ORAL ARGUMENT SCHEDULED FOR JANUARY 21, 2016
Nos. 14-7193 (Lead), 14-7194, 14-7195, 14-7198, 14-7202, 14-7203, 14-7204

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

SUSAN WEINSTEIN, *individually as Co-Administrator of the Estate of Ira William Weinstein, and as natural guardian of plaintiff David Weinstein (minor)*, et al.,

Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,

Appellees,

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Garnishee-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (Nos. 1:00-cv-2601-RCL; 1:00-cv-2602-RCL; 1:01-cv-1655-RCL; 1:02-cv-1811-RCL; 1:08-cv-520-RCL; 1:08-cv-502-RCL; 1:14-mc-648-RCL)

GARNISHEE-APPELLEE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' RESPONSE TO APPELLANTS' MOTION FOR LEAVE TO FILE THEIR REPLY BRIEF OVERSIZED

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Appellants' Motion For Leave To File Their Reply Brief Oversized ("Motion") continues their complete disregard of the rules which apply to everyone else, but to which Appellants believe themselves immune. Under D.C. Circuit Rule 28(e), the Motion should have been filed at least one week prior to the (extended) due date for their reply brief. It was not. Appellants likewise were required to file a *compliant* brief unless and until this Court said otherwise. They did not. Instead, Appellants filed their Motion on the reply brief's due date and, in direct contravention of Rule 28(e), they lodged only a *non-compliant* brief on that date. These procedural deficiencies alone warrant denial of Appellants' Motion. Furthermore, Appellants fail to offer any plausible reason for ignoring this Court's rules. Appellants' decision in their opening brief to ignore numerous issues that have been raised throughout these proceedings does not create an "extraordinarily compelling reason[ ]" for filing a reply brief that exceeds the word limit by more than 2,000 words. Accordingly, Garnishee-Appellee, the Internet Corporation for Assigned Names and Numbers ("Appellee"), respectfully requests that the Motion be denied.

I. APPELLANTS' MOTION IS UNTIMELY.

"[I]f a party wants to file an overlength brief, the party should seek leave to do so well before the brief is due," in order to "negate[ ] any implication that counsel is arrogantly presuming that the court will grant permission to file the

completed, overlength brief that is tendered on its due date." Bloomberg BNA, Federal Appellate Practice § 3.2(A)(3) (2d ed.); *id.* § 3.4(L)(2) ("counsel must predict as far in advance as possible whether it will be necessary to apply for leave to exceed the word limits and submit the request early enough to cut and trim some more, if the court rejects the request"). Thus, Circuit Rule 28(e)(2) explicitly requires that "[a] motion to exceed the limits on length of briefs . . . must be filed at least 7 days before the brief is due." *Id.* Moreover, Circuit Rule 28(e)(4) further requires that, "in the absence of an order granting a waiver," a party must "meet all filing requirements"—namely, that it must file a timely brief that is within the word limits. Finally, under Circuit Rule 28(e)(2), "[m]otions filed less than 7 days before the due date *will be denied absent exceptional circumstances*." *Id.* (emphasis added).

Here, Appellants have flouted every aspect of the clear and unambiguous requirements of Circuit Rule 28(e). Appellants' reply brief was due on October 27. Thus, under Circuit Rule 28(e)(2), a motion to exceed the word limit was required to be filed by October 20. Appellants, however, chose not to file their Motion until October 27, the very day that their reply brief was due. Circuit Rule 28(e)(4) also required that Appellants file a *compliant* brief unless and until this Court allowed otherwise. As this Court's rules clearly state: "Submission of a motion to exceed the limits on length of briefs or extend the filing time for a brief does not toll the

time for compliance with filing requirements. Movants will be expected to meet all filing requirements in the absence of an order granting a waiver." D.C. Cir. R. 28(e)(4). Appellants, however, ignored this requirement as well. Instead, Appellants chose to lodge with this Court *only* a non-compliant brief that exceeds the word limit by 2,363 words.

