No. 23-708

# In the Supreme Court of the United States

CHAVA RACHEL MARK, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF T.B.M, R.L.M., AND E.B.M., MINORS, ET AL., PETITIONERS

*v.*

REPUBLIC OF SUDAN, ET AL.

*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

Petitioners are U.S. nationals who are victims or family members of victims of a terrorist attack abroad. They sued Sudan, relying on a provision of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, that lifts a designated state sponsor of terrorism's immunity from civil suit and provides subject matter jurisdiction over certain terrorism-related claims.

Ten days after petitioners filed their complaint, the United States and Sudan entered into a Claims Settlement Agreement. In the Agreement, the President espoused and terminated all claims of U.S. nationals against Sudan related to terrorism occurring outside the United States. In exchange, Sudan agreed to provide compensation for plaintiffs in suits relating to terrorist attacks for which federal courts had found Sudan liable, and suits in which Sudan had reached private settlements.

Congress then enacted the Sudan Claims Resolution Act, which restored Sudan's immunity from suit and eliminated district court jurisdiction over terrorism-related claims. Sudan Claims Resolution Act (SCRA), Pub. L. No. 116-260, Div. FF, Tit. XVII, § 1704(a)(1) and (2), 134 Stat. 3292-3293. The SCRA expressly preserves jurisdiction in U.S. courts over pending litigation against Sudan arising from the September 11, 2001 terrorist attacks within the United States. SCRA § 1706(c), 134 Stat. 3295. Because the attack that injured petitioners occurred abroad, the SCRA eliminated the district court's jurisdiction over their suit. The question presented is:

Whether the SCRA's elimination of the district court's subject matter jurisdiction over petitioners' claims violates petitioners' rights under the equal protection component of the Due Process Clause.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Constitution, treaty, and statutes: Page

Miscellaneous: Page

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 77 F.4th 892. The opinion of the district court (Pet. App. 13a-25a) is unreported but is available at 2021 WL 4709718.

## JURISDICTION

The judgment of the court of appeals was entered on July 21, 2023. Petitions for rehearing were denied on September 25, 2023 (Pet. App. 26a-29a). The petition for a writ of certiorari was filed on December 26, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, a

foreign state is "immune from the jurisdiction of the courts of the United States and of the States" in civil suits unless a statutory exception to immunity applies. 28 U.S.C. 1604, 1605; see *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009). The FSIA is the "sole basis" for jurisdiction over a foreign country in a civil action in U.S. court. *Bank Markazi* v. *Peterson*, 578 U.S. 212, 216 n.1 (2016) (citation omitted). "[U]nless one of the Act's express exceptions to sovereign immunity applies," a foreign government is "presumptively immune," and U.S. district courts lack subject-matter jurisdiction over the suit. *Ibid.* (citation omitted); see 28 U.S.C. 1330(a) (conferring subject-matter jurisdiction in a civil action against a foreign state over "any claim * * * with respect to which the foreign state is not entitled to immunity either under" the FSIA or an applicable international agreement).

The FSIA includes a "terrorism" exception to foreign state immunity and creates a right of action under which a U.S. national "may seek 'money damages . . . against a foreign state for personal injury or death that was caused by' acts of terrorism, including 'torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support' to terrorist activities." *Bank Markazi*, 578 U.S. at 216 (quoting 28 U.S.C. 1605A(a)(1)); see 28 U.S.C. 1605A(c). The FSIA permits civil actions under the terrorism exception only if, among other criteria, the Secretary of State has designated the defendant foreign state a "state sponsor of terrorism." 28 U.S.C. 1605A(a)(2)(A)(i)(I).

b. The Constitution vests Congress and the President with controlling authority over foreign relations between the United States and other sovereigns. See, *e.g.*, *Bank Markazi*, 578 U.S. at 235. Most relevant

here, "Congress and the President have, time and again, as exigencies arose, exercised control over claims against foreign states." *Ibid.* That practice includes a centuries-long history of settling the claims of U.S. nationals against foreign states through executive agreements. See, *e.g., American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003).

Such executive agreements are grounded in the well-established customary international law principle of espousal, by which a government may adopt as its own the claims of its nationals against another government and resolve those claims as the espousing government deems appropriate. A sovereign's "absolute power" to espouse its nationals' claims "does not depend on the consent of the private claimholder." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985). And "[o]nce it has espoused a claim, the sovereign has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or waive it entirely." *Ibid.*

This Court has repeatedly upheld exercises of the espousal power, including when the President exercises that power as part of "rehabilitation of relations between this country and another nation." *United States* v. *Pink*, 315 U.S. 203, 230 (1942). Congress too "has implicitly approved the practice of claim settlement by executive agreement." *Dames & Moore* v. *Regan*, 453 U.S. 654, 680 (1981).

