No. 17-1673

In the Supreme Court of the United States

AVIATION & GENERAL INSURANCE COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether restoration of Libya's sovereign immunity in U.S. courts, following a period in which such immunity had been lifted, effected a taking of petitioners' property under the Fifth Amendment.

2. Whether petitioners' takings claims raised a nonjusticiable political question to the extent that petitioners sought judicial review of the President's decision to exclude petitioners' claims from the distribution of Libyan settlement proceeds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 882 F.3d 1088. The opinions of the Court of Federal Claims (Pet. App. 42a-52a, 53a-75a, 76a-96a) are reported at 127 Fed. Cl. 316, 121 Fed. Cl. 357, and 121 Fed. Cl. 206.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2018. On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 13, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1985, an EgyptAir flight from Athens to Cairo was hijacked by terrorists, leading to the killing of several passengers and the destruction of the aircraft's hull. Pet. App. 3a. In December 1988, a Pan Am flight was destroyed by a bomb as it flew across Scotland, resulting in the death of all passengers. *Ibid.* In both cases, the government of Libya sponsored or participated in the attacks. *Ibid.*

1. At the time of the attacks, Libya, like other foreign states, enjoyed sovereign immunity from suit in U.S. courts under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, for such conduct abroad. See 28 U.S.C. 1604; 28 U.S.C. 1605 (1982); 28 U.S.C. 1605 (1988); 28 U.S.C. 1606-1607. But in 1996, Congress amended the FSIA to strip state sponsors of terrorism of sovereign immunity in suits involving personal injury or death caused by certain terrorist acts. See 28 U.S.C. 1605(a)(7) (Supp. II 1996). Because the Department of State had previously designated Libya a state sponsor of terrorism, Libya's sovereign immunity was limited under this so-called "Terrorism Exception." Pet. App. 4a.

Petitioners allege that they are insurance companies that paid insurance claims resulting from the attacks. Pet. App. 44a. After Congress enacted the Terrorism Exception, petitioners filed two suits against Libya for damages resulting from the attacks, in which they asserted that Libya's sovereign immunity had been waived under Section 1605(a)(7). *Id.* at 4a-5a; see C.A. App. 242. The district court in one of the cases dismissed petitioners' complaint for lack of jurisdiction. *Certain Underwriters at Lloyds London* v. *Great Socialist People's Libyan Arab Jamahiriya*, No. 06-731, 2007 WL 2007573

(D.D.C. July 9, 2007). Petitioners had argued that the Terrorism Exception, which expressly lifted sovereign immunity for "terrorist act[s] that caused personal injury and death," had also "implicitly waived" Libya's sovereign immunity for an "act of terrorism [that] results in property damage." *Id.* at *2. The court rejected that argument as being contrary to the text of the statute, congressional intent, and the normal operation of sovereign immunity. *Id.* at *2-*3.

In January 2008, while that district court's decision was on appeal, see C.A. App. 242, Congress expanded the Terrorism Exception, replacing Section 1605(a)(7) with 28 U.S.C. 1605A. See Pet. App. 5a. Section 1605A lifted sovereign immunity for state sponsors of terrorism in suits involving claims of property loss, third-party liability, and life and property insurance arising from terrorist acts. 28 U.S.C. 1605A(d). After the provision's enactment, petitioners amended their district court complaints to assert jurisdiction under Section 1605A. Pet. App. 5a.

In August 2008, Congress enacted the Libyan Claims Resolution Act (LCRA), Pub. L. No. 110-301, 122 Stat. 2999. Section 5(a)(1)(A) of the LCRA provides that, upon certification by the Secretary of State, "Libya * * * shall not be subject to" the Terrorism Exception, thereby reinstating Libya's sovereign immunity. § 5(a)(1)(A), 122 Stat. 3000. The Secretary's certification was made contingent on, *inter alia*, the United States' receiving sufficient funds from Libya to ensure "fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending * * * against Libya arising under section 1605A." § 5(a)(2)(B)(ii), 122 Stat. 3001.

