21-552

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAVID M. ROEDER, individually and on behalf of a class of similarly situated individuals, SUSANNE A. ROEDER, individually and on behalf of a class of similarly situated individuals, RODNEY SICKMANN, individually and on behalf of a class of similarly situated individuals, DON COOKE, individually and on behalf of a class of similarly situated individuals, MARK SCHAEFFER, individually and on behalf of a class of similarly situated individuals,

Plaintiffs-Appellants,

—against—

J.P. MORGAN CHASE & CO., successor by merger to Chase Manhattan Corporation, JPMORGAN CHASE BANK, N.A., successor by merger to Chase Manhattan Bank,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAGE PROOF BRIEF FOR DEFENDANTS-APPELLEES

JAMES E. BRANDT
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, New York 10020
(212) 906-1200

ROMAN MARTINEZ
LATHAM & WATKINS LLP
555 11th Street, NW, Suite 1000
Washington, DC 20004
(202) 637-2200

WILLIAM TRACH
MICHAEL F. HOULIHAN
LATHAM & WATKINS LLP
John Hancock Tower
200 Clarendon Street
Boston, Massachusetts 02116
(617) 948-6000

Attorneys for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee J.P. Morgan Chase & Co., successor in merger to Chase Manhattan Corporation, certifies that it is a publicly held corporation, that it does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles and institutional accounts that it or its subsidiaries sponsor, manage or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co. Defendant-Appellee JPMorgan Chase Bank, N.A., successor by merger to Chase Manhattan Bank, certifies that it is a wholly owned subsidiary of Defendant-Appellee J.P. Morgan Chase & Co.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

STATUTE

OTHER AUTHORITIES

STATEMENT OF ISSUES

This case involves stale allegations of misconduct that purportedly occurred between March 1979 and January 1981—more than 39 years before this case was filed. The District Court accordingly dismissed Plaintiffs' federal and state claims as untimely. It had no need to reach Defendants' alternative—and equally valid—arguments that those claims also fail under the *Noerr-Pennington* doctrine and for lack of proximate causation.

The issues presented are:

1. Whether this Court should overturn the District Court's holding that Plaintiffs' federal claim is untimely, based on accrual and equitable tolling arguments that Plaintiffs either abandoned or failed to raise below.

2. Whether this Court should overturn the District Court's holding that Plaintiffs failed to satisfy the stringent criteria for pleading equitable estoppel as to their state law claims.

3. In the alternative, whether Plaintiffs' claims are barred by the *Noerr-Pennington* doctrine.

4. In the alternative, whether Plaintiffs' claims fail because Plaintiffs have not adequately pled proximate causation.

INTRODUCTION

This case involves alleged misconduct that occurred roughly forty years ago, in connection with the Iranian hostage crisis. Even though the events surrounding that crisis have been documented in countless publications, Plaintiffs allege that they only discovered a claim against Defendants—American financial services companies—from a 2019 New York Times article. As the District Court correctly found, allowing these claims to go forward under these circumstances would have "breathtaking implications" for the law governing statutes of limitations. JA___ (Opinion and Order 23, Dkt. 54 ("Op.")). The District Court rightly dismissed all claims as untimely.

On appeal, Plaintiffs try to resurrect their case with arguments that they failed to raise below. In the District Court, Plaintiffs relied *solely* on the New York state-law doctrine of "equitable estoppel" to excuse their delayed filing. But on appeal, Plaintiffs make two brand-new arguments: (1) that that their federal claim under 42 U.S.C. § 1985(1) accrued only upon publication of the 2019 New York Times article, under the so-called "discovery rule"; and (2) that their Section 1985 claim should be assessed under the more lenient standards applicable to federal "equitable tolling," rather than New York's exacting "equitable estoppel" doctrine. Both of those arguments are clearly waived, and should be rejected on that basis alone, but also fail on their merits. And the only argument Plaintiffs *did* make below—

equitable estoppel under New York law—is also mistaken. The District Court's thorough, well-reasoned decision should be affirmed for several reasons.

First, Plaintiffs argue that their federal claim did not accrue until publication of the 2019 New York Times article discussing Chase's alleged involvement in the hostage crisis, because they allege that is when they discovered "who and what caused [their] injury." But below, Plaintiffs did not invoke the so-called "discovery rule" in their opposition to Defendants' motion to dismiss (which extensively argued why the rule did not apply on the merits) and did not dispute that they abandoned that claim or otherwise mention it at oral argument. The District Court thus correctly found that theory "abandoned." JA___ (Op. 12). In any event, the Supreme Court and this Court have squarely rejected the notion that a claim only accrues once a plaintiff discovers the identity of the potential defendants and the details of the alleged misconduct. Plaintiffs' lead argument is thus both waived and incorrect.

Second, Plaintiffs argue that their Section 1985 claim is subject to the federal "equitable tolling" standard, rather than New York's more exacting "equitable estoppel" doctrine. Again, Plaintiffs failed to raise this argument below, and it is waived on appeal. It is also meritless. Federal equitable tolling requires Plaintiffs to plead "exceptional circumstances" that prevented them from bringing their claim within the limitations period *and* reasonable diligence in pursuing those claims. Plaintiffs satisfy neither requirement.

Third, Plaintiffs argue that their state law claims should be allowed to go forward based on New York's "equitable estoppel" doctrine. But estoppel is an "extraordinary remedy" reserved for truly "exceptional" cases where a defendant's affirmative misstatements—directed to the plaintiff—prevented them from timely bringing a claim. Defendants' alleged actions here do not come close to meeting the high bar required to plead estoppel. The Court's decision rejecting equitable estoppel was plainly correct.

Finally, Plaintiffs' claims fail for additional reasons the District Court had no need to address. The claims are squarely foreclosed by the *Noerr-Pennington* doctrine, which bars courts from imposing liability based on the results of government petitions. Here, Plaintiffs seek to hold Defendants liable for alleged efforts to influence the US government's foreign policy decision-making. That is classic petitioning activity within *Noerr-Pennington*'s heartland.

Plaintiffs also fail to adequately plead proximate causation as to any of their claims. Plaintiffs rely on long chains of contingent events and intervening acts, including serious breaches of international law by a sovereign entity. Such attenuated causal chains cannot satisfy proximate causation.

For all of these reasons, the District Court's sound decision should be affirmed.

STATEMENT OF THE CASE

A. Factual Background

1. The Shah's Entry Into The United States And The Hostage Crisis

Plaintiffs' claims arise from the 1979 Iranian Revolution and the ensuing attack on the US Embassy in Tehran. At that time, Iran was a monarchy under the Shah. JA___ (Am. Compl. ¶ 31, Dkt. 39 ("AC")). In early 1979, the Shah's domestic standing crumbled in the face of growing revolution, forcing him into voluntary exile. JA___ (*id.* ¶ 32). The Shah found temporary refuge in numerous countries and sought entry to the United States. JA___-___ (*id.* ¶¶ 32-36). In October 1979, the Carter Administration cleared the way for the Shah to enter the country for medical treatment, where he remained until his death in 1980. JA___-___ (*id.* ¶¶ 48-52, 74).

In November 1979, Iranian revolutionaries stormed the US embassy in Tehran and seized embassy personnel as hostages. JA___ (*id.* ¶ 55). The Iranian government subsequently held 52 hostages (including Plaintiffs or their family members) until January 20, 1981. JA___, ___ (*id.* ¶¶ 55, 78).

2. The Subsequent Investigation And Public Accounts Of The Crisis And "October Surprise"

During the crisis and in the years that followed, numerous books and articles focused on the purported actions taken by Chase Bank, its then-Chairman and CEO David Rockefeller, and former Chase advisor Henry Kissinger in connection with

events in Iran. This included considerable public reporting regarding Rockefeller's and Chase's purported roles in both lobbying the Carter Administration to provide refuge to the Shah and undermining negotiations to end the hostage crisis.

Throughout the crisis, national publications noted Rockefeller's public intervention on the Shah's behalf. As early as November 1979, the Washington Post reported that "pressure to bring the shah into this country seems to have come largely from the Rockefellers," and noted that "it was a Rockefeller doctor . . . who flew to Mexico and pronounced the Shah too sick to be treated anywhere but Manhattan." JA___ (*Rockefeller Keys Open Doors for Sick Shah* at 2, Dkt. 44-3).

In 1981, the New York Times published an extensive piece—based, in part, on interviews with Rockefeller—alleging that "[a] high-powered, financial and political 'old-boy network'—including David Rockefeller . . . waged a campaign" to obtain the Shah's admittance. JA___ (*Why Carter Admitted The Shah* at 1, Dkt. 44-2). Among other things, the article detailed purported financial ties between Chase and the Shah; Rockefeller's personal assistance to the Shah and entreaties on his behalf to the Carter Administration; and the role played by Rockefeller's aide Joseph Reed and Reed's physician in examining the Shah and reporting the necessity of treating him in the United States. JA___, ___-___ (*id.* at 3, 7-8).

Likewise, a number of authors and publications explored allegations that Rockefeller and his associates sought to undermine the Administration's hostage

negotiations prior to the 1980 U.S. Presidential Election (an effort commonly known as the "October Surprise"). In the early 1990s, two congressional inquiries reviewed allegations that the Reagan Campaign interfered with negotiations. JA___-___ (Rep. of the Special Counsel at 1-2, S. Doc. No. 102-125 (Comm. Print 1992), Dkt. 44-8) (describing allegations of interference by Reagan Campaign officials and stating that "[t]he purpose of this . . . investigation was to determine . . . whether there is credible evidence to support any of these allegations")); JA___-___ (H.R. Rep. No. 102-1, at 2-3 (1993), Dkt. 44-10) (describing the legislative mandate as including enumerated allegations against the 1980 Reagan Campaign and affiliated individuals)). While neither report ultimately substantiated the Reagan Campaign's involvement in such an effort, the House report noted allegations that "Kissinger and . . . Rockefeller were behind the continued breakdown in the negotiations . . . to effect a hostage release." JA___ (*id.* at 81).