2. a. The United States established diplomatic relations with Sudan in 1956 after Sudan's independence from joint administration by Egypt and the United Kingdom. See Bureau of African Affairs, U.S. Dep't of State, *U.S. Relations With Sudan: Bilateral Relations*

*Fact Sheet* (Oct. 24, 2022), https://go.usa.gov/xuUeP (*U.S.-Sudan Relations Fact Sheet*). In 1989, Brigadier General Omar al-Bashir seized power in a coup; Sudan then established links with international terrorist organizations. See *ibid.* In 1993, the Secretary of State designated Sudan a state sponsor of terrorism. *Ibid.*

In April 2019, al-Bashir was overthrown after a widespread popular uprising. *U.S.-Sudan Relations Fact Sheet*. A Transitional Military Council ruled Sudan until August 2019, "when it agreed to cede power to a civilian-led transitional government." *Ibid.* The transitional government took important steps to restore friendly relations with the United States. For example, in December 2019, the United States and Sudan announced their intention to exchange Ambassadors; the Sudanese Ambassador to the United States subsequently presented his credentials, and President Biden later nominated a United States Ambassador to Sudan. *Ibid.* Following a military takeover of the transitional government in October 2021, the United Nations Integrated Transition Assistance Mission, the African Union, and the Intergovernmental Authority on Development are facilitating a political process to restore a civilian-led transition. See *ibid.*

b. In support of its efforts to normalize relations with Sudan under the civilian-led transitional government—and to achieve a measure of compensation for victims of international terrorism—the United States entered into negotiations with Sudan to resolve pending lawsuits against Sudan for terrorism-related conduct in U.S. courts. Those negotiations culminated in the Claims Settlement Agreement in October 2020. See Claims Settlement Agreement, U.S.-Sudan, Oct. 30, 2020, T.I.A.S. No. 21-209; Pet. App. 32a-57a. The Agreement

acknowledges the two nations' shared goal of "further develop[ing] the relations between their two countries * * * , especially in light of Sudan's ongoing transition to democracy," and reflects the two nations' agreement that Sudan must address certain pending terrorism-related claims "as part of its effort to fully normalize relations with the United States." Pet. App. 32a-33a. The Agreement's stated "objective * * * is to reach a comprehensive settlement" that, with respects to acts of terrorism "occurring outside of the United States," (1) espouses and terminates the claims of U.S. nationals against Sudan; (2) "provides meaningful compensation" for "claims of foreign nationals" who were employees or contractors of the United States; and (3) "bars and precludes" all terrorism-related claims against Sudan in U.S. courts through legislation restoring Sudan's sovereign immunity, including in "suits and actions with judgments that are still subject to appeal or other forms of direct judicial review." *Id.* at 34a-35a.

In the Claims Settlement Agreement, the United States agreed to accept payment of $335 million as a "full and final settlement * * * through espousal," of all claims of U.S. nationals related to acts of terrorism "occurring outside of the United States of America and prior to" the Agreement's date of execution. Pet. App. 35a, 37a. That payment provided the funds for distribution to eligible U.S.-national plaintiffs in five identified cases arising from three particular acts of terrorism: the August 7, 1998 bombing of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania (the Embassy Bombings); the October 12, 2000 bombing of the U.S.S. Cole in Yemen (the Cole Bombing); and the January 1, 2008 killing in Sudan of United States Agency for International Development employee John

Granville.[1] *Id.* at 36a-37a, 42a-54a. The agreement also establishes a process to compensate eligible foreign nationals who already had been awarded damages in four identified suits arising from the Embassy Bombings.[2] *Id.* at 42a-54a.

c. Following the Claims Settlement Agreement, Congress passed and the President signed the Sudan Claims Resolution Act (SCRA), Pub. L. No. 116-260, 134 Stat. 3291; Pet. App. 58a-76a. Three sections of the Act are particularly relevant here.

First, Section 1702 of the Act sets out the "sense of Congress" that "the United States should support Sudan's democratic transition," and that Congress—"as part of the process of restoring normal relations between Sudan and the United States"—supports "efforts to provide meaningful compensation" to those who "have been awarded * * * a judgment for compensatory damages against Sudan." SCRA § 1702(1) and (2), 134 Stat. 3291; Pet. App. 58a.

