No. 24-___

IN THE
Supreme Court of the United States

SHARI MAYER BOROCHOV, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN AND
SYRIAN ARAB REPUBLIC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. TOLCHIN
THE BERKMAN LAW OFFICE, LLC
829 East 15th Street, Box 7
Brooklyn, NY 11230
(718) 855-3627
RTolchin@berkmanlaw.com

MICHAEL J. RADINE
OSEN LLC
190 Moore Street, Suite 272
Hackensack, NJ 07601
(201) 265-6400
MRadine@osenlaw.com

MATTHEW D. MCGILL
Counsel of Record
AARON HAUPTMAN
ADDISON W. BENNETT
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Petitioners

QUESTION PRESENTED

The Foreign Sovereign Immunities Act's "terrorism exception" supplies federal courts with subject-matter jurisdiction over claims seeking liability against a foreign state for its "act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). Terrorists acting on behalf of Hamas committed two terrorist attacks in Israel: a shooting at a holy site near Hebron and a car-ramming at a bus stop in Jerusalem. Both attacks injured U.S. nationals. The victims of these attacks and their family members sued two of Hamas's sponsors, the Islamic Republic of Iran and the Syrian Arab Republic, invoking jurisdiction under the terrorism exception. Although the district court found jurisdiction, the D.C. Circuit reversed, holding that the terrorism exception does not apply to the provision of material support for attacks intended to kill but that result only in grievous injuries. Instead, the court of appeals held that jurisdiction turns on whether someone happens to have died in the attack.

The question presented is:

Whether the Foreign Sovereign Immunities Act's terrorism exception extends jurisdiction to claims arising from a foreign state's material support for a terrorist attack that injures or disables, but does not kill, its victims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The petitioners are: Shari Borochov, Raphael Golan, Nadav Golan, Yael Inbar, Shai Fishfeder, Efrat Fishfeder, Ohad Fishfeder, Omer Fishfeder, and Shiri Fishfeder. They were the plaintiffs in the district court and the appellants in the court of appeals.

2. Respondents are the Islamic Republic of Iran and the Syrian Arab Republic, which were the defendants in the district court and the appellees in the court of appeals.

3. a. Eli M. Borochov, Ronen Steven Borochov, Devora Sue Borochov, Josef S. Borochov, Shira Nechama Borochov, Avraham M. Borochov, Yoav Golan, Rotem Shoshana Golan, Yehudit Golan, Matan G. Golan, Cici Jacobson, Eddy Jacobson, Chaim Goldwater, Esther Goldwater, Shmuel Gorfinkle, Sara Gorfinkle, Eshter Fishfeder, and David Fishfeder were plaintiffs in the district court and appellees in the court of appeals. The judgments awarding them damages were not appealed and are not at issue in this petition.

b. Natanel Chaim, Mark Chava, Rachel Mark, Yiska Mark, Shira Hodaia Mark Charif, Yehoshua Mordechai Mark, Miryam Mark, Orit Mark, Pdaya Menachem Mark, Ayelet Hashachar Batt, Aryeh Batt, and Elisheva Hirschfeld were plaintiffs in the district court whose claims were voluntarily dismissed without prejudice.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Borochov* v. *Islamic Republic of Iran*, No. 22-7058 (D.C. Cir.) (judgment entered March 8, 2024; rehearing en banc denied April 25, 2024); and
- *Borochov* v. *Islamic Republic of Iran*, No. 1:19-cv-2855 (D.D.C.) (judgment entered March 4, 2022).

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Shari Mayer Borochov et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the district court granting petitioners' motion for default judgment (App. 27a-82a) is reported at 589 F. Supp. 3d 15. The opinion of the court of appeals vacating that judgment (App. 1a-26a) is reported at 94 F.4th 1053.

JURISDICTION

The court of appeals entered judgment on March 8, 2024. App. 1a-26a. The court of appeals denied Borochov's petition for rehearing en banc on April 25, 2024. App. 83a. On July 17, 2024, the Chief Justice extended the time within which to file this petition to September 9, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The terrorism exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A, provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or

> resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency * * * .

The remainder of this provision is reproduced in the Appendix. App. 85a-90a.

INTRODUCTION

The terrorism exception to the Foreign Sovereign Immunities Act ("FSIA") allows victims of terrorist attacks to sue the foreign states that carry out or support those attacks. In the decision below, the court of appeals held that there is no jurisdiction over such suits unless some person is killed in the attack. That decision upended a clear consensus of federal judges and threatens to foreclose countless pending and future claims brought by grievously wounded victims of terrorism. This Court's intervention is necessary to restore that consensus, which had faithfully adhered to the text of the FSIA.

The terrorism exception vests federal district courts with subject-matter jurisdiction over claims seeking liability for "personal injury or death" caused by a state sponsor of terrorism's "act of * * * extrajudicial killing * * * *or* the provision of material support or resources for such an act." (emphasis added). The district court, joining the vast majority of judges to consider the question, concluded that jurisdiction lies where a foreign state provided material support for the purpose of extrajudicial killing, and that material support proximately caused the victim's injuries, even if the supported attack did not succeed in killing any of its victims.

But a panel of the D.C. Circuit reversed, holding that whether an injured victim of a terrorist attack

can sue turns on whether some other person died in the attack. That decision shuts the courthouse doors to numerous victims of terrorist attacks in both pending and future cases, including many members of the armed services who were grievously injured or permanently disabled by terrorist attacks while serving abroad. In the D.C. Circuit's view, whatever their injuries, those soldiers and other victims cannot sue unless the terrorist attack that wounded them also killed someone else.

As proceedings in the district courts presiding over pending cases have already demonstrated, this rule raises innumerable obstacles to otherwise meritorious claims, requiring plaintiffs to engage in onerous jurisdictional discovery to identify deceased victims of attacks in distant, war-torn regions that may have occurred many years ago. Subject-matter jurisdiction now depends on pure happenstance and the discovery of potentially unknowable facts.

