No. 04-2079

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EFRAT UNGAR, *et al.,*

Plaintiffs-Appellees,

v.

THE PALESTINE LIBERATION ORGANIZATION, *et al.,*

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Rhode Island

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES SUPPORTING AFFIRMANCE

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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 parent corporations or stock owned by any publicly held company.

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The interests of the *amici curiae* are set forth more fully in the accompanying motion for leave to file this brief. The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in Massachusetts. WLF devotes a substantial portion of its resources to defending national security. To that end, WLF has appeared in numerous courts to support the right of American victims of international terrorism to seek compensation by filing damage suits against the perpetrators. *See, e.g., Acree v. Republic of Iraq,* 370 F.3d 41 (D.C. Cir. 2004); *Jacobsen v. Oliver,* No. 01-1810 (D.D.C., dec. pending).

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 the Supreme Court and this Court on a number of occasions.

STATEMENT OF THE CASE

This case arises in the aftermath of the brutal slaying of Yaron Ungar (an American citizen) and his wife Efrat on June 9, 1996. They were traveling by car following a wedding in Israel when gunmen affiliated with the terrorist group

Hamas opened fire on the car. Both Yaron and Efrat were killed in the attack; their infant son Yishai was in the car but was unhurt. Several members of Hamas were eventually convicted in Israeli courts on charges related to the murders.

In March 2000, the Ungars' estates as well as several of their surviving relatives (including their two children) filed a suit in U.S. District Court for the District of Rhode Island under the Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. §§ 2333, *et seq.*[1] Named as defendants in the amended complaint were Hamas, several individual members of Hamas, the Palestinian Authority ("PA"), and the Palestine Liberation Organization ("PLO"). The amended complaint alleged, *inter alia,* that the PA and PLO "praised, advocated, encouraged, solicited, and incited" the terrorist acts of Hamas and its members, including the murders of the Ungars. Amended Complaint ¶ 47.

In November 2002, the district court denied the PA's and the PLO's Fed.R.Civ.P. 12(b)(6) motion to dismiss the complaint; the motion had sought dismissal on several grounds. *Estates of Ungar v. Palestinian Authority*, 228 F. Supp. 2d 40 (D.R.I. 2002) ("*Ungar II*"). The district court held, *inter alia*, that

[1] The ATA creates a cause of action for damages for any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism." 18 U.S.C. § 2333(a).

neither the PA nor the PLO was a "foreign state" entitled to sovereign immunity from a suit under the ATA. *Id.* at 48-49.[2] In May 2003, this Court dismissed an interlocutory appeal from that denial. The PA and PLO nonetheless refused to provide Appellees (hereinafter, "the Ungars") with requested discovery, asserting that the were entitled to sovereign immunity and thus should not be required to respond to discovery requests.

The PA and PLO thereafter filed a Fed.R.Civ.P. 12(b)(1) motion to dismiss the complaint, asserting that -- in light of their status as the embodiment of a foreign state -- the district court lacked subject matter jurisdiction over the amended complaint. In April 2004, the district court denied the Rule 12(b)(1) motion. *Estates of Ungar v. Palestinian Authority,* 315 F. Supp. 2d 164 (D.R.I. 2004) ("*Ungar IV*"). The court stated that a defendant's claim to be a "foreign state" within the meaning of § 2337(2) (and thus exempt from suit under the ATA) should be evaluated under the criteria established by § 201 of the Restatement Third on Foreign Relations Law for judging whether an entity is a "state."

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[2] The cause of action created by the ATA does not extend to suits against a foreign sovereign. *See* 18 U.S.C. § 2337(2) ("No action shall be maintained under section 2333 of this title against . . . (2) a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.")

Id. at 176-77. The court determined that the PA and PLO met none of those four criteria[3] and thus did not qualify as a "state" exempt from suits under the ATA. *Id.* at 177-86. The court held alternatively that the PA and PLO were not entitled to sovereign immunity because the U.S. government had neither recognized nor otherwise treated Palestine as a sovereign state. *Id.* at 186-87.

The PA and PLO continued to resist the Ungars' efforts to move forward with discovery. Based on that resistance, the district court in July 2004 entered a default judgment against the PA and PLO, awarding damages against them in the amount of $116 million. In this appeal, the PA and PLO contend: (1) they are entitled to sovereign immunity and thus not subject to suit under the ATA; (2) the case should have been dismissed because it raises nonjusticiable political questions; and (3) the district court should not in any event have entered a default judgment against them. *Amici* address only the first of those three issues.

