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

REPLY BRIEF

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REPLY BRIEF

The government does not deny the importance of the questions presented. Neither does the government deny that the D.C. Circuit violated this Court's multiple holdings 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). Finally, the government does not deny that, as construed by the D.C. Circuit, the statute violates both the Due Process Clause and constitutionally mandated separation of powers because it leaves the Petitioners with no judicial forum in which to present their equal protection claims. *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).

Unable to counter the Petitioners' arguments, the government seeks to minimize the significance of the D.C. Circuit's error. The government characterizes the D.C. Circuit's due process violations as a mere erroneous "analytical approach." Opp. Br. at 11. But this Court previously characterized the same issues as "serious constitutional questions." *Robison*, 415 U.S. at 366-67; *Webster*, 486 U.S. at 603. And the D.C. Circuit, itself, has previously held that these questions concern federal courts' "essential judicial function" under which federal courts are bound to resolve questions regarding the constitutionality of government conduct. *See e.g., Bartlett.*

The government attempts to explain why, despite its unconstitutional construction of section 1704(a)(1), the court of appeals reached the right result. None of the government's arguments address the questions raised in the Petition. And its efforts to deflect amount to a neon sign saying, "Don't look here!"

This is a case that no federal court wants to hear. It requires the courts to review the constitutionality of an international settlement agreement entered into by the U.S. government, where the Petitioners presented compelling evidence that the government and Sudan made material misrepresentations as to the rationale for excluding the Petitioners from any benefits of the settlement. The courts' discomfort with this case is evident from the extreme efforts made by the court of appeals to sidestep the merits of the Petitioners' constitutional claims.

The court of appeals, *sua sponte,* requested supplemental briefing on whether the Marks' constitutional challenges to the settlement agreement raised nonjusticiable political questions – an issue that had not been raised by the parties or the district court. Then, when it became apparent that the political question doctrine would not support abstention, the court raised on its own, and rendered its decision based upon, an entirely different previously-unasserted argument -- that section 1704(a)(1) deprived all courts of jurisdiction to hear the Marks' constitutional challenges to the settlement agreement.

The D.C. Circuit's activism is reminiscent of that of the Ninth Circuit in *United States v. Sineneng-Smith*, where this Court applied the party presentation principle

to vacate the dismissal of a criminal conviction because the court of appeals had asserted arguments of its own, invited supplemental briefing on those arguments, and rendered a decision based on those arguments rather than those of the parties. 590 U.S. 371, 375, (2020). Granted, federal appellate courts are obligated to examine their own jurisdiction and that of lower courts in a cause under review. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). But the mere fact that the D.C. Circuit felt the need to (twice) reach beyond the parties' arguments demonstrates that the merits of the Petitioners' equal protection claims cannot be easily dismissed. And the mere fact that none of Sudan, the government, and the district court suggested that (a) the case could be dismissed by analyzing section 1704(a)(1) in isolation from the other settlement terms or (b) that section 1704(a)(1) could be construed to entirely preclude a court from considering the equal protection arguments, demonstrates that these holdings are in conflict with binding decisions of this Court and the lower federal courts of appeal.

ARGUMENT

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

The Petition cites numerous decisions from this Court and the lower federal appellate courts that explicitly hold that courts must construe jurisdiction-stripping statutes as allowing constitutional claims to proceed absent clear and convincing evidence of a contrary congressional intent. Pet. at 2, 14-15. The Petition also cites decisions from this Court and the lower federal appellate courts holding that

statutes that deny a judicial forum to consider colorable constitutional claims are unconstitutional and violate both the Due Process Clause and constitutionally mandated separation of powers. Pet. at 16. The government implicitly concedes that the D.C. Circuit's decision is in direct conflict with these decisions and that the D.C. Circuit's construction of section 1704(a)1) denies a judicial forum to individuals seeking to raise constitutional claims. If for no other reason, the Court should grant the Petition and vacate the judgment because the D.C. Circuit's published decision establishes a precedent that, if left standing, would empower Congress to immunize any unconstitutional legislation or governmental conduct by simply pairing it with a jurisdiction-stripping provision like section 1704(a)(1). Such a result would undermine due process protections and separation of powers. It would also call into question the decisions in *Robinson*, *Webster*, *Bartlett*, and others to the contrary.

Rather than addressing the merits of the Petition, the government offers technical arguments purportedly justifying the result of the decision below. The government's arguments are based upon demonstrably false assumptions and incorrect legal premises and do not militate against granting the Petition.

