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No. 09-5147

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

MICHAEL BENNETT AND LINDA BENNETT,
INDIVIDUALLY AND AS CO-ADMINISTRATORS
OF THE ESTATE OF MARLA ANN BENNETT,
Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,
Defendants,

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
For the District of Columbia, Case No. 03-1486

CORRECTED BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

The parties are: plaintiffs Michael Bennett and Linda Bennet, individually and as co-administrators of the estate of Marla Ann Bennett; defendants Islamic Republic of Iran, and the Iranian Ministry of Information and Security; and movant-appellee United States of America.

B. Rulings Under Review

The ruling under review is Chief Judge Lamberth's March 31, 2009 memorandum opinion and order granting the United States' motion to quash the plaintiffs' writs of attachment (App. 15-46). It is reported at 604 F. Supp. 2d 152 (D.D.C. 2009).

C. Related Cases

A default judgment was issued in this case in 2007 under the same caption and district court docket number. 507 F. Supp. 2d 117 (D.D.C. 2007). We are not aware of any related cases currently pending in any other United States court of appeals or any court in the District of Columbia within the meaning of Circuit Rule 28. We note that on September 30, 2009, Chief Judge Lamberth issued a memorandum that captioned this case along with nineteen other civil suits pending in the district court for the District of Columbia. *In re: Islamic Republic of Iran Terrorism Litigation* (available at district court docket number 44 in the case on review). We do not

believe those cases fall within the definition of related cases under Rule 28, however.

/s/ Samantha L. Chaifetz
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Date: November 30, 2009

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GLOSSARY

FSIA	Foreign Sovereign Immunities Act
TRIA	Terrorism Risk Insurance Act
VCDR	Vienna Convention on Diplomatic Relations

No. 09-5147

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On Appeal from the United States District Court
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CORRECTED BRIEF FOR APPELLEE UNITED STATES OF AMERICA

JURISDICTIONAL STATEMENT

Plaintiffs asserted claims against Iran under 28 U.S.C. § 1605(a)(7), and invoked the jurisdiction of the district court under 28 U.S.C. §§ 1330(a), 1331, and 1332(a). *See* App. 7. The district court entered a default judgment in favor of the plaintiffs against Iran on August 30, 2007. Docket ("Dkt.") No. 21. Plaintiffs sought to enforce the judgment by obtaining writs of attachment against various properties

located in the District of Columbia. *See* App. 67, 74, 82, 88, 93. The United States filed a motion to quash those writs. App. 48 (Dkt. No. 34). The district court granted the motion to quash on March 31, 2009. 604 F. Supp. 2d 152 (D.D.C. 2009) (App. 15-45, 46). Plaintiffs noticed this appeal on April 23, 2009, within the period specified by Fed. R. App. P. 4(a)(1). App. 47. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Section 201 of the Terrorism Risk Insurance Act (TRIA) permits a plaintiff with a compensatory award against a terrorist party to attach the "blocked assets" of the terrorist party in order to satisfy the judgment. Section 201 excludes from the definition of "blocked assets" any property "subject to the Vienna Convention on Diplomatic Relations" that is "being used exclusively for diplomatic or consular purposes." The question presented is whether the district court properly concluded that the properties at issue are excluded from TRIA's definition of "blocked assets," and thus unavailable for attachment.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addendum to this brief.

STATEMENT OF THE CASE

This appeal concerns a district court's order quashing writs of attachment issued against property belonging to Iran. In August 2007, the Bennetts, plaintiffs-appellants here, obtained a default judgment against Iran and the Iranian Ministry of Information and Security for Iran's role in the July 2002 bombing of Hebrew University by Hamas operatives, which resulted in the death of their daughter, Marla Ann Bennett. *See Bennett v. Islamic Republic of Iran*, 507 F. Supp. 2d 116 (D.D.C. 2007) (Dkt. Nos. 20-21).

In 2008, in an effort to satisfy their default judgment for more than $12 million, plaintiffs sought and obtained writs of attachment against five parcels of real property owned by Iran and located in the District of Columbia. *See* App. 15-18. The United States, acting pursuant to 28 U.S.C. § 517, filed a motion to quash all five of the writs on the ground that plaintiffs sought to attach diplomatic properties governed by the terms of the Foreign Missions Act and the Vienna Convention on Diplomatic Relations. App. 48 (Dkt. No. 34). The district court granted the Government's motion and quashed the writs. App. 15-45, 46. Plaintiffs now appeal. App. 47.

STATEMENT OF THE FACTS

I. Legal Framework: Treaty Obligations and Federal Legislation

In recent years, Congress has enacted, and amended, several statutory provisions concerning private suits against state sponsors of terrorism – lifting the sovereign immunity of those foreign states for various types of claims, and allowing for the enforcement of judgments against certain assets of terrorist states that are located here.[1] This case turns on a crucial aspect of the governing law that has gone unchanged: in accordance with obligations under the Vienna Convention on Diplomatic Relations, certain diplomatic property of foreign states remains exempt from attachment by parties such as the Bennetts.

A. The Vienna Convention on Diplomatic Relations and the Foreign Missions Act.

The United States has entered into treaties and international agreements that establish its obligation to protect diplomatic property. Foremost among these is the Vienna Convention on Diplomatic Relations ("Vienna Convention" or "VCDR"), ratified by the United States in 1972, which provides the legal

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[1] *See*, *e.g.*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1242 (1996) (amending the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7)); Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, Title II, § 201, 116 Stat. 2332, 2337-39 (2002) (codified at 28 U.S.C. § 1610 note) (facilitating recovery of judgments under the Foreign Sovereign Immunities Act in some cases).

framework for reciprocal obligations regarding diplomatic relations between foreign states. *See* Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227 (1972), 500 U.N.T.S. 95.

The Vienna Convention establishes that the "premises of a foreign mission shall be inviolable," "immune from search, requisition, attachment or execution," and that "[t]he receiving State is under a special duty to take all appropriate steps to protect the premises of the mission." VCDR, art. 22. Under Article 30 of the Convention, the residence of diplomatic staff enjoys the same protection as the premises of the mission. *Id.*, art. 30(1); *see id.*, art. 1(e).

Further, the Vienna Convention requires a host country to take steps to protect these properties even under exceptional circumstances. Under Article 45, if diplomatic relations are severed or if a mission is recalled, the "sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State." *Id.*, art. 45(b). But even if the sending and receiving States cannot agree on a custodial third State, still "the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives." *Id.*, art. 45(a).