SUMMARY OF ARGUMENT

International law does not impose any limitations upon the jurisdiction of the federal courts over foreign defendants, regardless whether those defendants

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[3] The four criteria established by § 201 are whether an entity possesses: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.

claim to be sovereign states. Rather, to the extent that the federal courts have refrained from asserting jurisdiction over certain categories of foreign defendants, they have done so *voluntarily* for the sole purpose of furthering the interests of the United States. For example, the courts have recognized foreign sovereigns' immunity from suit in some circumstances, but only as a matter of grace and only because such recognition is thought to further the United States's ability to participate in mutually beneficial international exchanges.

Accordingly, it makes little sense to assert (as do the PA and PLO) that their claim to sovereign immunity should be adjudicated based on international law standards, such as those articulated in § 201 of the Restatement Third on Foreign Relations Law. Nothing in the text or history of the ATA or the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, indicates that Congress intended that the PA's and PLO's immunity claims should be judged under international law standards. Rather, that issue ought to be decided based on criteria that this nation has applied for 200 years in sovereign immunity cases: whether it is in the U.S. national interest to recognize immunity and, in particular, whether the elected branches of government have given any indication that they believe that a grant of immunity would serve U.S. foreign policy

interests in a given case.

Applying those criteria, there is little doubt that the PA and PLO are not entitled to sovereign immunity in this case, and thus are subject to suit under the ATA. The U.S. government has never recognized the existence of a sovereign Palestine. In the absence of such recognition, there can be no basis for the courts to grant sovereign immunity to groups (including the PA and the PLO) that claim to be agents of a sovereign Palestine. Any such grant would place the courts at odds with our elected branches of government, the branches to whom the Constitution assigns responsibility for the conduct of foreign affairs. While there may be a small number of cases in which a grant of sovereign immunity is appropriate even when the U.S. government lacks formal relations with a foreign entity (e.g., when the U.S. government recognizes such a foreign entity as the *de facto* ruler of some defined territory), this is not such a case. Indeed, the U.S. is bound under an existing international agreement *not* to recognize the sovereignty of an independent Palestine.

Alternatively, if the Court decides to seek guidance from the Restatement regarding the ATA's definition of a foreign "state," the district court was surely correct in ruling that the PA and PLO fail to meet that definition. The court

below and the district court in *Knox v. Palestine Liberation Organization,* 306 F. Supp. 2d 424 (2004), both cogently explained why "Palestine" cannot be deemed to possess any of the four attributes cited by the Restatement: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.

ARGUMENT

I. NEITHER THE PA NOR THE PLO IS THE TYPE OF ENTITY THAT CONGRESS HAD IN MIND WHEN IT EXEMPTED FOREIGN STATES FROM SUIT UNDER THE ATA

When Congress adopted the ATA in 1992, it expressed a strong national policy that American victims of international terrorism are entitled to seek compensation for their injuries in federal court. One exception to that policy is set forth in 18 U.S.C. § 2337(2): an ATA action may not be maintained against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or agency thereof acting within his or her official capacity or under color of legal authority." Accordingly, the PA's and PLO's immunity claims hinge on a finding that they are "agenc[ies]" of the "foreign state" of Palestine.

The ATA does not provide a definition of what is meant by the term "foreign state" in § 2337(2). Nor is there an all-inclusive definition of that term

in the most closely analogous federal statute, the FSIA.[4] Rather, the FSIA definition of "foreign state" merely provides examples of entities intended to be included within the term. *See* 28 U.S.C. § 1603(a) (for purposes of the FSIA, a "foreign state * * * includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.").

Nonetheless, the 200-year history of the recognition of sovereign immunity by the federal government provides a clear indication of the types of entities that Congress had in mind when it declared that "foreign states" would not, in most instances, be subject to suits in federal court. In particular, that history indicates that Congress did not intend to extend immunity from suit to any foreign entity not recognized by the Executive Branch as a sovereign state. Because the Executive Branch has not recognized the existence of a sovereign state of

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[4] The U.S. Supreme Court has declared that Congress intended the FSIA, adopted in 1976, to be "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). In light of that intent, and in light of the fact that both the FSIA and the ATA use the term "foreign state" in decreeing which foreign entities are not subject to suit in federal court, it is reasonable to assume that Congress intended to ascribe to the term "foreign state" the same meaning under the ATA as it had previously assigned that term under the FSIA. *See also Ungar IV,* 315 F. Supp. 2d at 175 ("The language and legislative history of Section 2337(2) of the ATA demonstrate that it is to be read and applied *in para materia* with the FSIA.").

