No. 24-277

IN THE

Supreme Court of the United States

SHARI MAYER BOROCHOV, *et al.*,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* U.S. SERVICEMEMBERS WHO HAVE BEEN INJURED IN TERRORIST ATTACKS PERPETRATED BY STATE SPONSORS OF TERRORISM IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici are U.S. servicemembers who have been injured in terrorist attacks perpetrated by state sponsors of terrorism. Each of the *amici* are plaintiffs in suits against Iran brought under the "Terrorism Exception" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605A. They have a strong interest in ensuring that the terrorism exception to the FSIA is interpreted broadly to allow victims of terrorism to seek justice and hold state sponsors accountable.

In these cases, *amici* have repeatedly established "by evidence satisfactory to the court," 28 U.S.C. § 1608(e), that the Islamic Republic of Iran ("Iran") is responsible for directing these attacks on U.S. forces with the specific aim of killing large numbers of Americans. Very often Americans did die—but in a number of cases, including those brought by *amici*, the victims of a given Iranian-sponsored terrorist attack managed to survive, often with horrific injuries.

Indeed, many of the *amici* have lost limbs, the use of other body parts, and physical senses, suffered traumatic brain injuries and profound mental and emotional harm, and received prognoses of chronic pain or even shortened

1. No counsel for any party authored this brief in whole or in part, and no person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties were timely notified of this filing at least ten days in advance.

life spans. Many of the *amici* have survived attacks with wounds that would have been fatal but for recent improvements in battlefield medicine. It would be a tragic irony if Iran, in its terror campaign against U.S. forces, was a beneficiary of these medical advances.

This case concerns Congress's conjunctive statutory effort to provide civil remedies not only for the "injury *or* death" of Americans "caused by [a state sponsor of terrorism's] act of . . . extrajudicial killing," but also for "injury *or* death" "caused by . . . [its] provision of material support or resources for such an act. . . ." 28 U.S.C. § 1605A(a)(1) (emphasis added). The courts uniformly interpreted the plain statutory text to reach any injuries proximately caused by the statute's *actus reus*—here providing material support for an intended extrajudicial killing (as opposed to performing the act of killing)—until the decision of the three-judge panel below defeated the unmistakable congressional purpose by reading the statute to apply *only* when the supported attack succeeds in an extrajudicial killing. That reading leaves the surviving *amici* without any remedy against the state sponsor who supported the attacks against them intending their deaths. Many similarly situated U.S. service personnel have been—and will be—victims of terrorist attacks carried out at the behest or with the assistance of state-sponsors of terrorism. *Amici* have a strong interest in ensuring that they and future injured are able to pursue their valid claims. Accordingly, *amici* urges that the petition be granted, and the judgment below reversed.

Amici are writing to the Court because the decision by the three-judge panel below would eliminate their sole

opportunity to hold Iran responsible for the injuries it has inflicted on them and many other former and future service members. That narrow view of the statute's jurisdiction, taken by only two of the many courts to have considered the issue, would *immunize* Iran for its role in supporting terrorist attacks intended to kill Americans but which the victims survived, usually with grievous injuries. That is not and cannot be the intent or purpose of § 1605A's Terrorism Exception.

SUMMARY OF ARGUMENT

The decision in *Borochov v. Islamic Republic of Iran*, which limited the terrorism exception to the FSIA to only those cases where a death occurred in the attack, contravenes explicit Congressional intent to hold state-sponsors of terrorism liable for attacks on U.S. citizens and overturns the prior consensus among well-reasoned district court decisions which allowed plaintiffs who only suffered injuries to pursue relief under the FSIA. These attacks launched by Iran, or those of its proxies, leave no doubt that they were intended to kill Americans. It would make little sense for Congress to allow jurisdiction for providing material support for an act that kills but not for providing the same support for an act that fell just short of killing due to miracles of medical innovation. This Court should grant certiorari to overrule the mistaken statutory reading of the lower court. Such an approach would align with Congress's purposes of deterring terrorism and providing accountability.

This question is important not only to petitioners and *amici*, but to every U.S. citizen who has been injured or may in the future be injured by an act of terrorism involving a state-sponsor of terrorism.