Public interest in the affair did not end with the congressional inquiries, as subsequent accounts alleged that Rockefeller and his associates interfered with hostage negotiations. One 2004 book, by award-winning investigative journalist Robert Parry, accused Joseph Reed, the former Rockefeller aide, of both admitting his own role in undermining negotiations and misleading congressional investigators about those efforts. JA___-___ (*Secrecy & Privilege* at 137-39, Dkt. 44-7). Another book, by University of California professor Peter Dale Scott in 2007, described a

purported "'special project', code-named Project Alpha," in which Rockefeller, Kissinger, Reed, and others sought admission for the Shah, who they code-named "the Eagle." JA___ (*The Road to 9-11* at 82, Dkt. 44-5) (citation omitted). That book then detailed purported evidence of cooperation between "Rockefeller and his shah team" and "the Reagan campaign to forestall" the "October Surprise." JA___-___ (*id.* at 90-92).

In December 2019, the New York Times published an article ostensibly detailing the contents of Reed's previously unreleased private papers. David D. Kirkpatrick, *How a Chase Bank Chairman Helped the Deposed Shah of Iran Enter the U.S.*, N.Y. Times (Dec. 29, 2019), https://www.nytimes.com/2019/12/29/world/middleeast/shah-iran-chase-papers.html. That article repeated many of the allegations recited above, including claims that Rockefeller and others affiliated with Chase successfully lobbied for the Shah's admission to the US and later opposed hostage negotiations. *Id.*

B. Plaintiffs' Complaint Alleging Misconduct By Chase

Plaintiffs filed this putative class action on March 18, 2020, JA___-___ (Compl., Dkt. 1), and filed an amended complaint on June 26, 2020, JA___-___ (AC). The complaint asserted nine claims against Defendants as successors to Chase, including a federal claim for alleged conspiracy to injure Plaintiffs while they served as diplomatic agents, in violation of 42 U.S.C. § 1985(1), and New York

common law claims for negligence, negligence *per se*, gross negligence, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. JA___-___ (AC ¶¶ 107-66). The gravamen of Plaintiffs' complaint is that Chase successfully influenced United States policy with respect to Iran, thereby causing and prolonging the hostage crisis.

Plaintiffs' primary substantive allegation is that a small group of Chase executives—including Rockefeller, Kissinger and Reed—entered into an agreement to "defeat[] President Carter's foreign policy decisions regarding Iran" by orchestrating the Shah's entry into the United States. JA___ (*id.* ¶¶ 39-40). This effort (which Plaintiffs refer to as "Project Eagle") was purportedly motivated by a desire to protect Chase's business interests in Iran. JA___ (*id.* ¶¶ 38-39). Plaintiffs contend that Chase accomplished this end by reporting to the Carter Administration that the Shah was in dire medical straits and required treatment in the US. JA___ (*id.* ¶ 49). In Plaintiffs' telling, Chase's efforts resulted in the US government's decision to admit the Shah, which in turn prompted Iranian revolutionaries to storm the embassy. JA___, ___-___ (*id.* ¶¶ 50, 54-55).

Plaintiffs also accuse Chase of successfully opposing the "October Surprise" negotiations. JA___-___ (*id.* ¶¶ 70-80). Chase purportedly did so due to concerns that, as part of the deal, the US would repatriate Iran funds held in the bank. JA___-___ (*id.* ¶¶ 72-73). Plaintiffs generally contend that Chase "gathered and spread

knowingly false rumors about possible payoffs to win the [hostages'] release," JA___ (*id.* ¶ 76), without specifying what Chase allegedly said or to whom.

Finally, the complaint alleges that Chase concealed their actions from public view. JA___-___ (*id.* ¶¶ 81-84). Plaintiffs contend that these efforts justify their delay in suing and that they only learned of the facts underlying their claims through the 2019 New York Times article. JA ___ (*id.* ¶ 106).

C. The District Court's Decision Dismissing The Complaint As Untimely

In July 2020, Defendants moved to dismiss all claims pursuant to Federal Rule of Civil Procedure 12(b)(6) based on, *inter alia*, untimeliness, First Amendment protections accorded to petitioning activity under the *Noerr-Pennington* doctrine, and failure to allege proximate causation. JA___ (Mot. Dismiss AC, Dkt. 43 ("MTD")).

In February 2021, the District Court granted Defendants' motion to dismiss. JA___-___ (Op.). The District Court found that Plaintiffs' state and federal claims were untimely, JA___-___, ___ (*id.* at 10-11, 17), and that Plaintiffs failed to plead facts supporting an equitable exception to the applicable statutes of limitations, JA___-___ (*id.* at 18-31).

The District Court began by noting that Plaintiffs conceded their state law claims are "prima facie time-barred," and thus must be dismissed "absent an exception to the applicable statute of limitations." JA___ (*id.* at 10). As to their

federal Section 1985 claim, the Court noted that Plaintiffs' complaint had invoked the so-called "discovery rule"—arguing that this claim only arose in 2019 when Plaintiffs purportedly discovered Defendants' identity and alleged misconduct. JA___ (*id.* at 12). But the Court found that Plaintiffs had "abandoned" that argument by failing to raise it in their briefing or at oral argument. *Id.* Accordingly, the Court concluded that the "discovery rule" could not "provide a basis for relief," and that Plaintiffs' federal claim, like their state claims, could not survive without an equitable exception to the statute of limitations. JA___ (*id.* at 12, 18).

The District Court then explained why Plaintiffs' discovery rule argument would fail even if it had not been abandoned. The Court noted that the "injury under [Section 1985] is the prevention of the officer from the discharge of his duties, or the injury to the officer in his person or property," and that "injury was suffered, *and the hostages knew of it*, when hostages were first imprisoned and then later released." JA___-___ (*id.* at 16-17) (emphasis added). The Court stressed that under Supreme Court precedent, the "'[l]imitations [period] begins to run against an action for false imprisonment . . . once the victim becomes held pursuant to legal] process,'" and "[i]t does not matter that, at the time, Plaintiffs were not aware that the injury was a consequence of a conspiracy." JA___ (*id.* at 17) (citation omitted) (final two alterations in original). Awareness of the "identity of the defendants," the Court explained, is irrelevant to accrual. JA___ (*id.* at 16) (quoting *Levy v. BASF Metals*

Ltd., 917 F.3d 106, 108 (2d Cir. 2019) (per curiam)). And, likewise, Plaintiffs "need not know of their cause of action for the statute of limitations to run." JA___ (*id.* at 17) (citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

The District Court thus concluded that Plaintiffs' efforts to invoke the discovery rule were "academic," because Plaintiffs would lose under even the most lenient version of that rule. JA___-___ (*id.* at 12-13). At a minimum, Plaintiffs "discovered" their *injury* by the time of their release, and so their claim accrued no later than January 20, 1981. *Id.* And because "[c]laims brought under [Section] 1985 . . . are generally subject to the limitations period provided by state law for personal injury actions" (here, three years), the District Court found that the applicable limitations period expired on January 20, 1984. JA___, ___ (*id.* at 17, 21) (emphasis added) (citation omitted). As Plaintiffs did not file their complaint until March 2020—more than 36 years after the limitations period expired—the Court concluded that both the federal and state claims were facially untimely. *See* JA___ (*id.* at 17).

Accordingly, Plaintiffs' federal and state claims were viable only if they affirmatively pled facts sufficient to support an equitable exception to the applicable statutes of limitations. JA___-___ (*id.* at 18-19). Both in the complaint and in their briefing, Plaintiffs had relied on only one equitable theory: equitable estoppel under New York law. The District Court stressed that equitable estoppel is an

"extraordinary remedy" that is "invoked sparingly and only under exceptional circumstances." JA___ (*id.* at 18) (citations omitted). The exception applies only if Plaintiffs can show: (1) acts by the defendant that "wrongfully induce[] the plaintiff" to refrain from timely filing their action; (2) Plaintiffs' "reasonable reliance on the defendant's misrepresentations;" *and* (3) Plaintiffs' "due diligence in bringing a claim when" the defendants' misconduct "ceases to be operational." JA___-___ (*id.* at 18-19) (citations omitted). The Court found that Plaintiffs failed to satisfy *any* of those requirements. JA___-___ (*id.* at 18-31).[1]

As to the first requirement, the District Court held that Plaintiffs failed to identify a single act that would support equitable estoppel. Several of Defendants' purported misstatements occurred years or even decades after the limitations period expired, and "[b]y definition . . . could not have been intended to induce [Plaintiffs] to refrain from timely commencing an action or even have had that effect." JA___ (*id.* at 21). The District Court found that certain alleged omissions—Reed's direction that his papers should not be released and Chase's purported failure to register under the Foreign Agents Registration Act ("FARA")—were not misstatements, but alleged failures to "confess." JA___ (*id.* at 22). It would have

[1] As to Plaintiffs' lone federal claim under Section 1985, the District Court also identified the requirements for the federal-law doctrine of equitable tolling, but noted that "'[f]or federal claims that borrow state statutes of limitation,' such as the Section 1985 claim, . . . , 'courts "borrow not only a state limitations period but also its 'tolling rules.'"'" JA___ (Op. 20 n.8) (citations omitted)).

"breathtaking implications," the Court explained, for such omissions to trigger equitable estoppel. JA___ (*id.* at 23).

With respect to the remaining allegations—concerning Rockefeller's 1981 New York Times interview and comment to a former hostage that he "barely knew" the Shah, JA___ (AC ¶ 81b, c)— the District Court concluded that neither statement had the effect of concealing from Plaintiffs their potential causes of action, JA___-___ (Op. 23-24). Noting that "equitable estoppel . . . is personal," the District Court held that actionable misstatements must have been "directed to Plaintiffs for the purpose of frustrating the bringing of a timely claim." JA___ (*id.* at 24). The Court found that there were "no plausible allegations" that Defendants' public-facing statements were intended to "frustrate the bringing of a timely claim" or "directed to Plaintiffs as opposed to the more general public in response to public concerns." JA___ (*id.* at 25; *see also id.* (explaining that the operative question is not the "medium through which a message is conveyed" but whether the "content" or "purpose" of purported misstatements were directed at preventing Plaintiffs from bringing a timely action)).

