No. __-____

IN THE

# Supreme Court of the United States

WILLIAM O. FULLER, as
Successor Personal Representative of
the Estate of ROBERT OTIS FULLER,

*Petitioner,*

*v.*

BANCO BILBAO VIZCAYA ARGENTARIA, S.A.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether a Court of Appeals panel can, consistent with *Steel Company v. Citizens for A Better Environment,* 523 U.S. 83 (1998) and the Constitutional requirement that courts have jurisdiction to proclaim the law, avoid a res judicata bar by determining that a prior panel in a separate case applied hypothetical jurisdiction, even though the latter decided the case on the merits and ruled that remaining challenges, including to subject matter jurisdiction, were "unavailing" and gave no indication that it was using hypothetical jurisdiction to reach the merits?

2. Whether a standard for assessing subject matter jurisdiction under the Terrorism Risk Insurance Act of 2002 ("TRIA") Pub. L. N. 107-297, § 201, 116 Stat. 2322 (2002), codified as amended at 28 U.S.C. § 1610 note, which requires the district court to disregard the express findings of the state court rendering a TRIA judgment and prior federal full faith and credit determinations, violates principles of federalism and intrudes on the state's powers given to it under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1605(a)(7) (repealed 2008) and 1608(e)?

## PARTIES TO THE PROCEEDING, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

(1) In addition to the parties named in the caption, the following parties, who are not parties to this petition, were named as Petitioners in the Second Circuit decision and judgment below sought to be reviewed:

a) Aldo Vera, Jr., as Personal Representative of the Estate of Aldo Vera, Sr.;

b) Gustavo E. Villoldo, individually and as Administrator, Executor, and Personal Representative of the Estate of Gustavo Villoldo;

c) Alfredo Villoldo.

(2) Petitioner is a personal representative of an estate and not a corporation requiring a corporate disclosure statement under Supreme Court Rule 29.6.

(3) The following are related proceedings relevant to this petition:

a) *Hausler v. The Republic of Cuba*, Case No. 02-12475, Div. 04 (Fla. 11th Cir. Ct.) (judgment entered Jan. 19 2007) (App. 68a-95a);

b) *Hausler v. Republic of Cuba*, Case No. 08-20197-Civ-Jordan (S.D. Fla.), appeal pending at Case No. 13-14633-BB (11th Cir.);

c) *Hausler v. J.P. Morgan Chase Bank, N.A.*, Case No. 09 Civ. 10289 (VM) (S.D.N.Y.) (consolidated with 08 MISC. 302 (S.D.N.Y.) (judgments entered Oct. 6, 2015 at ECF No. 646, May 9, 2016 at ECF Nos. 660-662);

d) *Hausler v. JP Morgan Chase Bank, N.A.*, 12-1264(L) (2d Cir.), (decided at *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. Oct. 27, 2014);

e) *Vera v. The Republic of Cuba*, Case No. 12 Civ. 1596 (AKH) (S.D.N.Y.) (district court proceedings below) (judgment entered Aug. 2, 2018 at ECF No. 972);

f) *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 18-2345 (2d Cir.) (judgment entered Dec. 30, 2019, decision at App. 1a-53a).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner William O. Fuller as Successor Personal Representative for the Estate of Robert Otis Fuller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-53a) is reported at 946 F.3d 120 (2d Cir. 2019). The Second Circuit's order denying rehearing and rehearing *en banc* on February 20, 2020 (App. 54a-55a), is unreported.

## JURISDICTION

The Second Circuit's opinion was filed on December 30, 2019. The court denied petitioners' Petition for Rehearing and/or Rehearing *En Banc* on February 20, 2020.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The primary provisions involved are set out in full in the Appendix to this Petition (App. 56a-67a) and include:

1. U.S. Const. art. III, § 1;

2. The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (repealed 2008);

3. 28 U.S.C. § 1738.

Additional highly relevant provisions include:

1. Terrorism Risk Insurance Act of 2002 ("TRIA") Pub. L. N. 107-297, § 201(a), 116 Stat. 2322 (2002), codified as amended at 28 U.S.C. § 1610 note, which provides:

> IN GENERAL.- Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

2. Cuban Asset Control Regulations ("CACRs), 31 C.F.R. § 515.311 which provides:

> Property; property interests. (a) Except as defined in § 515.203(f) for the purposes of that section the terms property and property interest or property interests shall include, but not

by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness obligations, notes, debentures, stocks, bonds, coupons, and other financial securities, bankers' acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, services, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

(b) As used in § 515.208, the term property means any property (including

> patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.

## STATEMENT

In the decision below the Second Circuit disregarded the fundamental principles of subject matter jurisdiction (and this Court's related jurisprudence) and res judicata by erroneously surmising that a prior panel of that court had not previously decided the disputed question of subject matter jurisdiction and instead had reached the merits based on hypothetical jurisdiction. App. 1a-53a. The earlier decision otherwise would have been res judicata on the subject matter jurisdiction question the same garnishee had again raised and the Second Circuit decided. Likewise, in violation of principles of federalism and full faith and credit, the circuit panel below, in ruling that the district court lacked subject matter jurisdiction to enforce the terrorism judgment before it, disregarded rulings of the Florida state court that rendered the judgment after an evidentiary hearing pursuant to 28 U.S.C. §§ 1605(a)(7), 1608(e), and other federal district courts in other cases which gave the terrorism judgment full faith and credit.

This appeal concerns a Florida state court judgment (App. 68a-95a, the "State Court Judgment") entered after a default in appearance in

January 2007 against the Republic of Cuba[1] pursuant to 28 U.S.C. § 1605(a)(7) (repealed 2008 and replaced by 28 U.S.C. § 1605A) for the extrajudicial torture and killing of Bobby Fuller. Each of the Southern District of Florida and the Southern District of New York granted the State Court Judgment full faith and credit in separate cases. App. 101a-105a. The State Court Judgment and federal judgments (collectively referred to as the "Hausler Judgments") have been successfully enforced for over a decade in multiple jurisdictions by Bobby Fuller's now-deceased sister, Jeanette Fuller Hausler as Personal Representative of the Estate of Bobby Fuller.[2]

In 2014, Respondent Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA") challenged the subject matter jurisdiction of the Hausler Judgments before the district court and then the Second Circuit in a

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[1] The State Court Judgment was also entered against defendants Fidel Castro Ruz, individually and as President of the State Council of Ministers, Head of the Communist Party and Commander-in-Chief of the Military, Raul Castro Ruz, individually and as First Vice President Of the Council of State and Council of Ministers and Head of the Cuban Revolutionary Armed Forces, The Cuban Revolutionary Armed Forces, and El Ministerio del Interior.

[2] Mrs. Hausler passed away in November 2018 and was substituted by Petitioner William O. Fuller as Personal Representative of the Estate of Robert Otis Fuller. Given the lengthy history of various enforcement proceedings referencing Mrs. Hausler, however, including in the decision below, the judgments will continue to be referred to as the Hausler Judgments.

separate enforcement action. *See Hausler v. J.P. Morgan Chase Bank, N.A.*, Case No. 12-1264 (2d Cir.) [hereinafter *Hausler*]; A.108a ("ISSUES TO BE ARGUED: Status, Effect and Enforceability of Florida State and Florida Federal Judgments"). The question of subject matter jurisdiction was briefed and argued at length. *Id.* The Second Circuit court in *Hausler* recounted Mrs. Hausler's various enforcement efforts and ultimately reached the merits, holding that blocked proceeds of electronic funds transfers ("EFT's") at issue were not attachable under TRIA § 201, the Cuban Asset Control Regulations ("CACRs), 31 C.F.R. § 501.201 *et seq.*, and New York law, and that all other arguments raised by the parties were "unavailing." *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014). BBVA's jurisdictional challenge in *Hausler* being unsuccessful, the Hausler Judgments for years continued to be enforced through successful garnishments and judicial turnover of other assets in both *Hausler* and in the case below.

In this case, notwithstanding the *Hausler* ruling, BBVA yet again challenged the subject matter jurisdiction of the Hausler Judgments. The Second Circuit, rather than finding that *Hausler* presented a res judicata bar to BBVA's jurisdictional challenge, found that the *Hausler* court had not decided that question because it had applied hypothetical jurisdiction to reach the merits of that appeal, even though the *Hausler* court made no suggestion that it was doing so. App. 31a-31a (n.22). The court below

reached this decision by relying on a companion case, *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014), which was decided under 28 U.S.C. § 1610(g), not under TRIA, as was *Hausler*. After surmising the existence of hypothetical jurisdiction to avoid the res judicata consequences of *Hausler*, the Second Circuit panel proceeded to review the question of subject matter jurisdiction *de novo,* including a review of the State Court Judgment's jurisdictional findings following an evidentiary hearing.[3] App. 41a-45a. On the limited and incomplete record before it, the Second Circuit made its own jurisdictional findings, usurping the Florida state court's power to do so, and the latter's detailed findings of fact and law. It then held that the district court lacked subject matter jurisdiction to enforce the State Court Judgment and its turnover orders were void and must be vacated.

### A. Background

In October 1960, Bobby Fuller a United States citizen, was tortured and executed by means which meet all international standards for torture and extrajudicial killing. App. 78.a-83a. After being arrested by revolutionary guard forces in Cuba, he was taken to a military-run tribunal where, within a matter of minutes, he was charged, tried and

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[3] As required under 28 U.S.C. §§ 1605(a)(7) and 1608(e), the Florida state court heard evidence, including documentary proof and witness testimony before reaching its decision, which record was not fully before the Second Circuit when it ruled. App. 96a-100a.

sentenced to death by a firing squad. App. 79a-80a. The following day Fuller's blood was drained, and he was then executed by firing squad and his body thrown into an unmarked ditch at an unknown location, despite his mother's pleas to have his body returned to her for burial at the family cemetery. App. 80a. In response to Fuller's killing, The United States Department of State filed a formal protest denouncing the proceedings and charging Cuba with "fail[ing] to observe basic civilized standards" and "inhuman behavior." App. 81a.

In 2005, Mrs. Hausler brought an action in Florida state court seeking relief against The Republic of Cuba, Fidel Castro Ruz, Raul Castro Ruz, the Cuban Revolutionary Armed Forces, and El Ministerio del Interior under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, for Cuba's extrajudicial killing of her brother. 28 U.S.C. § 1605(a)(7) (repealed 2008) provides:

> A foreign state shall not be immune from the jurisdiction of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing . . . except that the court shall decline to hear a claim. . . if the foreign state was not designated as a state sponsor of terrorism . . . . at the time the act occurred, unless later so designated as a result of such act . . . .

App. 58a, 60a-61a. The defendants did not appear, despite due service and notice upon them. App. 70a.

In issuing the State Court Judgment, the Florida court, as it was required to do under 28 U.S.C. §§ 1605(a)(7) and 1608(e), held a hearing, received and evaluated evidence, made extensive findings of fact, and concluded that it had subject matter jurisdiction upon "evidence satisfactory to the Court." App. 74a; *see also* App. 96a-100a. In the lengthy and detailed State Court Judgment, the Florida court determined that the facts "clearly demonstrate[d]" that Fuller was subject to acts of terrorism as defined under § 1605(a)(7) and expressly found that "Cuba . . . was designated to be a state sponsor of terrorism in 1982 . . . at least in part by reason of the acts of terrorism described herein including the torture and extra-judicial killing of Bobby Fuller . . . ." App. 74a. The State Court Judgment became final and no appeal was taken. *Hausler*, 770 F.3d at 210.

Since obtaining the State Court Judgment and for the last approximately eleven years, Mrs. Hausler has prosecuted numerous enforcement proceedings in a number of courts, obtaining approximately twelve turnover orders, excluding this case. The Southern Districts of Florida and New York expressly granted the State Court Judgment full faith and credit — and the Second Circuit has previously addressed the Hausler Judgments and their enforceability in *Hausler*. App. 101a-105a. *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 526 (S.D.N.Y. 2010); *Hausler*, 770 F.3d

at 210. Each of the federal full faith and credit judgments have been enforced, including in this case.

Respondent BBVA has on multiple occasions unsuccessfully challenged the Hausler Judgments based on subject matter jurisdiction, until the Second Circuit's decision below. As is most relevant here, in the Southern District of New York, Mrs. Hausler sought to enforce her Judgments against Cuba by seeking turnover of various assets which were the subject of multiple and separate turnover petitions against multiple parties. *See, e.g.*, *Hausler v. J.P. Morgan Chase Bank, N.A.*, Case No. 09 Civ. 10289 (V.M.) (S.D.N.Y.), ECF Nos. 91, 92, 107, 115, 385, 459, 460, 469, 543, 638. While litigating two of those turnover petitions to collect blocked accounts holding the proceeds of EFT's, BBVA 1) made the same jurisdictional challenge to the Hausler Judgments it made below, and 2) argued that EFT's were not property of Cuba under New York state law, which should control, and therefore were not attachable under TRIA § 201. The district court (Marrero, D.J.) held that it had subject matter jurisdiction to enforce the Hausler Judgments and the EFT's were subject to attachment and execution under TRIA and CACRs, finding that the statutory scheme and federal supremacy superseded any state law limitations. *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553 (S.D.N.Y. 2012), reversed in part

770 F.3d at 212; *Hausler*, Case No. 09 Civ. 10289, ECF No. 540, 661.[4]

On appeal of the district court's orders finding subject matter jurisdiction and ordering turnover, BBVA raised the same questions of subject matter jurisdiction to enter and enforce the Hausler Judgments as it raised and litigated here. Notably, the *Hausler* court dedicated a specific portion of the oral argument on appeal to the very same issue addressed by the court below. App. 108a ("ISSUES TO BE ARGUED: Status, Effect and Enforceability of Florida State and Florida Federal Judgments").

In its decision, the *Hausler* court detailed Mrs. Hausler's enforcement efforts noting she had sought "to enforce [her] 2009 Florida state court judgment" and recounted the procedural history of those efforts in the S.D. Fla. and the S.D.N.Y. *Hausler*, 770 F.3d at 210 ("Hausler sought a full faith and credit determination for the underlying state judgment in the United States District Court for the Southern

[4] BBVA also brought a collateral attack of the Florida full faith and credit judgment in the Southern District of Florida when the *Hausler* case was pending in the district court and after the *Hausler* district court declined to entertain the collateral attack. The Southern District of Florida ultimately rejected the collateral attack there, leaving its full faith and credit judgment intact, on the ground that the Southern District of New York had granted full faith and credit to the Florida state court judgment and, thus, BBVA lacked standing to pursue the collateral attack in Florida. *Hausler v. Republic of Cuba*, No. 08-20197-Civ-Jordan (S.D. Fla.), ECF No. 104 at n.2.

District of Florida. That request was granted on August 20, 2008.").

The *Hausler* court then addressed the merits which it observed involved a "matter of first impression": whether EFT's, could be attached under TRIA and the CACRs. *Id.* at 209-10. The *Hausler* court interpreted the language in both TRIA and CACRs and held on the merits that those statutes did not authorize attachment of the particular assets at issue, and that New York state law controlled to define property rights, not federal law. After the merits analysis it held that all other arguments were "unavailing." *Id.* at 212. BBVA's jurisdictional challenge to the Hausler Judgments being rejected by the *Hausler* court, Mrs. Hausler continued to enforce her Judgments in the district court, obtaining turnover of other assets. *See, e.g.*, *Hausler*, Case No. 09 Civ. 10289, ECF Nos. 638, 646, 661.

While the *Hausler* appeal was pending, Mrs. Hausler intervened in the court below to preserve her rights vis-a-vis competing judgment creditors Aldo Vera and Gustavo Villoldo, who also held terrorism judgments against the Republic of Cuba. BBVA again challenged the subject matter jurisdiction of the Hausler Judgments, along with that of the other judgment creditor plaintiffs. The district court rejected BBVA's subject matter jurisdiction arguments, found TRIA jurisdiction, and following an agreed procedure, ordered turnover of Cuban assets held at nineteen financial institutions. *Vera v. The Republic of Cuba*, Case No. 12 Civ. 1596

(AKH) (S.D.N.Y.), ECF 739-1. BBVA was the only garnishee to challenge entry of the order.

### B. The Court of Appeal's Decision Below

On appeal, BBVA repeated its challenge to subject matter jurisdiction that it had in the district court and in *Hausler*.[5] Notwithstanding that the Hausler Judgments, including the State Court Judgment had been afforded full faith and credit and successfully enforced in multiple jurisdictions and the same question of subject matter jurisdiction squarely addressed in *Hausler*, the court below reversed the district court's judgment and turnover orders against BBVA, finding that the district court lacked subject matter jurisdiction to enforce the Hausler Judgments. In doing so, it held as is relevant to this petition that 1) *Hausler* did not foreclose another attack on the Hausler Judgments

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[5] In the proceedings below, BBVA took five appeals to the Second Circuit, three of which were dismissed for lack of appellate jurisdiction. *See Vera*, 802 F.2d 242 (2d Cir. 2015) ("*Vera I*") (dismissing for lack of jurisdiction appeals from orders concerning Vera subpoena); *Vera*, 651 F. App'x 22 (2d Cir. 2016), *cert. denied* 137 S. Ct. 1064 (2017) ("*Vera II*") (dismissing for lack of jurisdiction appeals from an omnibus turnover order and related motion for reconsideration); *Vera*, 867 F.3d 310 (2d Cir. 2017) (" *Vera III*") (vacating district court orders of contempt and denial of motion to quash Vera subpoena, and vacating Vera judgment); *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 729 F. App'x. 106 (2d Cir. 2018) ("*Vera IV*") (dismissing for lack of jurisdiction, appeals concerning omnibus turnover order), and the decision below. Of these, only *Vera II*, *Vera IV*, and decision below involved the Hausler Judgments.

because according to the court below, the *Hausler* court never decided subject matter jurisdiction, and instead had relied on hypothetical jurisdiction to reach the merits, 2) the district court below should have disregarded the State Court Judgment's findings entirely and independently determined its basis for jurisdiction, 3) even without jurisdictional findings of the district court, the circuit court could, on the incomplete record before it, determine that Cuba was immune from suit under TRIA because, it found, Cuba was not designated as a terrorist state as a result of anything that happened to Bobby Fuller, notwithstanding the extensive findings of the Florida state court to the contrary, and the evidence it had considered to reach that conclusion, 4) restitution of the funds BBVA had been ordered to turnover was appropriate on the basis of unjust enrichment.

Petitioner filed a petition for rehearing or rehearing *en banc* in the Second Circuit, which application was denied on February 20, 2020. App. 54a-55. Neither of the other two judgment creditors sought rehearing.

## REASONS FOR GRANTING THE WRIT

The Court should grant the petition for four reasons set forth below:

First, this case is critical for this Court to review the doctrine of hypothetical jurisdiction because it lays bare the judicial inefficiencies that result from the doctrine's overbroad and improper use to

circumvent required subject matter jurisdiction analysis, in contravention of this Court's precedents. The lower court's decision to apply what amounts to a "hypothetical hypothetical jurisdiction" has broad and negative implications that dangerously open the door for courts to ignore fundamental jurisdictional questions altogether and render opinions on the merits on the theory that a prior court must have exercised hypothetical jurisdiction, a practice that is "ultra vires" of the constitutional mandate. *Steel Co.* 523 U.S. at 101-02.

Second, the precedent set by the decision below, will lead to judicial overreach, as it has in this case, by permitting courts to use hypothetical jurisdiction in cases where jurisdiction has already been fully and fairly litigated and decided, thus jeopardizing the important doctrines of finality and res judicata

Third, the decision below, which was decided on statutory subject matter jurisdiction, presents an important opportunity for the Court to resolve the circuit split that has developed regarding whether hypothetical jurisdiction may be applied to questions of statutory subject matter jurisdiction as opposed to Article III standing questions.

Fourth, the standard of review promulgated by the Second Circuit in the decision below for assessing the enforceability of a terrorism judgment under TRIA impermissibly supplants the statutory authority of state courts to render such terrorism judgments and in doing so violates basic principles of federalism and full faith and credit by stripping state

courts of their power and function to render such judgments.

## I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *STEEL CO.*, DRASTICALLY DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, AND LAYS BARE THE ADVERSE EFFECTS OF THE CIRCUIT SPLIT ON WHETHER AND WHEN HYPOTHETICAL JURISDICTION SHOULD APPLY

The decision below directly conflicts with this Court's decision in *Steel Co.* and demonstrates that the bounds of hypothetical jurisdiction are ripe for this Court's review to prevent abuse of that doctrine by the lower courts.

