ORAL ARGUMENT NOT YET SCHEDULED

16-5149

United States Court of Appeals
for the
District of Columbia Circuit

Roger C.S. Lin, *et al*.,

Plaintiffs-Appellants,

v.

United States of America and Republic of China (Taiwan),

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' BRIEF

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rules 12(c) and 28(a)(1)(A), undersigned counsel for Plaintiffs-Appellants hereby certifies the following:

I. PARTIES AND *AMICI*

Dr. Roger C.S. Lin, Julian T.A. Lin, and the Taiwan Civil Government ("Appellants") were plaintiffs in the United States District Court for the District of Columbia and are appellants here. The United States of America ("U.S.") and the Republic of China ("R.O.C.") (collectively, "Appellees") were defendants in District Court and are appellees here.

There were no intervenors or *amici* in the District Court.

II. RULINGS UNDER REVIEW

Appellants seek review of the Memorandum Opinion and Order entered on March 31, 2016, by the Honorable District Court Judge Colleen Kollar-Kotelly granting Defendants' motions to dismiss. The District Court's Memorandum Opinion is available on Lexis and Westlaw but otherwise unpublished. *See Lin v. United States*, 15-CV-00295 (CKK), 2016 U.S. Dist. LEXIS 43276 (D.D.C. Mar. 31, 2016); and 2016 *Lin v. United States*, No. 15-CV-00295 (CKK), 2016 WL 1273187 (D.D.C. Mar. 31, 2016).

III. RELATED CASES

This case has not previously been before this Court nor any court other

than the District court. Counsel for Appellants is unaware of any related case as that term is defined in the D.C. Circuit Rule 28(a)(1)(c).

Respectfully submitted,

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Date: September 6, 2016

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Taiwan Civil Government discloses that it is not a publicly held corporation, has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

This Court of Appeals has appellate jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeal "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The District Court issued an Order on March 31, 2016. *See* Joint Appendix ("JA")-57. The District Court's Order was a final, appealable order.

The District Court had jurisdiction over the Appellants' claims against both Defendants-Appellees pursuant to 28 U.S.C. § 1331, which provides that the district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" and the Alien Tort Statute, 28 U.S.C. § 1350. Under 28 U.S.C. § 1350, district courts have original jurisdiction in a civil action by an alien for a tort committed in violation of the law of nations or a treaty of the U.S. Arbitrary denationalization is a cognizable federal common law tort, which has been recognized as part of 28 U.S.C. § 1350. *See Rosner v. United States*, 231 F. Supp. 2d 1202, 1210 (S.D. Fla. 2002).

The District Court additionally had jurisdiction over the Appellants' claims against the U.S. pursuant to the Administrative Procedure Act ("APA") §§ 702 and 703. Section 702 of the APA waives sovereign immunity for non-

monetary suits against the U.S., such as Appellants' declaratory judgment claim for arbitrary denationalization. Section 703 provides that "[i]f no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer."

The District Court had jurisdiction over the U.S. because the U.S. is responsible for the relevant acts of the R.O.C. pursuant to agency principles. While the R.O.C. was acting as the U.S.'s agent, the R.O.C. illegally passed decrees (the "1946 Nationality Decrees" or the "Decrees") in violation of international law prohibiting the arbitrary deprivation of nationality and the creation of statelessness. *See* JA-034, Amended Complaint filed June 16, 2015 ("Amended Complaint"), at ¶ 92. The 1946 Nationality Decrees stripped the population of Taiwan of their Japanese nationality. *Id*., ¶ 90. As such, jurisdiction was proper. Although the U.S. argued that the District Court lacked subject matter jurisdiction, no finding was made on this issue, and thus it is not raised on appeal.

The District Court had jurisdiction over the Appellants' claims against the R.O.C. under the Foreign Sovereign Immunities Act ("F.S.I.A."), 28 U.S.C. §§ 1602-1611. Under the F.S.I.A., the District Court had jurisdiction over all of the Appellants' claims against the R.O.C. pursuant to the F.S.I.A.'s

tort exception, 28 U.S.C. § 1605(a)(5) where Appellee R.O.C. tortiously caused personal injury and/or loss of property to Appellants through the arbitrary deprivation of nationality.[1] As explained further below, the arbitrary denationalization committed by the R.O.C. caused damages to Appellants or those whom Appellants represent, by leaving such persons stateless and without an internationally recognized nationality.[2] Accordingly, jurisdiction is proper.

Appellants' Notice of Appeal was timely filed on May 20, 2016 in accordance with Rule 4(a) of the Federal Rules of Appellate Procedure. *See* JA-81.

STANDARD OF REVIEW

This Court reviews decisions of the U.S. District Court for the District of Columbia *de novo* as to questions of law and for clear error as to questions of fact. *Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir. 1985). A District Court has abused its discretion if it has "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

[1] *Id.*, at para. 20.

[2] *Id.*, at para. 97.

This Court routinely reviews *de novo* a district court's grant of a motion to dismiss for lack of subject matter jurisdiction under the F.S.I.A. *See Owens v. Republic of Sudan*, 531 F.3d 884, 887 (D.C. Cir. 2008). In this case, of ultimate importance to the Appellants, it is critical that the Appellants have "ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Prakash v. Am. Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984). Thus far, the Appellants have had no such opportunity.

STATEMENT OF ISSUES PRESENTED FOR REVIEW[3]

1. Whether the District Court erred when it failed to exercise its Constitutional power and duty to interpret treaties, statutes, the Constitution, and customary international law, necessary and adequate to enter the declarations (the "Declarations") sought by Appellants?

2. Whether the District Court erred when it erroneously determined that (a) it lacked subject matter jurisdiction; (b) Appellants lacked standing under Article III of the U.S. Constitution; (c) issuing the Declarations sought by the Appellants would not assist in redressing Appellants' injuries; and (d)

[3] Below is a summary of the issues on appeal, as more fully set forth in Appellants' Certificate As To Parties And Other Initial Submissions (including Statement of Issues To Be Raised), Document #1622940, July 1, 2016.

Appellants cannot prove that their injuries are fairly traceable to the United States and/or that they were caused by intervening causes?

3. Whether the District Court erred when it erroneously determined that it did not have subject matter jurisdiction over the R.O.C. under the FSIA, in part, because it erroneously determined that (a) Appellants had conceded that the mass tort of arbitration denationalization committed by the R.O.C. occurred in part in Nanjing and (b) no "entire tort" was committed within the U.S.?

4. Whether the District Court erred when it erroneously determined that the political question doctrine prevented the Court from issuing any of the Declarations sought by Appellants?

STATEMENT OF THE CASE

This appeal by Plaintiffs-Appellants Dr. Roger C.S. Lin, Julian T.A. Lin, and the Taiwan Civil Government ("T.C.G.") concerns the U.S. District Court for the District of Columbia's (the "District Court's") erroneous March 31, 2016 Order granting Motions to Dismiss from Defendants-Appellees the U.S. and the R.O.C. and dismissing Appellants' claims against Appellees.

The Appellants are or represent a number of individuals whom suffer, by no fault or action of their own, from the evil of persistent statelessness and

seek declarations that the legal instruments authoring their statelessness are illegal and invalid.

The American judicial and executive branches have recognized the evils of statelessness for decades. *See* Pls.' Opp'n to U.S. Mot. to Dismiss Pls.' Compl., Dkt. No. 25 at p. 1 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n. 16 (1963) (noting that treatise writers have "unanimously disapproved of statutes which denationalize individuals without regard to whether they have dual nationality.")) The U.S. Supreme Court has described denationalization as "a form of punishment more primitive than torture." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

While the District Court agreed that the Appellants' statelessness constituted a particularized and concrete injury, JA-065, the District Court's Memorandum Opinion by United States District Judge Colleen Kollar-Kotelly, entered March 31, 2016, ("Memorandum Opinion") held that Appellants lacked standing (as to the U.S. and the R.O.C.) and subject matter jurisdiction (as to the R.O.C.) to seek redress from that Court to end their statelessness despite the Appellants' showing of the grievous harm they continue to endure. The Memorandum Opinion likewise found that Appellants' claims presented non-justiciable political questions. The Memorandum Opinion was premised upon an erroneous view of both the law

and the evidence – as well as an erroneous understanding of what Appellants seek from the District Court. In fact, Appellants merely seek declarations that nationality laws imposed upon Appellants and the Taiwanese they represent were illegal and ineffective. Appellants do not – and could not – ask the District Court to end Appellants' statelessness or, of course, to determine who has sovereignty over Taiwan.

STATEMENT OF FACTS

I. The Actions Of The U.S. And The R.O.C. Created The Statelessness Of Persons Living In Taiwan.

In 1895, the Chinese Emperor transferred Taiwan to the Japanese Emperor at the conclusion of the Sino-Japanese War. Treaty of Shimonoseki, China-Japan, art. 2(b), April 17, 1895, 181 Consol. TS 217. This transfer was formalized in the Treaty of Shimonoseki, which entered into force on May 8, 1895 and transferred sovereignty and title over Formosa[4] to Japan. Article 5 of the Treaty gave residents a two-year period to "sell their real property and retire" to an un-ceded Chinese territory instead of adopting Japanese nationality. Treaty of Shimonoseki, China-Japan, art. 5. As a result, millions of Taiwanese living on the island of Formosa opted to become Japanese

[4] In the post-war period, Taiwan was variously referred to as Formosa.

nationals, while only 0.16% of the population opted for a Chinese nationality. *See* Lung-chu Chen & W. Michael Reisman, "*Who Owns Taiwan: A Search for International Title*," Faculty Scholarship Series, Paper 666 (1972).