The text and purpose of the terrorism exception provide no support for the new substantial obstacles that the court of appeals placed in front of victims of terrorism. Congress did not provide immunity for the state sponsor of a less effective terrorist, who is stopped before he can inflict his intended maximum damage, or who injures a victim fortunate enough to receive prompt, lifesaving care. As the district court here recognized, by extending jurisdiction to claims arising from a state sponsor of terrorism's "provision of material support or resources for" "an act of * * * extrajudicial killing," Congress empowered courts to remedy injuries proximately caused by *both* killings *and* "material support" aimed at effecting—"for"—an extrajudicial killing. 28 U.S.C. § 1605A(a)(1). Just as

someone may dress "for" a dinner party that gets abruptly canceled, a state sponsor of terrorism can provide support "for" an extrajudicial killing that does not materialize. That reading is faithful to the text, and it advances the FSIA's purpose of providing meaningful redress to victims of state-sponsored terrorism.

Before the D.C. Circuit's ruling, the overwhelming consensus among district courts was that the terrorism exception supplies jurisdiction in cases like this. But because the FSIA's venue provision provides the D.C. Circuit with an effective monopoly over these claims, a single decision of a three-judge panel has had the immediate and disastrous effect of foreclosing review of potentially thousands of claims across the Nation, bucking the considered judgment of other courts that had come to a contrary conclusion.

Unless this Court grants review, the decision below will almost certainly be the final word on the matter. And because, absent review, similarly situated plaintiffs are unlikely to file claims at all, this case may be this Court's best and final chance to review—and correct—the lower court's deeply mistaken reading of the statute's text, history, and purpose. This Court should clarify that the terrorism exception protects the victims of terrorist attacks that injure and maim their victims.

STATEMENT

1. Congress enacted the terrorism exception to empower victims of terrorist attacks to seek damages from the foreign states that sponsored the attack and to deter future attacks. Before the provision's enactment, "the FSIA provided no relief for victims of a terrorist attack." *Owens* v. *Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017), reversed on other grounds

sub nom. *Opati* v. *Republic of Sudan*, 590 U.S. 418 (2020). Dissatisfied with that state of affairs, in 1996 Congress withdrew foreign sovereign immunity and extended jurisdiction over cases seeking "damages * * * for personal injury or death that was caused by" a designated foreign sovereign's "act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking," "or the provision of material support or resources for such an act." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (then codified at 28 U.S.C. § 1605(a)(7)).

The following year, Congress added the "Flatow Amendment" to the terrorism exception, which, like the original terrorism exception, aimed to further "deter state support for terrorism." *Owens*, 864 F.3d at 764. Specifically, Congress created a federal cause of action against the foreign officials responsible for committing or supporting an attack. This amendment made clear that, unlike in other suits involving foreign sovereigns, victims could recover punitive damages. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3172 (1996).

Congress amended the terrorism exception again in 2008, again to expand available relief in federal courts. National Defense Authorization Act for Fiscal Year 2008, Pub L. No. 110-181, § 1083, 122 Stat. 3, 338. The D.C. Circuit had interpreted the Flatow Amendment to create a cause of action only against a foreign state's officials, and not the foreign state itself. See *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004). To restore "Congress's original intent," which had been "muddied by" the D.C. Circuit's decision, Congress made clear that

U.S. nationals, members of the armed forces, and employees and contractors of the federal government had a cause of action against state sponsors of terrorism. 153 Cong. Rec. S15614 (Dec. 14, 2007) (statement of Senator Lautenberg); see 28 U.S.C. § 1605A(c).

As it stands today, the terrorism exception employs a jurisdictional grant, a federal cause of action, and special damages rules to deter state sponsors of terrorism and empower their victims to seek redress. The statute strips sovereign immunity in cases seeking money damages for "personal injury or death that was caused by" a state sponsor's "act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). It creates a federal cause of action for particular plaintiffs, *id.* § 1605A(c), while allowing other plaintiffs to bring state-law claims so long as the victim of the terrorist attack was a U.S. national or member of the armed forces at the time of the attack, *id.* § 1605A(a)(2)(A)(ii). And it authorizes courts to grant expansive damages, including punitive damages and compensation for property loss. *Id.* § 1605A(c)-(d).

2. This case was brought by the victims of two terrorist attacks and their family members. In the first attack, members of a Hamas cell "nested a rifle in a window overlooking the courtyard of the Cave of the Patriarchs," a holy place in Judaism, Christianity, and Islam. App. 34a. Admittedly "intend[ing] to kill Jews," the Hamas gunmen fired upon and wounded Eli Borochov and one other victim. App. 35a. Though he survived, Eli "could not walk for two months." *Ibid.*

In the second attack, a terrorist acting on behalf of Hamas "raced his car into a bus stop in central Jerusalem, ramming 14 people," including Yoav and

Rotem Golan. App. 36a. Yoav and Rotem were "hurled * * * into the bus stop's glass wall," resulting in injuries that confined Yoav to a wheelchair for a month and that kept Rotem out of school for two months. *Ibid.* The terrorist was shot before he could retrieve an axe from his car that he "likely intended to use * * * against the crowd." *Ibid.* Thanks to this intervention, every victim survived.

Hamas terrorists would not have been able to commit those attacks without material support from Iran and Syria. The district court found that Iran has provided Hamas "millions of dollars," has "smuggle[d] weapons to Hamas through tunnels on the Egypt-Gaza border and sometimes via the Mediterranean Sea," and has helped "train[] Hamas soldiers over many years." App. 33a-34a. The court likewise found that Syria has provided "material support in the form of operational freedom, political legitimacy, protection, and training to Hamas," and that "without it, Hamas could not have undertaken these attacks." App. 32a.