As to the second and third elements of equitable estoppel, the District Court found that Plaintiffs' allegations were insufficient to plead either reasonable reliance or due diligence. JA___ (*id.* at 28). The District Court noted that the same 1981 article relied upon by Plaintiffs for Rockefeller's purported misstatement

undisputedly also listed all of "the material allegations . . . in the Complaint." JA___ (*id.* at 29). That publication and others put Plaintiffs on inquiry notice of their potential claims, and Plaintiffs made no serious effort to explain how, in light of these public disclosures, they could have reasonably relied on the alleged misstatements or exercised reasonable diligence in failing to pursue their claims for almost 40 years. JA___-___ (*id.* at 29-31).

The District Court accordingly dismissed all of Plaintiffs' claims as time-barred, without going on to address the other grounds for dismissal raised in Defendants' motion.

STANDARD OF REVIEW

This Court reviews a district court's dismissal of a complaint for failure to state a claim *de novo*. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 99-100 (2d Cir. 2015). A district court's determination that a party has abandoned an argument, as well as its denials of equitable tolling and equitable estoppel, are reviewed only for abuse of discretion. *See, e.g.*, *Colbert v. Rio Tinto PLC*, 824 F. App'x 5, 12 n.6 (2d Cir. 2020) (summary order) (abandonment); *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 81 & n.7 (2d Cir. 2003) (equitable tolling); *N. Am. Foreign Trading Corp. v. Mitsui Sumitomo Ins. Co. USA, Inc.*, 292 F. App'x 73, 75 (2d Cir. 2008) (summary order) (equitable estoppel).

SUMMARY OF ARGUMENT

Of the three arguments Plaintiffs advance in this appeal, two are clearly waived and none offers any basis for reversing the District Court's well-considered decision.

First, Plaintiffs argue that the limitations period for their Section 1985 claim did not begin to run until they discovered the identity of the alleged wrongdoers and the details of the scheme from the 2019 New York Times article. But as the District Court rightly found, Plaintiffs "abandoned" this argument by failing to raise it in opposition to Defendants' motion to dismiss—and it is thus also waived on appeal. *See* JA___ (Op. 12).

In any event, as the District Court also correctly found, Plaintiffs' "discovery rule" argument is meritless. That rule applies only to a narrow set of "self-concealing" injuries, such as certain cases of fraud and medical malpractice, not at issue here. And, even where the discovery rule applies, it is triggered by a plaintiff's awareness of his *injury*, not the identity of defendants or the particulars of alleged schemes. Plaintiffs' effort to have this Court hold that their decades-old claim did not even accrue until they knew "who and what caused [their] injury" would mark a sea-change in the law governing statutes of limitations, and should be firmly rejected.

Second, Plaintiffs argue that the District Court should have invoked the more lenient federal "equitable tolling" standard, instead of New York's harsher "equitable estoppel" doctrine, to their Section 1985 claim. But Plaintiffs *never argued* in the District Court that federal equitable tolling applies. To the contrary, they expressly conceded that New York's tolling standards govern all their claims. Plaintiffs' attempt to raise a distinct federal-law tolling argument for the first time on appeal can be easily rejected on that straightforward ground.

The argument is meritless in any event. Federal equitable tolling requires a plaintiff to plead facts showing that (1) "some extraordinary circumstance stood in his way and prevented timely filing" and that (2) "he has been pursuing his rights diligently." *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (citation omitted). Plaintiffs do *neither*, and so their tolling argument fails.

Third, Plaintiffs argue that their state law claims are saved by New York's equitable estoppel doctrine. But estoppel is an extraordinary remedy reserved for only truly exceptional cases where a defendant's affirmative misstatements—directed specifically to the plaintiff—prevented them from timely bringing a claim. Here, Plaintiffs fail to cite a single act by Defendants that is legally relevant to their purported inability to discover their claims. Instead, they cite a mixture of general statements to the public at large and statements that postdate the relevant expiration of the statutory period, neither of which supports equitable relief. Likewise,

Plaintiffs offer no account of their own diligence—an essential element that must be affirmatively pled to trigger estoppel. Their failure to allege *any action* on their own part to investigate their claims—even as the same allegations detailed in their complaint circulated widely in the decades before this lawsuit—is fatal.

Finally, Plaintiffs' claims fail for at least two other reasons raised by Defendants below—the First Amendment protection for their petitioning activity, and the absence of proximate causation. With respect to the former, all of Plaintiffs' claims try to hold Defendants liable for the results of their attempts to influence government action, a clear violation of the *Noerr-Pennington* doctrine. As to the latter, both theories that Plaintiffs now advance depend on twisting causal chains, the intervening actions of two sovereign governments, and breaches of international law. Taken together, those actions break the causal chain linking Defendants' purported actions and Plaintiffs' eventual harm.

The District Court's decision should be affirmed.

ARGUMENT

I. PLAINTIFFS' FEDERAL CLAIM IS UNTIMELY

In their complaint, Plaintiffs raised a single federal claim under 42 U.S.C. § 1985(1), which prohibits conspiracies "to injure [an officer of the United States] . . . while engaged in the lawful discharge" of his duties. That claim accrued upon Plaintiffs' injury, *i.e.*, their captivity, in January 1981, and the statute of limitations

expired three years later, in 1984—36 years before Plaintiffs filed this case. In the District Court, Plaintiffs conceded that this claim was facially untimely, and argued *only* that New York's equitable estoppel doctrine barred Defendants from invoking a limitations defense. Having failed with that strategy, Plaintiffs now try an entirely different approach on appeal—making two arguments that they never advanced below. Both arguments are waived and, in any event, meritless. Plaintiffs' untimely federal claim was properly dismissed.

A. Plaintiffs' Federal Claim Accrued In 1981, And The Statute Of Limitations Expired In 1984

Where a federal statute does not provide otherwise, "the standard rule [is] that the limitations period [for that statute] commences when the plaintiff has a complete and present cause of action," *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (citation omitted), *i.e.*, the time "when the plaintiff can file suit and obtain relief," *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citation omitted). Where a cause of action sounds in tort, the claim accrues and the limitations period begins "when the wrongful act or omission results in damages." *Id.* at 391 (citation omitted); *see also Yukos Capital S.A.R.L v. Feldman*, 977 F.3d 216, 246 (2d Cir. 2020) ("[I]t is the fact of harm or damage to the plaintiff which completes the tort and creates the legal right to damages." (emphasis and citation omitted)). In order to determine *when* an act results in "damages," courts may "adopt wholesale the rules that would apply in a

suit involving the most analogous tort." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017).

Here, the statute on which Plaintiffs' federal claim is based, 42 U.S.C. § 1985(1), does not contain an express limitations period. The limitations period thus begins to run when the wrongful act "results in damages." *Wallace*, 549 U.S. at 391 (citation omitted). To determine when this occurred, courts look to the most analogous tort. As the District Court noted, Plaintiffs' Section 1985 claim—alleging that Defendants conspired to "prolong" the hostages' unlawful captivity, JA___ (AC ¶ 108)—is most analogous to the tort of false imprisonment, JA___-___ (Op. 16-17); *see also* Restatement (Second) of Torts § 45A (1965) (defining false imprisonment to include persons who "instigate[] or participate[] in the unlawful confinement of another"). The Supreme Court has explained that the injury in a false imprisonment claim is complete, and the limitations period begins to run, when the "false imprisonment . . . end[s]," irrespective of later discovery of additional facts concerning the injury. *Wallace*, 549 U.S. at 389, 391 (internal quotation marks omitted).

As the District Court correctly held, "[t]hose principles squarely apply here[:] Plaintiffs' Section 1985(1) claim was complete and accrued in January 1981 when the hostages were released," JA___ (Op. 16), and the limitations period expired

three years later on January 20, 1984.[2] Plaintiffs' federal claim—which was not filed until March 2020—is thus time-barred.

B. Plaintiffs' "Discovery Rule" Argument Is Waived and Wrong

Plaintiffs challenge that conclusion by arguing that their federal claim did not accrue until the publication of the 2019 New York Times article, because that is when they learned "both the fact of [their] injury and who and what caused that injury." Plaintiffs' Opening Br. ("OB") 26. Plaintiffs rely on an exception to the standard rule of accrual known as the "discovery rule," under which "accrual [of a federal claim] is delayed 'until the plaintiff has "discovered"' his cause of action." *Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (citation omitted). While Plaintiffs' complaint briefly alluded to that exception, *see* JA (AC ¶ 106), they never pursued the argument in their briefing or oral argument below—and the District Court thus correctly concluded that they "abandoned" it. JA___ (Op. 12). In any event, the argument fails: The discovery exception is only implicated where an injury is "self-concealing," *Gabelli*, 568 U.S. at 450, and the only relevant benchmark for the discovery rule is awareness of the underlying injury, *Rotella*, 528 U.S. at 555. Here, Plaintiffs were undoubtedly aware of the relevant injury as it occurred, and so their claim does not implicate the discovery rule and would fail even if that rule applied.

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[2] The limitations period is determined by looking to the state law governing personal-injury torts, which in New York is three years. *See, e.g.*, *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994).

1. The District Court Correctly Found That Plaintiffs "Abandoned" Any Argument That Their Federal Claim Accrued Upon Discovery In 2019

Plaintiffs' present invocation of the "discovery rule" is a belated attempt to revive an argument they previously abandoned. In their complaint, Plaintiffs asserted that their Section 1985 claim accrued only when they "came into possession of the critical facts revealing that Chase inflicted injuries upon them and the details of how and why it did so" upon publication of the 2019 New York Times article. JA___ (Compl. ¶ 106]) *see also* JA___ (AC ¶ 106). In moving to dismiss, Defendants explained that under the Supreme Court's and this Court's precedent, Plaintiffs' claims accrued at the time of their injury, not when they discovered the purported wrongdoers or the details of the alleged conspiracy. JA___-___ (MTD 4-6). Plaintiffs' opposition did not dispute this argument or assert that their claim accrued in 2019. Instead, in a section of their brief titled "Chase Is Equitably Estopped From Asserting The Statute of Limitations," JA___-___ (MTD Opp'n 22-31 (Dkt. 48)), Plaintiffs argued *only* that New York's equitable estoppel doctrine salvaged their claims. *Id.* Indeed, the primary cases that Plaintiffs now invoke on appeal, such as *Rotella* and *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), were not even cited in their briefing below.

