 F.3d at 341—was relied upon by both the district court and Seventh Circuit.

It has long been established that "[u]nless the judgment is stayed, the district court may act to enforce it despite the pendency of an appeal." Filing the Notice of Appeal, 16A Fed. Prac. & Proc. Juris. § 3949.1 (4th ed.). "Unless a court issues a stay, a trial court's judgment . . . normally takes effect despite a pending appeal." *Coleman*

v. Tollefson, 135 S.Ct. 1759, 1764 (2015) (citations omitted). Even Petitioners concede this:

> As the Seventh Circuit correctly noted, the general rule described . . . has a significant exception: a district court may "take further action in aid of execution of a judgment that has not been stayed or superseded," *notwithstanding the pendency of an appeal.* On that point, *there is no dispute.*

Petition 35 (emphasis supplied). Where the Petition goes astray is in presuming the rule is different for the Tenth Circuit or that any "split" of authority merits the elucidation and attention of this Court.

B. The Tenth Circuit Concurs with the Seventh Circuit Regarding Orders "In Aid of Execution."

The Petition seizes upon "conflicting" *dicta* in *Garrick v. Weaver*, 888 F.2d 687 (10th Cir. 1989). But that *dicta* has been wrenched from its relevant context. The district court in *Garrick* exercised its discretion in exactly the opposite direction of the district court below in this case. Acting to preserve the appeal, the district court chose to keep the funds impounded pending the appeal. *Garrick*, 888 F.2d at 690 (the lower court "granted the defendants' motion to pay the entire amount into the registry of the court pending resolution of the dispute"). The explicit rationale of the district court's action pending the appeal was, therefore, "in aid of the appeal." *Id.*, at 687.

The Petition misreads *Garrick* as suggesting the "district court lacked authority to issue a 2042 order after the Wyatt Plaintiffs noticed their appeal." Petition 39. *Garrick* says no such thing.[14] Any loose language in *Garrick* that can be bent to another meaning is pure *dicta*, not part of the holding, and has not deterred courts in the Tenth Circuit from acting in a manner consistent with *Wyatt* and the federal rules of procedure.

The law in the Tenth Circuit regarding orders in aid of execution is no different from the law of the Seventh Circuit. *Int'l Paper Co. v. Whitson*, 595 F.2d 559, 562 (1979) (a notice of appeal does not divest the district court of power to enter orders in aid of execution); *see also Sabin v. Home Owners' Loan Corp.*, 147 F.2d 653, 657 (10th Cir. 1945), *cert. denied*, 326 U.S. 759 (1945); *U.S. v. Bergman*, 550 F. App'x. 651 (10th Cir. 2013) (citing *Int'l Paper Co. v. Whitson*).

For more than a century, and even before the adoption of federal rules of procedure, this Court's precedent has been unwavering: absent a stay, district courts retain jurisdiction to enter orders in aid of execution notwithstanding an appeal. *See, e.g., Orchard v. Hughes*, 68 U.S. 73 (1863), *overruled in part on other grounds*, *Hornbuckle v. Toombs*, 85 U.S. 648 (1873)).

More recently, uniformity in this area of the law is maintained by rules of procedure applicable to all courts.

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14. Even if *Garrick* could be read as counterpoised to the Seventh Circuit's decision in *Wyatt* (which it cannot), there is no compelling reason for a writ of certiorari when *Wyatt* fits so neatly into the mainstream of judicial precedent and the federal rules.

See Fed. R. Civ. P. 62; Fed. R. App. Proc. 8(a). Federal Rule 62(b) provides that a district court "may," but is not required to, stay the execution of a judgment pending appeal. Federal Rule of Appellate Procedure 8(a) reflects the aforementioned rule, providing that a party seeking a stay of execution or enforcement must "move first in the district court" but, if unsuccessful there, may then seek relief from the court of appeals. FRAP 8(a)(1)-(2).

In the case *sub judice*, three different courts weighed whether disbursement of the funds to the Gates Plaintiffs should be stayed pending the Wyatts' appeal. The district court refused to grant a stay. Then, the district court awaited while, in subsequent turns, the Wyatts' motions for a stay were denied by the Seventh Circuit and then by this Court (through Justice Kagan). Only then were the funds disbursed. In the absence of a stay or superseding order, "[t]he district court was acting within its jurisdiction." *Wyatt*, 800 F.3d at 341.

CONCLUSION

There is no legal confusion or issue of grave importance that justifies further quibbling over the district court's order disbursing the Gates Plaintiffs' funds. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March __, 2016

APPENDIX

APPENDIX A — MEMORANDUM IN RESPONSE TO SUBMISSION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, DATED SEPTEMBER 2, 2014

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

14-cv-6161 (VMK), 11-cv-8715 (VMK)

MARY NELL WYATT, *et al.*,

Plaintiffs/Judgment Creditors,

-against-

THE SYRIAN ARAB REPUBLIC, *et al.*,

Defendants/Judgment Debtors,

FISCAL DEPARTMENT OF THE OFFICE OF THE CLERK OF COURT FOR THE U.S. DISTRICT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Citation Third-Party Respondent,

-and-

FRANCIS GATES, *et al.*,

Third-Party Respondents.

Appendix A

FRANCIS GATES, *et al.*,

Plaintiffs,

-against-

THE SYRIAN ARAB REPUBLIC, *et al.*,

Defendants,

-against-

MARY NELL WYATT, *et al.*,

Adverse Claimants.

WYATT JUDGMENT CREDITORS'/ADVERSE CLAIMANTS' MEMORANDUM IN RESPONSE TO SUBMISSION OF THE GATES PLAINTIFFS

[TABLES INTENTIONALLY OMITTED]

I.

Introduction

This memorandum is respectfully submitted on behalf of the plaintiffs in *Wyatt v. Syrian Arab Republic* (D.C. Dist. Docket no. 08-cv-502) (hereinafter "Wyatt Plaintiffs").

Appendix A

Like the plaintiffs in the *Gates* case ("Gates Plaintiffs"), the Wyatt Plaintiffs are the victims of terrorism for which the Syrian Arab Republic ("Syria") is responsible. Like the Gates Plaintiffs, the Wyatt Plaintiffs have obtained a judgment against Syria. And like the Gates Plaintiffs, the Wyatt plaintiffs are seeking to enforce their judgment against a limited pool of Syrian assets known to exist within the jurisdictional reach of United States courts.

The Gates Plaintiffs have angrily sought to portray the Wyatt Plaintiffs as spoilers attempting to interfere with what the Gates Plaintiffs' view as their entitlement to recover the entirety of the approximately $82 million of Syrian assets presently in the court's registry (the "Syrian Assets"), which $82 million comprises the vast majority of all known Syrian assets in the United States. Of course, no *moral* right entitles the Gates Plaintiffs to recover all this money and leave the Wyatt Plaintiffs without any recovery. The Gates Plaintiffs premise their position on nothing more than their claim to have placed an enforceable lien on these funds before any other judgment creditors of Syria—surely a random twist of fate, and not a moral entitlement. The Gates Plaintiffs have already fought off the plaintiffs in *Baker v. Great Socialist People's Libyan Arab Jamahiriya* (D.C. Docket no. 03-cv-749) ("Baker Plaintiffs"), who unsuccessfully challenged the enforceability of the Gates Plaintiffs' lien and priority as to these assets on the ground, the Baker Plaintiffs alleged, that the Gates Plaintiffs had not complied with one provision of the Foreign Sovereign Immunities Act ("FSIA"), the requirement to obtain a court order permitting certain enforcement efforts under 28 U.S.C.

§ 1610(c), which the Baker Plaintiffs contended had to be obtained from every court where a plaintiff wanted to enforce a judgment rather than just one court. *Gates v. Syrian Arab Rep.*, 755 F.3d 568 (7th Cir. 2014).

However, the Baker Plaintiffs' challenge and the decisions of this Court and of the Seventh Circuit it generated resolved only the issues raised by the Baker Plaintiffs. Other issues not raised by the Baker Plaintiffs, and so not addressed by this Court or the Seventh Circuit, still remain.

The Wyatt Plaintiffs now present such a challenge: whether the Gates Plaintiffs may enforce their judgment at all given that they have failed to comply with another provision of the FSIA, 28 U.S.C. § 1608(e), which requires that notice of the judgment entered be formally served on the defendant foreign country in the same manner as a summons. The Wyatt Plaintiffs will show below that the Gates Plaintiffs failed to comply with this statutory requirement, and that courts have held that failure to comply with this statute bars FSIA plaintiffs from enforcing their judgments. Thus, the Wyatt Plaintiffs argue, the Gates Plaintiffs were never entitled to enforce their judgment at all, and will not be so entitled unless and until they comply with FSIA § 1608(e). The Wyatt Plaintiffs further argue that the issue of whether the Gates Plaintiffs complied with this statute was never raised before or decided by this Court or the Seventh Circuit, and is now properly raised by the Wyatt Plaintiffs. Lastly, the Wyatt Plaintiffs argue that once the Gates Plaintiffs' lien on the assets at issue is disqualified due to

their failure to comply with § 1608(e), the Wyatt Plaintiffs will be entitled to recover these particular assets.

The Wyatt Plaintiffs are not insensitive to the agita which their challenge to the Gates Plaintiffs' lien undoubtedly causes the Gates Plaintiffs and their counsel. But, the Wyatt Plaintiffs have no choice, as the Syrian assets in the United States are limited and Congress has ordained a winner-take-all system in which there is no equitable sharing of those limited assets. The Wyatt Plaintiffs' counsel would be remiss in their duties to the Wyatt Plaintiffs if they failed to zealously challenge the Gates Plaintiffs' lien in light of the Gates Plaintiffs' failure to follow the statutory mandates. As the Seventh Circuit observed, such challenges are typical in FSIA judgment enforcement cases:

> [T]he FSIA does not provide a mechanism for distributing equitably among different victims any Syrian assets in the United States that are subject to attachment. Instead, victims who finally obtain judgments must then engage in the costly, burdensome, and often fruitless task of searching for available assets.
>
> These victims of terror can then find themselves pitted in a cruel race against each other–a race to attach any available assets to satisfy the judgments. The terms of the race are essentially winner-take-all rather than any equitable sharing among victims of similar losses. Under the FSIA's compensation scheme,

> a terrorism judgment against Syria can be satisfied only at the expense of other terrorism victims.

Gates, 755 F.3d at 571.

In the winner-take-all world of FSIA judgment enforcement, there is no room for a judgment creditor to be allowed to get away with non-compliance with a statutory requirement. Such leniency shown to one judgment creditor would be unfair to other judgment creditors who followed the statutory requirements, often at significant effort and expense. Here, the Gates Plaintiffs opted for a procedural shortcut and failed to follow the requirements of § 1608(e). As will be shown below, non-compliance with § 1608(e) bars them from enforcing their judgment as a matter of law.

The Gates Plaintiffs' moral indignation should be ignored. The Court is not being asked to decide a moral issue, or even whether the winner-take-all scheme adopted by Congress is wise. The only issue before the Court is whether as a matter of law the Gates Plaintiffs' failure to comply with § 1608(e) bars them from enforcing their judgment. All the plaintiffs in all these cases have a moral right to recover Syrian assets. None of the involved plaintiffs is morally superior to any other. Moreover, the Gates Plaintiffs have aggressively rejected overtures from the Wyatt Plaintiffs to settle the issue and share the funds in some reasonable fashion, and even attacked the Wyatt Plaintiffs for seeking to resolve this amicably. The Gates Plaintiffs have thus chosen the high-stakes gamble

of winner-take-all; if they lose everything it is the result of their own choice.[1]

The Wyatt Plaintiffs wish to emphasize that in this memorandum they will respond only on the merits, and only to the issues that are actually before this Court. Thus, the Wyatt Plaintiffs will not respond to Section E (pages 8-9) of the Gates Plaintiffs' submission (DE 264-1) discussing whether the Gates Plaintiffs complied with 28 U.S.C. § 1610(c). This issue was raised in the Wyatt Plaintiffs' original motion filed in *Wyatt v. Syrian Arab Republic*, (N.D. Ill. Docket no. 14-cv-6161, DE 6, docketed with Notice of Filing in *Gates v. Syrian Arab Republic*, (N.D. Ill. Docket no. 11-cv-8715, DE 260) but was then *omitted* from the Wyatt Plaintiffs' Amended Motion (N.D. Ill. Docket no. 14-cv-6161, DE 9)—an amendment that the Gates Plaintiffs do not even inform the Court about or acknowledge, despite the fact that it was only the Wyatt Plaintiffs' Amended Motion (not the original motion) that was attached to and incorporated by reference in the Opposition filed by the Wyatt Plaintiffs in this case (DE

1. In an effort to eliminate the Baker Plaintiffs' priority lien on Syrian assets in New York, the Gates Plaintiffs have also moved in the SDNY to invalidate the Baker Plaintiffs' judgment on the ground, *inter alia,* that it was entered by a magistrate judge rather than a district judge without the consent of Syria. (*See* Memorandum of Law filed by Gates Plaintiffs in the Southern District of New York against the Baker Plaintiffs, annexed hereto as Ex. A, pp. 6-10 thereof). Thus, the Gates Plaintiffs themselves have no qualms about zealously challenging other judgment creditors over technical defects when it is to their advantage—which is another reason for this Court to ignore the self-righteous indignation they rain on the Wyatt Plaintiffs.

