No. 23-

IN THE

Supreme Court of the United States

CHAVA RACHEL MARK, *et al.*,

Petitioners,

v.

REPUBLIC OF THE SUDAN,
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioners, victims of a Sudan-sponsored Hamas terrorist attack, sued Sudan under the terrorism exception to the Foreign Sovereign Immunities Act. 28 U.S.C. § 1605A. Subsequently, the government entered into a comprehensive settlement with Sudan and removed Sudan from the list of designated state sponsors of terrorism. The settlement provided compensation for all of Sudan's terrorism victims except the petitioners and other victims of Sudan-sponsored Hamas terrorist attacks. The settlement included legislation that removed subject matter jurisdiction for all terrorism claims against Sudan except those arising out of the September 11, 2001 attacks. Sudan Claims Resolution Act ("SCRA"), Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020) (codified at 28 U.S.C. § 1605A (note)).

The petitioners challenged the constitutionality of the settlement. The D.C. Circuit analyzed the constitutionality of the jurisdiction-stripping provision without considering its interdependence with the other terms of the settlement. Finding that provision to be valid, the court held that it lacked jurisdiction to consider the Petitioners' constitutional challenges to other parts of the settlement and to the settlement as a whole.

The questions presented are:

1. Whether, as the D.C. Circuit held, the SCRA stripped the courts of jurisdiction over constitutional challenges to the rest of the settlement or the settlement as a whole, and if so, whether the denial of any judicial forum for these constitutional claims is, itself, unconstitutional.

2. Whether the D.C. Circuit improperly reviewed the constitutionality of the SCRA in isolation, ignoring its interdependence with the rest of the settlement.

LIST OF PARTIES

The petitioners were plaintiffs in the district court. They were the appellants in the court of appeals.

Respondent, Republic of the Sudan, was the defendant in the district court and an appellee in the court of appeals.

Respondent, the United States, was an intervenor in the district court and an appellee in the court of appeals.

LIST OF PROCEEDINGS

This case arises from the following proceedings:

Mark v. Republic of Sudan, No. 21-5250 (D.C. Cir.) (opinion issued and judgment entered July 21, 2023; rehearing and rehearing *en banc* denied September 25, 2023).

Mark v. Republic of Sudan, No. 1:20-cv-03022 (D.D.C.) (opinion issued and judgment entered October 7, 2021; modified judgment entered October 4, 2023).

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STATEMENT OF JURISDICTION

The court of appeals issued its opinion and judgment on July 21, 2023. (App. 1a-12a). The petitioners timely petitioned for rehearing or for rehearing *en banc*. The court of appeals issued its orders denying the petitions for rehearing on September 25, 2023. (App. 26a-29a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

This petition challenges government legislation and conduct pursuant to the Due Process Clause and the Equal Protection Clause of the Fifth Amendment of the United States Constitution, which provides in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V.

The Appendix hereto includes the U.S.-Sudan Claims Settlement Agreement, Oct. 30, 2020, T.I.A.S. No. 21-209 (App. 30a-57a) and the Sudan Claims Resolution Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (App. 58a-76a).

PRELIMINARY STATEMENT

This case presents recurring issues of exceptional importance to our constitutional system. This Court has never found that any act of Congress precludes review of claims that constitutional rights have been violated by government action. But the court below has done just that. App. 5a-6a. The D.C. Circuit expansively construed the jurisdiction-stripping provision of section 1704(a)(1) of the Sudan Claims Resolution Act ("SCRA"), Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020) (codified at 28 U.S.C. § 1605A (note)) (App. 61a-62a) to preclude judicial review of petitioners' constitutional challenges to the U.S.-Sudan Claims Settlement Agreement, Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021) (the "CSA") (App. 30a) and to the CSA and the SCRA as a unit. Applying section 1704(a)(1), as construed, the court of appeals dismissed the case without considering petitioners' other constitutional arguments.

The broad construction of section 1704(a)(1) directly violates this Court's oft-repeated holding that, absent clear and convincing evidence of a contrary congressional intent, courts must construe jurisdiction-stripping statutes as allowing constitutional claims to proceed. *See e.g.*, *Johnson v. Robison*, 415 U.S. 361, 366-67, 373-74 (1974); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986). This rule is based upon the need to avoid the "serious constitutional questions" that would arise if a federal statute denied any judicial forum for a colorable constitutional claim. *Robinson*, 415 U.S. at 366-67; *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12 (citing cases).

As the rule anticipates, the D.C. Circuit's construction of section 1704(a)(1) renders the statute unconstitutional. Specifically, the statute, as construed by the D.C. Circuit, violates the Due Process Clause of the Fifth Amendment because it deprives individuals of an independent forum in which to obtain adjudication of their constitutional rights. *See Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir.), *opinion reinstated on reconsideration sub nom. Bartlett on Behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987). It also violates the constitutional mandate of separation of powers because it subverts the courts' role as the final arbiters of the Constitution. *See id.*

In a dissenting opinion in *Webster*, Justice Scalia held that the Constitution bestows upon Congress unlimited power to define or remove the jurisdiction of the inferior federal courts, and that the Court's construction of jurisdiction-stripping statutes should not be constrained to allow constitutional claims to proceed: "[T]here is no shadow of a constitutional doubt that we are free to hold that the present suit, whether based on constitutional grounds or not, will not lie." 486 U.S. at 611-12 (Scalia, J., dissenting).

The D.C. Circuit's understanding of the due process and separation of powers questions and its construction and application of the jurisdiction-stripping statute align with Justice Scalia's dissent in *Webster*. But that is a view that has been consistently rejected by this Court. The Court should not allow the decision below to stand as a precedent enabling Congress to immunize any unconstitutional government action by coupling it with a jurisdiction-stripping provision precluding judicial review.

The decision below is constitutionally flawed for an additional reason. By reviewing the constitutionality of section 1704(a)(1) in isolation from the other provisions of the settlement scheme, the D.C. Circuit blinded itself to the most egregious of the settlement's equal protection violations and thereby skewed the constitutional analysis. The SCRA was enacted pursuant to, and in conjunction with, the CSA and other components of the overall settlement, all of which combined into what can only be viewed as a single government action or course of conduct.

And even if section 1704(a)(1) were a facially valid jurisdiction-stripping provision, when combined with the CSA and the other provisions of the settlement, it violates the petitioners' equal protection rights. Two provisions of a single scheme may be unconstitutional in combination, even if each is individually valid. *See e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, ___ U.S. ___, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015).

The settlement, as a whole completely nullifies ***only*** the petitioners' claims and those of the limited class of victims of Sudan-sponsored Hamas terrorism (the "Hamas Victims") while compensating ***all*** other known victims of Sudan-sponsored terrorism. The D.C. Circuit not only ignored the effect of the combination of the various pieces of the settlement, it even criticized the district court for "improperly analyz[ing] the constitutionality of the Agreement." App. 8a, n.3. Even if the D.C. Circuit's construction of the jurisdiction-stripping provision were not independently unconstitutional, the court below was required to consider whether, the combination with, and

dependence upon the other settlement provisions rendered the SCRA unconstitutional. *Cf.*, *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (holding where one statutory provision withstands constitutional scrutiny, courts must also consider whether an act, taken as a whole is constitutional).

STATEMENT OF THE CASE

A. Factual Background.

1. On Friday, July 1, 2016, Michael Mark was driving with his wife, Chava, and two of their children on a quiet country highway in Israel when two Hamas terrorists overtook their car and opened fire with a Kalashnikov assault rifle. App 2a, 14a. The terrorists fired approximately 25 bullets into the Marks' car, killing Michael and injuring Chava and the children. App 2a, 14a.

The petitioners are Chava Mark, her children, and other immediate family members (collectively, the "Marks" or the "petitioners"). They are all United States nationals who sued respondent, Republic of the Sudan ("Sudan") under the terrorism exception to the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. § 1605A. The Marks sought to hold Sudan liable for wrongful death and personal injuries that resulted from the terrorist attack carried out by Hamas with material aid and support from Sudan. App. 14a.

2. After the petitioners filed their complaint, but before Sudan filed a response, respondent, the United States entered into a comprehensive settlement agreement with Sudan that consisted of several components. At least in form, the primary component of the settlement was

the CSA, "including its annexes, appendices, side letters, related agreements, and instruments for implementation." App. 15a, 59a. Among other things, under the CSA the United States agreed to espouse and settle all terrorism claims of U.S. nationals against Sudan. App. 3a. The government also agreed to rescinded Sudan's designation as a state sponsor of terrorism. App. 15a, 33a, 62a. Sudan agreed to pay $335 million for the benefit of ***almost*** all of its terrorism victims whose claims were espoused – even those who were not U.S. nationals. App. 37a.

Among the "related agreements" included in the CSA were a number of so-called "private settlement agreements" entered into between Sudan and certain victims of Sudan-sponsored terrorism who were designated by the United States to be included in financial distributions to be made pursuant to the CSA. App. 33a, 42a, 62a[1].

Finally, the CSA required Congress to enact legislation necessary to carry out certain obligations of the United States under the CSA. App. 34a-37a. Primarily, the CSA required the United States to enact jurisdiction-stripping legislation barring terrorism lawsuits against Sudan. App. 34a-37a. In accordance with this obligation, SCRA section 1704(a)(1) precludes terrorism victims from maintaining their claims against Sudan. App. 58a, 61a-62a. This

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1. *See also*, Appellants' Reply Brief at 1, 3-8, and Office of Press Relations, USAID, Statement by Administrator Samantha Power, Compensation Delivered to Family of USAID Employee Killed in Line of Duty in Sudan (June 11, 2021), cited in Sudan's D.C. Circuit brief at 25 ("The Government of Sudan agreed to compensate specific victims of terrorist attacks as part of the negotiations for restoration of Sudan's sovereign immunities.").

jurisdiction-stripping provision was expressly contingent upon Sudan's payment of compensation pursuant to the CSA. App. 61a-63a.

The SCRA carves out one significant exception to the removal of jurisdiction. SCRA sections 1704 and 1706 preserve jurisdiction to hear the claims of the victims and family members of the September 11, 2001 terrorist attacks. App. 62a, 67a-68a. The September 11 claimant carve-out is based upon the following Congressional finding:

> It is the long-standing policy of the United States that civil lawsuits against those who support, aid and abet, and provide material support for international terrorism serve the national security interest of the United States by deterring the sponsorship of terrorism and by advancing interests of ***justice, transparency, and accountability***.

SCRA § 1706(a)(1), App. 67a (emphasis added).

3. Under the settlement regime, ***almost all*** of Sudan's terrorism victims are compensated. The CSA provides for compensation for various identified claimants from several different Sudan-sponsored terrorist attacks, including the 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania (the "Embassy Bombings") and the 2000 attack on the U.S.S. Cole (the "Cole Attack"). App. 37a, 42a-44a. The CSA also provides for compensation for the survivors of an employee of United States Agency for International Development (USAID) who was assassinated in Sudan in 2008. App. 42a.

The SCRA provides for "lump sum" payments to the 9/11 victims and families. App. 64a-65a. It also appropriates an additional $150 million (over and above the $335 million paid by Sudan) for increased payments to Embassy Bombings victims and their family members who, subsequent to the Embassy Bombings, became naturalized American citizens. App. 70a. This appropriation is claimed to be intended to achieve parity between the ***naturalized*** American citizen claimants and the claimants who were, at the time of the Embassy Bombings, U.S. nationals. App. 71a.

The ***only*** Sudan terrorism victims who receive no compensation are the petitioners and other claimants like the Plaintiffs whose claims arise out of Sudan-sponsored terrorist attacks carried out by the Hamas terrorist organization (the "Hamas Victims")[2]. Thus, while the petitioners' claims and those of other Hamas Victims were espoused and subjected to jurisdiction-stripping together with the claims of all other non-9/11 victims, only the Hamas Victims were excluded from any of the benefits of the settlement.

