No. 11-730

In the Supreme Court of the United States

DAVID M. ROEDER, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 1981, the United States and Iran entered into the Algiers Accords, an international agreement that secured the release of American hostages held captive in Tehran by Iran for 444 days. In agreeing to the Algiers Accords, the United States committed to bar and preclude lawsuits by United States nationals against Iran arising out of the seizure and detention of the hostages. The question presented is whether the 2008 amendments to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605A(a)(2)(B) and (c) (Supp. II 2008), abrogated the United States' obligation to bar such lawsuits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 646 F.3d 56. The opinion of the district court (Pet. App. 11a-48a) is reported at 742 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2011. A petition for rehearing was denied on September 12, 2011 (Pet. App. 49a-50a). The petition for a writ of certiorari was filed on December 12, 2011 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 4, 1979, Iranian militants unlawfully seized the American Embassy in Tehran, Iran, and

captured the Embassy's personnel. The captured individuals were held hostage for a period of 444 days. They were ultimately released on January 20, 1981, pursuant to an international executive agreement known as the Algiers Accords, which had been executed the preceding day. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-665 (1981); Pet. App. 1a. The Algiers Accords include two declarations of the government of Algeria, embodying an international agreement between the United States and Iran. See *Iran-United States: Settlement of the Hostage Crisis*, 20 I.L.M. 223 (1981); *Dames & Moore*, 453 U.S. at 664.

A central purpose of the Algiers Accords was the negotiated release of the Americans held hostage in Tehran, and the international agreement was accordingly made contingent on the hostages' freedom. See 20 I.L.M. at 225. In agreeing to the Algiers Accords, the United States committed to "bar and preclude the prosecution against Iran of any pending or future claim of * * * a United States national arising out of events * * * related to (A) the seizure of the 52 United States nationals on November 4, 1979, [or] (B) their subsequent detention." *Id.* at 227. The Algiers Accords were subsequently implemented by a series of Executive Orders and Treasury Department regulations. See *Dames & Moore*, 453 U.S. at 665-666.

2. Notwithstanding the Algiers Accords, for the last 30 years some of the Americans held hostage in Iran and their family members have repeatedly attempted to sue Iran for their seizure and detention. This action is the latest such effort.

a. *Pre-1996 Litigation*. In the immediate wake of the hostage crisis, some of the hostages and their families brought a number of different lawsuits against Iran.

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, provides "the sole basis for obtaining jurisdiction over a foreign state in our courts" in a civil suit. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, foreign governments and their agencies or instrumentalities are immune from suit in United States courts unless a specific statutory exception applies. 28 U.S.C. 1604; *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). Because Congress had not abrogated Iran's sovereign immunity in any FSIA exception, the hostages' claims were dismissed. See *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984); *Ledgerwood* v. *State of Iran*, 617 F. Supp. 311 (D.D.C. 1985).

b. *1996 Amendments to the FSIA*. In 1996, Congress amended the FSIA to add a new exception to the general rule of foreign sovereign immunity. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 221(a)(1), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)). Under that amendment, foreign sovereign immunity is unavailable in certain suits "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." 28 U.S.C. 1605(a)(7) (Supp. II 1996). This exception to the FSIA's general rule of foreign sovereign immunity is commonly known as the terrorism exception.

In 2000, petitioners here—who are some of the hostages and their family members—brought an earlier action, alleging that the 1996 amendments had abro-

gated Iran's sovereign immunity and created a cause of action against Iran for their seizure and detention. The terrorism exception, however, applies only if the foreign state was designated as a state sponsor of terrorism by the Department of State at the time the act occurred, or if the foreign state was subsequently so designated as a result of the act that is the basis for the suit. 28 U.S.C. 1605(a)(7)(A) (Supp. I 2001). Because "Iran had not been so designated," the 1996 amendments to the FSIA did not provide for jurisdiction over suits against Iran arising out of the hostage crisis. *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003) (*Roeder I*), cert. denied, 542 U.S. 915 (2004).

c. *2001 and 2002 Amendments to the FSIA*. In 2001 and 2002, while the litigation in *Roeder I* was pending before the district court, Congress amended the FSIA's terrorism exception to abrogate Iran's sovereign immunity for acts "related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia." 28 U.S.C. 1605(a)(7)(A) (Supp. III 2003).[1] That was the case number in the district court for *Roeder I*. The 2001 and 2002 amendments thus created an exception, limited to the *Roeder I* litigation alone, to Iran's sovereign immunity. See 333 F.3d at 235. But although the amendments granted subject-

[1] Congress originally amended the exception in November 2001, but its amendment contained a typographical error in the case number. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 803; *Roeder I*, 333 F.3d at 235. Six weeks later, in January 2002, Congress corrected the error. See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, Div. B, § 208, 115 Stat. 2299 (28 U.S.C. 1605(a)(7)(A) (Supp. III 2003)).

matter jurisdiction over petitioners' action, "[t]he question remained whether the Algiers Accords * * * survived the amendments." *Id.* at 235-236. The district court determined that the Algiers Accords did survive and thus that petitioners lacked a cause of action against Iran. *Id.* at 231-232.