Implementing these obligations of the Vienna Convention, the Foreign

Missions Act, 22 U.S.C. § 4301 *et seq.*, specifically authorizes the Secretary of State to "protect and preserve any property of [a] foreign mission" if that "mission has ceased conducting diplomatic, consular and other governmental activities in the United States and has not designated a protecting power or other agent approved by the Secretary to be responsible for the property of that foreign mission." 22 U.S.C. § 4305(c)(1); *see id.* § 4302(a)(3) (defining "foreign mission" to mean "any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of, or which is substantially owned or effectively controlled by . . . a foreign government").[2]

Consistent with the Vienna Convention, the Foreign Missions Act also prohibits the attachment of foreign mission property being held by the Department of State. Specifically, 22 U.S.C. § 4308(f) provides: "Assets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission shall not be subject to attachment, execution,

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[2] *See generally Palestine Information Off. v. Schultz*, 853 F.2d 932, 936 (D.C. Cir. 1988) (observing that "[i]n passing the Foreign Missions Act, Congress vested broad authority over foreign missions in the Secretary of State"); 22 U.S.C. § 4301(c) (charging the Secretary with determinations about the "treatment to be accorded to a foreign mission in the United States"). Pursuant to 22 U.S.C. § 4303(4), the Secretary has delegated her authority with respect to the treatment and oversight of foreign mission properties to the State Department's Office of Foreign Missions. *See* Delegation Authority No. 214 (cited at App. 57); 48 C.F.R. § 601.603-70.

injunction, or similar process, whether intermediate or final." *Id*.

B. The Foreign Sovereign Immunities Act and Section 201 of the Terrorism Risk Insurance Act.

Under the Foreign Sovereign Immunities Act ("FSIA"), foreign states are immune from the jurisdiction of federal and state courts, except as provided by the Act. 28 U.S.C. § 1604. One such exception permits suits, such as the Bennetts', for certain claims for personal injury or death caused by state-sponsored terrorism. *See* 28 U.S.C. § 1605(a)(7) (repealed Jan. 2008); *see also* 28 U.S.C. § 1605A.[3]

Even where a judgment may be obtained, the FSIA generally prohibits the attachment of a foreign state's property, subject to express statutory exceptions. 28 U.S.C. §§ 1609, 1610. Prior to the enactment of Section 201 of the Terrorism Risk Insurance Act ("TRIA") in 2002, judgment creditors could only attach the property of state sponsors of terrorism if the foreign state had used the property for commercial activity. *See* 28 U.S.C. § 1610(a)(7); *see also Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 23 (D.D.C. 1999).

TRIA § 201 expanded the rights of judgment creditors to attach properties

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[3] In 1996, Congress established the exception at § 1605(a)(7) for certain claims brought against state sponsors of terrorism and arising out of their provision of material support of acts of terrorism. In 2008, several months after plaintiffs' judgment was issued, Congress repealed § 1605(a)(7) and added a new section, 28 U.S.C. § 1605A, which, *inter alia*, reasserts the exception previously at § 1605(a)(7)). This case remains a suit under § 1605(a)(7). *See* App. 44.

of a "terrorist party," including state sponsors of terrorism such as Iran.[4] As relevant here, Section 201 permits terrorism victims with judgments under 28 U.S.C. § 1605(a)(7) to satisfy their judgments for compensatory damages by attaching "the blocked assets of [a] terrorist party." Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337 (codified at 28 U.S.C. § 1610 note).

Under TRIA, "blocked asset" is a term of art, initially defined 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 or 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." *Id.* § 201(d)(2)(A), 116 Stat. at 2339. The definition of "blocked asset" goes on to expressly *exclude* "property subject to the Vienna Convention on Diplomatic Relations . . . being used exclusively for diplomatic or consular purposes." *Id.* § 201(d)(2)(B)(ii), 116

[4] Before the enactment of TRIA, Congress twice expanded the rights of plaintiffs with judgments under 28 U.S.C. § 1605(a)(7) to allow them to attach generally the property of state sponsors of terrorism. *See* Treasury and General Government Appropriations Act of 1999, Pub. L. No. 105-277, Title I, § 117(a), 112 Stat. 2681, 2681-491 (1998) (adding 28 U.S.C. § 1610(f)(1)(A)); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f) (adding 28 U.S.C. § 1610(f)(3)). Each time, however, Congress authorized the President to waive this new attachment provision in the interest of national security, and each time, President Clinton immediately exercised this authority. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998); Presidential Determination No. 2001-01, 65 Fed. Reg. 66,483 (Nov. 6, 2000). The exception has never gone into effect.

Stat. at 2340; *see also id*. § 201(d)(3), 116 Stat. at 2340 (defining "property subject to the Vienna Convention on Diplomatic Relations" as property "the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under [the] Vienna Convention").

Because Section 201 authorizes attachment only of "blocked assets," any property subject to the Vienna Convention on Diplomatic Relations that "is being used exclusively for diplomatic and consular purposes" is not subject to attachment. TRIA § 201(a), 116 Stat. at 2337.

II. Historical Framework: U.S.-Iran Diplomatic Relations

A. Severance of Diplomatic Relations and Assumption of Custodial Responsibilities.

In response to Iran's seizure of American hostages, on November 14, 1979, the President exercised his powers under the International Emergency Economic Powers Act and "blocked all property and interests in property of the Government of Iran . . . subject to the jurisdiction of the United States." Exec. Order No. 12170, 44 Fed. Reg. 65,729 (Nov. 15, 1979). Initially the United States nonetheless allowed Iran to continue to occupy its diplomatic and consular properties here. App. 18. But on April 7, 1980, as the hostage crisis continued, the President exercised his foreign affairs powers to sever diplomatic relations

with Iran. *Id.* at 33. Iranian diplomatic officials were ordered to leave the United States. *Id.*

Shortly thereafter, the Department of State approved Algeria as the protecting power for Iranian interests in the United States. As it informed Algeria, however, the United States retained custody over Iran's diplomatic and consular properties in response to Iran's refusal to return custody of the United States' diplomatic and consular property to either the United States or its protecting power, Switzerland. *Id.* at 33-34; *see id*. at 58-59. The State Department assured Algeria by diplomatic note that it would take all appropriate measures for the safety and protection of Iran's diplomatic and consular properties in the United States. App. 33-34 .

As a result, the diplomatic and consular properties of Iran – including the five parcels of real property at issue in this case – have remained in the protective custody of the Department of State since 1980. App. 33-37; *id*. at 61-63 (noting that they remain blocked pursuant to Exec. Order No. 12170).

