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

No. 19-7160

ALEXANDER KHOCHINSKY,
Plaintiff-Appellant,
v.
REPUBLIC OF POLAND, a foreign state,
Defendant-Appellee.

On Appeal from the United States District Court for
the District of Columbia (Washington, DC)
Case No. 1:18-cv-01532-DLF (Hon. Dabney L. Friedrich)

# PETITION FOR REHEARING EN BANC

July 16, 2021

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## INTRODUCTION AND RULE 35(B)(1) STATEMENT

The Republic of Poland ("Poland") since 2010 has pursued Alexander Khochinsky ("Khochinsky") around the world for discriminatory and anti-Semitic reasons. The question is whether, *contra* the three-judge panel in this case, Poland's knowing misuse of the extradition process—in a case that the United States described as "for and on behalf of the Government of Poland"—abrogates its entitlement to sovereign immunity pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (the "FSIA"). Respectfully, the panel erred in concluding that Poland retains its sovereign immunity for Khochinsky's claims.

The Court should rehear the matter *en banc* because the ruling exposes every resident or citizen of the United States to discriminatory extradition attempts to nations that lack due process. It also leaves the Court in at least partial conflict with the Ninth Circuit, a conflict that should be reconciled. Conversely, finding jurisdiction over Poland on these claims poses no threat to either the United States's ability to defend itself, or to other countries' good faith use of the important extradition system.

The logic of the panel decision is effectively this: extradition is "fundamentally diplomatic" (Decision at 11) and therefore ineligible for the implicit waiver exception of the FSIA (28 U.S.C. § 1605(a)(1)), yet at the same time extradition is "process" that is excluded from the FSIA's noncommercial tort

exception (28 U.S.C. § 1605(a)(5)) because extradition is not "*exclusively* diplomatic." (Decision at 15, emphasis added). In other words, the panel concluded that extradition is too diplomatic, and yet somehow not diplomatic enough. The Court should rehear this matter *en banc* to articulate an internally consistent standard of law.

## BACKGROUND

For more than a decade, Poland has pursued Khochinsky around the world for one, simple reason: he sought to discuss the restitution of property stolen from his mother during the Holocaust in Poland.

Poland's government in the last decade has been singularly focused on denying restitution to Jews, seeking to criminalize various aspects of speaking the truth about the violence and depredation faced by Jews during the Holocaust on Polish territory. In 2018, Poland floated legislation that would prevent most Holocaust victims and their heirs from obtaining restitution. RA 009.That same year, Poland criminalized speech regarding Polish responsibility for the Holocaust. RA 010. Within days of the panel ruling in this case, Poland's lower house of parliament passed a law to eliminate restitution of Jewish property categorically.[1]

[1] *See. e.g., Politico*, "Polish lower house passes bill that will limit Jews' property restitution claims," June 25, 2021. Available at

Khochinsky's mother Maria lived in the city of Przemysl. RA 005; 123. Maria was lucky enough to travel further east to Lviv (then in the USSR, now in Ukraine) to be with her relatives for the Sabbath two days before Germany invaded the USSR at the start of Operation Barbarossa, the beginning of the war on the Eastern Front. RA 006; 124. This trip saved her life. By the time the Red Army re-took Przemysl in 1944, nine in ten of the city's Jewish residents had been murdered. RA 006. None of Maria's relatives in Przemysl survived. RA 010; 124.

Maria died in 1989. RA 002; 124. She had never been compensated for the property that was seized as her family was murdered. *Id.* Many years after he discovered that his mother's home had been destroyed, Khochinsky believed that he saw an opening for a fruitful discussion with Poland about his restitution claim. In or around 2010, Khochinsky learned that a painting reported missing from Poland was similar to a painting (*Girl with Dove*) that he had inherited from his father in 1991 (who acquired it after World War II). RA 011; RA 124-25. Poland claimed that the missing painting was removed from a Polish museum during World War II for protection, and that it was subsequently looted by the Nazis. RA 011. Khochinsky believed that if he offered an exchange, instead of simply

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https://www.politico.eu/article/poland-bill-limits-jewish-property-restitution-claims/

demanding payment for the stolen land, Poland would come to the table to discuss restitution. RA 012; 125.

Instead, Poland was furious. On January 25, 2013, a Polish court accused Khochinsky of purchasing the painting unlawfully, and of knowing that the painting had been obtained illegally when he acquired it. RA 013; RA 131–33. This accusation had no possible factual basis. Khochinsky never purchased the painting. RA 013; 124.

Poland then used this criminal charge to seek Khochinsky's extradition from the United States, where he was a lawful permanent resident. RA 014; RA 134–37. (Khochinsky is now a U.S. citizen. RA 123.) On February 25, 2015, the U.S. Department of Justice ("DOJ") filed a petition for a certificate of extraditability in the U.S. District Court for the Southern District of New York "for and on behalf of the Government of Poland." RA 015; 134–37.

Early the next morning, eight FBI agents arrived at Khochinsky's New York home and arrested him in front of his crying children. RA 015; 125. Khochinsky was imprisoned from February 26 to March 9, 2015, and then subject to house arrest and electronic monitoring. RA 015; 125.

Throughout the entirety of the extradition attempt, Poland was the party seeking relief through the DOJ as a pass-through. In February of 2015, the DOJ

reached out to Poland for input on the claimed offense, *i.e.*, title to the Painting, input that Poland provided. *In re Extradition of Khochinsky*, 116 F. Supp. 3d 412, 421 (S.D.N.Y. 2015). On April 2, 2015, Poland sent a package of additional documents to the DOJ's criminal division for use in the extradition proceeding. RA 015–16; 245. On April 9, 2015, Poland sent yet another package of documents to the DOJ's criminal division, again for use in the extradition proceeding. RA 016; 246.