The court of appeals affirmed. See *Roeder I*, 333 F.3d at 239. The court reasoned that an executive agreement like the Algiers Accords will not "be considered 'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Id.* at 237 (quoting *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984)). After examining the text and legislative history of the 2001 and 2002 amendments, the court concluded that there was "no clear expression in anything Congress enacted abrogating the Algiers Accords." *Ibid.* The court noted that a joint explanatory statement accompanying the 2002 amendment contained language that might have abrogated the Algiers Accords—"if the statement had been enacted." *Ibid.*; see H.R. Conf. Rep. No. 350, 107th Cong. 422 (2001) ("The provision * * * acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996."). But as the court observed, "Congress did not vote on the statement and the President did not sign a bill embodying it." *Roeder I*, 333 F.3d at 237.

d. *2008 Amendments to the FSIA.* In 2008, Congress reenacted the FSIA's terrorism exception. See National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 338 (28 U.S.C. 1605A (Supp. II 2008)). Congress also reen-

acted, with minor changes, the provision granting subject-matter jurisdiction over claims related to the acts at issue in the *Roeder I* litigation. See 28 U.S.C. 1605A(a)(2)(B) (Supp. II 2008). In addition, for the first time Congress created a private right of action against certain foreign states for state-sponsored terrorism. See 28 U.S.C. 1605A(c) (Supp. II 2008). Specifically, Section 1605A(c) creates a private right of action against "[a] foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i)." *Ibid.*

There are two ways in which a foreign state may be "a state sponsor of terrorism as described in subsection (a)(2)(A)(i)." First, under certain conditions a private plaintiff may proceed against a foreign nation if that nation had been designated by the State Department at the time of the complained-of act or was so designated as a result of the act. See 28 U.S.C. 1605A(a)(2)(A)(i)(I) (Supp. II 2008). As explained above, Iran was not designated as a state sponsor of terrorism at the time of, or as a result of, the hostage crisis, see *Roeder I*, 333 F.3d at 235, and thus that provision is not at issue in this case.

Second, a private plaintiff may proceed against a foreign nation if

> *in the case of an action that is* refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is *filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when* the original action or *the related action under section 1605(a)(7)* (as in effect before the enactment of this section) * * * *was filed.*

28 U.S.C. 1605A(a)(2)(A)(i)(II) (Supp. II 2008) (emphasis added). Section 1083(c)(3) of the NDAA provides in turn that "[i]f an action arising out of an act or incident has been timely commenced under [the former 28 U.S.C. 1605(a)(7)] * * * , any other action arising out of the same act or incident may be brought under [S]ection 1605A" within certain time periods. 122 Stat. 343.

3. Petitioners brought the present case, alleging that the 2008 amendments granted them a private cause of action against Iran. They argue for purposes of Section 1083(c)(3) of the NDAA that *Roeder I* was "timely commenced under" the former Section 1605(a)(7), *i.e.*, the FSIA's pre-2008 terrorism exception. Petitioners further argue that this suit "arise[s] out of the same act or incident" at issue in *Roeder I*. It therefore follows for purposes of Section 1605A(a)(2)(A)(i)(II) of the FSIA, petitioners maintain, that this suit is "an action" filed "by reason of" Section 1083(c)(3) of the NDAA. And, petitioners note, Iran "was designated as a state sponsor of terrorism" when *Roeder I* was filed. Petitioners thus maintain that taken together Section 1083(c)(3) of the NDAA and Section 1605A(a)(2)(A)(i)(I) of the FSIA "unambiguously give[] [them] a cause of action to sue Iran." Pet. App. 7a; see Pet. 6-8.

The district court disagreed and dismissed petitioners' action. Pet. App. 11a-48a. The court reasoned that the phrase "has been timely commenced" in the NDAA "may be reasonably read to limit [Section] 1083(c)(3)'s reach to cases related to those which were timely filed and are still pending, as the government argues, or to encompass cases related to any and all cases that were timely filed in the first instance, regardless of whether they were still pending when the NDAA became law, as plaintiffs argue." *Id.* at 42a. As a result, the court held,

"Congress has failed to enact plain, straightforward language creating a cause of action for plaintiffs; nor has Congress clearly expressed its intent to abrogate the Algiers Accords." *Id.* at 48a.