Palestine, neither the PA nor the PLO is an agency of a "foreign state" within the meaning of § 2337(2), and thus neither is exempt from suit under the ATA.

A. Because the Doctrine of Sovereign Immunity Derives Solely from U.S. Law, Not International Law, It Makes Little Sense to Look to International Law Definitions of a "State" in Determining Whether a Foreign Entity Is Entitled to Sovereign Immunity from the Jurisdiction of American Courts

The PA and PLO ask this Court to look to § 201 of the Restatement Third of Foreign Relations Law for the definition of a "state" for purposes of the ATA. There is some precedent for that request: the Second Circuit in 1991 relied on § 201 in determining that the PLO was not a "state" entitled to sovereign immunity under the FSIA from admiralty-based claims arising from the 1985 murder of an American citizen by Palestinian terrorists aboard an Italian cruise liner. *Klinghoffer v. Achille Lauro Lines*, 937 F.2d 44, 47-48 (2d Cir. 1991).[5]

Amici respectfully suggest, however, that the Restatement is not a reliable guide to what Congress meant by a "foreign state" when granting sovereign immunity under the FSIA and the ATA. The Restatement's definition of a "state" derives from international law. In particular, the four criteria for statehood set forth in § 201 come from the 1933 Montevideo Convention on the

[5] The Second Circuit determined that the PLO met none of § 201's four criteria for statehood. *Id.*

Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934). *See Ungar IV,* 315 F. Supp. 2d at 177. Importantly, neither the Montevideo Convention nor § 201 of the Restatement include any suggestion that their definitions of a "state" should have any bearing on whether states should be entitled to immunity from suit in the courts of other states. Indeed, nowhere in the Restatement Third of Foreign Relations Law is there any indication that the question of sovereign immunity is a matter with which international law concerns itself.

Moreover, the Supreme Court has made clear that when American courts grant sovereign immunity to foreign entities, they do so as a matter of grace, not because they feel compelled to do so by international law. Throughout our history, the three branches of American government have recognized sovereign immunity claims if and only if they believe that doing so serves American interests. As Chief Justice Marshall explained in addressing a sovereign immunity claim raised by the French government:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed upon itself. * * * All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

The Schooner Exchange v. McFaddon, 7 Cranch (11 U.S.) 116, 136 (1812).

Marshall went on to conclude that the self-interest of the United States dictated that immunity be granted to sovereign states because doing so would encourage the free exchange of goods and ideas with other nations and because "mutual benefit is promoted by intercourse with each other, and by an exchange of those good offices which humanity dictates and its wants require." *Id.* *See also National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) ("the doctrine [of sovereign immunity] is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from the standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign."); *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2248 (2004) ("foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement").

For the past 50 years, the scope of sovereign immunity has been undergoing a gradual retraction. For example, the FSIA now denies sovereign immunity in cases in which "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Yet, the Supreme Court has never

indicated that Congress's power to restrict the scope of sovereign immunity is in any way limited by international law. The Court recently held, based on § 1605(a)(3), that the Republic of Austria was not entitled to sovereign immunity in a suit over title to paintings in Austria's possession; the Court so held without ever suggesting that Congress's power to strip Austria of sovereign immunity was limited by international law, or even that international law was relevant in construing congressional intent. *Altmann*, 124 S. Ct. 2240. Indeed, the Court denied Austria's immunity claim even though sovereign immunity would unquestionably have barred suit at the time Austria took possession of the paintings in the 1940s; the Court explicitly rejected the notion that foreign states have any cognizable reliance interest in past statements by the United States that certain types of actions were immune from suit in United States courts. *Id.* at 2252.

In light of that history, there is no reason to suppose that Congress, in adopting the FSIA and the ATA, intended the term "foreign state" to be defined by reference to international law definitions of the term "state." Rather, the most reasonable conclusion is that Congress intended to grant sovereign immunity to "foreign state[s]" by reference to the same domestic-law guideposts that guided American courts in the two centuries prior to adoption of the FSIA in 1976.

