No. 24-277

IN THE
Supreme Court of the United States

SHARI MAYER BOROCHOV, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN AND
SYRIAN ARAB REPUBLIC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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The question presented is certworthy, and this case is an ideal vehicle to resolve it. The United States does not contend otherwise. Instead, it speculates that there could theoretically be further percolation despite the D.C. Circuit's effective monopoly and suggests review is not warranted because the decision below is correct. Those are no reasons to deny review of this important question, the answer to which will determine whether hundreds or thousands of wounded victims of terrorist attacks—often U.S. servicemembers—can seek redress for their injuries.

Moreover, the decision below *is* incorrect. The D.C. Circuit erroneously confined the terrorism exception's material support prong to aiding-and-abetting liability by ignoring the broader statutory scheme, as the United States does here. But Section 1605A's material support prong is just the civil tort analog to the criminal prohibitions on providing material support to terrorists in 18 U.S.C. §§ 2339A and 2339B, which apply not only to instances of aiding or abetting but whenever a person provides material support knowing or intending it will aid a terrorist attack, even if it does not occur. The terrorism exception provides a font of jurisdiction for similar civil claims for injuries caused by a foreign state's provision of material support to terrorism. None of the D.C. Circuit's or United States' arguments to the contrary is persuasive. This Court should grant review.

I. THE UNITED STATES DOES NOT DISPUTE THE CERTWORTHINESS OF THE QUESTION PRESENTED.

A. The United States does not dispute that the question presented—whether the Foreign Sovereign Immunity Act's (FSIA) terrorism exception applies when a foreign state materially supports a terrorist attack that results only in injury—is important enough to merit this Court's review. As the United States recognizes (at 8), the terrorism exception provides "an important means of fighting terrorism, discouraging material support for terrorism, and providing a measure of redress to victims of terrorist attacks and their families." It thus plays a crucial role in balancing the need to "respect[] the immunity historically afforded to foreign sovereigns" against the need to "hold[] them accountable … for their actions." *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 208-09 (2018).

Whether that balance shifts based on the fact that the terrorist attack that injured the plaintiff happened also to kill some other victim is worthy of this Court's review. Its resolution will determine whether hundreds or thousands of wounded victims of terrorist attacks—often U.S. servicemembers—can sue the state sponsors of terrorism whose material support for terrorist groups caused their injuries. See Pet. 24. This is a case where the D.C. Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Rather than dispute the certworthiness of the question presented, the United States primarily contends the D.C. Circuit's decision is correct. See U.S. Br. 8-17. That is wrong. See Pet. 12-23; *infra* pp.4-11. But this Court should grant review regardless.

Rulings by this Court on important questions of statutory interpretation better enable dialogue between Congress, the Executive, and the Judiciary about whether changes in the law are needed, as would be the case here if the D.C. Circuit's interpretation stands. Because it is Congress, not courts, that sets the boundaries of foreign sovereign immunity, it is imperative that the text Congress enacted be construed correctly. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Before a significant exception to sovereign immunity—which has been utilized in numerous cases—is abruptly foreclosed, this Court should address the proper meaning of that text. That is why this Court often "grant[s] certiorari because of the importance of [a] case" before ultimately "affirm[ing]." *Saenz* v. *Roe,* 526 U.S. 489, 498 (1999).

B. The United States does not dispute that this case is an ideal vehicle to decide the question. Instead, the United States speculates that conceivably there *could be* future vehicles from other circuits. U.S. Br. 17-18. But that speculation rests on the assumption that parties and courts will disregard the FSIA's venue provision, which provides for venue where "the events or omissions giving rise to the claim occurred" or in the "District of Columbia." 28 U.S.C. § 1391(f); see U.S. Br. 18 & n.2 (citing cases where the venue provision was not addressed, held "not exclusive," or held "forfeit[ed]"). And notably, the United States does not suggest that cases may arise in other circuits because terrorist attacks are likely to occur on U.S. soil. The possibility that the FSIA's provision for venue in the District of Columbia could be disobeyed is an inappropriate basis on which to prospect further percolation.