3. Eli Borochov, his family members, and the Golans and their family members sued Iran and Syria under the FSIA's terrorism exception, 28 U.S.C. § 1605A(c), claiming that their injuries were caused by Iran's and Syria's material support for Hamas's attempted extrajudicial killings. The plaintiffs who were American citizens sued under the cause of action for U.S. nationals created by the terrorism exception. See *id.* § 1605A(c). The plaintiffs who were Israeli citizens, who lacked a direct cause of action under § 1605A, sued under D.C. law, the choice-of-law rules of which required application of Israeli substantive law, App. 6a.

As is typical in terrorism-exception cases, Iran and Syria did not appear, so "the Clerk entered defaults against them." App. 6a. In such cases, the FSIA requires a plaintiff to "establish[] his claim or right to relief by evidence satisfactory to the court" before the court can enter default judgment. 28 U.S.C. § 1608(e). The district court accordingly considered whether the plaintiffs' evidence supported jurisdiction under the terrorism exception even though no one died in the attacks that injured them.

The district court held that it had jurisdiction—the eighth district judge (out of ten) to so find.[1] The court reasoned that "[t]he FSIA waives sovereign immunity for injuries caused by 'material support *for*' an extrajudicial killing," and that material support can be provided "for" an extrajudicial killing, and cause "personal injury," even if the terrorist's efforts to kill ultimately fail. App. 44a. The court explained that "[a]s used in the provision, 'for' 'indicate[s] the object or purpose of an action or activity.'" *Ibid.* (second bracket in original). Thus "support with the object or

---

[1] Compare App. 41a-46a (McFadden, J.); *Pautsch* v. *Islamic Republic of Iran*, 2023 WL 8433216, at *3 (D.D.C. Dec. 5, 2023) (Boasberg, C.J.); *Cabrera* v. *Islamic Republic of Iran*, 2023 WL 1975091, at *4-11 (D.D.C. Jan. 27, 2023) (Bates, J.); *Fissler* v. *Islamic Republic of Iran*, 2022 WL 4464873, at *5 (D.D.C. Sept. 26, 2022) (Kollar-Kotelly, J.); *Hake* v. *Bank Markazi Jomhouri Islami Iran*, 2022 WL 4130837, at *8 (D.D.C. Sept. 12, 2022) (Kelly, J.); *Roberts* v. *Islamic Republic of Iran*, 581 F. Supp. 3d 152, 169-70 (D.D.C. 2022) (Lamberth, J.); *Lee* v. *Islamic Republic of Iran*, 518 F. Supp. 3d 475, 491-92 (D.D.C. 2021) (Mehta, J.); *Gill* v. *Islamic Republic of Iran*, 249 F. Supp. 3d 88, 98-99 (D.D.C. 2017) (Walton, J.), with *Force* v. *Islamic Republic of Iran*, 610 F. Supp. 3d 216, 222 (D.D.C. 2022) (Moss, J.); *Burks* v. *Islamic Republic of Iran*, 2022 WL 20588923, at *9-10 (D.D.C. Sept. 30, 2022) (Cooper, J.).

purpose of an extrajudicial killing constitutes support 'for such an act' under the" terrorism exception. *Ibid.* Iran and Syria's support for Hamas qualified. App. 33a.

The district court further found that Iran's and Syria's material support for Hamas proximately caused Eli Borochov's and the Golans' injuries. App. 46a-48a. The court granted default judgment and awarded Yoav, Rotem, and their American family members damages. App. 50a-61a (liability); App. 62a-72a (damages). But the court denied Shari Borochov's and the Golans' Israeli family members' claims on the grounds that Shari Borochov did not qualify for solatium damages, and that the Israeli plaintiffs did not establish their entitlement to damages under Israeli law. App. 67a-68a, 75a-76a.

4. Iran and Syria did not appeal the judgments entered against them, but Shari Borochov and the Golans' Israeli family members appealed the district court's rejections of their claims. The D.C. Circuit, however, did not reach the appellants' arguments because it concluded that the district court lacked subject-matter jurisdiction over any of the claims against Iran and Syria. App. 2a-3a. The court reasoned that "because the attacker in this case (fortunately) did not kill anyone, the attack that caused Rotem and Yoav's injuries was not an 'extrajudicial *killing*.'" *Ibid.* The court of appeals rejected the district court's interpretation of the terrorism exception's "material support" language, concluding that the language was intended to add "aiding-and-abetting liability" to the statute. App. 16a. Because aiding-and-abetting liability requires "a *completed* crime," a foreign state could not

be liable unless an "extrajudicial killing" was completed—*i.e.*, unless someone died in the attack. App. 17a-18a.

That holding adopted a reading of the terrorism exception that a clear majority of judges have rejected. It left numerous victims of terrorist attacks—including injured soldiers, civilians like Rotem and Yoav, and family members like Shari—without recourse against the states that sponsored the attacks.

REASONS FOR GRANTING THE PETITION

I. THE D.C. CIRCUIT'S DEPARTURE FROM CONSENSUS EFFECTIVELY IMPOSES A NATIONWIDE RULE.

In holding that federal courts lack jurisdiction under the terrorism exception over claims arising from terrorist attacks in which no one dies, the D.C. Circuit departed from the consensus of courts to consider the question. Before the court of appeals' decision, only two district judges had ever held that a terrorist attack must result in someone's death to trigger the terrorism exception. See *Force*, 610 F. Supp. 3d at 228-29 (Moss, J.); *Burks*, 2022 WL 20588923, at *9-10 (Cooper, J.). Every other judge to face the question concluded the opposite. See *Pautsch*, 2023 WL 8433216, at *3 (Boasberg, C.J.) (collecting cases); see also *supra* at 8 n.1.