### A. The Second Circuit's Decision Conflicts with this Court's Decision in *Steel Co.*

In *Steel Co.* this Court emphatically admonished the practice of "hypothetical jurisdiction" – "'assuming' jurisdiction for the purpose of deciding the merits" – holding that hypothetical jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Steel Co.* 523 U.S. at 93-94 (quoting *United States v. Troescher*, 99 F.3d 933, 934, n. 1 (1996)). As explained in *Steel Co.*:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it

> ceases to exist, the only function remaining of the court is that of announcing the fact and dismissing the cause." . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

523 U.S. at 94-95 (alteration in original) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869) and *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

*Steel Co.*, acknowledged, however, that the merits might be addressed before jurisdiction in the very rare circumstance "where the outcome on the merits has been 'foreordained' by another case such that the 'jurisdictional question could have no effect on the outcome,' provided the court 'd[oes] not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed." *See Ctr. for Reproductive Law and Policy v. Bush*, 304 F.3d 183, 194 (2d Cir. 2002) (alteration in original) (quoting *Steel Co.*, 523 U.S. at 98). Moreover, even when a case might be foreordained, this Court cautioned that such rare instances do not "even approach[] approval of a doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt." *Steel Co.*, 523 U.S. at 101. There are strong reasons against hypothetical jurisdiction:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

*Id.* at 101-02 (internal citation omitted).

Some courts, such as *Center for Reproductive Law and Policy v. Bush*, have applied the "foreordained" exception within the strictures of *Steel Co.* 304 F.3d at 195 (applying hypothetical jurisdiction where court "entertained and rejected the same constitutional challenge to the same provision" resulting in dismissal of the claims); *see Starkey v. Boulder Cnty. Soc. Serv.*, 569 F.3d 1244, 1260-1263 (10th Cir. 2009) (discussing various applications of foreordained exception and applying it to same plaintiffs bringing same constitutional challenge against different defendants). Others,

including the court below have taken a constitutionally impermissible approach, seeming to avoid principles of stare decisis to reach a different outcome by employing hypothetical jurisdiction and avoiding difficult jurisdictional questions. *See, e.g.*, *Seale v. INS*, 323 F.3d 150, 157-59 (1st Cir. 1990) (bypassing the jurisdictional question on the stated basis of the "foreordained" exception, but actually ruling under stare decisis "[a]s a subsequent panel, we are bound by stare decisis to follow *Sousa*.").[6] Given the misapplication of the foreordained exception, this Court's guidance on the metes and bounds of the "foreordained" exception is necessary.

This case provides an ideal study within which to clarify the exception. First, in a remarkable and unprecedented posture, the court below did not itself use hypothetical jurisdiction to reach the merits, but rather hypothesized that the prior *Hausler* court must have used the doctrine to reach the merits, notwithstanding that (a) the issue of subject matter jurisdiction was squarely before *Hausler,* (b) the companion case the court below used to justify application of the doctrine was decided on different grounds (discussed below), and (c) *Hausler* had found all other arguments, which included the featured challenge to subject matter jurisdiction, "unavailing."

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[6] Other circuits have rejected the foreordained exception altogether. *See, e.g.*, *Friends of the Everglades v. U.S. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) ("Even if the resolution of the merits were foreordained – an issue we do not decide – the Supreme Court has explicitly rejected the theory of 'hypothetical jurisdiction.'")

*Hausler*, 770 F.3d at 212; *see LFoundry Rousset, SAS v. Atmel Corp.*, 690 F. App'x 748, 751 (2d Cir. 2017) (where summary order stated that court "'f[ound] no merit in the plaintiffs' other arguments'" court held that where issue "was raised and fully argued, such language—even without overt reference to a particular argument or explanation of the reasons it lacked merit—signifies an adjudication on merits." (quoting *Guerrini v. Atmel Corp.*, 667 F. App'x 308, 310 (2d Cir. 2016); and citing *Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004))). Thus, the court below effectively used a hypothetical to find hypothetical jurisdiction in reaching its conclusion.

Second, the court below, while purporting to apply *Steel Co.* and *Center for Reproductive Law and Policy* misapplied the "foreordained" exception, finding that because *Hausler* was decided days after its companion case *Calderon-Cardona,* the merits decision in *Hausler* was foreordained. In fact, the two cases were decided on different grounds involving the interpretation of different statutes, *Calderon-Cardona* decided under 28 U.S.C. § 1610(g) and *Hausler* decided under TRIA and the CACRs. Thus, the merits ruling in *Hausler*, which the *Hausler* court itself recognized was a "matter of first impression", included a new pronouncement of law that could not have been reached without first holding that the challenge to subject matter jurisdiction was "unavailing." *Cf. Steel Co.*, 523 U.S. at 98 (court may "not use the pretermission of the jurisdictional question as a devise for reaching a

question of law that otherwise would have gone unaddressed"); *Ctr. for Reproductive Law*, 304 F.3d at 194-95 (merits question was "foreordained" based on "controlling case in which this Court entertained and rejected the same constitutional challenge to the same provision").

In *Calderon-Cardona*, this Court held that TRIA § 201 was inapplicable because North Korea was not a designated terrorist state at the time the judgment at issue was entered, and instead interpreted and applied 28 U.S.C. § 1610(g) to determine what type of property interests were subject to attachment. 770 F.3d at 1000-01. The *Calderon-Cardona* court held that "[b]ecause of the absence of any definition of the property rights identified in the statutory text, we hold that FSIA §1610(g) does not preempt state law applicable to the execution of judgments in this case." *Id.* at 1001. In contrast, according to the *Hausler* decision, the circuit court addressed "a matter of first impression regarding the interpretation of § 201 of [TRIA]" — having entirely different wording from 28 U.S.C. § 1610(g) — and the CACRs. 770 F.3d at 209-10. The *Hausler* court noted that "[w]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Id.* at 211 (quoting *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir. 2010)). The *Hausler* court found that, although the CACRs listed various property interests subject to attachment, they did not include EFTs. *Id.* at 211-12. Further, it rejected

the district court's holding that TRIA and CACRs pre-empted state law as defining property available for attachment under those statutes. *Id.* at 212. It thus concluded state law applied to determine the property right, and that "[b]ecause no terrorist party or agency or instrumentality thereof has a property interest in the EFTs, they are not attachable under TRIA § 201." *Id.*

To be sure, both *Calderon-Cardona* and *Hausler* concerned which law defined attachable property rights; however, equally obvious was that the outcome of that question first turned on "the nature and wording of the statute pursuant to which attachment or seizure is sought" — *Calderon-Cardona* under 28 U.S.C. § 1610(g), and *Hausler* under the TRIA and CACRs. *See Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir. 2010). As is evident from the *Hausler* opinion, for example, had CACRs included EFTs as an attachable property interest, federal law would have preempted state law, leading to a different outcome from *Calderon-Cardona*. Thus, without subject matter jurisdiction, the *Hausler* merits decision interpreting TRIA and CACRs "otherwise would have gone unaddressed." *Steel Co.*, 523 U.S. at 98, 101-02 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *see also Friends of the Everglades*, 699 F.3d at 1288-89 (hypothetical jurisdiction cannot be

exercised where subject matter jurisdiction is distinct from merits).

The decision below was not only *ultra vires* because *Hausler* already decided the jurisdictional issue, but it muddies the finite boundaries of the "foreordained" exception providing dangerous precedent that could mislead subsequent courts to mistakenly substitute its own views of what a prior court might have intended to find hypothetical jurisdiction (as did the court below) and skip the jurisdictional question to reach an easier merits question, violating the fundamental jurisdictional principles articulated in *Steel Co.* This profound error should be corrected by this Court.

### B. In Applying "Hypothetical Hypothetical Jurisdiction", the Second Circuit Below So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Warrant this Court's Use of Its Supervisory Powers

In what appears to be an unprecedented decision, to avoid a res judicata bar on a challenge to subject matter jurisdiction, the court below reasoned that a panel of the same court in a different case years before must have used hypothetical jurisdiction to reach the merits, even though the earlier decision nowhere indicated that it was utilizing the doctrine. The court below thus applied a new type of further removed hypothetical jurisdiction, one based on another hypothetical. Courts of Appeals have assessed a district court's decision that was silent on

the issue of hypothetical jurisdiction, and found it to have improperly assumed jurisdiction rendering an advisory merits opinion and reversed on that basis. However, we are unaware of any case post-*Steel Co.* where a court of concurrent jurisdiction used the doctrine to assume that an earlier panel in a different case with the issue of subject matter jurisdiction squarely before it, had employed hypothetical jurisdiction to reach the merits, even though the earlier decision had nowhere indicated that the court was reaching the merits on the basis of hypothetical jurisdiction and even though that decision had indicated the court rejected the challenge to subject matter jurisdiction. *See, e.g.*, *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 572-73 (7th Cir. 2012) (vacating district court's "hypothetical determination" where district court assumed jurisdiction).[7]

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[7] It is true that two of the three members of the court below were also on the *Hausler* court, but this did not give it license to ignore the *Hausler* record, including the fact that *Hausler* and its companion case *Calderon-Cardona* were decided on different grounds, involving different statutes. Moreover, the integrity of the judicial process requires that each panel decides the case before it with the record before it, and not by engrafting presumed insider knowledge about prior decisions in other cases. *See Universal Reinsurance Co., Ltd. v. St. Paul Fire and Marine Ins. Co.*, 224 F.3d 139, 141 (2d Cir. 2000) (remanding for jurisdictional fact-finding in "abundance of caution" where panel could not find subject matter jurisdiction on record before it); *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 866-67 (2d Cir. 1996) (holding personal jurisdiction — question of law turning on questions of fact — required remand for discovery: "we are reluctant to rely on what may turn out to be an

The implications of the decision below lead to absurd and hazardous results for future cases and a challenge to the integrity of the courts. First, if the decision below is correct that the *Hausler* court applied hypothetical jurisdiction, this would condone an improper practice of permitting full briefing and argument on subject matter jurisdiction and then bypassing the issue to reach the merits without the court justifying its basis for using hypothetical jurisdiction, which is "disapproved by this Court." *Steel Co.* 523 U.S. at 101. The court below's use of what amounts to "hypothetical hypothetical jurisdiction" would impermissibly allow a court to later find silent application of hypothetical jurisdiction, even when the issue of subject matter jurisdiction had been contested. This approach has been rejected by this Court.

In any event, this is not what the *Hausler* court did. Rather, the *Hausler* court received lengthy briefing and argument on the subject matter jurisdiction issue, acknowledged that full faith and credit had been given to the Hausler State Court Judgment and that Mrs. Hausler was in the process of enforcing her Judgments, and addressed a merits question "of first impression" resulting in a new pronouncement of law interpreting TRIA and the CACRs and found the remaining challenges, including subject matter jurisdiction "unavailing". *See LFoundry Rousset*, 690 F. App'x at 751. This

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incomplete record to clarify legal doctrine for the district court's guidance").

point is evident because whether a panel has "already considered and rejected the basis for a given motion is dependent on the contours of the mandate, which 'impliedly decides at least enough issues to allow it to be **effective**, even if not all issues are made explicit.'" *LFoundry*, 690 F. App'x at 751 (emphasis added) (quoting *In re Coudert Bros. LLP*, 809 F. 3d 94, 101-02 (2d Cir. 2015)). *See also Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938) ("Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and subject matter."). The court below's interpretation of *Hausler*, however, would violate *Steel Co's.* rejection of "'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt" by permitting courts to do just that. *Steel Co.*, 523 U.S. at 101.

Further, the decision below is contrary to fundamental principles of res judicata and judicial economy. In reaching its "hypothetical hypothetical jurisdiction" determination, the court below has permitted the same parties to relitigate the same jurisdictional issue four years later and after Mrs. Hausler had relied on the *Hausler* decision and continued enforcing her Judgments in the courts against multiple other parties and successfully obtained the turnover of Cuban assets to satisfy the Judgments since then. Although subject matter jurisdiction is foundational to the proper functioning of the court system, so is finality. "[P]rinciples of res judicata apply to jurisdictional determinations — both subject matter and personal." *See Corbett v.*

*MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88-89 (2d Cir. 1997) (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982)); *Ripperger v. A.C. Allyn & Co.*, 113 F.2d 332, 333 (2d Cir. 1940) ("[A] decision in favor of jurisdiction is res judicata and invulnerable to collateral attack, even though the ground on which the decision was rested has subsequently been overruled.").

This is not a case like the "peculiar circumstances" cited in *Steel Co.* or in *Center for Reproductive Law and Policy* where the particular procedural posture made application of hypothetical jurisdiction appropriate because the decision would dispose of the litigation, ending the inquiry, and would render the jurisdictional question more in the nature of an advisory opinion. *See, e.g.*, *Ctr. for Reproductive Law*, 304 F.3d at 195 (where precise merits question already addressed it is the jurisdictional question that "resembles an advisory opinion . . ."). That rationale is inapplicable here because the merits questions were different in *Hausler* and *Calderon-Cardona.* It is also inapplicable in a judgment enforcement proceeding, a court's passing over the jurisdictional question before it would not finally end the inquiry. As it has here, the question continues to have substantive implications on the respective rights of the parties to the judgment which continues to be enforced until the judgment is satisfied. Application of the decision below would permit a court to evade the jurisdictional question in favor of the merits question

and reach a result, even though the nature of the dispute was sure to lead to additional and lengthy litigation affecting substantive rights, as it has here. This flouting of fundamental jurisdictional considerations violates principles of judicial economy including res judicata.

Finally, given the foregoing, including the *Hausler* record, the Second Circuit's presumed use of hypothetical jurisdiction by the *Hausler* court violates the premise that "[i]t is axiomatic that a panel of [the Court of Appeals] is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219-20 (2d Cir. 2016) (quoting *NML Capital v. Republic of Argentina*, 621 F.3d 230, 243 (2d Cir. 2010)) ("To the extent Plaintiffs submit that *Kiobel I* was wrongly decided, we reaffirm *Arab Bank's* conclusion – we are not free to consider that argument."). *See also FDIC v. First Horizon Asset Sec.*, 821 F.3d 372, 375-76, 376 n.2 (2d Cir. 2016) ("[W]e need not determine whether we would reach the same result as the [prior] panel did if we were not bound by that precedent."); *see also Newdow v. Lefevre*, 598 F.3d 638, 644 (9th Cir. 2010) ("As a general rule, we, as a three-judge panel, are without authority to 'overrule a circuit precedent; that power is reserved to the circuit court sitting en banc.'") (citation omitted).

For these reasons the decision below has so far departed from the usual course of judicial

proceedings that this Court's supervisory powers are necessary to correct the error.

### C. The Second Circuit's Misuse of Hypothetical Jurisdiction Underscores the Need to Resolve the Circuit Split Regarding the Reach of that Doctrine to Statutory Subject Matter Jurisdiction Questions

There is a deep split (and admitted confusion) among the Courts of Appeals as to whether *Steel Co.*'s strict limitations on using hypothetical jurisdiction to reach the merits applies only to Article III standing questions or also to questions of statutory subject matter jurisdiction, such as in this case. The Second Circuit in the decision below applied *Steel Co.* expansively, reasoning, "'where the jurisdictional constraints are imposed by statute, not the Constitution, and where the jurisdictional issues are complex and the substance of the claim is . . . plainly without merit,' [the court] may consider the merits of the case without first addressing statutory jurisdiction." *See* App. 33a (citing *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 338 n.2 (2d Cir. 2006)). This statement is troubling, as the merits question in *Hausler* was not "plainly without merit"; rather it was the subject of much debate and conflicting outcomes in the various courts; yet, the decision below suggests a court could avoid resolving the jurisdictional question, even with a complex merits issue.

The Second Circuit is joined in its expansive view of hypothetical jurisdiction by the First, Third, Sixth, Ninth, and Federal Circuits in holding (Petitioner submits, beyond the parameters of *Steel Co.*) that the doctrine can apply to statutory subject matter jurisdiction. *See, e.g.*, *Sinapi v. R.I. Bd. of Bar Examiners*, 910 F.3d 544, 550 (1st Cir. 2018) ("[B]ypassing jurisdictional questions to consider the merits is appropriate where, as here, the jurisdictional question is statutory."); *Restoration Preservation Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 59 (1st Cir. 2003) ("[W]hile Article III jurisdictional disputes are subject to *Steel Co.*, statutory jurisdictional disputes are not."); *Umsted v. Umsted*, 446 F.3d 17, 20 n.2 (1st Cir. 2006) ("[W]e bypass the issue here and assume, arguendo, subject matter jurisdiction under 28 U.S.C. § 1332 because the merits of this appeal are easily resolved against the party relying on our jurisdiction."); *Bowers v. National Collegiate Athletic Ass'n*, 346 F.3d 402, 415-16 (3d Cir. 2003) ("*Steel Co.* . . . should not be understood as requiring courts to answer all questions of 'jurisdiction,' broadly understood. . . . Instead, that case requires courts to answer questions concerning Article III jurisdiction before reaching other questions."); *Jordon v. AG of the United States*, 424 F.3d 320, 325 n.8 (3d Cir. 2005) ("assum[ing] without deciding" statutory subject matter jurisdiction reasoning that *Steel Co.* only applies to Article III standing questions); *Ali Kassem Abou Khodr v. Holder*, 531 F. App'x 660, 665 n.4 (6th Cir. 2013) (emphasis in original) (joining "several circuits [that] have interpreted *Steel Co.* to permit

courts to assume that *statutory* jurisdiction—as distinct from *constitutional* jurisdiction—exists in order to resolve a case, by means of a straightforward merits analysis, in favor of the party contesting jurisdiction"); *NLRB v. Barstow Cmty. Hosp.-Operated by Cmty. Health Sys., Inc.*, 474 F. App'x 497, 499 (9th Cir. 2012) ("[U]nlike Article III jurisdiction, statutory jurisdiction can be presumed to exist when the merits are more easily resolved" (citing *Steel Co.*, 523 U.S. at 97, 97 n.2)); *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) ("While we are generally obligated to resolve jurisdictional challenges first, Supreme Court precedent only requires federal courts to answer questions concerning their Article III jurisdiction—not necessarily their statutory jurisdiction—before reaching other dispositive issues." (citing *Steel Co.*, 523 U.S. at 95-97)).

The Fourth, Fifth, Seventh, and Eleventh Circuits have all held that this expansive use of *Steel Co.* is untenable, and further that hypothetical jurisdiction is impermissible for both Article III standing questions and statutory subject matter jurisdiction questions. *See, e.g.*, *Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017) (applying *Steel Co.* to statutory subject matter jurisdiction and holding "[t]he requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception'" (quoting *Steel Co.* at 94-95)); *Leibovitch*, 697 F.3d at 573 (applying bar on hypothetical jurisdiction to

statutory subject matter jurisdiction and holding "a court may not presume hypothetical jurisdiction in order to decide a question on the merits") *Garcia v. Quarterman*, 573 F.3d 214, 216 n.4 (5th Cir. 2009) (district court erred in applying hypothetical jurisdiction to statutory subject matter jurisdiction issue); *Friends of the Everglades*, 699 F.3d at 1288 (*Steel Co.* requires court to "have both statutory and constitutional jurisdiction before it may decide a case on the merits.");

The Eighth, Tenth, and D.C. Circuits have identified confusion that exists over whether *Steel Co.* applies only to Article III standing or equally to statutory subject matter jurisdiction questions. *See Edwards v. City of Jonesboro*, 645 F.3d 1014, 1017 (8th Cir. 2011) (internal citation omitted) ("With a few limited exceptions, federal courts must address *Article III subject-matter jurisdiction* before reaching the merits of a claim or another non-jurisdictional question such as issue preclusion. Whether this rule also applies to statutory jurisdiction, however, is a matter of some dispute."); *Abernathy v. Wandes*, 713 F.3d 538, 557 n.17 (10th Cir. 2013) (as to whether use of hypothetical jurisdiction is appropriate "[t]here is some suggestion in the case law that, with respect to statutory jurisdiction, as opposed to constitutional Article III jurisdiction, it would be") (collecting cases); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 511 (D.C. Cir. 2018) (citing cases within the D.C. Circuit that took both broad and narrow views of *Steel Co.*'s reach and finding that the "continuing vitality of those

decisions [which held that *Steel Co.* does not apply to statutory subject matter jurisdiction] may be open to question" in light of *Steel Co.* and its progeny).