Defendants noted Plaintiffs' abandonment in their reply brief and at oral argument. *See* JA___-___ (MTD Reply 1-3, Dkt. 49); JA___-___ (Tr. 5:22-6:3),

Dkt. 56 ("Tr."). At no point did Plaintiffs dispute that their federal claim was untimely on its face, or otherwise argue that the claim did not accrue until publication of the 2019 article. Rather, just as in their opposition brief, Plaintiffs focused solely on equitable estoppel. JA___-___ (Tr. 16:8-25:20). It is hard to imagine a clearer instance of abandonment. *See DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 449 (S.D.N.Y. 2018) (collecting cases).

Given all this, the District Court did not abuse its discretion in holding that Plaintiffs "abandoned" their discovery rule argument below. JA___ (Op. 12). And once an argument is abandoned in the district court, it is waived on appeal. *See Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005).

Plaintiffs challenge the District Court's abandonment finding in only a single footnote, itself insufficient to present the argument for review. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *see* OB26 n.5. Indeed, the content of Plaintiffs' footnote reveals no serious response. Plaintiffs first suggest that the argument was not abandoned because their complaint pleaded that accrual occurred only on discovery of the "critical facts" surrounding their injury. OB26 n.5. But that merely shows that Plaintiffs initially signaled—at the inception of the case—that they planned to argue the point. Their *abandonment* came later, when Plaintiffs failed to make the discovery-accrual argument in response to Defendants' motion to

dismiss. Courts regularly treat arguments or claims cited in a complaint but never developed as abandoned. *See, e.g.*, *Stinnett v. Delta Air Lines, Inc.*, 278 F. Supp. 3d 599, 614 (E.D.N.Y. 2017). Plaintiffs offer no good reason to conclude that the District Court's "abandonment" holding was error—much less an abuse of discretion. *See Colbert*, 824 F. App'x at 11 n.6.

Plaintiffs also argue that they somehow preserved their discovery accrual argument in their opposition to the motion to dismiss by stating that the "'Project Eagle papers revealed that Chase . . . really did conspire to . . . delay the Hostages' release.'" OB26 n.5 (alteration in original) (quoting JA___ (MTD Opp'n 30). But that single line appears in the portion of Plaintiffs' brief arguing that they satisfied the "reasonable reliance" prong of New York's equitable estoppel doctrine. JA___-___ (MTD Opp'n 22-31). It has nothing to do with accrual or the discovery rule. Indeed, the fact that this single sentence is, in Plaintiffs' view, the closest they came to raising a "discovery rule" argument in their briefing only highlights that they failed to raise the issue below.

In a last-ditch effort, Plaintiffs say their discovery rule argument should be considered simply because "there is clearly a record for this Court to review." OB26 n.5. That broad proposition would result in claims *never* being abandoned, since there is virtually always some "record" an appellate court can review to assess new arguments made on appeal. That is contrary to this Court's precedent—and the core

principles of a party presentation system—which requires litigants to address their arguments to the district court in the first instance. Plaintiffs' cavalier attempt to revive their accrual argument despite failing to press it below is exactly the kind of dilatory action that this Court routinely rejects. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008). The District Court's abandonment holding was not an abuse of discretion and should be affirmed.

2. The Discovery Exception Does Not Apply to Known Injuries Like The Hostages' Captivity

Abandonment aside, Plaintiffs' "discovery rule" rule argument also fails for two further reasons. *First*, the Supreme Court has made clear that the "discovery rule" is a limited, equitable exception to the standard rule that claims accrue upon an injury's occurrence—and that it applies only to a narrow set of "self-concealing" injuries not at issue here. *Second*, as the District Court explained, the applicability of this discovery exception is "academic" here because Plaintiffs "discovered" their injury *when it occurred—i.e.*, when they were released. JA___-___ (Op. 12-13). Plaintiffs' argument seeks not to *apply* the discovery exception, but to *extend* it to cover discovery of the identities of alleged tortfeasors and details of their misconduct. As the District Court concluded, that is plainly wrong and directly contrary to this Court's and the Supreme Court's precedent.

a. The Discovery Rule Is A Limited Exception To The Standard Rule That A Clam Accrues Upon Injury

As explained above, the standard rule is that tort-based actions accrue "when [a] wrongful act or omission results in damages . . . even [if] the full extent of the injury is not then known or predictable." *Wallace*, 549 U.S. at 392. Against that baseline rule, the Supreme Court has acknowledged an equitable discovery "exception" limited to cases in which a plaintiff's "injury is self-concealing." *Gabelli*, 568 U.S. at 449-50; *see also Rotkiske*, 140 S. Ct. at 360-61 (contrasting the "'standard rule'" with an "equitable" "discovery rule" based on "discovery of . . . injury" (emphasis and citation omitted)). As the Supreme Court has explained, "[u]sually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed." *Gabelli*, 568 U.S. at 450. The special treatment of such cases "preserve[s] the claims of victims *who do not know they are injured* and who reasonably do not inquire as to any injury." *Id.* (emphasis added).

The Supreme Court and this Circuit have broadly outlined two circumstances under which an injury may be "self-concealing," and thus trigger the discovery exception. *First*, an injury is self-concealing where the party is unaware that they have suffered any harm because it has not yet manifested, such as where they have

been defrauded or afflicted with a latent disease. In those cases, so long as the plaintiff "remains in ignorance of [injury] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Gabelli*, 568 U.S. at 449 (internal quotation marks and citations omitted); *see also Rotkiske*, 140 S. Ct. at 361 (describing "equitable, fraud-specific discovery rule"). *Alternatively*, an injury may be self-concealing where the plaintiff knows that he is experiencing some harm—such as a medical malady—but not that the harm resulted from any external source, rather than natural causes and misfortune. *See, e.g.*, *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011) ("Since [plaintiff] knew the critical facts of her daughter's injury at or near the time of her birth, any claim related to that injury accrued once Ms. Castillo had reason to suspect that . . . injury was iatrogenic [doctor-caused]."); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001) (noting that discovery rule has been applied in cases involving fraud, latent disease, and medical malpractice).[3]

The purpose and effect of the discovery exception is clear: It puts parties who suffer true "self-concealing" injuries on a level playing field with parties whose

[3] Even in the medical malpractice context, this Court has acknowledged that discovery-based accrual is the exception, and the "general rule" is that claims "accrue[] at the time of the plaintiff's injury." *A.Q.C.*, 656 F.3d at 139 n.2 (alteration in original; citation omitted). In so doing, the Court expressly disavowed previous dicta suggesting that discovery is the default. *Id.* (distinguishing *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008)).

injuries were always evident. *See Gabelli*, 568 U.S. at 450; *Rotella*, 528 U.S. at 555. For that reason, the discovery rule is only implicated where a party identifies a self-concealing injury—one akin to medical malpractice or fraud—where it is *impossible* for the plaintiff to have discovered *the fact of injury* as it occurred. *See Rotella*, 528 U.S. at 555. Where a plaintiff's injury is not self-concealing, the discovery exception does not apply, and the standard rule of injury accrual governs.

The injury underlying Plaintiffs' federal claim—their forceful imprisonment—is plainly not "self-concealing." Unlike the paradigmatic fraud and medical malpractice cases at the foundation of the discovery exception, *see TRW*, 534 U.S. at 27, the fact of Plaintiffs' injury was not inherently unknowable as it occurred. Instead, as the District Court correctly noted, Plaintiffs were contemporaneously aware of their captivity, and so their injury was in no sense concealed from them. JA___-___ (Op. 12-13). And, even if their injury is characterized as "prolonged" captivity, Plaintiffs were aware of the length of that captivity upon release. Thus, Plaintiffs' were "immediately aware of [their] injury and put on notice that [their] time to sue [was] running." *Gabelli*, 568 U.S. at 450. Their effort to invoke the discovery exception fails at the threshold.

Plaintiffs do not acknowledge the standard rule of accrual, much less explain why their case should not be subject to—and time-barred under—that rule. Instead, they cite *Rotella* for the proposition that discovery is the default. OB26. But that

fundamentally mischaracterizes *Rotella*. *Rotella* addressed the distinction between two different forms of a discovery rule—"injury discovery" and "injury and pattern discovery." 528 U.S. at 554. In doing so, the Court *expressly reserved* the issue of whether something *less* than discovery (*i.e.*, injury occurrence) should be the rule. *Id.* at 554 n.2. In fact, the Court explicitly noted the possibility that it might adopt an "injury occurrence" standard in a future case. *Id*. That is precisely what the Court did in *Wallace* and reiterated in *Gabelli* and *Rotkiske*—to the explicit exclusion of a broader discovery rule. *See Rotkiske*, 140 S. Ct. at 360 (distinguishing between the standard and discovery rules and dismissing the "expansive approach to the discovery rule as a 'bad wine of recent vintage'" (citation omitted)); *Gabelli*, 568 U.S. at 449 (describing discovery as an "exception" to the standard rule of injury accrual); *Wallace*, 549 U.S. at 391 ("[A] tort cause of action accrues . . . when the wrongful act or omission results in damages." (citation omitted)).

Plaintiffs' proposal to treat all cases as subject to a discovery rule would wash away a decade-and-a-half's worth of Supreme Court precedent and read out its clear guidance on the "standard" rule of injury accrual. It must be rejected.[4]

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[4] This Circuit has sometimes cited earlier accrual standards indicating that Section 1983 and 1985 claims accrue when the plaintiff "knew or had reason to know" of their injury. *See, e.g.*, *Redd v. Leftenant*, 737 F. App'x 603, 604 (2d Cir. 2018) (summary order). *But see Smith v. Campbell*, 782 F.3d 93, 100 (2d Cir. 2015). As noted above, the Supreme Court has made clear that such a discovery rule is fundamentally incompatible with the standard injury-accrual rule. *See, e.g.*, *Rotkiske*, 140 S. Ct. at 360.

b. Plaintiffs' Claim Would Fail Even Under the Discovery Exception

In any event, as the District Court explained, the question of whether the discovery exception applies to Plaintiffs' claims is "academic" here because those claims accrued in 1981—and expired in 1984—even under that exception. JA___-___ (Op. 12-13). Where the discovery rule applies, the Supreme Court has made unmistakably clear that it is "discovery of the *injury*, not discovery of the other elements of the claim, [that] starts the clock" running. *Rotella*, 528 U.S. at 555 (emphasis added); *see also Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002) ("[A]ccrual occurs 'when the plaintiff knows or has reason to know of the injury which is the basis of his action.'" (citation omitted)). So, for much the same reason that it does not implicate the discovery exception in the first place, Plaintiffs' federal claim would fail even if that rule applied: Plaintiffs were aware of their injury as it occurred. Thus, "the result here would be the same regardless of whether Plaintiffs' claim accrued when the injury ended (when their false imprisonment came to an end) or when they became aware of the injury (when they were held hostage)." JA___ (Op. 13).