B. Satisfaction of the Vienna Convention on Diplomatic Relations.

As noted, Article 45 of the Vienna Convention on Diplomatic Relations imposes on the United States an obligation to "respect and protect" Iran's diplomatic property in the United States. From 1980, when the United States

severed diplomatic relations with Iran, until 1983, the United States fulfilled this obligation by providing for "essential maintenance and repairs" of the properties at the expense of American taxpayers. App. 64-65. But as it became clear that the dispute concerning the parties' respective diplomatic and consular properties would not be resolved in the near term, the State Department determined that renting out Iran's properties would enable the United States to fulfill its "respect and protect" obligations over the long term. The Department reasoned that rental of the properties "would provide a source of funds for essential maintenance and repairs, necessary to supplement the scarce appropriated funds available for these activities." *Id.* at 60 (noting also that keeping the buildings occupied would help to protect and preserve them); *see id.* at 34-35. By diplomatic note tendered on March 10, 1983, the United States notified Algeria of its intentions to offer Iran's diplomatic and consular properties for rent in order to protect Iran's interests in the long term. App. 34.

Accordingly, the United States has periodically leased all of the diplomatic properties at issue here – 3003 and 3005 Massachusetts Ave., N.W.; 3410 Garfield St., N.W.; Lot 8, Square 2145 N.W.; and Lot 0820, Square 2145, N.W. [5]– to

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[5] More descriptively, these include the former Ambassador's residence at 3003 Massachusetts Ave., N.W.; the former Embassy Chancery at 3500 Massachusetts Ave., N.W.; a former diplomatic residence of the Embassy at 3410 Garfield St., N.W.;

various private parties and to other foreign governments' missions. App. 34-35. Proceeds from the rental of these properties go toward maintenance and repairs; any additional proceeds are deposited in a blocked Iranian diplomatic account. *Id.* at 35.

III. Judicial Framework: Attempts to Attach Iranian Diplomatic Properties

A. Prior Cases.

As the district court observed, App. 37-38, this is not the first case to come before the District Court or this Court seeking to attach properties owned by Iran and formerly maintained for its diplomatic mission. Prior cases have all reached the same conclusion – that these properties remain immune from attachment or execution. *See, e.g.*, *Mousa v. Islamic Republic of Iran*, No. 00-2096, at 7-8 (D.D.C. Nov. 5, 2003) (holding properties formerly associated with the Iranian diplomatic mission – including 3003 Massachusetts Avenue N.W., and 3410 Garfield Street N.W. – were immune from attachment under TRIA because "the United States [was] fulfilling its duties under international diplomatic law" by "protecting and maintaining the properties," and therefore they were "being used for diplomatic or consular purposes"); *Elahi v. Islamic Republic of Iran*, No.

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and two additional properties (at Lot 8, Square 2145 NW and Lot 0820, Square 2145, NW) that form part of the former Iranian Embassy compound and function primarily as parking lots for the Embassy. App. 15-16; *see id.* 61-63.

99-02802 (D.D.C. July 22, 2003) (quashing writs on the same properties as in *Mousa*, because allowing attachment of these properties "would result in a violation of an obligation owed by the United States pursuant to the two Vienna Conventions").[6] Other courts have similarly assessed and rejected efforts to attach Iranian diplomatic or consular properties in other jurisdictions. *See*, *e.g.*, *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 495-96 (5th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 287 F. Supp. 2d 608 (D. Md. 2003) (same), *aff'd on other grounds*, 376 F.3d 226 (4th Cir. 2004).

B. Proceedings Below.

As explained *supra*, the Bennetts sought to enforce a default judgment against Iran by attaching five real properties that are associated with the former Iranian diplomatic mission and have been under the control of the United States since 1980. *See* App. 15. The United States moved to quash plaintiffs' writs,

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[6] Other plaintiffs in this jurisdiction have been denied the relief sought on other legal bases. *See, e.g.*, *Hegna v. Islamic Republic of Iran*, No. 04-5139 (D.C. Cir. Apr. 22, 2005) (holding that plaintiffs – who sought to attach properties including 3003 and 3005 Massachusetts Ave., N.W., and 3410 Garfield St., N.W. – had relinquished any right to relief by accepting compensation from the U.S. Treasury); *Flatow*, 76 F. Supp. at 21-23 (holding that the leasing of Iran's former diplomatic properties on Massachusetts Avenue and Garfield Street by the United States "pursuant to its 'preserve and protect' responsibilities" did not render the properties subject to attachment under the FSIA's exception for commercial activity at 28 U.S.C. § 1610(a)(7)).

urging that they cover diplomatic properties not subject to attachment.

The district court agreed, holding that "in light of the Office of Foreign Mission's continued assertion of authority over Iran's former diplomatic property under the Foreign Missions Act," the "inescapable conclusion" is that the "real properties at issue are currently immune from attachment under the laws of the United States." App. 38. The court noted that, like other courts to consider such questions, it had also reached this conclusion in prior cases. *Id.* at 37-38 (citing cases).

The court rejected the arguments advanced by the plaintiffs in their district court papers: that the United States lacked standing to seek to quash the writs of attachment; that the Vienna Convention on Diplomatic Relations does not provide for immunity after the withdrawal of diplomatic relations; and that the properties at issue are subject to attachment under FSIA's commercial activity exception, 28 U.S.C. § 1610(a)(7). App. 39-43; *see* Pls. Mem. in Opp. to the Govt's Mot. to Quash ("Pls Mem. in Opp.") (Dkt. No. 35). Notably, plaintiffs do not raise any of these issues on appeal.

In rejecting plaintiffs' standing argument as "without merit and essentially frivolous," App. 39, the court observed that this case involves the United States's "independent foreign policy obligations under the Vienna Convention and the

Foreign Mission Act," namely its "duty to protect and respect the diplomatic properties of other nations," *id.* at 40, and related "foreign policy and national security interests," *id.* at 41 (acknowledging concerns about reciprocal or retaliatory action).

The court went on to address plaintiffs' argument that the Iranian properties at issue are covered by the FSIA's commercial activity exception, 28 U.S.C. § 1610(a)(7). Plaintiffs had argued that § 1610(a)(7) should apply because the properties were "unoccupied" and "not being maintained." Pls. Mem. in Opp. 9 (Dkt. No. 35). The district court explained that § 1610(a)(7) "turns on whether the foreign state – in this case Iran – is using the properties at issue for a commercial purpose," App. 43 (citing *Flatow*, 76 F. Supp. 2d at 23), and plainly no such activity had occurred here. The court explained that it made "no difference" to the immunity analysis whether the properties were unoccupied or even in poor condition. *Id.* at 43-44. The court observed that specific treatment of the properties of foreign missions falls within the Department of State's broad discretion under the Foreign Missions Act. *Id.*[7]

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[7] The district court also explained that plaintiffs could not rely on 28 U.S.C. § 1610(g), a provision enacted in 2008, to obtain relief, and concluded that, in any event, the application of § 1610(g) "would not alter the outcome with respect to the writs of attachment." App. 44. Plaintiffs do not challenge that ruling on appeal.