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2. In addition to the instant case, Plaintiffs are aware of the following civil actions against the Sudan: *Steinberg v. Republic of the Sudan*, civ. case no. 20-cv-2296; *Weinstock v. Republic of the Sudan*, civ. case no. 20-cv-3021; *Force v. Republic of the Sudan*, civ. case no. 20-cv-3027; and *Hirshfeld v. Republic of the Sudan*, civ. case no. 20-cv-3029.

B. Procedural Background.

1. In the district court, the Marks properly served Sudan with process pursuant to 28 U.S.C. § 1608(a)(3). ECF No. 12. Sudan filed a motion to dismiss. ECF No. 16. Sudan did not deny any of the factual allegations of the complaint. Rather, the motion to dismiss was based exclusively upon the CSA and the SCRA. Sudan argued that under the CSA and SCRA the district court lacked subject matter jurisdiction and personal jurisdiction and that the Marks no longer had a private right of action. App. 16a.

The Marks responded to Sudan's Motion to Dismiss. They acknowledged that the President has broad authority to espouse and settle claims of U.S. nationals, and that Congress may enact laws altering the rules of foreign sovereign immunity or jurisdiction. However, the Marks argued that these powers cannot be exercised in violation of individual claimants' constitutional rights. Memorandum of Points and Authorities in Opposition to Motion to Dismiss, ECF No. 20 at 1-2.

The Marks opposed Sudan's motion to dismiss based upon arguments that the CSA and the SCRA, individually and together, impinged upon their equal protection rights under the Fifth Amendment and their right of access to the courts. App. 18a; Memorandum of Points and Authorities in Opposition to Motion to Dismiss, ECF No. 20 at 2, 10, 12-13. Specifically, the Appellants argued that, through backroom deals, the CSA and SCRA, together, operated to impose upon the Hamas Victims the burdens of the settlement while distributing the settlement benefits among all other classes of claimants, to the exclusion of the

Hamas Victims. *See e.g.*, *id.* at 12-13. Then, after providing financial benefits for all ***other*** Sudan terrorism victims, the CSA and SCRA withdrew jurisdiction to hear any such claims – except those of the 9/11 victims. App. 62a, 67a. But because all other claimants were being compensated, the only claimants for whom the withdrawal of jurisdiction made a difference were the Hamas Victims, who were not compensated under the settlement ***and*** who could no longer pursue their claims in court.

The Marks filed and served upon the Attorney General of the United States a Notice of Constitutional Challenge under Fed. R. Civ. P. 5.1(a). App. 16a. The United States intervened as of right to defend the constitutionality of the CSA and that of SCRA and to seek dismissal. App. 16a.

Sudan and the government argued that the CSA and SCRA should be upheld because they reasonably compensated only claimants who, unlike the Marks, had ***previously*** established Sudan's liability through default judgments or so-called "private settlement agreements." App 19a-20a. The district court adopted this argument and held that the disparate treatment of the Plaintiffs under the settlement survived rational basis review. App 19a-20a. ("That the agreements limited Sudan's liability to claims where it was already on the hook was rational."). The district court rejected the Marks' constitutional challenge to the CSA, the SCRA, and the two together, and dismissed the complaint with prejudice. App. 19a, 24a, 25a.

2. The Marks filed a timely notice of appeal. In the court of appeals, the Marks raised the same constitutional arguments that they presented to the district court,

with one significant refinement: While preparing the Reply Brief, counsel for the Marks checked a seemingly innocuous citation in Sudan's brief, and discovered that contrary to Sudan's and the government's assertions, the so-called "private settlement agreements" were achieved as the result of negotiations between Sudan and the United States as part of the comprehensive settlement. *Reply Br.* at 6-7. This discovery was significant because it proved that Sudan and the United States had both falsely asserted in their appellate briefs (and in the district court) that the "private settlement agreements" were reached prior to, and independent of, the CSA[3]. *See Reply Br.* 5. Sudan also falsely represented that the so-called "private settlement agreements" were "beyond constitutional scrutiny because they do not involve state action by any U.S. government entity." *See id.* at 4.

In fact, the "private settlement agreements" were an integral part of the comprehensive settlement between the United States and Sudan. And contrary to Sudan's and the government's arguments, the private settlement agreements were not a justification for the disparate treatment of the Hamas Victims; they were a primary manifestation of the disparate treatment of the Hamas Victims. The United States had pre-selected the claimants with whom Sudan would be required to enter "private settlement agreements." Thus, belying Sudan's arguments to the contrary, the private settlement agreements were produced by state action and were emphatically subject to constitutional scrutiny.

3. Petitioners explained that the exceptional circumstances surrounding the discovery of the respondents' misrepresentations justified the court's consideration of these arguments despite being raised for the first time in an appellate reply brief. Reply Br. at 12.

Moreover, the Marks argued that these material misrepresentations required the court to "closely scrutinize" the Appellees' justifications for the Marks' disparate treatment under the settlement. *Reply Br.* at 1, 9. At oral argument, petitioners again argued that the misrepresentations required "heightened scrutiny."

After the case was fully briefed, the court of appeals, on its own motion, ordered the parties to "file supplemental briefs addressing whether the plaintiffs-appellants' constitutional challenge to the Claims Settlement Agreement and the Sudan Claims Resolution Act raises a nonjusticiable political question." Order dated September 19, 2022. The court further ordered the parties to be prepared to address the justiciability issue at oral argument. *Id*. The parties complied with the order and briefed the question of the political question doctrine's applicability.

The D.C. Circuit did not address the political question doctrine at oral argument or in its decision. Neither did it consider the questions of the respondents' material misrepresentations, the constitutionality of the CSA, or the constitutionality of the CSA and SCRA together. Instead, the court focused exclusively on the validity of the jurisdiction-stripping statute.

The court of appeal acknowledged that the Marks were challenging the constitutionality of the SCRA, and nonetheless it found that "by its plain terms" the SCRA's jurisdiction-stripping provision "divests this court of jurisdiction." App. 5a. The court added that it was required to "consider whether this jurisdictional ouster is within constitutional bounds." App. 5a. The court then addressed the constitutional validity of jurisdiction-

stripping statutes, ***generally***, and found that, as a matter of separation of powers, Congress's control over the jurisdiction of the federal courts is plenary, provided it does not violate other constitutional provisions when exercising its power to constitute inferior tribunals. App. 5a-6a, citing *Patchak v. Zinke*, 138 S. Ct. 897, 909, (2018) (plurality). Thus, the court held that Congress's power to define the limits of inferior courts' jurisdiction is so extensive as to allow Congress to divest jurisdiction to consider constitutional claims. App. 5a-6a.

Once it was satisfied that section 1704(a)(1) stripped jurisdiction for the Marks' constitutional claim, and that Congress had authority to enact such a statute, the court turned its attention to the equal protection challenge to the the jurisdiction-stripping provision, alone. App. 7a. Here, the court isolated the SCRA's jurisdiction stripping provision from the other terms of the settlement and found that it "rationally distinguished between ***terrorist attacks in general*** and the September 11 attacks." App. 10a (emphasis added). Thus, the court rejected the equal protection challenge to the jurisdiction-stripping provision. And with that decision, the court held that it and the district court lacked jurisdiction to consider the petitioners' constitutional challenges to the CSA. App. 5a-6a, 8a n.3. "Because we hold that we lack jurisdiction over the Marks' claims, we do not consider the Marks' constitutional arguments as they pertain to the substance of the Agreement." App. 8a n.3.

The court noted that a dismissal for lack of subject matter jurisdiction must be without prejudice. App. 12a. Accordingly, the court modified the district court's judgment to be a dismissal without prejudice. App. 12a.

The Marks filed a timely petition for rehearing or rehearing *en banc*. They argued that the court's construction of SCRA section 1704(a)(1) violated this Court's rule of construction that presumes jurisdiction stripping statutes do not preclude judicial review of constitutional claims. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). They also argued that, as construed by the court, section 1704(a)(1) violates the constitutional mandate of separation of powers and the Due Process Clause, pursuant to *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir.). Finally, the Marks argued that the court could not properly uphold the SCRA's jurisdiction-stripping provision without considering its relationship with the other components of the settlement. The D.C. Circuit denied the petition for rehearing or for rehearing *en banc*. App. 26a, 28a.

REASONS FOR GRANTING THE PETITION

I. The District of Columbia Circuit's Decision Construing SCRA § 1704(a)(1) As Precluding Constitutional Claims Warrants Review.

A. The D.C. Circuit's Construction Of SCRA § 1704 Conflicts With Decisions Of This Court And Of The Federal Courts Appeal That Apply A Presumption That Jurisdiction-Stripping Statutes Do Not Bar Constitutional Claims.

The court of appeals held that Congress's power to define the limits of inferior courts' jurisdiction is so extensive as to allow Congress to divest jurisdiction to consider constitutional claims. Therefore, the court of appeals purported to construe section 1704(a)(1) "by its

plaint terms" and found that it divested the courts of jurisdiction. App. 5a. App. 5a-6a.

This holding conflicts with numerous decisions of this Court and the lower courts of appeal that express "grave doubts" as to the constitutionality of any statute that denies a judicial forum for a colorable constitutional claim. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir.), *opinion reinstated on reconsideration sub nom. Bartlett on Behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987); *Citizens for Const. Integrity v. United States*, 57 F.4th 750 (10th Cir. 2023); *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019). These decisions establish a presumption that jurisdiction-stripping statutes do not bar constitutional claims. *Robinson*, 415 U.S. at 366-67; *South Carolina v. Regan*, 465 U.S. 367, 380 (1984); *Califano v. Sanders,* 430 U.S. 99, 109 (1977). The presumption is so compelling that it can only be overcome with clear and convincing evidence that Congress intended to preclude constitutional claims. *Robison*, 415 U.S. at 366-67, 373-74; *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12 (1986).

Section 1704(a)(1) divests courts of jurisdiction in general terms. App. 5a. It does not specify that it precludes courts from hearing constitutional claims. And there is no other indication in the statute or otherwise that Congress intended for it to have such an expansive construction. Therefore, the presumption that jurisdiction-stripping statutes do not bar constitutional claims applies, and the statute must be construed to allow the petitioners' to pursue their constitutional claims. The D.C. Circuit's

decision eschews the numerous decisions of this Court discussed above and construes section 1704(a)(1) broadly to preclude the petitioners' constitutional claims. It must be reversed.

B. The D.C. Circuit's Holding That Jurisdiction-Stripping Statutes May Preclude Judicial Review Of Constitutional Claims Violates Constutitional Separation Of Powers And The Due Process Clause And Conflicts With Numerous Rulings Of This Court And The Federal Courts Of Appeal.

The D.C. Circuit rendered section 1704(a)(1) unconstitutional by improperly construing the SCRA to deny any judicial review of the constitutionality of the CSA. This holding directly conflicts with numerous decisions of this Court that have expressed grave doubts as to the constitutionality of federal statutes that deny a judicial forum for a colorable constitutional claim. *See e.g.*, *Webster*, 486 U.S. at 603 *Robison,* **415 U.S. 361.** In *Bartlett v. Bowen*, the D.C. Circuit explained the basis for these grave doubts:

> a statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. 816 F.3d at 703.

