No. 07-2579

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs/Appellants,

v.

AVRAHAM DICHTER,

Defendant/Appellee,

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE, URGING AFFIRMANCE

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

November 19, 2007

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither WLF nor AEF has a parent corporation or any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE, URGING AFFIRMANCE

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to opposing litigation designed to create private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. WLF has regularly appeared in federal court proceedings raising ATS issues. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Presbyterian Church of Sudan v. Talisman Energy Inc*., No. 07-0016 (2d Cir., dec. pending); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003). WLF is concerned that an overly expansive interpretation of the ATS would threaten to undermine American foreign and domestic policy interests.

The Allied Educational Foundation (AEF) is a non-profit charitable

foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici agree with Appellee that he is immune from suit under the Foreign Sovereign Immunities Act. *Amici* are filing separately because of their particular interest in the political question issue. In light of the well-considered conclusion of the Executive Branch that adjudication of Appellants' claims would undermine United States foreign policy interests, *amici* believe that it would be wholly inappropriate for the Court to allow this case to proceed any further; the political question doctrine dictates that disputes of this nature are not appropriate for adjudication in the federal courts. *Amici* are also concerned that the ATS is being used to assert jurisdiction over parties and disputes that have little or no connection to the U.S. and that are more appropriately addressed in connection with proceedings in other nations.

WLF and AEF are filing this brief with the consent of all parties.

STATEMENT OF THE CASE

This case arises from claims by Appellants, residents of Gaza, that they and/or family members were injured/killed during a military operation carried out by the Israeli government in Gaza. The operation was an attack on a leader of the

Hamas terrorist organization, Saleh Mustafa Shehadeh, who – in violation of the law of war – was conducting operations from an area of Gaza City that was heavily populated with civilians.[1] The Israeli operation achieved its objective: Shehadeh was killed by a bomb dropped on the building in which he was staying. But, Appellants allege, the bomb also killed or wounded a number of civilians, including Appellants and/or their family members.

At the time of the 2002 bombing (and from 2000 to 2005), Appellee Avraham Dichter headed the Israeli Security Agency (ISA), which (Appellants allege) played a role in planning the military operation.[2] The bombing itself was carried out by the Israel Defense Force (IDF).

Appellants filed suit against Dichter under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 *note*, and the ATS, alleging the following acts: (1) war crimes; (2) crimes against humanity; (3) cruel, inhuman, or degrading treatment or punishment; (4) extrajudicial killings; (5) wrongful death; (6) negligence; (7) public nuisance; (8) battery; (9) intentional infliction of emotional distress; and (10) negligent infliction of emotional distress. Appellants allege that, in addition

---

[1] In the past decade alone, thousands of Israeli citizens have been killed or wounded as a result of terrorist attacks carried out within Israel by Hamas.

[2] Dichter now serves in the cabinet of the Israeli government as Minister for Public Security.

to planning and authorizing the 2002 bombing at issue here, Dichter was responsible for developing Israel's policy of "targeted killings" of anti-Israeli terrorists. Complaint ¶¶ 19, 63. Indeed, Appellants do not contest that Dichter's actions giving rise to this suit were actions carried out on behalf of the Israeli government and that Israel continues to stand behind those actions as government-sanctioned.[3]

In November 2006, the United States filed a Statement of Interest (SOI) with the district court, urging that the complaint be dismissed. The SOI declared that failure to dismiss the complaint would "seriously harm" United States interests in a variety of ways. The SOI said that failure to grant immunity to foreign officials such as Dichter would "strain[] diplomatic relations and possibly lead[] foreign nations to refuse to recognize the same immunity for American officials." SOI at 2. It would "threaten to enmesh the courts in policing armed conflicts across the globe – a charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs." *Id*. at 3. It would cause "serious harm"

---

[3] Appellants' basis for asserting that the suit is not subject to dismissal on sovereign immunity grounds is not that it contests that Israel ratified Dichter's conduct, but that a nation may not extend sovereign immunity to officials whose actions are alleged to constitute severe violations of customary international law – such actions (they assert) should be deemed as a matter of international law to have been outside the scope of those officials' authority. Appellants Br. 22-31.

for the United States by "bring[ing] U.S. sovereign immunity law into conflict with customary international law," which would recognize immunity for individual foreign officials under these circumstances, *id.* at 19, and thereby "inviting reciprocation in foreign jurisdictions." *Id.* at 22.