SUMMARY OF ARGUMENT

Plaintiffs in this litigation have a default judgment against Iran pursuant to the FSIA's "terrorism exception" to foreign sovereign immunity. The United States emphatically condemns the acts of terrorism that gave rise to this judgment, and has deep sympathy for plaintiffs' suffering. The United States remains committed to disrupting terrorist financing and to pursuing those responsible for terrorist acts against U.S. nationals.

Attachment of the properties targeted by plaintiffs' writs is not permitted under the laws of the United States, however, and would be inconsistent with obligations set out in the Vienna Convention on Diplomatic Relations. Because the relations among nations are by nature reciprocal, the position urged by plaintiffs could have significant implications for U.S. foreign policy and international relations. In the past, similarly situated plaintiffs have sought to attach many of the same properties at issue here, and courts have repeatedly determined that these properties are not subject to attachment. The district court here reached the same conclusion, and quashed appellants' writs of attachment. That judgment was proper, and should be affirmed.

Plaintiffs do not press the various arguments they advanced in the district court. They now argue that the properties qualify as attachable "blocked assets"

within the meaning of the TRIA. Their argument on appeal is sufficiently distinct from anything articulated in the district court that it may be considered waived. In any event, the argument fails on its merits because TRIA specifically excludes from its definition of "blocked assets" any "property subject to the Vienna Convention on Diplomatic Relations . . . [that] is being used exclusively for diplomatic or consular purposes." TRIA § 201(d)(2)(B)(ii), 116 Stat. at 2340.

As the State Department has determined and as prior cases reflect, the properties at issue in this case all fall within the statutory definition of "propert[ies] subject to the Vienna Convention on Diplomatic Relations." *Id.* § 201(d)(3), 116 Stat. at 2340. Plaintiffs readily concede that this is true of four of the five properties at issue, but argue that the fifth – 3410 Garfield Street, N.W. – is not subject to the Vienna Convention. *See* Pls. Br. 13, 23-26. This is a new development on appeal: plaintiffs did not previously so argue. The argument is thus waived. And, in any event, it is without merit. The district court found, based on undisputed evidence, that the Garfield Street property was, prior to 1979, a diplomatic residence. By its terms, the Vienna Convention makes clear that, whether or not it is part of the premises of the mission, the residence of diplomatic staff enjoys the same protections as the premises of the mission. VCDR, arts. 1(e), 30(1). Moreover, courts have concluded that deference is owed the State

Department on questions of whether a particular property is protected by the Vienna Convention, and the Garfield Street property has consistently been recognized as such.

Further, all five subject properties are in the protective custody of the Department of State. Acting pursuant to a broad delegation of authority and discretion, the Department protects and preserves the properties in satisfaction of international obligations and to advance long-term U.S. foreign policy objectives. Plaintiffs nonetheless argue that the properties are not "'being used exclusively for diplomatic and consular purposes.'" *Id*. at 16-19 (quoting TRIA § 201(d)(2)(B)(ii)). They neither suggest that the United States, as custodian of the properties, seeks to achieve any non-diplomatic objective, nor otherwise dispute that the United States' sole purpose in maintaining the properties is diplomatic. Rather, they maintain that TRIA requires a separate and independent assessment of the "the properties' use," and suggest that the leasing of property is necessarily not diplomatic. Pls. Br. 17.

Plaintiffs made no argument of this sort in district court. Even if this Court elects to consider it, plaintiffs' position does not find support in TRIA's "plain language," *id.*, as they now contend. In fact, their view rests on a misreading of the statute – one that treats Section 201(d)(2)(B)(ii) as if it establishes distinct

requirements of "diplomatic uses" and "diplomatic purposes." Plaintiffs' approach is fundamentally problematic. Contrary to accepted canons of statutory construction, plaintiffs read TRIA to require, rather than avoid, violations of international treaty obligations. Moreover, plaintiffs seek to replace the State Department's lawful exercise of authority (which reflects powers constitutionally vested in the Executive branch and discretion expressly afforded by Congress) with judicial determinations on matters of foreign policy. *See* App. 41-42 & n.9.

Finally, even plaintiffs' erroneous reading of the statute does not establish any basis for relief in this case. They have not identified any manner in which the property is "being used" that renders it attachable. Plaintiffs cannot overcome the presumption of immunity to which property of a foreign state is entitled where they identify no basis for an exception.

STANDARD OF REVIEW

Whether the properties at issue may be attached under TRIA is a question of law this Court reviews *de novo*. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004). This Court reviews any findings of fact for clear error. *Id.*

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS CANNOT ATTACH DIPLOMATIC PROPERTIES BELONGING TO IRAN THAT ARE BEING USED BY THE UNITED STATES EXCLUSIVELY FOR DIPLOMATIC PURPOSES.

A. As the District Court Recognized, the Department of State Has Broad Authority To Identify and To Protect Iran's Diplomatic Properties.

The Department of State is the agency within the United States government that administers matters arising under the Vienna Convention on Diplomatic Relations and manages foreign government-owned diplomatic and consular property as appropriate under the Foreign Missions Act. As discussed below, the Department's views as to the scope and application of the Vienna Convention are entitled to deference, and its authority over foreign missions is broad.

1. The Vienna Convention establishes a framework for regulating diplomatic relations between nations. The Convention's basic principles include the immunity of diplomatic property from attachment, VCDR, art. 22, and the obligation of a receiving State "to respect and protect" foreign diplomatic mission property, *id.*, arts. 22, 45.

In the United States, the Department of State is the agency charged with administering matters arising under the Convention, including accrediting foreign

diplomatic personnel and determining which properties qualify for the protections. VCDR, art. 1(I). Courts have consistently recognized the deference owed to Executive agencies in the interpretation of treaties that they negotiate and subsequently administer. *See, e.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Air Canada v. Dept. of Transp.*, 843 F.2d 1483, 1486 (D.C. Cir. 1988) (when operative terms of treaty "have some play," reviewing court "owes substantial deference to the interpretation given by the administering agency to matters within its competence"). Here particular deference is appropriate because the Executive branch is charged by the Constitution with conducting foreign policy, and the interpretation of international legal obligations is likely to have foreign policy implications. *See also* U.S. Const. art. II, § 3, cl.3. *Cf.* App. 42 (acknowledging that "questions concerning extent of United States treaty obligations . . . are largely nonjusticiable political questions") (citing *Holmes v. Laird*, 459 F.2d 1211, 1215 (D.C. Cir. 1972), as well as *Kucinich v. Bush*, 236 F. Supp. 2d 1, 16 (D.D.C. 2002)).