The court below assessed the separation of powers question differently. It observed that the Constitution

vests Congress with the authority 'to constitute Tribunals inferior to the supreme Court.' App. 5a, citing, U.S. CONST. art. I, § 8, cl. 9; *see also id.* art. III, § 1. The court of appeals continued: "This broad power includes the lesser power to limit the jurisdiction of those courts." *Id.*, citing *Patchak v. Zinke*, 138 S. Ct. 897, 909 (2018) (plurality). The court acknowledged that Congress's authority to limit federal court jurisdiction is limited by the Constitution. *Id.* But, it did not consider separation of powers to restrict this authority. Neither did it recognize that the Due Process Clause invalidates statutes that deprive individuals of a judicial forum for the adjudication of their constitutional rights.

The court's understanding of the separation of powers question is aligned with Justice Scalia's dissent in *Webster*, where he held that the Constitution explicitly vests Congress with the power to limit inferior federal court's jurisdiction, and that this power even allows Congress to divest the courts of jurisdiction to adjudicate constitutional claims. *Webster*, 486 U.S. at 611. However, the alignment of the decision below with Justice Scalia's *Webster* dissent merely highlights its conflict with the *Webster* majority and the other pronouncements by this Court and those of the federal courts of appeal.

The D.C, Circuit below held that under section 1704(a)(1), the Court could not even consider the Appellants' constitutional challenge to the CSA. Addendum at 7 n. 3. The court of appeals thus construed section 1704(a)(1) to be precisely the kind of statute that, under this Court's precedents, as explained by *Bartlett*, violates separation of powers and infringes due process. The decision below must be reversed.

II. The D.C. Circuit's Analysis Of The Constitutionality Of A Single Provision Within the Comprehensive Settlement Is Fundamentally Flawed And Requires Review.

The D.C. Circuit analyzed the validity of section 1704(a)(1) without considering its relationship with, and dependence upon, the other provisions of the settlement. In doing so, the court failed to appreciate the interdependence of the CSA and the SCRA, and that they were part of a single government action, policy, and course of conduct. Thus, the court of appeals analyzed the constitutionality of section 1704(a)(1) without reference to its context or the manner in which it was applied. This analysis was flawed and must be reviewed.

The CSA expressly required the United States to enact a provision like SCRA § 1704(a). App. 36a. Thus § 1704(a) was enacted pursuant to, and in performance of, the CSA. Moreover, under SCRA § 1704(a)(1) and (2), the restoration of Sudan's foreign sovereign immunity and the withdrawal of subject matter jurisdiction were expressly conditioned upon a certification by the Secretary of State confirming that Sudan made the required payments under the CSA and the "private settlement agreements." Hence, the SCRA's jurisdiction-stripping provisions were expressly contingent upon and inseparable from the CSA, in general and the payment provisions in particular. For this reason alone, any constitutional infirmities in the CSA must be attributed to the SCRA. *Cf.*, *Antolok v. United States*, 873 F.2d 369, 388-89 (D.C. Cir. 1989) (Wald, C.J. concurring).

It must be noted that the district court reviewed the settlement subject to a rational basis review. And,

after isolating the jurisdiction-stripping provision from the other components of the settlement, the D.C. Circuit also applied a rational basis review. However, as petitioners argued below, a heightened standard of review was required due to Sudan's and the government's material misrepresentations regarding the government's substantial role in negotiating with Sudan for the so-called "private settlement agreements." The purported non-governmental nature of the "private settlement agreements" was the principal rationale relied upon by the district court in upholding the settlement against the petitioners' equal protection challenge. App. 20a ("That the agreements limited Sudan's liability to claims where it was already on the hook was rational."). Because the jurisdiction-stripping provision of the SCRA was expressly conditioned upon Sudan's payment of those so-called "private settlement agreements," the constitutionality of section 1704(a)(1) must rise or fall with the constitutionality of those payments. This Court has held that an otherwise valid provision may be unconstitutional when combined with other provisions. *See e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Cf.*, *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, ___ U.S. ___, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015).

The D.C. Circuit's reasoning upholding section 1704(a)(1) further demonstrates why that provision cannot be properly constitutionally reviewed without reference to the other components of the settlement. The D.C. Circuit contrasted the treatment of the September 11 victims with the treatment of all other terrorism victims. The court held, "the Act's jurisdiction-stripping provision rationally distinguished between ***terrorist attacks in general*** and the September 11 attacks," App. 10a

(emphasis added). But this dichotomy ignores the plain fact that before section 1704(a)(1) was enacted, the CSA had already provided for compensation to all non-9/11 claimants except the Hamas Victims. App. 37a, 42a-44a. By compensating all other non-9/11 victims, the CSA had drained the pool of terrorism claimants "in general," who had any use for jurisdiction. Thus, as a practical matter, section 1704(a)(1)'s jurisdictional ouster impaired only the rights of the Hamas Victims, the same victims who had just been excluded from CSA's compensation regime, the U.S. government-orchestrated "private settlement agreements," and the SCRA's lump-sum and other payments. *Cf.*, *Santosky v. Kramer*, 455 U.S. 745, 775-776 (1982) (Rehnquist J. dissenting) ("it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme.").

Under these circumstances, the court of appeals could not properly analyze the constitutionality of section 1704(a)(1) without assessing its dependence upon, and relationship to, the other components of the settlement. *See e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, ––– U.S. ––––, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari Respectfully submitted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 21, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October 28, 2022, Argued;
July 21, 2023, Decided

No. 21-5250

CHAVA RACHEL MARK, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF TBM, RLM AND EBM, MINORS, *et al.*,

Appellants,

v.

REPUBLIC OF THE SUDAN AND UNITED STATES,

Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-03022).

Before: Srinivasan, Chief Judge, and Wilkins and RAO, Circuit Judges.

Appendix A

Opinion for the Court filed by *Circuit Judge* RAO.

RAO, CIRCUIT JUDGE: Chava Mark and her family sued Sudan, seeking compensation for a terrorist attack on their family. The question on appeal is whether we have jurisdiction. Under the Foreign Sovereign Immunities Act, a state sponsor of terrorism may be sued for personal injury arising from acts of terrorism. But in 2020, Congress enacted the Sudan Claims Resolution Act, which stripped the federal courts of jurisdiction to hear most terrorism related claims against Sudan. The Marks argue that the Act's jurisdiction-stripping provision is unconstitutional and therefore that their claims against Sudan may be heard in federal court. The district court dismissed for lack of jurisdiction. Finding no constitutional infirmity in the Act's jurisdiction-stripping provision, we affirm.

I.

Michael Mark was driving his wife, Chava Mark, and their children down a country highway in Israel, when two Hamas operatives began tailing them.[1] Swerving into the adjacent lane, the operatives fired roughly 25 bullets from a Kalashnikov assault rifle, killing Michael Mark and injuring his family.

Chava Mark and her children sued in federal district court, contending Sudan provided Hamas with material

1. We accept these allegations as true for purposes of reviewing the district court's dismissal. *See Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 861 (D.C. Cir. 2022).

support for the terrorist act. The Marks brought a single claim under the terrorism exception of the Foreign Sovereign Immunities Act ("FSIA"), which creates a private right of action against foreign states that provide "material support or resources" for "personal injury or death" caused by an "extrajudicial killing." National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 338-40 (codified as amended at 28 U.S.C. § 1605A(a)-(c)). The Marks sought $250 million in compensatory damages.[2]

After the Marks filed their complaint, the United States entered into a claims settlement agreement with Sudan. *See* Claims Settlement Agreement, U.S.-Sudan ("CSA" or "Agreement"), Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021). The Agreement was part of an ongoing effort to improve diplomatic relations between the United States and Sudan and to promote the latter's ongoing democratic transition. *Id.* pmbl. At the time the United States and Sudan entered into the Agreement, Sudan had compensated several victims of the 2000 terrorist attack on the *U.S.S. Cole* but multiple suits against Sudan remained pending. *Id.* The United States agreed to espouse and terminate all remaining claims against Sudan in exchange for a $335 million settlement payment. *Id.* art. III(2); *see also* Restatement (Second) of the Foreign Relations Law of the United States § 213 (1965) (explaining the espousal power allows the President to "waive or settle a claim against a foreign

2. Sudan was a designated state sponsor of terrorism during all times relevant to this appeal but was removed from the list in 2020.

state ... without the consent of [the injured] national"); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523, 237 U.S. App. D.C. 81 (D.C. Cir. 1984) ("Under well-established principles of international law, a sovereign possesses the absolute power to assert the private claims of its nationals against another sovereign.").

After receiving the $335 million, the United States enacted the Sudan Claims Resolution Act ("SCRA"), which effectively restored Sudan's sovereign immunity with respect to terrorism claims. Pub. L. No. 116-260, 134 Stat. 3291 (2020) (codified at 28 U.S.C. § 1605A (note)) (providing the FSIA's terrorism exception no longer applies to Sudan). The Act preserved only one class of suits—the ongoing proceedings brought by "victims and family members of the September 11, 2001, terrorist attacks." SCRA § 1706(a)(2)(A).

Following the Act's passage, Sudan invoked its immunity from suit and moved to dismiss the Marks' case for lack of subject matter jurisdiction. Sudan also maintained the Agreement terminated the Marks' cause of action. The Marks responded that the Act and the Agreement violated the equal protection component of the Fifth Amendment. The United States intervened in support of Sudan.

The district court granted Sudan's motion to dismiss. *Mark v. Republic of the Sudan*, 2021 U.S. Dist. LEXIS 194234, 2021 WL 4709718, at *5 (D.D.C. Oct. 7, 2021). The court held that the Act and Agreement were constitutional and therefore that the court lacked jurisdiction to consider

the Marks' claims. *Id.* 2021 U.S. Dist. LEXIS 194234, at *3-5. The Marks timely appealed.

II.

The Marks acknowledge their claims fit within the jurisdiction-stripping provision of the Sudan Claims Resolution Act. They maintain, however, that this provision violates the Constitution.

A.

Although the Act by its plain terms divests this court of jurisdiction, we nonetheless may consider whether this jurisdictional ouster is "[w]ithin constitutional bounds." *Bowles v. Russell*, 551 U.S. 205, 212, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007); *Patchak v. Zinke*, 138 S. Ct. 897, 909, 200 L. Ed. 2d 92 (2018) (plurality) (considering a constitutional challenge to a jurisdiction-stripping statute); *Belbacha v. Bush*, 520 F.3d 452, 456, 380 U.S. App. D.C. 245 (D.C. Cir. 2008) (recognizing that federal courts have "presumptive jurisdiction ... to inquire into the constitutionality of a jurisdiction-stripping statute").

The Constitution vests Congress with the authority "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9; *see also id.* art. III, § 1. This broad power "includes [the] lesser power to limit the jurisdiction of those courts." *Patchak*, 138 S. Ct. at 906 (plurality) (cleaned up). "[T]he subject-matter jurisdiction of the lower federal courts is determined by Congress in the exact degrees and character which to Congress may

seem proper for the public good." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989) (cleaned up). Congress'" 'control over the jurisdiction of the federal courts' is 'plenary,'" provided it "does not violate other constitutional provisions" when exercising its power to constitute inferior tribunals. *Patchak*, 138 S. Ct. at 906 (plurality) (quoting *Trainmen v. Toledo, P. & W.R. Co.*, 321 U.S. 50, 63-64, 64 S. Ct. 413, 88 L. Ed. 534 (1944)); *see also Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L. Ed. 1147 (1850) ("[A] statute which does prescribe the limits of [the courts'] jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein."). Congress' power to set lower federal court jurisdiction serves as an important constitutional check on the judiciary.

With respect to foreign sovereign immunity, Congress has exercised its power to specify whether and to what extent foreign sovereigns may be sued in federal court. *Diag Human v. Czech Rep. - Ministry of Health*, 824 F.3d 131, 134, 422 U.S. App. D.C. 413 (D.C. Cir. 2016). In civil suits, the FSIA mandates that "a foreign state shall be immune from the jurisdiction of the courts of the United States," unless certain exceptions apply. 28 U.S.C. § 1604; *see also id.* §§ 1605, 1605A, 1605B, 1607 (enumerating exceptions); *Argentine Republic*, 488 U.S. at 439 (explaining the FSIA is the exclusive avenue for "obtaining jurisdiction over a foreign state in federal court"). The FSIA's terrorism exception provides federal courts with jurisdiction over certain injuries caused by state sponsors of terrorism. 28 U.S.C. § 1605A(a)-(c).