Also in August 2008, the United States and Libya entered into an agreement to settle claims, including those arising from the 1985 and 1988 terrorist attacks. Pet. App. 5a; see 109a-112a. Under the agreement, Libya promised to provide $1.5 billion to the United States to distribute to U.S. nationals. *Ibid.*; see *id.* at 109a-112a, 113a-114a. Each nation also "accept[ed] the resources for distribution as a full and final settlement of its claims and suits and those of its nationals." *Id.* at 111a.

About two months later, the Secretary certified receipt of the Libyan settlement funds, triggering the LCRA's restoration of Libya's sovereign immunity. Pet. App. 115a. President Bush then issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008) (E.O. 13,477). The Executive Order provided that the United States had "espoused" the claims of U.S. nationals against Libya and required all such claims "pending suit in any court, domestic or foreign," to be "terminated." *Id.* § 1(a)(ii). Pursuant to the Executive Order, the State Department referred such claims to the Foreign Claims Settlement Commission (Commission), which was funded by the $1.5 billion payment from Libya. Pet. App. 6a. For the claims of *foreign* nationals, the Executive Order provided that such claims could no longer be maintained "in any court in the United States," and it directed that pending suits raising such claims in U.S. courts "shall be terminated." E.O. 13,477 § 1(b)(i) and (ii). The Executive Order also provided, however, that "[n]either the dismissal of the lawsuit, nor anything in th[e] order, shall affect the ability of any foreign national to pursue other available remedies for claims * * * in foreign courts or through the efforts of foreign governments." *Id.* § 1(b)(iii).

Some petitioners submitted to the Commission claims seeking compensation for damages resulting from the Pan Am attack. Pet. App. 6a. The Commission denied the requests, finding that those petitioners lacked standing because they "failed to meet their burden of proving that they own[ed] the claim[s]" or that "they (and not some other entities) actually suffered the net financial loss or represent[ed] the parties who actually suffered the net financial loss that form[ed] the basis of the claim[s]." C.A. App. 508; see *id.* at 508-511. The Commission also determined that none of the claims satisfied the Commission's "continuous nationality" jurisdictional rule, a longstanding principle of international law that requires, as a condition of a nation's espousal of claims, that the claims have been continuously owned by U.S. nationals from the date of injury. *Id.* at 511-525. The Commission thus determined that certain petitioners were ineligible because "they and their insured are foreign nationals"; one petitioner was ineligible "because its insured * * * was a foreign national"; and petitioners' remaining claims were ineligible because they "belonged to a foreign national at the time [they] accrued." Pet. App. 7a. Finally, the Commission held on the merits that petitioners "failed to meet their burden of proof as to the validity of any of their theories of the claim[s]." C.A. App. 525; see *ibid.* ("[E]ven if the Commission had jurisdiction, the claimants would still have failed to prove the legal merits of their claim[s].").

2. Petitioners filed this suit in the Court of Federal Claims, alleging that the United States had taken their property without just compensation in violation of the Fifth Amendment. Pet. App. 7a. Petitioners alleged

that "the United States' actions in furtherance of restoring 'normal' relations with Libya directly resulted in the taking of [petitioners'] judicially cognizable claims against Libya * * * without any remedy in either federal court or the Commission." *Ibid.* (brackets and citation omitted).

The government moved to dismiss, arguing that petitioners had failed to state a claim and that petitioners had raised a nonjusticiable political question regarding the President's authority to settle their claims. Pet. App. 8a. The Court of Federal Claims denied the government's motion, holding that petitioners had identified a cognizable property interest, *id.* at 63a-72a, and that petitioners' takings claims were justiciable, *id.* at 73a-74a.

The Court of Federal Claims then granted the government's motion for summary judgment, finding no taking of property for which compensation would be due. Pet. App. 42a-52a. In so ruling, the court applied the test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*), for determining whether compensation is due when a governmental regulatory action is alleged to have effected a taking. Under that test, a court considers "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Id.* at 124.