2. In the Foreign Missions Act, Congress assigned to the Department of

State the central role in carrying out U.S. policy "to support the secure and efficient operation" of American missions abroad and foreign missions in this country. 22 U.S.C. § 4301(b). The Act expressly charges the Secretary of State with managing the reciprocal relationship between the treatment of our own missions abroad and foreign missions here. *Id.* § 4301(c).[8] Accordingly, the Secretary is authorized "to decide what constitutes a foreign mission for the purposes of the Act." *Palestine Information Off. v. Schultz*, 853 F.2d 932, 936 (D.C. Cir. 1988); *see* 22 U.S.C. § 4302(b) ("determinations with respect to the meaning and applicability of the terms . . .[including "foreign mission"] shall be committed to the discretion of the Secretary"). In addition, the Secretary regulates, *inter alia*, the provisions of benefits – including "maintenance" and "protective services" – to foreign missions. 22 U.S.C. §§ 4303-4305; *see id.* § 4302(a)(1). Relatedly, the Act authorizes the Secretary to "protect and preserve any property of [a] foreign mission" when relations have been severed and there is no protecting power or agent approved to take responsibility for the property. 22 U.S.C. § 4305(c)(1).

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[8] Section 4301(c) provides: "The treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States."

This Court has previously acknowledged that Congress has "vested broad authority over foreign missions" in the Secretary of State. *Palestine Information Off.*, 853 F.2d at 936. Indeed, this Court has observed that "[w]hen exercising its supervisory function over foreign missions, the State Department acts at the apex of its power" because it "wields the combined power of both executive and legislative branches." *Id.* at 937 (cited at App. 26-27). *Cf.* App. 43 (recognizing that the State Department's decisionmaking with respect to the preservation of foreign diplomatic properties is not subject to second-guessing by courts); *id.* at 31-32 (explaining that matters relating to foreign relations are "'largely immune from judicial inquiry or interference,'" "particularly . . . where, as here, Congress vested the State Department with sweeping authority to manage former diplomatic properties in the United States") (quoting *Regan v. Wald*, 468 U.S. 222, 242 (1984)).

B. The Five Properties At Issue Are Not Subject to Attachment.

As set forth above, 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 enumerated statutory exceptions. 28 U.S.C. § 1609. This statute establishes a default presumption that the property of a foreign state is immune from execution and places the burden on a judgment creditor to show that a

specific property falls within an enumerated exception to the general rule of immunity. *See, e.g.*, *Olympic Chartering, S.A. v. Ministry of Industry and Trade of Jordan*, 134 F. Supp. 2d 528, 536 (S.D.N.Y. 2001) (acknowledging the "presumption of immunity for the property of foreign states"). Thus, as this Court explained in *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006), while the party asserting immunity may "bear the ultimate burden of persuasion," plaintiffs seeking to attach property "bear[] the burden of producing evidence that immunity should not be granted." *Id.* at 842.

In 2002, Congress added to the existing FSIA scheme by providing that "blocked assets" of a terrorist party are subject to attachment in aid of execution of a judgment on a claim based upon an act of terrorism. TRIA § 201(a), 116 Stat. at 2337 (codified at 28 U.S.C. § 1610 note). Congress specified, however, that property "subject to the Vienna Convention on Diplomatic Relations . . . being used exclusively for diplomatic or consular purposes" does not constitute a "blocked asset." *Id*. § 201(d)(2)(B)(ii), 116 Stat. at 2340.[9]

On appeal, plaintiffs argue that the properties they seek to attach are

[9] More fully, the section exempts "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, [and] is being used exclusively for diplomatic or consular purposes." TRIA § 201(d)(2)(B)(ii), 116 Stat. at 2340.

excepted from immunity by TRIA because they fall outside Section 201(d)(2)(B)(ii). Before the district court, however, they made no attempt to make any showing to this effect to overcome the presumption of immunity. Based on the undisputed evidence presented by the Government and careful analysis of the relevant law, the district court properly ruled that the five parcels of real property at issue are not within the scope of any applicable exception to general immunity.

1. Diplomatic Properties for Purposes of Section 201(d)(2)(B)(ii).

Plaintiffs concede that four of the five properties at issue "are diplomatic properties for the purposes of section 201(d)(2)(B)(ii)." Pls. Br. 13. They assert that "[t]here is a contest regarding the fifth property, located at 3410 Garfield Street, N.W." *Id*.

That is not the case, however. Plaintiffs had not previously disputed that the Garfield Street property was used as a diplomatic residence by Iran and is therefore subject to the Vienna Convention on Diplomatic Relations. *See* App. 62 (supporting declaration from the Deputy Assistant Secretary for Diplomatic Security and Deputy Director of the Office of Foreign Missions).[10] The argument

[10] If anything, plaintiffs' supplemental filing in the district court – which was quoted in the court's decision but then struck from the record – indicated that they agreed that the Garfield Street property is a diplomatic property. App. 23-24 & n.5 (quoting Dkt. No. 37); *see id*. at 42 (striking Dkt. No. 37).

plaintiffs seek to press on appeal is thus waived. *See Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009) (and cases cited therein) (explaining that it "does not suffice to make [an] argument for the first time on appeal"); *Ben-Kotel v. Howard University*, 319 F.3d 532, 535 (D.C. Cir. 2003) (finding "no occasion to decide" questions "because [plaintiff] did not raise them first in the district court"); *Marymount Hospital, Inc. v. Shalala*, 19 F.3d 658 (D.C. Cir. 1994).

Even if this Court were to entertain plaintiffs' argument, it is without merit. The district court properly noted that the Garfield Property was "used as a diplomatic residence of the Embassy," App. 15, and regarded it as a "diplomatic property" subject to the Vienna Convention on Diplomatic Relations, *e.g.*, *id*. at 21, 37-38, 39-45. This conclusion reflects the State Department's position since 1980, when the United States assumed protective custody of this and other diplomatic properties belonging to Iran. As discussed in Section A, *supra*, the State Department's view on this point is entitled to substantial weight, given the agency's role in administering matters arising under the Vienna Convention and its express authority under the Foreign Missions Act. *See Hegna*, 376 F.3d at 494 (giving "'substantial weight'" to the United States's view that the former residence of the General Consul of Iran was covered by the Vienna Convention on Consular

Relations). The Garfield Street property has, in fact, always been treated in this way. *See Mousa*, No. 00-2096 (D.D.C. Nov. 5, 2003); *Elahi*, No. 99-02802 (D.D.C. July 22, 2003); *Flatow*, 76 F. Supp. at 21-23.

Moreover, that the Garfield Street parcel is, as described in TRIA,"property subject to the Vienna Convention on Diplomatic Relations" is readily established. TRIA § 201(d)(2)(B)(ii), 116 Stat. at 2340. The State Department's view finds clear support in the text of the Vienna Convention, which guarantees the residence of diplomatic staff the same protections as the premises of the mission. VCDR, art. 30(1); *see id.*, art. 1(e).