The Sudan Claims Resolution Act effectively restored Sudan's sovereign immunity for most terrorism related claims. Under the Act, Sudan "shall not be subject to [various] exceptions to immunity from jurisdiction," including the FSIA's terrorism exception. SCRA § 1704(a)(1)(A). The Act preserved only one class of suits—the ongoing proceedings brought by "victims and family members of the September 11, 2001, terrorist attacks." *Id.* § 1706(a)(2)(A); *see also id.* § 1706(c) ("Nothing in this Act shall apply to ... any claim in any of the proceedings comprising the multidistrict proceeding [related to the September 11 attacks] brought by any person who, as of the date of the enactment of this Act, has a claim pending against Sudan.").

B.

The Marks concede their claims do not fit within the carve-out for the victims of the September 11 attacks and are encompassed by the Act's provision stripping jurisdiction for terrorism claims against Sudan. Nonetheless, the Marks maintain this provision is unconstitutional because it violates the equal protection guarantee of the Fifth Amendment. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (discussing the "equal protection component of the Fifth Amendment's Due Process Clause"). They argue the disparate treatment of their claims from those of the September 11 victims is (1) an arbitrary distinction that fails rational basis review, and/or (2) an impairment of their fundamental right to

access the courts that cannot survive strict scrutiny.[3] Because the jurisdiction-stripping provision of the Act is unconstitutional, the Marks contend, this court retains jurisdiction over their suit against Sudan for its support of the lethal terrorist attack on their family.

1.

The Marks first argue the Act's jurisdiction-stripping provision runs afoul of equal protection because it bars their claim while allowing the claims of "other similarly situated victims of Sudan-sponsored terrorism." In particular, they maintain the Act arbitrarily carves out claims brought by certain September 11 claimants.

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3. The Marks challenge both the Agreement and the Act as unconstitutional. The Agreement, however, espouses their claims and therefore "simply effected a change in the substantive law governing the lawsuit," but did not affect our jurisdiction. *Dames & Moore v. Regan*, 453 U.S. 654, 685, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981). The Marks' equal protection arguments do not distinguish between the disparate treatment with respect to jurisdiction-stripping and the disparate treatment with respect to the substantive claims espoused by the United States. Because we hold that we lack jurisdiction over the Marks' claims, we do not consider the Marks' constitutional arguments as they pertain to the substance of the Agreement.

We also note the district court improperly analyzed the constitutionality of the Agreement. Although the Marks raised the same constitutional arguments against the Act and the Agreement, the jurisdictional question should have been addressed first. Finding no jurisdiction, the proper course was to dismiss the suit without considering the Marks' claims about the Agreement. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

We apply rational basis review unless a statutory classification "proceeds along suspect lines [or] infringes fundamental constitutional rights." *Hettinga v. United States*, 677 F.3d 471, 478, 400 U.S. App. D.C. 218 (D.C. Cir. 2012) (per curiam) (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). The parties agree that the Marks' first equal protection challenge is subject to rational basis review. Judged under this standard, we must uphold the Act's statutory classifications "if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Beach Commc'ns, Inc.*, 508 U.S. at 313. So long as it does not classify along suspect lines or impair fundamental rights, Congress may provide "special treatment" to one group if there is a rational basis for doing so. *Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 741-42, 396 U.S. App. D.C. 353 (D.C. Cir. 2011); *see also Beach Commc'ns, Inc.*, 508 U.S. at 314 (explaining that under rational basis review a statute "bear[s] a strong presumption of validity").

The Act's jurisdiction-stripping provision easily satisfies this standard. Both Sudan and the United States offer several reasonable justifications for the Act. First, the Act's jurisdiction-stripping provision fosters stronger relations with Sudan by limiting its potential liability to United States nationals. The government exercised its power to espouse claims against Sudan, eliminating "sources of friction between the two sovereigns." *Dames & Moore v. Regan*, 453 U.S. 654, 679, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981) (cleaned up). Consistent with the espousal of claims in the Settlement Agreement, the Act

stripped jurisdiction over certain pending claims, freeing Sudan from potential liability that could otherwise impair its relationship with the United States.

Second, the Act's jurisdiction-stripping provision rationally distinguishes between terrorist attacks in general and the September 11 attacks. The Act's carveout for September 11 victims and families involves one of the most fatal attacks on the United States homeland. And the litigation surrounding September 11 has been ongoing for nearly twenty years. The Marks' claims, on the other hand, stemmed from a terrorist attack abroad, and their suit arose just a few months before the United States and Sudan entered into the Agreement. It was rational for the Act to maintain decades-old claims over more recent ones and to prioritize attacks on the homeland over other attacks.

2.

The Marks also contend the Act's jurisdiction-stripping provision violates equal protection by impairing their right to access the courts. Because the right to access the courts is a fundamental right, the Marks maintain the unequal treatment must survive strict scrutiny.

The Supreme Court has long held that citizens have a constitutional right to access the courts. *See, e.g., Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. Ed. 143, 6 Ohio L. Rep. 498 (1907). Circuit courts have recognized two types of access claims: forward looking claims and backward looking claims.

Christopher v. Harbury, 536 U.S. 403, 412-14, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) (discussing cases); *see also Broudy v. Mather*, 460 F.3d 106, 117-21, 373 U.S. App. D.C. 170 (D.C. Cir. 2006) (recognizing both types). Forward looking claims generally arise when the government hinders a litigant's ability to file or prepare for a lawsuit that has not yet commenced. For a forward looking claim to succeed, the Marks must show that "systemic official action frustrate[d] [the Marks] in preparing and filing" their suit. *Christopher*, 536 U.S. at 413. The Marks make no such showing. Backward looking claims arise when the government "cause[s] the loss or inadequate settlement of a meritorious case" or "the loss of an opportunity to sue." *Id.* at 413-14. To bring a successful backward looking claim, the Marks must assert that the government "caused the[ir] suit to be dismissed as untimely" or that some sort of official conduct "render[ed] hollow [their] right to seek redress." *Sousa v. Marquez*, 702 F.3d 124, 128 (2d Cir. 2012) (cleaned up). But the Marks assert neither. The Marks challenge Congress' restoration of Sudan's sovereign immunity, but these claims simply do not implicate the right to access the courts. *See Patchak v. Jewell*, 828 F.3d 995, 1004, 424 U.S. App. D.C. 173 (D.C. Cir. 2016), *aff'd sub nom. Patchak*, 138 S. Ct. at 897.

Moreover, the Marks' claims are in tension with the government's power to establish inferior courts and espouse the claims of its citizens. Since the Founding, the President has exercised the power to espouse the claims of citizens. *See, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259-60, 1 L. Ed. 568, 3 Dall. 199 (1796) (statement of Iredell, J.); *Dames & Moore*, 453 U.S. at 679 n.8. Similarly,

Congress has long exercised its plenary authority to set the jurisdictional reach of the federal courts. The right to access courts does not constrain either of these longstanding powers.

C.

Finally, although we hold the Act validly stripped the federal courts of jurisdiction over the Marks' cause of action, the district court erred when it dismissed the Marks' complaint with prejudice. "[A] dismissal for want of subject-matter jurisdiction can only be without prejudice." *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1253, 450 U.S. App. D.C. 20 (D.C. Cir. 2020); *see also* Fed. R. Civ. P. 41(b). Accordingly, we modify the district court's judgment to be a dismissal without prejudice.

* * *

The Marks family suffered a horrible attack by Hamas for which it seeks recovery from Sudan. Congress has, however, stripped this court of jurisdiction to hear the Marks' terrorism related claims. That provision is constitutional, and we lack jurisdiction. We affirm the district court's judgment as modified.

So ordered.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED OCTOBER 7, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:20-cv-03022 (TNM)

CHAVA RACHEL MARK, *et al.*,

Plaintiffs,

v.

REPUBLIC OF THE SUDAN,

Defendant.

October 7, 2021, Decided;
October 7, 2021, Filed

MEMORANDUM OPINION

Plaintiffs sue the Republic of the Sudan. They seek compensation for its decades-long support for the terrorist group Hamas, whose operatives carried out an attack in Israel that brutalized their family. Sudan moves to dismiss based on its renewed immunity in U.S. courts. The United States intervenes in support of Sudan's position. The Court agrees dismissal is required.

I.

In July 2016, operatives of the Hamas terrorist organization attacked members of the Mark family as they drove along an Israeli highway. Pls.' Compl. ("Compl.") ¶¶ 40, 64, ECF No. 1.[1] Of the 25 bullets fired into the family car, six struck Rabbi Michael Mark, killing him. *Id.* ¶ 65. The car careened off the road and overturned, but the other occupants survived, including Rabbi Mark's wife, Chava, who was shot in the head, and their daughter "TBM," who was shot in the stomach. *Id.* ¶¶ 67-71. The survivors suffer from permanent physical injuries. *Id.* ¶¶ 119-21. They also suffer from trauma and emotional injuries, as do a dozen other members of the Mark family. *Id.* ¶¶ 122-23.

Plaintiffs are victims, family members of victims, and the estate of a family member of a victim (collectively, "the Marks"). They sue Sudan for providing material support and resources to Hamas that enabled it to execute the attack. *Id.* ¶¶ 91-110. Relying on their status as U.S. nationals and the "terrorism exception" to the Foreign Sovereign Immunities Act ("FSIA"), *see* 28 U.S.C. § 1605A, they seek punitive damages on top of $250,000,000 in compensatory damages. Compl. at 20.[2]

Shortly after the Marks sued, the United States signed a bilateral claims-settlement agreement with the

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1. As it must at the motion to dismiss stage, the Court assumes as true all allegations appearing in the complaint.

2. All page citations refer to the pagination generated by the Court's CM/ECF system.

regime that now governs Sudan. *See* Claims Settlement Agreement, U.S.-Sudan, Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021) ("CSA"), ECF 29-1. Under the agreement, the United States espoused and terminated all claims by U.S. nationals against Sudan related to terrorist acts on foreign soil; in exchange, Sudan agreed to pay $335 million to compensate victims of specific attacks.[3] *Id.*

The CSA coincided with a broader normalization of relations between the two countries: The United States rescinded Sudan's designation as a state sponsor of terrorism, and Congress agreed that Sudan's sovereign immunity would resume once the Secretary of State certified that certain conditions had been met, including Sudan's payment of the CSA settlement funds. *See* Rescission of Determination Regarding Sudan, 85 Fed. Reg. 82,565 (Dec. 14, 2020); Sudan Claims Resolution Act, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020) ("SCRA"). Earlier this year, the Secretary certified that both countries discharged their obligations under the SCRA. *See* Certification Under Section 1704(a)(2) of the Sudan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Sudan, 86 Fed. Reg. 19,080 (Apr. 12, 2021).

So Sudan now moves to dismiss under Rule 12(b)(1), (b)(2), and (b)(6). *See* Def's Mot. to Dismiss ("Mot."), ECF

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3. The CSA compensates parties in nine lawsuits arising from three terrorist incidents: (1) the August 1998 bombings of U.S. embassies in Africa, (2) the October 2000 bombing of the U.S.S. Cole, and (3) the January 2008 murder of USAID employee John Granville. CSA at 11-12, ECF No. 29-1.