261-1). Since the Wyatt Plaintiffs have thus withdrawn their § 1610(c) argument, and did so on August 17, 2014, before the August 18 hearing herein and before the Gates Plaintiffs' brief was submitted, it is simply not before the Court and need not be addressed.

Similarly, the Gates Plaintiffs' entire discussion of whether failure to serve a default judgment as required by § 1608(e) renders the judgment "void" or "voidable" as per *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995) (discussed by the Gates Plaintiffs mainly on pp. 23-26 of their submission (DE 264-1)) is simply a red-herring: the Wyatt Plaintiffs have never argued that the Gates Plaintiffs' judgment is "void" or "voidable" due to their failure to comply with § 1608(e)—rather, the Wyatt Plaintiffs' argument is that their failure to comply with § 1608(e) *bars* the Gates Plaintiffs from enforcing their judgment, so long as that failure is not remedied.

Finally, the Wyatt Plaintiffs will not respond to the myriad extraneous "side show" issues raised by the Gates Plaintiffs, which serve only to muddy the waters and distract from the merits. Nor will the Wyatt Plaintiffs waste space responding to the irrelevant personal or *ad hominem* attacks that "merely distract from the merits of the litigation." *Revson v. Cinque & Cinque*, 221 F.3d 71, 82 (2d Cir. 2000).

Appendix A

II.

The Wyatt Plaintiffs' Procedural Posture

Presently before the Court are two separate iterations of the Wyatt Plaintiffs' claim to the Syrian Assets.

A. The Wyatt's Freestanding Enforcement Proceeding

The Wyatt Plaintiffs have filed their judgment against Syria in this Court under the caption *Wyatt v. Syrian Arab Republic,* (N.D. Ill. Docket no. 14-cv-6161). Within that docket number, the Wyatt Plaintiffs have served a citation on the Fiscal Department of the Office of the Clerk of Court for the U.S. District for the Northern District of Illinois ("Clerk"). That citation is governed by Illinois law, *see Gates,* 755 F.3d at 573. ("Since the parties are seeking attachment in the Northern District of Illinois, we look to Illinois law to determine the priority of the liens on the Syrian assets."). Under Illinois law service of the citation by the Wyatt Plaintiffs established a lien on the funds at issue. *Id.*; *see* 735 ILCS 5/2-1402(m); *Dexia Credit Local v. Rogan*, 629 F.3d 612, 632 (7th Cir. 2010).

Also under the *Wyatt* caption the Wyatt Plaintiffs have commenced a freestanding proceeding styled as a Motion to Release Funds naming the Clerk as a respondent as the holder of the Syrian assets seeking turnover of those assets, and also naming the Gates Plaintiffs as respondents since they are adverse claimants.

At the hearing on August 18, 2014, there was some discussion about whether counsel for the Gates Plaintiffs would accept service of this proceeding for the Gates Plaintiffs. (Ex. B, 8/18/14 Tr. p. 19). Accordingly, the Wyatt Plaintiffs had process servers serve the Gates Plaintiffs Pati and Sara Hensley and Francis Gates. The plaintiff "Jan Smith" could not be served because that is a pseudonym and her address does not appear in the docket, and counsel for the Gates Plaintiffs have refused to reveal her name and address. Regarding service on the Armstrong estate, if Ms. Gates was appointed and still remains the personal representative of that estate then the estate likely was served when she was served, but the Wyatt Plaintiffs have been unable to verify with any Probate Court that such an estate actually exists, and counsel for the Gates Plaintiffs have refused to even identify the Probate Court where that estate was created.[2] The Wyatt Plaintiffs therefore filed a motion in the D.C. District Court in the underlying *Gates* case to obtain access to this information for purposes of service. In their response to that motion, counsel for the Gates Plaintiffs obliquely suggested that they now would accept service for their clients. An email was sent out asking them to confirm that in a clear and direct manner (Ex. C), but

2. This raises another entirely new issue regarding the putative enforceability of the *Gates* judgment. If there was no estate created in any Probate Court, then the D.C. District Court never had subject matter jurisdiction over the claims of that estate. This was precisely the ruling of Judge Collyer—the same judge who presided over the *Gates* case—this year in another case involving Steven Perles, Esq., who is the Gates Plaintiffs' local counsel in D.C. *Van Beneden v. Al-Sanusi,* ___ F. Supp. 2d ___, 2014 WL 235214 (D.D.C. 2014).

they have not answered that email. In any event, it is clear that the Gates Plaintiffs and their counsel have notice of the freestanding proceeding. Moreover, the form of notice in this case is discretionary with the Court, *see* 735 ILCS 5/12-710(a) ("A claimant not voluntarily appearing shall be served with notice as the court shall direct. If a claimant fails to appear after being served with notice in the manner directed, he or she shall be concluded by the judgment entered in the garnishment proceeding."). At the hearing on August 18, 2014, this Court afforded the Gates Plaintiffs an opportunity to file a motion with respect the Wyatt Plaintiffs freestanding proceeding (Ex. B, 8/18/14 Tr. p. 19) ("So I'll give you a briefing schedule on that. I assume you both want to respond. And if you'll do that in one week. And then you can have a week reply. I'll have a fully briefed motion on that as well as the decision by your clients when I see you again…."). The August 25 deadline in that briefing schedule passed, and the Gates Plaintiffs did not file any such motion, and have thus defaulted in that proceeding.

B. The Wyatt Plaintiffs' Appearance as Adverse Claimants in Gates v. Syrian Arab Republic

In parallel with their commencement of the freestanding Motion to Release Funds discussed above, the Wyatt Plaintiffs have also appeared as Adverse Claimants in *Gates v. Syrian Arab Republic* (N.D. Ill. Docket no. 11-cv-8715), and filed an Opposition to the Gates Plaintiffs' motion for release and turnover of the funds at issue, on the grounds that the Gates Plaintiffs' failure to comply with FSIA § 1608(e) bars them from enforcing

their judgment. It is that appearance and opposition that the Gates Plaintiffs now move to strike.

The Gates Plaintiffs have moved to strike the Wyatt Plaintiffs' Opposition for lack of standing, and further argue that the Court should simply ignore their failure to comply with FSIA § 1608(e). The Court should deny that motion and reject that argument for at least three independent reasons:

First, the Wyatt Plaintiffs' appearance as Adverse Claimants was made pursuant to 735 ILCS 5/2–1402(g) (applicable here by operation of Fed. R. Civ. P. 69) which provides that in any proceeding to execute upon assets "the rights of any adverse claimant shall be asserted and determined." The Seventh Circuit has held that pursuant to 735 ILCS 5/2–1402(g), as Adverse Claimants the Wyatt Plaintiffs are statutorily entitled to appear herein and oppose the Gates Plaintiffs' motion for release of the Syrian funds, and to fully litigate that opposition, **without seeking or obtaining leave to intervene**. *See United States v. Macchione*, 309 Fed. Appx. 53, 55 (7th Cir. 2009) (explaining that 735 ILCS 5/2–1402(g) "require[s] the court to allow any party who asserts an interest in the property to 'appear and maintain his or her right' to the property… **without filing a motion to intervene**.") (emphasis added). *See also, e.g., Martin Produce, Inc. v. El Centro, LLC*, 2011 WL 10068659 (Ill. App. 1 Dist. 2011) ("The statutory provisions require that any person who appears to have a claim on property discovered pursuant to a citation to discover assets must be given an opportunity to appear and maintain his claim. 735 ILCS

5/2–1402(g)"); *B.J. Lind & Co. v. Diacou*, 3 Ill.App.3d 299, 301-02 (1972) (holding that it was reversible error to not to afford adverse claimants "the opportunity to prove their respective claims.").

Given the explicit holding of the Seventh Circuit in *Macchione* that leave to intervene is not necessary for Adverse Claimants such as the Wyatt Plaintiffs, all the arguments of the Gates Plaintiffs to the effect that the Wyatt Plaintiffs were required to seek and obtain leave to intervene, and discussing whether a motion to intervene would or should have been granted are absolutely irrelevant. The Gates Plaintiffs' argument on this point is with the Seventh Circuit, not with the Wyatt Plaintiffs. The Wyatt Plaintiffs do not need to move to intervene, much less receive leave to intervene, and they have a statutory right—without any intervention—to appear and to assert their adverse claim to the Syrian Assets.

Second, wholly irrespective of the Wyatt Plaintiffs' standing to raise the issue of the Gates' Plaintiffs failure to comply with FSIA § 1608(e), this Court has an independent duty to *sua sponte* examine and act upon that non-compliance, because actions under the FSIA implicate foreign relations and principles of comity. *See. e.g. Liu v. Rep. of China*, 892 F.2d 1419, 1432 (9th Cir. 1989) (raising non-jurisdictional defense *sua sponte*, despite China's appearance in the case and failure to raise it, because FSIA actions have "potential for embarrassing the Executive Branch" in its foreign relations); *Doe v. Qi*, 349 F. Supp.2d 1258, 1290 (N.D.Cal. 2004) (same); *Frolova v. Union of Soviet Socialist Republics*, 558 F.

Supp. 358 (N.D.Ill. 1983) (dismissing FSIA action *sua sponte* on non-jurisdictional grounds in light of foreign policy considerations) *aff'd on other grounds* 761 F.2d 370 (7th Cir. 1985).

The decision in *Peterson v. Islamic Rep. of Iran*, 2012 WL 4485764 (S.D. Tex. Sept. 27, 2012) is exactly on point. After realizing ***on its own*** that the judgment creditors had failed to comply with § 1608(e), the *Peterson* court *sua sponte* quashed their enforcement proceedings because "to depart from the statutory scheme would disregard congressional intent and U.S. diplomatic interests in ensuring proper service of foreign governments." *Id*. at *3.[3]

So too here: now that it has been alerted to the Gates Plaintiffs' failure to comply with § 1608(e), this Court has an independent duty—unrelated to the Wyatt Plaintiffs—to quash the Gates Plaintiffs' citation and other enforcement proceedings. "To the extent that a court has the power, or even duty, to consider a question *sua sponte*, it is hardly necessary to speak of 'thirdparty standing.' If a court may consider an issue on its own motion, it does not matter what triggers the court's inquiry. The court may consider the issue once it is suggested by any party—or, for that matter, non-party—even if there is no reason to confer a special right of 'third-party standing' on that party." *Walters v. Industrial and Commercial Bank of China, Ltd.*, 651 F.3d 280, 292-93 (2d Cir. 2011).

3. Counsel for the Wyatt Plaintiffs have examined the *Peterson* docket and the filings therein, and found that the issue of who raised non-compliance with § 1608(e) was not discussed in the court's decision and does not appear to have been raised by any party before that court.

Third, the Wyatt Plaintiffs have an undisputed right to initiate their own freestanding and independent enforcement proceedings against the Syrian Assets—and they have done exactly that, by serving the Clerk of the Court with a citation and by filing a motion for turnover in *Wyatt v. Syrian Arab Republic*, No. 14-cv-6161.

The Wyatt Plaintiffs' freestanding enforcement proceedings have effectively created a stakeholder proceeding, because the Clerk of the Court is now facing two competing claims. Thus, the Gates Plaintiffs' application for release and turnover of the funds to them, cannot be resolved without first addressing the Wyatt Plaintiffs' claims to the funds. Accordingly, the Gates Plaintiffs' demand to prevent the Wyatt Plaintiffs from having their day in court by "evicting" them from the Gates Plaintiffs' case-caption is a pointless endeavor—even if the Wyatt Plaintiffs had never appeared and filed an Opposition in the *Gates v. Syria* case, the Wyatt Plaintiffs would be and are entitled to have their claims considered by this Court under the caption of their freestanding proceeding.

III.