The District Court rejected the extradition request. *In re Extradition of Khochinsky*, 116 F. Supp. 3d. at 415. Khochinsky brought the present action and five claims against Poland on June 27, 2018.

Just weeks after Khochinsky's counsel reached out about Poland's missing certificate of service under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"), Poland (then in default in this case) retaliated *again* and obtained Khochinsky's arrest as he was waiting for a flight to New York from Paris. RA 115. On October 2, 2019, the French court denied Poland's extradition request. *Alexander Khochinsky*, 2019/01036 CA Paris, at RA 396.[2] On November 6, 2019,

[2] Khochinsky put information regarding the French proceeding both in his motion papers to the District Court and later before the Court of Appeals. This Court may properly take notice of this ultimate decision although it was reached

the U.S. District Court vacated Poland's default and dismissed the case. RA 363. Khochinsky appealed from those three rulings. The panel affirmed the District Court's ruling on June 18, 2021. *Khochinsky v. Republic of Pol.*, No. 19-7160, 2021 U.S. App. LEXIS 18166 (D.C. Cir. June 18, 2021).

## REASONS FOR GRANTING REHEARING

### I. The Panel Decision Threatens Americans Pursued by Bad-Faith Regimes Like Poland that Lack the Rule of Law.

Poland never contested Khochinsky's presentation of the facts because they are true.[3] The implications are bracing. Under the decision below, a foreign sovereign would face no consequence for attempts to haul an American to prison abroad for ulterior and persecutory purposes. In an increasingly nationalistic world in which countries like Venezuela have essentially criminalized doing business with Americans in the name of anarchist Communist revolution, treating the extradition process as a genteel, clerical affair that can be abused with impunity would have serious, even deadly, consequences.

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after briefing to the District Court had concluded. *See Ermini*, 758 F.3d at 156 n.2 (granting motion "to take judicial notice of a foreign court decision from Velletri, Italy, dated April 23, 2013.").

[3] Khochinsky repeatedly informed the District Court of Poland's bad faith and its improper motives in ignoring the lawsuit and pursuing extradition instead. *See, e.g.*, RA 115–116; 126. Poland never contradicted him. This illicit motive is therefore conceded. *See Hopkins v. Women's Div., Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 182 (D.D.C. 2002) (claims dismissed where plaintiff "has effectively conceded them by her silence").

The Court should grant rehearing pursuant to Fed. R. App. P. 35 because, respectfully, the panel decision was incorrect and conflicts with the Ninth Circuit's accurate appraisal of implied waiver in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). The panel here framed the risk posed by the interpretation of the FSIA backwards: the panel presented its ruling as a cautious one, in light of concern about whether the U.S. government might have to defend claims for damages abroad (which it has the resources to do), but the panel's interpretation subjects U.S. residents and citizens—here in the United States—to the whims of dictatorial and discriminatory regimes. This is terrifying. No American would be safe under the panel's view of the law from the risk of defending forcible expulsion from their homeland to face persecution or worse in countries that lack due process or the rule of law.

When Poland pursued Khochinsky's extradition in the United States, it invoked the jurisdiction of American courts over the property dispute initiated by Poland—over the whole dispute, not merely the part Poland wanted. This constituted a waiver of immunity under the FSIA, which provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which

the foreign state may purport to effect except in accordance with the terms of the waiver[.]" 28 U.S.C. § 1605(a). The implied waiver exception encompasses "factually and legally related causes of action." *Lord Day & Lord v. Socialist Republic of Viet.*, 134 F. Supp. 2d 549, 558 (S.D.N.Y. 2001).

The panel should have followed the analogous *Siderman* case that parallels Khochinsky's plight. As the Ninth Circuit explained, the *Siderman* record told "a horrifying tale of the violent and brutal excesses of an anti-Semitic military junta that ruled Argentina." *Id.* at 703. Khochinsky is the victim of uncontested anti-Semitic persecution. The Sidermans fled to the United States, but Argentina did not relent. Khochinsky was a lawful permanent resident of the U.S. in 2010. Argentina fabricated a baseless criminal action against Jose Siderman and "sought the assistance of our courts in obtaining jurisdiction over his person, requesting via a letter rogatory that the Los Angeles Superior Court serve him with documents relating to the action" *Id.* Poland's criminal accusation against Khochinsky is based on fiction, which Poland has never denied.

The Ninth Circuit held that Argentina's conduct constituted an implied waiver: "Here, we confront a situation where Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans, but by its actions deliberately implicated our courts in that persecution." *Id.* at 721–

22.[4] This precise logic applies here. Poland did not merely envision United States court participation its persecution of Khochinsky; Poland ensured that persecution—in New York City, no less.

The panel described the extradition process as follows: "a foreign sovereign operates at a level of remove when it seeks our assistance in extradition[.]" Yet that description denies the basic essence of extradition. The entire process is commenced and pursued *because* of the direct approach by one government to another. The panel's description is akin to describing the litigants in this matter as operating "at a level of remove" because only their attorneys appear before the Court. It ignores for what, and for whom, the entire process exists. As the DOJ itself stated, the extradition case was "for and on behalf of the Government of Poland." RA 015; 134–37.