The SOI further stated that recognizing Appellants' proposed causes of action would interfere with the ability of the Executive "to speak for the government with one voice – or, for that matter, to keep silent," in response to high-profile military actions that result in civilian casualties. *Id.* at 44. It would "subject the foreign states and officials involved to the burdens and embarrassments of litigation, leading to strains in U.S. relations." *Id.* at 45; *see also id.* at 51. It could lead to judicial pronouncements regarding "what constitutes a disproportionate use of military force" that "could cause embarrassment to the Executive not only to the extent that those pronouncements might conflict with positions taken by the Executive in its conduct of foreign affairs, but also to the extent that they might conflict with actions taken by the Executive in its conduct of military operations." *Id.* at 45 n.30.[4]

---

[4] The SOI declined to address explicitly whether the political question doctrine provided a separate, additional reason to dismiss the suit. The SOI nonetheless stated that the concerns outlined above – concerns "over judicial competence and interference with the Executive's conduct of foreign affairs – sound as well under the political question doctrine, . . .; and if plaintiffs had a

In May 2007, the district court issued a Memorandum and Order, granting Dichter's motion to dismiss. Special Appendix (SA) 1-20. The court held that Dichter, as an official of the Israeli government being sued for actions taken in his official capacity, was entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.* SA at 5-15. The court further held that dismissal was mandated under the political question doctrine. *Id.* at 15-19. The court held that adjudicating this matter over the objection of the Executive Branch would constitute "a lack of respect for the political branches." *Id.* at 16. The court said that it could not "ignore the potential impact of this litigation on the Middle East's delicate diplomacy. . . . Consideration of the case against this unique backdrop would impede the Executive's diplomatic efforts and, particularly in light of the SOI, would cause the sort of intragovernmental dissonance and embarrassment that gives rise to a political question." *Id.* at 17. The court distinguished each of the decisions upon which Appellants relied, noting that in none of them had the United States requested dismissal. *Id*. at 18.[5]

---

valid cause of action by which to bring their claims, there would be a serious issue whether this *particular* case should be dismissed on political question grounds, as Dichter argues." *Id.* at 51 n.36.

[5] In light of its dismissal on those two grounds, the court declined to rule on a third ground for dismissal raised by Dichter: that suit was barred under the act of state doctrine. *Id.* at 19 n.5.

SUMMARY OF ARGUMENT

The federal courts have long recognized that even when a case falls within their subject matter jurisdiction, the case may not be properly justiciable – and thus is subject to dismissal – because it raises questions of a political nature that more properly are resolved by one of the other branches of government. Cases are particularly likely to be deemed to raise nonjusticiable "political questions" when they involve foreign policy issues. *Whiteman v. Dorotheum GMBH & Co. KG,* 431 F.3d 57, 69 (2d Cir. 2005). The district court properly invoked the political question doctrine to hold that this case raises nonjusticiable questions. As the court explained, any effort to adjudicate Appellants' claims would require a court to closely scrutinize and pass judgment on the propriety of the military policy of Israel, a close ally of the United States. SA at 15-19. The Executive Branch has determined that any such scrutiny would strain diplomatic relations with that close ally and would intrude on the Executive Branch's authority to articulate the United States's response to Israeli military policy. Congress has never adopted any legislation purporting to grant the courts authority to delve into such issues. Under those circumstances, this case satisfies at least three of the six independent tests employed by the Supreme Court in determining whether the political question doctrine renders a case nonjusticiable: (1) there is a textually demonstrable

constitutional commitment of the issues raised to the political branches of government, and there is no evidence that Congress has sought to alter that commitment through legislation; (2) it would be impossible for the courts to resolve the issues raised by Appellants without expressing lack of respect to the Executive Branch; and (3) any adjudication of the case could cause considerable embarrassment to the Executive Branch by pronouncing a United States position on Israeli military policy that is at odds with the position announced by the Executive Branch.