The Wyatt Plaintiffs Have Timely Asserted Their Rights

During the conference held in this matter on August 18, 2014 the Gates Plaintiffs asserted that the Wyatt Plaintiffs' assertion of rights to the Syrian Assets was not timely made, and the Court questioned the Wyatt Plaintiffs' counsel as to why the Wyatt Plaintiffs had not appeared sooner. As explained during the conference,

and further detailed below, the Wyatt Plaintiffs actually appeared at the earliest possible time.

The Wyatt Plaintiffs' obtained their judgment in the U.S. District Court for the District of Columbia on December 17, 2012 (Wyatt D.C. DE 37). The Wyatt Plaintiffs immediately initiated the process of translating the judgment and order to Arabic so that it could be served on the defendant pursuant to § 1608(e). On January 15, 2013 the defendant Syria filed a notice of appeal (Wyatt D.C. DE 39). In February 2013 the Wyatt Plaintiffs asked the clerk to serve the order and judgment on the defendant Syria pursuant to FSIA §§ 1608(e) and 1608(a)(3), and the clerk did so (Wyatt D.C. DE 44-49). On March 15, 2013 the Wyatt Plaintiffs filed a motion seeking leave to file a *lis pendens* (Wyatt D.C. DE 50). On April 25, 2013, once they had obtained the signed receipt of delivery of the service dispatched by the clerk required by §§ 1608(e) and 1608(a)(3), and a "sufficient time" had passed as required by § 1610(c), the Wyatt Plaintiffs filed a motion pursuant to § 1610(c) seeking permission to enforce their judgment (Wyatt D.C. DE 52). On May 2, 2013 the Wyatt Plaintiffs filed a motion seeking permission to register their judgment in other districts pursuant to 28 U.S.C. § 1963 (Wyatt D.C. DE 53). All three motions were unopposed by Syria, but nevertheless on June 27, 2013, Chief Judge Lamberth denied them all without prejudice to moving again after Syria's appeal was decided (Wyatt D.C. DE 55). The denial of those motions—particularly the § 1963 motion—prevented the Wyatt Plaintiffs from taking any steps to enforce their judgment, much less in any other district.

The appeal ensued, and ultimately the D.C. Circuit's mandate was issued on March 12, 2014 (Wyatt D.C. DE 56). On May 9, 2014, the Wyatt Plaintiffs renewed their motion for permission to enforce the judgment pursuant to § 1610(c) (Wyatt D.C. DE 59), and Chief Judge Lamberth granted that motion on May 19, 2014 (Wyatt D.C. DE 60). (The denial of the appeal mooted the need for leave to register the judgment in other districts under 28 U.S.C. § 1963). By operation of Fed. R. Civ. P. 62(a) ("Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry") that order was stayed for 14 days until June 2, 2014. Thus, June 2, 2014, was the first moment that the Wyatt Plaintiffs had permission to enforce their judgment.

However, on June 2, 2014, the *Gates* matter before this Court was still on appeal in the Seventh Circuit. The pendency of that appeal divested this district court of jurisdiction until the mandate issued, *See Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *United States v. O'Connor*, 874 F.2d 483, 489 (7th Cir. 1989) ("There is a general rule that an appeal suspends the power of the court below to proceed further in the cause, except to take such steps as will assist the appellate court in its determination." (internal citation omitted)); *United States v. Brown,* 732 F.3d 781, 787 (7th Cir. 2013) (quoting O'Connor and noting that, despite that all parties failed

to raise the issue, the district court lacked jurisdiction to make a particular substantive change, which was therefore ignored by the Seventh Circuit); *see also Lightspeed Media Corp. v. Smith*, ___ F.3d ___, 2014 WL 3749128 at *7 (7th Cir. July 31, 2014) (same). That appeal was not decided until June 18, 2014, and the mandate from the Seventh Circuit did not issue until August 7, 2014 (Gates N.D. Ill. DE 254). Thus, August 7, 2014 was the very earliest point when the Wyatt Plaintiffs could have appeared before this Court with respect to the Syrian Assets.

Four days later, on August 11, 2014 the Wyatt Plaintiffs registered their judgment in this court (Wyatt N.D. Ill. DE 1). On August 14, 2014 the Wyatt Plaintiffs caused a Citation to be issued and served on the Clerk (Wyatt N.D. Ill. DE 4). On August 15, 2014 the Wyatt Plaintiffs filed their Motion for Release of Funds (Wyatt N.D. Ill. DE 9), a Notice of Appearance in the *Gates* matter (Gates N.D. Ill. DE 258), and a notice in the Gates case of the filing of the Motion for Release of Funds in the Wyatt case (Gates N.D. Ill. DE 260).

It is thus manifest that (even if they were required to show timeliness, which they respectfully dispute) the Wyatt Plaintiffs acted with the utmost alacrity in asserting their claim to the Syrian Assets, and any claim of untimeliness asserted by the Gates Plaintiffs must be rejected.

Appendix A

IV.

The Gates Plaintiffs Were Required to Comply With § 1608(e) and Were Not Permitted to Skip That Step Just Because Syria Had Appeared by Counsel

Section 1608(e) of the FSIA requires that a copy of any "default judgment" against a foreign state "***shall*** be sent" to the foreign state in the manner prescribed for service of process under § 1608(a). 28 U.S.C. § 1608(e) (emphasis added). The requirement mandated by § 1608(e) for the Gates Plaintiffs to serve Syria with a copy of their judgment is thus clear and unambiguous.

Despite the clear and unambiguous mandate of the statute, the Gates Plaintiffs took a shortcut and skipped service, perhaps to make up for a three year gap between the entry of their judgment and their seeking a § 1610(c) order during which the Gates Plaintiffs had failed to comply with § 1608(e). The Gates Plaintiffs' judgment was entered on September 26, 2008 (Gates D.C. DE 43). The Gates Plaintiffs *attempted unsuccessfully* to comply with §§ 1608(e) and 1608(a)(3) by asking the clerk to serve the judgment by DHL on October 16 and 20, 2008 (Gates D.C. DE 44-47). (The insufficiency of these attempts will be discussed in the next section). From that point forward, no further effort was made by the Gates Plaintiffs to comply with § 1608(e)—even though § 1608(a)(4) expressly commands that if service pursuant to § 1608(a)(3) cannot be carried out "within 30 days" then service is to be made via the United States Secretary of State. 28 U.S.C. § 1608(a)(4).

Instead of complying with their § 1608(a)(4) service obligation after passage of 30 days from their failed attempt at § 1608(a)(3) service, the Gates Plaintiffs sat on their hands until three years later when, on August 22, 2011, the Gates Plaintiffs suddenly filed an "Emergency Motion" for permission to enforce their judgment under § 1610(c), which requires that the court "determine[] that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e)." 28 U.S.C. § 1610(c). In that motion, the Gates Plaintiffs exhorted the court to overlook their failure to comply with § 1608(e)'s service requirement on the ground, they argued, that after their default judgment had been entered an attorney had appeared for the defendant Syria, filed an appeal, and filed a motion to vacate the default. (Gates D.C. DE 91).

Just eight days after the Gates Plaintiff's motion was filed—*i.e.,* before the 14 day period for opposition to motions established by D.C. L. Civ. R. 1.7(b) had passed—the D.C. District Court entered an *ex parte* one sentence order granting the Gates Plaintiffs' § 1610(c) application. There is no indication that the Court considered or analyzed the § 1608(e) issue, and it was certainly not discussed in the court's one sentence order. But it is elementary that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall,* 266. U.S. 507, 511 (1925). Indeed, such orders cannot even create the law of the case. *See Nat'l Traffic Service, Inc. v. Fiberweb, Inc.*, 2012 WL 3822165 at *2 (W.D.N.Y.

Sept. 4, 2012) ("The 'law of the case' doctrine …does not apply when the order does not reach the merits of a claim."); *Burrows v. BAC Home Loans Servicing*, 2010 WL 308720 at *2 (E.D. Cal. Jan. 12, 2010) (When grounds for the court's prior order are "unclear … the 'law of the case doctrine' is not applicable"); *Mudron v. Brown & Brown*, 2005 WL 645927 at *2 (N.D. Ill. Mar. 17, 2005) (order denying relief for alleged improper conduct does not imply that the conduct was legitimate, much less create "the law of the case."); *Gilmore v. Palestinian Auth.*, ___ F. Supp. 2d ___, 2014 WL 2865538 at *3 n.1 (D.D.C. June 23, 2014) ("Order … composed of a single sentence and made no findings whatsoever" is not evidence of the grounds for the court's decision). Even if the *Gates* district court had meant to rule on that issue, that ruling has now been superseded by a subsequent decision of the D.C. Circuit—ironically in the *Wyatt* case. *Wyatt v. Syrian Arab Rep.*, 554 Fed. App'x 16 (D.C. Cir. 2014).[4] In *Wyatt*, Syria appeared by counsel in the case early on to raise jurisdictional and procedural defenses, and to take

4. The fact that *Wyatt* is unpublished is of no moment, because D.C. Cir. R. 32.1(b)(1)(B) provides that: "All unpublished orders or judgments of this court, including explanatory memoranda...entered on or after January 1, 2002, may be cited as precedent." *Id.* (emphasis added); *see also*, *e.g.*, *Khaksari v. Chairman, Broadcasting Bd. of Governors*, 451 Fed. App'x 1, 2 (D.C. Cir. 2011) ("In *Zhengxing v. Tomlinson*, we held a translator …was an independent contractor and therefore outside the coverage of Title VII. No. 02–5267, 2002 WL 31926829 (Dec. 31, 2002). Because that decision has the force of precedent, *see* D.C. Cir. R. 32.1(b)(1)(B), and because Khaksari has not alleged any materially different circumstance in her case, we hold she was an independent contractor and not an 'employee' entitled to sue the BBG under Title VII Wfor workplace discrimination or retaliation.").

an appeal, as necessary, but not to litigate liability and damages on the merits. In entering its default judgment against Syria, the district court in *Wyatt* directed the plaintiffs to serve the order, judgment and underlying decision on Syria pursuant to § 1608(e) (Wyatt D.C. DE 37). Fearing that there would be difficulties and expense involved in complying with § 1608(e), the Wyatt Plaintiffs appealed that portion of the judgment, asking the D.C. Circuit to hold that because Syria had an attorney appear in the case there was no need to actually serve Syria as required by § 1608(e) via the means spelled out in § 1608(a). In other words, the Wyatt Plaintiffs asked to be exempted from strict compliance with § 1608(e), just like the Gates Plaintiffs did and just like the Baker Plaintiffs had done in their case. Indeed, in their oral arguments before the D.C. Circuit the Wyatt Plaintiffs cited the *Baker* case, *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90 (D.D.C. 2011). The D.C. Circuit emphatically rejected this argument, holding that despite Syria's appearance and active involvement in the case:

> § 1608(e) is a clear and unambiguous statute. By its terms it requires that '[a] copy of any such default judgment [against a foreign state] shall be sent to the foreign state … in the manner prescribed for service in this section.' That section mandates precisely what the district court ordered. Cross-appellants argue that the purposes of the statute have been accomplished by other means. The statutory language, however, ***admits of no such exception***.

Id. at 17 (emphasis added).

The D.C. Circuit's decision in *Wyatt* is supported by the recent decision in *Cortez Byrd v. Corporacion Forestal y Industrial de Olancho*, 974 F. Supp. 2d 264, 273 (S.D.N.Y. 2013) (rejecting argument that "notice pursuant to section 1608(e) was not required because [the foreign state defendant] appeared in the … action and argued sovereign immunity before the Fifth Circuit."). *See also, generally, Rep. of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256, 2258 (2014) (holding that litigants must strictly comply with requirements of FSIA).

Notably, the *Gates* plaintiffs' arguments as to why § 1608(e) service was purportedly unnecessary because Syria had appeared in the case are substantively identical to the arguments made by the Wyatt Plaintiffs in their appeal to the D.C. Circuit. *Compare* the Gates Plaintiffs' August 22, 2011 motion (Gates D.C. DE 91) (Ex. D) at pp. 15-30 *with* the Wyatt Plaintiffs' appellate brief (Wyatt D.C. Cir. DE 8-15-13) (Ex. E) at pp. 2, 4-7. The only real difference between the arguments—a difference in the moving plaintiffs' favor here—is that Syria's appearance in the *Gates* case occurred after default judgment had been entered, whereas Syria appeared in *Wyatt* long before the entry of judgment, and remained in the case throughout. Thus the holding of the D.C. Circuit in *Wyatt* requiring § 1608 service applies even more strongly to the Gates Plaintiffs, because in *Wyatt* Syria appeared to defend long before entry of judgment, whereas in *Gates* Syria appeared only after the default judgment was entered.