ARGUMENT

I. The Question Presented Is Important and Warrants This Court's Immediate Review

A narrow interpretation of the FSIA will limit the scope of the terrorism exception and disproportionally impact U.S. service members and other citizens who suffer horrendous injuries, but mange to survive. The *Borochov* panel overturned[2] a widely-based-consensus established by numerous district court opinions which found that § 1605A reaches a state sponsor of terrorism both "when a plaintiff 's 'personal injury or death . . . was caused by an act of . . . extrajudicial killing;'" and "when that 'personal injury or death . . . was caused by . . . the provision of material support or resources for such an act.'" *Cabrera v. Islamic Republic of Iran*, CA No. 19-3835 (JDB), 2023 U.S. Dist. LEXIS 14874, at *13-14 (January 27, D.D.C. 2023) (quoting 28 U.S.C. § 1605A(a)(1)); *Karcher v. Islamic Republic of Iran*, 396 F. Supp. 3d 12, 57 (D.D.C. 2019) ("Nothing on the face of Section 1605A(a)(1) requires that the material support or resources for an intended extrajudicial killing actually result in someone's death, as long as the victim represented in the case was injured.").

Iran's campaign of terrorism against U.S. citizens in the Middle East is likely to continue, and many more Americans could have their remedies erased if *Borochov* is allowed to stand. Iran provided material support for each of the terrorist attacks in which *amici* were injured and did so with the intent to kill Americans. For example,

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2. *Borochov v. Islamic Republic of Iran*, 94 F.4th 1053, 1061 (D.C. Cir. 2024).

many of the attacks in *Karcher v. Islamic Republic of Iran* involved a powerful roadside bomb called an explosively formed penetrator ("EFP") that courts have found indicate an intent to kill:

> EFPs were specifically designed to punch through armored vehicles. Iran's intention is further demonstrated by angling the weapon in order to overcome Rhino [EFP countermeasure] devices. Doing so ensured that the EFP would hit the crew compartment, rather than the engine. Because these weapons deliver deadly force, ***the Court presumes that Iran's intent was to kill a vehicle's occupants***. In other words, the goal was to kill people, not just disable vehicles. Moreover, Iran wanted EFPs to be used against the U.S. military, which Iran saw as a threat to its objectives.

396 F. Supp. 3d at 56 (emphasis added, record citations omitted). As a result, the *Karcher* court concluded: "Deploying an EFP represents a 'deliberated' attempt to kill someone." *Id.* at 58.

Another court noted "expert testimony that EFPs were constantly retooled to overcome U.S. defenses that attempted to make EFPs less deadly, indicating that EFPs were intentionally designed to inflict maximum harm on their targets." *Lee v. Islamic Republic of Iran*, 518 F. Supp. 3d 475, 492 (D.D.C. 2021). All of these cases explicitly permitted § 1605A claims premised on material support for attempted killings that proximately caused injuries.

These courts and many others have also found that Iran provided material support to orchestrate a campaign of murderous terrorism against U.S. forces through (1) the IRGC and the IRGC's foreign directorate, the Qods Force ("IRGC- QF"); (2) its Lebanese proxy, Hezbollah; and (3) its Iraqi Shi'a proxies:

> [T]he IRGC-QF spearheaded a closely coordinated campaign to equip the Shi'a militia for proxy warfare. That campaign is well attested to in U.S. Government documents. In 2007, the Qods Force earned its Treasury Department designation under E.O. 13224 in part because it "provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraqi Shi'a militants who target and kill Coalition and Iraqi forces and innocent Iraqi civilians." The State Department found that in 2011,
>
> > Iran was responsible for the increase of lethal attacks on U.S. forces [in Iraq] and provided militants with the capability to assemble explosives designed to defeat armored vehicles. The IRGC-QF, in concert with Lebanese Hizballah, provided training outside of Iraq as well as advisors inside Iraq for Shia militants in the construction and use of sophisticated improvised explosive device technology and other advanced weaponry.

Karcher, 396 F. Supp. 3d at 24 (record citations omitted).