No. 16. Based on its restored sovereign immunity, Sudan asserts that the Court lacks subject matter jurisdiction and personal jurisdiction and that the Marks no longer have a private right of action. *Id.* at 10-14. The Marks contend that the CSA and SCRA violate their rights to equal protection under the law and ask the Court to declare them unconstitutional. Pls.' Opp'n to Mot. to Dismiss ("Opp'n") at 19, ECF No. 20.[4] The Marks filed a notice of constitutional challenge under Federal Rule of Civil Procedure 5.1, *see* ECF No. 21, which the Court certified to the Attorney General, *see* ECF No. 25.

Intervening as of right, *see* 28 U.S.C. § 2403(a), the United States defends the constitutionality of the CSA and SCRA and supports dismissal, *see* U.S. Mem. of Law ("U.S. Mem."), ECF No. 30. This matter is now ripe.

II.

The FSIA is the "sole basis for obtaining jurisdiction over a foreign state" in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). Under the FSIA, a foreign state and its political subdivisions are presumptively immune from jurisdiction unless an exception applies. 28 U.S.C. §§ 1604-07; *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). The

4. Although a plaintiff cannot typically amend his complaint through briefing, *see Singh v. District of Columbia*, 55 F. Supp. 3d 55, 70 (D.D.C. 2014), requiring the Marks to file an amended complaint here would not alter the analysis and would needlessly delay the case's resolution. So the Court will address the constitutional challenge as the Marks advance it in the briefs.

FSIA creates an exception for claims alleging injury or death caused by state-supported terrorist acts under 28 U.S.C. § 1605A(a)(1), which also provides a private right of action.

A court must dismiss an action if it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). When evaluating a motion to dismiss under Rule 12(b)(1), the Court must treat the complaint's factual allegations as true and afford the plaintiff the benefit of all inferences derivable from the facts alleged. *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 90 (D.D.C. 2018). But the Court need not accept unsupported inferences or legal conclusions couched as facts. *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). Plaintiffs bear the burden of establishing jurisdiction by a preponderance of the evidence. *Erwin-Simpson v. AirAsia Berhad*, 375 F. Supp. 3d 8, 12 (D.D.C. 2019).

To defeat a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), plaintiffs must make a prima facie showing that the Court has personal jurisdiction over each defendant. *Id.* In doing so, they must provide factual support beyond mere conclusory assertions. *Id.* The Court can consider materials outside the pleadings in determining its jurisdiction, *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005), including undisputed facts in the record or disputed facts that it resolves, *see Herbert v. National Academy of Sciences*, 974 F.2d 192, 197, 297 U.S. App. D.C. 406 (D.C. Cir. 1992).[5]

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5. Because it lacks jurisdiction, the Court does not address Sudan's motion to dismiss for failure to state a claim under Rule 12(b)(6). *See* Mot. at 13-14.

III.

A.

The Marks never contest that, as enacted, the CSA terminates their claims or that the SCRA restores Sudan's sovereign immunity for those claims. *See* Opp'n at 11-13. And that much is clear from the text of the legislation: Sudan "shall not be subject to the exceptions to immunity from jurisdiction ... under section 1605(a)(7) (as such section was in effect on January 27, 2008) or section 1605A ...." SCRA § 1704(a)(1)(A); *see also* CSA, Art. IV(2)(d) (explaining that United States "[s]hall release and finally discharge Sudan from all espoused U.S. national claims" as further specified).

Rather, the Marks contend that the CSA and SCRA violate their constitutional rights. Opp'n at 10-19. They protest that their claims are arbitrarily treated differently than other terrorism-related claims against Sudan that are terminated under the CSA but eligible for distributions from the $335 million settlement fund or funds set aside in the SCRA. *Id.* at 16-17. They also point to an implicit carve out in the CSA and SCRA for an ongoing multidistrict lawsuit related to the September 11 terrorist attacks; Congress did not restore Sudan's sovereign immunity for that litigation, so it proceeds against Sudan. *Id.* The Marks cry foul at being left out of the mix, and they characterize the disparate treatment as an equal protection violation. *Id.* at 17-18.

Of course, not all differences amount to invidious discrimination. But the Marks assert that any differences

between the compensated claimants and themselves are arbitrary, as the CSA "provides no standards that determine which claimants receive payment under the CSA and which claimants do not." *Id.* at 16.

All parties agree the rational basis standard governs the Marks' equal protection claim. *See* Opp'n at 15; Def's Reply Mem. ("Reply") at 9, ECF No. 24; U.S. Mem. at 15; *see also Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 741-42, 396 U.S. App. D.C. 353 (D.C. Cir. 2011) (noting that claim that statute "violates equal protection by singling out" certain parties "for special treatment is subject only to rational-basis review"). Under that standard, the legislation is presumed valid and the Marks "have the burden to negative every conceivable basis which might support it." *FCC v. Beach Communications*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993) (cleaned up). Contrary to the Marks' suggestion, *see* Opp'n at 17, courts "never require a legislature to articulate its reasons for enacting a statute," so "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315.

The Marks fail to negate every conceivable justification and thus do not meet their burden. *See id.* Sudan advances a few unrebutted rationales. Reply at 10-15. More still, the United States as intervenor offers several justifications—each conceivable and each unrefuted by the Marks. *See* U.S. Mem. at 16-20.

First, the matters identified in the CSA as eligible for compensation all involved claims in which Sudan's liability

was already resolved by the date of the settlement, either through default judgment or private settlement. U.S. Mem. at 16-19. In contrast, when the Marks filed this case in October 2020, Sudan and the United States were in the final stages of negotiating their settlement. And Sudan was not served until March 2021—after the agreements were in force. *See* ECF No. 12. Even as of today, no judicial ruling or settlement has established Sudan's liability in the Hamas attack on the Mark family. It is understandable, then, that claims relating to that attack—and any number of other unknown or yet-unlitigated incidents—are not covered by the agreements executed last fall.[6] That the agreements limited Sudan's liability to claims where it was already on the hook was rational.

More, when government decisionmakers must draw a line for benefits or burdens *somewhere*, courts must be especially hesitant to second-guess where that line falls. *See Beach Commc'ns*, 508 U.S. at 315-16 ("Defining a class of persons" for benefits or burdens "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . ." (cleaned up)). And after all, the settlement resulted from a compromise. The Court may assume that the line fell where it did as a result of the push and pull of negotiation.

Second, unlike the attack on the Mark family, the incidents eligible under the CSA for compensation

6. Indeed, for all the Court knows, the settlement did not cover the attack on the Mark family simply because U.S. negotiators did not know about it to include it.

all involved attacks against United States property, its employees, or both. *See* U.S. Mem. at 18-19. It is understandable for the United States to prioritize compensation for attacks targeting itself rather than merely its nationals. This explanation blunts the Marks' argument that the CSA lacks any "standards that determine which claimants receive payment" and thus awards benefits arbitrarily. Opp'n at 16.

The wisdom of the distinction is beside the point. It need only be rationally related to a legitimate governmental interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). And it is: The United States has a legitimate interest in cultivating relations with foreign nations as well as securing compensation for its aggrieved nationals. *See generally Dames & Moore v. Regan*, 453 U.S. 654, 679-88, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981). The classifications implicitly created by the claims settlement are neither at odds with nor "clearly irrelevant" to the stated goals of the CSA and SCRA of repairing the countries' relationship. *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973).

Third , the claims related to September 11 are unique. Those claims were not espoused and terminated in the CSA and remain pending against Sudan. *See* SCRA § 1706(a)(2)(A). The Marks think this "disparate treatment" is also capricious, saying it "bears no rational relation" to the United States' goals in settling claims against Sudan. Opp'n at 15. But the September 11 claims are not similarly situated to the Marks' claims or those compensated by

the settlement. Unlike all the other claims, they concern a terrorist attack on U.S. soil. The United States could rationally carve out this high-profile tragedy with thousands of American casualties as sui generis. And here again, that litigation with hundreds of defendants had been ongoing for nearly two decades by the date of the settlement, unlike the Marks' eleventh-hour claims filed in October 2020. *See In re Terrorist Attacks on Sept. 11, 2001*, No. 03-mdl-01570, 2020 U.S. Dist. LEXIS 224722 (S.D.NY.).

Lastly, a word about the context. Even if it had reason to second-guess the Government's judgment here, the Court would not given the broad latitude the Constitution grants the political branches to manage the nation's foreign relations. *See, e.g.*, *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 420, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003) (terminating "claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs" because unresolved claims "may be sources of friction acting as an impediment to resumption of friendly relations" (cleaned up)).

With the power to settle claims comes the power to settle them imperfectly. The Marks essentially ask for the Court to rule that the executive branch should have negotiated better. This it will not and cannot do. *See Belk v. United States*, 858 F.2d 706, 710 (Fed. Cir. 1988) ("[J]udicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President's ability to conduct foreign

relations."). Nor can the Court assume that incorporating the Marks' claims in the settlement would come at no cost to equal or greater national priorities. Minding the separation of powers integral to our government, the Court declines to second-guess the political branches' wisdom here.

B.

In the alternative, the Marks assert that the Court should actually apply strict scrutiny in analyzing the CSA and SCRA because together they infringe on the Marks' fundamental right to access the courts. Opp'n at 18-19. This contention lacks merit. Congress's authority to limit the jurisdiction it has bestowed on federal courts is well established. *See Patchak v. Zinke*, 138 S. Ct. 897, 907, 200 L. Ed. 2d 92 (2018). No less so for foreign sovereign immunity, as it is "Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress." *Bank Markazi v. Peterson*, 578 U.S. 212, 236, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016). And the executive's ability to settle or terminate even private claims in the nation's interest is clear. *Garamendi*, 539 U.S. at 420. None of these routine, constitutionally prescribed actions generally bar the Marks from accessing the courts to seek justice.

More, the Marks fail to invoke the elements of a proper denial-of-access claim. *See Broudy v. Mather*, 460 F.3d 106, 117-18, 373 U.S. App. D.C. 170 (D.C. Cir. 2006). So their arguments understandably look very different than those that have prevailed in prior cases. *See Christopher*

v. Harbury, 536 U.S. 403, 412, 413-14, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) (collecting cases). The Marks are not the victims of misconduct by government actors whom they now sue for blocking their access to legal relief. *See id; cf. Sousa v. Marquez*, 702 F.3d 124, 128 (2d Cir. 2012) ("backward-looking right of access" claims "would be available only if the governmental action caused the plaintiff's suit to be dismissed as untimely or if official misconduct was so severe as to render hollow his right to seek redress" (cleaned up)).

Nor are the Marks in the same shoes as indigent or imprisoned plaintiffs who are hindered by fees or regulations imposed by the Government. *See Christopher*, 536 U.S. at 413-14. They are still free to enter court and sue any other defendant or for any other reason. After all, the Marks proceed before this very Court against the Islamic Republic of Iran on identical claims related to the Hamas attack. *See Mark v. Islamic Republic of Iran*, No. 20-cv-00651 (D.D.C.).

That the political branches changed the rules inside the courthouse does not mean that they have blocked the courthouse doors. Because the CSA and SCRA do not infringe on any right to access the courts, strict scrutiny is unwarranted.

* * *

Having determined that the CSA and SCRA survive constitutional challenge, the Court returns to its jurisdiction. The visit is brief.

No party disputes that the Secretary of State certified that the countries discharged their duties under the SCRA, so Sudan's sovereign immunity is restored. The terrorism exception to the FSIA was the sole basis for jurisdiction, so the Court now lacks personal and subject matter jurisdiction over Sudan. *See Verlinden*, 461 U.S. at 485 n.5. The Court must dismiss the case. *Accord Clay v. Socialist People's Libyan Arab Jamahiriya*, 614 F. Supp. 2d 21, 25 (D.D.C. 2009) (dismissing claims against Libya under FSIA § 1605A after Libyan Claims Resolution Act terminated terrorism-related claims and restored sovereign immunity).