The panel concluded that "[t]here is good reason to doubt that a foreign state's effort to exercise its agreed-upon treaty rights exhibits an intent to relinquish its immunity from suit." The panel's conclusion overlooks the

[4] The Ninth Circuit later employed an overly strict reading of what it means for a foreign country to "use . . . United States courts." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1206–07 (9th Cir. 2003). Although this Court is not bound to follow that interpretation, it is relatively narrow, and the *Blaxland* Court favorably contemplated other torts that did not turn on court activities. *Id.* at 1209. Even under *Blaxland* (which the panel read far too broadly) Khochinsky's claims for quiet title and aiding and abetting trespass would go forward.

fundamental nature of this lawsuit, however. Khochinsky does not seek a ruling that *any* extradition request "exhibits an intent to relinquish its immunity from suit." He seeks a ruling that *this* extradition—whose bad-faith character has never been challenged and which was for a reason (Holocaust restitution retaliation) that courts across Europe (and Congress and the U.S. State Department[5]) have recognized is a disturbing element of the nationalistic regime currently governing Poland—knowingly injected Poland into our courts to resolve a property dispute that Poland lacked the courage of its convictions to bring properly. Reviving Khochinsky's claims makes—at most—a subset of the tiny fraction of extradition requests that are rejected in any way eligible for FSIA jurisdiction. And few, if

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[5] *See* Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. No. 115-171, 132 Stat. 1288 (2018).

The French court in Khochinsky's case properly drew the connection between Poland's recent law penalizing speech about Polish complicity in the Holocaust and Khochinsky's speech about that very topic—circumstances likewise before the District Court. RA 395. This Court may properly take notice of these decisions as a matter of comity. *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

The European Court of Justice has also underscored the gravity of the situation in a statement entitled "Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges." *See* https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf. The ECJ noted that Poland's judicial crisis is "likely to cause serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU, on which the EU is founded, in particular the rule of law." *Id.*

any, governments have made this kind of discrimination a function of their international policy, such that the reciprocal concern expressed by the panel is diminished even further.

Lastly, the panel considered the consequence of its ruling on the relative interests involved. With respect, however, the panel reached the wrong conclusion and ignored the paramount interest: Americans targeted by rogue regimes. The panel put the issue this way: "And were we to find that a foreign state's extradition request implies a waiver of immunity in the United States, we might expect that, as a reciprocal matter, the United States would subject itself to suit in foreign proceedings whenever it requests extradition assistance." This balance is lopsided—against the panel's ruling. On the one hand, there is the theorical increase in risk of a suit for damages against the United States itself in a foreign court. On the other hand, is Khochinsky's life and liberty, pursued by a government whose fellow European states have acknowledged has abandoned the rule of law. Between these two options, there is no real choice.

## II. The Panel Decision on Counterclaim Immunity Is at Odds with Congress on a Matter of Great Importance.

The Court should also rehear *en banc* the panel's dismissal of Khochinsky's invocation of the counterclaim exception because the panel's conclusion puts different Congressional pronouncements into impermissible conflict.

Congress enacted the counterclaim exception because "if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding legal liabilities claimed against it and arising from that same transaction or occurrence." *Cabiri v. Government of Republic of Ghana*, 165 F.3d 193, 197 (2d Cir. 1999) (quoting H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 6604, 6622). That rationale perfectly encapsulates why Poland cannot avoid this suit. Poland brought an extradition proceeding that arose out of its ongoing dispute with Khochinsky over both *Girl with Dove* and land in Przemysl. *See, e.g.*, RA 135; 243–44. It pursued extradition to obtain multiple illicit benefits, including punishing Khochinsky and thereby chilling others from speaking about the Polish Holocaust. Poland may not opt into the courts for these benefits, and then opt out when it faces liability based on the same dispute.

Poland initiated this legal dispute when it invoked the cooperation of the U.S. government to haul Khochinsky to a Polish prison over title to *Girl with Dove* and his family land in Przemysl. *See, e.g.*, RA 135; 243–44. The case was "for and on behalf of the Government of Poland." RA 015; 134–37. Here, Poland not only knew about the extradition case, but did everything in its power to begin and support it by answering the questions of the Court and providing additional

"evidence" to the DOJ. *In re Extradition of Khochinsky*, 116 F. Supp. 3d 412, 421 (S.D.N.Y. 2015); RA 245–46. It was, fundamentally, Poland's case and Poland's case alone, to which Khochinsky's claims respond and for which Poland has relinquished sovereign immunity.

### *A. Two of Khochinsky's claims arise out of the same circumstances as the extradition Complaint.*

The panel erred in concluding that the extradition and Khochinsky's claims do not arise out of the same circumstances (Decision at 12-13.) Poland's extradition attempt was its disproportionate response to an ongoing dispute regarding *Girl with Dove* and the property in Przemysl. One led directly to the other. With the extradition attempt, Poland moved the entire dispute into the judicial system, and it specifically asked the court to consider the ownership of *Girl with Dove*. In other words, Poland brought a dispute about ownership of the Painting to the courts of the United States. The District Court (S.D.N.Y.) acknowledged the full context of the dispute, including the land in Przemysl, in its decision. *In re Extradition of Khochinsky*, 116 F. Supp. 3d at 415. Khochinsky's claim for quiet title to *Girl with Dove* and his claim for aiding and abetting trespass to his family land in Przemysl are counterclaims because they "aris[e] out of the transaction or occurrence that is the subject matter of the claim of the foreign state," 28 U.S.C. § 1607(b), a liberally-construed standard that is easily satisfied

here. *Cabiri*, 165 F.3d at 197; *see also Price v. United States (In re Price)*, 42 F.3d 1068, 1073 (7th Cir. 1994).