The D.C. Circuit's decision adopting the minority view effectively imposes a nationwide rule. That is because venue in actions against foreign states is proper only where "the events or omissions giving rise to the claim occurred," or in the "District of Columbia." 28 U.S.C. § 1391(f). This means that "most cases invoking the terrorism exception are filed in" the D.C. Circuit. *Owens*, 864 F.3d at 808. Terrorism suits

brought elsewhere are regularly transferred to the District of Columbia. See, *e.g.*, *Cummings* v. *Islamic Republic of Iran*, 2019 WL 7313589, at *2 (N.D. Cal. Dec. 30, 2019); *Asemani* v. *Islamic Republic of Iran*, 2018 WL 3036654, at *2 (N.D. Cal. June 18, 2018); see also *Nnaka* v. *Federal Republic of Nigeria*, 2019 WL 6831532, at *5 (S.D.N.Y. Aug. 12, 2019) (finding that "venue is improper as to Nigeria under the [FSIA] because no events relevant to the claims occurred in New York"). And even in rare cases decided elsewhere, district courts look to "the decisions from the District of Columbia as persuasive authority," *Herrick* v. *Islamic Republic of Iran*, 2022 WL 3443816, at *1 n.2 (S.D. Tex. Aug. 17, 2022), because it is "the venue in which the overwhelming majority of FSIA cases are filed," *Villoldo* v. *Republic of Cuba*, 659 F. Supp. 3d 1158, 1174 (D. Colo. 2023).

The venue provision makes further percolation of this issue exceptionally unlikely. Another court of appeals would only have occasion to weigh in on this question if a state sponsor of terrorism committed or provided material support for a terrorist attack on U.S. soil that resulted in no deaths *and* there were an appeal from a judgment of a district court on claims arising from such an attack. Even if the first condition were satisfied, the second very likely would not because state sponsors of terrorism typically do not appeal the judgments entered against them. Thus, the decision below effectively interpreted the statute for the entire Nation. That decision warrants this Court's review.

This Court routinely grants review in situations where, as here, one court of appeals' monopoly over a statute cuts off further consideration of its interpretation. See, *e.g.*, *American Lung Association* v. *EPA*, 985

F.3d 914, 941 (D.C. Cir. 2021) (per curiam) (exclusive Clean Air Act venue under 42 U.S.C. § 7607(b)(1)), reversed, *West Virginia* v. *EPA*, 597 U.S. 697 (2022); *Rudisill* v. *McDonough*, 55 F.4th 879 (Fed. Cir. 2022) (en banc) (exclusive jurisdiction over veterans benefits), reversed, 144 S. Ct. 945 (2024); *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022) (trademark registration), reversed sub nom. *Vidal* v. *Elster*, 144 S. Ct. 1507 (2024). That's especially so where, as here, multiple judges in the relevant forum have had the opportunity to weigh in. Just this past Term, this Court granted review—and then reversed—after the D.C. Circuit resolved a dispute among "no fewer than fourteen district judges" concerning proper interpretation of statute used to prosecute "defendants who allegedly participated in the Capitol riot." *United States* v. *Fischer*, 64 F.4th 329, 338 (D.C. Cir. 2023), vacated and remanded, 144 S. Ct. 2176 (2024).

The Court should do the same here. It is exceptionally unlikely that any other court of appeals will have the opportunity to answer the question presented. And the dispute among judges in the district where these cases are brought has percolated to its conclusion. The Court should not wait for a circuit split that is not coming. It should grant the petition to ensure this important federal statute is properly interpreted nationwide.

II. THE D.C. CIRCUIT'S READING OF THE TERRORISM EXCEPTION IS MISTAKEN.

The terrorism exception provides for jurisdiction over cases seeking liability for injuries caused by a foreign state's "act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). The court of appeals concluded that the material-support prong establishes

only aiding-and-abetting liability for a completed killing. But the better reading of the statutory text is that it provides freestanding jurisdiction for a state's "material support," and that jurisdiction exists even where the act of extrajudicial killing is not completed.

1. As the district court correctly held, the text of terrorism exception confirms it applies when a foreign sovereign's provision of material support "for" an extrajudicial killing proximately injures an eligible plaintiff, even when the terrorist's effort to kill is unsuccessful. That interpretation follows this Court's instruction to "interpret the relevant words [of a statute] not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (quotation marks omitted). Courts have long recognized that "[t]he text, history, and purpose of the [terrorism exception] make clear that the statute does not counsel a narrow reading." *Doe* v. *Bin Laden*, 663 F.3d 64, 70 (2d Cir. 2011) (per curiam); see also *Van Beneden* v. *Al-Sanusi*, 709 F.3d 1165, 1167 (D.C. Cir. 2013) ("Guided by the statute's text and purpose, we interpret its ambiguities flexibly and capaciously."). The D.C. Circuit's decision relegates that rule to cases concerning only "non-jurisdictional" statutory construction, App. 20a, even though courts had previously employed it because "Congress sought to lighten the *jurisdictional* burdens borne by victims of terrorism," *Van Beneden*, 709 F.3d at 1167 n.4 (emphasis added).

The terrorism exception confers jurisdiction over suits seeking "damages * * * for personal injury *or* death that was caused by an act of * * * extrajudicial killing * * * *or* the [foreign sovereign's] provision of material support or resources for such an act." 28

U.S.C. § 1605A(a)(1) (emphases added). The district court correctly recognized that "a foreign state's support [of a terrorist group] with the object or purpose of an extrajudicial killing constitutes support 'for such an act,'" even if all victims survive. App. 44a.

That interpretation follows naturally from the plain meaning of the word "for," which most naturally indicates an activity's "object or purpose": "One dresses 'for' dinner or studies 'for' an exam even if the dinner or exam never occurs." App. 44a. (citing Am. Heritage Dictionary 329 (3d ed. 1994)); see also *Cabrera*, 2023 WL 1975091, at *7. In the same way, state sponsors of terrorism provide material support "for" acts of extrajudicial killing whether or not the terrorists they support achieve their homicidal objectives.