B. U.S. Sovereign Immunity Law Has Been Marked by a Gradual Retraction and a Grant of Considerable Deference to the Executive Branch in Determining When Sovereign Immunity Applies

The development of sovereign immunity doctrine in the centuries prior to enactment of the FSIA sheds considerable light on how Congress intended the term "foreign state" to be understood. As noted above, beginning with *The Schooner Exchange* in 1812, the Supreme Court determined that immunity from suit in United States courts should be granted to foreign sovereigns as a matter of grace and comity. Because that grant was grounded in the implied consent of the American government, the Supreme Court "consistently has deferred to the decisions of the political branches -- in particular, those of the Executive Branch -- on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of America*, 461 U.S. 480, 486 (1983).

Until 1952, the State Department ordinarily requested that the courts grant immunity in *all* actions against entities the Department deemed to be "friendly foreign sovereigns." *Id.* In that year, the State Department announced its adoption of the "restrictive" theory of foreign sovereign immunity. Under that theory, "immunity is confined to suits involving the foreign sovereign's public

acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487. The "restrictive" theory still required the State Department to weigh in on a case-by-case basis, to express its view on whether a particular suit involved a sovereign's "public acts." Congress adopted the FSIA in 1976 in large measure to free the State Department of that case-by-case obligation; "[f]or the most part, the [FSIA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Id.* at 488.[6]

The Supreme Court nonetheless has never interpreted the FSIA as an all-encompassing, final word from the political branches regarding when a grant of sovereign immunity is warranted. To the contrary, the Court has made clear its understanding that the State Department continues to be well within its rights in "filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity." *Altmann*, 124 S. Ct. at 2255. Indeed, the Court recognized that in light of the President's "'vast share

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[6] Adoption of the FSIA was also intended to eliminate "detailed historical inquir[ies]" of the type that courts had previously felt obliged to undertake to determine whether a grant of sovereign immunity was warranted. *Altmann,* 124 S. Ct. at 2254. *Amici* respectfully suggest that the Restatement approach advocated by the PA and the PLO would require this Court to undertake just such a detailed historical inquiry, an inquiry that would entail an examination of a century or more of disputed Middle East history.

of responsibility for the conduct of our foreign relations,'" the State Department's opinion regarding whether foreign sovereign immunity is applicable to a particular case "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy" -- even when the precise question is also addressed by the FSIA. *Id.* at 2255-56 (quoting *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 414 (2003)). Of course, when (as here) the FSIA does *not* speak with precision to the issue before the court, courts are *required* to show substantial deference to the views of the Executive Branch. *Verlinden*, 461 U.S. at 486.

That requirement of deference extends to the question of which foreign entities qualify as "foreign state[s]," a term for which neither the FSIA nor the ATA provides a precise definition. The principal means by which the Executive Branch identifies a foreign entity as a "foreign state" is by granting it diplomatic recognition. Indeed, since the earliest days of this country, the Supreme Court has looked to the issue of diplomatic recognition to determine whether a foreign entity qualifies as a "state" for purposes of federal law. For example, the principal question in *Gelston v. Hoyt*, 3 Wheat (16 U.S.) 246 (1818), was whether either the Petion government or the Christophe government on the island of St.

Domingo (now Haiti) qualified as a "state" for purposes of a federal admiralty forfeiture statute.[7] The Court ruled that neither government should be deemed a "state" within the meaning of the statute, because there was no evidence "that either of these governments was recognised by the government of the United States, or of France [which had been the last recognized sovereign of St. Domingo], 'as a foreign prince or state.'" *Id.* at 324. Justice Story explained:

> No doctrine is better established, than that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.

Id.

The PA and PLO assert that the U.S. Supreme Court has adopted a definition of "state" akin to Restatement § 201: "the essential elements of statehood, people, territory, government, have long been recognized by the U.S. Supreme Court." Appellants Br. 17. But neither of the cases they cite holds any such