As between the competing circuits, the Eleventh Circuit's decision in *Friends of the Everglades*, which rejects hypothetical jurisdiction for either Article III or statutory subject matter jurisdiction questions, provides the closest expression of the Constitutional mandate, as articulated in *Steel Co.* regarding the need to satisfy federal jurisdiction. Addressing statutory subject matter jurisdiction, the Eleventh Circuit evaluated the arguments for applying hypothetical jurisdiction and held "[w]e cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment." *Friends of the Everglades*, 699 F.3d at 1288-89.

Like the decision in *Friends of the Everglades*, and although involving Article III standing, *Steel Co.* speaks in forceful terms regarding jurisdiction broadly, and did not limit its holding to Article III cases. As *Steel Co.* explained:

> Much more than legal niceties are at stake here. The *statutory* and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers . . .

523 U.S. at 101 (emphasis added). This conclusion is also drawn from *Steel Co.*'s progeny, which, while permitting other non-merits threshold issues to precede a subject matter jurisdiction determination,

involved questions of statutory jurisdiction. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999) (statutory questions of personal jurisdiction may be resolved prior to subject matter determinations because both types of jurisdiction are "essential element[s]" of a court's authority to dismiss a case on non-merits grounds (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937))); *Sinochem Int'l Shipping Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 433 (2007) (holding that threshold issue of *forum non-conveniens*, could be decided prior to statutory subject matter jurisdiction because it is a non-merits determination not involving "any assumption by the court of substantive 'law-declaring power'" (quoting *Ruhrgas*, 526 U.S. at 584-85)). In both *Ruhrgas* and *Sinochem* this Court, while allowing courts to choose between threshold, non-merits bases for dismissal, was careful not to use hypothetical jurisdiction to reach the merits and crafted its decisions to preserve *Steel Co.*'s strict limitations on using hypothetical jurisdiction in both Article III *and* statutory jurisdiction cases. *See also Kaplan*, 896 F.3d at 511 (questioning whether hypothetical can be applied to statutory subject matter jurisdiction in the wake of *Sinochem*'s reasoning and suggesting, without deciding, that it cannot).

Moreover, the Eleventh Circuit approach is more in line with *Steel Co.*, as, the "distinction between statutory limitations on subject-matter jurisdiction and other Article III jurisdictional limitations in tenuous, as both limitations arise from Article III."

*Kaplan*, 896 F.3d at 517 (Edwards, J., concurring). This is because Article III grants Congress the power to establish the lower courts' jurisdiction, which necessarily includes the power to limit their authority. *See Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."), *overruled in part on other grounds as stated in Kay v. Sec'y of Health & Human Serv.*, 80 Fed. Cl. 601 (Fed. Cl. 2008); *Kokkomen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."); *Ins. Corp. of Ireland*, 456 U.S. at 701-02 ("Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. . . . [T]his reflects the constitutional source of federal judicial power.").

Therefore, the use by some circuits of hypothetical jurisdiction to reach the merits and bypass a statutory subject matter jurisdiction question, as did the Second Circuit in this case, is an afront to Constitutional and statutory limits on their authority to declare law and is contrary to this Court's jurisprudence. The practice is by definition *ultra vires*. The circuit split and admitted confusion over the limits of their own jurisdiction is ripe for this Court's adjudication and guidance. This case presents an ideal opportunity for resolving this conflict as to whether *Steel Co.*'s ban on hypothetical

jurisdiction applies only to Article III standing or also to statutory subject matter jurisdiction.

## II. THE SECOND CIRCUIT'S STATED STANDARD OF REVIEW UNDER TRIA DISREGARDS A STATE COURT'S JUDGMENT, INCLUDING ITS EXPRESS FINDINGS, SUBVERTING FULL FAITH AND CREDIT AND BASIC PRINCIPLES OF FEDERALISM

The decision below is also an affront to full faith and credit and core federalism principles. The Second Circuit below held the district court may not use "the Florida courts' jurisdictional findings [to] 'bind or aid' it," in determining whether there is jurisdiction to attach a terrorist state's assets under TRIA § 201(a). App. 6a. This articulated standard undermines principles of federalism in a number of respects. First, by disregarding state court judgments, including the State Court Judgment here, the decision ignores that under FSIA, Congress empowered state courts to hear cases against foreign sovereigns for extrajudicial killings and to issue default judgments against them when the court, in its discretion, finds "evidence satisfactory to the court." 28 U.S.C. §§ 1605(a)(7) (repealed 2008),[8]

[8] Unlike its replaced 28 U.S.C. 1605A, Section 1605(a)(7) indicates the timing of the terrorist designation is an issue of abstention, not subject matter jurisdiction. *See* 28 U.S.C. § 1605(a)(7) (repealed 2008) ("[a] foreign state shall not be immune . . . in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extra-judicial killing . . . **except that** the court shall **decline to hear** a claim . . . if the foreign

1608(e). Such judgments are entitled to full faith and credit, even on default. App. 67a (28 U.S.C. § 1738); *Harvey v. Fresquez,* 479 F. App'x 360, 362 (2d Cir. 2012) ("default judgment is presumptively valid until reversed or set aside" and entitled to full faith and credit). True, TRIA enforcement jurisdiction includes a valid terrorism judgment; however, assessing that jurisdiction is not a license to abrogate the power granted to state courts to render them or ignore full faith and credit principles. *See Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 51 (2d Cir. 2010) ("The effect of the TRIA, therefore, was simply to render a judgment more readily enforceable against a related third party. The judgment itself was in no way tampered with, and separation of powers was thus in no way offended.")

Thus, second, the decision below represents a disregard of federalism principles, including full faith and credit, that state court judgments, including the State Court Judgment, should receive deference, even assuming the jurisdictional determination might later be determined to be incorrect. *See Underwriters Nat'l Assur. Co. v. North Carolina Life and Accident and Health Ins. Guaranty Ass'n*, 455 U.S. 691,705-07, 705 n.11 (1982) (review of state court judgment's jurisdictional findings is limited and finality requires full faith and credit be given even when jurisdictional determination is erroneous). *See also Allen v. McCurry*, 449 U.S. 90,

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state was not designated as a state sponsor of terrorism . . . at the time the act occurred, unless later so designated as a result of such act. . . ." (emphasis added)); App. 58a-61a.

103-05 (1980) (indicating deference to state court judgments and confidence in its ability to apply federal law in context of full faith and credit). Affording proper deference to the state court findings would have led, at worst, to concluding that court was mistaken in holding the subject matter jurisdiction evidence was "satisfactory." The State Court Judgment is still preclusive and enforceable. *Accord United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) (judgment was not void "simply because it is or may have been erroneous").[9]

Third, the decision ignores that a full faith and credit analysis requires state court judgments to be given the same weight they would receive in the state where it was entered. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985). The decision below does not even address this rule or assess how Florida law would review the Hausler Judgments, disregarding the district court's findings that Florida would not have permitted the collateral attack.[10]

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[9] Without the benefit of the full state court record, the Second Circuit below completely rejected the Florida court's detailed findings as set forth in the State Court Judgment, and proceeded to make a contrary determination on a record created in the course of a motion to dismiss, not following any evidentiary hearing. App. 69a, 74a-83a; App. 96a-100a. This was arbitrary and contrary to the statutory mandate that any ruling should follow the taking of evidence. 28 U.S.C. § 1608(e).

[10] Florida law bars BBVA from making its collateral attack, yet another reason why the court below should have rejected BBVA's repeated challenge to the Hausler Judgments. *See*

Under these principles, the district court's orders should have been sustained. The State Court Judgment, entered after a trial held complying with 28 U.S.C. § 1608(e), contains explicit jurisdictional findings based upon "evidence satisfactory to the Court." App. 69a, 74a. To hold that the district court is precluded from considering the state court's determination and how it was rendered is directly at odds with the FSIA's grant of power to the state court to make it and full faith and credit principles. Had the court below applied these principles, it would have sustained the orders of the district court. *See Travelers lndem. Co. v. Bailey*, 557 U.S. 137, 154 n.7 (2009) (holding collateral attack for subject matter "jurisdictional flaw in 1986" was impermissible). As the Supreme Court explained:

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*Tallentire v. Burkhart,* 153 Fla. 278, 279-80 (Fla.1943) (garnishee lacks standing to attack judgment unless property rights are injured by judgment's entry). In Florida, Rule 1.540 of Civil Procedure determines when judgments may be challenged; however, even default judgments are not void, but voidable where there was an opportunity to be heard. *See Estrada v. Estrada*, 274 So. 3d 426, 430-31 (Fl. Dist. Ct. App. 2019); *In re Itzler*, 247 B.R. 546, 551 (S.D. Fl. Bankr. 2000) (Florida default judgment "is just as conclusive as one which was hotly contested.") (quoting *Cabinet Craft, Inc. v. A.G. Spanos Enters., Inc.*, 348 So. 2d 920 (Fla. Dist. Ct. App. 1977)). And a challenge cannot be mounted from matters outside the record as BBVA did. *See deMarigny v. deMarigny,* 43 So. 2d 442, 445-46 (Fla. 1949). As the Florida courts would have given the State Court Judgment preclusive effect, so should have the court below. *See Johnson v. Muelberger*, 340 U.S. 581, 587 (1951) (attack on judgment disallowed "where the party attacking would not be permitted to make a collateral attack in the courts of the granting state").

"the need for finality forbids a court called upon to enforce a final order to 'tunnel back . . . for the purpose of reassessing prior jurisdiction de novo . . .'" *Id.* at 154 (quoting *Finova Capital Corp. v. Larson Pharmacy Inc. (In re Optical Techs., Inc.)*, 425 F.3d 1294, 1308 (CA11 2005)).

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: July 20, 2020

Respectfully submitted,

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# APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term, 2018

(Argued: January 29, 2019

Decided: December 30, 2019)

Docket No. 18-2345-cv

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ALDO VERA, JR., as Personal Representative of the Estate of ALDO VERA, SR.,

*Plaintiff-Appellee,*

WILLIAM O. FULLER, as Successor Personal Representative of the Estate of ROBERT OTIS FULLER; GUSTAVO E. VILLOLDO, individually and as Administrator, Executor, and Personal Representative of the Estate of GUSTAVO VILLOLDO; ALFREDO VILLOLDO,

*Petitioners-Appellees,*

—*v.*—

BANCO BILBAO VIZCAYA ARGENTARIA, S.A.,

*Respondent-Appellant.*

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B e f o r e :

CABRANES, LYNCH, and CARNEY, *Circuit Judges.*

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Respondent-Appellant Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA") appeals from an August 2, 2018 final judgment of the U.S. District Court for the Southern District of New York (Hellerstein, *J.)* entered following issuance of our mandate in *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.,* 729 Fed. App'x 106 (2d Cir. 2018). As relevant here, the District Court's judgment rendered final several of its previous orders requiring BBVA to turn over funds to Petitioners-Appellees Jeannette Fuller Hausler, Gustavo E. Villoldo, and Alfredo Villoldo from a blocked electronic fund transfer originated by the Cuban Import-Export Corporation, an instrumentality of the Republic of Cuba. These turnover orders, in turn, rested on the District Court's grant of full faith and credit to default judgments that Petitioners-Appellees secured against Cuba in Florida state courts, whose jurisdiction against the sovereign was asserted under the state-sponsored terrorism exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (" FSIA" ). The District Court made no independent findings regarding its own jurisdiction to enforce these judgments under the FSIA, and in particular under section 201(a) of the Terrorism Risk Insurance Act, 28 U.S.C. § 1610 note. Because our review of the record convinces us that jurisdiction did not lie, we reverse the judgment of the District Court, vacate the District Court's turnover orders, and remand the cause with instructions to dismiss the action for lack of subject-matter jurisdiction. Applying common-law equitable principles of restitution, we further direct the District Court to order

Petitioners-Appellees, as well as Plaintiff-Appellee Aldo Vera, Jr., also a party in these proceedings and a beneficiary of the same turnover orders, to return to BBVA the funds that BBVA paid them under the void turnover orders.

REVERSED and REMANDED with instructions.

JUDGE CABRANES joins the judgment of the Court.

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CARNEY, *Circuit Judge*:

This is the fifth appeal that we have seen in these proceedings. The current controversy arises from the efforts of Petitioners-Appellees Gustavo E. Villoldo and Alfredo Villoldo ("the Villoldos") and Jeannette Fuller Hausler (collectively, "the Villoldos and Hausler" or "Petitioners") to enforce several default judgments obtained by them against the Cuban government in Florida state courts. These judgments rest, factually, on allegations of torture and extrajudicial killing suffered by members of Petitioners' families in 1959 and 1960 at the hands of the revolutionary Cuban state. They rest, legally, with respect to those courts' jurisdiction over Cuba, on the state-sponsored terrorism exception of the Foreign Sovereign Immunities Act ("FSIA"), now codified at 28 U.S.C. § 1605A, and earlier found in substantially the same form at 28 U.S.C. § 1605(a)(7). Section 201(a) of the Terrorism Risk Insurance Act ("TRIA"), codified at 28 U.S.C. § 1610 note, would provide the District Court here a jurisdictional basis for enforcing those state judgments, if valid, by attaching and executing on Cuban assets blocked by banking institutions under the Cuban Assets Control Regulations, 31 C.F.R. Part 515.

Section 1605A revokes a state's sovereign immunity from legal proceedings and liability for certain terrorism-related claims for personal injury and death if, in addition to meeting ordinary tort liability standards, "the foreign state was designated as a state sponsor of terrorism at the time [the tor-

tious act] occurred, or was so designated *as a result of such act."* 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (emphasis supplied). The Republic of Cuba ("Cuba") was designated as a state sponsor of terrorism only in March 1982—over two decades after the abhorrent conduct that Petitioners allege. Accordingly, courts may exercise jurisdiction over Petitioners' claims against Cuba only if they can establish that either (1) Cuba was designated as a state sponsor of terrorism in 1982 at least in part because of the actions it took against their family members in 1959 and 1960, or (2) Cuba committed certain acts of terrorism (within the statute's meaning) against Petitioners or their family members after 1982.

Beginning in about 2007, Plaintiff-Appellee Aldo Vera, Jr. ("Vera"), the Villoldos, and Hausler (collectively, "Appellees") independently pursued litigation on their tort claims in Florida state courts, each obtaining a significant default judgment against Cuba. (Hausler's judgment was for over $400 million, Vera's, for $95 million, and the Villoldos', for $2.79 billion.) In 2013, seeking enforcement of those judgments in New York, they jointly filed an Omnibus Turnover Petition in the U.S. District Court for the Southern District of New York against nineteen banks. Those banks, Appellees alleged, held blocked Cuban assets in New York. One of the banks, Respondent-Appellant Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA"), sought dismissal of the turnover petition, contending first that the District Court lacked subject-matter jurisdiction over the enforcement proceeding, and, then, in the alternative, that the Florida state

court judgments were void and not entitled to the federal court's full faith and credit.

The District Court denied BBVA's motion to dismiss but did not make a threshold jurisdictional determination in doing so, relying instead on the jurisdictional findings and legal conclusions of the three Florida state courts to proceed under TRIA section 201(a). As we held in reviewing (and vacating) a prior contempt order against BBVA issued by the District Court with respect to Vera, reliance on a state court's legal conclusions does not adequately support a federal court's own exercise of subject-matter jurisdiction against a foreign sovereign or its assets when a proceeding is predicated on a default judgment. In *Vera v. Republic of Cuba,* 867 F.3d 310, 318 (2d Cir. 2017) *("Vera III"),* we explained that the District Court was required to "analyze the record independently to determine if Cuba was immune" from its jurisdiction and that the Florida courts' jurisdictional findings do not "bind or aid" it in making this determination. *See Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 493–94 (1983) ("At the threshold of every action in a District Court against a foreign state . . . it must apply the detailed federal law standards set forth in the Act."). Accordingly, the District Court's judgment against BBVA and the turnover orders that preceded it are subject to serious challenge.

After carefully examining the record on appeal, we conclude that, had it independently determined the issue, the District Court would necessarily have found that Hausler and the Villoldos failed to

establish that the exception to sovereign immunity provided for in section 1605A applied. As we ruled with respect to Vera in *Vera III,* Petitioners here have failed to show under section 1605A either that (1) Cuba was designated as a state sponsor of terrorism "as a result" of the pre-1982 acts underlying their judgments or that (2) the acts underlying their judgments occurred after 1982. Without either showing, the state-sponsored terrorism exception did not permit the court to exercise jurisdiction over Cuba's assets under TRIA section 201(a).

Accordingly, and as spelled out in greater detail below, we decide that the District Court did not have subject-matter jurisdiction over this enforcement proceeding. We therefore REVERSE the District Court's judgment; VACATE the District Court's turnover orders; and REMAND the cause to the District Court with instructions (1) to dismiss the amended Omnibus Turnover Petition and (2) to enter an order directing restitution by Appellees of the funds that BBVA paid them.

## BACKGROUND[1]

### I. The start of the *Vera* proceedings

The proceedings that culminated in this appeal began in March 2012, when Vera, who held a simi-

[1] This statement of facts is drawn from the findings of fact made in the Florida state court judgments secured by Hausler and the Villoldos. It also relies on documents supporting those judgments that were presented to the District

lar default judgment against Cuba issued by a Florida state court, filed suit in the U.S. District Court for the Southern District of New York seeking to enforce that judgment. *Vera v. Republic of Cuba,* No. 12-CV-1596 (S.D.N.Y.). In August 2012, after Cuba's default in the federal proceeding, the District Court (Hellerstein, *J.*) determined that Vera's Florida state court judgment was due full faith and credit and, accordingly, entered a federal judgment in the amount of approximately $49 million in Vera's favor. Then, in late 2012 and early 2013, Vera filed numerous turnover motions, seeking to seize assets from banks in New York that he alleged to be holding Cuban assets.

Vera was not long alone in seeking to enforce a default judgment against Cuba in New York federal courts. In 2013, both Hausler and the Villoldos—that is, Petitioners in this case—intervened in the *Vera* enforcement proceedings, asserting that their rights as judgment creditors were entitled to priority over Vera's. Before reviewing what happened next in those proceedings, it will be helpful to describe the key facts underlying the Villoldo and Hausler state court judgments and to provide a

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Court and to this Court by the parties in their Joint Appendix. Although BBVA challenges the Florida state courts' jurisdictional determinations, in this setting it has not disputed the reliability of their findings of fact. Accordingly, because of Cuba's default in the Florida state proceedings and because BBVA raises no argument to the contrary, we accept these findings as true for present purposes.

short outline of their respective procedural histories.[2]

## II. The Villoldo judgment

Gustavo E. Villoldo ("Gustavo") and Alfredo Villoldo ("Alfredo") are the Cuban-born sons of the late Gustavo Villoldo Argilagos ("Villoldo Argilagos"). Their father, a dual citizen of the U.S. and Cuba, founded a successful automotive company and owned numerous other businesses and landholdings in Cuba before the Cuban Revolution. After the revolution brought the Castro government to power on January 1, 1959, the Villoldo family became a target of the new regime because of their financial wealth and ties to the United States. Both sons are U.S. citizens.

Cuban soldiers arrested Gustavo and Alfredo on January 6, 1959. Gustavo was detained in unhealthy and inhumane conditions, beaten, and interrogated under torture in a Cuban facility where executions were being carried out. After their release five days later, the brothers and their father continued to be subject to severe harassment by the Cuban government. Cuban soldiers repeatedly took Villoldo Argilagos into custody and threatened to murder the entire family unless he turned over the family's businesses and properties

[2] None of the Florida state court judgments at issue in this appeal is, to our knowledge, reported in Westlaw, LexisNexis, or other commercially available databases. Accordingly, we cite to the judgments in the form provided by the parties in their Joint Appendix on appeal.

to the new regime. On February 16, 1959, one day after meeting with prominent Cuban government member Ernesto "Che" Guevara, Villoldo Argilagos committed suicide. He did so, according to Gustavo's testimony, because he was ordered to do so to save the lives of his wife and sons. The two brothers then fled to the United States, leaving behind their family's vast properties, which were soon after confiscated.

After leaving Cuba, Gustavo Villoldo joined the Central Intelligence Agency, and engaged in important intelligence activities on behalf of the United States. These included the 1967 operation that led to Che Guevara's execution in Bolivia. In deposition testimony, Gustavo Villoldo recounted that, shortly after the operation, two Cuban agents were sent to New York to kidnap or kill him. He testified further in general terms that, between 1997 and 2003, when he was living in the United States, the Cuban government made numerous threats against his life.