IV.

For these reasons, the Court will grant the motion and dismiss the case with prejudice. A separate Order will issue.

/s/ Trevor N. McFadden
TREVOR N. McFADDEN, U.S.D.J.

Dated: October 7, 2021

APPENDIX C — DENIAL OF REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 25, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5250

September Term, 2023

1:20-cv-03022-TNM

Filed On: September 25, 2023

CHAVA RACHEL MARK, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF TBM, RLM AND EBM, MINORS, *et al.*,

Appellants,

v.

REPUBLIC OF THE SUDAN AND UNITED STATES,

Appellees.

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX D — DENIAL OF PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED SEPTEMBER 25, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5250

September Term, 2023

1:20-cv-03022-TNM

Filed On: September 25, 2023

CHAVA RACHEL MARK, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF TBM, RLM AND EBM, MINORS, *et al.*,

Appellants,

v.

REPUBLIC OF THE SUDAN AND UNITED STATES,

Appellees.

BEFORE: Srinivasan, Chief Judge; and Wilkins and Rao, Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on September 5, 2023, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX E — PROVISIONS INVOLVED

CLAIMS AND DISPUTE RESOLUTION

Agreement Between the

UNITED STATES OF AMERICA

and SUDAN

with Side Letter

Signed at Washington October 30, 2020

Entered into force February 9, 2021

Appendix E

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89—497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

“. . .the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.”

Appendix E

CLAIMS SETTLEMENT AGREEMENT

BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

AND

THE GOVERNMENT OF THE REPUBLIC OF THE SUDAN

The Government of the United States of America

And

The Government of the Republic of the Sudan,

Wishing to further develop the relations between their two countries in a spirit of friendship and cooperation, especially in light of Sudan's ongoing transition to democracy;

Recognizing and condemning the horrific nature of the 1998 bombings of the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, and the 2000 attack on the U.S.S. Cole, and expressing deepest sympathies/or victims;

Acknowledging that certain victims of these attacks have asserted claims in U.S. courts against Sudan in relation to these attacks;

Acknowledging that while Sudan denies any involvement in these attacks, it has been willing to address these claims as part of its effort to fully normalize relations with the United States;

Acknowledging that Sudan has already paid compensation pursuant to certain private settlements to a number of victims of the 2000 attack on the U.S.S. Cole;

Recognizing Sudan's willingness to address additional claims arising out of the bombings of the U.S. Embassies and the attack on the U.S.S. Cole and Sudan's goal of having its immunities restored to those of a state not designated as a state sponsor of terrorism and barring and precluding suits and actions with respect to such claims from the jurisdiction of courts in the United States of America; and

Recognizing that the continued normalization of relations is a matter of great importance to the relationship between the two countries,

Have agreed on the following:

ARTICLE I

For purposes of this Agreement:

1. Reference to "Sudan" shall mean the Republic of the Sudan, the Government of the Republic of the Sudan, any agency or instrumentality of the

Republic of the Sudan, and any official, employee, or agent thereof acting within the scope of his or her office, employment, or agency.

2. Reference to the "United States" (or "U.S.") shall mean the United States of America, the Government of the United States of America, any agency or instrumentality of the United States of America, and any official, employee, or agent thereof acting within the scope of his or her office, employment, or agency.

3. For greater certainty, reference to "U.S. nationals" shall mean natural and juridical persons who were nationals of the United States at the time their claim arose and through the date of entry into force of this Agreement, and reference to "foreign nationals" shall mean all other natural and juridical persons, including those who were not nationals of the United States at the time their claims arose but have since become nationals of the United States.

ARTICLE II

The objective of this Agreement is to reach a comprehensive settlement that:

1. settles the claims of the United States of America and, through espousal, those of U.S. nationals;

2. provides meaningful compensation in connection with claims of foreign nationals employed or

performing a contract awarded by the United States and establishes a fair process through which to distribute compensation for such claims; and

3. bars and precludes all U.S. national and foreign national suits and actions (including suits and actions with judgments that are still subject to appeal or other forms of direct judicial review, as well as suits or actions to wholly or partially satisfy final judgments through execution or attachment) and future suits and actions in the courts of the United States of America through legislation providing to Sudan the sovereign, diplomatic and official immunities normally provided by the United States to other states

if such claims, suits, or actions are against Sudan or, where the claims, suits, or actions implicate in any way the responsibility of Sudan, against Sudan's nationals; and such claims, suits, or actions are brought by or on behalf of U.S. nationals or such claims, suits, or actions are brought by or on behalf of foreign nationals; and such claims, suits, or actions arise from personal injury (whether physical or non-physical, including emotional distress), death, or property loss caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such an act, occurring outside of the United States of America and prior to the date of execution of this Agreement.

ARTICLE III

1. Upon entry into force of this Agreement, the Government of the United States of America confirms the enactment of legislation that Sudan may invoke, upon the receipt by the United States of the funds referred to in Paragraph 2 of this Article, that:

    a. provides the same sovereign, diplomatic, and official immunity to Sudan and its property and to its agencies, instrumentalities, officials, and their property, as is normally provided by the United States to other states and their property and to their agencies, instrumentalities, officials, and their property; and

    b. bars and precludes all suits and actions specified in Article II of this Agreement pending in the courts of the United States of America whether brought by or on behalf of U.S. nationals or foreign nationals (including suits or actions with judgments that are still subject to appeal or other forms of direct judicial review, as well as any pending suits or actions to wholly or partially satisfy final judgments through execution or attachment) and future suits and actions specified in Article II.

2. The Government of the Republic of the Sudan shall transfer to the Government of the United States a payment of U.S. $335,000,000, as the basis for settling the claims and the legislation barring and precluding the suits and actions specified in Article II of this Agreement, to be used by the Government of the United States of America for making distribution payments as specified in the annex to this Agreement ("Annex").

3. In accordance with the applicable domestic procedures of the United States of America, the Government of the United States of America shall deposit amounts received from the Government of the Republic of the Sudan pursuant to this Agreement into an interest-bearing account in the United States Treasury until distribution pursuant to a determination by the Secretary of State of the United States of America ("Secretary") or a designee of the Secretary.

ARTICLE IV

1. The Government of the United States of America shall accept the funds specified in Article III(2) of this Agreement for distribution as a full and final settlement of its claims, suits, and actions and, through espousal, those of U.S. nationals as specified in Article II of this Agreement, and for payment of compensation, as specified in Article II, to resolve claims, suits, and actions of foreign nationals.

2. Upon receipt of the funds from the Government of the Republic of the Sudan specified in Article III(2) of this Agreement, the Government of the United States of America:

    a. Shall certify that Sudan has made final payment of the funds to the United States in accordance with any certification requirement set forth in the legislation referred to in Article III(1) of this Agreement.

    b. Shall take action as appropriate and necessary, consistent with its constitutional structure, to help bring about the success of Sudan's efforts to secure

        i. the termination of legal proceedings in U.S. federal or state courts involving any claims, suits, or actions specified in Article II of this Agreement, regardless of the nationality of the claimant; and

        ii. the nullification of any and all attachments and measures in support of attachments, and the vacatur of any judgments rendered by a U.S. federal or state court,

    consistent with the legislation referred to in Article III(1) of this Agreement.

c. Shall avoid any action that:

   i. contradicts the terms of this Agreement, and in particular challenges the sovereign immunity of Sudan concerning any of the claims, suits, or actions specified in Article II of this Agreement; or

   ii. stands as an obstacle to the accomplishment and execution of this Agreement.

d. Shall release and finally discharge Sudan from all espoused U.S. national claims that come within Article II of this Agreement and shall refrain from presenting any such claim to Sudan, on its behalf or on behalf of another, in the future. Consistent with this release and final discharge, if any such claim is presented directly by a U.S. national to Sudan in the future, Sudan shall have no responsibility for the claim and should refer it back to the Government of the United States of America.

e. Before making any distribution payment, pursuant to this Agreement, to an eligible recipient on an espoused claim of a U.S. national, shall require the recipient to execute a writing that includes a waiver and release of all the recipient's rights

to assert claims for compensatory or other relief in any form or to enforce any judgment against Sudan in connection with any claim, suit, or action specified in Article II of this Agreement.

f. Before making any distribution payment, pursuant to this Agreement, to an eligible recipient in connection with any other claim, shall require the recipient to execute a writing that includes a waiver and release of all the recipient's rights to assert claims for compensatory or other relief in any form or to enforce any judgment against Sudan in connection with any claim, suit, or action specified in Article II of this Agreement.

ARTICLE V

The Annex attached hereto is an integral part of this Agreement. This Agreement shall enter into force on the date of the later note in an exchange of diplomatic notes between the Government of the United States of America and the Government of the Republic of the Sudan confirming the completion of any internal procedures necessary for the entry into force of this Agreement, which in the case of the United States, shall include enactment of the legislation described in Article III(1).

In Witness whereof, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Washington, D.C., on this 30th day of October, 2020, in duplicate, in the English language.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

/s/____________________

FOR THE GOVERNMENT OF THE REPUBLIC OF THE SUDAN:

/s/____________________

ANNEX

1. The Government of the United States of America and the Government of the Republic of the Sudan, in furtherance of their Claims Settlement Agreement (the "Agreement"), of which this Annex is an integral part, have agreed that the Government of the United States of America shall make distributions from the Funds transferred pursuant to Article III of the Agreement as follows:

    a. to compensate U.S. nationals whose claims have been espoused by the United States of America pursuant to the Agreement and to the payment of private settlements related to certain claims in the following cases:

        i. *Owens v. Republic of Sudan* (D.D.C.), 01-cv-2244 (IDB)

        ii. *Khaliq v. Republic of Sudan* (D.D.C.), 10-cv-356 (IDB)

        iii. *Taitt v. Islamic Republic of Iran* (D.D.C.), 20-cv-1557 (RC)

        iv. *Granville v. Republic of Sudan*, Case No. 2018-28, in the Permanent Court of Arbitration

b. to the payment of a private settlement related to *Mwila v. The Islamic Republic of Iran* (D.D.C.), 08-cv-1377 (IDB); and

c. to fund a process (as set forth below) to distribute compensation to eligible foreign nationals whose claims have been addressed by the Agreement:

i. Definitions

A. For purposes of section (c) of this Annex--

(1) "Applicable Litigation" means any suit or action in the following cases:

Wamai v. Republic of Sudan (D.D.C.), 08-cv-1349 (IDB)

Amduso v. Republic of Sudan (D.D.C.), 08-cv-1361 (JDB)

Onsongo v. Republic of Sudan (D.D.C.), 08-cv-1380 (IDB)

Opati v. Republic of Sudan (D.D.C.), 12-cv-1224 (IDB)

(2) "*Embassy Bombings*" means the August 7, 1998 bombings of the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya.

(3) "*Party*" means the Republic of the Sudan or the United States of America. "Parties" means the Republic of the Sudan and the United States of America.

(4) "*Release*" means a document signed by the claimant in which the claimant agrees that, upon the receipt of compensation based on a determination by the Commission, the claimant fully, finally, and forever waives and releases any claims against Sudan or the United States related to the Agreement and the Embassy Bombings.

ii. Commission

A. *Establishment.* The Government of the Republic of the Sudan shall establish, in consultation with the United States of America, a Commission in a jurisdiction

mutually agreeable to Sudan and the United States.

B. *Appointment*. The Government of the Republic of the Sudan shall nominate one person to be sole commissioner of the Commission ("Commissioner") and shall notify the United States of its nomination in writing. If the United States does not object within seven (7) calendar days of written notice of such nomination, the person nominated shall be duly appointed as the sole Commissioner of the Commission without any further action from either Party. A Commissioner may also be appointed, and an appointed Commissioner may be replaced, by the joint agreement of the Parties.