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[7] The 1794 statute, ch. 50 § 3, inflicted forfeiture on ships "fitted out and armed, or attempted or procured to be fitted out and armed, with the intent to be employed 'in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince or state with whom the United States are at peace.'" *Id.* at 323 (quoting statute). A ship belonging to Hoyt was seized after he armed it with the intent of supporting the Petion government in its war against the Christophe government. *Id.*

thing. Indeed, neither case had anything to do with defining "the essential elements of statehood." *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869), addressed whether, in the aftermath of the Civil War, Texas should be deemed a State of the United States as defined in the Constitution and thus entitled (under Article III) to invoke the Supreme Court's original jurisdiction. *Penhallow v. Doane's Administrators*, 3 Dall. (3 U.S.) 54 (1795), held that the Continental Congress, even before adoption of the Articles of Confederation, had been granted sovereign authority by the 13 States and thus was empowered to create Commissioners of Appeal to hear prize cases. The cases contain no discussion whatsoever of the attributes of a "state." In short, the PA and PLO have cited no authority to dispute the proposition that the courts historically have turned to the Executive Branch for guidance regarding whether a foreign entity should be deemed a "state."

As noted above, federal courts traditionally have granted sovereign immunity to a foreign entity only when it is deemed in the United States's national interest that they do so. *Amici* find it difficult to imagine that it would ever be in the interests of the United States for the courts to grant sovereign immunity to a foreign entity when the Executive Branch does not recognize the entity as a

sovereign power. A long line of Supreme Court decisions attests to the requirement that federal courts defer to the Executive Branch on foreign policy matters. *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, 588-89 (1952) ("Policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Yet, federal courts would be sending a mixed message to the rest of the world regarding the United States's position on a central issue of foreign policy if they were to grant sovereign immunity to a foreign entity after the Executive Branch has announced that the United States does not recognize that entity's sovereignty. *See Knox,* 306 F. Supp. 2d at 443 (failure of courts to give effect to a deliberate Executive Branch policy of non-recognition "would reduce the effective control over foreign policy by the executive branch"). In sum, unless the Court is prepared to accept that Congress, when it adopted the FSIA and the ATA, was authorizing the courts to second-guess the President's foreign policy determinations, it must be the case that the FSIA and

the ATA require the courts to defer to Executive Branch determinations regarding whether an entity should be recognized as a "foreign state."

C. In Light of U.S. Policy Toward the PA and the PLO, Including the Non-Recognition of the Existence of a Sovereign Palestine, a Grant of Sovereign Immunity Is Unwarranted

Applying the criteria outlined above to the facts of this case, there is little doubt that the PA and the PLO are not entitled to sovereign immunity and thus are subject to suit under the ATA.

Most importantly, the United States government has never recognized the existence of a sovereign Palestine. Indeed, as both *Knox* and the court below recognized, "[I]t is a matter of public record that the United States affirmatively opposes the notion that a sovereign Palestine presently exists." *Knox*, 306 F. Supp. 2d at 446. Under those circumstances, any judgment from this Court granting judicial immunity to Appellants would undermine American foreign policy by sending mixed signals regarding whether the United States supports the view that Palestine presently exists.

This is not to say that the United States unequivocally opposes creation of a Palestinian state. To the contrary, in a June 24, 2002 speech, President Bush outlined a "road map" for peace in the Middle East that explicitly supported

eventual creation of a Palestinian state. But he emphasized that United States recognition of the existence of a Palestinian state was contingent on, *inter alia,* Palestinian abandonment terrorism as a weapon and adoption of democratic reforms.[8] Indeed, at his most recent press conference on November 12, 2004, the President reiterated his support for creation of a Palestinian state but made clear that until the obstacles to a peaceful settlement of the Israel/Palestine conflict are removed, any discussion of American recognition of a Palestinian state was premature. *See* "Bush Vows Mideast Peace Effort," *Washington Times* (Nov. 13, 2004) at A1. Accordingly, it is now official American policy to offer United States recognition of a Palestinian state as a reward for the PA's and PLO's adoption of certain reforms. The incentives created by that offer would be undermined were this Court to provide a judicial imprimatur on Palestinian sovereignty claims by granting sovereign immunity to the PA and PLO.

Moreover, although the PLO and PA are defendants in at least four pending lawsuits asserting claims under the ATA, the Executive Branch has given absolutely no indication that it supports the PA's and PLO's assertions of sovereign immunity. In one of those suits, *Gilmore v. Palestinian Interim Self-*

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[8] The full text of the "road map" can be found at www/un.org/news/dh/mideast/roadmap/122002.pdf.