Applying the *Penn Central* test, the Court of Federal Claims determined that no compensation was due to petitioners. The court noted that petitioners could not assert "an investment-backed expectation" in their claims against Libya, "nor can they characterize the Govern-

ment's action as novel or unexpected," given that Presidents have settled similar claims against foreign sovereigns since at least 1799. Pet. App. 48a-49a. The court also rejected petitioners' argument that "they had an investment-backed expectation to bring suit against and recover from Libya after Congress briefly lifted Libya's sovereign immunity." *Id.* at 49a. The court explained that the LCRA "merely restored the default rule of sovereign immunity," the availability of which, "or lack thereof, 'generally is not something on which parties can rely in shaping their primary conduct.'" *Id.* at 50a (quoting *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 865 (2009) (*Beaty*)). Finally, the court emphasized that the value of petitioners' legal claims was "speculative," in light of the low likelihood that petitioners "would have been able to collect on the judgment." *Id.* at 51a.

3. a. Petitioners appealed to the Federal Circuit, which affirmed. Pet. App. 1a-40a. At the outset, the court observed that petitioners had "shifted their argument" on appeal. *Id.* at 10a. In the trial court, petitioners had alleged that the United States took their property "*in the form of their legally cognizable claims* against the government of Libya." *Ibid.* (citation and ellipsis omitted). But on appeal, petitioners no longer sought compensation for the supposed "sale of their claims to Libya," and instead challenged only "the Government's decision to exclude them from the distribution of the Libya Claims Settlement Agreement proceeds." *Ibid.* (brackets, citation, and internal quotation marks omitted).

Addressing petitioners' new argument, the court of appeals held that "the question of whether [petitioners] were entitled to proceeds from the Libya Claims Settlement Agreement presents a nonjusticiable political

question." Pet. App. 11a. For that conclusion, the court relied on its prior decision in *Belk* v. *United States*, 858 F.2d 706 (Fed. Cir. 1988). There, victims of the Iranian hostage crisis brought takings claims after the government entered into the Algiers Accords with Iran, thereby securing the hostages' release but also settling their claims against Iran. Pet. App. 13a (citing *Belk*, 858 F.2d at 707). The *Belk* court found those takings claims to be nonjusticiable because "judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President's ability to conduct foreign relations." *Ibid.* (quoting *Belk*, 858 F.2d at 710). For similar reasons, the court of appeals concluded that petitioners' claims regarding their exclusion from the Libyan settlement proceeds were nonjusticiable, since "the President had complete discretion and authority to implement the settlement with Libya and to decide to whom the settlement funds would be distributed." *Id.* at 14a. The court held, however, that petitioners' allegations "regarding the Government's termination of their lawsuits against [the] Libya[n] state [was] a justiciable takings claim." *Id.* at 12a.

The court of appeals then held that the government did not effect a Fifth Amendment taking when it reinstated Libya's sovereign immunity, causing dismissal of petitioners' legal claims in U.S. courts. Pet. App. 14a-22a. For purposes of its analysis, the court assumed, but did not decide, that petitioners had a cognizable property interest in their lawsuits against Libya. *Id.* at 15a. The court nevertheless concluded, based on its application of the *Penn Central* test, that "even if [petitioners] had a property interest in their lawsuits, no taking occurred under the Fifth Amendment." *Ibid.*

First, the court of appeals determined that "[t]he character of governmental action in this case is the Government's authority to settle and espouse claims and reinstate Libya's sovereign immunity." Pet. App. 16a. That action, the court explained, merely "'adjust[ed] the benefits and burdens of economic life to promote the common good,'" rather than effecting "a physical invasion of [petitioners'] property rights." *Ibid.* (quoting *Belk*, 858 F.2d at 709). The court thus concluded that the first *Penn Central* factor weighed against finding a taking. *Ibid.*