Plaintiffs' argument to the contrary seeks not to apply the discovery rule, but to *extend* it. Plaintiffs argue that their claim only accrued once they discovered "*who* and *what* caused [their] injury." OB26-27 (emphasis added). Plaintiffs thus argue that a claim is timely so long as a plaintiff has not yet discovered precisely which

defendant it wants to sue and what theory of causation it intends to press. *See id.* at 28.

That is not the law. Rather, as the District Court correctly noted, this Circuit "has held that the statute of limitations does not start anew each time a plaintiff learns of the involvement of a new defendant." JA___ (Op. 15). That holding is well-supported in this Court's decisions rejecting efforts to defer accrual until plaintiffs can identify the purportedly responsible parties and their relationship to the injury. *See, e.g.*, *Levy*, 917 F.3d at 108; *Horn v. Politopoulos*, 628 F. App'x 33, 34-35 (2d Cir. 2015) (summary order); *cf. also Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 800 (2d Cir. 2014) (describing argument that accrual "required that plaintiffs know that defendants would be liable under a particular cause of action" as "dubious").

In *Levy,* for example, the plaintiff knew of her injury—a pecuniary loss—but not that it resulted from an alleged conspiracy or the identities of the conspirators. *See* 917 F.3d at 108. This Court held that "[t]he relevant inquiry . . . is *not* whether [plaintiff] had discovered the identity of the defendants or . . . the manipulation scheme she alleges in her complaint. Rather, the question is when [plaintiff] discovered *her CEA injury*." *Id.* (emphasis added). That is the exact context here: While Plaintiffs allege they were not aware of the identity of the defendants or the nature of the "scheme," they had discovered their Section 1985 injury—*i.e.*, that they

were imprisoned and unable to "discharge [their] official duties"—by the time of their release.

Plaintiffs' limitless alternative theory finds no support in this Court's precedent. Instead, Plaintiffs base that expansive theory on snippets of cases taken out of context. Plaintiffs cite primarily to medical malpractice cases where this Court has stated that accrual occurs when a party "has or [with reasonable diligence] should have discovered the critical facts of both his injury and its cause." *A.Q.C.*, 656 F.3d at 140 (citation omitted); *see also Valdez*, 518 F.3d at 173, 177 (same). However, the "cause" language in those cases, in context, simply refers to the idea that a person's illness is "caused" by an external source (inadequate medical treatment) rather than natural affliction. It does not remotely suggest, as Plaintiffs imply, that a claim only accrues once a claimant is aware of who harmed him and the legal theory he wishes to assert. Indeed, as the Supreme Court has explained, even in "the circumstance of medical malpractice, where the cry for a discovery rule is loudest," a person who knows he is "suffering from inadequate treatment is [still] responsible for determining within the limitations period then running whether the inadequacy was malpractice." *Rotella*, 528 U.S. at 556.

United States v. Kubrick, 444 U.S. 111 (1979), illustrates the point. Unbeknownst to him, the plaintiff in *Kubrick* had a particular antibiotic introduced into his system while in surgery and suffered hearing loss as a result. *See id.* at

113-14. The plaintiff was initially diagnosed with "bilateral nerve deafness," but it was only some time later that one of his physicians concluded that the deafness was caused by inadequate treatment. *Id.* Examining these facts, the Supreme Court agreed that accrual should be delayed, citing the Second Restatement of Torts for the proposition that the limitations period does not "start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it." *See id.* at 120 n.7 (quoting Restatement (Second) of Torts § 899 cmt. e (1979)). In other words, until the plaintiff knew that he had suffered an injury "caused" by an external source (the doctor's treatment), the limitations period did not begin to run. *See id.* at 121-22. But as the Supreme Court later made clear in *Rotella*, that does not mean the plaintiff must know "whether the inadequacy was malpractice." 528 U.S. at 556. All that was required was that the plaintiff knew his injury was not natural. *See generally* JA___-___ (Op. 14-15) (discussing *Kubrick*)).

Barrett, cited extensively in Plaintiffs' brief, is similar. The victim in *Barrett* had mescaline surreptitiously introduced into his system while undergoing voluntary medical treatment and died. 689 F.2d at 326. Quoting *Kubrick*'s discovery standard, *Barrett* held that the claim did not accrue upon injury because "[i]t is not even clear that [decedent's] family knew that he died solely as the result of administration of the drug." *Id.* at 329.

While *Barrett* noted in dicta that the decedents' family was likewise unaware of the tortfeasors' identities, *id.* at 330, none of this Court's subsequent decisions has held that such knowledge is necessary for a claim to accrue—even in the medical malpractice context. For example, in *Valdez ex rel. Donely v. United States*, the Court described *Kubrick*'s discovery rule as triggering accrual when the "plaintiff . . . learned that the injury he suffered related *in some way* to the medical treatment he received." 518 F.3d at 177 (emphasis added). Nor, as the District Court observed, could the answer be otherwise: If it were, a plaintiff's knowledge of each specific "doctor in the suite" would be a prerequisite "for the clock to begin to run against that doctor." JA___ (Op. 14).

Here, the fact that Plaintiffs were imprisoned and thus prevented from discharging their official duties—the injury specified by Section 1985—was known to them contemporaneously. Moreover, they knew that this injury resulted from external sources—the Iranian revolutionaries that imprisoned them and the US government's inability to negotiate their release. That is precisely analogous to the claimant who knows his injury results from his medical treatment but does not know that this treatment constitutes "malpractice." The fact that Plaintiffs were not aware of the alleged conspiracy to keep them confined, or the identities of the purported co-conspirators, is irrelevant under this Court's precedent. *Levy*, 917 F.3d at 108.

Finally, Plaintiffs contend that the District Court erred by focusing on their initial seizure as the relevant injury, rather than their "prolonged" captivity. OB30-32. But whether Plaintiffs' injury is characterized as their initial seizure or their prolonged detention, Plaintiffs were aware of that *injury* by the time of their release. Plaintiffs' effort to re-characterize the harm does not solve the fundamental problem with the argument: The discovery rule extends *only* to discovery of injury.

In short, even if this Court elects to ignore Plaintiffs' clear waiver and address the merits of their accrual argument, it should nonetheless affirm the District Court's well-reasoned rejection of that argument.

C. Plaintiffs' New Equitable Tolling Argument Is Both Waived and Incorrect

Like their accrual arguments, Plaintiffs' contention that their federal claim is governed by the federal "equitable tolling" doctrine (rather than New York's "equitable estoppel" doctrine) is waived.

Before the District Court, Plaintiffs conceded that New York law—not federal law—governed any equitable exception to the limitations periods for all of their claims. In their complaint, Plaintiffs quoted New York case law for the proposition that, to establish an equitable exception, they must show that Defendants "engaged in affirmative acts of fraud, misrepresentation and/or deception." *Compare* JA___ (AC ¶ 81), *with, e.g.*, *Simcuski v. Saeli*, 377 N.E.2d 713, 716 (N.Y. 1978). Then, when Defendants' motion to dismiss brief argued that New York law governed all

of Plaintiffs' claims—including their federal claim—to the exclusion of the federal equitable tolling doctrine, JA___-___ (MTD 6-7); JA___-___ (MTD Reply 2-3 & n.2), Plaintiffs did not contest that point—again arguing *solely* that their untimeliness should be excused under the New York doctrine of equitable estoppel. JA___-___ (MTD Opp'n 22-31).[5]

Plaintiffs now reverse course and raise a federal tolling argument for the first time. *See* OB32-34. Here, Plaintiffs do not even acknowledge, let alone attempt to justify, their belated change in position. Plaintiffs' equitable tolling argument can and should be dismissed for that reason alone. *See Wal-Mart Stores*, 396 F.3d at 124 n.29.

In any event, Plaintiffs' federal equitable tolling argument fails on its merits for two independent reasons. *First*, as Plaintiffs' were right to initially concede, their federal claim is governed by New York state law and not the parallel (and more lenient) federal tolling standard. *See Pearl*, 296 F.3d at 84-85 (describing the New

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[5] In a footnote, Plaintiffs noted that some New York courts use the "equitable estoppel" label as an "overarching term to cover both" the New York equitable estoppel and equitable tolling doctrines, but they did *not* invoke the federal equitable tolling doctrine cited here. JA___ (MTD Opp'n 22 n.18). Indeed, Plaintiffs made clear that the New York equitable tolling doctrine sometimes subsumed within the "equitable estoppel" label covers circumstances "when the defendant misleads the plaintiff to conceal the existence of a cause of action." *Id.* (citing New York caselaw). That New York equitable tolling doctrine is thus quite different from the federal equitable tolling doctrine Plaintiffs invoke here on appeal, which (Plaintiffs claim, OB32-33) does *not* turn on any wrongdoing by the defendant.

York standard as "less liberal" than the federal doctrine). As this Court has explained, state tolling rules govern claims under Section 1985 unless the application of state law would "defeat the goals" of that statute. *Abbas v. Dixon*, 480 F.3d 636, 641 (2d Cir. 2007) (quoting *Pearl*, 296 F.3d at 80) (as to Section 1983); *see also McGann v. City of New York*, 162 F.3d 1148 (2d Cir. 1998) (summary order) (same as to Section 1985).

Here, there is no suggestion that applying the New York doctrine, rather than its federal analog, would undercut the "central objective of the Reconstruction-Era civil rights statutes," including Section 1985, "to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief," *Hardin v. Straub*, 490 U.S. 536, 539 n.5 (1989) (citation omitted). Plaintiffs thus cannot avail themselves of the more "liberal" federal tolling rules and must meet the high bar required to plead equitable estoppel under New York law. *Pearl*, 296 F.3d at 85. As explained below, Plaintiffs do not come close to satisfying the criteria to invoke the "extraordinary remedy" of equitable estoppel. *See infra* at 40-51.