The United States has asked that this case be dismissed, in large measure for the reasons articulated in the preceding paragraph. That request is entitled to considerable deference; indeed, prior decisions of this Court suggest that courts should start with the presumption that the views of the Executive Branch are to be followed in the absence of a strong showing by the plaintiff that deference is unwarranted. Appellants have made no such showing here. They merely cite the truism that not every case touching on foreign relations is nonjusticiable, without making any real effort to articulate a rationale for rejecting the Executive Branch's explanation regarding why adjudication of these claims would seriously harm United States interests. Indeed, Appellants have cited not a single case in which a federal court refused to dismiss a case raising foreign policy issues despite similar

assertions of harm by the Executive Branch.

There is no merit to Appellants' contention that the concerns raised by the Executive Branch are too generic in nature to justify invocation of the political question doctrine. The district court well understood that determining whether a case raises nonjusticiable political questions requires a careful focus on the specific facts of that case and cannot be determined simply by declaring that the case falls within a class of cases that is entirely nonjusticiable. That is why the district court engaged in just such a case-specific analysis of Appellants' claims before determining that they were nonjusticiable. The views expressed by the Executive Branch in the SOI amply supported that case-specific determination. Moreover, it is of no moment that the SOI did not express a view with regard to whether Appellants' claims were nonjusticiable political questions; it is the Executive Branch's conclusions with respect to the foreign policy effects of adjudicating Appellants' claims – not its conclusions of law – that are entitled to particular deference.

Finally, Appellants are wrong to suggest that the district court erred in reaching the political question issue even though it determined that the FSIA deprived it of jurisdiction to hear claims against Dichter. To the contrary, the political question issue is a threshold, non-merits issue that a federal court may

invoke to dismiss a case even without first determining whether the FSIA deprives it of subject matter jurisdiction.

ARGUMENT

I. APPELLANTS' CLAIMS WERE PROPERLY DISMISSED UNDER THE POLITICAL QUESTION DOCTRINE

A civil lawsuit in a United States court involving officials of a foreign nation may adversely affect relations between the United States and that foreign nation. Accordingly, such cases raises sensitive separation of powers concerns because the Constitution assigns the political branches of government primary authority over the foreign policy and foreign relations of the United States. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (Matters relating to "the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). In recognition of those separation-of-power concerns, courts often conclude that lawsuits raise nonjusticiable political questions when consideration or resolution of those questions could adversely affect U.S. foreign policy. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Baker identified six factors that can render a case nonjusticiable because it raises a political question:

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

Baker, 369 U.S. at 217. If any "one of these formulations is inextricable from the case," the Court must dismiss the case as nonjusticiable. *Id.* At least three of the six *Baker* factors (the first, fourth, and sixth) are implicated by this lawsuit.

A. The Constitution Commits Resolution of the Issues Raised by This Suit to the Political Branches of Government

As a long line of cases from this Court and the Supreme Court (including *Agee* and *Harisiades*) have understood, Articles I and II of the U.S. Constitution vest virtually all authority over the conduct of foreign policy in the Executive and Legislative Branches, and provide for very limited judicial review of the exercise of that authority. This suit is in considerable tension with that policy, because it asks the Court to decide issues whose consideration and resolution are likely (for reasons set forth in the SOI) to have significant impact on U.S. relations with other

nations.

Moreover, the Constitution assigns to Congress – not to the judiciary – authority to define and punish offenses against customary international law (or, as it was known in the 18th century, the law of nations). *See* U.S. Constitution, Art. I, § 8, cl. 11 (Congress shall have power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."). Accordingly, the first *Baker* factor suggests that Appellants' claims are nonjusticiable.