Appendix A

The Gates Plaintiffs obtained their judgment in the D.C. District Court, where the holdings of the D.C. Circuit are obviously controlling. Thus, the D.C. Circuit's decision in *Wyatt* would be controlling on the *Gates* case if that issue were raised before Judge Collyer in the D.C. District. However, that issue is not required to be raised in that court, and can be raised by the Wyatt Plaintiffs in this case in the context of the Wyatt Plaintiffs' adverse claim, *inter alia*. The directly on-point decision of the D.C. Circuit, which is contradicted by no other circuit court in the country, nevertheless controls.

Thus, the bottom line is that the Gates Plaintiffs were required to serve their judgment on Syria pursuant to § 1608(e), using the means of service provided in § 1608(a), and any assertion that they were permitted to take a shortcut around that statutory requirement is contrary to the clear and unambiguous mandate of the statute itself and contrary to the explicit holding of the D.C. Circuit.

The Gates Plaintiffs have invoked a case from the Ninth Circuit, *Peterson v. Islamic Rep. of Iran*, 627 F.3d 1117 (9th Cir. 2010) for the proposition that a failure to strictly comply with § 1608(e) can be excused where there has been substantial compliance. But *Peterson* does nothing but reiterate and apply the Ninth Circuit's long-standing general rule that "a plaintiff's failure to properly serve a foreign state defendant will not result in dismissal if the plaintiff substantially complied with the FSIA's notice requirements and the defendant had actual notice."). *Id.* at 1129 (noting that the "Ninth Circuit has adopted a substantial compliance test for the FSIA's notice requirements.").

Unfortunately for the Gates Plaintiffs, however, the Ninth Circuit's "substantial compliance" for service on "foreign states" under § 1608(a) has been rejected by every other circuit to consider the issue including—significantly here—the D.C. Circuit and the Seventh Circuit. "We conclude that the provisions for service of process upon a foreign state or political subdivision of a foreign state outlined in section 1608(a) can only be satisfied by strict compliance … This interpretation is in accord with decisions of the Second, Seventh, and D.C. Circuits." *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001). *See also e.g. Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (noting that section 1608(a) "delineates the 'exclusive procedures' for effecting service of process upon a foreign state," the court refused to excuse the plaintiff's service on the Nicaraguan Ambassador in lieu of the head of the foreign affairs ministry); *Magnus Elec. v. Royal Bank of Canada*, 620 F. Supp. 387, 389 (N.D. Ill. 1985) *rev'd in part on other grounds*, 830 F.2d 1396 (7th Cir. 1987) (holding that "noncompliance with the [FSIA]'s literal requirements (though it certainly did provide notice) deprives this Court of personal jurisdiction."); *Greene Air Intern., Inc. v. Iberia Airlines of Spain, Inc.*, 1991 WL 70900 at *1 (N.D. Ill. 1991) ("The weight of authority indicates that failure to comply with these [sec. 1608 service] rules constitutes a fatal defect"); *Barot v. Embassy of Rep. of Zambia*, ___ F. Supp. 2d ___, 2014 WL 1400849 at *6 (D.D.C. Apr. 11, 2014) ("In any other context, the Court would be inclined to overlook … a technical error and to find sufficient service based on defendant's apparent actual notice of this lawsuit. But the Court cannot do that here. Like other courts in

this district, it is bound to follow the D.C. Circuit's strict interpretation of section 1608(a)(3)'s requirements, which does not permit a section 1608(a) case to proceed based on substantial compliance.").[5]

Thus, the Ninth Circuit's decision in *Peterson*, which is based on the Ninth Circuit's "substantial compliance" rule, is simply not good law in this Circuit or in the D.C. Circuit.

Indeed, when the very same *Peterson* plaintiffs attempted to enforce their judgment in a Texas district court in the Fifth Circuit—which like the D.C. and Seventh Circuits demands strict compliance with §§ 1608(e) and 1608(a)—the court refused to do so, because of the *Peterson* plaintiffs' failure to strictly comply with those provisions:

> In order to execute a default judgment against a foreign sovereign, **plaintiffs must first demonstrate that service of the judgment strictly complies with the**

5. By contrast, many circuits have held that in respect to service on foreign state ***agencies and instrumentalities***, which is governed by FSIA § 1608(b), "substantial compliance" is sufficient. *See e.g. Nikbin v. Islamic Rep. of Iran*, 471 F. Supp. 2d 53, 67 (D.D.C. 2007) ("[S]trict adherence to the terms of § 1608(a) is required for service against a foreign state itself, even though technically faulty service under § 1608(b) may suffice for agencies or instrumentalities.") (internal quotation marks and brackets omitted). These cases are inapposite to defendant Syria, which is a "foreign state" and must be served under § 1608(a).

> **statutory requirements of section § 1608(a)** of the Foreign Sovereign Immunities Act. The record evidence in this case shows service of the default judgment by a private citizen rather than the clerk of court, as mandated by section 1608(a)(3). While this defect may appear trivial, the Fifth Circuit has held on similar facts that private service by mail is insufficient, explaining that **to depart from the statutory scheme would disregard congressional intent and U.S. diplomatic interests in ensuring proper service of foreign governments**.

Peterson, 2012 WL 4485764 at *3 (emphasis added).

Thus, because the Seventh Circuit and the D.C. Circuit, like the Fifth Circuit, demand strict compliance with § 1608(e) and § 1608(a), the only relevant *Peterson* case here is the Texas case (*Peterson*, 2012 WL 4485764 (S.D. Tex. 2012), and not the Ninth Circuit case.

V.

The Gates Plaintiffs Failed to Comply With § 1608(e) as Their Attempt at Service Did Not Result in Signed Receipt as Required by § 1608(e)

Section 1608(a)(3) permits service required by § 1608(e) to be made "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." 28 U.S.C. § 1608(a)(3).

It is undisputed that the Gates Plaintiffs did not successfully carry out service by a form of mailing and obtain a signed delivery receipt. The Gates Plaintiffs conceded this point in their motion pursuant to § 1610(c) for permission to enforce their judgment filed in the D.C. District Court where instead of reporting compliance with § 1608(e) they argued that they did not need to serve Syria because "this requirement has been obviated by Syria's appearance in the case." (Ex. D, Gates D.C. DE 91 at pp. 2, 4-7).

That the Gates Plaintiffs failed to comply with § 1608(e) and carry out service via the means defined in § 1608(a) is plain. On October 16, 2008 the Gates Plaintiffs filed a request to the clerk to effect service by DHL on the head of the Syrian Ministry of Foreign Affairs (Gates D.C. DE 44), and on October 20, 2008 the clerk logged a docket entry indicating that the DHL package had been sent out on October 16, 2008 (Gates D.C. DE 45). However, on October 20, 2008 the clerk also logged a rejection letter received from DHL indicating that DHL had returned the DHL package "as missing the full contact name for the receiver." (Gates D.C. DE 46). (Ex. F). The docket reflects that another attempt at service by DHL was made on October 23, 2008 (Gates D.C. DE 47), and if one opens the docket entry one can see that the DHL waybill number was 783-7617-815. While there is no indication on the docket itself of the fate of this attempt, when the Gates Plaintiffs moved for permission to enforce their judgment under § 1610(c) and asked the court to allow them to skip the statutorily mandated § 1608 service, they attached a communication from DHL dated November 20, 2008 confirming that the package was <u>not delivered</u> and stating:

> In response to your inquiry concerning the above referenced shipment, DHL Express has traced this shipment through our shipping cycle and has ascertained the following:
>
> This shipment was attempted to be delivered on November 2, 2008 and was refused. The consignee advised our courier that the shipment was no longer required.

(Gates D.C. DE 91-1) (Ex. G).

Thus, what the record establishes is that while in October 2008 the Gates Plaintiffs did make two *attempts* to serve Syria by DHL, those attempts were unsuccessful. Their next step should have been to serve Syria via the State Department under § 1608(a)(4) ("if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia…"). Instead they dropped the ball and made no effort to serve for three years, and then sought to be absolved of the obligation to serve.

In their present submissions, the Gates Plaintiffs contend that their *attempts* at service constitute service and that they fulfilled their service obligations by delivering the papers to the clerk and asking the clerk to dispatch them by DHL. They cite no case law to support

the proposition that such "sewer service" is suficient, and indeed this position is not the law.

"Section 1608(c)(2) indicates that service is made on the date of receipt of the returned postal receipt or other proof of service." *Underwood v. United Rep. of Tanzania,* 1995 WL 46383 at *3 (D.D.C. 1995). In *USAA Cas. Ins. Co v. Perm. Mission of Rep. of Namibia*, 2010 WL 4739945 at *1 (S.D.N.Y. 2010) the court held:

> [S]ervice on a foreign state is complete only as of the date of a "signed and returned postal receipt." 28 U.S.C.A. § 1608(c) (West 2006). Here, Namibia has not returned its postal receipt. Because section 1608 "mandate[s] strict adherence to its terms, not merely substantial compliance," *Finamar Investors Inc. v. Republic of Taj.,* 889 F. Supp. 114, 117 (S.D.N.Y.1995), Plaintiff's service on Namibia is not complete.

Id.

The Gates Plaintiffs purport to rely on *Wye Oak Technology, Inc. v. Rep. of Iraq*, 2010 WL 2613323 (E.D. Va. 2010). In fact, however, *Wye Oak* provides no support for the Gates Plaintiffs' position—but strongly supports the Wyatt Plaintiffs' position. In *Wye Oak* the plaintiff first attempted to serve Iraq by mail under § 1608(a)(3), and when that failed the plaintiff successfully served Iraq by diplomatic means under § 1608(a)(4):

> [O]n October 8, 2009 … a summons was issued by the clerk of the court to the "Head of the Ministry of Foreign Affairs" of Iraq, care of the Embassy of the Republic of Iraq in Washington, DC. A cover letter to the clerk attached to the summons notes that "[s]ince [Wye Oak has] been unable to determine the address of that ministry, we propose accomplishing that task [of service]" by addressing the summons package to the Embassy. The summons and complaint directed to the head of the Ministry of Foreign Affairs was in fact delivered to the Embassy through FedEx, with a request that it be forwarded through diplomatic pouch to the head of the Ministry of Foreign Affairs in Iraq and that the Ministry issue a signed receipt. ***However, no signed receipt was ever returned from the Ministry of Foreign Affairs***; and, for that reason, on November 25, 2009, Wye Oak caused a summons to be issued by the clerks office pursuant to Section (a)(4) to the "Republic of Iraq," care of the Director of Special Consular Services at the United States Department of State.

Id. at 4 (emphasis added).

Iraq then challenged the sufficiency of service, arguing as follows:

> Iraq does not dispute that it was actually served under Section (a)(4), or that the service package

> it received met the service requirements of Section (a)(4). ***Rather, it argues that service under Section (a)(4) was premature, and therefore void, because Wye Oak had not first complied with the service requirements of Section (a)(3). Specifically, Iraq contends that because Wye Oak sent the October 8, 2009 summons to the Embassy of Iraq, Wye Oak never properly attempted service pursuant to Section (a)(3).*** …. Iraq … submits a declaration noting that FedEx and DHL had established delivery service to Iraq by April 2006 and that the clerk of the court could have utilized either carrier ***to dispatch the summons and complaint to the head of the Ministry of Foreign Affairs in Iraq in compliance with Section (a)(3)***.

Id. (emphasis added).

Thus, the issue in *Wye Oak* was not whether the plaintiff's service under § 1608(a)(3) was *successful*—the court explicitly held that it had failed because "no signed receipt was ever returned from the Ministry of Foreign Affairs"—but rather whether § 1608(a)(3) service had ever been properly *attempted* in light of the fact that the package had been sent to the head of the Ministry of Foreign Affairs via the Iraqi embassy and not directly to the Foreign Ministry in Iraq.

The *Wye Oak* court held that the plaintiff had properly *attempted* § 1608(a)(3) service on the head of the foreign

ministry via the embassy, because "[s]ection (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination." This is the language that the Gates Plaintiffs quote in their papers.

However, this holding is perfectly irrelevant to the question of whether § 1608(a)(3) requires that the package actually be accepted for delivery, and the signed delivery receipt returned to the court—indeed, on this question the *Wye Oak* court expressly held that the plaintiffs' § 1608(a)(3) service had *failed* because "no signed receipt was ever returned from the Ministry of Foreign Affairs." Accordingly, the *Wye Oak* plaintiff properly proceeded to serve pursuant to § 1608(a)(4), and that service was valid.

