No. 23-708

IN THE

Supreme Court of the United States

CHAVA RACHEL MARK, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF T. B. M., R. L. M., AND E. B. M., MINORS, *et al*,

Petitioners,

v.

REPUBLIC OF SUDAN, *et al*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CENTER FOR JUSTICE AND FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ABRAHAM BELL
Professor of Law
UNIVERSITY OF SAN DIEGO LAW SCHOOL
5998 Alcala Park
San Diego, CA 92110
(619) 260-7519
avibell@sandiego.edu

ELWOOD EARL SANDERS
Counsel of Record
ATTORNEY AT LAW
1108 E. Main St., Ste. 1201
Richmond, VA 23219
(804) 644-0477
sandy@lantagne.com

Counsel for Center for Justice and Freedom as Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

Amicus curiae is Center for Justice and Freedom, an organization that assists victims of terrorism, oppression, and injustice to obtain recompense through the legal system and brings public and governmental attention to the victims' stories and situations.. *Amicus curiae* has no direct financial interest in the parties to or the outcome of this case.*

SUMMARY OF ARGUMENT

This Court has long made clear that Congressional control over the jurisdiction of federal courts cannot be used to immunize government action from constitutional review. E.g., *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), *Boumediene v. Bush*, 553 U.S. 723 (2008), In the case at bar, the D.C. Circuit has adopted a novel approach to constitutional review and legislative interpretation that functionally permits the government action implemented in the Sudan Claims Resolution Act ("SCRA") and Claims Settlement Agreement ("CSA") to immunize itself from constitutional review.

Particularly where legislation purports to strip subject-matter jurisdiction in its entirety from the courts, constitutional review is vital, and this Court must take the opportunity not only to reject the D.C.

---

* No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person, other than *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties' received timely notice of the filing of this brief.

Circuit's misguided approach, but to clarify the standards by which such constitutional review may be conducted without infringing upon Congress' prerogative to establish the scope of judicial subject-matter jurisdiction.

The balance between the Congressional prerogative to regulate and control the jurisdiction of federal courts on the one hand, and the imperative to preserve access to judicial review of potential constitutional infirmities of government action, on the other, has been a source of controversy for well over a century, and the Court has struggled to provide clear standards. E.g., *Patchak v. Zinke*, 583 U.S. 244 (2018) (no majority opinion). The case at bar offers the Court an opportunity to clarify an important proposition that accords with past rulings but is evidently not clear to lower courts: where government actions include an element of stripping courts of jurisdiction, the constitutionality of the entirety of the governmental action must be exposed to review, rather than merely the jurisdiction-stripping as if it were an isolated provision.

ARGUMENT

I. FACTUAL BACKGROUND

Petitioners are victims and survivors of a Sudan-sponsored terrorist attack carried out by Hamas in July 2016, all members of the Mark family, who have sued Sudan for its material support of the Hamas terrorist organization. When the Marks filed suit, Sudan was recognized by the United States government as a state sponsor of terror amenable to

suit under the "terrorism exception" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605A. However, shortly after the Marks' action was filed, the United States entered into a settlement agreement with Sudan that included the CSA, a number of related agreements including private settlement agreements between Sudan and some terror victims, and a US commitment to enact the legislation that became the SCRA.

In aggregate, the settlement with Sudan resolved all outstanding terrorism claims against Sudan except those of the victims of Hamas terrorism. Most claims were resolved by US espousal of terror victim claims, and Sudan's payment of $335 million to espoused victim claims. Victims of the terror attacks of September 11, 2001 and their families were awarded "lump sump" payments rather than other shares of the settlement, and were also permitted to continue a multidistrict legal action against Sudan. Only victims of Hamas terrorism were excluded from the settlement—they received no compensation, and were barred from engaging in further legal action by a jurisdiction-stripping provision of SCRA.

The grounds for a constitutional challenge to the agreement are evident, and, indeed, while Sudan successfully invoked SCRA to demand dismissal of Petitioners' claim below on the grounds that the court no longer had personal and subject-matter jurisdiction and the Marks no longer had a cause of action, the Marks challenged the constitutionality of the settlement's exclusion of victims of Hamas terrorism on the basis of a violation of their Fifth Amendment rights to equal protection as well as access to judicial process.

Apparently unaware that the "private settlements" were a part of the settlement—in a misrepresentation that came to light only during preparation of briefs during proceedings before the Court of Appeals, the US and Sudan had falsely claimed that the private settlements preceded and were independent of the settlement—the district court ruled that the settlement survived equal protection scrutiny because there was a "rational basis" for restricting compensation to "claims in which Sudan's liability was already resolved by the date of the settlement, either through default judgment or private settlement," inter alia. *Mark v. Republic of Sudan*, 2021 WL 4709718, at *3 (D.D.C., 2021). This ruling is clearly unsustainable in light of the information regarding the private settlements that subsequently emerged.

The Court of Appeals sidestepped the issue by ruling on text of the jurisdiction-stripping portion of SCRA as if it were divorced from all other aspects of the settlement. Finding no constitutional infirmity in that provision of the SCRA when viewed in isolation, the court placed other parts of the settlement outside the court's purview using the bootstraps of that same jurisdiction-stripping provision. *Mark v. Republic of the Sudan*, 77 F.4th 892, 897 n. 3 (C.A.D.C., 2023).