Although "for" could also be read "to mean 'resulting in,'" interpreting "for" to refer to the foreign states' object or purpose is "more faithful to the text and structure of the terrorism exception as a whole." *Cabrera*, 2023 WL 1975091, at *7. The terrorism exception imposes liability both for committing extrajudicial killings *and* for materially supporting them. 28 U.S.C. § 1605A(a). "Unlike the direct-causation prong, the material-support prong does not ask whether the plaintiff's injury was caused by *an act of extrajudicial killing*." *Cabrera*, 2023 WL 1975091, at *7. Instead, because it is "*providing support* that triggers liability," what matters is whether the plaintiff's injury was "'caused by' a defendant [state's] material support." *Ibid.* If "for" referred to the result of the supported attack, it would collapse these two prongs.

That view—endorsed by the court of appeals—makes especially little sense when interpreting a "material support" statute. Material support is fungible:

"all material support" for terrorists "aids their unlawful goals." *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000); see *Owens*, 864 F.3d at 799. Expecting terrorists to "keep careful bookkeeping records" drawing a direct line from specific acts of support to specific attacks (or expecting plaintiffs to muster that evidence) would "likely render" the "material support provision ineffectual." *Simon* v. *Republic of Hungary*, 77 F.4th 1077, 1119 (D.C. Cir. 2023) (quotation marks omitted).

Thus, read in the context of the terrorism exception as a whole, the material support prong encompasses a foreign sovereign's provision of material support to a terrorist *for the purpose of* extrajudicial killing. Under that correct interpretation, a material-support claim involves a straightforward "two-step inquiry": "(1) did the defendant nation provide material support or resources 'for' the purpose of bringing about acts of extrajudicial killing," as evidenced by their funding a terrorist group that regularly commits such acts, and "(2) if so, was that provision of material support the proximate cause of the plaintiff's personal injury or death?" *Cabrera*, 2023 WL 1975091, at *8. That reading flows naturally from the terrorism exception's text *and* supports its purpose. At minimum, it faithfully construes the statute's "ambiguities" "flexibly and capaciously" in line with its purpose of "lighten[ing] the jurisdictional burdens borne by victims of terrorism seeking judicial redress." *Van Beneden*, 709 F.3d at 1167 & n.4.

2. Statutory and legislative history confirm that reading. Time after time, Congress has expanded the reach of the terrorism exception, often in direct response to judicial decisions narrowly interpreting the

exception. That history belies the notion that Congress meant for the material support prong merely to add aiding-and-abetting liability to acts supporting a completed killing.

When courts adopted a view of the terrorism exception (then codified at 28 U.S.C. § 1605(a)(7)) that Congress viewed as artificially limited with respect to available damages from state-sponsors of terrorism, it amended the exception to create a cause of action against "official[s], employee[s], or agent[s] of a foreign state designated as a state sponsor of terrorism" for "personal injury or death * * * for money damages which may include economic damages, solatium, pain, [sic] and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)." Pub. L. No. 104-208, § 589, 110 Stat. at 3172. The relevant House report states it was Congress's intention to "expand[] the scope of monetary damage awards available to American victims of international terrorism." H.R. Rep. No. 104-863, at 985 (1996). And the bill's primary author stated that state sponsors of terrorism should "pay" for "endorsing, directly or indirectly," their "dreadful" terrorist acts. Congressman Jim Saxton, News Release, *Saxton to the Flatow Family: "Be Strong, America Is Behind You"* (Feb. 26, 1997).

Then, in 2008, Congress enacted Section 1605A, today's terrorism exception, after the D.C. Circuit held that the then-extant version of the exception did not establish a cause of action against state sponsors of terrorism. See *Cicippio-Puleo*, 353 F.3d at 1027. A sponsor made clear the amendment, which expressly added such a cause of action, was intended to "provid[e] justice to those who have suffered at the hands of terrorists." 153 Cong. Rec. S15614 (Dec. 14,

2007) (statement of Senator Lautenberg). As before, Congress made no mention of limiting jurisdiction based on whether a terrorist attack happens to complete its intended killings.

In all, the statutory and legislative history of the terrorism exception demonstrates Congress's intent to *expand* relief available to victims of terrorism—never making any mention of an intent to limit relief to attacks that, by pure happenstance, result in a death.

3. The district court's reading also supports the terrorism exception's purpose. The FSIA "codif[ies] [a] careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions." *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 208-09 (2018). The terrorism exception plays an important role in that balance by ensuring "that a foreign state will be subject to suit when it is designated as a state sponsor of terrorism and damages are sought as a result of acts of terrorism." *Id.* at 209. The D.C. Circuit's unduly narrow reading of the terrorism exception undermines its purpose and upsets the balance Congress struck in the FSIA.

The terrorism exception "prevent[s] state sponsors of terrorism—entities particularly unlikely to submit to this country's laws—from escaping liability for their sins." *Han Kim* v. *Democratic People's Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014). In enacting the FSIA, the House Judiciary Committee recognized that "outlaw states consider terrorism a legitimate instrument [for] achieving their foreign policy goals," and thus authorized suits "against countries responsible for terrorist acts where Americans and/or their loved ones suffer injury *or* death at the hands of [a] terrorist state." H.R. Rep. No. 104-383,

at 62 (1995) (emphasis added). The terrorism exception's unique policy choice reflects Congress's judgment that "American citizens who have been aggrieved by any state sponsor of terrorism deserve every possible means of redress available to them." *Van Beneden*, 709 F.3d at 1167-68 n.4 (alteration, citation, and quotation marks omitted).