4. The court of appeals affirmed. Pet. App. 1a-10a (*Roeder II*). The court began by noting that during the five years between *Roeder I* and the 2008 amendments to the FSIA, legislators in four consecutive Congresses had "tried—and failed—to enact legislation that would explicitly abrogate the provision of the Algiers Accords barring the hostages' suit." *Id.* at 5a (internal quotation marks and citation omitted). The court observed that, "[j]ust as in *Roeder I*, the amendments that finally passed 'do not, on their face, say anything about the Accords.'" *Ibid.* (quoting *Roeder I*, 333 F.3d at 236). Moreover, the court noted that in *Roeder I* it had given "an example of language that might suffice to abrogate even without an express reference to the Accords, but the 2008 amendments contain no such language or anything comparable." *Ibid.* (internal citation omitted).

With respect to petitioners' statutory argument, the court of appeals observed that Section 1083(c)(3) of the NDAA refers to "an action" that "has been timely commenced." Pet. App. 9a. That language, the court of appeals explained, "can fairly be read to refer only to those cases timely commenced under [Section] 1605(a)(7) that were still pending when the [NDAA] was passed." *Ibid.* "If Congress had meant to embrace more than just pending cases," the court reasoned, "it might have used the past simple, 'was timely commenced.'" *Ibid.* And, the court noted, "[Congress] might have placed [Section] 1083(c)(3) [outside] of a section entitled 'Application to Pending Cases.'" *Ibid.* "Instead, Congress chose language suggesting that the predicate action in [Section]

1083(c)(3) is one that *has* been commenced but *is* still ongoing." *Ibid.* At a minimum, the court concluded, Section 1083(c)(3) is not sufficiently clear to abrogate the Algiers Accords. *Id.* at 9a-10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As the court of appeals explained in *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004), "[t]he authority of the President to settle claims of American nationals through executive agreements is clear." See *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) ("Given the fact that the practice goes back over 200 years and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable.") (brackets, citation, and internal quotation marks omitted); *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 & n.8 (1981). In *Dames & Moore*, this Court upheld the settlement of claims accomplished in the Algiers Accords as a permissible exercise of that Presidential authority. See *id.* at 686, 688. Petitioners thus do not contend (Pet. 12) that the President lacked the authority in the Algiers Accords to settle petitioners' potential future claims against Iran in return for their freedom from captivity.

Petitioners instead contend (Pet. 12-17) that the Algiers Accords do not stand on the same constitutional footing as other types of federal law, and thus the court of appeals erred in applying a clear statement rule to determine whether the Accords had been abrogated by

the 2008 FSIA amendments. As an initial matter, that is the same argument petitioners advanced in *Roeder I* with respect to the 2001 and 2002 FSIA amendments. They contended that the 2001 and 2002 amendments did not need to be clear in order to abrogate the Algiers Accords. See Pet. at i, *Roeder I*, 542 U.S. 915 (2004) (No. 03-1147) (presenting as the question for this Court's review "[w]hether Congress is required to satisfy a 'clear statement' requirement before it may abrogate an unratified executive agreement"). This Court declined to review that question in *Roeder I*, see 542 U.S. at 915, and there is no reason for a different result here. The court of appeals in this case simply applied its earlier standard to these particular facts. Petitioners do not contend that since *Roeder I* any other court of appeals has applied a different standard to determine whether an executive agreement has been abrogated by a federal statute.

In any event, petitioners' arguments continue to lack merit. See Br. in Opp., *Roeder I*, 542 U.S. 915 (2004) (No. 03-1147). This Court has consistently recognized that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook* v. *United States*, 288 U.S. 102, 120 (1933)); see *ibid.* (referring to the "firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action"). As the Court explained in *Whitney* v. *Robertson*, 124 U.S. 190 (1888), when a treaty and a statute "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if

that can be done without violating the language of either." *Id.* at 194.

Petitioners identify no decision suggesting that the rule of construction described above is inapplicable when an Act of Congress is claimed to have abrogated an executive agreement. An executive agreement like the Algiers Accords represents an established exercise of the President's constitutional authority to conduct foreign affairs, see p. 9, *supra*, and courts should be cautious for reasons of foreign relations and separation of powers in concluding that Congress intends to set aside an executive agreement between the President and a foreign nation. As the court of appeals explained in *Roeder I*, "[e]xecutive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties." 333 F.3d at 238. For that reason, in *Weinberger* v. *Rossi*, 456 U.S. 25 (1982), this Court required "some affirmative expression of congressional intent to abrogate the United States' international obligations" undertaken in a 1968 executive agreement with the Republic of the Philippines. *Id.* at 32.