Plaintiffs do not identify relevant contrary authority, and we are aware of none. The case on which they rely – *Permanent Mission of India v. City of New York*, 551 U.S 193 (2007) – is inapposite. It did not involve an action for attachment or address articles 45 or 30 of the Vienna Convention, which provide the obligation to "respect and protect" diplomatic property, including the residence of a diplomatic agent. Rather, *Permanent Mission of India* presented a jurisdictional question: whether foreign sovereigns were immune from a lawsuit to declare the validity of local tax liens on their property. The Supreme Court held that the case fell within the "right in immovable property" exception of the FSIA. *Permanent Mission of India*, 551 U.S. at 195; *see id.* at 197 & n.1 (noting that the

foreign states "are immune from foreclosure proceedings"). The Court looked to article 31 of the Vienna Convention on Diplomatic Relations (which addresses the limited immunity of diplomatic agents from civil jurisdiction), but found that it did not provide any clear guidance on the question presented. *Permanent Mission of India*, 551 U.S. at 201-02.

2. "Being used exclusively for diplomatic or consular purposes."

To fall under TRIA § 201(d)(2)(B)(ii), a foreign state's diplomatic property must also be "used exclusively for diplomatic or consular purposes." The United States has custody of the five properties at issue, and uses them exclusively for the purpose of satisfying its obligation to "respect and protect" Iran's former diplomatic properties during this ongoing period of severed relations. VCDR, arts. 22, 45.

a. The relevant facts have never been challenged: the State Department has determined that at times the most appropriate way to maintain the subject properties in light of the United States' severed diplomatic relations with Iran – and thereby comply with the Vienna Convention's obligations and advance U.S. diplomatic objectives – is to lease them and use the proceeds from the rentals for repairs. App. 60, 64-65. At other times, as at present, the State Department protects and preserves these properties without leasing to tenants. *Id.* at 29; *see*

Pls. Mem. in Opp. to Mot. 9 (Dkt. No. 35); App. 61-63.[11] In either case, the State Department determines the appropriate treatment of foreign mission property pursuant to the agency's statutory authority to protect such properties and in light of its responsibility to administer matters arising under the Vienna Convention.

The district court correctly noted that the State Department, in exercising its "broad – if not exclusive – discretion with respect to the preservation of [foreign mission] properties," "undoubtedly must consider an array of issues and competing priorities in light of limited resources." App. 43. The court concluded that it "was not free to second guess that Executive agency's decision making under these circumstances." *Id.*; *see also id.* at 41 (pointing to a summary of "foreign policy and national security interests the United States has at stake in this highly charged, politically sensitive context"). It is sufficient for the purposes of TRIA § 201(d)(2)(B)(ii) that "all of [the State Department's] actions in connection with the maintenance and rental of Iran's diplomatic and consular property have been and continue to be taken exclusively for diplomatic and consular purposes as

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[11] The properties at 3003 Massachusetts Avenue N.W. and 3410 Garfield Street N.W. are vacant, and the United States is making repairs. App. 61-62. The property at 3005 Massachusetts Avenue N.W. was rented to the Government of Turkey for use as a temporary chancery until 1999; since then it has been vacant. *Id.* at 62. The lots are periodically rented to other foreign missions, and, as with all of the rentals, proceeds are used to protect and maintain the Iranian diplomatic properties. *Id.* at 63.

such actions are in furtherance of obligations of the United States, as the receiving State, to protect the property pursuant to the Vienna Convention." App. 60; *see In re: Islamic Republic of Iran Terrorism Litigation* 162 (Dkt. No. 44).

b. On appeal, plaintiffs dispute this conclusion. They did not raise this dispute before the district court, however. *See* Pls. Mem. in Opp. (Dkt. No. 35) (no discussion of TRIA); *see also* Statement of Issues on Appeal (D.C. Cir.) (filed May 26, 2009) (identifying several issues for appeal but making no mention of TRIA generally or the requirements of Section 201(d)(2)(B)(ii) specifically). The argument is thus waived. *See, e.g.*, *Potter*, 558 F.3d at 547.

c. Even if this Court elects to examine the applicability of TRIA § 201(d)(2)(B)(ii), the proper outcome is clear; there is no basis on which to allow plaintiffs to attach the subject properties.

To be clear, it is not – as plaintiffs suggest – the Government's position that "[t]he mere fact that the United States has taken custody of these properties," Pls. Br. 16, establishes that they are "being used exclusively for diplomatic or consular purposes" and are thus immune from attachment. TRIA § 201(d)(2)(B)(ii), 116 Stat. at 2340. Consonant with precedent, it is the Government's position that TRIA requires that the United States be protecting the properties in consideration of diplomatic aims or obligations. (As noted earlier,

the uncontradicted record shows that this is the case here.) By contrast, if the United States were to take custody of a diplomatic property, but then abandon its treaty obligations and use the property in a manner not intended to advance Plaintiffs claim that the United States errs by focusing on "diplomatic purpose" and that the "plain language" of the statute "focuses on the properties' use." Pls. Br. 17. They urge that an independent assessment of the "use of the property" is required, separate from the question of "diplomatic purpose." *Id*. at 16-17. This argument finds no support in the text of the statute – let alone the plain language. Section 201(d)(2)(B)(ii) refers to property "being used exclusively for diplomatic or consular purposes," articulating a single requirement in which the passive participle "being used" is modified by the phrase "exclusively for diplomatic or consular purposes." The statute – unlike plaintiffs – makes no reference to "diplomatic *uses*." Pls. Br. 16 (emphasis in original).

For this reason, plaintiffs can offer no case law to support their position. Courts have uniformly held that where the State Department protects properties with the "goal of assuring that the United States is in compliance with its treaty obligations," it "clearly is using them for a 'diplomatic purpose.'" *Hegna*, 287 F. Supp. 2d at 610 (noting that the "purpose of the rentals [of Iranian diplomatic and consular property], as was described in the diplomatic note tendered on March 10,

1983 to Iran's protecting power, is to protect Iran's interest in the properties," and concluding that the use was therefore exclusively diplomatic); *see Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 495-96 (5th Cir. 2004) (finding that foreign property formerly used as the residence of the General Consul of Iran was immune from attachment under TRIA because the property was being used by the United States "exclusively for diplomatic or consular purposes," where the United States was leasing out the properties and using a portion of the funds to maintain and preserve the property pursuant to its diplomatic obligations under the Vienna Conventions); *Mousa*, No. 00-2096, at 7-8 (D.D.C. Nov. 5, 2003) (same, with regard to Iranian diplomatic properties in the District of Columbia).