***B. Khochinsky's property claims function as counterclaims.***

The panel erred further in applying an overly formalistic requirement that immunity is lost only for claims in the same docket number (Decision at 13). In fact, the counterclaim exception to sovereign immunity has never been limited to literal counterclaims. Instead, it encompasses analogous situations. Another case brought under the counterclaim exception, *Lord Day & Lord*, did not involve a single counterclaim. 134 F. Supp. 2d at 557. Instead, the foreign sovereign brought a claim in interpleader, and co-defendants brought cross-claims. The District Court held that the counterclaim exception applied, explaining: "the parties' interests are analogous making the application of the counterclaim exception appropriate." *Id.* at 557.

Khochinsky did not have a procedural opportunity to bring a counterclaim during the extradition proceeding. Instead, his claims regarding *Girl with Dove* (Count II) and the land in Przemysl (Count IV) function as counterclaims. Khochinsky's property-based claims arise out of the discussions between Khochinsky and Poland regarding their respective property rights, which was also the basis for the extradition attempt. As discussed above, Congress has determined

a foreign state "should not obtain the benefits of litigation before U.S. courts while avoiding legal liabilities claimed against it and arising from that same transaction or occurrence." *Cabiri*, 165 F.3d at 197 (quoting H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 6604, 6622).

The panel reviewed Khochinsky's procedural handicap as dispositive of the counterclaim exception, but reviving his claims serves the very policy that the counterclaim exception was enacted to protect: to prevent sovereigns from picking and choosing by misusing tools like extradition available only to foreign states. Had Poland been an individual claiming title to the Painting, its only option would have been a civil action. Poland deliberately avoided that proceeding to hide in bad faith behind an assertion of sovereign immunity. Poland crossed our borders to pursue Khochinsky advisedly, it must now face the consequences.

## III. The Holding that the Extradition Process Is not "Exclusively Diplomatic" Conflicts with the Panel's Own Ruling on Implicit Waiver.

Finally, the Court should rehear the panel's conclusion that the non-commercial tort exception of the FSIA (28 U.S.C. § 1605(a)(5)) does not apply to certain of Khochinsky's claims (Decision at 14).

Sovereigns are not immune for actions regarding "damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state[.]" 28 U.S.C. § 1605(a)(5). This basis for jurisdiction applies

to the torts of First Amendment Retaliation (Count I) and tortious interference with business relations (Count III). The panel erred by finding that these two claims were barred as ones "arising out of . . . abuse of process." (Decision at 13.) First Amendment retaliation and tortious interference with business relations are separate torts, each with their own elements. The U.S. tort exception excludes only certain enumerated causes of action. That list does not include either of these torts.

Moreover, the panel's analysis of the U.S. tort exception directly conflicted with its analysis of the other FSIA provisions. Abuse of process claims arise only from judicial proceedings, and elsewhere, the panel was emphatic that Poland did not participate in any judicial process.[6] *See Scott v. District of Columbia*, 101 F.3d 748, 756 (D.C. Cir. 1996) (an abuse of process claim requires "a 'perversion of the judicial process'"). Khochinsky has not disputed the existence of criminal proceedings in Poland and does not bring claims arising out of the Poland criminal charges. It is Khochinsky's *speech* in seeking restitution that is the gravamen of his First Amendment retaliation claim. Nor, even though those proceedings' discriminatory motivation has never been challenged by Poland, does Khochinsky bring claims arising out of those proceedings for malicious prosecution or abuse of process.

[6] Decision at 11: "[T]he foreign state 'makes no direct request of our courts.'"

Poland retaliated by abusing the respect that the United States grants to it as part of the diplomatic process. The panel first waives away Khochinsky's implicit waiver argument on the theory that extradition is a diplomatic event based on comity and cooperation (Decision at 11.) Yet later, the panel concludes that Khochinsky's claims are effectively abuse of process causes of action because extradition is not exclusively diplomatic (Decision at 15.) The Court should rehear this portion of Khochinsky's appeal *en banc* to resolve this internal inconsistency in the panel's ruling.

## CONCLUSION

For the foregoing reasons, Khochinsky respectfully requests that the Court rehear his petition *en banc*.

Dated: Boston, Massachusetts
July 16, 2021

Respectfully submitted,

SULLIVAN & WORCESTER LLP

/s/ Nicholas M. O'Donnell

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/s/ Nicholas M. O'Donnell

# ADDENDUM A

## CERTIFICATE AS TO PARTIES

The parties in this case are Plaintiff-Appellant Alexander Khochinsky, an individual, and Defendant-Appellee the Republic of Poland, a foreign state.

There are no amici or intervenors who appeared before the District Court or who have appeared before this Court.

# ADDENDUM B (PANEL DECISION)

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued October 9, 2020 Decided June 18, 2021

No. 19-7160

ALEXANDER KHOCHINSKY,
APPELLANT

v.

REPUBLIC OF POLAND, A FOREIGN STATE,
APPELLEE

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Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01532)

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*Nicholas M. O'Donnell* argued the cause and filed the briefs for appellant.

*Desiree F. Moore* argued the cause for appellee. With her on the brief was *George C. Summerfield*. *Jonathan M. Cohen* entered an appearance.

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the court filed by *Chief Judge* SRINIVASAN.

SRINIVASAN, *Chief Judge*: In 2010, Alexander Khochinsky, then a Russian foreign national living in the

United States, contacted the Republic of Poland seeking restitution for the loss of his family's land during the Nazi invasion. In an effort to negotiate with Poland for the payment of restitution, Khochinsky offered a painting in his possession that he believed resembled one reported missing by Poland. Poland did not respond to the offer as Khochinsky anticipated. Instead, it sought Khochinsky's extradition from the United States on the ground that he was knowingly in possession of a stolen painting. Poland's extradition attempt ultimately failed.

Khochinsky then brought an action against Poland, alleging that the effort to extradite him was tortious and infringed his rights. The district court dismissed the suit, holding that the Foreign Sovereign Immunities Act gives Poland immunity from Khochinsky's action. We affirm.