In August 2011, in a Florida state court proceeding, the Villoldo brothers secured a default judgment against Cuba for these wrongs. The court entered judgment in their favor in the amount of $2.79 billion, denominating $1 billion of that sum as punitive damages.[3] The Florida state court characterized Cuba's actions against the Villoldo family

[3] Earlier, in 2009, the Villoldos had obtained another Florida state court judgment in their favor against Cuba in the amount of $1.179 billion, relying on largely similar allegations. J. App'x 383–89.

as "torture" within the meaning of section 1605A of title 28 and ruled that, under that section, it had subject-matter jurisdiction to hear their claims. In December 2011, the Villoldos sued Cuba in the U.S. District Court for the Southern District of New York, seeking recognition and enforcement of their Florida judgment under the Full Faith and Credit Act, 28 U.S.C. § 1738. *Villoldo v. Castro Ruz,* No. 11-CV-9394 (S.D.N.Y.) (Swain, *J.).* In October 2012, according full faith and credit to the Florida judgment, Judge Swain entered a default judgment against Cuba and related individuals and entities in that case in the sum awarded by the Florida state court, making no independent jurisdictional findings.

In November 2017, after their ongoing enforcement proceedings in the District Court were nearly complete, the Villoldos (having returned to Florida state court) filed a "motion to re-establish the court record" there with respect to the 2011 judgment. They submitted new affidavits from Gustavo Villoldo, his daughter Elia Lora, and his attorney Andrew C. Hall, and various attachments to those affidavits. Granting this motion, the Florida state court then ruled—in November 2017—that "the information contained within the affidavits and attachments were relied upon by the Court when rendering its verdict at trial [in 2011] in this case." J. App'x 1027. Citing this newly-submitted evidence, the Florida court issued an opinion and amended final judgment on June 4, 2018, making significant additional findings of fact and instructing that the judgment was effective *nunc pro tunc* as of August

19, 2011.

In their 2017 affidavits, Gustavo Villoldo and Elia Lora represented that they had earlier testified at trial that their home in Florida was once surrounded by armed men whom they perceived to be agents of the Cuban state.[4] Lora's affidavit reflects that she had observed four men with large guns in their hands, that her family members armed themselves with two AR-15 rifles and yelled at the intruders to leave, and that local police responded to their 911 call within minutes but could not find the intruders. Neither Alfredo nor Gustavo Villoldo was present in the home at the time. More broadly, Gustavo Villoldo averred that he was subjected to a "concerted and continuing effort" by Cuba following Che Guevara's death in 1967 "to locate [him] in order to carry out [his] assassination." J. App'x 882.

## III. The Hausler judgment

Jeannette Fuller Hausler (now deceased) was a U.S. citizen.[5] Her brother, Robert Otis Fuller, nick-

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[4] This testimony was not reflected in the factual findings supporting the 2011 judgment and does not appear to be in the contemporaneous 2011 deposition given by Gustavo Villoldo.

[5] Jeannette Hausler died during the pendency of this appeal and William Fuller, who succeeded her as the administrator of Bobby Fuller's estate, has been substituted as Petitioner-Appellee. In this opinion, we continue to refer to Hausler as Petitioner and to the "Hausler Judgment," to avoid confusion and ensure continuity with the language used in multiple rounds of proceedings.

named "Bobby," was a dual U.S.-Cuban national born in Cuba, and heir to significant Cuban agricultural and business holdings. Mirroring the Villoldos' experience, the Fuller family's lives and properties were threatened by the new Cuban regime after January 1959. In early October 1960, Cuban agents arrested Fuller, who was returning from a short trip to Miami, and charged him with engaging in counterrevolutionary activities. He was tortured until he signed a prepared confession.

Fuller was then presented to a military tribunal where, within minutes, he was tried and sentenced to death. In the proceedings, he was denied access to meaningful legal counsel and was not permitted to call witnesses in his defense. On October 16, 1960, he was executed by firing squad. His death prompted the U.S. Department of State to file a formal protest denouncing the proceedings. In the protest, the Department accused the Cuban authorities of carrying out Fuller's trial in a "Roman [c]ircus atmosphere," failing to "observe basic civilized standards," and engaging in "inhuman behavior." J. App'x 597–98.

In January 2007, in Florida state court, Hausler secured a default judgment against Cuba for $400 million, of which $300 million was designated as punitive and $100 million as compensatory damages. In an opinion accompanying the judgment, the Florida state court ruled that Fuller was a victim of "extra-judicial killing" and asserted jurisdiction over Cuba under the FSIA's state-sponsored terrorism exception, then codified at 28 U.S.C.

§ 1605(a)(7).[6] J. App'x 592. The following year, on Hausler's application, the U.S. District Court for the Southern District of Florida granted full faith and credit to the state court judgment and entered a default judgment against Cuba, making no independent jurisdictional findings. *Hausler v. Republic of Cuba,* No. 08-CV-20197 (S.D. Fla.) (Jordan, *J.).*

Hausler then began proceedings in the Southern District of New York. *Hausler v. Republic of Cuba,* No. 09-CV-10289 (S.D.N.Y.) (Marrero, *J.).* In 2009 and 2010, relying on the Florida state and federal judgments, Hausler served writs of garnishment against various New York banks holding blocked Cuban assets. She then formally intervened in the *Vera* enforcement proceedings, now before us on appeal.

## IV. The *Vera* enforcement proceedings

The proceedings leading to this appeal have been protracted and circuitous, to say the least. As pre-

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[6] From 1996 through 2008, the state-sponsored terrorism exception to sovereign immunity was codified at 28 U.S.C. § 1605(a)(7). In 2008, section 1605(a)(7) was modified and then recodified as section 1605A. For purposes of the issues presented in this appeal, no relevant differences exist between current section 1605A and former section 1605(a)(7). *See Schermerhorn v. State of Israel,* 876 F.3d 351, 357 (D.C. Cir. 2017) (observing that "section 1605A(a) and its predecessor section 1605(a)(7) are nearly identical" in defining the scope of the terrorism exception). Even so, when discussing jurisdictional issues related to Hausler's judgment, we refer to section 1605(a)(7), the provision in effect when it was entered.

viewed in Section I, *supra,* Hausler and the Villoldos sought to use their Florida state court judgments to seize Cuban assets held by banks operating in the Southern District of New York. In 2013, both intervened in the *Vera* proceedings. Between March and June of that year, the Villoldos opposed Vera's turnover motions, contending that Vera's Florida state court judgment was void for lack of subject-matter jurisdiction and asserting, *inter alia,* that Aldo Vera, Sr., the victim of Cuba's acts, was not a U.S. national and was not actually killed by agents of Cuba, but rather by criminal elements operating in Puerto Rico.[7] In May 2013, Hausler intervened, contending that her rights as a judgment creditor preceded and therefore should take priority over those of both Vera and the Villoldos.

After this initial period of competition, however, the three family groups reached a détente. They advised the District Court that they would jointly petition for turnover of the relevant assets. In September 2013, they did so, filing the Omnibus Petition for Turnover Order ("Omnibus Petition") that we have mentioned and naming as respondents BBVA and eighteen other banks which, they alleged, were holding blocked Cuban assets.[8]

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[7] In a surprising twist, the Villoldo brothers further alleged that Vera, Sr., who in 1959 was the Chief of the Department of Investigation of the Cuban police, supervised the officers who tortured the brothers after they were arrested in Cuba.

[8] In February 2014, before the court's ruling, the Omnibus Petition was amended in ways not relevant here. Our references to it encompass the amended version.

BBVA moved to dismiss the Omnibus Petition for lack of subject-matter jurisdiction. The District Court denied the motion, construing BBVA's motion as a collateral attack on the Florida state court judgments, and not as a challenge to its own jurisdiction. In rejecting BBVA's arguments, the District Court commented that "[BBVA] must concede that the Florida [courts] made appropriate jurisdictional findings, and created a sufficient evidentiary record." *Vera v. Republic of Cuba,* 40 F. Supp. 3d 367, 376 (S.D.N.Y. 2014). The court further interpreted BBVA's motion as an improper challenge to the "merits" of the Florida state courts' determinations in that it attacked the Florida courts' findings (in the District Court's words) "that Cuba was designated as a state sponsor of terrorism, at least partially, as a result of the acts against Villoldo, Hausler, and Vera." *Id.* This "merits" argument was impermissible, in the District Court's view, because the Florida courts "held a trial in each of the three cases, found the facts, and applied the law, finding that acts of terrorism took the lives of plaintiffs' family members [and] that Cuba was designated as a state sponsor of terrorism either before these acts or partially as a result of these acts." *Id.*[9]

[9] Although they relied on slightly different analyses, all three Florida state courts had concluded that they could exercise jurisdiction over Cuba under the state-sponsored terrorism exception to sovereign immunity. Hausler's state court judgment set forth the conclusion that "Cuba, which was designated as a state sponsor of terrorism in 1982 . . . at least in part by reason of the acts of terrorism described herein

Determining then that it had jurisdiction to proceed, the District Court entered two orders important to the resolution of the appeal before us. In September 2014, the court enforced a subpoena in which Vera sought information about BBVA's holdings of Cuban assets outside the United States. Then, in March 2015, the District Court ordered that BBVA turn over the contents of a certain account to the U.S. Marshal. That account contained $553,185.21, the proceeds of an electronic fund transfer ("EFT") that had been initiated by the Cuban Import-Export Corporation, a Cuban instrumentality.[10] *Vera v. Republic of Cuba,* 91 F. Supp. 3d 561, 573 (S.D.N.Y. 2015).

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including the torture and extra-judicial killing of Bobby Fuller, is subject to suit in any State Court of the United States, pursuant to the provisions in 28 U.S.C. § 1605." J. App'x 592. The Villoldos' 2011 Florida state court judgment does not contain any language linking Cuba's 1982 designation as a state sponsor of terrorism to its acts against the Villoldos, but appeared to conclude that the FSIA generally "grants nationals of the United States a private right of action against a foreign state or officials or agents of that foreign state acting within the scope of his or her office, for damages for personal injury or death caused by acts of torture." *Id.* at 402–03. Vera's state court judgment, which is not directly challenged in this appeal but which we addressed and found wanting in *Vera III,* advised that "Cuba, which was designated to be a state sponsor of terrorism in 1982 . . . is subject to suit in any State Court of the United States, pursuant to the provisions of 28 U.S.C. § 1605." *See* Joint Appendix filed in *Vera v. Republic of Cuba,* No. 16-1227 (2d Cir.) *("Vera III"),* Dkt. No. 34, at 273 (providing copy of the judgment).

[10] The District Court's initial turnover order directed the U.S. Marshal to turn the funds over to Appellees within 15

BBVA timely appealed both of these orders, but we were compelled to dismiss its appeals for lack of jurisdiction because neither the order enforcing Vera's subpoena nor the turnover orders were "final decisions" of the District Court appealable under 28 U.S.C. § 1291. *See Vera v. Republic of Cuba,* 802 F.3d 242, 246 (2d Cir. 2015) *("Vera I")* (subpoena enforcement order not appealable); *Vera v. Republic of Cuba,* 651 Fed. App'x 22, 26 (2d Cir. 2016) *("Vera II")* (turnover orders not appealable).

After our decision in *Vera I,* BBVA refused to produce any information in response to the subpoena, and, upon the parties' stipulation to that effect, the District Court held BBVA in contempt in April 2016. BBVA appealed the contempt order, this time secure in its expectation of appellate jurisdiction. *See In re Air Crash at Belle Harbor,* 490 F.3d 99, 104 (2d Cir. 2007) (contempt orders regarded as final and appealable). In May 2017, while its appeal from the contempt order was pending, the District Court denied BBVA's motion for a further stay and ordered that the funds seized from BBVA be turned over to Appellees collectively.[11] *Vera v.*

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business days of receiving the funds. BBVA unsuccessfully sought reconsideration of this order. In ruling on BBVA's request, however, the District Court allowed BBVA to deposit the funds into the Registry of the U.S. Courts, rather than with the U.S. Marshal, if BBVA chose to seek a stay and file an interlocutory appeal. BBVA did so, and the deposit was thus made into the Registry. *Vera v. Republic of Cuba,* No. 12-CV-1596 (AKH), 2015 WL 13657629, at *4 (S.D.N.Y. May 8, 2015).

[11] At that point, in accordance with the District Court's May 2015 order, the funds were secured in the Registry of the U.S. Courts.

*Republic of Cuba,* No. 12-CV-1596 (AKH), 2017 WL 4350568, at *3 (S.D.N.Y. May 25, 2017).

In adjudicating BBVA's appeal from the District Court's contempt order, we held that the District Court lacked subject-matter jurisdiction over Vera's enforcement action against Cuba altogether; therefore, both the subpoena served by Vera on BBVA to enforce his judgment and the subsequent contempt order were void. *Vera v. Republic of Cuba,* 867 F.3d 310, 321 (2d Cir. 2017) *("Vera III").* Because *Vera III* concerned a discovery dispute pertaining only to Vera, however, the question whether the District Court had subject-matter jurisdiction to enforce the judgments held by Hausler and the Villoldos was not before us. In line with our mandate in *Vera III,* the District Court vacated the judgment it issued as to Vera, quashed Vera's subpoena, and vacated the related contempt order. It took no action with respect to Hausler and the Villoldos.

BBVA then appealed the District Court's May 2017 order directing that the funds be disbursed jointly to the three cooperating sets of plaintiffs, and we once again dismissed its appeal of the non-final order for lack of appellate jurisdiction. *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.,* 729 Fed. App'x 106 (2d Cir. 2018) *("Vera IV").* This time, however, we directed the District Court "to issue an appealable final judgment expeditiously" on remand so as to facilitate prompt review. *Id.* at 108.

In accordance with our mandate in *Vera IV,* the District Court entered final judgment on August 2,

2018. BBVA timely appealed. Now, on this matter's fifth trip to this Court,[12] our appellate jurisdiction over the entirety of the dispute between BBVA, on one hand, and Hausler, the Villoldos, and Vera, on the other, is undisputed.

## DISCUSSION

To resolve this appeal, we must address several intertwined factual and legal issues. We begin by reviewing the general principles of sovereign immunity as they apply to terrorism claims brought against a foreign state. Following *Vera III,* we next stress that, when a district court is pre-

[12] To recapitulate, this Court's previous rulings in the proceedings concerning BBVA's resistance to the enforcement efforts of Vera, Hausler, and the Villoldos, are:

1) *Vera v. Republic of Cuba,* 802 F.3d 242 (2d Cir. 2015) *("Vera I")* (dismissing for lack of appellate jurisdiction BBVA's appeal of subpoena enforcement orders);

2) *Vera v. Republic of Cuba,* 651 Fed. App'x 22 (2d Cir. 2016) *("Vera II")* (dismissing for lack of appellate jurisdiction BBVA's appeal of turnover orders);

3) *Vera v. Republic of Cuba,* 867 F.3d 310 (2d Cir. 2017) *("Vera III")* (holding, on BBVA's appeal of a contempt order, that the District Court lacked subject-matter jurisdiction to enforce Vera's judgment);

4) *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.,* 729 Fed. App'x 106 (2d Cir. 2018) *("Vera IV")* (dismissing for lack of appellate jurisdiction BBVA's appeal of the District Court's order directing the Registry to disburse funds to Appellees but ordering the District Court to enter final judgment expeditiously).

sented with a default judgment against a foreign sovereign, it must assure itself of its own power to hear the case without relying on the jurisdictional findings and legal conclusions of the court that issued the judgment. Then applying this framework to the case at hand, we consider whether Petitioners have presented sufficient competent evidence that the 1982 designation of Cuba as a foreign sponsor of terrorism was linked, even in part, to its acts against Hausler and the Villoldos, to support the District Court's exercise of jurisdiction over Cuba's assets under TRIA section 201(a).

After conducting a *de novo* review of the extensive record, we answer this question in the negative. We therefore conclude that the District Court lacked jurisdiction over Hausler and the Villoldos' actions to enforce their judgments (just as it lacked jurisdiction over Vera's action, the key question resolved in *Vera III)*. We finish by considering whether in our discretion to order that Appellees make restitution of the funds collected by them as a product of the District Court's jurisdictionally void orders. We conclude that such an order of restitution is appropriate in the circumstances presented here.

## I. Subject-matter jurisdiction over these claims against Cuba

### A. *Principles of subject-matter jurisdiction under the Foreign Sovereign Immunities Act*

The Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891, governs the jurisdiction of courts in the United States over all private civil actions against foreign sovereigns.[13] The FSIA provides 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), and "must be applied by the District Courts in every action against a foreign sovereign," *Verlinden B.V.,* 461 U.S. at 493. *See also Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela,* 863 F.3d 96, 113 (2d Cir. 2017) (referring to "[t]he Supreme Court's emphatic and oft-repeated declaration in *Amerada Hess"* and collecting cases concerning the categorical nature of the FSIA). It codifies two types of foreign sovereign immunity—immunity from jurisdiction and immunity from attachment and execution of the sovereign's property. We start by briefly describing the latter, as it is most directly at issue in this action to enforce Petitioners' default judgments.

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[13] The FSIA is codified, as amended, in title 28 of the U.S. Code, in sections 1330, 1332(a), 1391(f), 1441(d), and 1602 through 1611. In the text, for convenience, we refer only to the section number and presume codification in title 28, unless otherwise noted.

The FSIA provides that "the property in the United States of a foreign state shall be immune from attachment[,] arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609. In this case, the District Court asserted jurisdiction over the enforcement actions against Cuban assets under a modification to the FSIA enacted by TRIA section 201(a).[14] That statute grants courts subject-matter jurisdiction over post-judgment execution and attachment proceedings involving blocked assets "in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7)."[15]

TRIA section 201(a) provides for federal court jurisdiction over execution and attachment proceedings involving the assets of a foreign sovereign, however, only where "a *valid* judgment has been entered" against the sovereign. *Vera III,* 867 F.3d at 321 (internal quotation marks omitted) (emphasis in original)). In other words, section 201 "pro-

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[14] As we noted above, "TRIA" refers to the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337, currently codified at 28 U.S.C. § 1610 note.

[15] "Blocked assets" are defined in TRIA section 201(d)(2)(A) as "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701;1702)." The Cuban assets at issue in this appeal were blocked under section 5(b) of the Trading with the Enemy Act.

vides jurisdiction for execution and attachment proceedings to satisfy a judgment for which there was original jurisdiction under the FSIA . . . if certain statutory elements are satisfied." *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 52 (2d Cir. 2010). Whether the District Court here had jurisdiction under TRIA to attach and execute on Cuba's assets, therefore, turns on whether Petitioners held judgments that were based on an exception to immunity from jurisdiction established by the FSIA.[16] Accordingly, we now look at the FSIA's framework for sovereign immunity from jurisdiction.

The FSIA establishes that "a foreign state [is] immune from the jurisdiction of the courts of the United States and of the States except as provided

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[16] Petitioners' Omnibus Petition and certain of the District Court's orders also make reference to 28 U.S.C. § 1610(g), a provision enacted in 2008. Section 1610(g)(1) provides generally that "the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state . . . is subject to attachment in aid of execution, and execution, upon that judgment." The Supreme Court has recently clarified, however, that section 1610(g) "does not provide a freestanding basis for parties holding a judgment under § 1605A to attach and execute against the property of a foreign state, where the immunity of the property is not otherwise rescinded under a separate provision within § 1610." *Rubin v. Islamic Republic of Iran,* 138 S. Ct. 816, 827 (2018). Accordingly, while section 1610(g) defines the types of assets that might be subject to attachment and execution in terrorism cases brought against foreign states, it—unlike TRIA section 201(a)—does not provide the District Court an independent ground for jurisdiction.

in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. If any of the listed exceptions applies, however, then a court may exercise jurisdiction over the state, *see* 28 U.S.C. § 1330(a), and the foreign state may be held liable, in state or federal court, "in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

In this case, the only jurisdictional exception relied on by Petitioners is section 1605A, known as the "state-sponsored terrorism exception" or the "terrorism exception" from sovereign immunity. First enacted in 1996,[17] this section currently provides in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of

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[17] The terrorism exception was first enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. It was codified at 28 U.S.C. § 1605(a)(7) until 2008. As described *supra* n.6, for purposes of this appeal, current section 1605A and former section 1605(a)(7) may be treated as interchangeable. *See Schermerhorn,* 876 F.3d at 357.

> such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1). By its terms, this provision applies to claims for personal injury or death only if caused by one of several acts listed by statute: as relevant here, extrajudicial killing or torture.