On September 2, 1945 after the attack on Pearl Harbor, Japan surrendered to the U.S. and other Allied Powers (the "Allied Powers"). Following Japan's surrender, at the request and on behalf of the Allied Powers, Generalissimo Chiang Kai-shek undertook the administration and governance of Taiwan. Chiang Kai-shek was the head of the Nationalist Chinese Party of the R.O.C.[5] The role of Chiang Kai-Shek, as leader of the Chinese Nationalist Party, was defined as the "**representative** of the Allied Powers empowered to accept surrender[]" of the Japanese forces in Taiwan. General Order No. 1, Sept. 2, 1945, J.C.S. 1467/2 (emphasis added).

On October 25, 1945, Chiang Kai-shek's representative accepted the surrender of Japanese forces remaining in Taiwan on behalf of the Allied Powers and with the assistance of the U.S. Armed Forces. *See* Department of State Office Memorandum from Mr. Harding F. Bancroft to Mr. Rusk June 6,

[5] Chiang Kai-Shek, along with nearly two million of his supporters, fled Mainland China during the course of 1949 to escape the rise of communist forces that took over mainland China and eventually founded the People's Republic of China ("P.R.C.") on October 1, 1949.

1949. The June 1949 Memorandum reflected that, "[a]t the time of the surrender of the Japan military (sic)[,] responsibility for accepting and, carrying out the surrender in respect of Formosa was delegated by the Allies to Chiang Kai Shek. *Id.*

While acting as the administrator of Taiwan at the behest of the U.S., Chiang Kai-shek and his Chinese National Government extinguished the Japanese nationalities of all residents of Taiwan through the 1946 Nationality Decrees. On January 12, 1946, the first decree was issued, retroactive to December 25, 1945. It mandated the automatic "restoration" of Chinese nationality for the people of Taiwan and it stated:

> The people of Taiwan are people of our country. They lost their nationality because the island was invaded by an enemy. Now that the land has been recovered, the people who originally had the nationality of our country shall, effective December 25, 1945, resume the nationality of our country. This is announced by this general decree in addition to individual orders.

Swan Sik Ko, ed., *Nationality and International Law in Asian Perspective*, T.M.C. Asser Instituut, The Hague (1990) p. 53 (providing English translation of January 12, 1946 Decree).[6]

[6] This translation notes the effective date as December 25, 1945, even though secondary sources reference the effective date as October 25, 1945.

A second nationality decree relating to Measures Concerning the Nationality of Overseas Taiwanese (also translated as "Measures For The Adjustment of Nationality of Taiwanese Abroad"), was issued on June 22, 1946. This measure required persons living outside of Taiwan to have Chinese nationality "restored" to them, and issued a certificate of registration. The measure provided, in part, that:

> Beginning from October 25, 1945, Chinese nationality shall be restored to Taiwanese. Notice of this will be sent by the Ministry of Foreign Affairs by separate telegrams to the various diplomatic missions abroad, to be brought to the attention of the Governments of the countries to which they are accredited for notification to the authorities of territories under their jurisdiction.

Letter, Foreign Service of the United States of America, from the American Embassy in Nanking to the Secretary of State, June 17, 1945, with enclosure: translation of, "Measures for the Adjustment of Nationality of Taiwanese Abroad."

Notably, the Nationality Decrees did not give residents any choice in the matter and, importantly, it was not enacted as part of, or pursuant to, any legitimate or recognized Treaty. The R.O.C. did not consider the loss of Japanese citizenship to constitute "voluntary renunciation." Judicial Yuan Interpretation 36 [1947], Chieh No. 3571.

The U.S., as principal occupying power over Taiwan, failed and refused to intervene and prevent blatant violations of international law by its agent, the R.O.C. The U.S. was fully aware of the Decrees and continued for many years thereafter to accept the benefits of, and authorize, the continued administration of Taiwan by the R.O.C.

The U.S. State Department was demonstrably aware that, at least according to Japanese legal experts, the Decrees violated international law. In September of 1950, the American Consul General forwarded to the State Department an article by "one of the leading experts of the Japanese Government on nationality. . . ." *See* Foreign Service of The United States of America, Memorandum from Leo J. Callahan to Department of State, with enclosure: "On the New [Japanese] Nationality Law," Kenta Hiraga, Lawyers Association Journal, Vol. II, No. 6, pp. 341-368. The article explicitly states that the 1946 Nationality Decrees raise a "question as to the validity of this law from the standpoint of the international law. . . . [P]ending conclusion of a peace treaty it cannot be interpreted that Formosans already have lost their Japanese nationality." *Id.* at 4-5.

Despite international and internal recognition that the Decrees violated international law, the U.S. abandoned its legal obligations to ensure that its agent's actions complied with international law. The U.S.'s inaction enabled

its agent's illegal decrees to go into effect, rendering the people of Taiwan stateless. To this day, the R.O.C.'s Nationality Decrees do not offer the people of Taiwan an internationally accepted nationality. Importantly, on September 8, 1951, the "Allied Powers"[7] signed the San Francisco Peace Treaty with Japan. *See* Treaty of Peace with Japan (hereinafter "S.F.P.T."), Sept. 8, 1951, Allied Powers-Japan, 136 U.N.T.S. 46, entered into force Apr. 28, 1952, *available at* www.state.gov/documents/organization/65540.pdf). Currently, 46 countries are parties to the S.F.P.T., but neither the P.R.C. nor the R.O.C. are signatories. *See id.*

Pursuant to the S.F.P.T. Article 2(b), Japan renounced "all right, title and claim to Formosa and the Pescadores." S.F.P.T., art. 2(b). The S.F.P.T. did not address, nor resolve, the nationality of the people living on Taiwan. Neither the R.O.C. nor the P.R.C. was a party to the S.F.P.T.

The nationality status of Taiwan residents has remained unsettled, even after the S.F.P.T. came into effect because the S.F.P.T. did not transfer Taiwan to any sovereign. This was recognized at the outset of the Treaty by the

[7] The "Allied Powers" are defined as "Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America" in Article 23(a) of the Treaty of Peace with Japan.

American Embassy in Tokyo, which reported its view of the position of the Japanese government regarding Taiwan to the State Department:

> The only thing to which Japan has agreed is a renunciation of sovereignty, thus leaving the islands of Formosa and the Pescadores floating unattached and uncontrolled in some misty limbo of international law where the Japanese in some way hope they will remain until the fortune of events makes them once again available to Japan.

Foreign Service Dispatch from the American Embassy, Tokyo, to the Department of State, Dispatch No. 50, May 13, 1952, p. 3.

The people of Taiwan are "without a state"[8] and, to this day, in a circumstance of continually trying "to concretely define their national identity. . . ."[9] The S.F.P.T. did nothing to undo the illegal Nationality Decrees imposed upon the Appellants by the Appellees. The only nationality Appellants possess is an R.O.C. nationality – an internationally unrecognized nationality. The international community, including the U.N. and the U.S., currently do not recognize the R.O.C. as a state. Therefore, Appellants' lack of a recognized nationality constitutes statelessness.

[8] *Lin v. United States*, 539 F. Supp. 2d 173, 180 (D.D.C. 2008).

[9] *Lin v. United States*, 561 F.3d 502, 503 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 875 (2009).

II. The Action Below.

Appellants filed the original Complaint in this case on February 27, 2015, against Appellees seeking a declaratory judgment in the District Court for the District of Columbia. *See Lin v. United States*, 1:15-cv-00295-CKK, ECF No. 1. In response, the Appellees filed motions to dismiss the Complaint. ECF Nos. 12, 17. On June 16, 2015, Appellants filed an Amended Complaint, adding a money damages claim against the R.O.C. JA-7, ECF No. 18.

On July 15, 2015, both Defendants-Appellees filed motions to dismiss the Amended Complaint. JA-38, ECF. No. 23; JA-48, ECF No. 24. On March 31, 2016, the District Court granted the Appellees' Motions to Dismiss. JA-57, ECF No. 31.

In the District Court's March 31 Memorandum Opinion, the Court agreed that Appellants have suffered a grievous cognizable injury, JA-65, but held that it lacked subject matter jurisdiction over Appellants' claims with respect to both Defendants-Appellees. JA-58.

With respect to the U.S., the Court additionally held that the Appellants had failed to meet their burden of showing that their injury was fairly traceable to the U.S. and that it was not capable of being redressed. JA-69-71. With respect to the R.O.C., the Court accepted the R.O.C.'s apparent concession that Appellants' injuries were traceable to the R.O.C., but found that the

injuries caused by the R.O.C.'s actions could not be redressed by a favorable decision of the District Court. JA-065, n. 5; JA-071. Accordingly, Appellants appeal the March 31, 2016, Order and Memorandum Opinion of the District Court.

SUMMARY OF THE ARGUMENT

First, the District Court erred in dismissing the Appellants' claims for mass human rights violations on the basis of standing. The District Court erroneously ignored the logical relationship between the Appellants' grievous injury and its causation and redressability. Applying well-settled principles of agency law, as well as the duty to supervise one's agent and maintain the *status quo* of occupied territories, Appellants properly demonstrated that their injury was fairly traceable to the U.S. Further, Appellants' injury is redressable by a favorable decision of this Court because this Court need only find that the relief sought – declarations constituting powerful evidence of the Appellants' statelessness – is *likely* to redress a concrete injury. The declarations are likewise substantially *likely* to shape the choices of third parties such as the United Nations ("U.N.") and United Nations High Commissioner For Refugees ("U.N.H.C.R."), which have concrete, international legal obligations to resolve statelessness.