Next, the court of appeals determined that reinstatement of Libya's sovereign immunity did not interfere with petitioners' "investment-backed expectations." Pet. App. 17a. The court explained that "changing the status of Libya's sovereign immunity was neither novel nor unexpected," given that Presidents had settled similar claims since at least 1799. *Ibid.* Because "[f]oreign sovereign immunity reflects current political realities and relationships," moreover, "its availability (or lack thereof) generally is not something on which parties can rely in shaping their primary conduct." *Id.* at 18a (quoting *Beaty*, 556 U.S. at 864-865) (internal quotation marks omitted). The court also rejected petitioners' argument that they could have had reasonable expectations of compensation "at the time [they] invested in their insurance contracts or at the time of the terrorist attacks." *Id.* at 18a-19a. "At those times," the court explained, "Libya had sovereign immunity from suit in the United States," and the government's reinstatement of Libya's sovereign immunity "could not have interfered with any reasonable expectation that [petitioners] could sue Libya at the time their claims accrued." *Id.* at 19a.

The court also "disagree[d] with [petitioners'] characterization that the Government failed to provide an alternative forum to litigate their claims against Libya." *Id.* at 20a. That argument, the court noted, ignores that the Executive Order preserved their right to pursue relief in foreign courts—a right that petitioners simply "chose" not to invoke. *Ibid.*

Finally, the court of appeals determined that "the economic impact" of the government's action was "speculative and uncertain," because "there was no guarantee that [petitioners] would have been successful in obtaining a judgment, let alone successful in enforcing that judgment against Libya." Pet. App. 21a. Petitioners offered only "anecdotal evidence," with "no support in the record," for their assertion that they would have successfully collected on their claims. *Ibid.* Those assertions were insufficient, the court explained, to "establish a definitive value of [petitioners'] pending claims at the time of their termination," or to "provide assurance that [petitioners] would have obtained and enforced a judgment against Libya." *Ibid.*

b. Judge Reyna filed a separate opinion concurring in part and dissenting in part. Pet. App. 23a-40a. Judge Reyna would have held that all of petitioners' claims—not merely their claims about the distribution of settlement proceeds, but also their claims about reinstatement of Libya's sovereign immunity—raised nonjusticiable political questions. *Id.* at 34a-40a. Judge Reyna would have held further that petitioners lacked standing to invoke the Fifth Amendment because they possessed only subrogation claims that were derivative of the claims of their insureds, and their insureds would not have had valid claims against the United States. *Id.* at 28a-34a.

ARGUMENT

Petitioners renew their argument (Pet. 10-24) that the court of appeals misapplied *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), when it held that the reinstatement of Libya's sovereign immunity did not effect a compensable taking under the Fifth Amendment. Petitioners also argue (Pet. 24-27) that claims regarding their exclusion from the settlement fund are justiciable. The court of appeals correctly rejected petitioners' arguments, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for addressing the questions presented. Further review is unwarranted.

1. The court of appeals correctly held that the Libyan Claims Resolution Act did not effect a taking of petitioners' property requiring compensation under the Fifth Amendment when it reinstated Libya's sovereign immunity in U.S. courts. Petitioners do not assert any conflict among the courts of appeals, arguing instead (Pet. 28) merely that the court below "disregarded or misapplied" longstanding principles of takings law. Petitioners' argument based on the circumstances of this case is unpersuasive.

a. As an initial matter, the reinstatement of Libya's sovereign immunity did not interfere with any cognizable property right possessed by petitioners. During the course of this litigation, petitioners have "shifted their argument" concerning the supposed property rights at issue. Pet. App. 10a. In the Court of Federal Claims, petitioners argued that the government "took" their property "in the form of their legally cognizable claims against the government of Libya." *Ibid.* (citation, ellip-

sis, and emphasis omitted). On appeal, however, petitioners stated "that they 'do not allege that the sale of their claims to Libya was a taking, but are challenging the Government's decision to exclude them from the distribution of the Libya Claims Settlement Agreement proceeds.'" *Ibid.* (quoting Pet. C.A. Br. 26) (brackets omitted). Now before this Court, petitioners seem to be reverting to the argument they made in the Court of Federal Claims. See Pet. 21 ("Petitioners' property, their claims against Libya, were terminated.").