Under *Wye Oak*, there is absolutely no question that the Gates Plaintiffs failed to serve under § 1608(a)(3)—"no signed receipt was ever returned from the Ministry of Foreign Affairs" of Syria and, moreover, Syria refused delivery. The Gates Plaintiffs were therefore required to do exactly what the *Wye Oak* plaintiffs did: move on to diplomatic service. They never did so.

The Gates Plaintiffs also seek to mislead the court with their quotation from *Phoenix Consulting v. Rep. of Angola,* 35 F. Supp. 2d 14, 18 (D.D.C. 1999), "The requirements of service under 1608(a)(3) are 'satisfied at the time of mailing.'" *Id.* 35 F. Supp. 2d at 18. That cite and quote are misleading at best. In *Phoenix*, unlike here, the papers had been *successfully delivered* to and accepted at Angola's foreign ministry, but Angola argued

that *the clerk in the foreign ministry who accepted the papers was not specifically authorized* to receive service of process on behalf of its foreign minister. The court rejected this argument and held that § 1608(a)(3) was satisfied when, and only when "the process documents have been dispatched in compliance with the express terms of § 1608(a)(3) and delivered in conformity with the foreign ministry's internal mail handling procedures." *Id.* at 19 (emphasis added). In the phrase quoted by the Gates Plaintiffs ("satisfied at the time of mailing") the court was not discussing whether delivery is necessary—it expressly held that delivery *is* necessary—but rather whether the clerk had to ensure delivery to the foreign minister *personally*, as opposed to delivery to the foreign ministry. Because in the *Gates* case there was no delivery at all, the *Phoenix* case is completely inapposite.

What happened in the *Gates* case is much more akin to what happened in *Ben Haim v. Islamic Rep. of Iran*, 902 F. Supp. 2d 71 (D.D.C. 2012). In that case, the DHL package was actually delivered to Iran and signed for, but then immediately rejected by whomever had signed for it. Plaintiff argued that this was "contumacious conduct," a deliberate avoidance of receiving the package, comparable to a comment made in another case, *Flatow v. Islamic Rep. of Iran,* 999 F. Supp. 1, 6 n.1 (D.D.C. 1998), where a pattern of contumacious evasion of service had been documented, and therefore the defendant Iran should be deemed to have been served. Chief Judge Lamberth rejected that argument, holding:

> [T]this authority does not support plaintiffs' case. In the present case, there is no evidence of any "contumacious conduct" of the type that led this Court in *Flatow* to find service had been effectuated. *See id.* Here defendants simply rejected the service packages; they did not open the package, nor did they take the return receipt, nor did they scrawl any message on the back of the envelope. Though someone apparently signed for one package before rejecting it, this does not match the "contumacious conduct" that led this Court to find service adequate in *Flatow*. Thus there is no legal basis for this Court to conclude that service by mail has been effectuated on either defendant.

Ben Haim, 902 F. Supp. 2d at 73.

In the *Gates* case, as in *Ben Haim,* there has been no showing of any contumacious evasion of service. The plaintiff tried to serve twice. Once, the envelope was returned immediately because it was not properly addressed. The second time the delivery driver was told that the package was "no longer required," but it is unclear who said that or whether that person even knew what the package was. Indeed, the "no longer required" comment suggests that the recipient may have been under a misapprehension as to what it was. The package was not even signed for and then rejected as in *Ben Haim*, nor was there any evidence that the package was opened before it was rejected. There is simply no foundation for

contumacious conduct here. Thus, as in *Ben Haim,* the attempted but unsuccessful DHL service was ineffective.

The court should not lose sight of the fact that the Gates Plaintiffs plainly agree that the DHL service was ineffective. If they did not so agree they would not have felt the need to ask Judge Collyer to excuse them from having to serve—something she had no authority to do, to be sure, but which the Gates Plaintiffs felt the need to request. This Court should also not lose sight of the fact that the Gates Plaintiffs were not without an easy remedy: § 1608(a)(4) permitted them to serve via the State Department, an expedient of which, for whatever reason, they chose not to avail themselves. That choice was theirs, and having made, it the Gates Plaintiffs must live with the fact that their *attempted* DHL service was unsuccessful and therefore ineffective.

VI.

Having Failed to Comply With § 1608(e), the Gates Plaintiffs are Barred From Enforcing Their Judgment

The Gates Plaintiffs argue that regardless of whether they complied with the letter of § 1608(e), the Syrian government, or at least their counsel, knew of the judgment and that should be deemed "good enough." In other words, the Gates Plaintiffs would have this Court treat the statutory requirements as hortatory suggestions, not explicit minimum requirements. As will be shown in this section, that is not the law. Rather, the law requires

a court that uncovers a failure to comply with § 1608(e) to both prospectively decline to permit enforcement and quash or vacate any existing attachment or execution proceedings. The decision in *LeDonne v. Gulf Air, Inc.*, 700 F .Supp. 1400 (E.D. Va. 1988) makes this point clearly:

> Plaintiff … concedes her failure to serve, or even attempt to serve, a copy of the default judgment on Gulf Air or Aviation Services. This undisputed fact, by itself, ***is dispositive***. The FSIA mandates that a copy of the default judgment be served on the foreign agency or instrumentality in accordance with the procedures outlined in section 1608(b). See 28 U.S.C. §§ 1608(b), 1608(e). ***Plaintiff's failure to do so directly contravenes the requirements of the FSIA and, therefore, deprives this Court of the power to enforce the Illinois judgment***. 28 U.S.C. §§ 1330(b) and 1608(e).

LeDonne, 700 F. Supp. at 1414 (emphasis added).[6]

Exactly so here: in their motion to Judge Collyer seeking to deem § 1608(e) complied with because of Syria's counsel's entry into the case, the *Gates* plaintiffs

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6. *LeDonne* referenced service under § 1608(b), rather than § 1608(a), because—in contrast to this case—the defendants in that case were foreign state agencies and instrumentalities, and not the foreign state itself. Service on agencies and instrumentalities under § 1608(b), is more lenient than service on foreign states under § 1608(a). *See Nikbin*, 471 F. Supp. 2d at 67. Accordingly, *LeDonne* applies here *a fortiorti*.

have "concede[d] [their] failure to serve … a copy of the default judgment" on defendant Syria, and "[t]his undisputed fact, by itself, is dispositive. [That] failure … directly contravenes the requirements of the FSIA and, therefore, deprives this Court of the power to enforce the… judgment." *Id.*

Similarly, in *Peterson*, 2012 WL 4485764, the court denied the plaintiffs' application to enforce their terrorism judgment against Iran, because "[i]n order to execute a default judgment against a foreign sovereign, **plaintiffs must first demonstrate that service of the judgment strictly complies with the statutory requirements of section § 1608(a)**…." *Peterson*, 2012 WL 4485764 at *3 (*see* block quote in Point IV, *supra*).

Likewise, in *Cortez,* 974 F. Supp. 2d at 273, the court vacated existing enforcement proceedings after finding that § 1608(e) had not been complied with.

The *Peterson* court's reference to case law requiring strict compliance with the service provisions of FSIA § 1608(a) is highly salient, because (like the Fifth Circuit) the Seventh Circuit also demands strict compliance with § 1608(a). *See e.g. Alberti, supra*, 705 F.2d at 253. *See also Magnus Elec., supra,* 620 F. Supp. at 389 (holding that "noncompliance with the [FSIA]'s literal requirements (though it certainly did provide notice) deprives this Court of personal jurisdiction.").

Thus, the result of the Gates Plaintiffs' failure to serve their judgment on Syria as required by § 1608(e)

is that they are currently prohibited from enforcing their judgment, which means that they are barred from attaching or executing against the Syrian Assets in the court's registry, and their citation must be vacated. *See LeDonne*, 700 F. Supp. at 1414; *Peterson*, 2012 WL 4485764 at *3; *Cortez Byrd*, 974 F. Supp. 2d at 273.

The Gates Plaintiffs treat § 1608(e)'s service requirement as nothing more than a precursor to § 1610(c), which requires that the court find compliance with § 1608(e) and that a sufficient time had passed to allow enforcement of the judgment pursuant to § 1610(a) and (b) to proceed. Thus, the Gates Plaintiffs argue that once a § 1610(c) order is obtained, compliance with § 1608(e) loses independent significance. But when the statutory scheme is considered as a whole one can readily see that this is not so. As the Seventh Circuit held in this case, *Gates,* 755 F. 3d at 578), § 1610(c) permission is not necessary to enforce a judgment pursuant to § 1610(g) which is what the Gates Plaintiffs have sought to do. Because § 1610(c) permission is not needed to enforce pursuant to § 1610(g), the service requirement of § 1608(e) must be viewed as an independent requirement when the enforcement at issue is pursuant to § 1610(g). The same is true with regard to enforcement proceedings pursuant to Terrorism Risk Insurance act ("TRIA") § 201. And, in light of the fact that § 1608(e) is an independent requirement with regard to both of those enforcement mechanisms, it is likewise an independent requirement with regard to enforcement made pursuant to § 1610(a) and § 1610(b) (both of which are expressly referenced by § 1610(c) but not at issue here).

If § 1608(e) were not a freestanding requirement subject to scrutiny or challenge by adverse claimants as well as the judgment debtor, it would be little more than advisory or aspirational. Consider that if the defendant foreign country were not served, and thus presumably did not know about the entry of a default judgment against it, and adverse claimants could not invoke failure to comply with § 1608(e) as a challenge to a litigant's judgment enforcement proceeding, there would be little incentive for plaintiffs to comply with § 1608(e)'s notice requirement. Indeed, complying with § 1608(e) would serve as nothing but a penalty as those who comply with that provision must delay their enforcement proceedings, thus risking the loss of available assets to other judgment creditors, and litigants who would comply with § 1608(e) would, by doing so, alert the defendant country to the impending enforcement of a judgment and thus risk the defendant moving to vacate a default while litigants who ignore § 1608(e) would not run that risk. The statute should not be interpreted in a way that assumes it can be ignored without consequence today and in future cases.

The Gates Plaintiffs do not address the issue of whether they are permitted to enforce their default judgment not having served it on the defendant Syria as required by § 1608(e). Instead, they cite cases such as *Antoine,* 66 F.3d at 105 and *Peterson,* 627 F.3d at 1117 for the proposition that that failing to comply with § 1608(e) renders the judgment merely voidable, not void. But in making this argument the Gates demonstrate that they misunderstand the Wyatt Plaintiffs' contention. The Wyatt Plaintiffs do not suggest that the Gates Plaintiffs' underlying monetary judgment against Syria is either

void or voidable. Rather, the Wyatt Plaintiffs contend, as briefed above, that the Gates Plaintiffs' judgment against Syria is unenforceable unless and until they comply with § 1608(e), and that any measures they have taken to enforce their judgment before complying with § 1608(e) are ineffective. As a result, in the winner-take-all mode of judgment enforcement ordained by Congress, a judgment creditor that has complied with the provisions of § 1608(e) necessarily has priority over a judgment creditor that has not, regardless of who was first in time.

VII.

The "Mandate Rule" Does Not Preclude this Court from Considering the Wyatt Plaintiffs' Arguments

The Gates Plaintiffs argue that the Seventh Circuit's decision adjudicating the Baker Plaintiffs' challenge to the Gates Plaintiffs' lien on the Syrian Assets, *Gates,* 755 F.3d at 568, is somehow dispositive of the Wyatt Plaintiffs' claims, and that the "mandate rule" requires that the court simply follow the Seventh Circuit's mandate regardless of what new information or what new claims by new parties who were not part of the Baker Plaintiffs' appeal may surface. As will be shown in this section, the Gates Plaintiffs are wrong on all these counts.

A. The Wyatt Plaintiffs Were Not Party to the Baker/Gates Litigation and Appeal

The "mandate rule" invoked by the Gates Plaintiffs is inapplicable to the Wyatt Plaintiffs who were not parties to this proceeding prior to the appeal, much less the

proceedings before the Seventh Circuit. Indeed, the Wyatt Plaintiffs have brought their own, entirely separate and plenary proceeding, in which they are seeking turnover of the funds at issue. If the Wyatt Plaintiffs prevail in that proceeding, the Gates Plaintiffs' motion for release of the Syrian Assets to them will necessarily be denied. The "mandate rule" is therefore simply not relevant to the Wyatt Plaintiffs who are strangers to the prior proceedings.