Second, the District Court erroneously misapplied the political question doctrine. The District Court misstated *Baker v. Carr*, 369 U.S. 186 (1962) – the mere *presence* of a *Baker* factor does not render a case non-justiciable, the factor must be indelibly intertwined with questions *necessary* to adjudicate the case. The District Court further misstated the holding of *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009) (the "*Lin I*" case), which stated that determining the *sovereign* of Taiwan was a non-justiciable question. Sovereignty is not an issue that must be decided prior to an examination of the merits of Appellants' claims regarding *nationality*. Furthermore, a jurisdictional inquiry under the F.S.I.A. is not a political question.

Finally, the District Court erred when it determined that it lacked subject matter jurisdiction over Appellants' claims against the R.O.C. under Section 1605(a)(5) of the F.S.I.A. The District Court erroneously stated that Appellants conceded facts and erroneously misapplied the territoriality limitation of Section 1605(a)(5). Lastly, the District Court erroneously declined to apply the appropriate Ninth Circuit tests for interpreting F.S.I.A. Section 1603(c).

ARGUMENT

I. Appellants Have Standing Under Article III Of The U.S. Constitution.

As the District Court correctly noted, "[t]o establish constitutional standing, plaintiffs 'must have suffered or be imminently threatened with a concrete and particularized injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.'" JA-063 (citing *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014)). Standing requirements are not intended to serve as a pass-through equaling the rigors of standards of proof reserved for the fact finder. *See, e.g., Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013); *see also Grayson v. AT&T Corp.*, 15 A.3d 219, 232 (D.C. 2011) ("[The] standing analysis is different 'at the successive stages of litigation' . . . the examination of standing in a case that comes to us on a motion to dismiss is not the same as in a case involving a summary judgment motion; the burden of proof is less demanding when the standing question is raised in a motion to dismiss.").

a. As Recognized By The District Court, Appellants Have Suffered A Personal And Concrete Injury.

In analyzing the first requirement of standing, the District Court held that the Appellants have alleged "'facts showing disadvantage to themselves as individuals,' so as to demonstrate that they have 'such a personal stake in

the outcome of the controversy as to assure [] concrete adverseness.'" JA-065. Further, the District Court agreed that the Appellants have suffered a personal and concrete injury, going beyond any general interest in the future of Taiwan, when Appellants were "stripped of their Japanese nationality." JA-065 citing Pls.' Am. Compl. at ¶ 8.

However, while the District Court recognized the grave injury suffered by Appellants, it erroneously determined that Appellants did not have standing. The District Court's rejection of indisputable evidence available to and presented by Appellants is at odds with precedent recognizing the clear, logical connection between proof of a cognizable injury and proof of its causation and redress. As courts have noted, when a suit is challenging the legality of government action:

> the nature and extent of facts [that must be proved] in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Shannon v. Graves, 2000 U.S. Dist. LEXIS 1943 at *15-16 (D. Kan. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Accordingly, the District Court erred in dismissing the Appellants' case for want of standing, without allowing Appellants any opportunity to develop and

present evidence, even after the Appellants presented compelling evidence of a grievous injury violating *jus cogens* international legal norms.

b. Appellants Have Met Their Burden Of Showing That Their Injury Is Fairly Traceable To (Caused By) The U.S.

The District Court erred in holding that the Appellants had not made an adequate showing that their injuries were fairly traceable to the U.S.[10] The District Court held that, despite the detailed record Appellants presented of the U.S.'s control and direction of Chiang Kai-shek as well as its conscious acceptance of Chiang Kai-shek's illegal enactment of the 1946 Nationality Decrees, it did not find that the Appellants had met their burden to demonstrate that it is "'substantially probable' that the challenged actions by Defendant United States have caused Plaintiffs alleged injuries." JA-069-070 citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996).

The District Court erred in its reasoning for three reasons: 1) the District Court ignored basic agency principles of liability, as well as the duty of the principal to maintain the *status quo*, when it found that the fact that the U.S.

[10] As the District Court noted, "Defendant [R.O.C.] concedes that Plaintiffs have met this [causation] element of standing with respect to Defendant Republic of China." JA-065, n. 5. Thus, the District Court considered only the U.S.'s arguments on the issue of causation for the purposes of standing. If this Court accepts Appellants' evidence establishing the agency relationship between the R.O.C. and the U.S., then the R.O.C.'s concession on standing applies with equal force to the U.S.

did not authorize the R.O.C. to issue the 1946 Nationality Decrees was fatal to Appellants' arguments; 2) the District Court erroneously concluded, without comment, that agency principles do not support a finding that Chiang Kai-shek and his Nationalist Government acted as an agent of the U.S.; and 3) the District Court imposed an impermissibly high burden of causation upon the Appellants when it held that Appellants failed to prove there was no intervening cause between the 1946 Nationality Decrees and the present injury. Each of these errors is discussed in turn below.

i. The District Court Erred When It Ignored Well-Established Case Law Providing That A Principal May Be Liable For The Acts Of An Agent Where The Principal Has A Duty To Supervise That Agent Or Where The Principal Has Ratified Its Agent's Unauthorized Conduct.

The District Court held, in error, that express authorization of the Decrees was required for the Appellants to establish the causation element of standing as to the U.S. JA-068 ("if . . . the United States did not authorize . . . the nationality decrees . . . then any alleged injury arising from the decrees cannot be fairly traceable to the United States" (internal quotation marks omitted)). However, the District Court's dependence on authorization in order to establish causation ignores case law establishing that a principal may be liable for the acts of an agent where the principal has a duty to supervise

that agent.

Courts have held that the U.S. may be liable for failure to supervise their agents or employees in the context of 42 U.S.C. § 1983 protections from civil rights violations perpetuated by government employees such as police officers. The U.S. Court of Appeals for the Tenth Circuit has held that:

> [S]upervisors are not liable under 42 U.S.C. § 1983 unless there is 'an affirmative link . . . between the constitutional deprivation and either the supervisor's personal participation, . . . exercise of control or direction, or . . . failure to supervise.'

Swepi, LP v. Mora Cnty., New Mexico, 81 F. Supp. 3d 1075, 1127-1128 (D.N.M. 2015) (citing *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009)).

Appellants do not assert a Section 1983 claim, but the commitment of both Congress and the Courts to hold the U.S. liable for the acts of an agent compels a similar result here. In the Section 1983 case, the U.S. government official may be held liable for a failure to supervise its agents acting to deprive an individual of rights "secured by the Constitution and laws." *Id.* at 1125, 1128. In this case, the U.S. government should be held liable for a failure to supervise its agents for acting to deprive many thousands of people of a right to nationality that *should* have been secured by the law at that time.

Specifically, under international law, the U.S. had a legal obligation to

maintain the existing laws of Japan, including its nationality laws, during the U.S. occupation of Taiwan pending the execution of the S.F.P.T. and thereafter. Notably, in this case, complete sovereignty over Taiwan was not transferred to any other sovereign by treaty, including the R.O.C., an ambiguity that persists to this day.[11] As such, the R.O.C. (and by extension, the U.S.) had a legal obligation to "respect[]... the laws in force...." *See* Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907, art. 43 ("The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.")[12]; *see also* the International Committee of the Red Cross's ("I.C.R.C.") Report of the Expert Meeting: Occupation And Other Forms Of Administration Of Foreign Territory, at p. 7, n. 1 ("Under

[11] JA-011, Pls.' Am. Compl. at n. 8 (citing U.S. Treaties in Force ("The United States does not recognize the 'Republic of China' as a state or government")).

[12] The U.S. committed to the application of the Rules of Land Warfare of the Hague Convention with respect to Formosa. Memorandum from the Inter-Divisional Area Committee on the Far East, June 28, 1944 (Foreign Relations of the United States, Diplomatic Papers, 1944, The Near East, South Asia, and Africa, The Far East, Volume V, Lot 122, Box 53).

occupation law, the sovereign title relating to the occupied territory [of Taiwan] does not pass to the occupant, who has, therefore, to preserve as far as possible the *status quo ante*."). The fact that the U.S. delegated administrative responsibilities to the R.O.C. does not excuse the U.S. from responsibility for the R.O.C. actions in violation of that duty. Restatement (Third) of Agency § 7.06 (2006) ("A principal required... by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent.") The laws of occupation *should* have secured for the people of Taiwan the right to a cognizable nationality in compliance with international law. Instead, the R.O.C. violated its duty to maintain the *status quo ante*.

While the issue of applicable prescription statutes is not on appeal, Appellants note that the R.O.C.'s duty to maintain the *status quo ante* is continuing. The I.C.R.C. Report of the Expert Meeting on Occupation notes, at p. 45, that "[a]n essential feature of the ending of an occupation is often, though not always, an act of self-determination involving the inhabitants of the occupied territory." *Id.* The R.O.C.'s occupation can only end following an "act of self-determination involving the inhabitants of the occupied territory." Until the R.O.C. ceases occupying Taiwan, the R.O.C. has a duty to maintain the *status quo ante*.

Despite both Appellees' responsibility to maintain the *status quo*, and despite having full advance knowledge of its agents' actions in violation of international law, the U.S. and, in particular, the U.S. Department of State, failed to limit or negate the illegal actions of its agent, the R.O.C. In short, the U.S. had a legal duty to supervise and correct its agent's illegal actions. The Appellants made this point in their Opposition in the District Court below. Pls.' Opp'n to U.S. Mot. to Dismiss at p. 4, Dkt. No. 25 ("The United States had a responsibility to maintain the existing [Japanese] laws of that region pending a treaty. . . .") However, the District Court rejected the Appellants' argument without comment or explanation. The District Court erroneously ignored the above-discussed "failure to supervise" principles.