Plaintiffs do not address these decisions in any way, except to claim that the Fourth Circuit "declined to accept" this analysis. Pls. Br. 15. In fact, the Fourth Circuit simply did not reach the issue: the court affirmed *Hegna*, 287 F. Supp. 2d 608 (D. Md. 2003), on the separate ground that the plaintiffs there had relinquished any rights to compensatory damages, and the court expressed no view as to whether the properties plaintiffs sought were "blocked assets." *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 229, 232 (4th Cir. 2004).

Furthermore, while plaintiffs do not discuss the Fifth Circuit's decision in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004) (rejecting

arguments like those proffered by plaintiffs), they do cite another Fifth Circuit case – *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) – and urge that it supports their reading of TRIA § 201(d)(2)(B)(ii). App. 16-17. It does not. *Connecticut Bank of Commerce* addressed the FSIA's exception for the attachment of property used in commercial activities, 28 U.S.C. § 1610(a). The court came to the unexceptional conclusion that property "used for a commercial purpose" is distinct from property "generated by commercial activity." 309 F.3d at 251 (concluding that royalties – which are produced by commercial activity, but are not necessarily put toward a commercial purpose – might not fall within the commercial activity exception). The court noted that "use" is defined as: "'to carry out a purpose or action by means of: make instrumental to an end or process ... utilize.'" *Id*. at 254 (quoting Webster's Third New International Dictionary 2524 (Philip B. Gove ed., Merriam Webster Inc. 1993) (1961)). As that definition makes clear, within the ordinary meaning of "use," TRIA requires only that the United States "carry out" its diplomatic purpose "by means" of the former Iranian properties, or that the properties are "made instrumental to" the Government's diplomatic end.

d. Despite plaintiffs' lengthy discussion of Section 201(d)(2)(B)(ii), the alleged basis for plaintiffs' request for relief on appeal remains wholly unclear.

Plaintiffs do not identify any error by the district court. Nor do they describe any way in which the properties at issue are being used for a non-diplomatic purpose.

The closest plaintiffs come is to assert that the leasing of such properties is inherently non-diplomatic. *See* Pls. Br. 17 (claiming that "'[u]se as a rental property' is *not* a diplomatic purpose"). Reliance on such an assertion is multiply flawed. To begin with, plaintiffs made no arguments in the district court regarding the leasing of properties. They emphasized, instead, that the five properties are currently unoccupied. *E.g.*, Pls. Mem. in Opp. 9 (Dkt. No. 35). On that point they were correct as a factual matter. And that brings to the fore a critical point: it is undisputed that no leasing is occurring at this time, thus the properties are not "being used" in the manner now asserted by the plaintiffs.

In light of the facts, no further analysis is required. But if this Court wishes to examine plaintiffs' assertion that the leasing of the subject properties necessarily constitutes a non-diplomatic purpose, that mistaken insistence underscores plaintiffs' failure to come to grips with the question of purpose posed by the statute. In excluding Vienna Convention property from the definition of "blocked assets" if the property is "being used exclusively for diplomatic . . . purposes," TRIA § 201(d)(2)(B)(ii) directs an inquiry into the actor's apparent intent. Because rentals may serve either nondiplomatic or diplomatic purposes,

further inquiry into the United States's intent is undoubtedly required. *See, e.g.*, *Hegna*, 287 F. Supp. 2d at 610.

e. In search of some basis for their argument, plaintiffs offer comparisons of TRIA § 201(d)(2)(B)(ii) to several other statutory provisions. These arguments are unavailing.

First, plaintiffs suggest that analogy to FSIA's commercial activity exception is appropriate. *See* Pls. Br. 18. The FSIA, however, provides that the commercial character of a foreign state's activity is to be determined by reference to the activity's "nature" rather than its "purpose." 28 U.S.C. § 1603(d) (defining "commercial activity" for purposes of the FSIA). The Supreme Court has held that the FSIA thus requires an inquiry into whether the activity is one by which a private party engages in commerce, rather than an inquiry into the intent of the foreign sovereign in undertaking the activity. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Because TRIA § 201(d) specifically refers to "purpose" rather than "nature," an inquiry into apparent intent is both necessary and appropriate.

Second, plaintiffs posit that the language of TRIA § 201(b)(2) is inconsistent with the view that, under § 201(d)(2)(B)(ii), a property may be rented out and still thought to serve a diplomatic purpose. Pls. Br. 17-18. Section

201(b)(2) confers on the President the authority to issue waivers of TRIA as it applies to certain property that comes within the definition of "blocked asset." Specifically, TRIA § 201(b)(2)(A) provides that the President may not waive the attachment of diplomatic property "used by the United States for any nondiplomatic purpose (including use as rental property)." TRIA § 201(b)(2)(A), 116 Stat. at 2337.

Although plaintiffs suggest that this provision is inconsistent with the United States's position here, there can be no inconsistency between TRIA § 201(d)(2) and TRIA § 201(b)(2)(A). The former defines the scope of what is a "blocked asset," while the latter confers on the President the authority to issue waivers of TRIA as it applies to certain property that comes within the definition of blocked asset. In sum, the waiver provision has no bearing on the antecedent definitional question whether a particular property is considered a "blocked asset" under TRIA.

Even insofar as Section 201(b)(2)(A)'s exception to the President's waiver power anticipates that the United States may use property as rental property for a nondiplomatic purpose, it does not classify all use as rental property as use for a nondiplomatic purpose. Rather, like Section 201(d)(2)(B)(ii), this provision requires an inquiry into the rationale for the United States' use of the property.

See Hegna, 287 F. Supp. 2d at 610 ("The section does not necessarily mean, as plaintiffs contend, that the rental by the United States of a foreign government's property is ipso facto for a nondiplomatic purpose.").

Moreover, the fact that Congress excepted from the President's waiver power property subject to the Vienna Convention that the United States has used for a nondiplomatic purpose demonstrates that Congress was aware that the United States might use such property for a diplomatic purpose. Otherwise, the characterization "nondiplomatic" would be superfluous. Therefore, contrary to plaintiffs' assertion, the waiver provision does not make the United States' "use as a rental property" *per se* a use for a nondiplomatic purpose.

Third, plaintiffs suggest that the United States's construction of TRIA § 201(d)(2)(B)(ii) renders this provision superfluous in light of the pre-existing bar on attachment of assets held in protective custody under the Foreign Missions Act, 22 U.S.C. § 4308(f) (barring the attachment of foreign assets held in the protective custody of the Department of State for the benefit of a foreign state). *See* Pls. Br. 18. That argument ignores the structure of TRIA, which provides a mechanism for the attachment of various assets not otherwise subject to attachment (i.e., "[n]otwithstanding any other provision of law"). TRIA § 201(a), 116 Stat. at 2337. Section 201(d)(2)(B) is therefore necessary to except certain

diplomatic property from the universe of assets made attachable under TRIA. Section 201(d)(2)(B)(ii) is consistent with 22 U.S.C. § 4308(f) but by no means superfluous.

f. Plaintiffs ultimately suggest that, by enacting TRIA § 201(d)(2)(B)(ii), Congress intended to abrogate the obligations of the United States under the Vienna Convention on Diplomatic Relations. They insist that any other reading would undermine Congressional intent. *See* Pls. Br. 19-21.