Nor have Appellants even arguably demonstrated the "exceptional circumstances" necessary to justify their decision to file their Motion "less than 7 days before the due date." D.C. Cir. R. 28(e)(2). Indeed, Appellants *concede* that they have known for approximately one month that, in their view, additional words would be required. Motion at 3; *see* Exhibit A to Appellants' Motion ("Exh.") at 7.[1] Appellee filed its opposition brief on September 28. As Appellants acknowledge in their Motion, they "*immediately recognized* that replying to [Appellee's brief] was going to be a difficult task" that, in their view, "would require more time and space than a typical reply brief." Motion at 3 (emphasis added). Thus, on September 29, Appellants' counsel sent an email that asked Appellee's counsel to consent to allow 3,500 extra words in their reply brief, as well as a 30-day extension of the due date. Exh. at 7. In that email, Appellants' counsel further explained that "we would like to move *now* for those 3,500 words."

[1] Exhibit A to Appellants' Motion is a chain of email correspondence between Appellants' counsel and Appellee's counsel.

Id. (emphasis added). Two days later, on October 1, Appellee's counsel sent an email informing Appellants' counsel that Appellee would consent to a two-week (rather than a 30-day) extension of the due date but not to an extension of the word limit. *See id.* Appellants thus had 29 days to prepare their reply brief. However, instead of filing a motion for additional words at that time, or any other time in the ensuing 22 days, Appellants waited until the very day their reply brief was due to file the present Motion.

Appellants' attempts to justify their dilatory filing are frivolous. Their principal argument is that their Motion "does not fit within Circuit Rule 28(e)" because that rule "pertains to motions filed well before the brief, seeking *prospective* leave to exceed the word limits," whereas here, Appellants "ask[] the Court to accept the brief *retrospectively*, notwithstanding that it is oversized." Motion at 4 (emphases in original). According to Appellants, "the 7-day limitation in Circuit Rule 28(e) exists to enable the Court to respond to motions to exceed the word limits before the deadline to file has run," but the 7-day rule is inapplicable to a motion that is "filed at or just before the deadline." *Id.* at 4–5. This is absurd. Under Appellants' proffered interpretation, Circuit Rule 28(e)(2) simply prevents motions to exceed the word limit from being filed 2, 3, 4, 5, or 6 days before the brief's due date, but not motions to exceed the word limit that are filed *on or after* the due date. This is tantamount to saying that the timing rule applies only when a

motion is timely. Indeed, Appellants' reading of Circuit Rule 28(e)(2) would render it a dead letter since, if correct, no party would ever file a motion for additional words until the date the brief was due. Rule 28(e)(2), however, is explicitly intended to *foreclose* that type of brinksmanship.

Appellants also make the bizarre argument that "exceptional circumstances" exist for their failure to file a timely Motion because Appellants identified their desire for extra words and raised the issue with opposing counsel nearly a month ago, but chose not to raise it with the Court until now. *See* Motion at 5. This, of course, gets it precisely backwards. The fact that Appellants identified their professed need for additional words nearly a month ago demonstrates that there was no late-breaking, exceptional circumstance that could possibly justify a reprieve from the ordinary rule that a motion to exceed the word limit "*must* be filed at least 7 days before the brief is due" (D.C. Cir. R. 28(e)(2) (emphasis added)). Appellants had ample time to file a timely motion for additional words; they inexplicably *chose* not to do so.

Accordingly, because Appellants failed to file their Motion "at least 7 days before the[ir] [reply] brief [was] due," and because no "exceptional circumstances" even remotely justify such failure, Appellants' Motion should be rejected. D.C. Cir. R. 28(e)(2).

II. APPELLANTS' MOTION IS MERITLESS.

Even if Appellants had timely moved this Court for permission to exceed the word limit for their reply brief (which they did not), their Motion would still be meritless. Circuit Rule 28(e)(1) provides that "[t]he court disfavors motions to exceed limits on the length of briefs" and that "such motions will be granted only for *extraordinarily compelling* reasons." D.C. Cir. R. 28(e)(1) (emphasis added). Here, however, there are no "extraordinarily compelling reasons" for exceeding the word limit.