In *Hansen v. Islamic Republic of Iran*, the plaintiffs suffered injuries as a result of the January 8, 2020 Iranian ballistic missile bombardment wherein it "fired at least eleven ballistic missiles at the Ayn al-Asad airbase" housing hundreds of U.S. service members in an attempt to kill *amici*. 2024 U.S. Dist. LEXIS 106793, No. 22-cv-477 (DLF), at *2 (D.D.C. June 17, 2024). Living quarters, a dining facility, gym and other living accommodations were destroyed in the attack. Fortunately, no U.S. service members were killed in the terrorist attack, but the blast waves caused significant concussive injuries for hundreds of U.S. service. "Servicemembers reported perforated eardrums, cracked teeth, and bleeding eyes, among other things . . . [m]any servicemembers—including all the plaintiffs in this case—were subsequently diagnosed with traumatic brain injuries." *Id.* at *4. These service members have been unable to continue their service, have lost their ability to provide for their families, and in one instance committed suicide as a result of the injuries sustained. *Id.* at *5.

Miraculously surviving a terrorist attack is not an indicator that the attack was not meant to kill. Rather, survival was often a result of improved battlefield medicine which helped victims survive wounds that likely would have been fatal even a few years earlier. As a surgeon expert, Dr. Shean Phelps, the former Senior Flight Surgeon for the Army's Special Forces in Iraq and Afghanistan, testified in *Karcher v. Islamic Republic of Iran*, the U.S. military reduced the "died-of-wounds rate tremendously" during its time in Iraq. Crucial techniques included faster response times and better containment of blood loss. *See* 396 F. Supp. 3d at 61-63. However, although the died-of-wounds rate dropped in Iraq during the 2004-2011 period,

the survivable wounds from EFP were grievous. For example, *Karcher* plaintiff Staff Sergeant (Ret.) Robert Canine was in a vehicle hit by an EFP in Iraq on May 17, 2009. An EFP struck his vehicle on the passenger side, where he was seated. The "slug" (the EFP's projectile, a wad of copper weighing several pounds and traveling thousands of miles per hour) entered the vehicle and struck Mr. Canine's feet. *See id.* at 43. No one died, but the EFP slug ripped off his right leg and part of his left foot and caused other severe injuries. *Id.* Mr. Canine came close to dying from blood loss. *Id.* He was evacuated to a U.S. Air Force hospital in Balad, Iraq, where he received massive transfusions of blood and plasma. *Id.* The quick response process and blood transfusions saved his life.

U.S. service personnel, U.S. State Department personnel, other U.S. government employees and agents, and other citizens spend significant amounts of time overseas for business or personal reasons, and they deserve the right to pursue claims under the FSIA should they suffer from a terrorist attack. The October 7, 2023 terrorist attacks in Israel, leading to significant U.S. casualties, is just the latest reminder that the scourge of state-sponsored terrorism[3] will continue to impact innocent Americans for the foreseeable future. Thus, the Court should recognize that the question presented is important to more than just the parties before this Court; it is important to every past and future American victim of terrorism who ultimately pursues justice through the courts. And given the role that Congress intended for this

3. The Root Cause Of October 7: Iran's Regime, Hoover Institution website, Research, https://www.hoover.org/research/root-cause-october-7-irans-regime (last visited Oct. 9, 2024).

regime to play in deterring acts of terrorism, the question presented is also important to the national interest as a whole.

II. This Court Should Grant Certiorari and Reverse

Prior to *Borochov*, the majority of district courts to consider the issue had ruled that attempted extrajudicial killings constituted extrajudicial killings; "most cases addressing this issue have reached consistent conclusions about the scope of the terrorism exception. . . ." *Cabrera v. Islamic Republic of Iran*, CA No. 19-3835 (JDB), 2023 U.S. Dist. LEXIS 14874, at *19-20 (January 27, D.D.C. 2023). This result corresponds with Congress's legislative purposes in enacting the relevant statute. "Congress enacted the terrorism exception expressly to bring state sponsors of terrorism . . . account for their repressive practices." *Han Kim v. Democratic People's Republic of Kor*ea, 774 F.3d 1044, 1048 (D.C. Cir. 2014). Congress's "very purpose" for the FSIA terrorism exception was to "give American citizens an important economic and financial weapon" and to "compensat[e] the victims of terrorism, and in so doing to punish foreign states who have committed *or sponsored such acts* and deter them from doing so in the future." *Han Kim*, 774 F.3d at 1048 (citing *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88–89 (D.C. Cir. 2002) (quoting H.R. Rep. No. 104–383, at 62)) (emphasis added).