The plain terms of TRIA refute that proposition, however. Pursuant to Section 201(d)(2)(B)(ii), property cannot be attached if attachment "would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations," § 201(d)(3), 116 Stat. at 2339 (defining "property subject to the Vienna Convention on Diplomatic Relations"), unless the United States has elected to abandon its treaty obligations. *Id.* § 201(d)(2)(B)(ii), 116 Stat. at 2340. Congress thus chose to structure the statute so as to *avoid* treaty violations, not to require them (as plaintiffs urge). *See also, e.g.*, *Weinberger v. Rossi*, 465 U.S. 25, 32 (1982) (It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, [6 U.S.] 2 Cranch 64, 118 (1804), that 'an act of congress ought never be construed to violate the laws of nations, if

any other possible construction remains.'"').[12]

The necessary consequence of a successful attachment of the properties sought by plaintiffs is that the United States would be unable to fulfill its obligation to "respect and protect" the premises of Iran's mission. *See, e.g.*, *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 60-61 (D.D.C. 2003). Indeed, it would require the United States to renege on its assurance to Algeria that it would "retain custody of these properties until Iran releases to the custody of the Government of Switzerland Protecting Power the diplomatic and consular properties owned by the United States in Iran." App. 64. Because the plaintiffs' interpretation of Section 201(d)(2)(B)(ii) would lead to a violation of the United States' treaty obligations under the Vienna Convention, the district court correctly rejected it. *Cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237-38 (D.C. Cir. 2003) (noting that "neither a treaty nor an executive agreement will be considered 'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,'" and on this basis concluding that an amendment to the FSIA did not abrogate the Algiers Accords) (citations omitted).

[12] While TRIA does not require the violation of longstanding treaty obligations, it nonetheless facilitates recovery by various judgment creditors. For example, under TRIA § 201, certain judgment creditors may attach a foreign state's nondiplomatic property even if the state did not use that property for commercial activities; such property was not attachable before TRIA's enactment.

CONCLUSION

For the foregoing reasons, the district court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Corel WordPerfect 12 word count is 8,822, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2009, the above brief was sent via electronic filing to the following counsel of record:

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On December 1, 2009, a true and correct electronic copy of the foregoing brief, including a corrected table of authorities, was sent via electronic filing to the above-listed counsel of record.

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ADDENDUM

22 U.S.C. § 4301(b)-(c). A-1

22 U.S.C. § 4302(a)(1), (b). A-1

22 U.S.C. § 4303. . . . . A-2

22 U.S.C. § 4305(c). A-2

22 U.S.C. § 4308(f). A-3

28 U.S.C. § 1604. . . . . A-3

28 U.S.C. § 1605(a)(7). A-3

28 U.S.C. § 1609. . . . . A-4

28 U.S.C. § 1610(a)(7). A-4

TRIA § 201(a). A-4

TRIA § 201(d)(2)-(3). A-5

22 U.S.C. § 4301(b)-(c). Congressional declaration of findings and policy.

(b) Policy
The Congress declares that it is the policy of the United States to support the secure and efficient operation of United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions and public international organizations and the official missions to such organizations, and to assist in obtaining appropriate benefits, privileges, and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law.

(c) Treatment of foreign missions in United States
The treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States.

22 U.S.C. § 4302(a)(1), (b). Definitions.

(a) For purposes of this chapter--

(1) "benefit" (with respect to a foreign mission) means any acquisition, or authorization for an acquisition, in the United States by or for a foreign mission, including the acquisition of--

(A) real property by purchase, lease, exchange, construction, or otherwise,

(B) public services, including services relating to customs, importation, and utilities, and the processing of applications or requests relating to public services,

(C) supplies, maintenance, and transportation,

(D) locally engaged staff on a temporary or regular basis,

(E) travel and related services,

(F) protective services, and

(G) financial and currency exchange services,

and includes such other benefits as the Secretary may designate;

. . .

(b) Determinations with respect to the meaning and applicability of the terms used

in subsection (a) of this section shall be committed to the discretion of the Secretary.

22 U.S.C. § 4303. Authorities of Secretary of State.

The Secretary shall carry out the following functions:

(1) Assist agencies of Federal, State, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled.

(2) Provide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 4304 of this title.

(3) As determined by the Secretary, dispose of property acquired in carrying out the purposes of this Act.

(4) As determined by the Secretary, designate an office within the Department of State to carry out the purposes of this Act. If such an office is established, the President may appoint, by and with the advice and consent of the Senate, a Director, with the rank of ambassador. Of the Director and the next most senior person in the office, one should be an individual who has served in the Foreign Service and the other should be an individual who has served in the United States intelligence community.

(5) Perform such other functions as the Secretary may determine necessary in furtherance of the policy of this chapter.

22 U.S.C. § 4305(c). Property of foreign missions.

(c) Cessation of diplomatic, consular, and other governmental activities in United States; protecting power or other agent; disposition of property

If a foreign mission has ceased conducting diplomatic, consular, and other governmental activities in the United States and has not designated a protecting power or other agent approved by the Secretary to be responsible for the property of that foreign mission, the Secretary--

(1) until the designation of a protecting power or other agent approved by the Secretary, may protect and preserve any property of that foreign mission; and

(2) may dispose of such property at such time as the Secretary may determine after the expiration of the one-year period beginning on the date

that the foreign mission ceased those activities, and may remit to the sending State the net proceeds from such disposition.

22 U.S.C. § 4308(f). General provisions.

(f) Attachment, execution, etc., of assets
Assets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission shall not be subject to attachment, execution, injunction, or similar process, whether intermediate or final.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(7). General exceptions to the jurisdictional immunity of a foreign state.

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

(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 [subject to specified exceptions not applicable in this case].

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act 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. § 1610(a)(7). Exceptions to the immunity from attachment or execution.

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if–

> (7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

TRIA § 201(a), 116 Stat. at 2337, 28 U.S.C. § 1610 note.

(a) IN GENERAL-Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], 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.

TRIA § 201(d)(2)-(3), 116 Stat. at 2340, 28 U.S.C. § 1610 note.

(d) Definitions.--In this section [this note] the following definitions shall apply:

(2) Blocked asset.--The term 'blocked asset' means--

(A) 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); and

(B) Does not include property that--

. . .

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) Certain property.–The term 'property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' and the term 'asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.