II. CONSTITUTIONAL REVIEW MUST CONSIDER THE WHOLE OF THE GOVERNEMENT ACTION.

This Court has long recognized that the constitutionality of government action, and, in particular of statutes scrutinized under the Equal

Protection Clause (or the equal protection component of the Fifth Amendment's Due Process Clause) cannot be judged solely on the bare basis of the words therein, but, rather, must be judged on the totality of the government action given expression in the statute. The breadth of constitutional review extends beyond mere statutory language and encompasses the examination of accompanying government actions.

Thus, for instance, facially valid administrative actions, regulations and statutes that employ no suspect classification can nonetheless be found constitutionally infirm by virtue of a motive to discriminate on the basis of a suspect classification. E.g., *Washington v. Davis*, 426 U.S. 229 (1976). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court stressed the importance of considering the practical consequences of legislation in addition to the legislative text.

Indeed, a statute that is valid on its face can be found constitutionally defective solely due to discriminatory enforcement that falls afoul of the Equal Protection Clause, even where the language of the statute shows no sign of invidious discrimination, and there is no evidence of improper motive by the legislator. Thus, for example, this Court found in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) that a municipal ordinance regulating the operation of laundries that was facially neutral, but was applied with "an evil eye and an unequal hand" against Chinese persons could not be enforced, even as the court specifically eschewed any conclusion regarding the intent of the legislators.

The necessity to evaluate the full extent of the government action is is particularly true in the case of legislation that strips courts of jurisdiction. While addressing a challenge sounding in Article III of the Constitution rather than the Equal Protection Clause, this Court ruled in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), that a jurisdiction-stripping clause in legislation could not be given effect when aimed to "prescribe a rule for the decision of a cause in a particular way." In that case, this Court evaluated the validity of jurisdiction-stripping language that removed the Court of Claims' jurisdiction over certain property claims of pardoned members of the Confederacy. The Court had no choice but to examine the pardons themselves and their purpose, as well as the motives and effects of the prior legislation which had confiscated property of Confederates. *Id* at 137-148.

These cases cannot be understood without acknowledging that the subject of the judicial constitutional review of legislation is not merely the text of the law, but the entire government action of which it is part—from its motivation to its execution to its accompanying plans and behavior.

In the case at bar, there is no disagreement that the CSA and SCRA were conceived together—indeed the SCRA was an agreed upon implementation of a central component of the settlement. It is of no relevance whether one insists, like the Court of Appeals, on beginning with an examination of the SCRA. In any event, the SCRA's motives are to be found in the motives of the entire settlement, and the implementation and application of the SCRA are

inseparably linked to the other parts of the settlement contained in the CSA and other agreements.

The constitutional validity of the restoration of sovereign immunity and the stripping of judicial jurisdiction in the SCRA under the rules of equal protection can only be determined by looking at the whole of the settlement. The settlement as a whole resolves all claims of terror victims except victims of Hamas through compensation, preservation of lawsuits or both; it is not adequate to examine solely that portion of the SCRA which directly discusses jurisdiction by permitting September 11, 2001 cases to go forward, while otherwise denying jurisdiction.

A statute that explicitly stripped federal courts of all subject-matter jurisdiction to hear cases of victims of a terrorist group that targeted victims of a particular ethnicity and religion (for instance, African Catholics), while leaving the courts with jurisdiction to resolve claims by victims of all other terrorist groups would certainly be viewed as constitutionally suspect for its discriminatory treatment, and the standard of review would be dictated by the class of discriminated against victims. The fact that the statute accomplishes its discrimination not by facially identifying the discriminated-against class, but, rather, by incorporating a prior administrative or executive action that discriminated against the protected class, cannot change the legal standard of evaluation.

And, of course, the fact that the statute in question strips jurisdiction cannot be used to justify narrowing the scope of review to exclude the possibility of examining the entire government action. To allow, for instance, a statute to strip federal courts

all subject-matter jurisdiction to hear cases brought by victims of all terrorist groups designated by the Secretary of State, where the Secretary of State previously designated only a terrorist group that targeted African Catholics would be no more insulated from constitutional review than a statute which directly named the terrorist group targeting African Catholics. It would be absurd to find that the mere division of the discrimination into several separate acts (a Secretary's designation, and the jurisdiction-stripping statute in this example) could insulate the government action from judicial review.

Permitting state actors to avoid judicial review simply by means of the accounting trick of splitting up constitutionally infirm actions into several components not only functionally eviscerates the constitutional protections to which the affected parties are entitled, it incentivizes bad decision-making that obscures the necessary information to enable the public to hold decision-makers accountable.

CONCLUSION

For these reasons, the Center for Justice and Freedom respectfully requests that the Court grant the Mark family's petition for a writ of certiorari in order to reverse the judgment of the court of appeals.

Respectfully submitted,

ELWOOD EARL SANDERS
Counsel of Record
ATTORNEY AT LAW
1108 E. Main St., Ste. 1201
Richmond, VA 23219
(804) 644-0477
sandy@lantagne.com

ABRAHAM BELL
Professor of Law
UNIVERSITY OF SAN DIEGO LAW SCHOOL
5998 Alcala Park
San Diego, CA 92110
(619) 260-7519
avibell@sandiego.edu

January 29, 2024