The District Court's finding that the U.S. is not responsible for the unauthorized acts of its agent ignores basic principles of agency law. *See* Restatement (Third) of Agency § 7.03(1) ("A principal is subject to direct liability to a third party harmed by an agent's conduct when . . . the agent acts with actual authority or the principal ratifies the agent's conduct . . . and . . . the agent's conduct is tortious."); § 7.03(2). In this case, the U.S. ratified the R.O.C.'s unauthorized implementation of the Appellants' statelessness.

The Appellants' Amended Complaint and Opposition to the Appellees' Motions to Dismiss in the District Court below offered detailed accounts of

contemporaneous statements and documents of the U.S. Executive and Legislative branches: 1) establishing an agent-principal relationship between the U.S. and the R.O.C., JA-019 – JA-28, Pls.' Am. Compl. at ¶¶ 45-69, and 2) the U.S.'s acceptance and ratification of the R.O.C.'s action, JA-16 – JA-18, Pls.' Am. Compl. at ¶¶ 37-44.

Under the Restatement (Third) of Agency, § 4.01(1), "[r]atification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority. Moreover, pursuant to § 4.01(2), an act is ratified by a person: "(a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents." Under the laws of this jurisdiction, one "may ratify the act expressly or impliedly, by conduct inconsistent with any other hypothesis . . . and once he has done so he is bound by the agent's act *nunc pro tunc*." *Lewis v. WMATA*, 463 A.2d 666, 672 (D.C. 1983). Moreover,

> [a]lthough an agent may not be authorized to do a certain act, if the principal, with knowledge of the act, acquiesces in it, by allowing the agent to do similar acts, or by retaining the benefits of the act when it was done in service to him, then the past unauthorized act is ratified.

Id. at 671 (citing W. SEAVEY, AGENCY §§ 21, 38, at 39, 73 (D.C. 1964)).

The U.S. may accrue liability through the ratification of an agent's unauthorized conduct. In *Cadillac Fairview/Cal. v. Dow Chem. Co.*, 299 F.3d 1019, 1025 (9th Cir. 2002), the Ninth Circuit found that although an agency relationship between the United States and a series of private companies flowed primarily from a contract, those companies' actions undertaken as agents of the U.S. would also subject the U.S. to liability under principles of agency law.

Sources of international law provide further support. Article 7 of the U.N.'s published materials regarding the responsibility of states for international wrongful actions makes clear that "the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions... [t]his is so even where the organ or entity in question has overly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence." U.N. Legislative Series: Materials on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. ST/LEG/SER.B/25 (2012) at p. 62; *see id.* at 64 ("under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their

omissions, even when those agents act outside the sphere of their authority or violate internal law.")

Here, the U.S. ratified the acts of the R.O.C. denationalizing thousands of people when the U.S. was made aware of the illegal Nationality Decrees, failed to take any action to correct the R.O.C.'s actions, and thereafter: 1) continued to authorize similar acts of administration by the R.O.C. of Taiwan and 2) continued to accept the benefits of the R.O.C.'s administration of Taiwan.

After Japan's surrender in 1945, the U.S. was unequivocally in control of Formosa, JA-19, Pls.' Am. Compl. at ¶ 46, and delegated broad authority to Chiang Kai-shek and his Nationalist Government to administrate the island on the U.S.'s behalf. *See* Department of State Bancroft Memorandum, June 6, 1949; *see also* S. REP. No. 84-13 at 1.

The U.S. was made fully aware that Chiang Kai-shek utilized this broad grant of authority to institute a gross human rights violation – the arbitrary denationalization of many thousands of individuals through the 1946 Nationality Decrees. In a November 21, 1946, *Aide-Memoire* from the State Department to the Chinese Embassy, the State Department stated, "it is understood that the Chinese Government now considers all Taiwanese to be Chinese." JA-017, Pls.' Am. Compl. at ¶ 41. The U.S. was likewise aware

that "pending conclusion of a peace treaty it cannot be interpreted that Formosans already have lost their Japanese nationality." *See* Department of State Callahan Memorandum with enclosure: "On the New [Japanese] Nationality Law," Kenta Hiraga. In response, the U.S. did nothing.

Thereafter, the U.S. "with knowledge of the [R.O.C.'s actions], acquiesce[d] in it, by allowing the [R.O.C.] to do similar acts . . ." *See Lewis*, 463 A.2d at 671. The U.S. continued to allow the R.O.C. to administer Taiwan on the strength of U.S. financial and military aid and to enact legal and policy changes to the *status quo ante* as the R.O.C. saw fit.

The U.S. further ratified the actions of its agent by continuing to accept the benefits of Chiang Kai-shek's continued administration of Taiwan – an administration that continues to this day through the R.O.C. – long after the passage of the 1946 Nationality Decrees. Even after the Decrees, American military forces maintained military control over Formosa, allowing Chiang Kai-shek's government a wide range to govern so that U.S. administrative personnel would not have to be dispatched to Taiwan in great numbers as originally planned. JA-019, Pls.' Am. Compl. at ¶ 47. Further, a significant amount of American taxpayer money and U.S. personnel were committed to rebuilding the economy and responsible governance of Taiwan. JA-020, Pls.' Am. Compl. at ¶ 51. Thus, the U.S. continued to rely on, and "retain[] the

benefits of," *Lewis*, 463 A.2d at 671, the administration of Chiang Kai-shek as forwarding the objectives of American economic and strategic military considerations at that time.

The Appellants fully satisfied their burden under the requirements of standing that the conduct of the U.S. as the R.O.C.'s principle during the relevant time period, is "fairly traceable" to the U.S. The District Court's holding to the contrary was made in error.

ii. Principals Of Joint And Several Liability Are Applicable To Sovereign Governments.

The District Court erroneously rejected "Plaintiffs' assertion that Chiang Kai-shek acted as an agent of the United States" as an "attempt by Plaintiffs to benignly conflate the Allied Powers and the United States into one." JA-069. The Appellants' agency argument fails, opined the District Court, because "the 'Allied Powers,' as defined in Article 23(a) of the Treaty of Peace with Japan, included [many other nations]." JA-069.

The District Court's reasoning presumes, without comment, that the existence of co-principals *must as a matter of law* extinguish the liability of any one principal for the acts of an agent. Such reasoning is plain error and ignores basic principles of joint and several liability. Indeed, pursuant to agency principles, "[m]ultiple principals may consent that an agent take action

on their behalf in the same transaction or other matter." Restatement (Third) of Agency § 3.16, cmt. b.

A U.S. Court of Claims examining substantially similar facts left open the direct question of whether sovereign co-principals engaged in a joint venture, such as the allied occupation, should be held jointly and severally liable for the acts of an agent, consistent with agency principles as applied to private parties. *See Anglo Chinese Shipping Co. v. United States*, 130 Ct. Cl. 361, 366-367 (Ct. Cl. 1955) ("When private parties or private corporations or municipal corporations enter into a joint venture, the parties are jointly and severally liable for the acts of their agent, and their individual property may be levied upon to satisfy any judgment, at least after the assets of the joint venture have been exhausted. Whether this rule should be applied to sovereign nations engaged in a joint enterprise has never been decided, and we do not now decide it . . . .") International arbiters of sovereign responsibility have historically held that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents." U.N. Doc. ST/LEG/SER.B/25 at n. 8 (citing U.N.R.I.A.A., vol. XV (Sales No. 66.V.3), pp. 399, 401, 404, 407, 408, 309, 411); *see also Velázquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 170 (July 29, 1988) ("under international law a State is

responsible for the acts of its agents undertaken in their official capacity and for their omissions.").

In this case, particularly given the great scope of the human rights violations which constitute the Appellants' injury, there appears to be little practical reason to exculpate a joint venture of foreign sovereigns for conduct which would otherwise attach injury to each sovereign if acting alone. Further, while it may be true that Chiang Kai-shek was installed as an administrator in Taiwan on behalf of *the Allied Powers*, each of the identified Allied Powers demonstrably did not share an equal role in the direction, funding, and responsibility undertaken for, Chiang Kai-shek. It was American money, American troops, and American agricultural and economic institutional support upon which Chiang Kai-shek relied.

Even if, *arguendo*, the District Court had justifiably identified the involvement of other Allied Powers as a potential stumbling block to the Appellants' agency arguments, such a query would have been properly put to the Appellants as a fact question requiring an opportunity for further fact development and presentation. *See Prakash*, 727 F.2d at 1180. The District Court's apparent determination that the possible existence of co-principals frustrated *per se* the entirety of the Appellants' agency arguments – is plain error.

iii. Decades Of Stasis And International Failure To Resolve This Issue Is Not An Intervening Cause.

Lastly, the District Court erred in requiring that Appellants demonstrate – as a part of their burden to establish standing – that decades of potential intervening causes between the 1946 decrees and the present alleged injury are the true cause of the injury. The District Court rejected the Appellants' argument that the 1946 Nationality Decrees were fairly traceable to the U.S. for the secondary reason that "Plaintiffs have not put forward any evidence demonstrating that Plaintiffs' current situation is . . . not a consequence of the 'years and years of diplomatic negotiations and delicate agreements' that have occurred during the intervening years." JA-069. The District Court erred in requiring Appellants to evidence the *absence* of an intervening cause for two reasons.