Regardless of how petitioners' takings argument is conceived, however, petitioners have not identified any cognizable form of constitutionally protected property. Petitioners assert (Pet. 15) that, under the LCRA, their claims were "sold to Libya for a cash payment." That assertion is incorrect. The LCRA reinstated Libya's sovereign immunity in suits in U.S. courts, thereby imposing "one particular barrier" to recovery in that venue. *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981). But the United States did not terminate petitioners' legal claims, much less did it take them or "sell" them (Pet. 21) to Libya. To the contrary, the Executive Order implementing the LCRA specified that, although the claims of foreign nationals could no longer be maintained in U.S. courts in light of the reinstatement of Libya's sovereign immunity, "[n]either the dismissal of the lawsuit, nor anything in th[e] order, shall affect the ability of any foreign national to pursue other available remedies for claims * * * in foreign courts or through the efforts of foreign governments." E.O. 13,477 § 1(b)(iii). Petitioners thus "could have sought relief in foreign courts," or could have sought relief through the

efforts of foreign governments, including those governments in a position to espouse their claims, but they "chose not to do so." Pet. App. 20a.

Even if the United States could plausibly be described as in some sense having terminated claims by foreign nationals based on conduct occurring abroad, moreover, petitioner has identified no authority supporting the notion that a potential tort claim, of the sort that petitioners seek to pursue against Libya, is a form of constitutionally protected property. To the contrary, courts have consistently held that "a pending tort claim does not constitute a vested right." *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (citing cases), cert. denied, 519 U.S. 1077 (1997); see *Salmon* v. *Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) ("[A] legal claim for tortious injury affords no definite or enforceable property right until reduced to final judgment.") (brackets and citation omitted); *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986) ("[R]ights in tort do not vest until there is a final, unreviewable judgment."); see also *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009), cert. denied, 560 U.S. 924 (2010). Nor can petitioners reasonably assert a property interest in the legal regime that existed at any point in time—for instance, during the period in which Libya was unable to invoke a sovereign immunity defense against petitioners' claims. See *New York Cent. R.R.* v. *White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); cf. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 864 (2009) ("Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases.").

Finally, petitioners are wrong in arguing (Pet. 13) that their property rights were implicated by the President's decision to "exclude" them from access to proceeds from the $1.5 billion settlement with Libya. Access to the settlement proceeds, by means of seeking compensation through the Commission, was afforded only to U.S. nationals whose claims were "espoused" (*i.e.*, adopted) by the United States. E.O. 13,477 § 1(a)(ii); see *Antolok* v. *United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government."). Petitioners are ineligible to receive proceeds from the settlement because their claims were not espoused by the United States. In complaining (Pet. 11) that the government "exclude[d] Petitioners" from the settlement agreement, therefore, petitioners are actually objecting to the government's *refusal* to espouse their claims. Needless to say, petitioners do not possess any cognizable property interest in having their claims, based on injuries to foreign nationals, espoused and settled by the United States. See *American & European Agencies, Inc.* v. *Gillilland*, 247 F.2d 95, 97-98 (D.C. Cir.) ("No claimant * * * has a right to participate" in distribution of Commission funds "in any amount until the Commission has made an award."), cert. denied, 355 U.S. 884 (1957); see also 22 U.S.C. 1623(h) (no judicial review for decisions by the Commission about the distribution of settlement proceeds).

b. Even if petitioners could identify a cognizable property interest that was impaired by the LCRA, the court of appeals correctly applied the *Penn Central* test

to determine that "no taking occurred under the Fifth Amendment." Pet. App. 15a.

i. The court of appeals properly concluded that the reinstatement of Libya's sovereign immunity did not interfere with petitioners' "reasonable investment-backed expectations." Pet. App. 17a. The availability or unavailability of a legal defense, much less a jurisdictional bar to suit like sovereign immunity, is not the type of interest on which a person may reasonably rely. As this Court has explained, a legislature "[o]f course * * * remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); see *Martinez* v. *California*, 444 U.S. 277, 281-283 (1980) (upholding California statute granting officials immunity for certain types of tort claims and rejecting litigant's argument that the statute was "an invalid deprivation of property").