Indeed, it is not even clear that the United States actually thinks further percolation is likely. It hedges that "[e]ven if" additional percolation does not occur, review still is "not warrant[ed]" because "[t]he court of appeals' decision is correct" and if it is not, that is Congress's problem. U.S. Br. 17 (acknowledging that "Congress might prefer a different result"). Those are not reasons to deny review. Because the well of vehicles to decide this important federal question is very likely to run dry, the Court should grant review now. See Pet. 28-29.

II. THE DECISION BELOW IS ERRONEOUS.

The United States urges denial of the petition based largely on its view that the decision below is correct. This Court should grant review regardless. See *supra* pp.2-3. But the decision below *is* wrong.

A. The terrorism exception extends jurisdiction to cases seeking "money damages … for personal injury or death that was caused by an act of … extrajudicial killing … *or* the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1) (emphasis added). The United States asserts (at 12) that "[a] foreign state cannot naturally be said to have provided material support or resources *for* an act of extrajudicial killing if no such act occurs." But that is *ipse dixit*, in tension with the United States' own criminal prosecutions for providing material support to terrorists, and true only if, as the United States contends, "for" requires a causal link between the material support and a completed killing.

If, as the district court held (Pet. App. 44a), "for" instead refers to the "object or purpose of an action," then material support can be provided for an act of extrajudicial killing—and if the provision of support

causes an injury, complete the tort—even if the extrajudicial killing does not come to fruition. All concede that "for" *can* refer to an intended goal. See Pet. App. 20a (D.C. Circuit); U.S. Br. 12 ("'for' *may also* 'refer to the cause or instigation of an act'" (emphasis added) (quoting Pet. App. 19a)). The only question is whether "for" refers to intent in the terrorism exception. Text and context make clear that it does.

1. The terrorism exception "uses the word 'or' to connect" its commission of terrorism and material support prongs, and "'or' is 'almost always disjunctive.'" *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79, 87 (2018) (citation omitted). Thus, the prong covering claims based on a foreign state's "act of … extrajudicial killing" and the prong covering claims based on a foreign state's "provision of material support … for such an act" are separate fonts of jurisdiction for separate claims. 28 U.S.C. § 1605A(a)(1). The first is triggered by a foreign state's commission of terrorist attacks; the second by the foreign state's provision of material support *for* such attacks. Reading "for" to refer to "causation of the completed act," Pet. App. 20a, 22a, collapses the disjunctive prongs of the terrorism exception and distracts from the causation provided in the text. It thus strangely eliminates jurisdiction over claims arising from "personal injury or death … *caused by* … the provision of material support," 28 U.S.C. § 1605A(a)(1) (emphasis added); see Pet. 14.

2. The D.C. Circuit (Pet. App. 16a-17a) and United States (at 13) contend the material support prong provides only aiding-and-abetting liability. But neither explains why, if Congress merely intended to do so, it did not employ the explicit language of aiding-and-abetting as it has elsewhere in the terrorism context. Pet. 19; 18 U.S.C. § 2333(d)(2).

The more natural construction—specifically indicated by Section 1605A's text, contra U.S. Br. 13—is to construe the material support prong in line with the statutes criminalizing the provision of material support to terrorists. See 18 U.S.C. §§ 2339A, 2339B. Section 1605A expressly directs as much, stating that "the term 'material support or resources' has the meaning given that term in section 2339A of title 18." 28 U.S.C. § 1605A(h)(3). This is clear textual evidence that Congress meant to extend jurisdiction to civil claims for providing material support on the same terms as the criminal prohibitions in Sections 2339A and 2339B.

Both Sections 2339A and 2339B are "preventive measure[s]" that "criminaliz[e] not terrorist attacks themselves, but aid that makes the attacks more likely to occur." *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 35 (2010). Specifically, Section 2339A criminalizes the provision of "material support or resources … knowing or intending that they are to be used in preparation *for*, or in carrying out" various terrorist acts, including torture, murder, destruction of aircraft, and hostage taking—the very acts covered by the FSIA's terrorism exception. 18 U.S.C. § 2339A(a) (emphasis added); see 28 U.S.C. § 1605A(a)(1). And Section 2339B criminalizes "knowingly provid[ing] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1). Neither provision requires that a terrorist attack actually happen; providing material support with the requisite intent violates the statutes regardless. See *United States* v. *Hassoun*, 476 F.3d 1181, 1188 (11th Cir. 2007); *United States* v. *Moalin*, 973 F.3d 977 (9th Cir. 2020). Thus, it is incorrect for the United States to contend (at 12) that material support "cannot naturally" be provided

"*for* an act of extrajudicial killing if no such act occurs." It criminally charges individuals on precisely these grounds.