Appellants respond that Congress, through its enactment of the ATS, assigned to the federal courts responsibility for defining and policing compliance with customary international law. Appellants Br. 34 (citing *Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir. 1995), for the proposition that the first *Baker* factor is inapplicable to suits raising customary international law claims because "ATS suits [are] committed to the judiciary."). That argument is based on an outdated understanding of the ATS. As this Court recently recognized, the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), rejected *Kadic*'s understanding regarding the role of federal courts in defining and enforcing customary international law. *See Khulumani v. Barclay National Bank Ltd.*, ___ F. 3d ___, 2007 U.S. App. LEXIS 24370, at *24 (2d Cir. Oct. 12, 2007) (Katzmann,

J. concurring). *Kadic* had held that the ATS not only established federal court jurisdiction over tort suits by aliens alleging violations of the law of nations, but also created a cause of action on behalf of any alien alleging injury due to such a violation. *Id.* (citing *Kadic*, 70 F.3d at 246). As *Khulumani* explained, "The Supreme Court [in *Sosa*] flatly rejected this notion." *Id*. Rather, *Sosa* held, the ATS is purely a jurisdictional statute and creates no rights of action for alleged violations of the law of nations. *Id.*

Sosa held that when Congress adopted the ATS in 1789, it contemplated that the statute authorized only three very limited causes of action recognized by federal common law: suits alleging violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa*, 542 U.S. at 715, 720, 724. While *Sosa* held open the possibility that there may exist additional federal common law rights of action over which courts may exercise ATS jurisdiction, *id.* at 731 (Court is reluctant to "shut the door to the law of nations entirely"), it held that federal courts should exercise "great caution" in recognizing *any* new private rights of action under the ATS. *Id.* at 728. Among the reasons cited by *Sosa* for exercising caution were (1) a decision to create a private cause of action is one better left to legislative judgment; (2) creation of ATS causes of action can have significant collateral consequences on U.S. foreign relations, a subject normally left to the

discretion of the elected branches of government; and (3) the federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 725-28. In other words, *Sosa* rejects Appellants' assertion that the ATS assigns the federal courts responsibility for defining and policing compliance with customary international law. Accordingly, the existence of the ATS does not provide *any* support for Appellants' efforts to overcome the conclusion that the issues raised by this case are nonjusticiable because the Constitution commits the resolution of such foreign policy issues to the political branches. Appellants contend that Dichter, acting on behalf of Israel, authorized disproportionate use of force in the attack on Shehadeh – they contend that a bomb attack in a civilian neighborhood carried an inexcusable risk of civilian casualties. But Appellants point to no case law suggesting that it is within the province of the courts to establish standards for what constitutes a disproportionate use of force; such issues historically have been deemed within the sole province of the elected branches. *See, e.g., Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (suit challenging tactics employed by anti-government military forces in Nicaragua raised nonjusticiable political questions, despite absence of objection to the lawsuit

by either the U.S. or Nicaragua government).[6]

Nor can adoption of the TVPA be deemed a congressional invitation for courts to resolve issues relating to the conduct of military operations by sovereign nations. The TVPA provides a right of action against one who, under color of foreign law, subjects an individual to "extrajudicial killing." 28 U.S.C. § 1350 *note*. There is absolutely no indication in the TVPA or its legislative history that Congress intended thereby to permit courts to examine the legality of military operations carried out by sovereign nations. Such an extravagant expansion of judicial authority would, for all the reasons set forth in the SOI, undermine Executive Branch authority over foreign policy issues; Congress should not be deemed to have engaged in such an extraordinary exercise in the absence of any indication that it harbored such an intent.[7]

---

[6] The absence of standards for determining what constitutes a disproportionate use of force suggests that Appellants' claims should be deemed nonjusticiable under the second *Baker* factor as well: "a lack of judicially discoverable and manageable standards for resolving" the issues raised. *Baker*, 369 U.S. at 217.