Second, even if federal equitable tolling principles applied, they would afford Plaintiffs no relief. A plaintiff seeking equitable tolling under federal law must plead facts showing that (1) "some extraordinary circumstance stood in his way and prevented timely filing"; *and* that (2) "he has been pursuing his rights diligently."

Menominee Indian Tribe, 577 U.S. at 250, 255 (citation omitted); *see also Ellul*, 774 F.3d at 801. Plaintiffs do neither.

As to the first requirement, Plaintiffs cite three purported "extraordinary circumstances," but overlook that none of those actions or omissions could have "prevented [them from] filing [a] timely" action before the statute of limitations expired in January 1984. *Menominee Indian Tribe*, 577 U.S. at 255 (citation omitted). Plaintiffs primarily focus their attention on Defendants' purported failure to register as "agents" of the Shah under FARA. *See* OB32-34 (citing *Veltri v. Bldg. Servs. 32B-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004) and *Valdez*, 518 F.3d at 182). But as Plaintiffs themselves point out, allegations related to Chase's purported agency for the Shah are unrelated to their federal claim, which turns only on whether Chase undermined the "October Surprise" negotiations and so prolonged their captivity. *See* OB40 ("The [complaint] does not contend that Chase's advocacy for the Shah is what prolonged the Hostages' captivity."). Plaintiffs' October Surprise allegations theorize that Defendants sought to delay the hostages' release for their *own* financial ends, not as the Shah's lobbyists. *See* JA___-___ (AC ¶¶ 72-73). Whether Defendants registered under FARA therefore could not have impacted Plaintiffs' ability to discover the basis for their federal claim.

The same is true of the other "special circumstances" that Plaintiffs cite: Reed's purported misstatements to Congress and the sealing of the "Project Eagle"

papers. OB23. Neither could have impacted Plaintiffs' ability to bring a *timely* action, because they occurred well after the statutory period expired in 1984. *See* OB13-14 (citing alleged misstatements by Reed "in the early 1990s); *id.* at 16 (alleging Reed's papers were delivered "under seal" in 2012). Actions outside of a lapsed limitations period cannot revive expired claims. *See Koch v. Christies Int'l PLC*, 699 F.3d 141, 157 (2d Cir. 2012).[6]

Plaintiffs' federal tolling argument also fails because that doctrine *separately* requires a plaintiff to plausibly allege that he "acted with reasonable diligence throughout the period he seeks to toll." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *see also Syfert*, 768 F. App'x at 69. As discussed above, public accounts released many years before the present action mirror Plaintiffs' allegations. *Supra* at 5-8. Those accounts firmly rebut Plaintiffs' contention that "despite all due diligence [they were] unable to obtain vital information bearing on the existence of their claim." OB32 (citation omitted). Plaintiffs cannot point to a single allegation showing diligence in investigating their claims in light of the numerous public disclosures. *See Pinaud*, 52 F.3d at 1139, 1158 (rejecting equitable tolling where

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[6] Plaintiffs also claim, in passing, that Defendants "conducted Project Eagle so far out of the public eye that it was 'almost entirely invisible.'" OB34. To the extent this can be understood as one of the "extraordinary circumstances" on which they rest their claim, it clearly does not suffice. *See Syfert v. City of Rome*, 768 F. App'x 66, 69 (2d Cir. 2019) (summary order) ("Conclusory allegations of non-disclosure do not amount to . . . the sort of extraordinary circumstances that warrant equitable tolling." (citing *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1157-58 (2d Cir. 1995)).

pleading failed to indicate "why 'by the exercise of reasonable diligence' [plaintiff] was only able to 'discover' the wrongs against him after" the statutory period had expired (internal quotation marks omitted)); *cf. Pearl*, 296 F.3d at 85 (equitable tolling limited to situations where "a plaintiff could show that it would have been impossible for a reasonably prudent person to learn about his or her cause of action" (emphasis and citation omitted)).

In short, whether due to waiver, inapplicability, or insufficiency, Plaintiffs' equitable tolling arguments are meritless. Plaintiffs' federal claim is untimely, and the District Court properly dismissed it.[7]

II. PLAINTIFFS' STATE LAW CLAIMS ARE UNTIMELY

Plaintiffs concede that their state common law claims are facially untimely. OB34. They contend, however, that those claims are salvaged by New York's doctrine of equitable estoppel. Like their other timeliness arguments, however, Plaintiffs' equitable estoppel argument fails as a matter of law and was rightly rejected by the District Court.

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[7] On appeal, Plaintiffs do not raise any argument that their federal claim should be subject to equitable estoppel under New York law. Rather, Section I of their Opening Brief, which discusses the federal claim, raises only accrual and *federal* equitable tolling arguments. OB24-34. And Section II of their brief discusses equitable estoppel only as to their state claims. *Id.* at 34 (citing only the "New York common law torts" asserted in Counts II through IX of the complaint). Accordingly, Plaintiffs have waived any argument that equitable estoppel applies to their federal claim. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995).

"Equitable estoppel is an extraordinary remedy," *Pulver v. Dougherty*, 58 A.D.3d 978, 979 (N.Y. App. Div. 2009), used "sparingly and only under exceptional circumstances," *Gross v. N.Y.C. Health & Hosps. Corp. (In re Gross)*, 122 A.D.2d 793, 794 (N.Y. App. Div. 1986). A plaintiff seeking to invoke equitable estoppel must plead both (1) that he was "induced by [a defendant's] fraud, misrepresentations or deception to refrain from filing a timely action," and (2) that he exercised "due diligence . . . in bringing his action." *Simcuski*, 377 N.E.2d at 717 (describing "diligence" as "an essential element" of equitable estoppel).

As to the first element, a plaintiff must "articulate[] . . . acts by defendants that prevented [him] from timely commencing suit." *Abbas*, 480 F.3d at 642 (third alteration in original; citation omitted). Under that standard, "[a] wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations." *Zumpano v. Quinn*, 849 N.E.2d 926, 930 (N.Y. 2006). Rather, a plaintiff must allege acts that were "affirmative and specifically directed at preventing the plaintiff from bringing suit; failure to disclose the basis for potential claims is not enough, nor are broad misstatements to the community at large." *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014), *aff'd*, 579 F. App'x 7 (2d Cir. 2014).

As to the second element, "the burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel

have ceased to be operational." *Simcuski*, 377 N.E.2d at 717. Equitable estoppel "will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make inquiry and ascertain all the relevant facts." *Rite Aid Corp. v. Grass*, 48 A.D.3d 363, 364-65 (N.Y. App. Div. 2008). Such knowledge may be imputed where the facts supporting a plaintiffs' claims "were publicly reported and thus discoverable by a reasonable investigation." *Dowe v. Leeds Brown Law, P.C.*, 419 F. Supp. 3d 748, 764 (S.D.N.Y. 2019).

As the District Court correctly found, Plaintiff's allegations satisfy *neither* of these two stringent requirements. JA___, ___ (Op. 20, 28).

A. No Affirmative Acts Prevented Plaintiffs From Suing

Plaintiffs fail to allege any affirmative acts by Defendants that prevented them from timely bringing suit.

First, most of the alleged conduct relied upon in support of Plaintiff's equitable estoppel argument actually occurred long after the limitations period had expired in January 1984. *See* OB39-40. Plaintiffs cite, among other things, allegedly false statements made to congressional investigators in connection with the 1992 Senate and 1993 House reports and a purported misstatement in Rockefeller's 2002 memoir. *See id.* at 19, 40. But actions that post-date the end of the limitations period are legally irrelevant to an estoppel claim. *See, e.g.*, *Powers Mercantile Corp. v. Feinberg*, 109 A.D.2d 117, 122 (N.Y. App. Div. 1985)

("[P]laintiff's claim of equitable estoppel fails since it is based upon a deposition taken at a time when the Statute of Limitations had already run . . . ."), *aff'd*, 494 N.E.2d 106 (1986). Plaintiffs offer no theory under which those statements fell within the limitations period, and accordingly they must be disregarded.

Second, none of the alleged misstatements was directed at Plaintiffs themselves or otherwise had the purpose of "prevent[ing] [Plaintiffs] from bringing suit." *Twersky,* 993 F. Supp. 2d at 442. As the District Court correctly held, a statement can only support equitable estoppel if it is "directed to a plaintiff or intended to frustrate his ability to timely sue." JA___ (Op. 25). The New York Court of Appeals' decision in *Zumpano* illustrates these requirements. There, the court declined to estop the defendant diocese from asserting a limitations defense despite finding that it had engaged in a "corrupt campaign and . . . pattern of concealment"—including repeated relocations of priests and payoffs to victims of clerical sexual abuse in exchange for their silence—designed to prevent the scandal from coming to light. *Zumpano*, 849 N.E.2d at 928. In so holding, the court noted that the defendants' denials did not prevent the plaintiffs from independently investigating the church's conduct. *Id.* at 929.

Zumpano thus makes clear that the allegedly deceptive statements cannot simply be general denials aimed at the public at large, but must be "directed at plaintiffs" and "sufficiently specific so as to admit plaintiffs' reasonable reliance in

failing to investigate or to file suit." *Twersky v. Yeshiva Univ.*, 579 F. App'x 7, 11 (2d Cir. 2014) (summary order); *see also Santo B. v. Roman Catholic Archdiocese of N.Y.*, 51 A.D.3d 956, 958 (N.Y. App. Div. 2008) (no equitable estoppel where plaintiff failed to "aver specific promises or statements" made to plaintiff). Indeed, were the rule otherwise, essentially any public statement short of admitting misconduct would qualify as warranting equitable estoppel. New York courts have thus sensibly required that the extraordinary remedy of estoppel be limited to particularized statements made for the purpose of "concealing the . . . tort," *Ross v. Louise Wise Servs., Inc.*, 868 N.E.2d 189, 198 (N.Y. 2007), and in order to induce the plaintiff not to pursue his claim, *Rich v. Orlando*, 128 A.D.3d 1330, 1331 (N.Y. App. Div. 2015) (holding that the conduct on which estoppel is based requires "intent that such conduct (representation) will be acted upon").