The exception is further cabined by two important preconditions set forth in subsection (a)(2). First, a court may hear such a claim *only if* "the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act." *Id.* § 1605A(a)(2)(A)(i)(I).[18] Second, to maintain such a claim, either the claimant or the victim must be a U.S. national, member of the U.S. armed forces, or employee or contractor of the U.S. government at the time of the act giving rise to liability.[19] *Id.* § 1605A(a)(2)(A)(ii).

Our Court has repeatedly held that both of these conditions must be satisfied for the terrorism

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[18] With respect to the designation requirement, section 1605A defines "state sponsor of terrorism" as "a country the government of which the Secretary of State has determined, for purposes of [several enumerated laws] or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism." 28 U.S.C. § 1605A(h)(6).

[19] Section 1605A sets up a third precondition as well, requiring that, in cases where the listed act took place on the territory of the defendant foreign state, the claimant afford that state "a reasonable opportunity to arbitrate" his or her claim. *See* 28 U.S.C. § 1605A(a)(2)(iii). This precondition is not at issue here.

exception to apply. *See Vera III,* 867 F.3d at 317 ("Even if a foreign state has engaged in one of the terrorist acts described above . . . it is not subject to suit in the United States unless the foreign state was designated as a state sponsor of terrorism [in accordance with the statute]." (internal quotation marks omitted)); *In re Terrorist Attacks on Sept. 11, 2001,* 714 F.3d 109, 115 n.7 (2d Cir. 2013) ("The FSIA's terrorism exception . . . does not apply to [instrumentalities of a non-designated state] because that exception is only available against a nation that has been designated by the United States government as a state sponsor of terrorism at the time of, or due to, a terrorist act.").

Cuba never appeared in the Florida state court or the District Court here to present a defense, jurisdictional or otherwise. Nevertheless, "the FSIA, by its terms, authorizes consideration of sovereign immunity from both jurisdiction and execution even in the absence of an appearance by the sovereign." *Walters v. Indus. & Commercial Bank of China, Ltd.,* 651 F.3d 280, 293 (2d Cir. 2011). The statute allows for courts to "consider the [jurisdictional] issue once it is suggested by *any* party—or for that matter, non-party." *Id.* (emphasis in original). Indeed, even if no party raises the issue, courts have an obligation to consider subject matter jurisdiction *sua sponte. Henderson ex rel. Henderson v. Shinseki,* 562 U.S. 428, 434 (2011). Accordingly, BBVA was entitled to raise Cuba's sovereign immunity from execution on its assets before the District Court as a defense to Petitioners' enforcement action; and it may, on appeal,

challenge the District Court's ruling that Cuba was not immune.[20]

B. *Review and enforcement of default judgments in the FSIA context*

In reviewing a default judgment, we generally "deem[] all the well-pleaded allegations [as to liability] in the pleadings to be admitted." *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.,* 109 F.3d 105, 108 (2d Cir. 1997). This principle does not preclude us, however, from undertaking "an inquiry into whether the default judgment itself is void for lack of subject matter jurisdiction." *Id.* Pursuing such an inquiry, we review jurisdictional conclusions *de novo,* and in assessing "whether there is a factual basis to support the [District Court's] exercise of subject matter jurisdiction . . .we are not limited in our right to refer to any material in the record." *Velez v. Sanchez,* 693 F.3d 308, 314 (2d Cir. 2012) (internal quotation marks omitted).

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[20] For this reason, we reject the Villoldos' argument that that BBVA lacks standing to "collaterally attack" their Florida state court judgment. Villoldo Br. 23–26. First, we rejected this contention in *Vera III,* explaining that "[w]e need not consider a collateral attack on the Florida judgment [because] BBVA's principal argument . . . is that the *District Court* lacked subject-matter jurisdiction." 867 F.3d at 320 n.9 (emphasis in original). Moreover, as described above, a district court may consider its jurisdiction when suggested by *any* party, "even if there is no reason to confer a special right of 'third-party standing' on that party." *Walters,* 651 F.3d at 293.

In these proceedings, Petitioners asked the District Court to enforce judgments issued by several Florida state courts, each of which concluded that its jurisdiction over Cuba was authorized by the state-sponsored terrorism exception. These judgments did not, however, bar the District Court from considering the jurisdictional question anew, nor did they relieve it of its obligation to assure itself of its *own* jurisdiction, whether upon BBVA's motion or *sua sponte*.

It is generally true, of course, that "principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n.9 (1982). At the same time, a finding of jurisdiction is preclusive only when the jurisdictional issues "have been fully and fairly litigated . . . in the court which rendered the original judgment." *Durfee v. Duke,* 375 U.S. 106, 111 (1963). Here, as we decided in *Vera III,* Cuba's failure to appear meant that, although the Florida courts heard relevant evidence, "the jurisdictional facts necessary to eliminate Cuba's sovereign immunity under the FSIA were not fully and fairly litigated" in the Florida actions. 867 F.3d at 318. The Florida state courts' jurisdictional conclusions could therefore "neither bind the District Court . . . nor . . . be relied on by the parties." *Id; see also Jerez v. Republic of Cuba,* 775 F.3d 419, 422–23 (D.C. Cir. 2014) (refusing to accord res judicata effect to similar Florida state default judgment entered against Cuba).

Thus, to determine whether it had jurisdiction under TRIA section 201(a) to attach or execute on Cuba's assets, the District Court should have first determined for itself whether the state-sponsored terrorism exception to jurisdictional immunity applied to the Florida state court default judgments.[21] *See Vera III,* 867 F.3d at 321 (in absence of valid underlying judgment, "TRIA did not pro-

[21] Vera's situation is different from that of Hausler and the Villoldos in one notable respect. Upon Cuba's default in the federal proceeding in *Vera* in 2012, the District Court granted full faith and credit to Vera's Florida state court judgment and entered a federal default judgment against Cuba. J. App'x 304–05. The Villoldos and Hausler, in contrast, never requested that the District Court here *enter* a federal default judgment against Cuba on their judgments, likely because other federal courts had already done so. *See* J. App'x 408–09 (Villoldo federal default judgment entered by Judge Swain of the Southern District of New York); *id.* at 611–12 (Hausler federal default judgment entered by Judge Jordan of the Southern District of Florida). Instead, Hausler and the Villoldos requested only that the District Court here *enforce* their judgments against Cuba under TRIA section 201(a). Therefore, while in *Vera III* we reviewed both the District Court's entry of a default judgment and its later reliance on that judgment to support enforcement jurisdiction under TRIA section 201(a), here we review the District Court's jurisdiction over the enforcement proceedings only.

Under the circumstances presented now, though, the distinction has little practical effect. As observed in the text, because Cuba defaulted, "the jurisdictional facts necessary to eliminate Cuba's sovereign immunity were not fully and fairly litigated" in these prior federal court proceedings. *See Vera III,* 867 F.3d at 318. Accordingly, when confronted with BBVA's challenge, the District Court should have considered whether it was enforcing "judgment[s] for which there was original jurisdiction under the FSIA," *Weinstein,* 609 F.3d at

vide a proper basis for subject matter jurisdiction over subsequent proceedings"). In this case, however, the District Court simply granted full faith and credit to the Florida courts' jurisdictional conclusions rather than analyzing whether their determinations could support its application of the terrorism exception. *See Vera,* 40 F. Supp. 3d at 376–77. This deficiency calls into question the District Court's exercise of jurisdiction over the enforcement of the judgments.

Ordinarily, we would address a District Court's failure to make appropriate findings to support its jurisdiction by remanding for further proceedings. In *Vera III,* however, we declined to do so because "the case present[ed] no relevant unanswered factual issues regarding the existence of subject matter jurisdiction." 867 F.3d at 319 n.8. We follow the same approach here and proceed to decide *de novo* whether the District Court had subject-matter jurisdiction under the FSIA and TRIA section 201(a) over the enforcement actions brought by Hausler and the Villoldos.[22]

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52, to assure itself of its own jurisdiction under TRIA. This inquiry, in turn, would have required it to answer the same question as was posed in *Vera III:* whether the factual findings of the underlying judgments and any other evidence properly before it could support application of the state-sponsored terrorism exception to Cuba.

[22] Seeking to avoid the *de novo* review established by *Vera III,* Petitioners contend that precedent bars us from revisiting the question of subject-matter jurisdiction. We do not find their arguments persuasive, for the following reasons.

First, the Villoldos argue that in *Vera II* and *Vera IV,* where we dismissed BBVA's appeals of the District Court's

### C. *The Villoldos' and Hausler's claims and Cuba's designation as a state sponsor of terrorism*

The Villoldos' and Hausler's claims arise largely from acts that predated Cuba's 1982 designation as a state sponsor of terrorism by over two decades.

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turnover orders for lack of appellate jurisdiction, we also decided the issue of subject-matter jurisdiction *sub silentio,* insofar as BBVA had briefed the issue in both appeals. Villoldo Br. 22–23. This contention is without merit: once we determined that we, the Court of Appeals, lacked jurisdiction over the appeal, we had no occasion (or, indeed, arguably, authority) to rule on a challenge to the *District Court*'s jurisdiction over the case as a whole.

Second, Hausler contends that we decided that we had subject-matter jurisdiction to enforce her judgment in an appeal from a collateral proceeding in *Hausler v. JP Morgan Chase Bank, N.A.,* 770 F.3d 208 (2d Cir. 2014). She submits that this 2014 decision binds us now. Hausler Br. 31–36. Although BBVA had addressed the jurisdictional question in its appellate brief in that appeal, there, we ruled against Hausler on the merits, holding that she could not attach certain blocked EFTs because "neither Cuba nor its agents or instrumentalities ha[d] any property interest in the EFTs that are blocked in the garnishee banks." *Id.* at 212. That case, however, was argued in tandem with *Calderon-Cardona v. Bank of N.Y. Mellon,* 770 F.3d 993 (2d Cir. 2014), which definitively resolved the merits question at issue in *Hausler:* the nature of the ownership interest necessary for a blocked EFT to be deemed the "property" of a foreign state. In *Calderon-Cardona,* we dealt with attachment of property under section 1610(g), while in *Hausler* we addressed the analogous provision in TRIA section 201(a). But we resolved *Hausler* by applying *Calderon-Cardona,* which had issued only several days prior. 770 F.3d at 211–12. As we have commented elsewhere in similar circumstances, "[i]t would be

Accordingly, to justify invoking those pre-1982 acts and the state-sponsored terrorism exception to sovereign immunity as the basis for this enforcement action, they must establish that Cuba was so designated "as a result of" its acts against their families. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I); *see also id.* § 1605(a)(7)(A) (2007); *City of New York v. Permanent Mission of India to the United Nations,* 446 F.3d 365, 369 (2d Cir. 2006) ("The party seeking to establish jurisdiction [over a foreign state] bears the burden of producing evidence establishing that a specific exception to immunity applies.").

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ironic if, in our desire to avoid rendering an advisory opinion, we were to address a novel [jurisdictional] question in a case where the result is foreordained by another decision of this Court." *Ctr. for Reprod. Law & Policy v. Bush,* 304 F.3d 183, 195 (2d Cir. 2002).

Accordingly, because the outcome in *Hausler* was indisputably "foreordained" by our decision in *Calderon-Cardona,* the *Hausler* court sensibly avoided delving into the voluminous record on appeal to ascertain the precise basis for the district court's assertion of jurisdiction in that case. *See Ivanishvili v. U.S. Dep't of Justice,* 433 F.3d 332, 338 n.2 (2d Cir. 2006) (explaining that "where the jurisdictional constraints are imposed by statute, not the Constitution, and where the jurisdictional issues are complex and the substance of the claim is . . . plainly without merit," we may consider the merits of the case without first addressing statutory jurisdiction). The 2014 *Hausler* decision thus cannot reasonably be understood to have decided the jurisdictional issue. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 98 (1998) (approving of ruling where court "declined to decide [the] jurisdictional question, because the merits question was decided *in a companion case,* with the consequence that the jurisdictional question could have no effect on the outcome") (internal citations omitted).

We have not yet had occasion to articulate how taut the causal link must be between a specific enumerated act—such as an extrajudicial killing or act of torture—and a country's later designation to support application of the terrorism exception. Here too, we need not address whether Petitioners must meet the more demanding standard of "but-for causation" *(i.e.,* that Cuba was designated a state sponsor of terrorism as a direct result of the specific acts taken against their family members, and that it would not otherwise have been so designated). Rather, as we did in *Vera III,* we examine the record to ascertain if the Villoldos or Hausler adduced evidence that "specifically links" Cuba's acts against their families to the Secretary of State's determination in 1982 to designate Cuba as a state sponsor of terrorism. 867 F.3d at 319. And again, as in *Vera III,* we find the record patently insufficient, even under this lesser causation standard, to support the Villoldos' and Hausler's position.

During one of several collateral federal district court proceedings spawned by this sprawling litigation, the State Department in 2012 filed a Statement of Interest presenting its formal position as to the "reason or reasons Cuba was designated a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979."[23] J. App'x 323.

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[23] After BBVA moved in the U.S. District Court for the Southern District of Florida to vacate the Hausler judgment for lack of subject-matter jurisdiction, the State Department made this filing at the invitation of then-District Judge

The submission, which BBVA points to on appeal, consisted of an affidavit by Peter M. Brennan, an experienced diplomat who was then in charge of the Department's Office of the Coordinator for Cuban Affairs. Brennan averred that, in 1982, when it was so designated, "Cuba belonged in the category of states that have repeatedly provided support for . . . organizations and groups abroad that used terrorism and revolutionary violence as a policy instrument to undermine existing governments." *Id.* at 324. This support was the reason for its designation, he implied. In support of this understanding, Brennan's affidavit cited contemporaneous Congressional testimony given by two State Department officials: (1) the March 12, 1982 testimony of Thomas Enders, Assistant Secretary of State for Inter-American Affairs, before the Subcommittee on Security and Terrorism of the Senate Judiciary Committee; and (2) the March 18, 1982 testimony of Ernest Johnson, Jr., Deputy Assistant Secretary for Economic Affairs, before a subcommittee of the Senate Foreign Relations Committee.[24] We also referred to these documents in *Vera III*.

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Adalberto Jordan. *Hausler v. Republic of Cuba, No.* 08-CV-20197 (S.D. Fla. Feb. 7, 2012), ECF No. 79.

[24] *See The Role of Cuba in Int'l Terrorism & Subversion: Hearing Before the Subcomm. on Sec. & Terrorism of the S. Comm. on the Judiciary,* 97th Cong. 142–48 (1982) (testimony of Thomas Enders); *Regulation Changes on Exports: Hearing Before the Subcomm. on Near E. & S. Asian Affairs of the S. Comm. on Foreign Relations,* 97th Cong. 9–10 (1982) (testimony of Ernest Johnson, Jr.).

Enders, in his testimony before the Senate Subcommittee on Security and Terrorism, provided an extensive catalogue of Cuban support given to insurgent groups in other Latin American countries, including Nicaragua, El Salvador, Guatemala, Honduras, Costa Rica, Colombia, and Chile. Enders specifically referenced Cuba's implementation in 1978 of a "new strategy . . . of uniting the left in the countries of the hemisphere for the purpose of using it . . . [to establish] more Marxist-Leninist regimes in this hemisphere" as standing in contrast to the country's previous attempts to "portray itself as a member of the international community not unlike others, carrying out state-to-state relations through embassies and emphasizing trade and cultural contacts." J. App'x 332. Enders portrayed the members of the Cuban leadership group as subject to a "deep-seated drive to re-create their own guerrilla experience elsewhere," observing that "the Castro regime has made a business of violent revolution." *Id.* at 336.

Johnson's brief testimony echoed Enders's remarks. He again tied Cuba's 1982 designation to its support of armed groups outside its borders. He expressed the "hope [that] . . . the addition of Cuba [to the list] will demonstrate to other countries . . . that our export controls are truly directed towards terrorism. . . . In the case of Cuba, we evaluated carefully the evidence of Cuban support for revolutionary violence and groups that use terrorism as a policy instrument." *Id.* at 362.

Notably absent from Enders's and Johnson's testimony is any reference to political repression or

human rights abuses within Cuba itself, either during the 1959–60 period, when Cuba tortured the Villoldos and their father and executed Bobby Fuller; during the period immediately preceding Cuba's 1982 designation as a state sponsor of terrorism; or in any other time period. Instead, the underlying record supports Brennan's assertion that Cuba was designated as a result of its "support for organizations and groups abroad that used terrorism and revolutionary violence as a policy instrument." J. App'x at 324; *see also Vera III,* 867 F.3d at 318 (reaching same conclusion). In the face of these official statements describing the Secretary of State's reasons in 1982 for designating Cuba as a state sponsor of terrorism, neither the Villoldos nor Hausler present any persuasive evidence that Cuba was in fact so designated "as a result of" its violent actions against their families decades prior.

*The Villoldos*

The Villoldos cite extensively the jurisdictional conclusions of the Florida state court. Such conclusions, however, cannot be relied on by the parties to establish jurisdiction in the District Court here. *Vera III,* 867 F.3d at 318. They also recount their allegations of horrible mistreatment that they and their father suffered at the hands of the Cuban revolutionary government in 1959, but provide no evidence that might "specifically link" these acts to the Secretary of State's 1982 designation of Cuba as a state sponsor of terrorism.

Looking to other acts to establish such a link, the Villoldos refer further to the Florida state court's factual finding that "Cuba stole [their family's] enormous wealth and used it to fund the exportation of terrorism throughout Latin America, establishing jurisdiction as to all three Villoldo plaintiffs." Villoldo Br. 49. But, even assuming that Cuba's seizure of the Villoldos' assets helped to support its later promotion of terrorism overseas, the available record strongly suggests that Cuba was not designated a state sponsor of terrorism as a result of any seizure of assets within its borders, regardless of the use to which it later may have put some portion of those assets. Accordingly, the Villoldos have failed to meet their burden to establish that the District Court had jurisdiction over their action to enforce their Florida state judgment based on Cuba's acts of torture or property seizures committed in 1959.

Turning to more recent events, the Villoldos contend in the alternative that the District Court here had jurisdiction to enforce their state court judgment because of Cuba's alleged repeated attempts to assassinate Gustavo Villoldo *after* its 1982 designation as a state sponsor of terrorism. These, they insist, constituted some of the acts of "torture" on which the Florida state judgment was based.[25]

[25] We need not consider whether these alleged post-1982 acts could support valid claims for "hostage taking" or "the provision of material support or resources" within the meaning of 28 U.S.C. § 1605A. The Florida state court issued a judgment explicitly based on a finding of "torture," and as we have explained, the District Court's jurisdiction here is

Villoldo Br. 49–52. Their allegations, however, are legally insufficient.

The terrorism exception incorporates the definition of "torture" established in the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat.73. *See* 28 U.S.C. § 1605A(h)(7). The TVPA defines torture as "any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* . . . whether physical or mental, is intentionally inflicted on that individual for [certain enumerated purposes]." 28 U.S.C. § 1350 note (emphasis added). *See Chowdhury v. Worldtel Bangladesh Holding, Ltd.,* 746 F.3d 42, 52 (2d Cir. 2014) (torture is a "deliberate and calculated act of an extremely cruel and inhuman nature specifically intended to inflict excruciating and agonizing physical or mental pain or suffering") (citation omitted). The Villoldos urge, and the Florida state court reached the legal conclusion, that "threats of assassination and assassination attempts" carried out against Gustavo Villoldo after 1982 "are properly classified as torture." J. App'x 865. After reviewing the record, we conclude that neither the Florida court's findings of fact nor any evidence submitted by the Villoldos—nor, indeed, the Villoldos' general allegations—support this conclusion.[26] Accordingly, the Villoldos

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entirely dependent on its recognition of a valid state court judgment. *Vera III,* 867 F.3d at 321.

[26] The specific post-1982 acts that Gustavo alleges include: (1) that on six occasions armed individuals "approached [him] in an aggressive manner"; (2) that on one

failed to establish that Cuba committed torture or any other act enumerated in section 1605A(a)(1) against either of them after 1982. The District Court therefore lacked jurisdiction over the Villoldos' enforcement action and should have dismissed their petition.[27]

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of these occasions, a Cuban man approached him outside a restaurant in Miami, Florida, displayed a weapon, and stated he would kill him; and (3) that "armed assassins surrounded [his] family's home in Miami" while he was driving to and from a nearby convenience store." J. App'x 883. While disturbing, none of these incidents amount to "torture" within the meaning of the TVPA.