Government Authority, the federal district judge hearing the case explicitly invited the Justice Department to express its views on sovereign immunity and other issues raised by the suit. On April 1, 2004, the Justice Department submitted a Notice to the court, stating, "[T]he United States respectfully informs the Court that it declines to participate in this litigation." *Gilmore*, No. 01-853 (GK) (D.D.C.).[9] Thus, the United States has only recently passed up an opportunity to disavow the obvious implication of its non-recognition of Palestinian statehood: that Palestine is not a "foreign state" and thus that its agencies -- including the PA and the PLO -- are not entitled to sovereign immunity.

Indeed, the United States in 1975 entered into an agreement with Israel, whereby the United States bound itself to refuse to grant formal recognition to the PLO until such time as PLO formally recognized Israel's right to exist and accepted United Nations Security Council Resolutions 242 and 338 (which call for a termination of armed conflict, and recognition and respect for the security of all states in the Middle East). This 1975 agreement, negotiated with Israel by Secretary of State Henry Kissinger, is known as the Geneva Memorandum; the United States bound itself to this agreement in consideration for Israel's

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[9] A copy of the April 1, 2004 "Notice of the United States" filed in *Gilmore* is attached hereto.

agreement to withdraw from vital areas of the Sinai Peninsula in Egypt. *See* http://countrystudies.us/israel/27.htm. This agreement is contained as an appendix to the September 1, 1975 peace agreement between Israel and Egypt. It was later incorporated into the 1979 Treaty of Peace between Egypt and Israel (the full text can be found at http://yale.edu/lawweb/avalon/mideast/isregypt.htm). The 1979 agreement is still in effect and is supported by the Special International Securities Assistance Act of 1979, 22 U.S.C. § 3401, *et seq.* and by Executive Order 12150, 44 Fed. Reg. 43455. Because the PLO has not complied with UN Resolution 242, the termination of belligerency, the United States continues to be bound by the conditions set forth in the 1975 agreement.[10]

The PA's and PLO's assertion that, by adopting the FSIA and § 2337(2) of

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[10] Indeed, even if Palestine could somehow be deemed a "foreign state" within the meaning of the FSIA, the existence of the Geneva Memorandum would prevent the PA and the PLO from being granted sovereign immunity under the FSIA. The FSIA provision that grants immunity to a "foreign state," 28 U.S.C. § 1604, explicitly provides that any such grant is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act" in 1976. One such "existing international agreement" is the 1975 Geneva Memorandum, which commits the United States not to recognize an independent Palestine until certain preconditions (not yet fulfilled) are met. Although kept secret at the time it was executed, the Geneva Memorandum is fully binding on the United States, and its provisions have been carried forward by subsequent agreements between the United States and Israel. The Memorandum was deposited with the U.S. Senate at the time of its execution and represents an executive international agreement.

the ATA, Congress intended to extend to them the benefits of sovereign immunity is belied by a variety of actions taken by Congress. For example, on December 22, 1987, Congress adopted the Antiterrorism Act of 1987, P.L. 100-204, 22 U.S.C. §§ 5201 *et seq.* One of the explicit determinations of the 1987 law was as follows: "[T]he Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States." 22 U.S.C. § 5201(b). Seventeen years later, that statute remains the law of the land. It is difficult to believe that a legislative body that believes that the PLO is "a terrorist organization and a threat to the United States" would adopt legislation that grants immunity to the PA and the PLO.

Moreover, the ATA's legislative history indicates that the ATA was adopted precisely to ensure that Americans would be able to recover damages from the PLO arising from any terrorism for which the PLO was responsible, not to grant sovereign immunity to the PA and PLO from suits brought by victims of terrorism. A December 31, 1992 House Judiciary Committee report explained that Congress adopted the ATA after hearing testimony from Lisa Klinghoffer[11]

[11] She was the daughter of Leon Klinghoffer, an American citizen murdered by Palestinian terrorists in 1985.

that highlighted the need for legislation to fill a gap in legal remedies available to American victims of terrorism. The Committee explained:

> The recent case of the Klinghoffer family is an example of this gap in our efforts to develop a comprehensive legal response to international terrorism. Leon Klinghoffer, a passenger on the Achille Lauro cruise liner, was executed and thrown overboard in a 1985 terrorist attack. His widow, Marilyn Klinghoffer, and family took their case to the courts in their home state of New York. Only by virtue of the fact that the attack violated certain Admiralty laws and that an organization involved, the Palestine Liberation Organization, had assets and carried on activities in New York, was the court able to establish jurisdiction over the case. A similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the United States.