## I.

On appeal from a dismissal in favor of a foreign sovereign on grounds of sovereign immunity, we assume the unchallenged factual allegations in the complaint to be true. *Simon v. Republic of Hungary*, 812 F.3d 127, 135 (D.C. Cir. 2016).

### A.

The story behind Khochinsky's suit traces back to a small town in Poland at the outset of World War II. At the time, Khochinsky's mother, Maria Khochinskaya, a Polish Jew, lived in the town of Przemysl, Poland, where her family owned property. In 1939, Nazi Germany invaded Poland, prompting the Soviet Union to respond by annexing a portion of Przemysl. The annexation cut the city in half, with Maria's residence falling within the annexed portion.

A few years later, on June 20, 1941, Maria and her grandmother took a trip that saved their lives. That day, a Friday, they traveled east to Lviv (then part of the Soviet Union) to observe the Sabbath with Maria's mother. The next day, Nazi Germany invaded the Soviet half of Przemysl, murdering Maria's relatives who had remained behind. Maria became heir to the family property in Przemysl, and that inheritance passed to Khochinsky upon his mother's death in 1989.

In the 1990s, Khochinsky returned to Przemysl to find that his mother's house had been replaced by a Catholic church. That was a surprise to Khochinsky because his family had never been compensated for the conversion of the property. He initially did not seek restitution from Poland, though, due to his perception that Poland was unreceptive to Holocaust-related restitution claims.

Khochinsky's calculus changed in 2010, when he learned that a painting reported missing from Poland resembled one that he had inherited from his father. When Khochinsky's father died in 1991, Khochinsky inherited *Girl with Dove*, a painting by French rococo master Antoine Pesne. According to Khochinsky's father, the painting had been in Germany before he acquired it following World War II. As for the painting reported missing by Poland, it had been looted from the Wielkopolskie Museum in Poland by Nazi forces and never recovered.

Khochinsky did not know whether the two paintings were one and the same. Regardless, Khochinsky believed that *Girl with Dove* might serve as a useful bargaining chip in his efforts to obtain restitution from Poland for his family's land. To that end, in 2010, he contacted Poland and offered *Girl with Dove*. A Polish official, indicating an interest in negotiating with

Khochinsky, sent an expert to Khochinsky's gallery to examine the painting. The expert determined that *Girl with Dove* was the missing painting but did not share his conclusion with Khochinsky.

Rather than negotiating with Khochinsky, Poland opted to pursue criminal charges against him. In January 2013, a Polish court accused Khochinsky of knowingly and unlawfully purchasing *Girl with Dove*, and Poland issued a "Wanted Person Notice" for his arrest. Later that year, Poland submitted a request to the United States for Khochinsky's extradition. In early 2015, an Assistant United States Attorney filed a petition for a certificate of extraditability in the United States District Court for the Southern District of New York. The next day, Khochinsky was arrested and imprisoned for more than one week. Upon release, Khochinsky was subject to continued house arrest and electric monitoring.

In August 2015, the district court denied the Government's petition for a certificate of extraditability and dismissed the extradition complaint. *In re Extradition of Khochinsky*, 116 F. Supp. 3d 412, 422 (S.D.N.Y. 2015). The court found that "the Government failed to adduce any evidence" that Khochinsky knew *Girl with Dove* was "stolen at the time he acquired it." *Id.* The court thus held that "the Government ha[d] failed to establish probable cause to believe that Khochinsky committed the crime with which he [was] charged." *Id.*

B.

In June 2018, Khochinsky filed suit against Poland in the United States District Court for the District of Columbia. Khochinsky claimed that Poland's unsuccessful—and, in his view, retaliatory—extradition request had caused him "substantial damage." Compl. ¶ 115, J.A. 17. Khochinsky's

complaint set out five counts against Poland: (i) a violation of his First Amendment rights by instigating a retaliatory extradition process; (ii) quiet title as to his ownership of *Girl with Dove*; (iii) tortious interference with his business stemming from his imprisonment and house arrest; (iv) aiding and abetting a trespass of his family land; and (v) abuse of process in connection with Poland's conduct in the extradition proceeding.

Poland did not timely answer Khochinsky's complaint or enter any appearance. As a result, on March 12, 2019, the Clerk of the Court entered a default against Poland. A few weeks later, however, on April 23, 2019, Poland moved to vacate the Clerk's entry of default and to dismiss Khochinsky's claims for lack of jurisdiction based on sovereign immunity. Two days after that, on April 25, Khochinsky moved for entry of default judgment.

The district court took up all three motions at once, granting Poland's two motions and denying Khochinsky's. First, the court found good cause for vacatur of the default, placing particular emphasis on the meritorious nature of Poland's jurisdictional defense. *Khochinsky v. Republic of Poland*, No. 18-cv-1532, 2019 WL 5789740, at *4 (D.D.C. Nov. 6, 2019). Second, and relatedly, the court determined that, under the Foreign Sovereign Immunities Act (FSIA) it lacked jurisdiction over Khochinsky's claims. *Id.* at *4–7. Third, in light of its jurisdictional ruling, the court denied Khochinsky's motion for default judgment as moot. *Id.* at *3 n.1.

II.

On appeal, Khochinsky challenges the district court's dismissal under the FSIA as well as the court's vacatur of the default. We reject those challenges.

A.

We first consider the district court's vacatur of the default, which we review for abuse of discretion. *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 965 (D.C. Cir. 2016). Under Federal Rule of Civil Procedure 55(a), "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Here, Poland initially failed to respond to Khochinsky's complaint, and the Clerk of Court entered default against Poland. A few weeks later, however, Poland moved to vacate the Clerk's entry of default pursuant to Rule 55(c), which permits a court to "set aside an entry of default for good cause." Fed. R. Civ. P. 55(c).