II. The Government's Arguments Demonstrate That The Petition Should Be Granted.

1. The government dedicates much of its brief to a lengthy discussion of the justifications for seeking a settlement with Sudan and the executive branch's authority to espouse and settle individuals' claims against foreign sovereigns. The government relies on *dicta* from a

1984 decision of the D.C. Circuit stating that a sovereign has "absolute power" to espouse its nationals claims. Opp. Br. at 3, citing *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984)[1]. The government's argument is a red herring, and it is incorrect.

The government's argument is a red herring because it suggests that the Petitioners deny the authority of the executive branch to espouse and settle claims. In fact, the Petitioners have consistently acknowledged that the executive enjoys such powers. *See e.g.*, App. Br. at 16. The government's argument is incorrect because, contrary to the government's framing of the *Reclamantes dicta*, the power of the President to espouse claims is not "absolute." "[L]ike every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), *quoting United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–320 (1936). Accordingly, the Petitioners have consistently argued that while the government has the power to espouse and settle their claims, the government is required to exercise that power in conformity with the Petitioners' constitutional equal protection rights. *See e.g.*, App. Br. at 17; App. Reply Br. at 13. "Rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them." *Boos v. Barry*, 485 U.S. 312, 324 (1988), *quoting Reid v. Covert,* 354 U.S. 1, 16, (1957).

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1. *Reclamantes* dealt with the authority of a ***foreign*** sovereign (Mexico) to espouse claims of its ***own*** citizens.

2. The government also argues that the Petitioners fail to demonstrate that, but for the due process violations, the court of appeals might have reached a different result. Opp. Br. at 11. Again, the government is wrong. The Petition identifies several reasons why the court would have ruled in their favor had it not reviewed section 1704(a)(1) in isolation from the rest of the settlement, and had it not found that the jurisdiction-stripping provision precluded its review of the settlement as a whole.

The Petitioners argued that Sudan and the government made material misrepresentations to both the district court and the court of appeals regarding the rationale supporting the disparate treatment of the Hamas victims. Pet. at 10-12, 18-19. Specifically, the principal rationale cited by the district court in upholding the settlement against the Petitioners' equal protection challenge was that the settlement compensated only claimants who, unlike the Petitioners, had ***previously*** established Sudan's liability through default judgments or "private settlement agreements." App 19a-20a. Sudan and the government both falsely asserted that the so-called "private settlement agreements" had been reached prior to and independent of the Claims Settlement Agreement. And Sudan explicitly and falsely represented to the courts that the "private settlement agreements" did not involve state action by any U.S. government entity and were therefore immune from constitutional scrutiny. See Pet. at 11. But, as the Petitioners discovered, the U.S. government required Sudan to enter these "private settlement agreements" with certain pre-selected claimants. Thus, contrary to the Respondents' assertions, the "private settlement agreements" were not a rationale justifying the disparate treatment of the Petitioners; the "private settlement

agreements" were a result of the disparate treatment. Pet. at 10-12; 18-19. And, because the "private settlement agreements" were produced by U.S. government action, contrary to Sudan's argument, they are subject to constitutional scrutiny. *Ibid*.

3. The Petitioners argued that the Respondents' material misrepresentations as to the "private settlement agreements" required the court to "closely scrutinize" the Respondents' proffered rationale for the disparate treatment, and that the misrepresentations required "heightened scrutiny." Pet. at 12, *citing* App. Reply Br. at 1, 9. Similarly, the Petitioners cited authority from the Second and Ninth Circuits holding that where the government articulates a ***false*** rationale for its disparate treatment of a plaintiff, the government's actions are deemed arbitrary and in violation of the Equal Protection Clause. App. Reply Br. at 10, *citing Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004), *overruled on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Fajardo v. Cnty of Los Angeles*, 179 F.3d 698, 700 n.2 (9th Cir. 1999); *but see*, *Highway Materials, Inc. v. Whitemarsh Twp.*, 386 F. App'x 251 (3d Cir. 2010) (holding evidence of pretext alone does not suffice); *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202 (10th Cir. 2006) (same); *Smith v. City of Chicago*, 457 F.3d 643, 651 (7th Cir. 2006) (same). Thus, the government is plainly wrong when it asserts that "it is undisputed that the petitioners' equal protection claim is subject to rational basis review." *See* Opp. Br. at 11.