First, the referenced decades of international political consideration of the Appellants' humanitarian plight are not so remote and unforeseeable that a court could reasonably interpret them as "intervening causes." *See generally* Jury Instructions cited in *Alkire v. Marriott Int'l, Inc.*, 2007 U.S. Dist. LEXIS 25530 at *16 (D.D.C. 2007) (Colleen Kollar-Kotelly, J.) (". . . you have to decide whether the third person's acts or omissions were reasonably foreseeable. If under the circumstances a reasonably prudent person would

have reasonably foreseen the third person's acts or omissions and protected against them, then the defendant may be liable for the plaintiff's injuries.").

In 1946, the R.O.C.'s predecessor enacted legal instruments that deprived thousands of people of their nationality. A reasonably prudent person would have foreseen that a failure to prevent the codification into law of a mass human rights deprivation and *jus cogens* violation would birth the type of humanitarian crisis which prompts generations of international political consideration. Notably, the U.N. Charter, signed little more than a year before the 1946 Nationality Decrees, expressly contemplated that the international community would, in order to eliminate future world conflict, work together "in solving international problems of an… humanitarian character." U.N. Charter, art. 1, ¶ 3. It would have been considered unavoidable to relevant government actors in 1946 that a codification into law of a mass human rights violation would eventually implication international community involvement.

The subsequent international involvement referenced vaguely by the District Court is not remote or intervening, but rather a continuation of the Appellees' negligent actions flowing from the tortious imposition of the decrees themselves. When the R.O.C., as the occupier of Taiwan administering Taiwan for the U.S., lost international recognition as a

sovereign, the Appellees had a further duty to, yet failed to, take action to remedy the statelessness created by the illegal Nationality Decrees.

Even if, *arguendo*, the presence of intervening causes presented a fact question bearing upon Appellants' showing of standing, such a query would have been properly put to the Appellants as a fact question requiring an opportunity for further fact development and presentation. *See Prakash*, 727 F.2d at 1180.

Second, the District Court erred by requiring Appellants to establish elements more properly required for a showing of proximate causation. In order to prove claims successfully *before a fact-finder*, plaintiffs must show that no intervening causes of harm have severed the link of proximate causation between the defendant's alleged actions and the claimed injury. In this case, had the District Court denied the Defendants-Appellees' Motions to Dismiss, the Appellants would have had to convince a fact-finder that no intervening cause produced the Appellants' statelessness.

U.S. Courts have consistently noted that "particularly at the pleading stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation" and that "for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause… the test for whether a complaint shows the 'fairly

traceable' element of Article III standing imposes a standard lower than proximate cause." *Rothstein*, 708 F.3d at 92 (internal citations omitted). In other words, demonstrating a lack of intervening causation may well be necessarily bound up in a showing of proximate cause, but the Appellants were not required to meet a standard of proximate causation in order to demonstrate standing. The District Court's holding to the contrary is plain error.

c. Appellants' Injuries Are Redressable by A Favorable Decision Of This Court.

The District Court abused its discretion when it found that the Appellants' injury claims against both Appellees could not be redressed by the declaratory judgment Appellants seek. Citing *Fla. Audubon Soc'y*, 94 F.3d at 661, the District Court correctly restated the standard that "[r]edressability examines whether the relief sought, assuming that the court chooses to grant it, will likely **alleviate** the particularized injury alleged by the plaintiff." JA-071 (emphasis added).

As Appellants argued in their Opposition in the Court below, "a federal plaintiff must show only that a favorable decision **is likely to** redress his injury, not that a favorable decision will **inevitably** redress his injury." Pls.' Opp. To U.S. Mot. To Dismiss at p. 37 (emphasis added) (citing *Made In The*

USA Found. v. United States, 56 F. Supp. 2d 1226, 1230 (N.D. Ala. 1999) (citing *Pub. Citizen v. United States*, 491 U.S. 440 (1989)) (The Supreme Court found that a declaratory judgment might fulfill the redressability requirement even if it does not provide full redress for the plaintiffs' injuries)). The relief sought need not be complete, but only likely to address some injury. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158 (10th Cir. 2005) ("The plaintiff must show that a favorable judgment will relieve a discrete injury, **although it need not relieve his or her every injury**." (emphasis added)).

Of particular importance to this case, a declaratory judgment may redress a plaintiff's injuries where it supports a plaintiff's claim or defense in an adverse proceeding. *M & T Mortg. Corp. v. White*, 2006 U.S. Dist. LEXIS 1903 at *19-20 (E.D.N.Y. 2006) (The declaratory judgment is "substantially likely" to redress "[defendant's] continuing injury." It "is not speculative because it would support his defense in an existing and ongoing foreclosure proceeding."); *see also Rincon Mushroom Corp. of Am. v. Mazzetti*, 2010 U.S. Dist. LEXIS 99926 at *14 (S.D. Cal. 2010) ("A declaratory judgment from this Court in Plaintiff's favor would likely redress the situation by making clear that the Tribe lacks regulatory jurisdiction over the property. Such a declaratory judgment would allow [the plaintiff] to use or sell the land . . . redress[ing] Plaintiff's loss of income.").

Similarly, the declaratory judgments sought in this case would be highly "likely redress [to] the situation by making clear that" the Nationality Decrees of 1946 were implemented in violation of international law, including the duty to maintain the *status quo*, and that an arbitrary denationalization of millions of individuals has followed. The declaratory judgment sought by the Appellants here, like the plaintiffs in *M & T Mortg. Corp.*, would directly assist in alleviating the Appellants' statelessness by obtaining an answer as to the legality of the instruments which created Appellants' injury in the first place.

As the Appellants argued in the District Court, this Circuit in *Klamath Water Users Ass'n v. F.E.R.C.*, 534 F.3d 735, 740 (D.C. Cir. 2008) stated that "[t]here will, of course, be occasions on which an order directed to a party before the court will significantly increase the chances of favorable action by a non-party." Summarizing the court's decision in *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1 (D.C. Cir. 2005), the *Klamath* court observed that a district court's order which stands to "significantly affect [a third party's] ongoing proceedings" even where that third party only has "discretionary authority" to affect a plaintiff's position was "enough to satisfy redressability." 534 F.3d at 740 (internal citations and quotation marks omitted).

In this case, the District Court correctly held that the Appellants have suffered a concrete, grievous harm that is neither abstract nor hypothetical. The Appellants have sought redress in the form of a declaratory judgment adjudicating the legality of Decrees that caused their harm. The Appellants have likewise described in great detail the creation of the Appellants' injury and the ways in which the international community's subsequent inaction has rested in great part upon international confusion regarding R.O.C. nationality. *See* JA-027 – JA-31, Pls.' Am. Compl. at ¶¶ 67-76.

The District Court was clearly erroneous in its observation that "Plaintiffs allege no facts plausibly demonstrating how the sought declaration, if issued by this Court, would be used 'within international bodies such as the United Nations [] to end their statelessness.'" JA-072. The Appellants have made clear that a declaration invalidating the Nationality Decrees stripping Appellants of their Japanese nationality in violation of the indisputable duty to maintain the *status quo*, and creating their statelessness, would significantly motivate the U.N. (and nations bound to comply with international laws prohibiting statelessness) to finally end Taiwan inhabitants' statelessness. Importantly, Appellants are not required in their Complaint to detail their advocacy plan and strategy above a showing that a declaration that a law is legally invalid would alleviate the Appellants' injuries suffered as a result of

that law. Such a connection is plain, and has been accepted by this Circuit as supportive of standing. *See, e.g., Shannon*, 2000 U.S. Dist. LEXIS 1943 at *14-15.

Further, Appellants were not given the opportunity to develop or present evidence which would support the jurisdictional grounds for their claim, and the District Court's apparent reasoning that there is no evidence Appellants could develop in order to establish redressability is plain error. *See Prakash*, 727 F.2d at 1180.

The declaration Appellants seek, from the only court competent to do so, that the 1946 Nationality Decrees are illegal and invalid, would trigger concrete international legal obligations held by the very third parties from which Appellants must ultimately seek resolution: international organizations charged by law with resolving Appellants' statelessness. And, of course, the Appellees both were directly responsible for the Appellants' statelessness and have legal obligations – and the ability – to change the Appellants' statelessness.

The U.N.H.C.R. has "specific responsibilities in respect of statelessness and the realization of an effective nationality." "Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia," European Series, Vol. 3, No. 1 at Foreword *1 (June 1997). "In

particular, the UNHCR, has been requested to take active steps to ensure statelessness in avoided... through the provision of technical and advisory services pertaining to the preparation and implementation of nationality legislation to concerned States." *Id.* A declaration that the Nationality Decrees authoring the Appellants' statelessness are illegal and invalid would provide powerful, overwhelming evidence to the U.N.H.C.R. (and to Appellees) that the Appellants are, indeed, stateless and that their stateless status triggers the U.N.H.C.R.'s responsibilities to assist stateless persons.

The U.N., more generally, is committed to enabling and encouraging peaceable and legal avenues to prevent and correct violations of *jus cogens* norms. U.N. Charter, art. 1. One such *jus cogens* norm is the right of Self-Determination of peoples. The right to Self-Determination is reflected in numerous international legal covenants on Human Rights, including the U.N. Charter, which reflect customary international law. *See, e.g.* U.N. Charter, art. 1 ("The Purposes of the United Nations are... [t]o develop ... self-determination of peoples...."); *see also* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (stating that "all peoples" have the right to Self-Determination.); G.A. Res. 2625 (XXV), Preamble, U.N. Doc. A/RES/15/1514 (Oct. 24, 1970) ("*Convinced* that the

principle of... self-determination of peoples constitutes a significant contribution to contemporary international law..."); G.A. Res. 1514 (XV), para. 2, U.N. Doc. A/RES/15/1514 (Dec. 14, 1960) ("all peoples have the right of self-determination"). The right of Self-Determination fundamentally includes a right to determine one's nationality.