In exercising its discretion under Rule 55(c), a "district court is supposed to consider 'whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.'" *Mohamad v. Rajoub*, 634 F.3d 604, 606 (D.C. Cir. 2011), *aff'd sub nom. Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012) (quoting *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980). There is an interest favoring "the resolution of genuine disputes on their merits," such that "all doubts are resolved in favor of the party seeking relief." *Jackson v. Beech*, 636 F.2d 831, 835–36 (D.C. Cir. 1980). And that interest is pronounced in the context of a foreign state desiring to assert defenses based on its sovereign status. *See FG Hemisphere Associates, LLC*

*v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006).

Here, the district court addressed the three primary considerations, finding that Poland's default was the result of confusion rather than willfulness, that Poland's defense of sovereign immunity was meritorious, and that Khochinsky suffered no prejudice from vacatur of the default. Khochinsky primarily attacks the district court's finding as to a lack of willfulness. But "[e]ven when a default is willful, a district court does not necessarily abuse its discretion by vacating a default when the asserted defense is meritorious and the district court took steps to mitigate any prejudice to the non-defaulting party." *Gilmore*, 843 F.3d at 966. That is the case here.

Khochinsky has no colorable argument as to meritoriousness or prejudice. "[A]llegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." *Mohamad*, 634 F.3d at 606 (quoting *Keegel*, 627 F.2d at 374). Poland's defense readily meets that standard, and in fact is ultimately meritorious, as discussed below. As for prejudice, there is no indication of any cognizable prejudice to Khochinsky from the vacatur of a default that had been entered a few weeks beforehand. When given an opportunity to address the point at oral argument, Khochinsky's counsel acknowledged the absence of prejudice. *See* Oral Argument at 23:30-24:00.

We thus find no basis to set aside the vacatur of the default, especially given that the defaulting party is a foreign nation seeking to assert the defense of sovereign immunity. As we have previously noted, "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with nations and undermine the State Department's continuing efforts to encourage foreign

sovereigns to resolve disputes within the United States' legal framework." *FG Hemisphere Associates*, 447 F.3d at 838–39 (quoting *Practical Concepts Inc. v. Republic of Bolivia*, 811 F2d 1543, 1551 n.19 (D.C. Cir. 1987)).

In an effort to bolster his argument that the district court erred in vacating the entry of default, Khochinsky seeks to supplement the record on appeal with evidence of a French court's October 2019 denial of Poland's further efforts to extradite Khochinsky, this time from Paris. That evidence, in Khochinsky's view, bears on whether Poland acted willfully in failing to respond to his complaint in this case. As explained, however, we sustain the district court's vacatur of default regardless of any willfulness on Poland's part. And at any rate, the evidence was not before the district court at the time of its grant of vacatur and thus does not bear on whether the court abused its discretion. *See Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 24 n.9 (D.C. Cir. 1984).

Khochinsky raises one additional ground for setting aside the district court's vacatur of default: the court's decision not to enforce (or even acknowledge) Poland's failure to comply with local rules pertaining to the process for seeking vacatur of a default and to conferring with an opposing party before filing a nondispositive motion. Noncompliance with those procedural rules, however, did not prejudice Khochinsky in any material way. We thus find no abuse of discretion in the district court's vacatur of the default.

B.

We now turn to the core of the case: Poland's assertion of sovereign immunity from Khochinsky's claims. We review de novo the district court's dismissal of the claims on grounds of

sovereign immunity. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 874 (D.C. Cir. 2014).

The FSIA, 28 U.S.C. §§ 1602 *et seq.*, affords the exclusive basis for a United States court to obtain jurisdiction over claims against a foreign state. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The statute first establishes a baseline grant of immunity, 28 U.S.C. § 1604, and then sets out various defined exceptions to that general grant, *id.* §§ 1605–07. The result is that courts lack jurisdiction over a claim against a foreign state unless it "comes within an express exception." *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 196 (D.C. Cir. 2004).

Khochinsky contends that his claims implicate three FSIA exceptions: the implied waiver exception, 28 U.S.C. § 1605(a)(1); the counterclaim exception, *id.* § 1607; and the noncommercial tort exception, *id.* § 1605(a)(5). We agree with the district court that none of those exceptions extends to Khochinsky's claims.

1.

We first consider the implied waiver exception. Under 28 U.S.C. § 1605(a)(1), a foreign state will not be "immune from [ ] jurisdiction" in any case "in which the foreign state has waived its immunity either explicitly or by implication." Khochinsky contends that, by requesting his extradition, Poland implicitly waived its sovereign immunity as to all of his claims in this case. We disagree.

The FSIA does not specifically define what will constitute a waiver "by implication," but our circuit has "followed the virtually unanimous precedent construing the implied waiver provision narrowly." *Creighton Ltd. v. Gov't of Qatar*, 181

F.3d 118, 122 (D.C. Cir. 1999) (internal quotation marks and citation omitted). In particular, we "have held that implicit in § 1605(a)(1) is the requirement that the foreign state have *intended* to waive its sovereign immunity." *Id.* (emphasis added); *see Ivanenko v. Yanukovich*, 995 F.3d 232, 239 (D.C. Cir. 2021). And as we have observed, "courts rarely find that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir.1985)).