[7] Appellants' assertion that the ATS and/or TVPA authorize suit for "extrajudicial killings" *whenever* military operations extend into areas populated by civilians is frivolous. *See* Appellants Br. 41. Because Hamas does not maintain a regular army in accordance with the laws of war, its leaders are located exclusively within civilian areas. Appellants' assertion would disable Israel and the United States from carrying out effective anti-terrorism measures. Nor can there be any dispute that Hamas is, in fact, a terrorist organization. The

Appellants fault the district court for basing its nonjusticiability determination in part on the "volatile" and "politically charged" nature of the Middle East conflict. Appellants Br. 47-49. Appellants' objection is without merit. The extreme sensitivity of Middle East foreign policy issues serves to highlight the need for strict adherence to the well-established rule of judicial non-involvement in foreign affairs. In outlining the scope of federal court ATS jurisdiction, *Sosa* strongly cautioned courts to provide "case-specific deference to the political branches" in cases involving sensitive foreign policy issues, by applying the political question doctrine to bar adjudication of claims whose resolution might harm U.S. foreign policy interests. *Sosa*, 542 U.S. at 733 n.21. *See also, Whiteman*, 431 F.3d at 68-69. Accordingly, the district court acted appropriately in taking the volatile nature of Middle East politics into account in making its case-specific political question determination.

U.S. Department of State includes Hamas on its official list of Foreign Terrorist Organizations. *See* U.S. Dept. of State, Office of Counterterrorism, *Foreign Terrorist Organizations*, *available at* www.state.gov/s/ct/rls/fs/37191.htm. Congress has directed the State Department to maintain such a list as a means of curtailing support for terrorist activities by groups that "threaten[] the security of United States nationals or the national security of the United States." *See* 8 U.S.C. § 1189. The summary execution of captured terrorist leaders arguably violates the TVPA; conducting military operations against the leaders of an organization engaged in terrorist attacks upon Israel clearly does not.

B. The Court Cannot Resolve Appellants' Claims Without Expressing a Lack of Respect for the Executive Branch

Appellants' claims also qualify as nonjusticiable under the fourth *Baker* factor: it would be impossible for this Court to resolve those claims without expressing a lack of respect for the Executive Branch.

As the United States explained in its SOI, judicial recognition of a cause of action based on disproportional use of military force would have "wholly untenable" practical consequences. SOI at 3. The United States explained that the norm cited by Appellants – proportionality in the use of military force – "however well accepted, is subjective, open-ended, and susceptible to considerable controversy in its application." *Id.* Creating such a cause of action "would threaten to enmesh the courts in policing armed conflicts across the globe – a charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs." *Id.* When, as here, the Executive Branch has determined the appropriate United States response to the use of military force (a response that included a statement that Israel's use of force was excessive but did not suggest that Israel had violated international law), respect for the Executive Branch's constitutional authority and its superior competence in foreign policy matters requires courts to refrain from conducting an independent evaluation of that use of

military force.

Moreover, as the United States has explained, failing to respect the Executive Branch's determinations in this area could result in retaliation by foreign courts against the United States and its officials. SOI at 2, 22. Appellants cite this Court's *Permanent Mission* decision for the proposition that the Court has rejected Executive Branch concern over the possibility of foreign-court retaliation as a reason for invoking the political question doctrine. Appellants Br. 42 n.9 (citing *City of New York v. Permanent Mission of India to the UN*, 446 F.3d 365, 377 n.17 (2d Cir. 2006), *aff'd and remanded*, 127 S. Ct. 2352 (2007)). *Permanent Mission* held no such thing; indeed, the issue never arose in that case. To the contrary, avoiding harm to American foreign policy interests has always been a principal consideration in determining the applicability of the political question doctrine. *See, e.g., Sosa,* 542 U.S. at 733 n.21. Retaliation against U.S. officials by foreign courts certainly qualifies as one such harm.

The danger that foreign courts will consider international law claims against U.S. officials is far from hypothetical. *Amici* note that the U.S. government has taken exception to efforts by prosecutors in Germany and elsewhere to investigate possible criminal charges against former Secretary of Defense Donald Rumsfeld and other senior U.S. officials for alleged crimes based on the conduct of U.S.

foreign policy. It would be difficult for the U.S. government to maintain that opposition while simultaneously tolerating ATS and TVPA suits in U.S. courts against foreign government officials, particularly for conduct lacking any connection with the United States.