> Article 1 of the two 1966 international covenants on human rights [The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious, or language community he or she wishes.

Gibran Van Ert, *Nationality, State Succession, and the Right of Option: The Case of Quebec*, 36 The Canadian Yearbook of International Law, 151-180 (1998) (internal citations omitted). President Woodrow Wilson described the right to Self-Determination as more than a "mere phrase," but rather "an imperative principle of actions which statesmen will henceforth ignore at their peril." February 11, 1918 Joint Session Address Of President Wilson To Congress.

The Supreme Court of Canada has similarly highlighted the importance of the right of Self-Determination of one's nationality as distinct from a question of sovereignty, stating that "international law expects that the right

of Self-Determination will be exercised by peoples within the framework of [even] existing sovereign states . . . ." *Reference re Secession of Quebec*, para. 122, Supreme Court of Canada, 20 Aug. 1998, 37 I.L.M. 1340 (1998).

The U.N. has taken concrete actions to protect and enforce the right of Self-Determination through the administration of plebiscites. For decades, the U.N. has amassed significant experience in organizing and overseeing plebiscites, often where powerful evidence of statelessness has been presented. *See, generally, United Nations Participation in Popular Consultations And Elections*, Decolonization: A Publication of the U.N. Department of Political Affairs, Trusteeship and Decolonization, No. 19 (December 1983).

The Appellants were not afforded an opportunity to present and develop evidence demonstrating the connection between the sought declarations and the plebiscite for which those declarations would pave the way. However, the Appellants were clear in their Amended Complaint, ¶¶ 80-85, JA-32 – JA-33, that the U.N. and the international community, including Appellees, were obliged to take steps to protect and promote the right of Self-Determination of all peoples, and that the sought declarations would trigger international obligations to promote and enforce that right.

On facts easily comparable to this case, this Court of Appeals recently

reversed the D.C. District Court, finding that where redress depended upon independent future decisions of a third party to sell (or not sell) its own property, the plaintiff had "marshaled enough evidence to show a substantial likelihood of redress" in light of "the incentives [the plaintiff had shown would] shape [the third party's] choices in the future." *Teton Historic Aviation Found. v. United States DOD*, 785 F.3d 719, 726 (D.C. Cir. 2015). Similar to the plaintiffs in *Teton*, the Appellants have made a showing that a declaratory judgment that the 1946 Nationality Decrees constituted are illegal and invalid would constitute powerful evidence of the Appellants' statelessness and that international actors such as the U.N. and the U.N.H.C.R. would be highly incentivized to comply with concrete, international legal obligations to resolve the Appellants' statelessness as a result of such evidence.

In sum, the District Court erred in finding that the Appellants are without standing to bring their claims.

II. The Legality Of The 1946 Nationality Decrees Does Not Present A Quintessential Non-Justiciable Political Question.

The District Court misapplied the political question doctrine to dismiss the Appellants' claims for mass human rights violations when it 1) erroneously stated that the political question doctrine could be applied where

any one of the factors presented in *Baker v. Carr* is "present" and 2) erroneously stated that it was the holding of a prior lawsuit filed by Appellant Dr. Roger C.S. Lin, the *Lin I* case, 561 F.3d 502, that Appellants' claims in this case are non-justiciable.

The District Court further erred where it held that a jurisdictional inquiry under the F.S.I.A. could present a separate political question.

a. Mere Political Overtones Or Consequences Do Not Make A Case Non-Justiciable.

The political question doctrine is intended to serve as a significantly narrow limitation on the justiciability of "political questions" but not "political cases." *See Davis v. Bandemer*, 478 U.S. 109, 122 (1986); *see also Baker*, 369 U.S. at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."). Courts have expressly held that "the mere fact that a case may have political overtones or consequences does not make it non-justiciable." *See United States v. Ghailani*, 686 F. Supp. 2d 279, 291 (S.D.N.Y. 2009). The doctrine is narrowly tailored, requiring a "discriminating analysis of the particular question posed." *See Baker*, 369 U.S. at 211.

Significantly, the District Court does not accurately or completely restate the *Baker* rule. The District Court states that if one of the *Baker* factors

is "present, the Court may find that the political question doctrine bars adjudication of Plaintiffs' claims." JA-073. The Supreme Court in *Baker*, however, expressly stated that the mere *presence* of one factor was not enough, stating "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." 369 U.S. at 217.

Significantly, the *Baker* case, which Justice Earl Warren later identified in his memoirs as "the most important case of my tenure on the Court",[13] was a victory for the principles that later characterized the Warren Court's liberal civil rights legacy: that it is the duty of the Courts to enter what Justice Frankfurter deemed to be "the political thicket" [14] in cases where an unprotected minority required protection from the political majority and the political process was fundamentally unequipped to render such protection.[15]

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[13] Earl Warren, *The Memoirs Of Chief Justice Earl Warren*, 306 (1977).

[14] Justice Frankfurter warned against the dangers of entering the "Political Thicket" in *Colegrove v. Green*, 328 U.S. 549, 556 (1946) and dissented passionately to the decision in *Baker v. Carr*.

[15] *See, e.g.*, *Sincock v. Gately*, 262 F. Supp. 739, 857 (D. Del. 1967) holding that gerrymandering is not permissible under the Fourteenth Amendment because "the underlying rational of *Baker v. Carr* . . . is that voters aggrieved by apportionment discriminations [*e.g.*, a mechanism employed by the political majority to the detriment of the political minority] may appear in Federal Court to vindicate their rights" even where "[c]oncededly, gerrymandering is fairly deep in the 'political thicket.'" In an opinion authored by Justice Warren, the Supreme Court upheld *Sincock v. Gately* in *Roman v. Sincock*, 377 U.S. 695 (1964).

As such, when the *Baker* Court defined what was meant to be an extremely narrow area of political case law into which the Courts would not tread, the mere presence or potential for presence of a *Baker* factor was deemed insufficient for dismissal on the ground of political question. *Baker*, 369 U.S. at 217. Instead, the *Baker* Court expressly required a showing that one of the *Baker* factors is indelibly intertwined with questions necessary for the court to confront in order to adjudicate the case. *Id.* The District Court made no such showing, instead relying generally upon a persistent misreading of the first *Lin* case, as detailed below.

b. District Court's Reliance On *Lin I* Is Reversible Error.

The District Court erroneously held that the *Lin I* case, 561 F.3d 502 – a case filed by Dr. Lin and others (but not the other Plaintiff-Appellants in this case) – constituted "settled D.C. Circuit precedent" that "the nationality of Taiwan residents presents a quintessential non-justiciable political question." JA-074. This is simply incorrect and the District Court erred in its reading of that case. This Court of Appeals in *Lin I* determined only that the "identification of Taiwan's sovereign" – an issue not present in this case – was a non-justiciable political question. 561 F.3d at 508.

In *Lin I*, the court explained that addressing the Appellants' claims "would require. . . trespass into a controversial area of U.S. foreign policy in

order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan." *Id.* at 503-04. Indeed, it was the question of sovereignty, not any question of nationality, which this Circuit cited as non-justiciable in *Lin I*.

To the contrary, the question of who exercises sovereignty over Taiwan is not an antecedent question, or even relevant to, the Court's examination of the merits of the Appellants' claims for declaratory judgment. The Appellants have asked this Court to review the legality of legal instruments, which have indisputably caused their concrete and grievous harm, and were enacted by an agent of the U.S. with the full knowledge and implicit ratification of the U.S., including the Department of State. The requested relief does not require this Court to examine the question of Taiwan's sovereignty.

Similarly, the District Court – misled by Appellees – erroneously observed that the Appellants' argument is "essentially identical" to the arguments made in *Lin I*. JA-075. Plainly, they are not. In *Lin I*, the Appellants asked this Court to read and interpret the S.F.P.T., a task this Court believed to be impermissibly bound up with conclusions regarding the sovereignty status of Taiwan. However, in this case, the legality of the 1946 Nationality Decrees do not require this Court to address any questions of sovereignty.

c. Jurisdiction Inquiries Under The F.S.I.A. Cannot Present A Separate Political Question.

The District Court erred when it held that it would be a non-justiciable political question to determine whether or not F.S.I.A. § 28 U.S.C. 1605(a)(5) (the "tort exception") applies to the challenged acts "within the United States" at the relevant time. JA-079, n. 11. The F.S.I.A. has expressly delegated foreign sovereign immunity determinations to the Courts regardless of the political consequences.

To satisfy the strictures of the political question doctrine, U.S. courts will decline to hear cases from a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. However, in a determination as to whether the doctrine applies, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211.

Congress affirmatively delegated the inquiry of immunity to the judicial branch, away from the executive branch, when it took the step of codifying previously uneven State Department practice into the F.S.I.A. The Supreme Court has acknowledged that the judicial responsibility for answering questions of immunity must, in accordance with the purpose of the F.S.I.A. itself, withstand the potential impact of those decisions upon foreign

relations. *Samantar v. Yousuf*, 560 U.S. 305, 312 (2010).