Until the decision below, the as-amended terrorism exception has functioned largely as intended: Victims have obtained judgments against state sponsors of terrorist attacks ranging from embassy bombings, *Owens*, 864 F.3d 751, to attacks on U.S. naval ships, *Taitt* v. *Islamic Republic of Iran*, 664 F. Supp. 3d 63 (D.D.C. 2023), to attacks by Iran-backed terrorist organizations on troops in Iraq, *Karcher* v. *Islamic Republic of Iran*, 396 F. Supp. 3d 12 (D.D.C. 2019). In this way, victims (including those injured in attacks in which all victims survived) have been able to claim some measure of compensation, either by attaching assets traceable to terrorist owners or by applying for disbursements from the U.S. Victims of State Sponsored Terrorism Fund. See *Braun* v. *United States*, 31 F.4th 793, 794-95 (D.C. Cir. 2022) (discussing the Victims Fund).

No longer. The decision below eliminates the only means to hold state sponsors of terrorism accountable to the victims of the attacks they sponsor that happen to prove non-fatal. Now, even though the material support for fatal and for non-fatal terrorist attacks is exactly the same—provided in each case with the same murderous intent—whether an injured victim of a terrorist attack can bring a claim depends on whether some other victim of the attack died. This flawed interpretation leaves victims of terrorism with

no redress for debilitating, lifelong injuries—and relieves the state sponsors of their attacks of any liability—for the utterly bizarre reason that the sponsored terrorist failed to kill, perhaps because of heroic lifesaving efforts of the victims themselves.

There is no conceivable reason that Congress would have limited jurisdiction to claims arising from attacks in which a victim died or otherwise penalized victims of terrorism for surviving an attack. Indeed, it enacted the terrorism exception "to protect the lives *and safety* of its citizens," H.R. Rep. No. 104-383, at 38 (emphasis added), by enabling suits for "*personal injury or* death," 28 U.S.C. § 1605A(a)(1) (emphasis added). Nor could Congress have intended to *reward* state sponsors of terrorism for the advances in battlefield medicine that have saved the lives of so many of their victims, although often leaving them with a lifetime of pain and disability. See Supplemental Amicus Brief of U.S. Veterans at 3-4, *Borochov* v. *Islamic Republic of Iran*, No. 22-7058 (D.C. Cir. May 18, 2023). Yet under the court of appeals' decision, that is how the terrorism exception operates.

4. The court of appeals agreed that "'for' can denote an 'intended goal.'" App. 20a. But it nevertheless read the material support prong to do nothing more than add aiding-and-abetting liability for a completed killing.

Congress knows how to create liability for aiding and abetting terrorism when it wants to and chose to use markedly different language to penalize the provision of material support for acts of terror. Compare 18 U.S.C. § 2333(d)(2), with 28 U.S.C. § 1605A(a)(1). Despite this meaningful differentiation, the court of appeals equated providing material support for an ex-

trajudicial killing with aiding and abetting an extrajudicial killing. It justified that choice primarily with policy rationales, which, besides being unable to overcome the statute's text and history, are flawed on their own terms.

First, the court worried that "the district court's reading would broadly expand Congress's waiver of sovereign immunity to include not just attempted-but-failed killings, but also providing advance funding for attacks that never occur at all." App. 21a. That concern is badly misplaced, however, because Section 1605A(a)(1) only confers jurisdiction over claims for "personal injury or death," which would not arise from a wholly unexecuted attack.

Second, the court raised concerns over reading what it called "an illogical asymmetry" into the terrorism exception: namely, that state sponsors of terrorism can be sued for supporting someone else's attempted-but-failed extrajudicial killing, but not for making such an attempt themselves. App. 21a. But that asymmetry is hardly illogical; it instead reflects the reality that state sponsors of terrorism rarely commit acts of terror directly; instead, these states fund nonstate terrorist groups to maintain "plausible deniability when these groups use violence" and preserve "the power to have them operate in" their interest. Nicole Hassenstab, *Understanding Iran's Use of Terrorist Groups As Proxies*, American University School of International Service (Feb. 5, 2024), https://bit.ly/3J4SW14.

Third, the court expressed concern that broad material-support liability would embroil courts in "challenging factual inquiries" about "a foreign government's subjective intent in providing weapons or

money to terrorist groups." App. 21a-22a. But as numerous lower courts have recognized, knowingly supporting a terrorist group is enough to establish a state's *objective* intent to support extrajudicial killing. See *Owens*, 864 F.3d at 799 ("[N]either specific intent nor direct traceability [is required] to establish the liability of material supporters of terrorism."); *Boim* v. *Holy Land Foundation for Relief & Development*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability."). The fact that material support is fungible removes a substantial amount of complexity from this finding: "all material support" for terrorists "aids their unlawful goals." *Humanitarian Law Project*, 205 F.3d at 1136.

Moreover, in the context of the terrorism exception, courts have "the authority—indeed * * * the obligation—to adjust evidentiary requirements to differing situations." *Han Kim*, 774 F.3d at 1048 (alterations, citation, and quotation marks omitted). For example, under "the long-established, common-law rule of *res ipsa loquitur*," "courts have, without direct proof, inferred negligence from the very nature of events." *Ibid.* That principle squarely applies here: In light of "Congress's purpose" in enacting the terrorism exception, "where a plaintiff has produced compelling, admissible evidence" that the state sponsor of terrorism materially supported a terrorist organization that "routinely" commits extrajudicial killings, "courts can assume" that the sovereign's object and purpose was to support such killing. *Id.* at 1049.