Indeed, under Appellants' restrictive view of the political question doctrine, it would not bar suits against U.S. officials in *U.S. courts* based on the ATS. Adjudication of such suits would, of course, constitute the ultimate lack of respect for the Executive Branch's conduct of foreign policy. *See, e.g., Doe v. Israel*, 400 F. Supp. 2d 86, 101-105 (D.D.C. 2005). But under Appellants' view of the political question doctrine, it would be perfectly acceptable for U.S. courts to hear ATS claims challenging tactics employed by U.S. officials in fighting the war in Iraq, or challenging such decisions as the use of atomic weapons against Japanese cities during World War II.

C. Any Adjudication of This Case Could Cause Considerable Embarrassment to the United States Government

Appellants' claims also qualify as nonjusticiable under the sixth *Baker* factor: adjudicating such claims is a potential source of embarrassment to the United States government because doing so could result in multifarious pronouncements by different branches of the government on a single question. As

the district court correctly found, adjudicating Appellants' claims against the "unique backdrop" of delicate Middle East diplomacy "would cause the sort of intragovernmental dissonance and embarrassment that gives rise to a political question." SA at 17.

Israel is a close ally of the United States. The State Department has determined that adjudicating Appellants' claims – and thereby risking creation of dissonant U.S. responses to the military action at issue in this case – could impose considerable strain on diplomatic relations between Israel and the United States. SOI at 2, 45, 51. Appellants have not disputed that determination; indeed, they seem to relish the creation of such strains. But the Executive Branch has determined that maintaining a close relationship with the Israeli government is an important U.S. foreign policy objective, and the Supreme Court has made clear that the political question doctrine counsels against adjudicating claims that risk creation of dissonant U.S. responses to a foreign policy issue and thereby risk straining relations with a U.S. ally. *Baker*, 369 U.S. at 217.

Adjudicating Appellants' claims risks straining U.S. relations with other countries as well. The Executive Branch has long taken the position – a position shared by most foreign governments – that customary international law provides civil immunity to foreign officials for their official acts. *See* SOI 19-22. Indeed, a

principal reason that Congress adopted the FSIA was to bring U.S. foreign immunity law into line with prevailing international practice. *Id*. at 19. Denying civil immunity to Dichter – a position at odds with the State Department's position – would take the United States out of compliance with customary international law and potentially create friction with allies who would begin to doubt whether their officials would be afforded immunity under similar circumstances. That potential friction provides an additional reason to conclude that Appellants' claims are nonjusticiable.

II. THE EXECUTIVE BRANCH'S OPINIONS REGARDING THE ADVERSE EFFECTS OF ADJUDICATING APPELLANTS' CLAIMS ARE ENTITLED TO CONSIDERABLE DEFERENCE

Appellants assert that the district court erred by deferring to the views expressed by the United States in its SOI. Appellants Br. 42-45. By so asserting, Appellants have misconstrued the nature of the deference owed the Executive Branch.

It is not the views of the United States on an issue of statutory construction or constitutional interpretation that are implicated by the political question issues raised here. While such views often are not accorded any special deference by the courts, the views of the United States that have a bearing on political question issues are views regarding the practical implications of adjudicating claims

touching on foreign policy issues – and such views are entitled to significant deference. As the Supreme Court explained in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the proper interpretation of the FSIA is "a pure question of statutory construction" that is "well within the province of the judiciary." 541 U.S. at 701. Thus, while "the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." *Id.* But the Court explained that considerable deference *would* be due the State Department's views regarding the practical foreign policy implications of adjudicating a particular set of claims: "Should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 702.