As the Supreme Court in *Samantar* notes, Congress's subsequent adoption of the F.S.I.A. meant that the State Department's institutional reliance upon "political considerations," a method giving rise to inconsistency and unreliability, was abandoned in favor of the application of a consistent and defined rubric of exceptions under the F.S.I.A. 560 U.S. at 312. Indeed, it was the desire to *remove* politics from foreign sovereign immunity determinations, which motivated Congress' adoption of the F.S.I.A.

Because one central purpose of the F.S.I.A. was to remove politics from an inherently political realm (*i.e.*, the imposition of civil liability upon foreign sovereigns), U.S. Courts have been loath to apply the political question doctrine to determinations of the application of exceptions to immunity under the F.S.I.A.

In particular, the District Court within this Circuit has consistently "rejected the theories that the terrorism exception to foreign sovereign immunity presents a non justiciable political question, violates the U.N. Charter, or constitutes an unconstitutional violation of the separation of powers" and held that "this Court is bound by such precedent[.]" *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79, 88 (D.D.C. 2009), *aff'd* 646 F.3d 1 (D.C. Cir. 2011).

In *Gates*, defendant Syria's arguments against application of the terrorism exception of the F.S.I.A. were strikingly similar to the political question theories advanced in this case: that nearly all of the *Baker* factors applied, and "that the designation of a state as a sponsor of terror, a critical element of abrogation of sovereign immunity under the terrorism exception to sovereign immunity in the F.S.I.A., is a political decision that is made by the executive branch and not by the courts." *Id.* at 87. The *Gates* court rejected the claim that suits under F.S.I.A. Section 1605(a)(7), the predecessor to Section 1605(A), present a non-justiciable political question. *Id.* at 88. Similarly, in *Wyatt v. Syrian Arab Republic*, 736 F. Supp. 2d 106, 112 (D.D.C. 2010), the court noted, "[this] Circuit has foreclosed the defendant's assertion that the F.S.I.A.'s terrorism exception allows for cases that present non-justiciable political questions." *Id*. at 113, n. 8.

Further, at least one U.S. Court has made determinations relating to the contested legal or sovereignty status of a foreign territory for jurisdictional purposes. In *Beattie v. United States*, 756 F.2d 91, 105 (D.C. Cir. 1984), this Court determined, for jurisdictional purposes, that Antarctica was not a "foreign country" pursuant to the definition of "foreign country" within the Federal Tort Claims Act ("F.T.C.A."). This Court acknowledged that "[t]he United States refuses to recognize territorial sovereignty in Antarctica; at the

same time, however, it maintains a basis for asserting claims of its own." 756 F.2d at 107. Indeed, at the time of this Court's decision, no less than eight discrete sovereignty claims had been made upon various parts of Antarctica, and the claims of Great Britain, Argentina, and Chile all overlapped – causing several documented international instances of diplomatic friction. And yet, no mention was made at all of the justiciability of the Court's inquiry into the legal status of Antarctica as a "foreign country" for jurisdictional purposes.

As such, the District Court erred in holding that a jurisdictional finding by the Court as to the application of 1605(a)(5) presents a non-justiciable political question. To the contrary, a court's congressionally delegated inquiry into the applicability of the F.S.I.A. is limited and may not be foreclosed by the political question doctrine even where a case is otherwise inherently political. *See, generally*, *Samantar*, 560 U.S. at 311-312.

The District Court erred in its determination that the Appellants' case presents non-justiciable political questions. The District Court abused its discretion by plainly misreading and misapplying binding precedent of this Circuit and clearly misconstruing the record presented by the Appellants.

III. This Court Has Subject Matter Jurisdiction Over The R.O.C. Under Section 1605(a)(5) Of The F.S.I.A.

The District Court's determination that there could be no subject matter jurisdiction over Appellants' claims on the basis that the enactment of the 1946 Nationality Decrees did not occur "within the United States" for the purposes of 28 U.S.C. Section 1605(a)(5) of the F.S.I.A. – is plain error.

a. Section 1605(a)(5) Of The F.S.I.A. Does Not Require All Potential Prerequisite Acts, Such As Planning Activity, To Occur Within The U.S. And The Appellants Have Made No Concessions Regarding The R.O.C.'s Vague, Unsubstantiated Allusions To Tortious Conduct Which Allegedly Occurred In Nanjing.

First, the District Court erred when it incorrectly assumed that the Appellants had conceded that the tort occurred, at least in part, in the R.O.C.'s then-capital of Nanjing, China, and thus had not made out an allegation "that the decisions regarding the 1946 nationality decrees occurred *entirely* in Taiwan. . . ." JA-079 – JA-80 (citing *Jerez v. Republic of Cuba*, 775 F.3d 419, 424 (D.C. Cir. 2014)). Appellants' pleadings in the District Court merely summarize the R.O.C.'s arguments for the Court's convenience and plainly do not concede the veracity of those arguments by mere reference. *See* Pls.' Opp'n To R.O.C.'s Mot. To Dismiss at 25 (Appellants stated only that "[t]he R.O.C. next advances the arguments that . . . the 1946 Decrees did not 'occur

within the United States, because the R.O.C. was operating its government out of Nanjing . . . in 1946" (citing the R.O.C.'s Mot. To Dismiss at 4-5.))

Second, the District Court erroneously concluded, without allowing Appellants any opportunity for the development of their evidence, that Appellants did not make sufficient allegations that the U.S. had any form of legal jurisdiction – not sovereignty – over Taiwan. JA-079 (citing JA-009, Pls.' Am. Compl. at ¶ 5). The District Court bases its incorrect ruling upon a flawed reading of the extraterritoriality exception of Section 1605(a)(5) of the F.S.I.A.

Pursuant to F.S.I.A. § 1605(a)(5), the R.O.C. "shall not be immune from the jurisdiction of the courts of the United States . . . in any case" in which "money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . . ."

The District Court accepted the R.O.C.'s erroneous argument that the 1946 Nationality Decrees did not "occur within the United States," because, as the R.O.C. vaguely contended, some planning activity for the Decrees may have occurred in Nanjing. R.O.C. Mot. to Dismiss at 4-5. Even if, *arguendo*, any such planning activity occurred, 1605(a)(5) does not require every aspect

of the tortious activity to occur within the U.S. *See Olsen v. Gov't of Mexico*, 729 F.2d 641 (9th Cir. 1984).

In *Olsen*, the Ninth Circuit stated that:

> requiring every aspect of the tortious conduct to occur in the United States . . . would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose of the FSIA, which is to 'serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts.'

Id. at 646 (citing 28 U.S.C. § 1602). In that case, an aircraft left Tijuana Airport, flew over Mexico, and – due to negligent piloting over Mexican and U.S. territory as well as improper maintenance of the aircraft and inoperative radar at the airport in Mexico – crashed just north of the Mexican-American border. *Id*. at 644, 646. Tortious acts in Mexico, inextricably bound up with tortious acts in the U.S., caused the Appellants' claimed injury. Nonetheless, the Court held that where at least one complete tort could be discerned as occurring within the U.S. – the negligent piloting of the aircraft within the U.S. before it crashed – the conduct satisfied the territoriality requirement of 1605(a)(5). *Id.* at 646.

Importantly, the District Court did not allow the parties any opportunity to develop or present evidence on the question of what, if any, precipitating

activity for the 1946 Nationality Decrees occurred in Nanjing and not Taiwan. Such a query would have been properly put to the parties as a fact question requiring an opportunity for further fact development and presentation. *See Prakash*, 727 F.2d at 1180.

Moreover, U.S. Courts consistently hold that acts of planning occurring outside the U.S. – similar to the R.O.C.'s vaguely alluded to, but unsubstantiated hypothetical conduct in Nanjing – do not preclude the tort from occurring "within the United States" under Section 1605(a)(5). In *Letelier v. Republic of Chile*, 488 F. Supp. 665, 665-666 (D.D.C. 1980), the court applied the tort exception even where tortious acts, in that case the denotation of a car bomb within the U.S., were only carried out following planning activity overseas "purportedly at the direction and with the aid of . . . [the] Republic of Chile." *Id.* In that case, there were undisputed facts that discrete acts of planning precipitating the bombing had occurred overseas. Nonetheless, the Court applied Section 1605(a)(5). *Id.* at 673, *see also Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (an assassination carried out by two gunmen in California following a conspiracy originated and developed overseas was "within the United States" pursuant to 1605(a)(5)).

Recognizing overseas planning and conspiracy activity as a part of a tort cognizable under Section 1605(a)(5) is the only sensible reading of the

tort exception. Because modern international torts are increasingly cross-border affairs, and frequently the result of proximate acts of planning and conspiracy taking place in a territory other than that of the intended victim, allowing foreign sovereigns to retain immunity for torts carried out in the U.S. as a result of planning abroad by the foreign sovereign would necessarily foreclose liability for the vast majority of a sovereign's conduct. Notably, this is not what Congress intended. The tort exception was cast "in general terms" to restrict immunity for "*all* tort actions for money damages." *See* H.R. REP. No. 94-1487, at 20-21 (1976).[16] Congress could well have limited Section 1605(a)(5) to immunity for traffic accidents, as the District Court suggests it meant to do, JA-078, but affirmatively chose instead to draft a broad exception for all torts.

b. Appellants Have Demonstrated That Taiwan Was Within The Jurisdiction Of The U.S. When The R.O.C. Enacted The 1946 Nationality Decrees And "Within The United States" For The Purposes Of 1605(a)(5).