Second, Section 1704 states that Sudan and its agencies and instrumentalities "shall not be subject" to the FSIA's terrorism exception to sovereign immunity once certain conditions are satisfied. SCRA § 1704(a)(1)(A), 134 Stat. 3292; Pet. App. 61a. Those conditions include the Secretary of State's certification that Sudan's

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[1] The identified cases are: *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C.); *Khaliq* v. *Republic of Sudan*, No. 10-cv-356 (D.D.C.); *Taitt* v. *Islamic Republic of Iran*, No. 20-cv-1557 (D.D.C.); *Mwila* v. *Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.); *Granville* v. *Republic of Sudan*, No. 2018-28 (P.C.A.). See Pet. App. 42a-43a.

[2] The identified cases are: *Wamai* v. *Republic of Sudan*, No. 08-cv-1349 (D.D.C.); *Amduso* v. *Republic of Sudan*, No. 08-cv-1361 (D.D.C.); *Onsongo* v. *Republic of Sudan*, No. 08-cv-1380 (D.D.C.); *Opati* v. *Republic of Sudan*, No. 12-cv-1224 (D.D.C.).

designation as a state sponsor of terrorism has been formally rescinded, based on criteria that include Sudan's provision of assurances that it would not support acts of international terrorism in the future, and receipt of funds to settle claims pursuant to the Agreement. SCRA § 1704(a)(2), 134 Stat. 3293; Pet. App. 62a-63a. The Secretary made this certification on March 20, 2021. *Certification Under Section 1704(A)(2) of the Sudan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Sudan*, 86 Fed. Reg. 19,080, 19,080-01 (Apr. 12, 2021). The SCRA provides that Sudan's restored immunity applies "to all conduct and any event occurring before the date of the [Secretary's] certification," regardless of its effect on "any action filed before, on, or after that date." SCRA § 1704(b), 134 Stat. 3293; Pet. App. 63a.

In addition to restoring Sudan's sovereign immunity, Section 1704 provides that "any * * * private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply" against Sudan. SCRA § 1704(a)(1)(B), 134 Stat. 3292; Pet. App. 61a-62a. Like Sudan's restored immunity, the elimination of private rights of action for terrorism-related claims applies "to all conduct and any event occurring before the date of the [Secretary's] certification," despite its effect on "any action filed before, on, or after that date." SCRA § 1704(b), 134 Stat. 3293; Pet. App. 63a.

Third, because the Agreement expressly resolved only claims related to acts of terrorism "occurring outside of the United States," Pet. App. 35a, Section 1706 provides that "[n]either the [C]laims [A]greement, nor any other aspect of the effort to normalize relations with Sudan * * * resolved claims against Sudan

involving victims and family members of the September 11, 2001, terrorist attacks," SCRA § 1706(a)(2)(A), 134 Stat. 3294-3295; Pet. App. 67a-69a; see 28 U.S.C. 1605B (creating an exception to foreign sovereign immunity and a right of action for acts of terrorism in the United States). Section 1706 further states that the Agreement did not espouse the claims asserted in *In re Terrorist Attacks on September 11, 2001*, No. 03-mdl-1570 (S.D.N.Y. 2005); that those claims "remain pending"; and that "[n]othing in this Act shall apply to[] * * * or otherwise affect" any claim in the *In re Terrorist Attacks* litigation. SCRA § 1706(a)(3) and (c), 134 Stat. 3295; Pet. App. 68a.

3. a. This case arises from a 2016 attack in Israel against members of the Mark family, which was allegedly perpetrated by the terrorist organization Hamas. Pet. 5. Petitioners are victims, family members of victims, and the estate of a family member of a victim of the attack. *Ibid.* They sued Sudan under the FSIA's terrorism exception, 28 U.S.C. 1605A, on the theory that Sudan provided material support to Hamas and thereby caused their injuries. Pet. 5; see Pet. App. 2a-3a.

Petitioners filed their complaint on October 20, 2020, ten days before the Claims Settlement Agreement was signed, and served Sudan on March 9, 2021, nearly five months later, and more than two months after Congress enacted the SCRA. See D. Ct. Doc. 1 (Oct. 20, 2020); D. Ct. Doc. 12 (Mar. 10, 2021). Sudan moved to dismiss the complaint based on the Claims Settlement Agreement and the SCRA. Pet. App. 15a-16a. Petitioners opposed the motion, arguing that the Claims Settlement Agreement and the SCRA violate their rights to equal protection of the laws and unconstitutionally deny them

access to the courts. *Id.* at 16a. The United States intervened to defend the constitutionality of the Claims Settlement Agreement and the SCRA. See *ibid.*; see also Pet. 9-10.

b. The district court dismissed the complaint for lack of subject-matter jurisdiction. Pet. App. 13a-25a.