As this Court recognized in *Rossi*, see 456 U.S. at 32, the determination whether a federal statute has abrogated an executive agreement directly implicates the long-established interpretive principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The repudiation of an executive agreement, particularly an agreement like the Algiers Accords that secured the release of United States citizens held hostage by a foreign state, should not be lightly inferred, because such a repudiation affects the

Executive Branch's ability to negotiate future agreements involving similarly grave interests. Especially in this context, a clear-statement requirement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." Pet. App. 9a (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991)). A clear-statement requirement likewise assures that the President considered the consequences of abrogation in deciding whether to support or oppose the legislation.

Petitioners incorrectly contend (Pet. 17-19) that the decision below contravenes separation-of-powers principles by allowing an executive agreement that was not ratified by the Senate to supersede an Act of Congress. The court of appeals did not, however, "elevate[] an unratified executive agreement to a status above that of a constitutionally enacted statute." Pet. 19. To the contrary, the court recognized in *Roeder I* that "[t]here is no doubt that laws passed after the President enters into an executive agreement may abrogate the agreement." 333 F.3d at 235. The court simply determined in this case that the particular laws on which petitioners rely—the 2008 amendments to the FSIA—do not abrogate the Algiers Accords, and that determination raises no meaningful constitutional concern.

Nor does this case even provide a suitable occasion for determining what interpretive standard to apply when an Act of Congress is alleged to have abrogated a prior executive agreement. At the time Congress enacted the 2008 amendments, *Roeder I* established that a clear statement would be necessary to abrogate the barrier to private suits imposed by the Accords. Yet "[j]ust as in *Roeder I*, the amendments that finally passed 'do not, on their face, say anything about the Ac-

cords.'" Pet. App. 5a (quoting *Roeder I*, 333 F.3d at 236). And even though the court in *Roeder I* had provided "an example of language that might suffice to abrogate even without an express reference to the Accords," the 2008 FSIA amendments "contain no such language or anything comparable." *Ibid.* Accordingly, the 2008 amendments are reasonably read to leave undisturbed the independent bar to suit imposed by the Algiers Accords. For that reason, the proper disposition of this case does not depend on the precise degree of clarity that is required for an Act of Congress to abrogate an executive agreement.

2. Petitioners further contend (Pet. 20-27) that, even if a clear-statement requirement applies, Congress may speak clearly without expressly abrogating the Algiers Accords. The court of appeals, however, did not disagree. The court noted that in *Roeder I* it had provided "an example of language that might suffice to abrogate *even without an express reference to the Accords*, but the 2008 amendments contain no such language or anything comparable." Pet. App. 5a (emphasis added; internal citation omitted); see *Roeder I*, 333 F.3d at 237; cf. *Martin* v. *Hadix*, 527 U.S. 343, 354 (1999) (noting that this Court had previously suggested language that "might qualify as a clear statement that a statute was to apply retroactively"). The court of appeals thus explicitly recognized that a statutory amendment could have been sufficient to abrogate "even without an express reference to the Accords." Pet. App. 5a. The court simply determined that the 2008 amendments lacked sufficiently clear language to abrogate the Accords, and that narrow and case-specific determination does not warrant review.

In considering whether the 2008 amendments suffice to abrogate, the court of appeals stated that petitioners' interpretation of those amendments "may well represent the best reading of [Section] 1083(c)(3)." Pet. App. 8a. Petitioners seize on that statement (Pet. 23-24) as evidence that the court effectively imposed an express abrogation requirement. But as the court of appeals proceeded to explain, the language of Section 1083(c)(3) "can fairly be read" as the government urges. Pet. App. 9a. According to the court, Section 1083(c)(3) can be read to allow all suits (like *Roeder I*) that were timely when filed but that have long since been concluded, or it can be read to allow only suits that were pending at the time of its enactment in 2008. As the court of appeals pointed out, Section 1083(c)(3) is entitled "Application to Pending Cases" and refers in the present perfect tense to "an action" that "has been timely commenced." Those textual indications support the government's view "that the predicate action in [Section] 1083(c)(3) is one that *has* been commenced but *is* still ongoing." *Ibid.*; see *Chicago Manual of Style* § 5.126 (16th ed. 2010) (explaining that present perfect tense may denote a past act, state, or condition that "continues up to the present").