Nor could petitioners have reasonably expected that the status of Libya's sovereign immunity would remain stable. As this Court explained in *Beaty*, "[f]oreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" 556 U.S. at 864-865 (quoting *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004)). That reasoning is particularly apt here, for several reasons. (1) At the time that petitioners' claims accrued, "Libya had sovereign immunity from suit in the United States." Pet. App. 19a. (2) Libya's immunity was not lifted at all until 1996, and was not fully lifted against petitioners' claims until January 2008. *Id.* at 19a-20a. (3) The jurisdictional rule on which petitioners

seek to rely (the Terrorism Exception) targeted rogue nations whose orientation toward the United States was likely to change; indeed the rule was *intended* to change the behavior of those nations. *Id.* at 20a. (4) Libya's immunity against suits like petitioners' was revoked fully only for a period of about six months. *Id.* at 5a-6a.

Petitioners also could not reasonably have developed or relied on an expectation that the government would permit the continued litigation of their claims in U.S. courts. As a matter of foreign policy, Presidents have settled and terminated claims against foreign sovereigns "since at least 1799." Pet. App. 17a; see *Dames & Moore*, 453 U.S. at 679 ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."). Petitioners argue (Pet. 18) that never before has "the government terminated claims as part of a foreign claims settlement agreement with a foreign sovereign without also providing access to an alternative remedy, forum, or specific benefit." Even aside from the fact that petitioners' request to share in the settlement proceeds based on claims of non-U.S. nationals is nonjusticiable, see pp. 21-22, *infra*, and is in any event without merit, see p. 14, *supra*, petitioners' argument is based on an incorrect premise. Although petitioners' claims may no longer proceed in U.S. courts, absent an abrogation by Congress or a voluntary waiver of sovereign immunity by Libya, those claims have not been resolved on the merits. Petitioners thus remain free "to pursue other available remedies for [the] claims * * * in foreign courts or through the efforts of foreign governments." E.O. 13,477 § 1(b)(iii).

Petitioners could not reasonably have expected to share in the settlement proceeds, moreover, because

petitioners are foreign nationals or are otherwise unable to satisfy the Commission's "continuous nationality" rule. Pet. App. 7a. As this Court has observed, "[t]here is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts." *United States* v. *Pink*, 315 U.S. 203, 228 (1942). Thus, since its establishment, the Foreign Claims Settlement Commission has lacked jurisdiction to consider claims brought by foreign nationals. See International Claims Settlement Act of 1949, ch. 54, § 4(a), 64 Stat. 13-14 (22 U.S.C. 1623(a)(1)).

In any event, petitioners are incorrect (Pet. 22) that their exclusion from the settlement proceeds was "unprecedented." The Iranian hostage crisis led to the signing of the Algiers Accords, which "prohibit[ed] United States nationals from prosecuting claims related to" the crisis in any forum, foreign or domestic. *Belk* v. *United States*, 858 F.2d 706, 707 (Fed. Cir. 1988). Despite the hostage victims' argument that their release was "not sufficient compensation for the extinguishment of [their] rights" against Iran, the Federal Circuit concluded that the Algiers Accords did not interfere with any investment-backed expectations. *Id.* at 710. Petitioners' argument here is even less persuasive, given that they are foreign nationals who still retain the right to seek relief in foreign courts or through the efforts of foreign governments.

ii. The court of appeals also correctly determined that "[t]he character of governmental action in this case," the reinstatement of Libya's sovereign immunity, further demonstrates that no taking occurred. Pet. App. 16a. Petitioners argue (Pet. 14-16) that the court erred by focusing on the absence here of any physical

invasion of petitioners' property. Petitioners assert that the inquiry should have focused instead on the "severity of the burden" imposed on petitioners' asserted property rights, and on whether petitioners were "'singled out to bear a particularly severe regulatory burden.'" Pet. 14, 16 (quoting *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 544 (2005)) (brackets omitted). Petitioners' argument is based on a misreading of *Lingle*.