Yet in *Borochov v. Islamic Republic of Iran*, the three-judge panel ruled that the injured plaintiffs could not sue Iran because "[t]he Golans' injuries were not 'caused by an act of * * * extrajudicial killing' because the terrorist attack that injured them did not kill anyone." 94 F.4th

1053, 1061 (D.C. Cir. 2024). The panel looked at the wrong cause. The Golans' injuries were caused by the material support Iran provided for the attackers intending the Golans' deaths.

This outcome conflicts with Congress's goals in enacting the statute. "Congress passed both statutes [TVPA and FSIA terrorism exception] in order to aid victims in their pursuit to prosecute claims of particular types of torture and terrorism against foreign states." *Gill v. Islamic Republic of Iran*, 249 F. Supp. 3d 88, 98 (D.D.C. 2017). Thus, the FSIA should allow a suit for an "attempted extrajudicial killing, even if no one died as a result of that attempt." *Gill v. Islamic Republic of Iran*, 249 F. Supp. 3d 88, 99 (citing *Warfaa v. Ali*, 33 F. Supp. 3d 653, 666 (E.D. Va 2014) and *Doe v. Constant*, No. 04 Civ. 10108 (SHS), 2006 U.S. Dist. LEXIS 101961 at *13 n.3 (S.D.N.Y. October 24, 2006)). This is so, "given the Act's 'text and purpose,' its 'ambiguities [should be interpreted] flexibly and capaciously. . . .'" *Id.* at 99 (quoting *Van Beneden v. Al-Sanusi*, 709 F.3d 1165, 1167 & n.4 (D.C. Cir. 2013)). Many other courts also found that "the process of committing an extrajudicial killing does not imply that death results—meaning that an *attempted* extrajudicial killing could constitute an 'act of extrajudicial killing' based upon Congress's intent to 'lighten the jurisdictional burdens borne by victims of terrorism seeking judicial redress. . . .'" *Roberts v. Islamic Republic of Iran*, 581 F. Supp. 3d 152, 170 (D.D.C. 2022) (quoting *Van Beneden*, 709 F.3d at 1167 & n.4); *Cabrera*, CA No. 19-3835 (JDB), 2023 U.S. Dist. LEXIS 14874, at *5 ("Every judge in this District to consider this issue prior to 2022—and several who addressed it in the past year—has concluded that 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."); *Lee v. Islamic Republic of Iran*, 518 F. Supp. 3d 475, 491 (D.D.C. 2021); *Cohen v. Islamic Republic of Iran*, 238 F. Supp. 3d 71, 81 (D.D.C. 2017) ("It is not necessary, however, for one of the plaintiffs to have died in the attack in order for the state-sponsor-of-terrorism exception to apply.").

The Court has repeatedly emphasized the importance of adhering to congressional intent in statutory interpretation. In *King v. Burwell*, 576 U.S. 473 (2015), the Court stated that it must interpret statutes "in a way that is consistent with the Legislature's intent." Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court emphasized the importance of considering the overall statutory scheme and Congress's policy objectives. These principles support a broader interpretation of the FSIA's terrorism exception that aligns with Congress's intent to hold state-sponsors of terrorism accountable.

III. In the Alternative, This Court Should Call for the Views of the Solicitor General

If the Court is uncertain about the virtues of plenary review, it would be appropriate to call for the views of the Solicitor General. The United States has previously weighed in on related matters. For example, in *Opati v. Republic of Sudan*, No. 17-1268, this Court invited the Solicitor General to file a brief at the petition stage regarding whether punitive damages were available against state sponsors of terrorism in cases based on acts occurring before the punitive damages provision was enacted—and the government recommended that the

Court hear the case. And at the merits stage, the United States filed a brief supporting the plaintiffs, explaining that the government has "a strong interest in opposing state-sponsored terrorism, and in supporting appropriate recoveries for victims," while also managing "[l]itigation against foreign states in United States courts," which "can have significant foreign affairs implications for the United States." U.S. *Opati* Br. 1. Those same interests are in play here where those disproportionately impacted by the decision below are US service personnel, and it would make sense for the Court to consider seeking the government's views about whether the D.C. Circuit's ruling balances them appropriately.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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