The court of appeals thus did not apply any express abrogation requirement. Rather, the court examined the text of the statute, determined that the government's reading is fairly possible, and therefore concluded that the 2008 amendments are not sufficiently clear to abrogate the Algiers Accords. The court's reasoning is consistent with the operation of clear-statement requirements more generally. See, *e.g.*, *FAA* v. *Cooper*, 132 S. Ct. 1441, 1453 (2012) ("[B]ecause the Privacy Act waives the Federal Government's sovereign

immunity, the question we must answer is whether it is plausible to read the statute, as the Government does, to authorize only damages for economic loss."); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) (holding that the existence of "plausible" alternative interpretations of statutory language means that the statute does not qualify as an "unambiguous" expression of a waiver of sovereign immunity); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 259 (1994) (concluding that Congress had not clearly expressed its intent that a statute apply retroactively, despite the fact that the retroactivity argument had "some force").

3. Finally, petitioners contend (Pet. 27-34) that the 2008 amendments are sufficiently clear to abrogate the Algiers Accords. Again, the court of appeals' application of its existing legal framework to the particular legislation at issue here does not warrant this Court's review. In any event, the decision below is correct. As the court of appeals explained, despite the fact that *Roeder I* identified Congress's need to speak clearly in order to abrogate the Accords, "the amendments that finally passed 'do not, on their face, say anything about the Accords.'" Pet. App. 5a (quoting *Roeder I*, 333 F.3d at 236). And as noted above, although the court in *Roeder I* provided "an example of language that might suffice to abrogate even without an express reference to the Accords," "the 2008 amendments contain no such language or anything comparable." *Ibid.* Instead, "Congress chose to cut and paste the same, insufficient language" from the 2001 and 2002 amendments and "to place it in the jurisdictional section" of the 2008 amendments. *Id.* at 27a. It is not as if Congress was unaware of the need to speak more clearly: during the five-year span between *Roeder I* and the 2008 amendments, legislators in four consecutive

Congresses proposed bills that closely tracked the language identified by the court in *Roeder I*, but none of those provisions was enacted. *Id.* at 5a.

Petitioners argue that the phrase "has been timely commenced" in Section 1083(c)(3) of the NDAA "simply denotes a completed action," Pet. 29, and thus that provision applies to any prior related lawsuit—even lawsuits like *Roeder I* that were not pending when the NDAA was passed. Although the present perfect tense may "denote[] an act, state, or condition that is now completed," it may also refer to an act, state, or condition that "continues up to the present." *Chicago Manual of Style* § 5.126 (16th ed. 2010). Indeed, one of the ways that the present perfect tense differs from the simple past tense is that the former can describe "a past action that comes up to and touches the present." *Ibid.* For that reason, other statutes use the phrase "has been commenced" to refer to pending suits. See, *e.g.*, *Breed* v. *Jones*, 421 U.S. 519, 523 n.5 (1975). The court of appeals therefore was correct that Section 1083(c)(3) "can fairly be read to refer only to those cases timely commenced under [Section] 1605(a)(7) that were still pending when the [NDAA] was passed." Pet. App. 9a.

Petitioners argue that the court of appeals paid too much attention to Section 1083(c)(3)'s heading, "Application to Pending Cases," because the provision's text is "plain." Pet. 30. But the text of Section 1083(c)(3) is not unambiguous for the reasons given by the court of appeals, and it was therefore appropriate for the court to consider whether the section heading "shed[s] light" on the provision's meaning. *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 529 (1947). Petitioners also argue (Pet. 31-32) that the court of appeals paid too little attention to an adjacent provision, Section

1083(c)(2) of the NDAA, which applies to prior actions and expressly refers to pending cases. But the presumption "that the presence of a phrase in one provision and its absence in another reveals Congress' design[] grows weaker with each difference in the formulation of the provisions under inspection." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 436 (2002). As the court of appeals correctly observed, "the relevant subsections were added at different times in the legislative process, serve different purposes and share little similar language." Pet. App. 10a.

Regardless, even accepting (as the court of appeals did) that petitioners' statutory arguments have "force," the court of appeals correctly concluded that the 2008 amendments are not sufficiently clear to override the Algiers Accords. See Pet. App. 10a ("Because of [Section] 1083(c)(3)'s ambiguity regarding whether [petitioners], whose case was not pending at the time of enactment, may file under the new terrorism cause of action, we are required again to conclude that Congress has not abrogated the Algiers Accords."). It is simply not clear that Congress intended to abrogate the United States' international commitment in the Accords, and the court of appeals therefore did not err in declining to permit petitioners to bring suit against Iran for their seizure and detention more than 30 years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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