In *Lingle*, the Court explained that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion." 544 U.S. at 537. Although the Court has also "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster," *id.* at 537, the Court's regulatory takings jurisprudence "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain," *id.* at 539. On the other end of the spectrum are governmental actions, like the reinstatement of sovereign immunity in this case, that "merely affect[] property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* at 538 (quoting *Penn Central*, 438 U.S. at 124). As the court of appeals explained, "the Government reinstated Libya's sovereign immunity for the common good, reflecting the 'current political realities and relationship' between the United States and Libya." Pet. App. 16a (quoting *Beaty*, 556 U.S. at 864) (brackets omitted); see *id.* at 21a ("The President's action in settling claims against Libya was designed to normalize relations between the United

States and Libya, restore international comity, and promote international commerce."). Indeed, the governmental action involved here—the adjustment of sovereign immunity and court jurisdiction in domestic legal proceedings—is especially *unlike* a physical invasion of property.

In any event, petitioners were not "singled out to bear any particularly severe regulatory burden." *Lingle*, 544 U.S. at 544. By reinstating Libya's sovereign immunity in U.S. courts to what it was at the time of the conduct that is the basis of the suit, the LCRA did not resolve petitioners' claims against Libya on the merits, but instead left petitioners free "to seek relief in a foreign forum." Pet. App. 20a. The restoration of Libya's immunity was also applied universally, to all individuals and corporations of any nationality, *id.* at 106a, and the Executive Order treated petitioners identically to other foreign nationals, *id.* at 5a-6a.

iii. Finally, the economic impact on petitioners of the LCRA was "speculative and uncertain." Pet. App. 21. As the court of appeals explained, had petitioners' suits been permitted to continue in U.S. courts, "there was no guarantee that [petitioners] would have been successful in obtaining a judgment, let alone successful in enforcing that judgment against Libya." *Ibid.*; see *United States* v. *Sperry Corp.*, 493 U.S. 52, 63 (1989) (rejecting takings claim based on Algiers Accords where claimant "would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible"). That is particularly so here because the Commission had already determined that, even if it could consider the merits of petitioners' compensation claims, petitioners "failed to

meet their burden of proof as to the validity of any of their theories of the claim[s]." C.A. App. 525.

Petitioners argue (Pet. 19) that the court of appeals failed to "account for th[e] 100% diminution in [the] value" of petitioners' legal claims against Libya. But the economic impact of a governmental action on a property interest is inherently speculative if the value (and indeed the existence) of the property interest itself is speculative. See, *e.g.*, *Tennessee Scrap Recyclers Ass'n* v. *Bredesen*, 556 F.3d 442, 456 (6th Cir. 2009); *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995). Here, petitioners' claims—even assuming they constitute a cognizable property interest—were of uncertain value given the real possibility that they would have failed in court, or would have been uncollectable even if successful. The value of petitioners' claims also would have fluctuated with the existence or nonexistence of Libya's sovereign immunity: Libya's immunity was a barrier to suit when the claims accrued; was subsequently eliminated as a barrier; but was reinstated as a barrier in August 2008. See Pet. App. 19a. Petitioners are also incorrect (Pet. 21) that the value of their legal claims against Libya "is now zero." Because the Executive Order expressly preserved the right of foreign nationals to seek relief against Libya "in foreign courts or through the efforts of foreign governments," E.O. 13,477 § 1(b)(iii), petitioners may yet receive compensation from Libya for their claims.