C. *Administrative Fees*. U.S. \$2,000,000 shall be allocated for the administrative fees of the Commission. Following the receipt of the funds specified in Article III(2) of the Agreement, the Government of the United States of America shall establish procedures to transfer funds from this allocated U.S. \$2,000,000 to

the Commission for the payment of administrative fees.

iii. Eligible Claims

A. *Criteria.* The Commission shall determine claimant eligibility for awards consistent with the following criteria.

(1) A claimant may not have otherwise received compensation originating from the amounts transferred pursuant to Article III(2) of the Agreement.

(2) A claimant is only eligible to receive compensation for one claim matching the criteria in this subsection (A).

(3) A claimant must be a named plaintiff awarded compensatory damages in an Applicable Litigation related to the wrongful death or injury of a foreign national.

(4) A claimant may not receive compensation unless the Applicable Litigation in which the claimant is a plaintiff has

been dismissed with prejudice as to that claimant's claims against Sudan as a defendant and any judgment in favor of the claimant against Sudan in the Applicable Litigation has been vacated. The Commission may make determinations of eligibility pending receipt of confirmation that the Applicable Litigation has been dismissed with prejudice as to Sudan as a defendant and judgments against Sudan in the Applicable Litigation vacated.

(5) A claimant must provide two signed original Releases.

(6) A claim falls within one of the categories of eligible claims, as follows:

(a) *Estate Claim.* A claim by a legal representative of an estate for wrongful death caused by the Embassy Bombings. The Commission shall require proof of a putative legal representative's

entitlement to collect on behalf of the applicable estate.

(b) *Injury Claim*. A claim by an individual for a discernible injury sustained in connection with the Embassy Bombings (other than an injury sustained as a result of a claimant's familial relationship with an individual killed or injured by the Embassy Bombing). In the event that a claimant can demonstrate good cause for a lack of available medical records, the Commission may, in its discretion, accept other records to verify the individual's injuries.

(c) *Non-Beneficiary Family Members Claim*. A claim for mental pain and anguish by a family member of a foreign national

killed in the Embassy Bombings provided that the claimant is (1) living at the time the claimant applies to the Commission for compensation and (2) not eligible to receive compensation through an Estate Claim as a beneficiary of the estate of such foreign national.

B. *Award Amounts*. The amount of compensation to be distributed to a claimant based on the category of eligible claim is as follows:

(1) *Estate Claims*: U.S. $800,000 per claim

(2) *Injury Claims*: U.S. $400,000 per claim

(3) *Non-Beneficiary Family Member Claims*: U.S. $100,000 per claim

iv. Process

A. *Applications*. The Commission shall establish procedures for

claimants to apply for compensation for eligible claims. The Commission shall notify the counsel of record in the cases listed in the definition of Applicable Litigation and the authorized representative of each Party of the procedures within sixty (60) days of the appointment of the sole Commissioner. The procedures shall include a deadline for claimants to apply for compensation that is not later than ninety (90) days following the posting of the application procedures to the counsel of record by registered mail. The Commission shall report the total number of claimants and the number of claimants by category of claim to both Parties no later than thirty (30) days following the deadline for claimants to apply for compensation.

B. *Determinations*. Determinations of the Commission shall be made by the sole Commissioner. Determinations of the Commission shall be final and not subject to judicial review.

The Commission may establish procedures for review of eligibility

determinations by the Commission and the submission of supplemental information to the Commission. Any review of a determination shall be completed by the Commission within ninety (90) days of the initial determination. If sufficient funds remain to support the administrative functions of the Commission, the Commission may extend the period available to review determinations consistent with any other applicable deadlines for completion of the Commission's work.

C. *Notice and Payments*. The Commission shall inform the authorized representative of each Party of the Commission's determinations, which shall include the category of eligible claim, amount of compensation to be awarded, and a description of how the claim is consistent or inconsistent with the criteria for eligible claims listed above and the standards adopted by the Commission. The Commission shall make determinations on a rolling basis.

If a claim is determined eligible for compensation, the Commission shall request payment instructions from the claimant. Upon the Commission's receipt of such payment instructions, the Commission shall transmit one executed original of the Release of the claimant to each Party.

The Government of the United States of America shall establish procedures to transfer funds to an eligible claimant following receipt from the Commission of the Commission's determination, including the requisite description, the category of eligible claim, and the amount of compensation; an executed original Release; and payment instructions.

v. Miscellaneous

A. *Report*. The Commission shall prepare and deliver a final "Report" of the Commission's activities to the Parties within twenty-five (25) months of the appointment of the sole Commissioner.

B. *Termination*. The Commission shall terminate one (1) month following the issuance of the Report.

Appendix E

United States Department of State

Assistant Secretary of State
for African Affairs

Washington, DC 20520-3430

October 30, 2020

His Excellency
Mohammed Abdalla Eltom
c/o Embassy of the Republic of the Sudan
2210 Massachusetts Ave., NW
Washington, DC 20008

Dear Mr. Ambassador:

This letter provides further clarification concerning Article IV(2) of the Claims Settlement Agreement between the. United States of America and the Republic of the Sudan, signed at Washington, D.C., October 30, 2020 (the "Agreement"). Article IV(2) of the Agreement provides that:

2. Upon receipt of the funds from the Government of the Republic of the Sudan specified in Article III(2) of this Agreement, the Government of the United States of America:

    a. Shall certify that Sudan has made final payment of the funds to the United States in accordance with any certification

requirement set forth in the legislation referred to in Article III(1) of this Agreement.

b. Shall take action as appropriate and necessary, consistent with its constitutional structure, to help bring about the success of Sudan's efforts to secure

   i. the termination of legal proceedings in U.S. federal or state courts involving any claims, suits, or actions specified in Article II of this Agreement, regardless of the nationality of the claimant; and

   ii. the nullification of any and all attachments and measures in support of attachments, and the vacatur of any judgments rendered by a U.S. federal or state court,

consistent with the legislation referred to in Article III(1) of this Agreement.

These provisions address the termination of litigation and reflect the process by which the termination of litigation would be secured in the U.S. judicial system.

As discussed during the negotiations between the Parties to the Agreement, Sudan, as the defendant in any cases covered by the Agreement, and consistent with the

Foreign Sovereign Immunities Act, would be responsible for moving to dismiss any such case in the court in the United States in which it is pending. The legislation referred to in Article III(1) presumably would be a basis for the motion to dismiss.

The United States, which is currently not a party to such cases, nonetheless has the ability to participate in the litigation. For example, the United States has the authority to make filings in cases pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a state or federal court. The United States has made such filings in many cases in the courts of the United States, and in particular, in cases that were covered by the 2008 Libya Claims Settlement Agreement. In those cases, Libya moved for dismissal, and the United States supported Libya's request for dismissal with a filing that explained the United States' interest in the litigation.

The process for initiating the United States' participation in those cases began with a request by the Department of State to the Department of Justice to make such a filing, invoking among other things, the 2008 Libya Claims Resolution Act, which restored to Libya immunities normally enjoyed by states that are not designated as state sponsors of terrorism. The Department of Justice agreed with the recommendations in those cases, filed the appropriate papers to support dismissal requested by Libya, and the cases were dismissed in due course.

As explained during the negotiations, while the Department of State cannot guarantee that the United States will appear in any particular case in advance, it would expect that once Sudan were to move to request dismissal of a case covered by the Agreement on the basis of the legislation referred to in Article III(1), the Department of State would send a request to the Department of Justice for participation by the United States to support Sudan's request for dismissal on that basis and that such a request by the Department of State would receive favorable consideration. This would apply to all cases covered by the Agreement, including, but not limited to, *Opati v. Republic of Sudan* (D.D.C), 12-cv-1224 (IDB).

Sincerely,

/s/ Tibor P. Nagy
Tibor P. Nagy

Appendix E

TITLE XVII—SUDAN CLAIMS RESOLUTION

SEC. 1701. SHORT TITLE.

This title may be cited as the ''Sudan Claims Resolution Act''.

SEC. 1702. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) the United States should support Sudan's democratic transition, particularly in light of the country's dire economic situation, and this is a critical moment to address longstanding issues in the relationship between the United States and Sudan;

(2) as part of the process of restoring normal relations between Sudan and the United States, Congress supports efforts to provide meaningful compensation to individuals employed by or serving as contractors for the United States Government, as well as their family members, who personally have been awarded by a United States District Court a judgment for compensatory damages against Sudan; and

(3) the terrorism-related claims of victims and family members of the September 11, 2001, terrorist attacks must be preserved and protected.

SEC. 1703. DEFINITIONS.

In this Act:

(1) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term "appropriate congressional committees" means—

(A) the Committee on Foreign Relations and the Committee on the Judiciary of the Senate; and

(B) the Committee on Foreign Affairs and the Committee on the Judiciary of the House of Representatives.

(2) CLAIMS AGREEMENT.—The term "claims agreement" means the Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of the Sudan, done at Washington, D.C., on October 30, 2020, including all annexes, appendices, side letters, related agreements, and instruments for implementation, including the escrow agreement among the Central Bank of Sudan, the Federal Reserve Bank of New York, and the escrow agent appointed thereby, as well as the escrow conditions release agreement, set out in an exchange of diplomatic notes between the United States and Sudan on October 21, 2020, and subsequently amended on December 19, 2020.

(3) FOREIGN NATIONAL.—The term ''foreign national'' means an individual who is not a citizen of the United States.

(4) SECRETARY.—The term "Secretary" means the Secretary of State.

(5) STATE SPONSOR OF TERRORISM.—The term "state sponsor of terrorism" means a country the government of which the Secretary has determined is a government that has repeatedly provided support for acts of international terrorism, for purposes of—

(A) section 1754(c)(1)(A)(i) of the Export Control Reform Act of 2018 (50 U.S.C. 4813(c)(1)(A)(i));

(B) section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371);

(C) section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)); or

(D) any other provision of law.

(6) SUDAN.—The term ''Sudan'' means the Government of the Republic of the Sudan.

Appendix E

SEC. 1704. RECEIPT OF ADEQUATE FUNDS; IMMUNITIES OF SUDAN.

(a) IMMUNITY.—

(1) IN GENERAL.—Subject to section 1706, and notwithstanding any other provision of law, upon submission of a certification described in paragraph (2)—

(A) Sudan, an agency or instrumentality of Sudan, and the property of Sudan or an agency or instrumentality of Sudan, shall not be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution under section 1605(a)(7) (as such section was in effect on January 27, 2008) or section 1605A or 1610 (insofar as section 1610 relates to a judgment under such section 1605(a)(7) or 1605A) of title 28, United States Code;

(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 28 U.S.C. 1605A note), section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (Public Law 104–208; 28 U.S.C. 1605 note), and any other private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Sudan, or

any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court; and

(C) any attachment, decree, lien, execution, garnishment, or other judicial process brought against property of Sudan, or property of any agency, instrumentality, official, employee, or agent of Sudan, in connection with an action that is precluded by subparagraph (A) or (B) shall be void.

(2) Certification.—A certification described in this paragraph is a certification by the Secretary to the appropriate congressional committees stating that—

(A) the August 12, 1993, designation of Sudan as a state sponsor of terrorism has been formally rescinded;

(B) Sudan has made final payments with respect to the private settlement of the claims of victims of the U.S.S. Cole attack; and

(C) the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—

(i) payment of the agreed private settlement amount for the death of a citizen of the United States who was an employee of

the United States Agency for International Development in Sudan on January 1, 2008;

(ii) meaningful compensation for claims of citizens of the United States (other than individuals described in section 1707(a)(1)) for wrongful death or physical injury in cases arising out of the August 7, 1998, bombings of the United States embassies located in Nairobi, Kenya, and Dar es Salaam, Tanzania; and

(iii) funds for compensation through a fair process to address compensation for terrorism-related claims of foreign nationals for wrongful death or physical injury arising out of the events referred to in clause (ii).