The complete tort of the implementation and enactment of the 1946 Nationality Decrees occurred in Taiwan where it was completely "subject to

[16] The District Court accepted, without comment, that 1605(a)(5) requires the act precipitating the injury to occur within the U.S. On its face, 1605(a)(5) requires only that the injury occurred within the U.S. *See* Restatement (Third) of the Foreign Relations Law of the United States § 454 cmt. e (1987) (stating that immunity is waived whenever the injury occurs in the U.S. "regardless of where the act or omission causing the injury took place.")

the jurisdiction" of the U.S., and thus, "within the United States." The District Court's reading of the F.S.I.A.'s definition of the "United States," as including only "the continental United States and those islands that are part of the United States and its possessions," and "not . . . territories over which the United States might exercise some form of jurisdiction" – ignores critical historical context as well as controlling precedent and is plain error. JA-78 – JA-79 (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-41 (1989); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839 (D.C. Cir. 1984)).

As the Appellants argued before the District Court, Pls.' Opp. To R.O.C. Mot. To Dismiss at pp. 19, 21-22, *Persinger* and *Hess* are each premised upon principles of sovereignty, and are disqualified from application by the unique historical circumstances of this case. Incredibly, a close situation has already been examined by the Ninth Circuit Court of Appeals. *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951), concerned whether the military occupation of Okinawa rendered that occupied territory part of the U.S. for purposes of the F.T.C.A. Like 1605(a)(5), Section 2680(k) of the F.T.C.A. also limits the liability of a sovereign for claims arising in foreign

countries. *See* 28 U.S.C. § 2680(k).[17] Examining near-identical facts to the case at bar, the *Cobb* Court examined whether American-occupied Okinawa was a "foreign country" for the purposes of Section 2680(k)'s territorial limitation on tort liability during the same narrow time period at issue in this case – after the surrender of Japan in 1945 but before the S.F.P.T. was signed in 1951. *Cobb*, 191 F.2d at 606-607. At the time of the tortious activity at issue in *Cobb*, the U.S. occupied Okinawa and "administered [Okinawa] as a sort of trustee" pending the hoped-for treaty that would formalize sovereignty claims. *Id*. at 606-608. Of particular importance to this case, the *Cobb* Court held that "the traditional test of sovereignty, when applied to the status of Okinawa, admits of no conclusive answer" such that "[w]hile the traditional test furnishes a useful tool of construction in the usual case it cannot control the interpretation of 28 U.S.C. Section 2680(k)[18] in the unusual case . . . ." *Id.* at 608. (footnote added). The *Cobb* Court concluded that in the special case of Okinawa, the sovereignty analysis could not be applied to any equitable end. *Id.*

[17] 28 U.S.C. Section 2680(k) provides an exception to the U.S. Government's waiver of immunity for "[a]ny claim arising in a foreign country."

[18] Similarly, 28 U.S.C. § 1603(c) "distinguishes the 'United States' from an immune 'foreign state' by defining the 'United States' . . . ." *Sablan Constr. Co. v. Gov't of the Trust Territory of the Pac. Islands*, 526 F. Supp. 135, 137-138 (D.N. Mar. I. 1981).

The case at bar – that Taiwan was "subject to the jurisdiction of" and "within" the United States in 1946 – presents another special case. Because the sovereignty analysis is unavailing given the specific strictures of World War II history, the Ninth Circuit in *Cobb* looked to the central purpose of the controlling statute – an approach that ought to have guided the District Court in this case. The *Cobb* court held that the "foreign country" exception to the F.T.C.A.'s waiver of immunity, an inquiry substantially similar to the Section 1603(c) inquiry, "must be decided in the way that accords more clearly with the central purpose of the Act." *Cobb*, 191 F.2d at 608.

The central purpose of the F.S.I.A. is to "serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. Because the F.S.I.A. requires us to protect the rights of plaintiffs whenever possible, the "central purpose" approach ought to have guided the District Court to include Taiwan within the jurisdictional precepts of Section 1603(c), both in order to protect the rights of plaintiffs abroad and to protect the rights of foreign states only in circumstances that warrant such treatment - in territories wherein the foreign state exercised actual jurisdiction and control. *See, e.g., Olsen*, 729 F.2d at 646 (rejecting the defendant foreign sovereign's argument that all tortious activity under § 1605(a)(5) must occur in the U.S. because such a result would encourage

foreign states to plead facts skirting the § 1605(a)(5) in a way which "'contradicts the purpose of the FSIA,' which is to 'serve the interests of justice . . . .'").

The District Court speciously analogizes the case of Taiwan in 1946 to that of American embassies abroad in territories held by courts to be the sovereign territory of a foreign state. JA-078 (citing *Persinger*, 729 F.2d at 839). In *Persinger*, the court declined to extend the jurisdiction of its courts to embassies that were unambiguously within the sovereign territory of Iran *primarily* because Congress did not mean, "to remove sovereign immunity for governments acting on their own territory. . . . " *Id.* at 841. However, Congress's stated concern for territorial sovereignty is inapplicable in this case.

Unlike the example of American embassies abroad, Taiwan in 1946 indisputably did not constitute territory belonging to any other foreign sovereign. Before the S.F.P.T. (and arguably, thereafter as well) there was no possibility of "removing sovereign immunity for governments acting on their own territory" in Taiwan because there were no such governments with sovereignty claims of any kind over Taiwan other than the U.S. (on behalf of the Allied Powers).

The District Court further erroneously reads *Hess* as fatal to the Appellants' case. *See* JA-078. In *Hess*, the Supreme Court described the reach of Section 1603(c) as including the continental U.S. and "those islands that are part of the United States or its possessions." 488 U.S. at 440. *Hess* is inapplicable to the facts of this case under *Cobb* because the Supreme Court in that case rested its analysis of 1603(c) upon the traditional test of sovereignty and "possession." *Id*. Even if *Hess* was not distinguishable, the Appellants have presented evidence that the situation of Taiwan in 1946 would comport with *Hess.* In 1946, Taiwan was considered part of the U.S.'s "chain of island possessions."[19]

As the Appellants argued in the District Court below, Pls.' Opp. To R.O.C.'s Mot. To Dismiss at pp. 23-24, the Ninth Circuit in *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), stated that the disposition of Section 1603(c) "rests on the proposition that Congress intended that the F.S.I.A. would make United States law on sovereign immunity consistent with international law." 722 F. 2d at 587 (citing *Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir.1981), *cert. denied*, 454

[19] "I have been informed by military authorities that the loss of Formosa would be a severe blow to our [American] **chain of island possessions**." Letter, Roger D. Lapham, Chief, ECA mission to China, to Paul Hoffman, ECA Administrator, dated 1949 (emphasis added).

U.S. 1148, (1982)). While the holding of *McKeel* is distinguishable from this case because it analyzes the reach of Section 1605(a)(5) to American embassies, the Ninth Circuit approached Section 1603(c) as a question of whether the territory was "under the exclusive territorial jurisdiction" of the U.S. *United States v. Corey*, 232 F.3d 1166, 1178, n. 7 (9th Cir. 2000) (citing *McKeel*, 722 F. 2d at 587).

While the District Court ignored the Ninth Circuit's approach, such an approach remains dispositive in this case in the absence of the "traditional test." The military occupation and trusteeship of Taiwan by the U.S. placed Taiwan within the exclusive territorial jurisdiction of the U.S. in 1946 – when the Nationality Decrees were enacted. Military occupation constitutes a transfer of "power, authority, and duty to exercise some of the rights of the deposed sovereign." "War Powers And Military Jurisdiction," The Judge Advocate General's School," J.A.G.S. Text No. 4 at 67 (1945). Similarly, the Supreme Court has held that while a territory is occupied:

> [O]ther nations [are] bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. **As regarded all other nations, it**

> **[is] a part of the United States, and belong[s] to them as exclusively as the territory included in our established boundaries.**

Fleming v. Page, 50 U.S. 603, 615 (1850) (emphasis added).

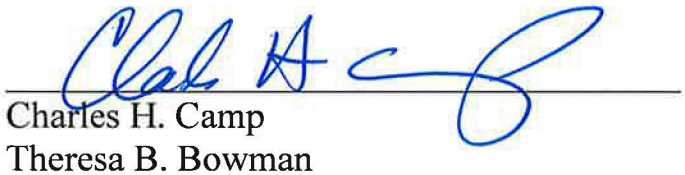
Similarly, the court in *Sablan* reasoned that the territory at issue was within the definition of the "United States" pursuant to § 1603(c) because, in part, of the degree of control over the territory manifested by the U.S. in that case. 526 F. Supp. at 139. The court had jurisdiction because it was clear that the U.S. had "ultimate authority over Trust Territory governance." *Id.* at 139.

Ninth Circuit courts examining similar facts have looked to both the central purpose of the jurisdictional statute, *Cobb*, 191 F.2d 604, and to a test of "exclusive territorial jurisdiction," *Corey*, 232 F.3d 1166. In 1945 and 1946, the U.S. exercised exclusive jurisdiction and control over Taiwan such that, at the time the 1946 Nationality Decrees were implemented, Taiwan was "subject to the jurisdiction of the United States" under § 1603(c) and, thus, "within the United States" under § 1605(a)(5). The District Court's rulings to the contrary – made in partial reliance upon unsubstantiated evidentiary assertions forwarded by the Defendants-Appellees – are plain error.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants pray that this Court reverse the District Court's March 31, 2016, Order and Memorandum Opinion erroneously granting Defendants-Appellees' Motions to Dismiss the Amended Complaint.

Respectfully submitted,



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