The district court first observed that the text of the Claims Settlement Agreement clearly terminated petitioners' claims, while the text of the SCRA clearly restored Sudan's sovereign immunity from those claims. Pet. App. 18a. And, the court noted, "[a]ll parties agree[d] the rational basis standard governs" petitioners' assertion that those provisions violate the equal protection component of the Due Process Clause. *Id.* at 19a. Applying the rational basis standard, the court explained that petitioners had not met their burden to negate "every conceivable justification" for distinguishing between their claims and the claims that the Agreement and the SCRA preserved or made eligible for compensation. *Ibid.* The court reasoned that the political Branches had rationally distinguished between claims involving attacks on foreign soil against U.S. property or personnel where Sudan's liability had already been determined, and claims like petitioners' that lack those characteristics. *Id.* at 19a-21a. The court likewise explained that "the claims related to September 11," which were not espoused and terminated, "are unique." *Id.* at 21a.

The district court further held that the Claims Settlement Agreement and the SCRA do not unconstitutionally deny petitioners access to the courts. Pet. App. 23a-24a. "That the political branches changed the rules inside the courthouse," the court reasoned, "does not

mean that they have blocked the courthouse doors." *Id.* at 24a.

4. The court of appeals affirmed. Pet. App. 1a-12a.

Focusing on the SCRA, see Pet. App. 8a n.3, the court of appeals held that the statute does not deny petitioners equal protection by restoring Sudan's sovereign immunity in suits by U.S. nationals arising from attacks on foreign soil. *Id.* at 8a-10a. The court explained that the Act's jurisdiction-stripping provision "easily satisfies" rational basis review by "foster[ing] stronger relations with Sudan by limiting its potential liability to United States nationals." *Id.* at 9a-10a. The court further explained that the SCRA "rationally distinguishes between" claims like petitioners' and the nearly 20-year-old claims arising from the attack of September 11, 2001, "one of the most fatal attacks on the United States homeland." *Id.* at 10a. The court determined that it "was rational for the Act to maintain decades-old claims over more recent ones and to prioritize attacks on the homeland over other attacks." *Ibid.*

The court of appeals also held that the SCRA did not unconstitutionally impair petitioners' access to the courts. Pet. App. 10a-12a. The court explained that courts of appeals "have recognized two types of access claims: forward looking claims" that "arise when the government hinders a litigant's ability to file or prepare for a lawsuit that has not yet commenced," and "backward looking claims" that "arise when the government causes the loss or inadequate settlement of a meritorious case or the loss of an opportunity to sue." *Id.* at 10a-11a (brackets, citation, and internal quotation marks omitted). The court explained that petitioners had not alleged the type of governmental conduct necessary for either type of claim. *Id.* at 11a. And the court declined

to extend a constitutional right of access to the courts to constrain the "longstanding powers" of the President to espouse claims and Congress's "plenary authority to set the jurisdictional reach of the federal courts." *Id.* at 11a-12a.

**ARGUMENT**

The court of appeals correctly affirmed the dismissal of petitioners' claims following Congress's enactment of the SCRA. Petitioners nevertheless contend (Pet. 14-20) that this Court's review is warranted because, in their view, the court of appeals' analytical approach was erroneous. But the court of appeals correctly affirmed the judgment dismissing petitioners' complaint against Sudan for lack of subject-matter jurisdiction, and this Court "reviews judgments, not statements in opinions," *FCC* v. *Pacifica Found.*, 438 U.S. 726, 734 (1978) (citation omitted). Petitioners make no attempt to explain why a court following their preferred approach would reach a different outcome in this case. No further review is warranted.

1. The court of appeals correctly held that Section 1704(a)(1) of the SCRA does not deny petitioners equal protection.

a. It is undisputed that petitioners' equal protection claim is subject to rational basis review. Pet. App. 9a. Under that "'relatively relaxed'" standard, a court considers whether a challenged action advances "legislative goals in a rational fashion." *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981) (quoting *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 314 (1976) (per curiam)). "Where there are 'plausible reasons'" for the challenged action, this Court's "'inquiry is at an end.'" *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313-314 (1993) (quoting *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179

(1980)). "As long as the classificatory scheme chosen * * * rationally advances a reasonable and identifiable governmental objective," reviewing judges "must disregard the existence of other methods of allocation that [they], as individuals, perhaps would have preferred." *Schweiker*, 450 U.S. at 235.