Finally, the D.C. Circuit justified its crabbed reading with concerns that a broad interpretation of the FSIA's jurisdictional provisions might "produc[e] friction in our relations with other nations." App. 21a (alteration and quotation marks omitted). That concern is irrelevant to the FSIA's terrorism exception, which applies only to foreign governments designated by the Executive Branch as state sponsors of terrorism, 28 U.S.C. § 1605A(a)(2)(A)(i)(I), of which there are currently four. That designation reflects the Executive Branch's judgment that diplomatic relations are at their nadir and strongly suggests that those relations would not be materially affected by the Court's resolution of an ambiguity in the FSIA in favor of victims of terrorism. In any event, *Congress* has already made the policy choice, in enacting the FSIA and the terrorism exception, that the benefits of providing jurisdiction in these cases outweigh the costs. Courts lack the power and the capacity to replace the political branches' policy judgments with their own, yet the court of appeals expressly relied on its own policy judgment here to avoid the straightforward result of the statute's most natural reading. Courts are in no position to repair our relations with Iran, Syria, Cuba, or North Korea. The FSIA—not to mention the fundamental structure of the federal government—instructs them not to try. Those questions are "'outside the competence'" of the courts. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 19 (2015) (quoting *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 358 (1955)).[2]

---

[2] In the alternative, the terrorism exception also reasonably can be read to include attempted extrajudicial killings. First, the FSIA defines "extrajudicial killing" (by reference to the Torture

* * *

In sum, as the vast majority of district judges has concluded, "the material-support prong of the terrorism exception extends to injuries caused by a defendant nation's material support for a nonfatal, attempted extrajudicial killing." *Cabrera*, 2023 WL 1975091, at *4. As long as the material support was intended to enable an extrajudicial killing and proximately caused the plaintiff's injury, the terrorism exception is satisfied. The court of appeals' contrary conclusion falls into a troubling pattern of courts giving the terrorism exception an artificially narrow reading that is manifestly contrary to Congress's intent. This Court should correct the court of appeals' failure to honor that intent and to ensure that the terrorism exception's text, context, structure, and history are not subordinated to a judicial policy choice.

Victim Protection Act) as "a deliberated killing not authorized by a previous judgment" of a legitimate court or "carried out under the authority of a foreign nation." 28 U.S.C. §§ 1605A(h)(7), 1350 Note at 3(a). Courts have held that this definition does not require "fatalities in each attack, but rather that each attack was 'undertaken with careful consideration, not on a sudden impulse,' to inflict fatalities." *Fissler*, 2022 WL 4464873, at *5 (quoting *Salzman* v. *Islamic Republic of Iran*, 2019 WL 4673761, at *13 (D.D.C. Sept. 25, 2019)); see also *Karcher*, 396 F. Supp. 3d at 55; *Lee*, 518 F. Supp. 3d at 491-92; *Burks*, 2022 WL 20588923, at *8; *Stearns* v. *Islamic Republic of Iran*, 633 F. Supp. 3d 284, 347 (D.D.C. 2022); *Roberts*, 581 F. Supp. 3d at 170. Second, courts have held that the terrorism exception's phrase "*act of* extrajudicial killing" encompasses "the *process* of committing an extrajudicial killing," which "does not imply that death results." *Roberts*, 581 F. Supp. 3d at 169-70 (emphases added).

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

Actions against state sponsors of terrorism for attacks causing grievous injury and disability, but not death, are commonplace. In the District of Columbia in the past few years alone, there have been at least ten cases presenting this exact scenario. See App. 1a; *Brown* v. *Islamic Republic of Iran*, 687 F. Supp. 3d 21, 40 (D.D.C. 2023); *Pautsch*, 2023 WL 8433216, at *3; *Fissler*, 2022 WL 4464873, at *5; *Roberts*, 581 F. Supp. 3d at 169-70; *Stearns*, 633 F. Supp. 3d at 284; *Lee*, 518 F. Supp. 3d at 491-92; *Karcher*, 396 F. Supp. 3d at 57-58; *Gill*, 249 F. Supp. 3d at 98-99; *Cabrera*, 2023 WL 1975091, at *4-11. Because this fact was not commonly essential to jurisdiction before the court of appeals' decision below, the death of a non-plaintiff victim has not always been specifically pleaded, including in some of the cases discussed above. While it thus is difficult to determine precisely the number of claims foreclosed by the decision below, it is clear that the number is large. The above cases involved hundreds of plaintiffs. In one case alone, undersigned counsel represents victims injured in more than three hundred separate terrorist attacks, some of which did not result in a death. See Amended Complaint ¶¶ 82-367, *Heaton* v. *Islamic Republic of Iran*, No. 19-cv-3003 (D.D.C. Jan. 29, 2021).

In any event, the impact of the decision below has been widespread and immediate. Courts have responded by ordering jurisdictional discovery, see Minute Order, *Force*, No. 1:16-cv-01468 (D.D.C. Mar. 18, 2024), and plaintiffs have requested additional time to identify non-plaintiff victims who died in an attack, see Notice of New Authority at 4-5, *Karcher*, No. 1:16-

cv-00232 (D.D.C. Mar. 28, 2024). But war and terrorism are inherently chaotic, and this information may never be knowable when the critical events occurred long in the past in remote, war-torn regions. The decision below makes subject-matter jurisdiction depend—irrationally—on a potentially unknowable fact having nothing to do with the plaintiff's injuries.

Claims affected by the decision below are particularly common when brought by members of the armed forces. Terrorist attacks sponsored by Iran and Syria commonly wound, but do not kill, servicemembers serving abroad. Servicemembers risk their lives protecting American interests in places where they are vulnerable to attack by state-sponsored terrorist groups. The Department of Defense has estimated that over 50,000 servicemembers were wounded in Iraq and Afghanistan, in large part due to Iran's support for terrorist groups in the region. See Department of Defense, *Casualty Status* (July 16, 2024), https://www.defense.gov/casualty.pdf. Fortunately, as battlefield medical techniques have continued to improve, fewer and fewer of those wounded servicemembers have died from their wounds. See Supplemental Amicus Brief of U.S. Veterans at 3-4, 7, *Borochov*, No. 22-7058 (D.C. Cir. May 18, 2023).