None of Plaintiffs' allegations satisfies that standard. Plaintiffs do not point to a single statement that was directed to them or allegedly intended to frustrate their ability to bring a claim. Instead, the actions that Plaintiffs cite during the limitations period consist only of general denials, none of which actually involve the conduct at issue in this litigation and none of which was made directly to Plaintiffs.[8] For example, Plaintiffs allege that Rockefeller stated to former hostage (but non-

[8] Plaintiffs allege one purported misstatement to former hostage Moorhead Kennedy, but he is not a party to this litigation. *See* OB36-37.

plaintiff) Michael Kennedy that "he barely knew" the Shah. JA___ (AC ¶ 81b). Similarly, they allege that Rockefeller "misrepresented to the public [Defendants'] actual financial interest in the Shah's dynasty" by stating that the Shah's holdings in Chase were of "no real significance." *Id.* (AC ¶ 81c). At most, those statements constitute nothing more than the type of general denials that the New York Court of Appeals held did *not* trigger equitable estoppel in *Zumpano*.[9]

Finally, Plaintiffs also recast Defendants' alleged failure to register under FARA as a basis for estoppel. OB37. But if failure to register were alone enough to trigger estoppel, then Defendants would be "legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations," a result foreclosed by *Zumpano*. 849 N.E.2d at 930. Like

[9] Plaintiffs make much of *Zumpano*'s statement that the plaintiffs failed to "allege any specific misrepresentation to them by defendants, *or any deceptive conduct sufficient to constitute a basis for equitable estoppel*," 849 N.E.2d at 930 (emphasis added), reading the emphasized language to permit estoppel based on "conduct other than statements made directly to plaintiffs," OB38. Their interpretation—which would permit estoppel based on an undefined category of conduct directed to the other parties or the general public—is irreconcilable with the obfuscation at issue in *Zumpano* itself. And Plaintiffs' other cited cases are equally unhelpful. This Court's decision in *Veltri* speaks only to the application of *federal* tolling law. 393 F.3d at 323. And the decision in *Rodriguez v. Morales* states at most that "fraudulent concealment" does not require actual fraud, *not* that the conduct need not be directed at the relevant plaintiff. 200 A.D.2d 406, 407 (N.Y. App. Div. 1994).

generalized denials, a defendant's failure to volunteer information to potential claimants cannot support estoppel. *Id.*[10]

As the District Court observed, Plaintiffs' attempt to reframe the purported failure to register as *active* concealment, rather than a non-actionable omission, would have "breathtaking implications." JA___ (Op. 23). Plaintiffs would treat every failure to comply with any registration or disclosure requirement—conscious or not—as an indefinite bar to asserting the statute of limitations. Plaintiffs cite no authority for treating an alleged failure to comply with routine registration requirements as meeting the extraordinary standard required to satisfy equitable estoppel.

For ease of reference, the chart below identifies each of the estoppel allegations (which appear in paragraph 81(a)-(g) of the complaint) and summarizes—based on the reasons noted above—why each is insufficient to trigger equitable estoppel under New York law:

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[10] Further, despite Plaintiffs' insistence that Defendants' FARA registration "would have [given them] reason to investigate further," OB37, they fail to explain what additional pertinent information such registration would have furnished. Rockefeller's support for and advocacy on behalf of the Shah was well-publicized at the time—including by Rockefeller himself. *See, e.g.*, JA___ (*Why Carter Admitted the Shah* at 3). That registration might in some sense have "strengthened [their] case" through corroboration is no answer. *Pearl*, 296 F.3d at 84-85 (citation omitted).

Para.	Allegation	Response
81(a)	Rockefeller "claimed that aside from a side comment at an April 1979 meeting involving President Carter, he 'did nothing more publicly or privately to influence the administration's thinking,'" and wrote in his biography that "'despite the insistence of journalists and revisionist historians, there was never a "Rockefeller-Kissinger" behind-the-scenes campaign that placed relentless pressure on the Carter administration to have the Shah admitted to the United States regardless of the consequences.'"	The cited statements appear in Rockefeller's 2002 memoirs and so post-date the limitations period. David Rockefeller, *Memoirs* 369 (2002). Additionally, the cited statements were directed to the general public and not to Plaintiffs, as the complaint itself concedes. JA__ (AC ¶ 81(a) (alleging that those claimed misstatements were made "to the public")).
81(b)	In 1981, Rockefeller "met with former hostage Michael Kennedy" and stated that "he barely knew" the Shah.	Mr. Kennedy is not a plaintiff in this case, and the statement that Rockefeller "barely knew" the Shah does not offer any specific contention on which Plaintiffs could reasonably rely.
81(c)	Rockefeller "misrepresented to the public [Defendants'] actual financial interest in the Shah's dynasty" by stating that the Shah's holdings in Chase "may have been small accounts of convenience, but they had no real significance."	The statement was, by Plaintiff's own admission, directed "to the public," rather than any individual plaintiff, and it does not contain any specific statement with regard to the allegedly tortious actions.
81(d)	Defendants "[r]efused to register as foreign agents of the Shah despite being required to do so by [FARA]."	The claimed act is both public-facing, rather than specific to Plaintiffs, and a non-actionable omission.

Para.	Allegation	Response
81(e)	Joseph Reed "deceived Congressional and FBI personnel who investigated in 1992-93 the long-rumored conspiracy to thwart President Carter's hostage negotiations" by (1) "refus[ing] to speak to or even acknowledge investigator contact;" (2) "l[ying] to the FBI by stating that he did not know what October Surprise referred to;" and (3) "further l[ying] to [the FBI] when he denied meeting with Reagan Campaign Chairman William Casey in 1980."	The alleged statements by Reed post-date the limitations period. Also, they were not made to Plaintiffs, and at most reached them as members of the public.
81(g)	Reed donated his secret records of Project Eagle to Yale University but only on the stipulation that the records remain sealed until Rockefeller's death.	The claimed act post-dates the limitations period. It is also public-facing, rather than specific to Plaintiffs, and a non-actionable omission.

See JA___-___ (AC ¶ 81).

B. Plaintiffs Fail To Demonstrate The Reasonable Reliance Or Diligence Necessary To Obtain Equitable Relief

Plaintiffs likewise fail to affirmatively allege the diligence required to merit estoppel. As the District Court observed, "even assuming" that Plaintiffs relied on the acts and omissions noted above, "they have not demonstrated how such reliance was reasonable and dissuaded them from learning of their cause of action or timely bringing suit." JA___ (Op. 28).

That conclusion was plainly correct. As discussed above, New York law requires a party seeking equitable estoppel to "demonstrate . . . due diligence . . . in

ascertaining the facts" underlying their claim, *Pahlad v. Brustman*, 33 A.D.3d 518, 519-20 (N.Y. App. Div. 2006), *aff'd*, 8 N.Y.3d 901 (2007), and failure to allege diligence is grounds for dismissal, *see Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 267-68 (S.D.N.Y. 2006); *see also Putter v. N. Shore Univ. Hosp.*, 858 N.E.2d 1140, 1143 (N.Y. 2006) (affirming dismissal where plaintiff "had sufficient information available to require him to investigate" but alleged no such efforts).

Plaintiffs do not point to any efforts to investigate their claims, despite numerous accounts detailing substantially every material allegation in their complaint that were publicly available for decades prior to their filing a claim. On appeal, Plaintiffs offer no serious response to the District Court's finding that they should have brought, or at least investigated, their claims following the 1981 New York Times article setting forth substantially every allegation in the complaint regarding Chase's purported role in obtaining the Shah's entry. JA___-___ (Op. 28-31); OB41.

Instead, Plaintiffs argue that the District Court erred by focusing on their initial seizure rather than their allegation that Chase undermined the "October Surprise." OB41-42. But two books published as early as 2004 and 2007 raised substantially the same allegations cited in the complaint. JA___-___ (*The Road to 9-11* at 90-92); JA___-___ (*Secrecy & Privilege* 137-39); *see supra* at 7-8. The 2007 account in particular alleges a meeting between Rockefeller "and several of his aides

who were dealing with the Iranian issue" and the Reagan Campaign, and contends that the purpose of the meeting was "to forestall" the October Surprise. JA___-___ (*The Road to 9-11* at 90-91). Those publications were, at very least, sufficient to put Plaintiffs on inquiry notice of potential claims, and their failure to allege *any* responsive action on their own part is fatal to their arguments for equitable estoppel. *See Thea v. Kleinhandler*, 807 F.3d 492, 501 (2d Cir. 2015) ("When a plaintiff relies on a theory of equitable estoppel to save a claim that otherwise appears untimely on its face, the plaintiff must specifically plead facts that make entitlement to estoppel plausible (not merely possible)."); *see also Haining Zhang v. Schlatter*, 557 F. App'x 9, 11-12 (2d Cir. 2014) (summary order) (equitable estoppel unavailable where publication "provided plaintiffs with sufficient time to investigate and timely file their claims"); *Whitney Holdings, Ltd. v. Givotovsky*, 988 F. Supp. 732, 748 (S.D.N.Y. 1997) ("[Plaintiff] has neither affirmatively pleaded diligence in bringing the action nor even asserted that it could not have discovered the facts underlying the claim until 1995.").

Finally, in a last-ditch effort to demonstrate their reasonable reliance and diligence, Plaintiffs point to *Congress's* investigations in 1992-93. Plaintiffs argue that they were somehow excused from pleading diligence because Congress's reports must have included every fact relevant to their claims, and they were thus entitled to rely on them without further inquiry. OB42. That argument does not hold

up. Investigative efforts by third parties cannot satisfy Plaintiffs' diligence obligations, as parties seeking equitable relief must show their *own* diligence. *See Abercrombie*, 438 F. Supp. 2d at 267 ("Without any allegations of diligent action on Plaintiff's behalf, Plaintiff cannot rely on equitable estoppel."). In any event, contrary to Plaintiffs' suggestion, the House and Senate investigations did not "exonerate[] Chase." OB41-42. In fact, the House's report noted the allegations against Chase without purporting to resolve those claims. *See* JA___ (H.R. Rep. No. 102-1, at 81). Far from excusing Plaintiffs' obligation to undertake reasonable diligence, those accounts only *added* to their inquiry notice.

The District Court's conclusion that Plaintiffs could not meet the high bar required to trigger equitable estoppel was not an abuse of discretion, and should be affirmed.