c. Petitioners argue (Pet. 22) that the court of appeals' decision leaves the government with "virtually unbridled discretion to appropriate and redistribute property so long as it is incident to a foreign claims settlement." That argument mischaracterizes the court's decision, which was appropriately based on the "ad hoc,

factual inquiries" required by *Penn Central*. 438 U.S. at 124. The decision thus turned on case-specific factors, such as the particular nature of the governmental action at issue (reinstatement of sovereign immunity), Pet. App. 16a-17a; Libya's long history of immunity in U.S. courts, which remained intact at the time that petitioners' claims accrued, was lifted for a time, and was then reinstated, *id.* at 18a-19a; and the Executive Order's preservation of petitioners' right to seek relief in foreign courts, *id.* at 20a. Petitioners have identified no other case that shares those features.

2. Petitioners argue (Pet. 24-27) that the court of appeals erred in holding that, "to the extent [petitioners] seek judicial review of the President's decision to exclude them from the settlement's proceeds, [petitioners] raise a nonjusticiable political question." Pet. App. 12a-13a. Petitioners acknowledge (Pet. 26) that "the President enjoys broad foreign policy powers, including the authority to terminate claims pursuant to a foreign claims settlement agreement," but nevertheless contend that "the subsequent domestic decision of how to allocate the settlement proceeds among claimants" is subject to "constitutional constraints" that may be enforced by the judiciary. But the *distribution* of claims-settlement proceeds is intertwined with the settlement itself. See Pet. App. 14a ("[Petitioners'] argument that they should have been included in the distribution of settlement funds questions the President's policy decision to exclude them."). Petitioners essentially ask this Court to second-guess the President's "policy decision" about which victims of international terrorist incidents most merit compensation, *ibid.*, and his decision to exclude from the monetary settlement and award distri-

bution of settlement funds for the claims of foreign nationals. A judicial determination that the government took petitioners' property by excluding them from settlement proceeds, moreover, could force the government to insist upon larger or differently tailored settlements, or even discourage the government from making future settlements altogether. See *Belk*, 858 F.2d at 710 ("A judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President's ability to conduct foreign relations.").

In any event, even if petitioners' objection to being excluded from the settlement were justiciable, it would fail. Petitioners had no cognizable property interest in having their claims "espoused" and settled by the United States. E.O. 13,477 § 1(a)(ii); see p. 14, *supra*. And any takings claim based on exclusion from the settlement would fail under the *Penn Central* test for the same reasons described above. See pp. 14-20, *supra*; see Pet. App. 18a-19a (rejecting argument "that at the time [petitioners] invested in their insurance contracts or at the time of the terrorist attacks * * * [petitioners] had an expectation of being compensated for the claims they paid as a result of the attacks").

3. Even if the questions presented might otherwise warrant this Court's review, this case would be a poor vehicle for considering them. During the course of the litigation, petitioners have "shifted their argument" concerning the supposed property rights they seek to invoke, Pet. App. 10a, and their argument remains unclear even now. See pp. 11-12, *supra*. This lack of clarity makes review in this case particularly improvident, given that petitioners raise no legal question of general applicability and instead contend (Pet. 28) merely that

the court below "disregarded or misapplied" longstanding principles of takings law in resolving their particular claims.

Finally, review of petitioners' takings claims is also unwarranted because, as Judge Reyna explained at length in his separate opinion, petitioners have failed to demonstrate standing to assert those claims. See Pet. App. 28a-34a. Among other things, petitioners insured or reinsured the airlines whose planes were involved in the attacks and "have no subrogated interest that accrued from the claims of the victims who perished in the Pan Am bombing." *Id.* at 30a; see *ibid.* ("[T]here is no (subrogated) legal basis on which the insurer and reinsurers can seek recovery against Libya or the U.S. Government."). The Commission similarly concluded that petitioners lack standing because petitioners "failed to prove that they (and not some other entities) actually suffered the net financial loss or represent the parties who actually suffered the net financial loss that forms the basis of the[ir] claim[s]." C.A. App. 508; see *id.* at 508-511. Petitioners' lack of standing provides an independent barrier to consideration of their takings claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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