B. The "Mandate Rule" Only Applies to Issues Decided by the Court of Appeals

Most fundamentally, the Seventh Circuit did not consider at all the issue of whether the Gates Plaintiffs had complied with § 1608(e) for the very simple reason that the Baker Plaintiffs did not raise that issue. It is obvious why the Baker Plaintiffs did not raise that issue: the Baker Plaintiffs, like the Gates Plaintiffs, did not comply with § 1608(e) either. *See Baker*, 810 F. Supp. 2d at 101. Thus both the Baker Plaintiffs and the Gates Plaintiffs inhabited the same glass house, and neither party threw the § 1608(e) stone. Essentially, the Baker Plaintiffs cherry-picked some issues related to FSIA compliance while omitting others, such as the Gates' Plaintiffs non-compliance with § 1608(e), in light of the fact that doing so would harm the Baker Plaintiffs' own interests. Simultaneously, the Gates Plaintiffs fought off the Baker Plaintiffs on every ground they could think of except for their non-compliance with § 1608(e), for precisely the same reason. In other words, the Baker Plaintiffs and the Gates Plaintiffs at least passively colluded before this Court and the Seventh

Circuit to avoid raising compliance, *vel non,* with§ 1608(e), thereby undermining the adversarial process. As the Seventh Circuit disapprovingly observed of both the Gates Plaintiffs and the Baker Plaintiffs, "neither side has a monopoly on slick procedural maneuvers." *Gates,* 755 F.3d at 580.

Since the issue of compliance with § 1608(e) was never raised by the Baker Plaintiffs or the Gates Plaintiffs before this Court or before or the Seventh Circuit, it cannot be said that the decision of the Seventh Circuit determined that issue.

The "mandate rule" applies only to issues that were decided by the Court of Appeals. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) ("In general, any issue conclusively decided by [the Seventh Circuit] on appeal may not be reconsidered by the district court on remand."). But the issue decided by the Seventh Circuit on appeal related solely to whether the Gates Plaintiffs were required to obtain a new FSIA § 1610(c) order, and did not touch upon, much less decide, whether they had complied with § 1608(e)—which is the question placed at issue by the Wyatt Plaintiffs.

Indeed, the Gates Plaintiffs have candidly admitted in their papers that the appeal decided by the Seventh Circuit had nothing to do with § 1608(e):

> The Bakers' claim of priority contested the Gates Plaintiffs' compliance with § 1610(c) but ***never contested notice to Syria under § 1608(e)***.

(Gates N.D. Ill. DE 259 at p. 3) (emphasis added). Since, as the Gates Plaintiffs admit, the Baker Plaintiffs "never contested notice to Syria under § 1608(e)," and consequentially the Seventh Circuit did not reach this issue at all, the Seventh Circuit's mandate does not govern this issue.

Moreover, as discussed above, the *Baker* plaintiffs never raised this issue because they, too, had failed to serve Syria as required by § 1608(e). Therefore, because both parties to the appeal passively but effectively colluded to keep the § 1608(e) issue off the radar of this Court and the Seventh Circuit, it played no part in any prior adjudication in this case. Thus, the "mandate rule" does not apply to this question.

C. The Gates Plaintiffs Mislead this Court When They Assert That the Seventh Circuit Determined that they Complied with § 1610(c)

The Gates Plaintiffs argue that the decision of the Seventh Circuit held that the Gates Plaintiffs had complied with § 1610(c), and that this means that the Seventh Circuit had implicitly held that the Gates Plaintiffs had complied with § 1608(e). But the Seventh Circuit made no such finding.

The Baker Plaintiffs had challenged the Gates Plaintiffs' priority lien on the ground that the Gates Plaintiffs had obtained an order under § 1610(c) permitting them to enforce their judgment *only* from the D.C. District Court, and not from the Northern District of Illinois. It

was the Baker Plaintiffs' contention that a plaintiff must obtain a § 1610(c) order from every district in which he wants to enforce a judgment. *That* was the challenge to the Gates Plaintiffs' compliance with § 1610(c) that was presented and decided in the Seventh Circuit. The Seventh Circuit merely held that no such repetitive § 1610(c) applications were necessary; one from one court was enough to permit the judgment to be enforced anywhere. But more importantly, the Seventh Circuit held that § 1610(c) did not even matter, since permission under that section was not necessary for enforcement under § 1610(g).

The question of whether the Gates Plaintiffs had complied with § 1608(e)'s service requirement was simply not raised or decided by the Seventh Circuit. Indeed, it would be fair to say that compliance with § 1608(e) was the furthest thing from that court's mind in deciding that appeal. For the Gates Plaintiffs to assert that compliance with § 1608(e) was decided by the Seventh Circuit is simply disingenuous.

D. The "Mandate Rule" Does Not Preclude a District Judge From Considering New Issues Not Decided By the Circuit Court

Even if the "mandate rule" applied to the Wyatt Plaintiffs and to the question at issue, which it does not, "[a]n appellate mandate does not turn a district judge into a robot, mechanically carrying out orders that become inappropriate in light of subsequent factual discoveries." *Barrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993). Specifically, and among other reasons, the district

court can and should deviate from the mandate whenever it finds "the sort of circumstance that justifies modification under Fed. R. Civ. P. 60(b)." *Id.*[7]

Such a circumstance is clearly present here. The *Gates* plaintiffs never complied with § 1608(e), and are therefore prohibited from enforcing their judgment. Indeed, that "failure… directly contravenes the requirements of the FSIA and, therefore, deprives this Court of the power to enforce the … judgment." *LeDonne*, 700 F. Supp. at 1414.

Moreover, even if the Court had the power to do so, "to depart from the statutory scheme would disregard congressional intent and U.S. diplomatic interests in ensuring proper service of foreign governments." *Peterson*, 2012 WL 4485764 at *3.

Clearly, those are circumstances that would "justif[y] modification under Fed. R. Civ. P. 60(b)." *Barrow*, 11 F.3d at 731. In fact, in *Cortez Byrd*, 974 F. Supp. 2d at 273, the court granted Rule 60(b) relief in similar circumstances—the court had initially allowed judgment enforcement proceedings to proceed without compliance with § 1608(e) but when the affected party appeared and pointed out the non-compliance to the court the court disallowed the non-compliant party from enforcing its judgment. *Id.*

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7. Notably, the Seventh Circuit most clearly did ***not*** require the filing of a Rule 60(b) motion, or even that the district court is limited to the ***specific*** grounds for relief cognizable under that rule; rather, it held only that district courts may deviate from the mandate for the same ***types*** of reasons, inter alia, as justify Rule 60(b) relief.

Appendix A

VIII.

The Gates Plaintiffs' Reliance on Prudential Standing is Misplaced

The Gates Plaintiffs argue that the Wyatt Plaintiffs cannot challenge the *Gates* judgment because, they say, the Wyatt Plaintiffs lack prudential standing. To make this argument the Gates Plaintiffs import the concept of "prudential standing" from the realm of constitutional law and have sought to mis-apply it here.

Prudential standing is a doctrine under which the courts may decline to hear a litigant's claims because "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99–100 (1979). Prudential standing is not mandatory, and the Supreme Court disregards prudential standing where appropriate in its view. *Warth v. Seldin,* 422 U.S. 490, 500–01 (1975). Where prudential standing is applied, the Court looks at whether the plaintiff's claimed injury comes within the "zone of interest" arguably protected by the constitutional provision or statute in question *Assn. of Data Processing Service Orgs. v. Camp,* 397 U.S. 150, 153 (1970); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 39 n. 19 (1976); *Valley Forge Christian College v. Americans United,* 454 U.S. 464, 475 (1982); *Clarke v. Securities Industry Ass'n,* 479 U.S. 388 (1987).

The Court also looks at whether the litigant is seeking determination of his own grievance, or "generalized grievances" shared by all or a large class of citizens. *United States v. Richardson,* 418 U.S. 166, 173, 174–76 (1974); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978); *Allen v. Wright,* 468 U.S. 737, 751 (1984).

In this case, the Wyatt Plaintiffs certainly are seeking to protect their own interest as opposed to a "generalized grievance" shared by the public at large. The Wyatt Plaintiffs hold a judgment which competes with the Gates Plaintiffs' judgment, and winning this issue will recover money for the Wyatt Plaintiffs and nobody else in the world. In the winner-take-all world of FSIA judgment enforcement, *Gates* 755 F. 3d at 571, the only party with an interest in enforcing the strict requirements of statutes such as § 1608(e) is a competing judgment creditor. Even Syria no longer cares, because in any event it will lose the funds.

The Gates Plaintiffs' arguments that the Wyatt Plaintiffs do not have standing are readily refuted by simply looking at the arguments made by the Gates Plaintiffs themselves in *Baker v. Nat'l Bank of Egypt,* (S.D.N.Y. 12-CV-7698). That case is an enforcement proceeding brought by the Baker Plaintiffs to enforce their judgment against certain Syrian assets. In that case, the Gates Plaintiffs have appeared and have argued that the Baker Plaintiffs' judgment against Syria is void because it was entered by a magistrate judge without the consent of Syria. Notwithstanding that this is an

argument one might have thought should be made by Syria and not by a competing judgment creditor (or so the Gates Plaintiffs would argue using the arguments they have deployed in our case), the Gates Plaintiffs in *Baker* argued the opposite:

> In competition with the Bakers, the Gates Plaintiffs have every right to collaterally attack the Bakers' Judgment as void and nugatory. Moreover, the deficiencies of subject matter jurisdiction are patent on the face of the record in the *Baker* proceedings in the District Court of the District of Columbia, permitting this Court a fair perspective of judging the merits of the jurisdictional issue *Fishel v. Kite,* 101 F. 2d 685 (D.C. Cir. 1938) (permitting collateral attack upon judgment where want of jurisdiction appears affirmatively from the record. As argued in more detail *infra,* the Gates Plaintiffs challenge the Bakers' magistrateissued default judgment as void on its face, together with the writs attempting to enforce it.

(Ex. A, p. 10).

Having presented in New York the argument that they have standing to challenge the *Baker* judgment's compliance with the relevant procedural requirements, the Gates Plaintiffs should not be heard by this Court to argue that the Wyatt Plaintiffs lack standing to do the same.

IX.

The Fact That the Syrian Assets Are in the Registry of the Court Does Not Preclude the Wyatt Plaintiffs From Executing Against Them or Give the Gates Plaintiffs Priority as to Them

The Gates Plaintiffs argue that because the Syrian Assets have been paid into the court's registry they are no longer the property of Syria and must be turned over to the Gates Plaintiffs because, they contend, it was the Gates Plaintiffs who caused them to be paid into the court's registry. Thus, the Gates Plaintiffs suggest that the Court has no power to rectify its previous order that was entered by the Court unaware of the Gates Plaintiffs' noncompliance with § 1608(e) or the materiality of that issue, and that the Court is required to turn a blind eye and let the Gates Plaintiffs receive $82 million to which they are not entitled through the artifice of failing to disclose material information to this Court. The Gates Plaintiffs' arguments should be rejected.

Title 28 U.S.C. § 2042 governs whenever a party seeks to withdraw from the court's registry funds that have been deposited there. That section provides in relevant part:

> No money deposited under section 2041 this title shall be withdrawn except by order of court. … Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney ***and full proof of the right thereto***, obtain an order directing payment to him.

Id. (Emphasis added).

Thus, under § 2042, in order to withdraw the Syrian Assets from the court's registry, the Gates Plaintiffs must still present "full proof of the right thereto." *Id.* The Seventh Circuit has explicitly held that § 2042 "does not operate to change the ownership of the funds." *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1257 (7th Cir. 1984). *See also, Baxter v. United Forest Products*, 406 F.2d 1120, 1124 (8th Cir. 1969) ("The fact that the money has been paid into the registry of the court ***does not deprive the defendants of ownership of the funds, since the court merely holds the money as trustee for the rightful owner***."); *In re Moneys Deposited,* 243 F.2d 443, 445 (3d Cir. 1957):

> It is settled that a state may constitutionally direct the escheat of unclaimed money which has been deposited in the registry of a federal court sitting in the state and may do so even though the money has been subsequently deposited in the United States treasury pursuant to the federal statute. For although such subsequent deposit in the federal treasury is required by the statute to be 'in the name and to the credit of the United States' the fact is that ***the United States has no beneficial interest therein but holds the money as statutory trustee for the rightful owners when and if they are determined by the court***.

Id., 243 F.2d at 445 (emphases added).

In the absence of being able to demonstrate that they complied with § 1608(e), the Gates Plaintiffs cannot establish their right to the Syrian Assets, and therefore they cannot be permitted to withdraw those assets from the court's registry. Thus, the deposit of the funds into the registry is of no moment.