The views of the United States expressed in the SOI are the considered judgment of the Executive Branch on the practical effects of adjudicating Appellants' claims. Those views include determinations that allowing *this case* to go forward: would "strain diplomatic relations and possibly lead[] foreign nations to refuse to recognize the same immunity for American officials"; would "threaten to enmesh the courts in policing armed conflicts around the globe" and thereby "intrude on the Executive's control over foreign affairs"; would cause "serious

harm" for the United States by "bring[ing] U.S. sovereign immunity law into conflict with customary international law"; would interfere with the ability of the Executive "to speak for the government with one voice – or, for that matter, to keep silent," in response to high-profile military actions that result in civilian casualties; and could lead to judicial pronouncements regarding "what constitutes a disproportionate use of military force" that "could cause embarrassment to the Executive not only to the extent that those pronouncements might conflict with positions taken by the Executive in its conduct of foreign affairs, but also to the extent that they might conflict with actions taken by the Executive in its conduct of military operations." SOI at 2, 3, 19, 44, and 45 & n.30. Appellants have not suggested any reason why the Court should not provide substantial deference to all those State Department assessments regarding the likely impact of this suit on U.S. foreign policy – assessments which all strongly suggest that Appellants' claims are nonjusticiable political questions.

Appellants are correct, of course, that the courts are not absolutely *required* to accept the Executive Branch's assessments. *See, e.g., Whiteman,* 431 F.3d at 69 ("the stated foreign policy interests of the United States" were entitled to deference under the circumstances of that particular case, but court declines to determine whether deference is always appropriate). But the Court has made clear that in

general, deference is appropriate in the absence of a substantial reason not to grant deference. *See, e.g., Matimak Trading Co. v. Khalily*, 118 F.3d 76, 82 (2d Cir. 1997) (court defers to State Department determination that Hong Kong should not be deemed a *de facto* foreign state, after observing that "no reason is apparent, and none is suggested, for refusing to defer to the State Department in this case."). In the absence of any coherent explanation from Appellants regarding why the Court should reject the State Department's assessment that adjudicating their claims would cause "serious harm" to U.S. interests, the Court should defer to that assessment.

Appellants' only response is that the concerns raised by the SOI are somehow mere "generic concerns" that do not apply specifically to this case. Appellants Br. 40, 41. That contention is demonstrably incorrect. The SOI does not speak of harms that might arise if *other* cases are adjudicated or if the federal courts permit adjudication of some general class of foreign policy-related claims. Rather, the SOI expresses concern that *this particular lawsuit* would create the harms about which the State Department is concerned. *See, e.g.*, SOI at 2 ("*any* refusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests") (emphasis added). In other words, the State Department claims that a denial of immunity *in this case alone* could cause the

feared serious harms. The entire SOI focuses on the specific facts of this case and the specific claims being asserted by Appellants. Thus, the SOI does not simply provide policy reasons regarding why the courts should not recognize any new causes of action under the ATS; instead, it focuses on the specific causes of actions asserted by Appellants and explains why recognition of those causes of action (*e.g.,* a cause of action based on disproportionate use of force) are likely to have adverse effects on U.S. foreign policy interests. *See, e.g.,* SOI at 39-42.

Moreover, the concerns raised by the Executive branch can only be deemed substantial. Appellants' claims do not merely challenge one isolated incident in which civilians were killed. Limited challenges of that nature, because they involve isolated events that are unlikely to be repeated, might create less cause for concern. But this suit in essence challenges the legitimacy of Israel's entire anti-terrorism program, which has involved numerous targeted killings of Hamas terrorists living in heavily populated urban areas. Adjudication of such broad-scale challenges are bound to have significant foreign-policy repercussions, regardless of how they are ultimately decided. Friction with a major U.S. ally is likely to be greatest when, as here, the ally perceives the lawsuit in question to represent a frontal assault on its self-defense measures.