The result is that hundreds or thousands of wounded soldiers have been injured (often severely) by Iran's and Syria's material support for terrorist attacks that failed to kill any victims. *E.g.*, *Pautsch*, 2023 WL 8433216, at *1 ("servicemembers and civilians" injured in "numerous attacks" in Iraq); *Brown*, 687 F. Supp. 3d at 31 ("[s]eventeen soldiers, two government contractors, and their relatives" suing for attacks in "Iraq and Afghanistan"); *Cabrera*, 2023 WL 1975091, at *1 ("servicemembers"); *Fissler*, 2022 WL

4464873, at *1 ("terrorist attacks on coalition soldiers during the American invasion and occupation of Iraq"); *Lee*, 518 F. Supp. 3d at 479 (99 attacks on servicemembers between 2004 and 2011). The victims in these attacks have experienced severe burns, lost limbs, suffered traumatic brain injuries, and continue to deal with devastating psychological injuries—to name just a few. The decision below unnecessarily forecloses relief for many of them.

The judicial policy choices leading to this unfortunate result cannot be reconciled with the policy choices Congress enacted into the FSIA—particularly as it relates to wounded servicemembers. In crafting the FSIA's terrorism exception, Congress recognized the importance of protecting servicemembers by establishing jurisdiction and creating a cause of action where "the claimant or the victim" of a terrorist attack was "a member of the armed forces." 28 U.S.C. § 1605A(a)(2)(A)(ii)(II), (c)(2). The court of appeals' decision sets the statute at odds with that language, declaring that a wounded soldier expressly granted a cause of action has not made a jurisdictionally required showing, absent evidence of an unrelated third party's death. Jurisdiction, under the court of appeals' view, therefore, may have no relation to the injury suffered by the plaintiff and instead may depend on whether a party not before the court happened to die. Plaintiffs with identical injuries face starkly different outcomes because the terrorist was unsuccessful, or perhaps stopped by military or law enforcement before he could inflict his maximum intended damage. Indeed, even one of the district judges who agreed with the court of appeals recognized the "incongruity" that, under the court of appeals' reading, a victim with "grievous injuries" may be shut out of court at the same time a victim with "a less severe injury" may be

able to bring an action—all because of the results of an attack on its *other* victims. *Force*, 610 F. Supp. 3d at 227.

Jurisdiction does not, and should not, depend on how many times a terrorist can pull a trigger or ram a vehicle into civilians before he is stopped, or how quickly a victim can receive lifesaving care. It is the provision of material support "for" acts of terrorism and not a non-party victim's stroke of luck—good or bad—that is the key jurisdictional fact that Congress enacted into the FSIA.

The court of appeals still senselessly drew a jurisdictional dividing line based on the "mere fortuity" of whether a terrorist attack happens to kill someone—whether that be the plaintiff or anyone else. *Brown*, 687 F. Supp. 3d at 40. That results in there being no jurisdiction for victims—including American soldiers—who were grievously wounded in attacks that happened to kill no victims, while providing that protection to victims with identical (or far less severe) injuries but who, by pure happenstance, are able to identify an unrelated third party who was killed in the attack. See *Hammons* v. *Islamic Republic of Iran*, 2023 WL 5933340 (D.D.C. July 24, 2023), report and recommendation adopted, 2023 WL 6211248 (D.D.C. Sept. 25, 2023) (finding terrorism exception satisfied where unrelated civilians were killed in terrorist attack, and reserving judgment on whether a death is necessary in all cases). The text, purpose, and history of the FSIA all reject that result, and the D.C. Circuit's erroneous restriction of the statute should not be the final word on the matter among the federal courts. Absent review, hundreds or thousands of pending claims may be improperly extinguished, and

hundreds or thousands of future would-be claims may never be brought.

IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle to resolve this question. And, due to the D.C. Circuit's effective monopoly and the jurisdictional nature of its holding, future vehicles will be rare, if they emerge at all.

1. This case is an appropriate vehicle to resolve this important question. The question presented is outcome-determinative, squarely presented, and was the sole basis for the final judgment issued below. There is no barrier to review.

The court of appeals held that petitioners' claims must be dismissed for lack of subject-matter jurisdiction because the terrorism exception does not extend to terrorist attacks in which all victims survived. That is the *only* reason the district court might lack jurisdiction under the terrorism exception here. Every other element of that exception is plainly met. App. 39a-48a (finding that a victim of each attack was a U.S. national, that Iran and Syria are designated as state sponsors of terrorism, and that the case sought money damages for injuries caused by the states' material support). Thus, but for the issue presented, all agree that there would be jurisdiction over petitioners' claims.

2. Though the decision forecloses many claims, future vehicles will be limited. Although the fact pattern underlying this case is commonly recurring, see *supra* at 24-29, if the Court denies this petition, it will have limited opportunities to review this question.

Because this issue is jurisdictional, the decision below will prevent many future claims from being

filed. While a foreclosed merits argument can realistically be preserved for appellate review in a case presenting other issues, a foreclosed jurisdictional argument prevents the case from being brought in the first place. There is no reason to expect plaintiffs to continue filing claims presenting this issue based on the slim chance of this Court granting a petition for certiorari. When combined with the practical reality that a single district is the proper venue for nearly every terrorism-exception case, the most likely outcome is that such cases will not be brought at all.

This Court therefore has limited opportunities for review. And once the shallow well of already-filed cases runs dry, this Court may not have another chance to correct the error made below. And even in that dwindling set of cases, it is not clear that the single question presented here will be dispositive or as cleanly presented as it is here. The Court should take this best, and perhaps last, opportunity before it now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT J. TOLCHIN
THE BERKMAN LAW OFFICE, LLC
829 East 15th Street, Box 7
Brooklyn, NY 11230
(718) 855-3627
RTolchin@berkmanlaw.com

MICHAEL J. RADINE
OSEN LLC
190 Moore Street, Suite 272
Hackensack, NJ 07601
(201) 265-6400
MRadine@osenlaw.com

MATTHEW D. MCGILL
Counsel of Record
AARON HAUPTMAN
ADDISON W. BENNETT
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 955-8500
MMcGill@gibsondunn.com

Counsel for Petitioners

September 9, 2024