[27] Because the District Court made its jurisdictional determination in 2014, it did not then have before it the amended 2018 judgment that the Florida state court directed to be effective *nunc pro tunc* as of the 2011 judgment or the additional materials submitted by the Villoldos in support of their 2017 state court motion to "re-establish the record." The Villoldos did, however, file both the 2018 judgment and the materials supporting their motion with the District Court in New York, and in July 2018, requested that the court consider these materials "should [it] engage in further review of the Florida state court's subject matter jurisdiction." J. App'x 1044. Although the District Court did not take up the Villoldos' invitation and instead entered final judgment in response to our mandate in *Vera IV,* 729 Fed. App'x at 108, the newly-filed materials are now part of the record on appeal.

In reaching our conclusion on this argument, we have reviewed the entirety of the record, including the materials submitted by the Villoldos in 2017 and 2018. Because, after having considered these materials, we conclude that the Villoldos have failed to establish that the terrorism exception applies, a remand for the District Court to consider them in the first instance is unnecessary.

*Hausler*

For her part, Hausler seeks to satisfy the preconditions to reliance on the terrorism exception by pointing to testimony given by Peter Deutsch, a former Congressman, and Jaime Suchlicki, a professor at the University of Miami and expert on Cuban affairs.[28] Deutsch testified in a 2003 deposition in unrelated proceedings that, as a member of Congress, he was a cosponsor of the 1996 AEDPA amendment that generated the terrorism exception. In that deposition, he stated his view that "in 1961 President Kennedy effectively and in fact . . . designated [Cuba] as a state sponsor of terrorism." J. App'x 685. In a 2012 affidavit filed in related proceedings in the U.S. District Court for the Southern District of Florida, Deutsch further declared that he "agreed to be directly involved in the drafting and enactment as a co-sponsor of the [FSIA terrorism exception] based upon assurances that my constituents who had suffered from the Government of Cuba's acts of extra-judicial killing and torture during the period of 1960–61 would,

[28] In the course of the proceedings before Judge Jordan in the U.S. District Court for the Southern District of Florida, the attorney who initially litigated Hausler's claim before the Florida state court filed an affidavit in which he both acknowledged that no transcript was made of the default judgment proceeding and represented that the deposition testimony of Congressman Deutsch and proffered testimony by Professor Suchlicki were admitted into the state court record. *Hausler v. Republic of Cuba,* No. 08-CV-20197 (S.D. Fla. Jan. 20, 2012), ECF No. 77. No further record appears to be available.

under this legislation, be able to obtain legal redress." *Id.* at 661. He emphasized that he "would not have agreed to be a co-sponsor of that legislation [had he] not received those assurances," and that he "was assured that the language as drafted, and as later enacted, met this test." *Id.* In 2012, Deutsch reiterated his view that "[i]n 1961 President John F. Kennedy effectively and in fact designated the Government of Cuba a state sponsor of terrorism, in part by reason of the extra-judicial killing of U.S. citizens during the 1960–61 time period." *Id.* at 662.

Professor Suchlicki supported Deutsch's assertions. He averred in a 2012 affidavit that the "historical evidence overwhelmingly demonstrates that the Government of Cuba was condemned by the Kennedy administration starting no later than early 1961, based at least in part upon the extrajudicial killing and torture of U.S. citizens," and that, as a professional in the field, he was "not aware of any statement which would support the view that support for Latin American revolutionaries was the only reason for such designation of the Government of Cuba as a state sponsor of terrorism." *Id.* at 673.

The assessments offered in the statements of Deutsch and Suchlicki reflect a misunderstanding of the statutory regime that governs sovereign immunity and its "terrorism exception." The version of FSIA in effect when Hausler obtained her judgment abrogated the sovereign immunity of a foreign state designated under "section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance

Act of 1961 (22 U.S.C. 2371)." 28 U.S.C. § 1605(a)(7)(A) (2007). Congress did not, however, add section 620A to the Foreign Assistance Act until June of 1976. Pub. L. No. 94–329, § 303, 90 Stat. 729 (1976). Cuba could not therefore have been so designated in 1961 as Deutsch and Suchlicki appear to claim.

Deutsch and Suchlicki, however, are not entirely incorrect. *Section 620(a)* of the original Foreign Assistance Act of 1961 expressly prohibited the provision of foreign aid to Cuba and authorized the President "to establish and maintain a total embargo upon all trade between the United States and Cuba." Pub. L. No. 87-195, § 620, 75 Stat. 424, 444-45 (1961). Moreover, President Kennedy in fact implemented such an embargo in February 1962. Proclamation No. 3447, Embargo on All Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 7, 1962). Thus, while Deutsch and Suchlicki are correct that President Kennedy sanctioned Cuba during this period (and he did so under a provision of the Foreign Assistance Act *adjacent* to that identified in the FSIA), these sanctions did not lift Cuba's immunity under the FSIA.

Accordingly, as demonstrated by the previously cited Congressional testimony of high-ranking State Department officials, Cuba was not designated as a state sponsor of terror under the relevant provisions until 1982. Because the decision to designate a state as a sponsor of terrorism is committed by statute to the discretion of the Secretary of State, we often regard such official pronounce-

ments as authoritative.[29] *See Vera III,* 867 F.3d at 319 (relying on "legislative materials and statements by government officials submitted in this case [that] make no mention of extrajudicial killings or of the death of Vera's father"); *Roeder v. Islamic Republic of Iran,* 195 F. Supp. 2d 140, 160–61 (D.D.C. 2002) (relying on State Department reports and letters to conclude that Iran was not designated as a state sponsor of terrorism as a result of the 1979–81 hostage crisis and rejecting contrary testimony given by an independent expert), *aff'd,* 333 F.3d 228 (D.C. Cir. 2003).

In sum, although Hausler's witnesses establish that a succession of presidential administrations

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[29] As we observed *supra* note 19, section 1605A expressly commits designation of a country as a "state sponsor of terrorism" to the discretion of the Secretary of State. *See* 28 U.S.C. § 1605A(h)(6). Section 1605(a)(7), the predecessor provision in effect when Hausler secured her Florida state court judgment, operated to the same effect. It abrogated the sovereign immunity of state sponsors of terrorism designated under "section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405 (j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)." 28 U.S.C. § 1605(a)(7)(A) (2007). Both provisions committed designation to the discretion of the Secretary of State. *See* 50 U.S.C. App. 2405(j)(1)(A) (2007) (requiring license for the export of goods to a country "if the Secretary of State has made the following determinations . . . [t]he government of such country has repeatedly provided support for acts of international terrorism"); 22 U.S.C. § 2371(a) (2007) ("The United States shall not provide any assistance under this chapter . . . to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.").

has vigorously condemned human rights abuses in Cuba, Hausler cannot seriously dispute that it was not until 1982 that Cuba was designated a state sponsor of terrorism, and that the record shows that the basis for the formal designation was Cuba's active support for violent groups acting outside of its borders. *See Vera III,* 867 F.3d at 318. Thus, Hausler, too, failed to adduce evidence demonstrating a specific link between the death of her brother in 1960 and Cuba's designation as a state sponsor of terrorism over two decades later. Accordingly, she has failed to meet her burden to establish that the District Court had jurisdiction over her action under TRIA section 201(a) to enforce her Florida state court judgment.

We conclude, therefore, that the terrorism exception—the sole potential basis for subject-matter jurisdiction in this case—applied neither to Hausler nor the Villoldos' actions before the District Court. Hausler and the Villoldos thus did not hold valid judgments against Cuba enforceable under TRIA section 201(a); the District Court lacked jurisdiction over the enforcement proceeding; and the District Court's orders requiring BBVA and other banks to turn over blocked Cuban assets to all three groups of Appellees (Hausler, the Villoldos, and Vera) were void for want of jurisdiction.

## II. Restitution of funds turned over to Appellees

Having determined that the District Court lacked subject-matter jurisdiction over the Villoldo and Hausler enforcement actions—and having earlier decided the same with respect to Vera in *Vera III*—we now confront the consequences of these rulings.

The District Court declined to stay execution of its turnover orders pending BBVA's appeal from the court's final judgment. For the reasons set forth above, we conclude that these turnover orders were void *ab initio*. BBVA has requested that, if such a result is reached, this Court order all three Appellees to make restitution to BBVA of the funds that they received under the invalid turnover orders. Appellees counter that restitution to BBVA is inappropriate because BBVA lacks its own possessory interest in the funds. After all, Appellees argue, the funds at issue are the property of the Cuban Import-Export Corporation, a Cuban instrumentality that never appeared in this case; BBVA was merely an intermediary bank that blocked the assets under the Cuban Assets Control Regulations, 31 C.F.R. Part 515. Accordingly, Appellees urge, once BBVA delivered the funds to the Registry of the U.S. Courts, it was dispossessed of any interest of its own, and only the Cuban Import-Export Corporation or the Cuban government itself would have standing to seek their return. To this, BBVA replies that it retains a possessory interest in the funds because (1) it is subject to potential

liability for the funds to the Cuban corporation; and (2) it is entitled to an equitable lien on the monies for its expenses in diligently protecting the Cuban corporation's property from execution.

In considering what equity demands in this situation, we first summarize the traditional standards applicable to requests for restitution and then consider their application here.

The Supreme Court has long ago observed that "[t]he right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." *Baltimore & O.R. Co. v. United States,* 279 U.S. 781, 786 (1929). This well-established right may be tempered, however, by application of equitable principles. Thus, the most recent Restatement of the law of restitution offers this qualified statement: "A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution *as necessary to avoid unjust enrichment."* Restatement (Third) of Restitution and Unjust Enrichment § 18 (Am. Law Inst. 2011) (emphasis added). Because an order of restitution is generally seen as discretionary, we consider whether "the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atl. Coast Line R. Co. v. Florida,* 295 U.S. 301, 309 (1935).

In conducting this inquiry, we are mindful of the Restatement's comment that a judgment debtor's "entitlement to restitution may not be resisted

merely on the ground that an invalid judgment gave effect to what was, in any event, a *moral* obligation owed to the judgment creditor." Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt.e (Am. Law Inst. 2011) (emphasis added). Instead, the Restatement ties an entitlement to restitution to the *legal* validity of the underlying debt or liability, explaining that, while "[a]n invalid or erroneous judgment that gives effect to a *valid* liability does not create unjust enrichment," a "restitution claim based on legal compulsion stands on a different footing" when it is based on "money . . . paid to satisfy a claim that is valid in equity and good conscience yet *legally unenforceable." Id.* (emphases added). Thus, when a debtor has been "compelled by law to pay a claim that is not legally enforceable . . . [t]he need to remedy this misapplication of legal process . . . constitutes an important reason for restitution that is independent of the individualized equities of the parties." *Id.*

Appellees' immense default judgments against Cuba reflect the horror of those acts that Cuba is alleged to have committed against their family members between 1959 and 1976. In determining whether Appellees were "unjustly enriched" for equitable purposes by receiving the funds they have collected, however, we must weigh the legal validity of their underlying claims, not the relative moral standing of the parties. Here, as set forth in Section I.C, *supra,* Appellees articulate no sound or even plausible jurisdictional basis under section 1605A for their claims or for the judgments entered. This void suggests that the consequent

turnover orders are not expressions of an underlying "valid liability" that some merely ancillary technical ground has made unrecoverable.[30] Rather, Appellees have collected substantial funds pursuant to void turnover orders in a case where the District Court had no basis in law for exercising jurisdiction. We are compelled in these circumstances to rule that restitution is warranted.

The unavoidability of this conclusion is underscored by our prior rulings. In *Vera II,* in which we dismissed BBVA's attempt to directly appeal the District Court's turnover orders, we held that we lacked appellate jurisdiction because the orders did not effect injunctive relief of the type that is immediately appealable, and because BBVA could not show that the orders "'(1) might have a serious, perhaps irreparable consequence; and (2) can be effectually challenged only by immediate appeal.'" *Vera II,* 651 Fed. App'x at 26 (quoting *Bridgeport Guardians, Inc. v. Delmonte,* 537 F.3d 214, 220 (2d Cir. 2008)). The turnover orders did not work an irreparable harm on BBVA's interests, we reasoned, because "the mere loss of funds pending

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[30] Vera argues that his receipt of an amended state court judgment in 2018, specifically finding that the terrorism exception to sovereign immunity is established in his case, creates a valid liability such that he has not been unjustly enriched. However, it does not appear that Vera has taken any steps to register that judgment in federal district court as would be necessary to create an enforceable debt. Relatedly, the Florida state court judgments entered for Hausler and the Villoldos do not create a liability independent of the FSIA claims registered in federal district court, which we void with this opinion.

final judgment can be remedied on appeal through recovery of the funds with interest." *Id.* And, in May 2017, when the District Court denied BBVA a further stay and ordered that the funds deposited in the Court Registry be disbursed to Appellees, it expressly relied on this statement. *See Vera v. Republic of Cuba,* No. 12-CV-1596 (AKH), 2017 WL 4350568, at *2 (S.D.N.Y. May 25, 2017) ("As the Second Circuit held when denying BBVA's appeal for lack of jurisdiction, BBVA has failed to show that the Turnover Order would 'have a serious, irreparable consequence' because 'the mere loss of funds pending final judgment can be remedied on appeal through recovery of the funds with interest.' "). Indeed, with subject-matter jurisdiction at the very least an open question throughout this proceeding, the Villoldos, Hausler, and Vera all can fairly be said to have assumed the risk of sustaining an adverse ruling on appeal when they opposed BBVA's stay motion and sought execution of the turnover orders before appellate review was complete. *See PSM Holding Corp. v. Nat'l Farm Fin. Corp.,* 884 F.3d 812, 823 (9th Cir. 2018) (judgment creditor "assumed some amount of risk when it opted to execute on the judgment while an appeal was pending"); *Strong v. Laubach,* 443 F.3d 1297, 1300 (10th Cir. 2006) (same).

In reaching our decision, we acknowledge the complexities surrounding BBVA's possessory interest in the funds. On the one hand, we agree with Appellees that BBVA's concern about confronting double liability is speculative at best. And, even if BBVA *might* be entitled to an equitable lien on the

funds to the extent it has sustained costs related to its vigorous defense of the Cuban corporation's assets, it has not yet presented any documentation of the attorney's fees that it has incurred in this action, and its entitlement to recover them may, in any event, be subject to legitimate dispute. On the other hand, we note that, even if BBVA does not have a possessory interest in the funds, it may well have an interest in completing the transfer of the funds to the Cuban Import Export Corporation, now that the funds transfer is no longer blocked by the United States.[31]

We ultimately conclude, however, that the strength (or weakness) of BBVA's interest in the funds does not provide an adequate basis for denying restitution to BBVA. When a party seeks restitution of funds collected from it pursuant to an invalid judgment, it is not ordinarily required to establish the nature of its possessory interest in the lost funds. Rather, the baseline rule in this Circuit is that "a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *LiButti v. United States,* 178 F.3d 114, 120 (2d Cir. 1999); *see also In re Craig's Stores of Texas, Inc.,* 402 F.3d 522, 525 (5th Cir. 2005) ("[W]hen the underlying litigation was dismissed for lack of jurisdiction, the disputed registry funds should have been disbursed back to the party that deposit-

[31] The U.S. government unblocked the funds in 2015. *See* 31 C.F.R. § 515.584(e).

ed them in the registry."). Of course, we may decline to apply this rule if equitable considerations counsel otherwise. *See LiButti,* 178 F.3d at 120 ("[T]his rule is not without exceptions."). But as discussed above, the equitable considerations at play in such a restitution analysis principally concern whether restitution is necessary to avoid unjustly enriching the party that benefited from the enforcement of an invalid judgment. For the reasons already stated, we conclude here that Appellees were unjustly enriched by enforcement of the void turnover orders, and that equity and good conscience require restoration of the *status quo ante,* particularly given (1) the absence of an underlying valid liability, and (2) Appellees' decision to seek execution of the turnover orders, notwithstanding the substantial and apparent risks that the orders were vulnerable to reversal on appeal. Accordingly, we direct the District Court on remand to enter an order requiring restitution by Appellees of the funds that BBVA paid them under the void turnover orders. We have reviewed the parties' additional arguments and conclude that they are unavailing.

## CONCLUSION

The District Court lacked subject-matter jurisdiction over this enforcement proceeding under TRIA. The turnover orders that it issued in the enforcement proceeding were void *ab initio.* Accordingly, we REVERSE the judgment of the District Court, VACATE the turnover orders, and

REMAND the cause to the District Court with instructions to (1) dismiss the amended Omnibus Petition and (2) issue an order directing Appellees to return to BBVA the funds that BBVA paid them under the void turnover orders.

JOSÉ A. CABRANES, *Circuit Judge:*

I join the judgment of the Court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of February, two thousand twenty.

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Docket No: 18-2345

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Aldo Vera, Jr., as Personal Representative of the Estate of Aldo Vera, Sr.,

*Plaintiff-Appellee*,

William O. Fuller, as Successor Personal Representative of the Estate of Robert Otis Fuller; Gustavo E. Villoldo, individually and as Administrator, Executor, and Personal Representative of the Estate of Gustavo Villoldo; Alfredo Villoldo,

*Petitioners-Appellees*,

v.

Banco Bilbao Vizcaya Argentaria, S.A.,

*Respondent-Appellant*.

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## ORDER

Appellee, William Fuller, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

U.S.C. Const. art. III

ARTICLE III. THE JUDICIARY

**Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before men-

tioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**Section 3.** Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

28 U.S.C. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

Effective: October 6, 2006 to January 27, 2008

**(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;

**(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; or

**(7)** not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

**(A)** if the foreign state was not designated as a state sponsor of terrorism under sec-

tion 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

**(B)** even if the foreign state is or was so designated, if—

**(i)** the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

**(ii)** neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

**(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)** For purposes of paragraph (7) of subsection (a)—

> **(1)** the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

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

**(3)** the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

**(f)** No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

**(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 subsection (a)(7), 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. § 1738

### § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

**Exhibit A**

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IN THE CIRCUIT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISIDICTION DIVISION

CASE NO. 02-12475 DIV. 04

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JEANNETTE HAUSLER *as Successor Personal Representative of the Estate of* ROBERT OTIS FULLER, ("BOBBY FULLER"), *Deceased,* on behalf of THOMAS CASKEY as Personal Representative of the Estate of LYNITA FULLER CASKEY, surviving daughter of ROBERT OTIS FULLER, The ESTATE OF ROBERT OTIS FULLER, FREDERICK FULLER, FRANCES FULLER, GRACE LUTES, JEANNETTE HAUSLER, AND IRENE MOSS,

*Plaintiffs*,

vs.

THE REPUBLIC OF CUBA, FIDEL CASTRO RUZ, individually and as President of the State and Council Of Ministers, Head of the Communist Party and Commander-in Chief of the Military, RAUL CASTRO RUZ, individually and as First Vice President Of the Council of State and Council of Ministers and Head of the Cuban Revolutionary Armed Forces, The CUBAN REVOLUTIONARY ARMED FORCES, and EL MINISTERIO DEL INTERIOR,

*Defendants*.

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## AMENDED FINAL JUDGMENT

THIS CAUSE came before the Court for Non Jury trial on Wednesday, December 13, 2006, and after receiving extensive evidence, this Court hereby rules as follows:

## I. CAUSE OF ACTION

This is an action brought by Jeannette Hausler, as Personal Representative of the Estate of Robert Otis Fuller ("Bobby Fuller"), Deceased, pursuant to the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1602-1611, the Anti-Terrorism and Effective Death Penalty Act of 1966 ("AEDPA") 28 U.S.C. § 1605 (a)(7), and the Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350, arising out of the Defendants' extra-judicial torture and killing of Bobby Fuller on October 15th and 16th, respectively, 1960.