Precisely because adjudication of such broad-scale challenges to a foreign

nation's military policy are likely to lead to significant friction between that nation and the United States, the district court acted properly in taking into account Israel's objections to the lawsuit. Appellants object that Israel's concerns about being sued are irrelevant when determining whether the suit is nonjusticiable; they assert that a foreign nation's policy interests "are irrelevant to the separation of powers concerns underlying the political question doctrine." Appellants Br. 44. While technically correct, that assertion overlooks that when a foreign nation, particularly a close American ally such as Israel, expresses its policy interests to the United States in strong terms, the U.S. State Department has good reason to listen closely and to design a response that best serves American interests. Thus, Israel's strong objections to this lawsuit increase the credibility of the State Department's assertion that adjudication of Appellants' claims will seriously harm U.S. foreign policy interests. In passing on the credibility of that assertion, the district court acted totally appropriately in taking into account the views of the Israeli government.

Finally, although the SOI does not take a position on whether this case raises nonjusticiable political questions, that omission has little relevance to the ultimate disposition of that question of law. Indeed, as noted by the Supreme Court in *Altmann*, the courts are quite capable of deciding on their own pure questions of

law, and thus the State Department's views on such legal issues as whether this case raises nonjusticiable political questions are entitled to little, if any, judicial deference. *Altmann*, 541 U.S. at 701. But even though the SOI did not take a position on the ultimate legal issue, it did include numerous conclusions regarding the likely foreign policy effects of adjudicating Appellants' claims. Those conclusions, which are highly relevant to the determination of the political question issue, are entitled to particular deference. *Id.* at 702.

III. THE DISTRICT COURT ACTED PROPERLY IN REACHING THE POLITICAL QUESTION ISSUE

The district court initially determined that it lacked subject matter jurisdiction to hear this case because Dichter is entitled to immunity under the FSIA. SA at 5-15. The court then determined, as an alternative holding, that dismissal was also mandated under the political question doctrine. *Id.* at 15-19. Appellants contend that the district court erred in reaching the political question issue; they contend that the district court's initial ruling on the FSIA deprived it of jurisdiction to consider any other issues. Appellants Br. 51.

Appellants' argument is without merit. The district court acted within its jurisdiction when it ruled on the political question issue at the same time that it ruled on the FSIA issue. As this Court explained in *Whiteman*, district courts are

not bound to decide FSIA jurisdictional issues in advance of political question issues:

> An "alternative" holding urged by the United States is that subject- matter jurisdiction to consider plaintiffs' claims does not lie under the FSIA. . . . Although this argument is both complex and important, it need not be the first in our order of consideration. We have previously held that a federal court may consider "threshold" non-merits grounds for dismissing a claim – including, for example, deference to the foreign affairs powers of the Executive pursuant to the "political question" doctrine – before determining whether it has subject matter jurisdiction to consider that claim. *See Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994).

Whiteman, 431 U.S. at 73 n.18. The Court ultimately invoked the political question doctrine to order dismissal of the plaintiffs' claims, and at the same time reserved decision on the FSIA immunity issue. *Id.*

Accordingly, the district court was entitled to address the FSIA and political question issues in any order it deemed appropriate, and to base dismissal of the complaint on either or both issue. There is no jurisdictional basis for vacating the district court's holding that this case raises nonjusticiable political questions, and this Court possesses jurisdiction to address that issue regardless how it resolves the FSIA immunity issue.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully requests that the Court affirm the decision of the district court.

Respectfully submitted,

_____
Daniel J. Popeo

_____
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amici curiae*

Dated: November 19, 2007

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,469, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

_____
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2007, I deposited two copies of the *amicus curiae* brief of WLF and AEF in the U.S. Mail, First Class postage prepaid, addressed to the following:

Maria C. LaHood
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
mlahood@ccr-ny.org

Robert N. Weiner
Arnold & Porter, LLP
555 Twelfth Street, N.W.
Washington, DC 20005-1006
Robert_Weiner@aporter.com

Kent A. Yalowitz
Arnold & Porter, LLP
399 Park Avenue
New York, NY 10022
Kent_Yalowitz@aporter.com

Serrin Turner, Ass't U.S. Attorney
Office of the U.S. Attorney
86 Chambers St.
New York, NY 10007

I further certify that on November 19, 2007 I sent an electronic copy of WLF's brief to each of the email addresses listed above.

_____
Richard A. Samp