We have found the requisite evidence of a foreign state's intent to qualify as an implied waiver of sovereign immunity "in only three circumstances": (i) the state's "executing a contract containing a choice-of-law clause designating the laws of the United States as applicable"; (ii) the state's "filing a responsive pleading without asserting sovereign immunity"; or (iii) the state's "agreeing to submit a dispute to arbitration in the United States." *Ivanenko*, 995 F.3d at 239; *see World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n.11 (D.C. Cir. 2002). And "courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *World Wide Minerals*, 296 F.3d at 1161 n.11 (internal quotation marks omitted).

A foreign state's extradition request does not fit in that selective company. Extradition operates upon norms of "international comity." *See Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992). Extradition treaties implementing those norms have produced "a global network of bilateral executive cooperation that aims to prevent border crossing from becoming a form of criminal absolution." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323

F.3d 1198, 1208 (9th Cir. 2003). Conditioning a foreign state's exercise of treaty rights on submitting to the jurisdiction of United States courts could imperil the spirit of cooperation and comity underpinning that regime. In that context, there is good reason to doubt that a foreign state's effort to exercise its agreed-upon treaty rights exhibits an intent to relinquish its immunity from suit. And were we to find that a foreign state's extradition request implies a waiver of immunity in United States courts, we might expect that, as a reciprocal matter, the United States would subject itself to suit in foreign proceedings whenever it requests extradition assistance. *See id.* at 1208 n.6. We know of no sound basis for putting the parties to an extradition treaty to that choice as a matter of course.

That is particularly so in view of extradition's fundamentally diplomatic, executive character. "Subject to judicial determination of the applicability of the existing treaty obligation of the United States to the facts of a given case, extradition is ordinarily a matter within the exclusive purview of the Executive." *Shapiro v. Sec'y of State*, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd sub nom. Comm'r v. Shapiro*, 424 U.S. 614 (1976). The Executive generally "conducts the procedure on behalf of the foreign sovereign," such that the foreign state "makes no direct request of our courts" and "its contacts with the Judiciary are mediated by the executive branch." *Blaxland*, 323 F.3d at 1207. Because a foreign sovereign operates at a level of remove from United States courts when it seeks our assistance in extradition, there is all the more reason to doubt that an extradition request connotes an intent to waive the requesting sovereign's immunity in our courts.

For essentially these reasons, the only other court of appeals to address the issue held that an extradition request does not impliedly waive sovereign immunity. *Id.* at 1206–09. In reaching that conclusion, the Ninth Circuit in *Blaxland*

distinguished the sole case on which Khochinsky relies here, a previous Ninth Circuit decision, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). That earlier decision involved a letter rogatory, which is a "direct court-to-court request," whereas "extradition is a diplomatic process carried out through the powers of the executive, not the judicial, branch." *Blaxland*, 323 F.3d at 1207. While we have no occasion here to decide the status of a letter rogatory for purposes of the FSIA's implied waiver exception, we agree with the Ninth Circuit that an extradition request does not effect an implied waiver of sovereign immunity.

The terms of the specific extradition treaty at issue—between the United States and Poland—suggests no ground for drawing any different conclusion in the specific circumstances. The U.S.-Poland Treaty does not directly address the subject of sovereign immunity against actions in either party's courts. Rather, the Treaty generally provides for the signatory countries to "request extradition . . . through the diplomatic channel." Extradition Treaty Between the United States of America and the Republic of Poland, U.S.-Pol., art. 9, July 10, 1996, T.I.A.S. No. 99-917. And by making use of the Treaty's "diplomatic channel" through a request for assistance from the United States's Executive Branch, Poland did not subject itself to the jurisdiction of United States courts.

2.

Khochinsky next argues that two of his claims—the claim for quiet-title related to *Girl with Dove* and the claim for aiding-and-abetting-trespass related to his family land in Przemysl—fall within the FSIA's counterclaim exception. Under that exception, "[i]n any action brought by a foreign state, or in which a foreign state intervenes," the "foreign state shall not be accorded immunity with respect to any counterclaim" fitting

within three defined categories. 28 U.S.C. § 1607. Those three categories include, as relevant here, a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." *Id.* § 1607(b). According to Khochinsky, the extradition proceeding amounts to an "action brought by a foreign state" within the meaning of that provision, and his quiet-title and aiding-and-abetting-trespass claims arise out of the same "transaction or occurrence" as the extradition proceeding.

Even assuming that those two claims arise out of the same transaction or occurrence as the original extradition proceeding, Khochinsky's claims simply do not constitute "counterclaims" for purposes of the FSIA's counterclaim exception. Consistent with the ordinary understanding of a counterclaim, *see* Fed. R. Civ. P. 13, the counterclaim exception applies only when there is an "action brought by a foreign state, or in which a foreign state intervenes," and when the ostensible "counterclaim" is brought "in" that same action. *See* 28 U.S.C. § 1607 ("*In* any action brought by a foreign state . . .") (emphasis added).

Khochinsky's claims against Poland satisfy neither requirement. First, as the district court observed, the extradition proceeding was brought by the *United States*, not Poland, and at no point did Poland "intervene in the extradition proceeding or appear as a party in the proceeding at all." *Khochinsky*, 2019 WL 5789740, at *6. Second, Khochinsky brings his current claims in an entirely distinct action, one that he, not the foreign state, initiated. Those claims, then, are not counterclaims, much less counterclaims in an action brought by a foreign state. Khochinsky responds that he was unable to assert his claims in the original "action," i.e., the extradition proceeding. But that only confirms that an extradition

proceeding is not the sort of action as to which the FSIA's counterclaim exception generally applies.

3.

Third and finally, Khochinsky argues that two of his claims—the claims for First Amendment retaliation and for tortious interference with business relations—fall within the FSIA's noncommercial tort exception. That exception potentially applies in any case:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1605(a)(5). But even if Khochinsky's relevant claims fit within that description, the exception excludes from its coverage "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 1605(a)(5)(B).