III. PLAINTIFFS' CLAIMS FAIL FOR ADDITIONAL REASONS

Even if they were timely, Plaintiffs' claims would still fail for two additional reasons. *First*, all of Plaintiffs' theories of relief fall squarely within the protection accorded to petitioning activity by the *Noerr-Pennington* doctrine. JA___-___ (MTD 12-21); JA___-___ (MTD Reply 4-9). *Second*, none of Plaintiffs' claims offer a cognizable account of proximate cause—instead relying on attenuated causal chains involving actions by two sovereign actors and serious breaches of international law. JA___-___ (MTD 21-30); JA___-___ (MTD Reply 9-12). Each

argument was fully briefed below and provides an independent basis for affirming the dismissal of Plaintiffs' claims. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982).

A. The *Noerr-Pennington* Doctrine Bars All of Plaintiffs' Claims

The *Noerr-Pennington* doctrine establishes a straightforward and uncontroversial principle: Where a party successfully petitions the government to take an action, a third party who claims to have been harmed by that government action cannot hold the petitioner liable for their harm. *See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) ("[N]o violation . . . can be predicated upon mere attempts to influence the passage or enforcement of laws."). In other words, *Noerr-Pennington* prohibits civil liability for the *results* of a party's petitioning.

Although *Noerr-Pennington* arose in an antitrust context, lower courts have applied *Noerr-Pennington* to claims under federal civil rights statutes, including Section 1985, that would impose liability for the results of petitioning activity. *See, e.g.*, *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1343 (7th Cir. 1977) (noting "chill[ing]" effect suit would have on "the exercise of the right to petition"); *see also Shoultz v. Monfort of Colo., Inc.*, 754 F.2d 318, 321 (10th Cir. 1985) (dismissing § 1985 claim based on "First Amendment right to petition for a redress of grievances"). Likewise, courts have broadly applied *Noerr-Pennington* to state

common-law causes of action that turn on the results of petitioning activity. *Video Int'l Prod. Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988); *see also Bath Petroleum Storage, Inc. v. Markey Hub Partners, L.P.*, 229 F.3d 1135 (2d Cir. 2000) (summary order) ("*Noerr-Pennington* immunity is applicable to . . . state-law claims such as fraud and tortious interference.").

Plaintiffs' claims fall squarely within this protection for petitioning activity. Plaintiffs allege that Chase petitioned the federal government to take certain actions, that the federal government took those actions, and that Plaintiffs were harmed as a *result* of the government action purportedly brought about by Chase's lobbying. *See, e.g.*, JA___, ___-___ (AC ¶¶ 108, 119-20). The actions alleged in Plaintiffs' primary theory—that Defendants "pressur[ed] . . . the United States government" to change its policy and "admit the Shah," JA___ (AC ¶ 43), which in turn led to their harms—is clearly "lobbying" aimed "to influence governmental action," *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380-82 (1991). Plaintiffs' second theory—that Chase "carried out a "propaganda effort that . . . impeded talks to free the captives" and thereby prolonged their captivity, JA___ (AC ¶¶ 73, 76)—is similarly a claim that Defendants successfully opposed a particular government action. Both are clearly protected under *Noerr-Pennington.* Indeed, those allegations are closely comparable to the "publicity campaign to influence governmental action" addressed in *Noerr*. 365 U.S. at 140-41; *id.* at 129 (describing

campaign to "foster the adoption and retention of laws . . . destructive of" a rival business and "to create an atmosphere of distaste for [their rivals] among the general public").

Below, Plaintiffs argued that *Noerr-Pennington* is inapplicable because Defendants' petitioning purportedly involved falsehoods or "illegal and unethical" means. *See, e.g.*, JA___, ___ (AC ¶¶ 39, 50). But the Supreme Court has made clear that *Noerr-Pennington*'s immunity for a petition's *results* are not defeated by allegations concerning the *method* of petitioning. As such, allegations that petitioning activity involved even knowing false statements or deception do not deprive a petition of *Noerr-Pennington* immunity. *See, e.g.*, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("[M]isrepresentations" are "condoned in the political arena"); *Noerr*, 365 U.S. at 140 (no loss of protection even where publicity campaign involved "deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information").

Likewise, *Noerr-Pennington* applies even when the petitioning at issue is undertaken in a "manner" that is "improper or even unlawful." *Omni Outdoor Advert.*, 499 U.S. at 381. As the Third Circuit rightly observed, even where a petition involves "bribery, deceit or other wrongful conduct . . . [t]he remedy for such conduct rests with laws addressed to it and not with courts looking behind sovereign state action." *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp.*, 185

F.3d 154, 162 (3d Cir. 1999); *see also Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 897-900 (10th Cir. 2011) (applying *Noerr-Pennington* to injury resulting from lobbying involving bribery).

In short, Plaintiffs' claims are plainly based on their objection to the results of successful petitioning, and can be rejected on that basis alone.

B. Defendants' Alleged Actions Did Not Proximately Cause Plaintiffs' Harm

Plaintiffs' claims also fail because Plaintiffs do not allege any plausible theory of proximate causation. Instead, they rely on attenuated causal chains requiring extraordinary intervening acts by sovereign actors.

All of Plaintiffs' federal and state claims require them to establish that Defendants' actions proximately caused their injuries.[11] That requirement "place[s] manageable limits [on] liability" by requiring the plaintiff to show that the defendant was "a substantial cause of the events which produced the injury." *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980). Proximate causation

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[11] *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (federal causes of action are "presume[d] . . . limited to plaintiffs whose injuries are proximately caused by violations of the statute"); *Ingrassia v. Lividikos*, 54 A.D.2d 721, 724 (N.Y. App. Div. 2008) (negligence); *Vernes v. Phillips*, 194 N.E. 762, 763 (N.Y. 1935) (false imprisonment); *Klein v. Metropolitan Child Servs., Inc.*, 562 A.D.3d 708, 710-11 (N.Y. App. Div. 2012) (IIED); *Brown v. N.Y.C. Health & Hosps. Corp.*, 225 A.D.2d 36, 44 (N.Y. App. Div. 1996) (NIED). Notably, while proximate causation as to Plaintiffs' federal cause of action is determined by federal law, this Court looks to "state tort analogs" for content of that requirement. *Barnes v. Anderson*, 202 F.3d 150, 158 (2d Cir. 1999) (§ 1983).

turns in part on "the aggregate number of factors involved which contribute towards the harm and the effect [of] each," and "whether the defendant has created a continuous force active up to the time of harm, or whether the situation was acted upon by other forces for which the defendant is not responsible." *Mack v. Altmans Stage Lighting Co.*, 98 A.D.2d 468, 470 (N.Y. App. Div. 1984).

"Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury," the intervening act "breaks the causal nexus" if it is "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct." *Derdiarian*, 414 N.E.2d at 670; *see Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir. 2007) (applying "common law definition of superseding cause" in § 1983 action). For that reason, "an intervening intentional or criminal act will generally sever the liability of the original tortfeasor." *Turturro v. City of New York*, 68 N.E.3d 693, 705 (N.Y. 2016) (citation omitted).

These standards are particularly stringent where an asserted causal chain depends on a sovereign entity's serious breaches of international law. While such cases are necessarily rare, courts considering causal chains that implicate "[a] sovereign's affirmative choice to engage in a wrongful act" have concluded that the state action "usually supersede[s]" other potential causes. *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 393 (7th Cir. 2018); *see also In re Korean Air Lines Disaster of*

Sept. 1, 1983 ("*KAL*"), No. 83-MC-0345, 1985 WL 9447, at *8 (D.D.C. Aug. 2, 1985); *The Lusitania*, 251 F. 715, 736 (S.D.N.Y. 1918). For that reason, a party whose causal theory depends on intervening wrongful acts by a state actor must plead "facts specifically connecting a defendant's actions to the ultimate . . . attack." *Kemper*, 911 F.3d at 393; *cf. also Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (dismissing action where plaintiff offered "no nonconclusory allegation . . . that plausibly shows that moneys . . . transferred to Iran" supported terrorist organizations or attacks.).

Both theories advanced in Plaintiffs' complaint rest on twisting, highly contingent causal chains that cannot satisfy the legal standard for proximate causation. Plaintiffs' claims related to the initiation of the hostage crisis and their prolonged detention require multiple intervening steps, including the actions of both the American and Iranian governments. *See generally* JA___-___, ___-___ (AC ¶¶ 49-57, 76-78); *see also* JA___-___ (MTD 23-24). Moreover, both causal chains depend on Iran's extraordinary breach of international law that cannot be legally ascribed to Defendants.

Plaintiffs' evident response—that Defendants were "warned" of a possibility that their actions could result in the assault on the embassy, *see, e.g.*, JA___ (AC ¶ 43)—is no answer. That a defendant's actions might "ma[k]e it more likely that" a state actor would engage in a wrongful act is insufficient. *Rothstein*, 708 F.3d at

97; *see also Kemper*, 911 F.3d at 393; *KAL*, 1985 WL 9447, at *5 (noting that, prior to downing the aircraft, the Soviet Union warned that flights in its air space might be "fired on without warning"). Plaintiffs allege no facts connecting Defendants to the parties or attacks that harmed them, and their reliance on Defendants' purported knowledge of a risk of harm does not bridge the gap in their pleadings. *Kemper*, 911 F.3d at 393 (proximate causation requires "facts specifically connecting [the] defendant's actions to the ultimate . . . attack").

Taken together, these circuitous causal chains and intervening, extraordinary acts by Iran do not establish proximate causation as a matter of law. The District Court's decision can be affirmed on this independent ground.

CONCLUSION

The District Court's decision should be affirmed.

Dated: July 26, 2021

Respectfully submitted,

/s/ William J. Trach

James E. Brandt
Samir Deger-Sen
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Tel: (212) 906-1200
Fax: (212) 751-4864

Roman Martinez
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Tel: (202) 637-2200
Fax: (202) 637-2201

William J. Trach
Michael F. Houlihan
LATHAM & WATKINS LLP
John Hancock Tower
200 Clarendon Street
Boston, MA 02116
Tel: (617) 948-6000
Fax: (617) 948-6001

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains 13,993 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

Dated: July 26, 2021

/s/ William J. Trach
William J. Trach

STATUTORY ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 1985

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully

qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.