In fact, the court of appeals applied rational basis review only after applying its sleight of hand to

analytically isolate section 1704(a)(1) from the entirety of the settlement. Pet. App. at 8a-9a. The Petitioners did ***not*** agree that rational basis review applied. See App. Reply Br. at 1, 9 (calling for heightened scrutiny). Additionally, as discussed in the Petition (Pet. at 18-20), the D.C. Circuit's maneuver isolating the jurisdiction-stripping provision from the other terms of the settlement not only led to its erroneous application of a rational basis standard or review, it also warped the court's analysis of the equal protection claim.

Application of a heightened level of scrutiny or a presumption that the government's conduct is arbitrary makes sense under circumstances like these, where the government misrepresents the reasons for its disparate treatment. As this Court explained in *Romer v. Evans,* "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." 517 U.S. 620, 632 (1996). Where the government misrepresents the rationale for its conduct, it entirely frustrates the court's efforts to determine whether the classification is rationally related to the object to be attained. The Court should not reward Respondents for making false representations of material facts to the courts below.

4. Indeed, the Respondents' misrepresentations regarding the so-called "private settlement agreements" is so egregious that it calls into question the Respondents' other proffered justifications for their disparate treatment of the Petitioners. After all, if the Respondents had confidence that those other justifications were adequate, they would not need to pile on with misrepresentations

regarding the "private settlement agreements."

5. The Petition also provides examples of how the D.C. Circuit's improper constitutional analysis of section 1704(a)(1) in isolation from the rest of the settlement enabled the court to disregard the Respondents' material misrepresentations and to apply a rational basis standard of review. Pet. at 18-20. As discussed above, the court of appeals exploited the isolation of the jurisdiction-stripping provision to apply a rational basis level of review notwithstanding the Respondents' patent and material misrepresentations. Additionally, and as discussed in the Petition (Pet. at 19-20), by evaluating the constitutionality of section 1704(a)(1) alone, the court of appeals framed the equal protection analysis as a comparison between the victims of the September 11, 2001 terrorist attacks and victims of "terrorist attacks in general." Pet. App. at 10a. The Petition explains why this is a false dichotomy because by the time the settlement addressed the September 11 victims, it had already provided for compensation for all victims of "terrorist attacks in general" other than the Petitioners and the other Hamas Victims.

III. The Questions Presented Are Properly Before The Court.

The government seeks additional refuge in its claim that the Petitioners failed to raise the questions presented in the court of appeals. *Ibid.* at 14[2]. The Petitioners argued throughout the proceedings that the Claims Settlement

2. The government attempts to merge the questions presented into one and doing so, misstates both questions. Opp. Br. at 14.

Agreement and the SCRA must be reviewed as a unit. In the district court the Petitioners contended that the CSA and SCRA, individually and together, impinged on their equal protection rights. See Memorandum of Points and Authorities in Opposition to Motion to Dismiss, ECF No. 20 at 2. In the court of appeals, the Petitioners argued that "the CSA and SCRA together nullify ***only*** the Plaintiffs' claims." App. Br. at 12; *see also*, *ibid*. at 19-20, 21-22 (CSA and SCRA together compensate all victims but Petitioners), 24 (the CSA and SCRA placed all the burdens of settlement on the Petitioners), 25 (same). Additionally, in their Reply Brief, the Petitioners argued that the deception regarding the private settlement agreements infected the entire settlement, including the jurisdiction-stripping provision of the SCRA which was based upon and contingent upon the CSA. The Petitioners clearly raised this issue below.

The government also argues that the Petitioners failed to raise their arguments that the court of appeals could not, consistent with the Due Process Clause and separation of powers, construe or apply section 1704(a)(1) to remove jurisdiction to hear constitutional claims. Opp. Br. at 14. This argument is disingenuous. The government ignores that, until the court of appeals held that the section 1704(a)(1) precluded judicial review of the Petitioners' constitutional challenges, that argument had never been raised – not by the parties, and not by the district court. The Petitioners challenged this ruling at their first opportunity – in a timely-filed petition for rehearing. In addition to violating the Petitioners' due process rights and constitutional separation of powers, the court of appeals unduly involved itself in the presentation of the appellate arguments. *United States v. Sineneng-Smith*, 590 U.S. 371, 375, (2020).

This Court has held that "the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction." *Rosales-Mireles* v. *United States*, 585 U.S. 129 (2018). The D.C. Circuit's decision conflicts with binding precedent and undermines the public legitimacy of our justice system. The Petition should be granted.

CONCLUSION

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

Respectfully submitted,

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