Poland contends that Khochinsky's pertinent claims are ones "arising out of . . . abuse of process," *id.*, and we agree. Khochinsky's First Amendment retaliation claim asserts that Poland undertook the extradition process to retaliate against his speech. Compl. ¶¶ 120, 122, J.A. 18. And his tortious interference claim contends that Poland's actions caused him to be imprisoned and subjected to house arrest. Compl. ¶ 133, J.A. 19. Both of those claims "arise out of" an alleged "abuse of process"—i.e., an alleged abuse of the extradition process. While Khochinsky observes that the two claims are not

themselves actions for abuse of process, the statutory language covers not just claims *of* abuse of process, but any claims "*arising out of*" an alleged "abuse of process." 28 U.S.C. § 1605(a)(5)(B) (emphasis added). That is true of Khochinsky's two relevant claims here, both of which "derive from the same corpus of allegations concerning his extradition." *Blaxland*, 323 F.3d at 1203; *see Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999).

Khochinsky submits that the term "abuse of process" for purposes of § 1605(a)(5)(B) refers solely to abuse of judicial process, whereas extradition is a diplomatic process. But as the Ninth Circuit observed in *Blaxland*, a claim against a foreign state for wrongfully "invoking the extradition procedures" involves an "abuse of process" within the meaning of § 1605(a)(5)(B). *Blaxland*, 323 F.3d at 1204. Whether the term "abuse of process" is "defined according to a uniform federal standard or according to applicable state law"—here, District of Columbia or New York law—the term "concern[s] the wrongful use of legal process," including an alleged effort to "misuse[] legal procedures to detain" or "extradite" someone. *Id.* at 1204, 1206; *see* Restatement (Second) of Torts § 682 (1977) (defining tort of abuse of process); *Doe v. District of Columbia*, 796 F.3d 96, 108 (D.C. Cir. 2015) (same under D.C. law); *Curiano v. Suozzi*, 469 N.E.2d 1324, 1326 (N.Y. 1984) (same under N.Y. law). And Khochinsky is wrong, moreover, insofar as he assumes that extradition is an exclusively diplomatic process, to the complete exclusion of any judicial role: while extradition, as we have explained, is fundamentally diplomatic in character, it ultimately involves the courts in some measure in its execution—as evidenced by the termination of the extradition proceedings in this case upon a judicial determination that probable cause was lacking.

For all of those reasons, an alleged abuse of the extradition process counts as an "abuse of process" under § 1605(a)(5)(B). It follows that Khochinsky's claims of First Amendment retaliation and tortious interference fall outside the scope of the FSIA's noncommercial torts exception.

* * * * *

For the foregoing reasons, we affirm the district court's grant of Poland's motion to dismiss for lack of jurisdiction.

*So ordered.*

# STATUTORY ADDENDUM

Table of Contents for Statutory Addendum

28 U.S.C. §1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

> (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or

constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110–181, div. A, title X, §1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) Limitation on Discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the

court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter [28 USCS § 1605 or 1605A] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

JUSTICE FOR UNCOMPENSATED SURVIVORS TODAY (JUST) ACT OF 2017

SECTION 1.
SHORT TITLE
This Act may be cited as the “Justice for Uncompensated Survivors Today (JUST) Act of 2017”.

SEC. 2.
REPORT ON HOLOCAUST ERA ASSETS AND RELATED ISSUES
(a) Definitions. In this section:

(1) Appropriate congressional committees. The term "appropriate congressional committees" means—

(A) the Committee on Foreign Relations of the Senate;

(B) the Committee on Appropriations of the Senate;

(C) the Committee on Foreign Affairs of the House of Representatives; and

(D) the Committee on Appropriations of the House of Representatives.

(2) Covered countries. The term "covered countries" means participants in the 2009 Holocaust Era Assets Conference that are determined by the Secretary of State, or the Secretary's designee, in consultation with expert nongovernmental organizations, to be countries of particular concern relative to the issues listed in subsection (b).

(3) Wrongfully seized or transferred. The term "wrongfully seized or transferred" includes confiscations, expropriations, nationalizations, forced sales or transfers, and sales or transfers under duress during the Holocaust era or the period of Communist rule of a covered country.

(b) Report. Not later than 18 months after the date of the enactment of this Act, the Secretary of State shall submit a report to the appropriate congressional committees that assesses and describes the nature and extent of national laws and enforceable policies of covered countries regarding the identification and the return of or restitution for wrongfully seized or transferred Holocaust era assets consistent with, and evaluated with respect to, the goals and objectives of the 2009 Holocaust Era Assets Conference, including—

(1) the return to the rightful owner of any property, including religious or communal property, that was wrongfully seized or transferred;

(2) if return of any property described in paragraph (1) is no longer possible, the provision of comparable substitute property or the payment of equitable compensation to the rightful owner in accordance with principles of justice and through an expeditious claims-driven administrative process that is just, transparent, and fair;

(3) in the case of heirless property, the provision of property or compensation to assist needy Holocaust survivors, to support Holocaust education, and for other purposes;

(4) the extent to which such laws and policies are implemented and enforced in practice, including through any applicable administrative or judicial processes; and

(5) to the extent practicable, the mechanism for and an overview of progress toward the resolution of claims for United States citizen Holocaust survivors and United States citizen family members of Holocaust victims.

(c) Sense of Congress. It is the sense of Congress that after the submission of the report described in subsection (b), the Secretary of State should continue to report to Congress on Holocaust era assets and related issues in a manner that is consistent with the manner in which the Department of State reported on such matters before the date of the enactment of the Act.