Because neither Section 2339A nor Section 2339B requires a terrorist attack to occur, they are distinct from aiding-and-abetting liability, which requires the completion of an underlying crime. Rather, the provision of material support is a crime in and of itself—an act of primary liability. Demonstrating this, the United States regularly charges individuals for *aiding and abetting* the provision of material support to terrorists. See, *e.g.*, *United States* v. *Ghayth*, 709 F. App'x 718, 722 (2d Cir. 2017); *United States* v. *Farhane*, 634 F.3d 127, 149 n.18 (2d Cir. 2011).

Inasmuch as Section 1605A's material support prong is the civil counterpart to Section 2339A, it should likewise be interpreted as a standalone wrong that triggers jurisdiction regardless of whether the supported terrorist act (*e.g.*, the extrajudicial killing) occurs. The meaning of "for" in Section 2339A is object or purpose, and the same is true of the terrorism exception. See 18 U.S.C. § 2339A (criminalizing material support provided "in preparation *for*" terrorist acts).[1]

B. Both the United States and the D.C. Circuit expressed concern that the statute cannot function properly if "for" means "object or purpose." But the

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[1] The primary distinction between a criminal claim under Section 2339A and a civil claim under the FSIA is that, because the latter is a civil tort, material support must result in some injury to the plaintiff—*i.e.*, "cause[]" "personal injury or death." 28 U.S.C. § 1605A(a)(1); see *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 692 (7th Cir. 2008) (en banc) ("[T]here is no tort without an injury.").

statute functioned fine for decades before the D.C. Circuit upset the broad consensus of district court judges applying it.

1. The D.C. Circuit worried that interpreting "for" to refer to intent would create "challenging factual inquiries." Pet. App. 21a. The United States wisely abandons this reasoning. Courts have no difficulty resolving intent-based factual inquiries in criminal material support cases. As the United States has recognized, proving general intent to support terrorist attacks—not the "specific intent the perpetrator of the actual terrorist act must have to commit one of the specified offenses"—suffices. U.S. Dep't of Justice, Part 15, Providing Material Support to Terrorists (18 U.S.C. § 2339A), Criminal Resource Manual, https://www.justice.gov/archives/jm/criminal-resource-manual-15-providing-material-support-terrorists-18-usc-2339a. The same is true of civil cases. See *Owens* v. *Republic of Sudan*, 864 F.3d 751, 799 (D.C. Cir. 2017) (holding as much for the terrorism exception), *vacated on other grounds sub nom. Opati* v. *Republic of Sudan*, 590 U.S. 418 (2020). Moreover, intent can be proven with circumstantial evidence and overlaps heavily with the showing of reasonable foreseeability required by the proximate cause element, so it is not an especially challenging inquiry. *See United States* v. *Hassan*, 742 F.3d 104, 139-42 (4th Cir. 2014); *United States* v. *Hendricks*, 950 F.3d 348, 352 (6th Cir. 2020); *Owens*, 864 F.3d. at 794, 798.

2. Still, the United States echoes the D.C. Circuit's concern that if "for" means intent, "[a] foreign state sponsor of terrorism could not be sued for *itself* attempting an extra-judicial killing in which no one died, but it *could* be sued for supporting *another actor's* failed attempt." U.S. Br. 12; Pet. App. 21a. But

this supposed oddity just reflects the fact that tort law generally does not encompass attempts. See *Boim*, 549 F.3d at 692. The terrorism exception covers material support provided for specified acts of terrorism, irrespective of whether they ultimately occur, because providing material support for terrorism is a congressionally created standalone tort. And Congress's policy choice is explained by the reality that state sponsors of terrorism more frequently support terrorist groups than directly commit acts of terror themselves. See Pet. 20.[2]