Appellants argue that they need extra words so they can respond to several "new issues" that Appellee has purportedly raised. *See* Motion at 2–3. Appellee, however, raised no "new" issues in this case. To the contrary, the issues raised in Appellee's opposition brief are the *same* issues that Appellee has been raising throughout these proceedings. Take, for example, Appellee's argument that Appellants' claim is foreclosed by the Foreign Sovereign Immunities Act. Appellee has made clear at every stage of these proceedings that this was an issue:

- Appellee raised that issue below in its memorandum in support of the motion to quash. Mem. in Support of Non-Party ICANN's Mot. to Quash Writs of Attachment ("Motion to Quash"), D.E. 89-1, at 24–25 (July 29, 2014) ("Even if [the country-code top-level domains at issue here] can be considered 'property in the United States of a foreign state,' this Court lacks jurisdiction to issue their attachment under the

FSIA.") (capitalization altered).[2]

- Appellee re-iterated this issue in their reply brief in support of the motion to quash. Non-Party ICANN's Reply in Support of Its Mot. to Quash Writs of Attachment, D.E. 109, at 9 (Oct. 10, 2014) ("As ICANN explained in its Motion to Quash, even if the .IR, .SY, and .KP ccTLDs are considered property of Defendants, then the FSIA bars this Court's subject-matter jurisdiction.").

- Appellee raised the issue again in *this Court* in opposition to Appellants' motion for certification. Appellee's Opp'n To Appellants' Motion To Certify ("Certification Opp'n") at 13, No. 14-7193 (D.C. Cir. June 9, 2015) ("Attachment of a foreign state's property in the United States is controlled by the Foreign Sovereign Immunities Act, which provides that 'the property in the United States of a foreign state shall be immune from attachment . . . except as provided' in 28 U.S.C. §§ 1610–1611. In other words, this Court may exercise jurisdiction only if one of the narrow exceptions in Sections 1610 and 1611 of the Foreign Sovereign Immunities Act applies. Importantly, however, no such sovereign immunity exception applies here. As such, once the parties commence merits briefing on these appeals, the Court will be able to resolve the present appeals simply by holding that it lacks jurisdiction.") (citations, emphasis, and footnote omitted).

- Indeed, at that time, Appellants themselves *acknowledged* that Appellee "seem[ed] intent" on raising this jurisdictional argument in its appellate brief. Appellants' Reply In Supp. Of Mot. To Certify at 3, No. 14-7193 (D.C. Cir. June 11, 2015).

In short, Appellants were well aware that the Foreign Sovereign Immunities Act has always been at issue in this matter, *and that it was specifically at issue in this appeal*.

[2] When citing to items filed in the District Court that were not included in an appendix, docket numbers correspond to *Weinstein v. Islamic Republic of Iran*, and page numbers correspond to the electronic case-filing numbering.

Appellants, therefore, cannot plausibly contend that the Foreign Sovereign Immunities Act argument is "new." Instead, Appellants once again *chose* to ignore this issue in their opening brief. That tactical judgment is obviously not an "extraordinarily compelling reason[]" under Circuit Rule 28(e). Indeed, if it were, then extensions of the word limits under Circuit Rule 28(e) would be the norm rather than the exception. Appellants would routinely ignore obvious counter-arguments in their opening briefs and then claim additional words are necessary to address them in their reply briefs. This would be unwarranted in any circumstance, but it is particularly unwarranted where, as here, Appellee explicitly (and repeatedly) *told* Appellants that it would make the very argument that Appellants now claim that they need additional words to address.

Three additional circumstances further underscore why this Court should deny Appellants' Motion. *First*, as noted above, Appellee consented to a 14-day extension of Appellants' due date, giving Appellants almost twice the usual time to prepare their reply brief. Appellants, therefore, had ample time to winnow down their brief to comply with this Court's rules and/or file a timely motion to exceed the word limit. *Second*, the Federal Rules of Appellate Procedure already permit an appellant to use 7,000 words more than an appellee. *See* Fed. R. App. P. 32(a)(7)(B)(i). The reason for this, of course, is so that an appellant can both make its affirmative argument *and* respond to an appellee's counter-arguments. It is well

settled that this Court can "affirm a judgment on any ground that is properly raised below and that, as a matter of law, sustains the judgment." 5 Am. Jur. 2d Appellate Review § 774. Therefore, the need to respond to such counter-arguments is not an "extraordinary circumstance"; but rather, it is the norm. *Third*, the reply brief that Appellees have lodged already abuses the requisite glossary requirement (D.C. Cir. R. 28(a)(3)) to impermissibly skirt this Court's word limit by: (i) including substantive explanations of certain issues in the glossary; (ii) assigning acronyms to those substantive explanations; and (iii) using the acronyms so defined in the brief.[3]