The Gates Plaintiffs argue that because the appeal was decided affirming this Court's judgment the Syrian Assets must be automatically released to the Gates Plaintiffs. The Court should reject this argument because the very judgment of this court that the Gates Plaintiffs invoke did not contemplate an automatic release of the Syrian Assets, but only that:

> the funds shall be held in the registry during the pendency of the Seventh Circuit Appeal… and shall ultimately be distributed as directed by this Court.

(Gates N.D. Ill. DE 238) (Ex. H). Thus, even before the appeal to the Seventh Circuit this Court's judgment contemplated that any distribution of the Syrian Assets after the appeal would not be autonomic, but would require further direction from the court appropriate to whatever circumstances existed at the time such distribution was to be made. As the circumstances have played out, the issue of whether the Gates Plaintiffs have complied with § 1608(e) is a new issue that must be decided before the Syrian Assets can be distributed, a process which is fully in keeping with the judgment's directive that any distribution shall be only "as directed by this Court" (*id.)* and § 2042's demand for "full proof of the right thereto."

A claim very similar to the Gates Plaintiffs' claim that this Court must release the funds to them because those funds were already deposited into the Court's registry in the context of the earlier proceedings in this matter was made—and resoundingly rejected—in *Hegna v. Islamic Rep. of Iran*, 376 F.3d 485 (5th Cir. 2004). In that case, victims of a terrorist attack holding an unsatisfied judgment against Iran argued that the federal court in Texas was obligated to deliver the asset at issue to them, despite their ineligibility to receive it, because the asset had already been placed in the custody of the court. The Fifth Circuit rejected this argument:

> Assuming, arguendo, that the Hegnas' argument has some validity and that the "right ... to execute" now lies strictly with the district court, the court certainly possesses the ability to revisit its ruling. A court may "relieve a party or a party's legal representative from a final judgment, order, or proceeding" for a variety of reasons, including the open-ended "any... reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). *See also* Fed. R. Civ. P. 59(e) (describing the period of time in which a party must file a motion to alter or amend a judgment).
>
> The Hegnas' theory places form above common sense and above the district court's ability to re-evaluate its ruling.

Id., 376 F.3d at 491-92 (emphasis added) (footnotes

omitted). *See* also *Baxter*, 406 F.2d at 1124 ("The fact that the money has been paid into the registry of the court does not deprive the defendants of ownership of the funds, since the court merely holds the money as trustee for the rightful owner."); *In re Moneys Deposited,* 243 F.2d at 445 ("[M]oney which has been deposited in the registry of a federal court" remains in trust[] for the rightful owners when and if they are determined by the court.").

Indeed, in *United States v. Klein*, 303 U.S. 276 (1938) the Supreme Court held (applying the largely identical predecessor to § 2042) that even after funds in the court's registry were transferred to the Treasury, "the fund remains subject to the order of the District Court to be paid to the persons lawfully entitled to it upon proof of their ownership." *Id.* at 280. *Klein* remains good law, *see United States v. 8.0 Acres of Land,* 197 F.3d 24, 30 (1st Cir. 1999) (applying *Klein* in a § 2042 case).

All the more so here: the funds at issue, which remain in the registry of this court, were deposited there pursuant to a court order that required further order of the court to distribute them, and subject to § 2042 which requires any party applying to withdraw them to present "full proof of the right thereto." *Id.*

X.

The Doctrine of *In Custodia Legis* Does Not Apply

The Gates Plaintiffs have invoked the doctrine of *in custodia legis.* However, the Gates Plaintiffs' reliance on

in custodia legis is misplaced since the Wyatts Plaintiffs' judgment is enforceable under both FSIA § 1610(g) and TRIA § 201. Under TRIA, the fact that the funds are in the custody of the court is no bar to the service of a citation. *See United States v. All Funds on Deposit with R.J. O'Brien & Associates*, 892 F. Supp. 2d 1038, 1045-46 (N.D. Ill. 2012) (TRIA's "notwithstanding" proviso overrides the *in custodia legis* doctrine); *United States v. All Funds on Deposit with R.J. O'Brien & Associates*, 982 F. Supp. 2d 830, 841-42 (N.D. Ill. 2013) (same).

XI.

The Wyatt Plaintiffs' 2009 Motion to Intervene in the Gates Case in the D.C. District Court Has Nothing to Do With the Present Issues

The Gates Plaintiffs mislead the Court with their argument about a motion to intervene filed by the Wyatt Plaintiffs in the *Gates* case in the D.C. District Court in 2009, claiming that the Wyatt Plaintiffs are somehow foreclosed from bringing the present application because of that application. This argument by the Gates Plaintiffs is simply recklessly inaccurate.

The facts and chronology are as follows:

On January 5, 2009, the Gates Plaintiffs filed in the D.C. District Court a motion for "Immediate Sequestration of Personal Property of Syrian Arab Republic Pursuant to D.C. Statutory Code Section 15-320(A) and FRCP 69(A)(1)." (Gates D.C. DE 55). Had such an order been granted,

it would have caused the sequestration of whatever property Syria had in Washington, D.C., which would have trampled the rights of the Wyatt Plaintiffs who, on March 25, 2008, had filed a *lis pendens* in the D.C. District Court imposing a lien on any property of Syria in Washington, D.C. (Wyatt D.C. DE 5). Accordingly, on January 23, 2009 the Wyatt Plaintiffs moved to intervene in the *Gates* case for the purpose of opposing the Gates Plaintiffs' motion to sequester Syria's assets in Washington, D.C. (Gates D.C. DE 60). At the same time as they were moving for sequestration of Syrian assets in Washington, D.C., the Gates Plaintiffs also moved for permission to register their judgment in other districts, and for permission to enforce their judgment pursuant to § 1610(c) (Gates D.C. DE 51 and 54). Ultimately, on February 6, 2009 the D.C. District Court denied all the Gates Plaintiffs' enforcement motions without prejudice to renewal after resolution of Syria's appeal from the judgment against it, and denied the Wyatt Plaintiffs' motion to intervene to address the issue of sequestration versus *lis pendens* as moot, since the Gates Plaintiffs' motion to sequester was being denied (Gates D.C. DE 63).

Thus, on its substance the motion to intervene had nothing to do with the issues presently before this Court. The issue presented was limited to the sequestration versus *lis pendens* issue, and had nothing to do with whether the Gates Plaintiffs' failure to comply with § 1608(e) bars them from enforcing their judgment against the Syrian Assets now in this court's registry.

The Gates Plaintiffs suggest that the Wyatt Plaintiffs could have raised the Gates Plaintiffs' failure to comply with § 1608(e) before the D.C. District Court at the time of their motion to intervene in 2009. But at that time the Wyatt Plaintiffs did not even have a judgment,[8] and it would certainly have been premature for them to raise such a challenge to the Gates Plaintiffs' judgment at that time. The issue they did raise, the *lis pendens*, is a pre-judgment lien mechanism, which was all the Wyatt Plaintiffs had standing to assert at that time.

Additionally, regardless of whether the Wyatt Plaintiffs theoretically could have raised the Gates Plaintiffs' failure to comply with § 1608(e) as an issue in 2009, that cannot excuse the Gates Plaintiffs' failure to comply with § 1608(e) and thus rectify the Gates Plaintiffs' infirm and presently unenforceable judgment.

In any event, it is of no moment whatsoever what issues the Wyatt Plaintiffs raised in their motion to intervene in the *Gates* case in 2009 because that motion was denied without prejudice as moot for the simple reason that the D.C. District Court was not allowing the Gates Plaintiffs to enforce their judgment at that time until Syria's appeal was decided.

---

8. The Wyatt Plaintiffs' judgment was not entered until December 17, 2012 (Wyatt D.C. DE 37), that judgment was on appeal until March 12, 2014 (Wyatt D.C. DE 56), and they did not receive permission to enforce it until May 19, 2014 (Wyatt D.C. DE 60).

Appendix A

XII.

The Gates Plaintiffs' Rule 11 Motion is Improper and Should be Ignored

The Gates Plaintiffs have oddly attached a motion for sanctions under Fed. R. Civ. P. 11(c) to their motion (DE 264-5, 264-6, 264-7, and last several pages of 264-1). Aside from being a transparent effort to arrogate to themselves another entire 35 pages of unauthorized briefing, their filing violates explicit procedure set forth in Rule 11.

The Gates Plaintiffs' filing of a Rule 11(c) motion violates the explicit mandate of Rule 11(c)(2) that such a motion "***must not be filed or be presented to the court***" until 21 days after service, a provision commonly known as the "safe harbor" provision. Fed. R. Civ. P. 11(c)(2) (emphasis added). Similarly, their inclusion of an application for Rule 11 relief in their memorandum of law also violates the explicit mandate of Rule 11(c)(2) that such a motion "***must be made separately from any other motion.***" *Id.* (emphasis added). We have alerted the Gates Plaintiffs' counsel to these issues but they have not responded. (Ex. I).

These filings of the Gates Plaintiffs should be disregarded and stricken.

Appendix A

XIII.

Conclusion

WHEREFORE, it is respectfully requested that the Court enter an order denying the Gates Plaintiffs' Motion to Strike (DE 266) in all respects.

Dated: Brooklyn, New York
September 2, 2014

Respectfully submitted,

THE BERKMAN LAW OFFICE, LLC
Attorneys for the Wyatt Plaintiffs / Judgment Creditors in 14-cv-6161 and Wyatt Adverse Claimants in 11-cv-8715

by: /s/_____
Robert J. Tolchin

111 Livingston Street, Suite 1928
Brooklyn, New York 11201
718-855-3627

[EXHIBITS OTHER THAN EXHIBITS 8 AND 14 HAVE BEEN INTENTIONALLY OMITTED]

APPENDIX B — EXHIBIT 8 TO MEMORANDUM IN RESPONSE TO SUBMISSION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, FILED SEPTEMBER 3, 2014

FOLDOUT

APPENDIX C — EXHIBIT 14 TO MEMORANDUM IN RESPONSE TO SUBMISSION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, FILED SEPTEMBER 3, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 06-01500 (RMC)

FRANCIS GATES, *et al.*,

Plaintiffs,

v.

THE SYRIAN ARAB REPUBLIC, *et al.*,

Defendants.

MOTION TO INTERVENE

For the reasons set forth in the attached memorandum, the plaintiffs in the matter of *Wyatt, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00502(RMU)(D.D.C.) and in the matter of *Shatsky, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00496(RNJ)(D.D.C.) (collectively: "Movants") respectfully move for an Order

(1) Pursuant to Fed.R.Civ.P. 24 and 28 U.S.C. § 1605A(g)(1), granting the Movants leave to intervene in the above-captioned action for the purpose of opposing the Plaintiffs' Motion for Immediate Sequestration of Personal Property of Syrian Arab Republic Pursuant to

Appendix C

D.C. Statutory Code Section 15-320(a) and FRCP 69(a)(1) (dkt. # 55); and

(2) Granting any other relief that the Court finds just, necessary or appropriate.

Plaintiffs, by their attorneys,

/s/ David J. Strachman
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Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 06-01500 (RMC)

FRANCIS GATES, *et al.*,

Plaintiffs,

v.

THE SYRIAN ARAB REPUBLIC, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE

Introduction

On January 5, 2009, the plaintiffs in the above-captioned action ("Gates plaintiffs") filed a Motion for Immediate Sequestration of Personal Property of Syrian Arab Republic Pursuant to D.C. Statutory Code Section 15-320(a) and FRCP 69(a)(1) (dkt. # 55) ("Motion for Sequestration").

Unfortunately, the Gates plaintiffs have neglected to inform the Court that the Movants, who are the plaintiffs in *Wyatt, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00502(RMU)(D.D.C.) and in *Shatsky, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00496(RJL)(D.D.C.), hold

priority liens, entered pursuant to 28 U.S.C. § 1605A(g)(1), on any real property or tangible personal property owned by the Syrian Arab Republic located within this judicial district that is subject to attachment or execution under 28 U.S.C. § 1610.

Accordingly, the Movants seek to intervene in this action for the purpose of opposing the Motion for Sequestration.

Pursuant to Fed.R.Civ.P. 24(c) and Local Rule 7(j), attached hereto as Exhibit A is the Movants' proposed Memorandum in Opposition to the Motion for Sequestration.

RELEVANT BACKGROUND

The Movants are plantiffs in *Wyatt, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00502(RMU)(D.D.C.) and in *Shatsky, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00496(RJL)(D.D.C.).

Both the *Wyatt* and *Shatsky* actions were brought against the Syrian Arab Republic under 28 U.S.C. § 1605A, which is the newly-enacted terrorism exception to the Foreign Sovereign Immunities Act ("FSIA").