Moreover, the United States cannot explain why this supposed "illogical asymmetry" is preferable to the illogic of jurisdiction over a plaintiffs' claim turning on whether an unrelated victim died. Its only response is that "'the FSIA requires line-drawing,'" but that equally explains any asymmetry between the treatment of foreign states the directly commit terrorist attacks and those that materially support them. U.S. Br. 16 (quoting *Force* v. *Islamic Republic of Iran*, 610 F. Supp. 3d 216, 228 (D.D.C. 2022)). Congress has repeatedly expressed desire to provide remedies for victims for terrorism. See *Han Kim* v. *Democratic People's Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014) ("With [its enactments], Congress aimed to prevent state sponsors of terrorism … from escaping liability for their sins."). So, if "illogic[]" in the statute

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[2] Any asymmetry is less substantial than the United States contends. If a state sponsor of terrorism attempts an extrajudicial killing itself but fails to kill the victim, in many instances it will nonetheless have tortured the victim and thus be liable under that prong of the terrorism exception, which, as the United States acknowledges (at 10), does not require death. See 28 U.S.C. § 1605A(a)(1), (h)(7).

matters, it cuts in favor of interpreting the material support as creating standalone liability.

3. The United States contends the material support prong cannot "provide a 'freestanding' basis for jurisdiction," because the material support prong's use of "'such an act' refers back to the enumerated [terroristic] acts" such as an extrajudicial killing. U.S. Br. 11, 13. And it worries, with the D.C. Circuit, Pet. App. 22a-25a, that if the provision of material support is enough to trigger jurisdiction without the completion of an enumerated terroristic act, it would be difficult to determine the conditions upon which a court "'shall hear a claim,'" some of which turn on "'the time the act described in paragraph (1) occurred,'" U.S. Br. 14-15 (quoting 28 U.S.C. § 1605A(a)(2)(A)(i)(I), (ii)).

But the material support prong can both be freestanding and refer to specific terrorist acts, just as in Section 2339A. After all, there must be a purpose—*i.e.*, a terrorist act—"for" which the support is given. And if that provision of material support causes the injury, there is jurisdiction regardless of whether the enumerated act occurs.

As far as the conditions listed in Section 1605A(a)(2)(A), courts should naturally look to the time the material support was provided since that is the "act" that must "cause[]" "personal injury or death." 28 U.S.C. § 1605A(a)(1). But regardless of whether the "relevant date" is when material support is provided or when the injury occurs, as the United States suggests (at 14), it is unlikely to pose a practical problem for courts assessing claims. State sponsors of terrorism are so designated precisely because they provide *ongoing* support for terrorism, see Pet. App. 30a-34a (detailing the years of support Syria and Iran have provided to Hamas), and most—including

Iran and Syria here—have been designated as such for decades.[3]

4. Finally, the United States suggests that reading "for" to refer to intent "would 'broadly expand'" the terrorism exception to cases where "the act that injures the plaintiff is not one covered by the terrorism exception." U.S. Br. 14 (quoting Pet. App. 21a). But that simply begs the question whether the statute already extends jurisdiction to cases where the provision of material support causes an injury, as the majority of decisions involving numerous victims have long held. Petitioners are not "broadly expand[ing]" the statute; the D.C. Circuit, at the United States' urging, has greatly narrowed it.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Moreover, subsection (a)(2) merely provides conditions which, if met, *require* the court to hear the claim. The text does not provide conditions that *must* be met for the court to hear the claim. Notably, the terrorism exception used to say "the court shall *decline* to hear a claim" if certain conditions were not met, but Congress changed that when it expanded the terrorism exception in 2008. Compare 28 U.S.C. § 1605(a)(7) (2006) (emphasis added), with 28 U.S.C. § 1605A(a)(2). That amendment "ha[s] real and substantial effect." *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 589 U.S. 178, 189 (2020) (citation omitted). Today, subsection (a)(2) merely restricts courts' discretion to decline to exercise jurisdiction based on any number of abstention doctrines.

Respectfully submitted.

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