The FSIA establishes State and Federal Court jurisdiction over foreign states and their officials, agents, and employees in certain enumerated instances. Specifically, the FSIA eliminates the sovereign immunity of foreign states over any claim that may be brought against a designated state sponsor of terrorism (and/or its agents and instrumentalities) under federal law, under governing state law, under governing foreign law, or under international law establishing a cause of action for acts of state-sponsored terrorism "in which money damages are sought against a foreign state for personal injury or death that was caused

by an act of *torture, extra-judicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources. . .for such an act if such act or provision of material support is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency. . .*" *28 USC §* 1605 (a)(7). FSIA further provides that "an official, employee or agent of a foreign state designated as state sponsor of terrorism. . . shall be liable to a United States national or the national's legal representatives for personal injury or death caused by acts. . .for which the Courts of the United States may maintain jurisdiction. . ." 28 USC § 1605, Civil Liability for Acts of State Sponsored Terrorism. The Defendants, despite being properly being served with process pursuant to 28 USC § 1608, have failed to answer or enter an appearance in this matter, and Defaults were entered against the Defendants, The Cuban Revolutionary Armed Forces, Fidel Castro Ruz and Raul Castro Ruz on June 28, 2006; against The Republic of Cuba on September 2, 2006 and the Defendant, The Ministry of the Interior on October 3, 2006, pursuant to 28 USC § 1608(e) and the applicable Florida Rule of Civil Procedure. This matter was set for non-jury trial as the FSIA requires that a Default Judgment against a foreign state be entered only after a Plaintiff "establishes his claim or right to relief by evidence that is satisfactory to the Court." 28 USC § 1608(e). See also *Flatow v. The Islamic Republic of Iran,* et al., 999 F. Supp. 1, at 6 (1998).

Defendants have failed to contravene the evidence presented by Plaintifs demonstrating that the conduct set forth herein is actionable under standards set by federal, state and international law. In particular, Plaintiffs have demonstrated to the Court's satisfaction that extra-judicial torture and killing, for purposes of the FSIA and the AEDPA are defined in Section 3 of the Torture Victim Act of 1991, 28 USC § 1350. Section 3 (a) Defines Extra-Judicial Killing as;

> ". . .a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples. . ."

The definition of Extra-Judicial Killing used in the Torture Victim's Protection Act of 1991, mirrors word for word the language of Part I, Article III, Section 1(d) of the Geneva Convention adopted on August 12, 1949, to which The Republic of Cuba was a signatory, which states in part;

> ". . .the following acts are and shall remain prohibited at any time and at any place whatsoever. . .
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted Court affording all the judicial Guarantees which are recognized as Indispensable by civilized peoples."

In defining what constitutes a "previous Judgment pronounced by a regularly constituted court affording all the Judicial guarantees that are recognized as indispensable by civilized peoples, " Section 3 of the Geneva Convention, "Judicial Proceedings," offers relevant guidance:

**III. Judicial Proceedings**

*Article 99*

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel.

*Article 101*

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107

*Section 3(b) of the Torture Victim Protection Act of 1991, defines torture as:*

". . .any act, directed against an individual in the offender's custody or physical control by which severe pain or suffering. . . whether

> physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or third person, or for any reason based on discrimination of any kind."

The facts as more specifically set forth below clearly demonstrate that Bobby Fuller was not afforded "the judicial guarantees which are recognized as indispensable by civilized peoples," as those guarantees are defined under the Geneva Convention and the AEDPA, and that he was the victim of both Torture and Extra-Judicial Killing perpetrated by the Defendants, both individually and collectively, actionable under federal, state and international law.

## II. JURISDICTION

This Court has jurisdiction over the subject matter of this cause pursuant to the express terms of 28 USC § 1605(a) which provides in part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> (7) not otherwise covered by Paragraph (2), in which money damages are sought against a foreign state for personal injury or death that

> was caused by an act of torture, extra-judicial killing,. . ., or the provision of material support or resources. . .for such an act if such act or provision of material support is engaged in by any official, employee or agent of such foreign state while acting in the scope of his or her office, employment or agency, except that the Court shall decline to hear a claim under this paragraph–
>
> > (A) If the foreign state was not designated as a state sponsor of terrorism under 6(j) of the Export Administration Act of 1979 . . .at the time the act occurred, unless later so designated as a result of such act; (emphasis added).

This Court expressly finds that all statutory criteria for the exercise of jurisdiction under this statute over a claim against Defendant Cuba and the remaining Defendants (who are agents or instrumentalities of Defendant Cuba) have been established by evidence satisfactory to the Court. In particular, the Court finds that Defendant, Cuba, which was designated to be a state sponsor of terrorism in 1982, under the terms of 56(j) of the Export Administration Act of 1979, at least in part by reason of the acts of terrorism described herein including the torture and extra-judicial killing of Bobby Fuller, is subject to suit *in* any State Court of the United States, pursuant to the provisions 28 USC § 1605. See also *Ring v. Socialist Peoples Libyan Arab,* 995 F.Supp.325 (ED NY 1998); and

*Weininger v. Fidel Castro,* et al (SD NY 2006) 05 CIV 7214 (VM).

## III. REMEDY APPLIED RETROACTIVELY

Pursuant to 28 USCA § 1605, the remedies sought in this action apply retroactively for the purposes of establishing subject matter and personal jurisdiction. As congress expressly directed the retroactive application of 28 USC § 1605(a)(7) in order to further a comprehensive counter-terrorism initiative by the legislate branch of government, the event complained of herein, although occurring prior to the enactment of the Anti-Terrorism Effective Death Penalty Act of 1996 does provide a basis for subject matter jurisdiction. See also *Flatow v. The Islamic Republic of Iran*, et al., 999 F. Supp 1 (USDC DC 1998).

## IV. STATUTE OF LIMITATIONS

This cause of action brought pursuant to 28 USC § 1605 (a) (7) has been brought within the applicable statute of limitations. 28 USC § 1605 (f) states:

> No action shall be maintained under Section (a) (7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. "All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation."

Given the equitable tolling mandated by the subject legislation, this cause of action has been brought within the applicable time frame. In fact, the Court in *Flatow, supra, at* 23, extinguished any doubt as to this conclusion when it stated, "This Court therefore concludes as a matter of law that the earliest possible date for the statute of limitations to expire for any action brought pursuant to 28 USC 1605(a)(7) and 28 USC 1605 will be April 24, 2006." Given the foregoing, and the fact that this cause of action was filed prior to May 15, 2002, the claims herein are not barred by the statute of limitations.

## V. FINDINGS OF THE FACTS

This Court having heard clear and convincing evidence hereby makes the following findings of fact:

### A. FULLER FAMILY HISTORY:

At the turn of the century, 1903, Bobby's grandfather, Albin Jewett and his mother, Jennie (then 3 years old) moved from Massachusetts to Holguin, Cuba. Their family lineage could be traced back to the Mayflower and in fact, Jennie, was a proud member of the Daughters of the American Revolution until her death at age 99. The Jewett family purchased approximately 10,000 acres of prime real estate and established a plantation and thriving businesses, including lumber enterprises, saw mill, live stock and dairy cattle and sugarcane operations. Their property was named "Lewiston" due to other family connections to New England. In

1925, William Otis Fuller married Jennie Jewett after which he took over the operations of Lewiston. William and Jennie Fuller had eight children, four boys and four girls. in addition to their thriving plantation and business operations in Cuba, the Fullers also possessed and maintained a home in Miami, Florida where the boys attended High School. The girls all attended a boarding school in Massachusetts. However, Lewiston was "home" to Jennie, and William Fuller and all of the children, especially Bobby, the eldest male, who in fact shortly prior to his death had inherited the task of running the Lewiston Plantation and associated business enterprises. Bobby's father, William Fuller possessed a Harvard education and a University of Miami law degree. In short, the Fullers were recognized as a highly successful and civic minded family in both Cuba and the United States.

**B. BOBBY FULLER:**

Bobby Fuller was born on the Plantation in Lewiston, Cuba on May 11, 1934. From birth he possessed dual citizenship in both Cuba and the United States and remained an American citizen through the date of his death, Bobby attended and graduated from Miami Senior High School in 1952. Shortly thereafter, he fell in love with and was married to Maretta June Wixsom. After the commencement of the Korean conflict, Bobby enlisted in the United States Marine Corps and served honorably in Korea from March 23, 1954 through March 22, 1957. Lynita Fuller, Bobby's beautiful

baby girl, was born while he was serving on foreign soil on October 29, 1954. Unfortunately, after Lynita's birth, while Bobby was still serving his country in Korea, he learned of his wife's infidelity which lead to the couple's divorce in 1956. In his absence, and in light of his wife's difficulties, it was agreed that Lynita's maternal grandparents would maintain custody over her until such time as Bobby had obtained his discharge and put certain family matters in order, including the family's possessions, home and business operations in Cuba, which was feeling the effects of political turmoil which ultimately lead to the Fidel Castro lead revolution. In fact, after his discharge, Bobby spent most of his time in Cuba having inherited the reigns of control of their various businesses from his father. Due to the existing turmoil, Bobby allowed his daughter to remain in the custody of his grandparents as he did not think it was safe for her in his beloved, Lewiston.

## C. BOBBY FULLER'S "TRIAL, TORTURE AND EXECUTION":

By December of 1959, the communist revolution was in full force on the island of Cuba. The sanctity of personal holdings and the survival of existing business enterprises such as the Fullers' were threatened. Bobby's father, William, was repeatedly harassed and threatened by members of the Castro led revolutionary movement. On one such occasion, armed revolutionaries came to the Lewiston plantation, placed a noose around William Fuller's neck

and threatened to hang him due to his ties to America and their concerns over his loyalty to the "Revolution." After going to his father's side and protesting such treatment, a gun was put to Bobby's head and his life was threatened as well. Thereafter, William Fuller returned to Miami, However, Bobby stayed In Lewiston to look over and protect his mother and the Fuller family properties and operations. After a short visit to Miami, Bobby returned in early October of 1960 to the family Lewiston plantation. Shortly after his arrival, he was arrested by Castro agents and charged with counterrevolutionary activities against the Castro regime. Like most other prisoners of the regime, Mr. Fuller was kept in solitary confinement except for those periods of time that he was interrogated and/or tortured, until such time as he capitulated by signing a prepared confession.

By 4:00 P.M. on the day of his arrest, October 15, 1960, Bobby was escorted to a military run tribunal where he was charged, tried and sentenced to death within a period of only a few minutes. Those present described a "Roman circus atmosphere." Bleachers were set up to allow for hundreds of pro-Castro supporters to participate by yelling and screaming, "PAREDON, PAREDON" (TO THE WALL, TO THE WALL!! referencing a location for firing squad executions). Other exclamations of, "DEATH TO THE AMERICANS, DEATH TO THE YANKEES!!" were also rampant. It was in this bloodthirsty atmosphere that Bobby, with several others, was escorted in chains down an aisle and ordered to stand before the tribunal encompassed purely of Castro regime

members. Mr. Fuller was not allowed to sit. Mr. Fuller was not allowed to call any witnesses. Mr. Fuller was not provided with effective defense counsel as evidenced by the Affidavit of Richard Jewett, an eyewitness to the proceedings. It was in a period of approximately 15 minutes that Bobby's trial was completed, he was sentenced to death by a firing squad and his appeal was denied. After these inhuman, sham proceedings, Bobby was immediately removed to a jail cell where he sat in solitary confinement awaiting his execution by firing squad. After persistent protests, his mother Jennie Fuller was allowed a very short visit with him, at which time he professed his love and affection for her, his father, his siblings and his daughter, Lynita. As the five minute period evaporated, Bobby Fuller handed over his only keepsake, a ring, with a request that it be given to his brother Freddy who would know what to do with it.

In the early morning hours of October 16th, Bobby Fuller was removed from his cell and taken to a location where his blood was drained. Thereafter, he was driven to Santiago de Cuba, where he was executed by firing squad. Notwithstanding his mother's pleas to have his body returned to her for burial at the family cemetery in Lewiston, Bobby Fuller's remains were thrown in an unmarked ditch at an unknown location shared by countless other victims of the firing squads. To date, the whereabouts of Bobby's remains have never been disclosed. Bobby Fuller was 25 years old and his execution took less than 24 hours after his arrest

and within two weeks of his loving daughter's sixth birthday.

After the proceedings, The United States State Department filed a formal protest, that was personally delivered to the Cuban Foreign Ministry by the United States *Charge d'Affaires,* Daniel Braddock, which denounced the proceedings and charged that the Cuban authorities had "failed to observe basic civilized standards." The United States protest described the events as having been carried out in a "Roman Circus atmosphere," and personalty charged Premier Fidel Castro's regime as being guilty of "inhuman behavior," in refusing to release Bobby Fuller's body to his relatives for humane burial.

"The aforementioned facts clearly demonstrate that Bobby Fuller was not afforded the "judicial guarantees which are recognized as indispensable by civilized peoples," and that he was the subject of the acts of terrorism as described herein of both torture and extra-judicial killing as defined under 28 USC § 1605(a)(7). The violations of these guarantees include, but are not limited to the following:"

a) Mr. Fuller and his family received inadequate notice of the trial as is well established by fact that no more than 24 hours elapsed between his arrest and summary execution.

b) Prior to this sham of a court proceeding, Mr. Fuller was questioned extensively without the presence of an attorney.

c) Mr. Fuller was held in solitary confinement prior to *his* "trial" during which time he was extensively interrogated and tortured to the point where he capitulated by signing a prepared confession.

d) Mr. Fuller was not afforded the opportunity of effective legal counsel of his own choosing.

e) Mr. Fuller was not afforded adequate time to prepare a defense, particularly in light of the severity of the charges and potential penalties

f) In fact, Mr. Fuller was denied the opportunity to provide a defense.

g) The tribunal did not disclose its intent to seek the death penalty prior to trial, and if fact, assured him that it would not be imposed in order to obtain his confession.

h) Mr. Fuller was taunted and humiliated for being an American by the prosecutor, the tribunal and the frenzied mob present to witness the spectacle.

i) Mr. Fuller was denied access to family members prior to his death and his remains were disposed of in a manner reflecting the complete absence of any humanity.

This Court further finds that Defendants, Fidel Castro Ruz, Raul Castro Ruz, the Cuban Revolutionary Armed Forces and El Ministerio Del Interi-

or were at all times material hereto, inclusive of the torture and extra-judiclal killing of Bobby Fuller, acting as agents and instrumentalities of the Republic of Cuba in the implementation of policy at the operational level in such a manner as to mandate the award of both compensatory and punitive damages. The Court further finds that the Defendant Republic of Cuba supervised, directed benefited from and is legally responsible for the actions of its agents and instrumentalities as set forth in this Judgment.

**D. COMPENSATORY DAMAGES:**

The amendments to the FSIA, 28 USC § 1605(a)(7) and 28 USCA § 1605, as well as governing federal, state and international standards, permit the recovery of compensatory damages. As enumerated in those amendments, these damages may include economic losses resulting from the death of Mr. Fuller, survival damages, including the pain and suffering of the decedent between the time of his arrest and his illegal execution, and solatium, which is inclusive of mental anguish, loss of the decedent's love, affection, care, attention, companionship, comfort and protection, bereavement, grief and hurt feelings sustained by any family member with a "close emotional relationship with the decedent," including siblings. See *Flatow, supra, at 30-32.* Relevant decisions agree that the trial Court is provided broad discretion and may take into consideration a wide variety of factors, including the decedent's achievements and plans

for the future which would have affected the claimants. *Flatow, supra, at 32.* Furthermore, it has been recognized that "the malice associated with terrorist attacks transcends even that of pre-meditated murder. The intended audience of a terrorist attack is not limited to the families of those killed and wounded. . .but in this case, the American public. . .the terrorist intent is to strike fear not only for one's own safety, but also that of friends and family and to manipulate that fear in order to manipulate political objectives. Thus, the character of the wrongful act itself increases the magnitude of the injury. It does demand a corresponding increase in compensation for increased injury."

In this matter, this Court has heard compelling evidence concerning the significant losses sustained by the Plaintiffs herein, including the following:

a) The economic losses sustained by the Estate of Robert Otis Fuller.

b) The pain and suffering sustained by Robert Otis Fuller between the time of his arrest and his illegal and summary execution.

c) The solatium sustained by his siblings, Frederick Fuller, Frances Fuller, Grace Lutes, Jeannette Hausier and Irene Moss.

d) The solatium of Robert Otis Fuller's daughter, Lynita Fuller, of incomprehensible proportions.

**1. Economic Loss:**

In support of the claim for economic loss, the Plaintiffs presented the expert testimony of Dr. Octavio Verdeja, Jr., a Certified Public Accountant, an expert in business valuation, who has over the years provided calculations for businesses transported from Cuba to the United States. Mr. Verdeja calculated the economic losses suffered by the Plaintiffs as a result of Bobby Fuller's death by using two alternative means. Under Method I, Mr. Verdeja calculated the probable current value of Mr. Fuller's Estate had Bobby Fuller lived to pursue the types of business interests he had successfully maintained through his death. Specifically, Mr. Verdeja calculated the present money value of Mr. Fuller's business enterprises including dairy milk production, beef, piso (the leasing of land for cattle grazing), lumber and sugar cane production. Under method I, the present money value of the economic loss sustained by the Plaintiffs in this case amounts to $88,549,377.00. Under Method II, Mr. Verdeja calculated the probable present money value of Mr. Fuller's Estate, had he lived without regard to the types of business interests he had successfully pursued prior to his death. Specifically, Mr. Verdeja calculated the present money value of the income and savings that Mr. Fuller would have generated, given the resources available to him at the time of his death. Under this methodology, the present money value of the loss sustained by the Estate was $50,995,962.00.

This Court finds that even the most conservative view of the evidence presented justifies a substantial economic award. Accordingly, compensatory damages for economic losses resulting from the death of Bobby Fuller are hereby awarded in the amount of *Sixty Five Million Dollars ($65,000,000.00)*.

**2. The Pain and Suffering sustained by Bobby Fuller prior to execution**

With regard to this item of damage, the Court had the benefit of both lay and the expert testimony of Claudia Edwards, Ph.D., which depicted severe mental pain and anguish experienced by Bobby Fuller between the time of his arrest and ultimate execution, including but not limited to the horror of standing before a biased tribunal in a setting described by diplomatic onlookers as a "Roman Circus," undergoing a sham of a trial and being sentenced to death, all in the presence of his mother, being placed in solitary confinement without any opportunity to speak to family with the limited exception of a heart rendering 5 to 10 minutes with his mother, being removed to an infirmary where his blood was drained and then ultimately walked before a firing squad for his execution.

Based upon the lay and expert testimony received, and after contemplation of the circumstances surrounding the last tragic moments of Mr. Fuller's life, damages are hereby awarded by this Court to Mr. Fuller's Estate for this element of damage in the amount of *Five Million Dollars ($5,000,000.00)*.

### 3. Solatium of Siblings, Frederick Fuller, Frances Fuller, Grace Lutes, Jeannette Hausler and Irene Moss

This Court received compelling evidence concerning the close emotional relationship between Bobby Fuller and his beloved brothers and sisters, Frederick Fuller, Frances Fuller, Grace Lutes, Jeannette Hausler and Irene Moss. It is clear from the evidence presented that each of the siblings suffered a devastating and permanent injury as a result of the torture and extra-judicial killing of their brother, Bobby Fuller. This Court also finds that their loss arising from their brother's torture and extra-judicial killing was heightened by the inhumane denial of the Defendants to return Mr. Fuller's remains to his family for proper burial and the establishment of a proper and permanent memorial. Although this Court heard evidence in profound detail concerning each siblings painful reaction to the events and the irreparable harm to them as a result of their brother's death, this Court finds it impossible to say that one sibling suffered anymore than another, and accordingly, compensatory damages for the pain and suffering of Bobby Fuller's siblings are hereby awarded as follows:

Frederick Fuller *Four Million Dollars ($4,000,000.00)*

Frances Fuller *Four Million Dollars ($4,000,000.00).*

Grace Lutes *Four Million Dollars ($4,000,000.00).*

Jeannette Hausler *Four Million Dollars ($4,000,000.00)*

Irene Moss *Four Million Dollars ($4,000,000.00)*

**4. Solatium of Robert Otis Fuller's Daughter, Lynita Fuller:**

With regard to Lynita Fuller, this Court heard extraordinary lay and expert testimony reflecting the devastating impact of the absence of Bobby Fuller on Lynita's life. The evidence detailed not only the decedent's achievements, but the plans for his future with Lynita. This Court has also been impressed by the testimony reflecting that as a result of Bobby Fuller's death, Lynita was isolated from the entire Fuller family and as a result lost the extensive benefits that would have been hers, in the form of love, companionship and nurturing. In the absence of Bobby Fuller's presence, the evidence was that Lynita was turned over to her maternal grandparents, both of whom were alcoholics and ignored the duties entrusted to them as her custodians, and in fact, subjected her to abusive treatment and circumstances. In addition, this Court also was struck by evidence to the effect that Lynita's mother was also an alcoholic who subjected her daughter to physical and sexual abusive perpetrated by her boyfriend, and then, Lynita's stepfather. As described by Dr. Claudia Edwards, an expert in psychological trauma, Lynita sustained serious and irreparable psychological harm

manifesting itself in severe loss of self-esteem and self-worth, as well as isolation and significant depression, which drastically impaired her ability to enjoy or even pursue the happiness to which she was entitled. In short, this Court finds from the evidence presented that Bobby Fuller's torture and summary execution had an devastating impact upon his daughter Lynita and compensatory damages are hereby awarded as follows:

Solatium of LYNITA CASKEY FULLER: *Ten Million Dollars ($10,000,000.00).*

## E. PUNITIVE DAMAGES

"The purpose of Punitive Damages, as the name implies is to punish wrongful conduct—to prevent its repetition by the offender and to deter others who might choose to emulate it. . .The victim to whom the award is made thus stands as a surrogate for civilized society in general; the victim is made more than whole in order that others may be spared a similar injury. . . .Yet another reason to award punitive damages in this particular case is to vindicate the interest of society at large in the collection and dissemination of complete and accurate information about world conflicts." *Anderson v. The Islamic Republic of Iran,* 90 F. Supp 2d 107 (USDC DC 2000). Therefore, in order to arrive at the proper punitive award and to serve the aforementioned purposes of the subject legislative enactments, it was important to gain an understanding of the Defendants' terrorist behavior, and

support thereof, over time, in order to gage its repetitive nature and assess the proper deterrent. In the present matter, the evidence presented to this Court, in credible detail, demonstrated the Defendants' persistent, undeterred commitment to international terrorist activity and the sponsorship thereof.