Section 1605A(g) of the FSIA provides in relevant part as follows:

> (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 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.

28 U.S.C. § 1605A(g) (emphasis added).

On March 25, 2008. the *Wyatt* plaintiffs filed a notice of pending action pursuant to § 1605A(g), to which was attached a copy of the complaint filed in their action. See *Wyatt,* Civ, No. 08-00502, dkt. # 5.

On March 27, 2008, the *Shatsky* plaintiffs filed a notice of pending action pursuant to § 1605A(g), to which was attached a copy of the complaint filed in their action. See *Shatsky,* Civ. No. 08-00496, dkt. # 3.

Thus, pursuant to 28 U.S.C. § 1605A(g)(1), since March 25, 2008 (for the *Wyatt* plaintiffs) and March 27, 2008, (for the *Shatsky* plaintiffs), the Movants have held a lien of *lis pendens* upon any real or tangible personal property owned by the Syrian Arab Republic located within this judicial district, that is subject to attachment or execution under 28 U.S.C. § 1610.

The Motion for Sequestration filed by the Gates plaintiffs seeks enforcement of their judgment *inter alia* against Syrian assets on which the Movants have a priority lien.

Accordingly, the Movants seek to intervene in this action to oppose the Motion for Sequestration.

ARGUMENT

I. THE MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that "[o]n timely motion, the court must permit anyone to intervene who...claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

Rule 24(a)(2) requires a court to consider four factors: "(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant

is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties." *Fund For Animals, Inc. v. Norton,* 322 F.3d 728, 731 (D.C. Cir. 2003) (internal quotation marks omitted).

As shown below, all four factors are satisfied here.

A. The Movants' Motion Is Timely

There is no question that the instant motion is timely. The Motion for Sequestration was filed only on January 5, 2009. Despite the fact that the Movants' § 1605A(g) liens are a matter of public record on the docket of this Court, counsel for the Gates plaintiffs did not notify the Movants or their counsel of the Motion for Sequestration.

The Movants first became aware of the Motion for Sequestration purely by a chance review of the Pacer docket on January 13, 2009, and their counsel immediately contacted counsel for the Gates plaintiffs to alert the latter of the Movants' intention to intervene. Exhibit B. Counsel for the Gates plaintiffs stated that his clients would oppose the instant motion. Exhibit C.

Thus, the instant motion is being filed a mere seven business days after the Movants first became aware of the Motion for Sequestration.

This Motion is thus clearly timely. *See e.g. Acree v. Republic of Iraq,* 370 F.3d 41, 49 (D.C. Cir. 2004) (The timeliness of a motion to intervene is determined "in light of all the circumstances of the case, including the purpose

for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties.").

B. The Movants Claim an Interest Relating to the Property Which Is the Subject of the Motion for Sequestration

Nor is there any doubt that the Movants "claim[] an interest relating to the property or transaction which is the subject of the action." *Fund For Animals*, 322 F.3d at 731.

As discussed, *supra,* the Movants have a statutory lien pursuant to 28 U.S.C. § 1605A(g) on all real and tangible personal property of Syria in this district subject to execution under 28 U.S.C. § 1610.

It is long and well established that a lienholder "claims an interest relating to the property ... that is the subject of the action" and is entitled to intervene by right in proceedings relating to the disposition of the property subject to their lien. *See e.g. Calvert "Fire Ins. v. Environs Development Corp.,* 601 F.2d 851 (5th Cir. 1979) (A mere equitable lien on property has been found sufficient interest in property under Rule 24); *Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir.) (a lien is "clearly a legally cognizable interest in property" for purposes of Rule 24); *Genesis Press, Inc. v. MAC Funding Corp.,* 2008 WL 4695114 at *2 (D.S.C. 2008) (A patty claiming a lien in property at issue is entitled to intervene under Fed.R.Civ.P. 24(a)(2)).

The Movants thus clearly satisfy this prong of Rule 24.

C. The Disposition of the Motion for Sequestration May Impair or Impede the Movants' Ability to Protect Their Interest in the Property Subject to Their Liens

The Motion for Sequestration seeks an order directing Syria to deliver to the registry of this Court the sum of $412,909,857.00 pursuant to D.C. Code Section 15-320(a), which authorizes this Court to "order an immediate sequestration of [the judgment debtor's] real and personal estate" and "cause the possession of the estate and effects whereof the possession or a sale is decreed to be delivered to the complainant." Motion for Sequestration at 2-3.

Clearly, then, if the Court were to grant the Motion for Sequestration, the real and tangible personal property of Syria, upon which the Movants have a statutory lien pursuant to 28 U.S.C. § 1605A(g), would be in direct danger of being sequestered and liquidated, thereby rendering the Movant's liens nugatory.

Therefore, the disposition of the Motion for Sequestration would without a doubt impair and impede the Movants' ability to protect their statutory lien interest in that property.

Indeed, if the Movants are not given the opportunity to assert their liens in the context of this case, *i.e.* in the context of the Motion for Sequestration, they will never have an opportunity to do so and their liens would become meaningless.

D. Syria Does Not Adequately Represent The Movants' Interests

The only existing party in this case that could **hypothetically** represent the Movants' interests in opposing the Motion for Sequestration would be Syria.

However, Syria does not even remotely represent the Movants' interest here.

In the first place, Syria has presented no **substantive** opposition to the Motion for Sequestration. Syria's opposition consists solely of a bald and unsupported reiteration of its claim (which is the basis for its appeal) that it was never served in this action. If that anemic argument – really a collateral attack on the judgment – is rejected, there will be no remaining opposition or obstacle whatsoever to a grant of the relief sought in the Motion for Sequestration.

Second, Syria clearly has no interest whatsoever in supporting Movants' claim to have priority liens on the assets at issue, and it has of course made no such argument. Accordingly, if the Movants are allowed to intervene to assert their priority liens, no one will do so.

***

Therefore, the Movants are entitled to intervene as of right under Rule 24(a)(2).

II. IN THE ALTERNATIVE, THE MOVANTS SHOULD BE GRANTED LEAVE TO INTERVENE

Alternatively, if the Court concludes that the Movants are not entitled to intervene as a matter of right, the Court should exercise its discretion to grant intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B), which permits intervention upon timely motion where the movant "has a claim or defense that shares with the main action a common question of law or fact."

The Movants satisfy this requirement, since their claim to have a priority lien on the assets at issue shares with the Motion for Sequestration "a common question of law or fact," namely whether those assets are subject to execution by the Gates plaintiffs.

Given the absence of any briefing on this issue, the Court should allow permissive intervention here.

WHEREFORE, plaintiffs' motion should be granted.

Plaintiffs, by their attorneys,

/s/ David J. Strachman
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Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 06-01500 (RMC)

FRANCIS GATES, *et al.*,

Plaintiffs,

v.

THE SYRIAN ARAB REPUBLIC, *et al.*,

Defendants,

v.

MARY NELL WYATT, *et al.*, and SHABTAI SCOTT SHATSKY, *et al.*,

Intervenors.

INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR IMMEDIATE SEQUESTRATION OF PERSONAL PROPERTY OF SYRIAN ARAB REPUBLIC PURSUANT TO D.C. STATUTORY CODE SECTION 15-320(A) AND FRCP 69(A)(1)

Introduction

On January 5, 2009, the plaintiffs filed a Motion for Immediate Sequestration of Personal Property of Syrian

Arab Republic Pursuant to D.C. Statutory Code Section 15-320(a) and FRCP 69(a)(1) (dkt. # 55) ("Motion for Sequestration").

The plaintiffs have failed to inform the Court that the Intervenors, who are the plaintiffs in *Wyatt, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00502(RMU) (D.D.C.) and in *Shatsky, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00496(RJL)(D.D.C.), hold priority liens, entered pursuant to 28 U.S.C. § 1605A(g)(1), on any real property or tangible personal property owned by the Syrian Arab Republic ("Syria") located within this judicial district that is subject to attachment or execution under 28 U.S.C. § 1610.

Accordingly, the Intervenors request that the Court deny the Motion for Sequestration in respect to any real or tangible personal property owned by Syria located within this judicial district that is subject to attachment or execution under 28 U.S.C. § 1610.

ARGUMENT

The Intervenors are plaintiffs in *Wyatt, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00502(RMU) (D.D.C.) and in *Shatsky, et al. v. Syrian Arab Republic, et al.,* Civ. No. 08-00496(RJL)(D.D.C.).

Both the *Wyatt* and *Shatsky* actions were brought against Syria under 28 U.S.C. § 1605A, which is the newly-enacted terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"). Section 1605A(g) of the FSIA provides in relevant part as follows:

> (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 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.

28 U.S.C. § 1605A(g) (emphasis added).

On March 25, 2008, the *Wyatt* plaintiffs filed a notice of pending action pursuant to § 1605A(g), to which was attached a copy of the complaint filed in their action. See *Wyatt,* Civ. No. 08-00502, dkt. # 5.

On March 27, 2008, the *Shatsky* plaintiffs filed a notice of pending action pursuant to § 1605A(g), to which was

attached a copy of the complaint filed in their action. See *Shatsky,* Civ. No. 08-00496, dkt. # 3.

Thus, pursuant to 28 U.S.C. § 1605A(g)(1), since March 25, 2008 (for the *Wyatt* plaintiffs) and March 27, 2008, (for the *Shatsky* plaintiffs), the Movants have held statutory liens on any real or tangible personal property owned by the Syria located within this judicial district, that is subject to attachment or execution under 28 U.S.C. § 1610.

The Motion for Sequestration seeks an order directing Syria to deliver to the registry of this Court the sum of $412,909,857.00 pursuant to D.C. Code Section 15-320(a), which authorizes this Court to "order an immediate sequestration of [the judgment debtor's] real and personal estate" and "cause the possession of the estate and effects whereof the possession or a sale is decreed to be delivered to the complainant." Motion for Sequestration at 2-3.

Clearly, then, if the Court were to grant the Motion for Sequestration, the real and tangible personal property of Syria in this district, upon which the Movants have a statutory lien pursuant to 28 U.S.C. § 1605A(g), would sequestered and liquidated, thereby rendering the Movant's liens nugatory.

WHEREFORE, the Intervenors respectfully request that the Court deny the Motion for Sequestration in respect to any real or tangible personal property owned by Syria located within this judicial district that is subject to attachment or execution under 28 U.S.C. § 1610.

Appendix C

Plaintiffs, by their attorneys,

/s/ David J. Strachman
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Appendix C

From: Davld J. Strachman

To: cook@squeezebloodfromturnip.com; sperles@perleslaw.com

Sent: Tuesday, January 13, 2009 10:12 AM

Subject: Gates v Syria

Dear David and Stephen -

I just became aware that the Gates plaintiffs have filed a motion to immediately sequester all of Syria's personal property.

As you know (and as you should have informed Judge Collyer), my clients, the plaintiffs in *Shatsky v. Syria,* C.A. 08-00496-RJL, have a priority *lis pendens* on Syria's property.

So, the Shatsky plaintiffs are now going to intervene in Gates to protect their rights.

Please indicate whether you will oppose such a motion.

- Dave

David J. Strachman
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Appendix C

From: David J. Cook (mailto:davidcook@cookcollectionattorneys.com]

Sent: Tuesday, January 13, 2009 1:58 PM

To: David J. Strachman; cook@squeezebloodfromturnip.com; sperles@perleslaw.com

Subject: Re: Gates v Syria

Dear Dave:

Thank you for your note, but we advise you that we are going to ***oppose*** your motion to intervene.

Applicable case law and statutory authorities do not support any of type of intervention, which you seek.

David Cook
(415) 989-4730
Cook@SqueezeBloodFromTurnip.Com

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 06-01500 (RMC)

FRANCIS GATES, *et al.*,

Plaintiffs,

v.

THE SYRIAN ARAB REPUBLIC, *et al.*,

Defendants.

ORDER

For the reasons set forth in the Motion to Intervene and attached memorandum filed by the plaintiffs in the matter of *Wyatt, et al. v. Syrian Arab Republic, et al.*, Civ. No. 08-00502(RMU)(D.D.C.) and in the matter of *Shatsky, et al. v. Syrian Arab Republic, et al.*, Civ. No. 08-00496(RJL)(D.D.C.) (collectively: "Movants") it is hereby

ORDERED, pursuant to Fed.R.Civ.P. 24 and 28 U.S.C. § 1605A(g)(1), that Movants shall be permitted to intervene in the above-captioned action.

SO ORDERED

Date:

_____
U.S. District Judge