H.R. Rep. 102-1085 Pt. 1 (Dec. 31, 1992). Just the prior year, the Second Circuit had ruled that the PLO was not a "foreign state" entitled to sovereign immunity under the FSIA; without that ruling, the Klinghoffer family would not have been permitted to continue with its suit to collect damages from the PLO in connection with Mr. Klinghoffer's death. *Klinghoffer v. Achille Lauro Lines,* 937 F.2d 44 (2d Cir. 1991). Thus, by citing favorably to the Klinghoffer lawsuit and by expressing a desire to expand the scope of the decision issued in that lawsuit by adopting the ATA, the House Judiciary Committee could not have more plainly expressed its understanding that the PLO and affiliated groups would be subject to suit under the ATA for any terrorism-related injuries suffered

by Americans. That understanding is wholly inconsistent with the PA's and PLO's claim that § 2337(2) was intended by Congress to exempt them from any ATA suits.

Amici recognize that there may be a small number of cases in which a grant of sovereign immunity is appropriate even when the U.S. government lacks formal relations with a foreign entity. For example, *Banco Nacionale de Cuba v. Sabbatino*, 376 U.S. 398 (1964), held that even unfriendly states that lack formal diplomatic ties with the U.S. (in that case, Cuba) should be granted access to American courts unless they are in a state of war with the United States. *Sabbatino*, 376 U.S. at 408-410. The Court explained its holding as an application of "principles of comity governing this country's relations with other nations." *Id.* at 408. In other words, so long as the unfriendly nation is one that in the eyes of the Executive Branch is "a recognized sovereign power," we grant the nation access to our courts, in the hopes that it will extend like consideration to us -- even when we do not extend diplomatic recognition to that nation. *Id.* at 410. A plausible argument could be made that sovereign immunity ought to be extended to nations such as Cuba, based on similar considerations. But such arguments are of no benefit to the PA and the PLO. Palestine is not "a recognized sovereign

power" in the eyes of the Executive Branch. Rather, the United States recognizes that, until a final peace accord can be reached, Israel retains sovereignty over the land claimed by the PA and the PLO. Under those circumstances, there is little that the United States could gain by granting sovereign immunity to the PA and PLO, because they lack the sovereign authority that would allow their courts to exercise jurisdiction over suits against the United States.

In sum, there is no basis for granting sovereign immunity to the PA and the PLO in this case. In the absence of U.S. recognition of the existence of a sovereign Palestine, any grant of sovereign immunity would undermine U.S. foreign policy and would be inconsistent with the entire history of the courts' treatment of sovereign immunity doctrine over the past 200 years.

II. IF THE COURT DECIDES TO SEEK GUIDANCE FROM THE RESTATEMENT, THE PA AND PLO FAIL TO MEET THAT STANDARD

For all the reasons cited above, the definition of a "state" set forth in the Restatement Third on Foreign Relations Law does not provide meaningful guidance regarding whether Congress intended to include the PA and the PLO among those "foreign state[s]" entitled to sovereign immunity under the FSIA

and the ATA. Nonetheless, the result would be the same even if the Court decides to seek guidance from the Restatement. Both *Knox* and the court below cogently explain why "Palestine" cannot be deemed to possess any of the four attributes cited by the Restatement: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. Rather than simply repeating here the findings of those Courts, *amici* will focus on what they deem the more significant misstatements in the historical analysis contained in Appellants' brief.

First, the record is clear that nothing in the League of Nations Covenant constitutes recognition of a Palestinian state. As *Knox* aptly noted:

> At the end of World War I the League of Nations placed Palestine (until then part of the Ottoman Empire) under British control, or "Mandate," for the purpose of eventually establishing an independent state. *See* Convention between the United States and Great Britain in respect to Rights in Palestine, Dec. 23, 1924, U.S.– Br., 44 Stat. 2184.

Knox, 306 F. Supp. at 431. The operative word here is "eventually." Contrary to Appellants' suggestion, Br. 7-8, there is no language or action from which establishment of a "provisional" state can be inferred. As for Appellants' suggestion that independence of Palestine as a nation was assured by Article 22, Paragraph 4 of the Covenant of the League of Nations, Appellants admit, Br. 8,

that "World War II erupted before fulfillment of the Mandate of Palestine." Article 22, Paragraph 4 does not by itself establish a "provisional" state of Palestine.