The facts supporting the punitive claim are set forth in the Plaintiffs' Second Amended Complaint 34 through 56, *(Pages 9 through 15),* all of which are deemed admitted or otherwise established as a matter of law pursuant to the Defendants' default in this case. The punitive claim in this case was also supported by the testimony of lay and expert testimony, particularly Dr. Jaime Suchlicki which corroborated those facts set forth in the Second Amended Complaint and further expanded upon the Defendants' role in the arena of international terrorism, Unbeknownst to most Americans, the Defendants in this cause, have engaged in and provided uninterrupted support of international terrorism for more than four decades, dating at least to the time of the death of Bobby Fuller. It is by no coincidence that the Republic of Cuba was one of the original designated state sponsors of terrorism and has remained on that list ever since. As early as the 1960's the Defendants established training camps in and around Havana, Cuba, utilized by members of various international terrorist organizations, including the PLO, Hamas and Hezbolah. In January of 1966, Fidel Castro and the other Defendants sponsored and hosted the "Tri-Continental Conference," in Havana, Cuba, which had

the stated purpose of devising a global strategy against "American and Western Imperialism."

This meeting was attended by a plethora of terrorist groups including those from Africa, the Middle East, Central and South America. In so doing, the Defendants were credited with establishing the "first" international terrorist network and support structure. In conjunction with that conference, the Defendants facilitated the publication of the "Minimanual of the Urban Guerrilla," which encouraged international terrorist acts and provided step-by-step instructions as to how to carry out such activities as bomb building, kidnapping, sabotage and hostage taking. This guideline has no doubt been used by many, if not all, of the terrorists groups posing a threat to the United States and civilized society, including the PLO, Hamas, Hezbolah, ETA and Los Macheteros. September 11, 2001 was not the first terrorist attack on American soil bringing death to American citizens. We need to look only at the actions of the Macheteros, a terrorist group recognized by the F.B.I. and the US Department of State, to have been trained and financed by the Defendants in this cause, as an example of this unfortunate, but little known fact. Amongst their "credits" of attacks upon the United States, we can include the following:

a) The 1979 Ambush of a United States Navy bus killing two U.S. sailors and wounding nine.

b) The 1983 armed robbery of a Wells Fargo depot in West Hartford, Connecticut in which they absconded with 7.1 million dollars. The second largest cash robbery in American history. 14 of the 19 members of that group were arrested and convicted. Unfortunately, the leader of the group, Victor Gerena escaped and is known by the F.B.I. to be living in Cuba, harbored by the Defendants. The F.B.I. specifically uncovered that this operation was financed by the Defendants, and in fact, traced at least 2 million dollars of the proceeds to Havana. Mr. Gerena is still on the F.B.I.'s Most Wanted Listed.

The aforementioned matters are but a small example of the Defendants' willful, wanton and intentional crimes against civilized society. As reflected in the Second Amended Complaint, and corroborated and expanded upon by the trial testimony in this case, the Defendants have provided training, intelligence, financial support and otherwise sponsored international terrorist groups, including but not limited to the E.L.N., E.T.A. F.A.R.C., HAMAS, HEZBOLAH, I.R.A., LOS MACHETEROS, M19, P.L.O., TUPAMAROS, and TUPAC AMARU. In fact, the PLO and several other of these organizations have long maintained headquarters in Havana. The F.B.I. have identified no less than 77 known fugitives believed to be harbored by the Defendants in Cuba including, Joan Shesimard a/k/a Asatah Shakur, one of the United States' most wanted fugitives for

killing a New Jersey State Trooper in 1973, Charlie Hill, a member of the Republic of the New Africa Movement wanted for the hijacking of TWA 727 and the murder of a New Mexico State Trooper, amongst many, many others.

As reflected by the State Department's annual review of states sponsoring terrorism, the Defendants engagement and support of international terrorism has continued through the present date unabated. We need only turn to Castro's statements at Tehran University in 2001, where he proudly proclaimed, *"Iran and Cuba, in cooperation with each other, can bring* America to *its' knees," and* the US Department of State's acknowledgments of Havana's close ties and support of Hamas and Hezbolah in locations as proximal as the tri-border area to understand the unrelenting motive of the Defendants to bring terrorism to the United States and to strike fear in the hearts of its citizenry.

In summation, the testimony and documentary evidence presented in this case conclusively establish that Fidel Castro, Raul Castro, The Cuban Revolutionary Armed Forces and the Ministry of the Interior acting in the scope of their capacity as agents and/or instrumentalities of the Republic of Cuba have engaged in repetitive and undeterred use and support of international terrorism, inclusive of torture and extrajudicial killings (dating at least to, and including, the extrajudicial killing of Bobby Fuller), which mandates a powerful response in the form of punitive damages. In accor-

dance therewith, punitive damages are hereby awarded against FIDEL CASTRO RUZ, individually, and as President of the State and Counsel of Ministers, Head of the Communist party and Commander in Chief of the Military, RAUL CASTRO RUZ, individually, and as First Vice President of the Counsel of State and Counsel of Ministers and head of the Cuban Revolutionary Armed Forces, THE CUBAN REVOLUTIONARY ARMED FORCES, EL MINISTERIO DEL INTERIOR and THE REPUBLIC OF CUBA to which the actions of its agents and instrumentalities are imputed, punitive damages in the amount of: Three Hundred Million Dollars ($300,000,000.00).

IT IS HEREBY ORDERED AND ADJUDGED that a Final Judgment is hereby GRANTED on behalf of JEANNETTE HAUSLER, as Personal Representative of the Estate of Robert Otis Fuller (BOBBY FULLER), Deceased, and against the Defendants, THE REPUBLIC OF CUBA, FIDEL CASTRO RUZ, RAUL CASTRO RUZ, THE CUBAN REVOLUTIONARY ARMED FORCES AND EL MINISTERIO DEL INTERIOR, jointly and severally as follows:

1. For Economic losses due the Estate in the amount of: *Sixty Five Million Dollars ($ 65,000,000.00).*

2. For non-economic compensatory damages, the amount of: *Thirty Five Million Dollars ($35,000,000.00).*

3. Punitive damages in the amount of: *Three Hundred Million Dollars ($300,000,000.00).*

The sum execution may issue forthwith against the said Defendants and any of their assets wherever situated. This Court will retain jurisdiction to enforce this judgment or any matters pertaining thereto. This Judgment shall bear interest at a rate of 9% percent per year from date of entry until satisfied.

DONE AND ORDERED in Miami-Dade County, Florida this 19 day January of 2007.

/s/ Thomas S. Wilson, Jr.
Thomas S. Wilson, Jr.
Circuit Court Judge

*Copies furnished for:*
JOHN S. GAEBE, ESQ.
ALFONSO PEREZ, ESQ.
ROBERTO MARTINEZ, ESQ.
RON KLEINMAN, ESQ.

IN THE CIRCUIT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 02-12475

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JEANNETTE HAUSLER *as Successor Personal Representative of the Estate of* ROBERT OTIS FULLER, ("BOBBY FULLER"), *Deceased,* on behalf of THOMAS CASKEY as Personal Representative of the Estate of LYNITA FULLER CASKEY, surviving daughter of ROBERT OTIS FULLER, *and The ESTATE OF ROBERT OTIS FULLER,*

*Plaintiff,*

vs.

THE REPUBLIC OF CUBA, and
EL MINISTERIO DEL INTERIOR

*Defendants.*

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**PLAINTIFFS' WITNESS AND EXHIBIT LIST**

Plaintiff, through undersigned counsel, in compliance with this Court's Pre-Trial Instructions, files this list of witnesses and exhibits:

**WITNESSES**

1. The parties
2. impeachment and rebuttal witnesses
3. Ms. Jeannette Hausler
   c/o University of Miami School of Law
   P.O. Box 248087
   Miami, FL 33176
4. Tom Caskey
   695 East 8th Avenue
   Hialeah, FL 33010
5. Bill Fuller
   637-12th Street, Apt. 6
   Miami Beach, FL
6. Freddy Fuller
   637-12th Street, Apt. 6
   Miami Beach, FL
7. Mr. Richard Jewett
   6376 S.W. 11th Street
   Miami, FL 33144
8. Ms. Francis Fuller
   9460 S.W. 106th Court
   Miami, FL 33176
9. Laura Patella-Sanchez, Esq.
   University of Miami
   Institute for Cuban and
   Cuban American Studies
   1531 Brescia Avenue
   Coral Gables, FL 33124

10. Claudia Edwards, Ph.D.
    6301 S.W. 98th Street
    Miami, FL 33156

11. Oscar Padron, CPA
    Turner & Associates
    19 West Flagler Street, Suite 600
    Miami, FL 33130

12. Jaime Suschlicki, Director
    University of Miami
    Institute for Cuban and
    Cuban American Studies
    1531 Brescia Avenue
    Coral Gables, FL 33124

13. U.S. Congressman, Peter Deutsch
    1001 Pines Blvd.
    Pembroke Pines, FL 33026

14. Esperanza DeVarona
    University of Miami,
    Cuban Heritage Collection
    1300 Memorial Drive
    Coral Gables, FL 33124

**EXHIBITS**

1. Bobby Fuller's Birth Certificate
2. Bobby Fuller's Citizenship Certificate
3. Bobby Fuller's US Marines Certificate
4. Lynita Fuller Caskey's Birth Certificate and Death Certificate

5. Bobby Fuller's Report of Death
6. Photographs of Bobby Fuller and the Fuller Family,
7. Photographs of Bobby Fuller & Lynita Fuller
8. Photographs of family in Cuba and ranch in Holguin, Cuba
9. Books, Newspaper articles, magazine articles and other publishings
10. Copy of the Geneva Convention
11. Blow-UP *"Time Line of events leading to execution"*
12. Videocassette of the deposition of Peter Deutsch *(re: Anderson v. Cuba)*
13. Expert reports on Cuba, tables, graphs
14. Depo transcripts utilized in case of Anderson v. The Republic of Cuba
15. Exhibits utilized in case of Anderson v. The Republic of Cuba
16. Videotape of the Fuller family and Lynita Caskey Fuller.
17. Order Appointing Jeannette Hausler as Personal Representative of Estate of Robert Fuller
18. Order Appointing Robert Caskey as Personal Representative of the Estate of Lynita Caskey Fuller.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to ALFONSO PEREZ, ESQ., and IAN MARTINEZ, ESQ. of RASCO, EININGER, PEREZ & ESQUENAZI, P.I., Co-Counsel for Plaintiff at 283 Catalonia Avenue, 2nd Floor, Coral Gables, Florida 33134, this 9th day of September, 2004.

GAEBE & MCCULLOUGH, P.A.
*Attorneys for Plaintiffs*
3211 Ponce DeLeon Blvd., Suite 201
Coral Gables, FL 33134
Telephone No. 305-443-1922
Fax No. 305-443-1917

By: /S/ JOHN S. GAEBE
John S. Gaebe

**UNITED STATES DISTRICT COURT**
**Southern District of Florida**

Case Number: 08-20197-CIV-JORDAN-McALILEY
Doc #143

Filed September 24th, 2008

Jeannette Hausler a Personal Representative
of the Estate of ROBERT OTIS FULLER et al

*Plaintiff*

v.

Republic of Cuba, et al

*Defendant*

## CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

I, STEVEN M. LARIMORE, Clerk of the United States district court certify that the attached judgment is a true and correct copy of the original judgment entered in this action on 8/20/2008, as it appears in the records of this court, and that

* No Notice Appeal from this Judgment has been filed, and no motion of any kind listed in Rule 4(a)

* Insert the appropriate language: . . . "no notice of appeal from this judgment has been filed, and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate

of the Federal Rules of Appellate Procedure has been filed.

IN TESTIMONY WHEREOF, I sign my name and affix the seal of this Court.

| | |
|---|---|
| September 22, 2008 | /s/ STEVEN M. LARIMORE |
| Date | Clerk |
| | [ILLEGIBLE] |
| | (By) Deputy Clerk |

A Certified Copy
J. MICHAEL MCMAHON CLERK

BY /s/ LATECIA CURTIS
DEPUTY CLERK

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Procedure has been filed." . . . "no notice of appeal from this judgment has been filed, and any motions of the kinds listed in Rule 4(a) of the Federal Rules of Appellate Procedure (†) have been disposed of, the latest order disposing of such a motion having been entered on [date]". . . "an appeal was taken from this judgment and the judgment was affirmed by mandate of the Court of Appeals issued on [date].". . . "an appeal was taken form this judgment and the appeal was dismissed by order entered on [date]."

(†Note: The motions listed in Rule 4(a), Fed. R. App, P., are motions: for judgment notwithstanding the verdict; to amend or make additional findings of fact; to alter or amend the judgment; for a new trial; and for an exension of time for filing a notice of appeal.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-20197-CIV-JORDAN

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CLOSED CIVIL CASE

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JEANNETTE HAUSLER as Successor Personal Representative of the Estate of ROBERT OTIS FULLER, ("BOBBY FULLER"), Deceased, on behalf of THOMAS CASKEY as Personal Representative of the Estate of LYNITA FULLER CASKEY, surviving daughter of ROBERT OTIS FULLER, The ESTATE OF ROBERT OTIS FULLER, FREDERICK FULLER, FRANCES FULLER, GRACE LUTES, JEANNETTE HAUSLER, AND IRENE MOSS

*Plaintiffs*,

vs.

THE REPUBLIC OF CUBA, FIDEL CASTRO RUZ, individually and as President of the State and Council Of Ministers, Head of the Communist Party and Commander-in Chief of the Military, RAUL CASTRO RUZ, individually and as First Vice President Of the Council of State and Council of Ministers and Head of the Cuban Revolutionary Armed Forces, The CUBAN REVOLUTIONARY ARMED FORCES, and EL MINISTERIO DEL INTERIOR,

*Defendants*

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## AMENDED FINAL DEFAULT JUDGMENT GRANTING FULL FAITH & CREDIT TO STATE JUDGMENT[1]

The plaintiffs' motion for final default judgment [D.E. 36] against defendants The Republic of Cuba, Fidel Castro Ruz, Raul Castro Ruz, and The Cuban Revolutionary Armed Forces is GRANTED.

Pursuant to 28 U.S.C. § 1738, full faith and credit, and federal recognition, is given to the Amended Final Judgment Dated January 19, 2007, in *Hausler et al. v. Republic of Cuba et al.*, No, 02-12475 (Div. 04), Eleventh Judicial Circuit, in and for Miami-Dade County, Florida ("Amended Judgment"), which awarded the plaintiffs 400 million dollars in damages against the defendants jointly and severally, and bore interest at the rate of 9% per annum under Florida law until satisfied.

Given that the Amended Judgment has not been satisfied, interest on the judgment (at the rate of 9%) stands at 54 million dollars as of July 19, 2008. The Amended Judgment is therefore now 400 million dollars in damages, plus 54 million dollars in interest, in favor of the plaintiffs and against the defendants against whom final default judgment is hereby entered.

The Amended Judgment will bear post-judgment interest from July 28, 2008, the date of this Court's prior Order, at the rate set by 28 U.S.C. § 1951.

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[1] Amended solely to exclude Defendant El Ministerio Del interior.

The Clerk is hereby ordered to administratively re-open this matter.

DONE AND ORDERED in chambers in Miami-Dade County, Florida, this 20th day of August, 2008.

/s/ ADALBERTO JORDAN
Adalberto Jordan
United States District Judge

cc: All counsel of record

[SEAL]

Certified to be a true and correct
copy of the document on file
Steven M. Larimore, Clerk,
U.S. District Court
Southern District of Florida

By /s/ [ILLEGIBLE]
Deputy Clerk

Date September 22, 2008

Argument Schedule for consolidated
Appeals in 12-1264-cv(L)

ISSUES TO BE ARGUED:
TRIA Interpretation, Preemption,
5th Amendment and U.C.C. Article 4-A

**Arguing in opposition to**
**District Court decision(s)**

| | | | |
|---|---|---|---|
| Bank of America, N.A., | ( ) | } | |
| Citibank, N.A. | ( ) | } | |
| JP Morgan Chase Bank, N.A. | ( ) | } | 11 total |
| Royal Bank Of Scotland N.V., fka Abn Amro Bank N.V. | ( ) | } | |
| UBS AG | ( ) | } | |
| ********** | | | |
| Banco Bilbao Vizcaya Argentina, S.A. | ( ) | } | |
| Banco Bilbao Vizcaya Argentina Panama, S.A | ( ) | } | |
| Caja de Ahorros y Monte de Piedad de Madrid | ( ) | } | |
| Estudios Mercados y Suministros, S.L. | ( ) | } | |
| LTU Luftransport-Unternehmen | ( ) | } | 11 total |
| Novafin Financiere, S.A. | ( ) | } | |
| Phillips Mexicana S.A.De C.V. | ( ) | } | |
| Premuda S.p.A. | ( ) | } | |
| Shanghai Pudong Development Bank Co. Ltd. | ( ) | } | |
| United States as *Amicus Curiae* | (8 ) | | |

**Arguing in support of District Court decision(s)**

Jeannette Fuller Hausler (30)

ISSUES TO BE ARGUED:
Appellate Jurisdiction, Article III Standing,
Prudential Standing and
Improper Intervenor and Interpleader

**Arguing that these issues should be decided against Appellants**

Jeannette Fuller Hausler (10)

**Arguing that these issues should be decided in favor of Appellants**

| | | | |
|---|---|---|---|
| Banco Bilbao Vizcaya Argentina, S.A. | ( ) | } | |
| Banco Bilbao Vizcaya Argentina Panama, S.A | ( ) | } | |
| Caja de Ahorros y Monte de Piedad de Madrid | ( ) | } | |
| Estudios Mercados y Suministros, S.L. | ( ) | } | |
| LTU Luftransport-Unternehmen | ( ) | } | 10 total |
| Novafin Financiere, S.A. | ( ) | } | |
| Phillips Mexicana S.A.De C.V. | ( ) | } | |
| Premuda S.p.A. | ( ) | } | |
| Shanghai Pudong Development Bank Co. Ltd. | ( ) | } | |

ISSUES TO BE ARGUED:
Status, Effect and Enforceability
of Florida State and
Florida Federal Judgments

**Arguing in opposition to District Court decision(s)**

| | | | |
|---|---|---|---|
| Banco Bilbao Vizcaya Argentina, S.A. | ( ) | } | |
| Banco Bilbao Vizcaya Argentina Panama, S.A | ( ) | } | |
| Caja de Ahorros y Monte de Piedad de Madrid | ( ) | } | |
| Estudios Mercados y Suministros, S.L. | ( ) | } | |
| LTU Luftransport-Unternehmen | ( ) | } | 8 total |
| Novafin Financiere, S.A. | ( ) | } | |
| Phillips Mexicana S.A.De C.V. | ( ) | } | |
| Premuda S.p.A. | ( ) | } | |
| Shanghai Pudong Development Bank Co. Ltd. | ( ) | } | |

**Arguing in support of District Court decision(s)**

| | | | |
|---|---|---|---|
| Jeannette Fuller Hausler | (8 ) | | |