(b) Scope.—Subject to section 1706, subsection (a) of this section shall apply to all conduct and any event occurring before the date of the certification described in subsection (a)(2), regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date.

(c) Authority of the Secretary.—The certification by the Secretary referred to in subsection (a)(2) may not be delegated and may not be subject to judicial review.

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SEC. 1705. REAUTHORIZATION OF AND MODIFICATIONS TO UNITED STATES VICTIMS OF STATE SPONSORED TERRORISM FUND.

(a) IN GENERAL.—The Justice for United States Victims of State Sponsored Terrorism Act (34 U.S.C. 20144) is amended—

(1) in subsection (c)(2)(A)(i), by striking "state sponsor of terrorism" and inserting "foreign state that was designated as a state sponsor of terrorism at the time the acts described in clause (ii) occurred or was so designated as a result of such acts";

(2) in subsection (e)(6), by striking "January 2, 2030" each place it appears and inserting "January 2, 2039"; and

(3) in subsection (j)(6), in the first sentence, by inserting after "final judgment" the following: ", except that the term does not include payments received in connection with an international claims agreement to which the United States is a state party or any other settlement of terrorism-related claims against Sudan".

(b) LUMP SUM CATCH-UP PAYMENTS FOR 9/11 VICTIMS, 9/11 SPOUSES, AND 9/11 DEPENDENTS.—Subsection (d)(4) of the Justice for United States Victims of State Sponsored Terrorism Act (34 U.S.C. 20144) is amended—

(1) in subparagraph (A), by striking "subparagraph (B)" and inserting "subparagraphs (B) and (C)"; and

(2) by adding at the end the following:

"(C) LUMP SUM CATCH-UP PAYMENTS FOR 9/11 VICTIMS, 9/11 SPOUSES, AND 9/11 DEPENDENTS.—

"(i) IN GENERAL.—Not later than 90 days after the date of enactment of this subparagraph, and in accordance with clauses (i) and (ii) of subsection (d)(3)(A), the Comptroller General of the United States shall conduct an audit and publish in the Federal Register a notice of proposed lump sum catch-up payments to 9/11 victims, 9/11 spouses, and 9/11 dependents who have submitted applications in accordance with subparagraph (B) in amounts that, after receiving the lump sum catch-up payments, would result in the percentage of the claims of 9/11 victims, 9/11 spouses, and 9/11 dependents received from the Fund being equal to the percentage of the claims of 9/11 family members received from the Fund, as of the date of enactment of this subparagraph.

"(ii) Public Comment.—The Comptroller General shall provide an opportunity for public comment for a 30-day period beginning on the date on which the notice is published under clause (i).

"(iii) Report.—Not later than 30 days after the expiration comment period in clause (ii), the Comptroller General of the United States shall submit to the Committee on the Judiciary and the Committee on Appropriations of the Senate, the Committee on the Judiciary and the Committee on Appropriations of the House of Representatives, and the Special Master a report that includes the determination of the Comptroller General on—

"(I) the amount of the lump sum catch-up payment for each 9/11 victim;

"(II) the amount of the lump sum catch-up payment for each 9/11 spouse;

"(III) the amount of the lump sum catch-up payment for each 9/11 dependent; and

"(IV) the total amount of lump sum catchup payments described in subclauses (I) through (III).".

SEC. 1706. PRESERVATION OF CERTAIN PENDING INTERNATIONAL TERRORISM CLAIMS AGAINST SUDAN.

(a) FINDINGS.—Congress makes the following findings:

(1) It is the long-standing policy of the United States that civil lawsuits against those who support, aid and abet, and provide material support for international terrorism serve the national security interests of the United States by deterring the sponsorship of terrorism and by advancing interests of justice, transparency, and accountability.

(2) Neither the claims agreement, nor any other aspect of the effort to normalize relations with Sudan—

(A) resolved claims against Sudan involving victims and family members of the September 11, 2001, terrorist attacks; or

(B) otherwise advanced the interests of the victims and family members of the September 11, 2001, terrorist attacks.

(3) The claims referenced in paragraph (2)(A) remain pending in the multidistrict proceeding 03–MDL–1570 in the United States District Court for the Southern District of New York, and subsection (c) preserves and protects those claims.

(b) SENSE OF CONGRESS.—It is the sense of Congress that the executive branch should not file a Statement of Interest or any other submission, or intervene in any other way, in the multidistrict proceeding 03–MDL–1570, in connection to the rescission of the designation of Sudan as a state sponsor of terrorism or the restoration of Sudan's immunities from jurisdiction and execution in conformity with this Act, if such action would disadvantage terrorism victims.

(c) IN GENERAL.—Nothing in this Act shall apply to, be construed to apply to, or otherwise affect—

(1) any claim in any of the proceedings comprising the multidistrict proceeding 03-MDL-1570 in the United States District Court for the Southern District of New York brought by any person who, as of the date of the enactment of this Act, has a claim pending against Sudan (including as a member of a class certified under Rule 23 of the Federal Rules of Civil Procedure or as a putative member of such a class pending certification); or

(2) the enforcement of any judgment in favor of such person entered in such proceeding.

(d) Applicable Law.—Proceedings described in subsection (c) shall be governed by applicable law in effect before the date of the enactment of this Act, including—

(1) chapter 97 of title 28, United States Code (commonly known as the ''Foreign Sovereign Immunities Act of 1976''), including 28 U.S.C. 1605A note;

(2) section 201 of the Terrorism Risk Insurance Act of 2002 (Public Law 107–297; 28 U.S.C. 1610 note), with respect to any asset that, on or after the date of enactment of this Act, is designated as a blocked asset (as defined in subsection (d)(2) of that section);

(3) rules governing the rights of parties to amend pleadings; and

(4) other relevant provisions of law.

(e) Rule of Construction.—Nothing in this section shall alter, impact the interpretation of, or otherwise affect—

(1) any section of chapter 97 of title 28, United States Code; or

(2) any other provision of law.

Appendix E

SEC. 1707. COMPENSATION FOR CERTAIN NATURALIZED UNITED STATES CITIZENS AND FOREIGN NATIONALS.

(a) Compensation.—

(1) In general.—There is authorized to be appropriated $150,000,000 for payment of compensation, notwithstanding any other provision of law, to any individual who—

(A) has been awarded a judgment in any of the cases set forth in section (c) of the Annex to the claims agreement; and

(B) is—

(i) a United States employee or contractor injured in connection with the bombings of the United States embassies located in Nairobi, Kenya, and Dar es Salaam, Tanzania, who became a United States citizen after August 7, 1998, and before the date of the enactment of this Act;

(ii) a family member—

(I) of a United States employee or contractor injured in connection with the bombings of the United States embassies located in Nairobi, Kenya, and Dar es Salaam, Tanzania; and

(II) who is a United States citizen as of the date of the enactment of this Act; or

(iii) a family member—

(I) of a foreign national United States employee or contractor killed during those bombings; and

(II) who is a United States citizen as of the date of the enactment of this Act.

(2) Payments.—With the requirement of achieving parity in compensation between individuals who became United States citizens after August 7, 1998, and individuals who were United States citizens on or before August 7, 1998, payment of compensation under paragraph (1) to—

(A) an individual described in paragraph (1)(B)(i) shall be based on the same standards used to determine the compensation for an employee or contractor injured in connection with the bombings described in that paragraph who was a United States citizen on or before August 7, 1998;

(B) an individual described in paragraph (1)(B)(ii) shall be on an equal basis to compensation provided to a family member of an individual described in subparagraph (A); and

(C) an individual described in paragraph (1)(B)(iii) shall be on an equal, or, where applicable, a pro rata basis to compensation provided to a family member of a United States employee or contractor who was a United States citizen killed during such bombings.

(b) DISTRIBUTION AND REQUIREMENTS.—

(1) DISTRIBUTION.—The Secretary shall distribute payments from funds made available to carry out subsection (a)(1) to individuals described in that subsection.

(2) AUTHORIZATION LETTER.—Not later than December 31, 2021, the Secretary shall send a letter to each individual who will receive payment under paragraph (1) informing the individual of the amount of compensation the individual will receive pending the execution of any writings under paragraph (3), and the standards used to determine compensation under subsection (a)(2), taking into account the individual's final judgment amount.

(3) REQUIREMENT BEFORE DISTRIBUTION.—Before making a payment to an individual under paragraph (1), and after the delivery of the authorization letter under paragraph (2), the Secretary shall require the individual to execute a writing that includes a waiver and release of all the individual's rights to assert claims for compensatory or other relief in any form or to enforce any judgment against Sudan in connection

with, and any claims against the United States related to, any claim, suit, or action specified in Article II of the claims agreement.

(c) Foreign Nationals.—Notwithstanding any other provision of law or the claims agreement—

(1) individuals described in subsection (a)(1) are not eligible to receive any compensation as provided by Sudan pursuant to Article III of the claims agreement; and

(2) the funds provided by Sudan for distribution of compensation to such individuals pursuant to the Annex of the claims agreement shall be redistributed—

(A) among all other individuals eligible for compensation under section (c) of the Annex to the claims agreement consistent with the principles set out in that Annex; or

(B) if Sudan and the foreign nationals eligible for compensation reach a private settlement, then pursuant to the terms of that settlement.

(d) Department of State Reporting Requirements.—

(1) Initial Report.—Not later than 90 days after the date of the enactment of this Act, the Secretary shall submit to the appropriate congressional committees a report that includes a detailed

description of the plan of the Department of State for the distribution of payments to each category of individual described in subsection (a)(1), including how the Department is arriving at compensation levels for each individual and the amount of compensation each such individual will receive from funds made available to carry out that subsection.

(2) UPDATED REPORT.—Not later than December 31, 2021, the Secretary shall submit to the appropriate congressional committees a report describing—

(A) whether the distribution plan described in paragraph (1) was carried out; and

(B) whether compensation levels were provided as described in the report required by paragraph (1).

(e) COMPTROLLER GENERAL REPORT.—Not later than December 31, 2022, the Comptroller General of the United States shall submit to the appropriate congressional committees a report assessing the implementation of this section by the Department of State, including whether—

(1) all distributions were made in accordance with the requirements of subsections (a), (b), and (c); and

(2) all individuals described in subsection (a)(1) received compensation from amounts made available to carry out that subsection in the manner described in subsection (a)(2).

Appendix E

SEC. 1708. TREATY AND EXECUTIVE AGREEMENT PRACTICE.

(a) FINDINGS.—Congress makes the following findings:

(1) Congress and the executive branch share responsibility for the foreign relations of the United States pursuant to Article I and Article II of the Constitution of the United States.

(2) All legislative powers of the Federal Government, including on matters of foreign relations, are vested in the Congress of the United States pursuant to section 1 of Article I of the Constitution.

(3) The executive branch may not direct Congress to take any action, nor may it convey any legislative or other power assigned to Congress under the Constitution to any entity, domestic or foreign.

(4) The original escrow release conditions agreement prescribed specific legislative text and purported both to require enactment of such text and provide a veto to Sudan over exceptions to that text.

(5) Congress rejected the approach described in paragraph (4).

(6) The executive branch and Sudan subsequently amended the escrow release conditions agreement to eliminate the specific legislative text as well as

the purported requirement for enactment and the purported veto over exceptions to that text.

(b) Amendment to Case-Zablocki Act.—Section 112b of title 1, United States Code, is amended by adding at the end the following:

"(g) It is the sense of Congress that the executive branch should not prescribe or otherwise commit to or include specific legislative text in a treaty or executive agreement unless Congress has authorized such action.".