A recent case from the Federal Circuit illustrates the potentially severe consequences of the sorts of gamesmanship engaged in by Appellants here. In *Pi-Net Int'l, Inc. v. JPMorgan Chase & Co.*, a party filed an opening brief that "deleted spaces between various words" in an effort to evade the word-count requirement. Order at 2, *Pi-Net Int'l, Inc. v. JPMorgan Chase & Co.,* No. 2014-

[3] *See, e.g.*, Appellants' Lodged Reply Brief at viii (purporting to define the acronym "FSIA" as follows: "The Foreign Sovereign Immunities Act, codified at 28 U.S.C. 1602-1611. Of those sections, only 28 U.S.C. 1609-11 are relevant or potentially [*sic*] to this appeal. The term 'FSIA' is often, but erroneously, used by ICANN and others to refer also to TRIA §201. TRIA §201 is not part of the FSIA and was codified as a note to it by the Office of Law Revision Counsel."); Appellants' Lodged Reply Brief at viii (purporting to define "IP" as "Internet Protocol. When used as part of the phrase 'IP address,' refers to a numerical label assigned to an electronic device that connects to the Internet (*e.g.* a computer, mobile phone, or printer).").

1495 (Fed. Cir. Apr. 20, 2015). After the court directed the party to show cause why the "appeal should not be dismissed for failure to file an opening brief in compliance with the court's rules," the party moved for leave to file a "corrected brief" that "replace[d] various phrases or case citations with abbreviations such as 'TOA1' and list[ed] those citations only in the table of authorities." *Id.* The court denied the motion to file a corrected brief and dismissed the appeal. *Id.*; *cf.* Fed. R. App. P. 31(c) ("If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal."); 5 Am. Jur. 2d Appellate Review § 774 ("An appellate court also may affirm a lower court's opinion solely on the basis of a party's failure to comply with the jurisdiction's appellate rules of procedure . . . ."). Appellee takes no position on whether a similar response is warranted here. But at the very least, the *Pi-Net* case further underscores why the present Motion should be denied.

III. APPELLEE'S COUNSEL AND THIS COURT HAVE ACCOMMODATED APPELLANTS, NOT THE OTHER WAY AROUND.

Finally, Appellee feels obligated to briefly respond to Appellants' baseless assertion that Appellants have "accommodate[d]" Appellee in this matter. Motion at 5. Appellee neither sought nor received any accommodation from Appellants. To the contrary, Appellee filed its opposition brief on time and within the word limit. Appellee then *consented to*—and this Court granted—Appellants' motion

for a two-week extension, which roughly doubled the time that Appellants had to prepare their reply brief. Notwithstanding this generous extension, Appellants refused to comply with this Court's rule stating that a compliant brief *must* be filed by the due date, even after Appellee's counsel reminded Appellants of this obligation. *See* D.C. Cir. R. 28(e)(4); Exh. at 2 (e-mail from Appellee's counsel); Motion at 6 (conceding that Appellants did not "submit a complaint [*sic*] reply brief"). Nevertheless, Appellants now attempt to justify their dilatory Motion on the spurious ground that *they* have made a "good faith effort to accommodate the wishes of opposing counsel" and that *Appellee* has "refused to be reasonable." Motion at 5. Needless to say, the record clearly indicates that such claims are a fallacy.

* * *

The rules exist for a reason. Appellants, like others, should be required to abide by them. Accordingly, Appellee respectfully requests that this Court deny the Motion.

Dated: October 30, 2015

Respectfully submitted,

/s/ Noel J. Francisco

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. In addition, the electronic filing described above caused the foregoing to be served on all registered users to be noticed in this matter, including:

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Dated: October 30, 2015

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