Appellants argue that statehood is somehow conferred upon "Palestine" by UN General Assembly Resolution 181 (1947). It is well-understood that resolutions of the General Assembly are non-binding. See United Nations Charter, Article 10, which provides:

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Appellants cite (Br. 10) the statement in Resolution 181 that the independent Arab and Jewish states "shall come into existence in Palestine two months after the evacuation of the Armed Forces of the mandatory Power has been completed but in any case not later than 1 October, 1948." No one can seriously contend that the independent Arab state came into being prior to October 1, 1948 or at any time thereafter. As *Knox* explained:

> In November 1947, the General Assembly adopted Resolution 181(II), which called for Palestine to be partitioned into a Jewish state and an Arab state, and contemplated that each state would gradually gain independence.

> *See* Future Government of Palestine, G.A. Res. 181(II), U.N. GAOR, Supp. No. 1, at 131, UN Doc. N519 (1947). Resolution 181(II) engendered more violent conflict because leaders of the Palestinians rejected it, while Jewish leaders accepted it. When British forces pulled out of the region in May 1948, Jewish leaders proclaimed the establishment of Israel, along the borders called for under Resolution 181(II), and full-blown war erupted between Israel and various neighboring Arab states. Israel prevailed and controlled much of the territory which had been allotted to the contemplated Arab state by Resolution 181(II), while Egypt and Jordan controlled the remaining portions - the Gaza Strip and the West Bank of the Jordan River (the "West Bank"), respectively.

Knox, 306 F. Supp. 2d at 431-32.

Appellants admit (Br. 10) that "major violence . . . prevented completion of G.A. Res. 181 plans for partition of the Mandate Territory into independent Arab and Jewish states." Appellants argue (Br. 11) that "the borders between Palestinian territory and the proclaimed Jewish state were clearly established." There were no borders, only armistice lines where the fighting stopped. *See* General Armistice Agreement, Feb. 24, 1949, Egypt-Isr., 42 U.N.T.S. 251; General Armistice Agreement, Mar. 23, 1949, Isr.-Leb., 42 U.N.T.S. 287; General Armistice Agreement, Isr.-Jordan, Apr. 3, 1949, 42 U.N.T.S. 302; General Armistice Agreement, July 20, 1949, Isr.-Syria, 42 U.N.T.S. 327. Appellants do not cite any recognized borders.

Nor did the Oslo Accords or other subsequent documents create a legally

recognized sovereign Palestine. As *Knox* noted:

> The Interim Agreement [signed by Israel and the PLO in September 1995] explicitly states that the "status" of the occupied Palestinian territories "will be preserved during the interim period." [Interim Agreement on the West Bank and the Gaza Strip, 36 *I.L.M.* 551,] art. XXI(8), at 568. A logical inference from these facts, and from the title of the Interim Agreement as "Interim," is that the Oslo Accords aim towards *eventual* statehood for Palestine (or some other permanent arrangement), not that the Oslo Accords have already created an independent state of Palestine.

Knox, 306 F. Supp. 2d at 433.

Knox also provides an exhaustive explanation regarding why, under the four factors set forth in Restatement § 201, "Palestine" does not meet the Restatement's definition of a "state." *Id.* at 434-38. *Amici* will not repeat that explanation here. *Amici* wish to add a final word regarding the position of the United Nations with respect to a "sovereign" Palestine. Palestine is not a member of the United Nations. Moreover, the U.N. Security Council, through its November 19, 2003 adoption of Resolution 1515, has indicated its acceptance of President Bush's "road map" for a peaceful resolution of conflict in the Middle East. It provides a conceptual framework aimed at attaining a so-called "two-state solution" whose *aspirational goal* is the formation of a Palestinian state which lives side by side and in peace with Israel. The "road map" and the implementing Resolution 1515 provide that progress toward these aspirational

goals will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and are able to build a practicing democracy based on tolerance and liberty. The key point is that Resolution 1515 recognizes the *aspirational* nature of Palestinian statehood; the Security Council fully recognizes that the state of "Palestine" does not now exist.

CONCLUSION

Amici curiae respectfully request that the judgment below be affirmed.

Respectfully submitted,

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Counsel wish to thank Timothy Kotsis, at student at Catholic University's Columbus School of Law, for his assistance in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). 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 6.0), the word count of the brief is 6,742, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2004, two copies of the brief of *amici curiae* WLF, *et al.,* in support of Plaintiffs-Appellees were placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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