Like any plaintiffs raising an equal protection claim subject to rational basis review, petitioners bear "the burden 'to negative every conceivable basis which might support'" the challenged action. *Beach Commc'ns*, 508 U.S. at 315 (citation omitted). And "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated" the challenged action. *Ibid.* Thus, a court should not deem a law unconstitutional unless "it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Armour* v. *City of Indianapolis*, 566 U.S. 673, 681 (2012) (quoting *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

b. The court of appeals correctly held that Section 1704(a)(1) of the SCRA "easily satisfies this standard." Pet. App. 9a. Congress could rationally decide that restoring Sudan's foreign sovereign immunity from suits in U.S. courts based on alleged acts abroad within the scope of the FSIA's special exception for suits against state sponsors of terrorism would further the United States' interest in fostering stronger diplomatic relations with Sudan. *Ibid.*; see SCRA § 1702(1) and (2), 134 Stat. 3291; Pet. App. 58a. As this Court has observed, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." *Dames & Moore* v. *Regan*,

453 U.S. 654, 679 (1981) (citation omitted). When the SCRA was enacted, Sudan had begun a fragile transition to democracy under a government that repudiated support for terrorism and embraced the United States' longstanding interest in preventing terrorist attacks. The political Branches' decision to restore Sudan's sovereign immunity (and to make inapplicable the private right of action in 28 U.S.C. 1605A(c)) is plainly rational under these circumstances.

Likewise, the SCRA reflects a rational effort to balance foreign policy considerations with the United States' interest in securing a measure of compensation for victims of terrorism. See Pet. App. 10a. Section 1704(a)(1) restored Sudan's immunity from suits based on overseas acts of terrorism, upon the Secretary's certification that Sudan had provided compensation for plaintiffs eligible to receive compensation under the Claims Settlement Agreement. See SCRA § 1704(a)(2), 134 Stat. 3293; Pet. App. 62a-63a. The plaintiffs in those cases had already obtained judgments on liability or settled with Sudan by the time Section 1704(a)(1) was enacted. By contrast, petitioners sued Sudan only days before the Agreement was executed (despite having earlier filed identical claims against Iran), and they served Sudan nearly two months after the SCRA was enacted. See Pet. 5. Congress could rationally distinguish between longstanding and newly filed claims when deciding how to effectuate an interest in compensating victims. See Pet. App. 10a.

Finally, Congress could also reasonably distinguish between claims arising from attacks on foreign soil and claims arising from the September 11, 2001 attacks in the United States. See Pet. App. 10a. The 9/11 attacks are unique: They resulted in the largest number of

domestic fatalities in U.S. history at the hands of foreign terrorists. Litigation regarding those attacks has been ongoing for some two decades. As the lower courts correctly held, the equal protection component of the Due Process Clause does not require the political branches to permit continued litigation of all claims against Sudan or none. See *ibid.*[3]

2. Petitioners' contrary arguments (Pet. 14-20) confirm that this case does not warrant certiorari.

Petitioners' principal contention (Pet. 14-17) is that because this Court has expressed "'grave doubts' as to the constitutionality of any statute that denies a judicial forum for a colorable constitutional claim," the court of appeals could not properly pass on the constitutionality of Section 1704(a)(1) of the SCRA without also reviewing petitioners' merits challenge to the Claims Settlement Agreement. Pet. 15 (citing *Webster* v. *Doe*, 486 U.S. 592 (1988)); see Pet. 18-20 (contending that the court of appeals erroneously considered SCRA § 1704(a)(1) in isolation from the rest of the statute and the Claims Settlement Agreement). But petitioners never made this argument (or even cited *Webster*) in the court of appeals. That is reason enough to deny the petition. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Moreover, this Court "reviews judgments, not statements in opinions," *Pacifica Found.*, 438 U.S. at 734 (citation omitted), and petitioners never explain why a

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[3] Petitioners do not challenge the court of appeals' determination that the SCRA does not violate petitioners' right to access the courts. Pet. i; see Pet. App. 11a-12a. In any event, that holding is correct and does not warrant this Court's review. As the court of appeals explained, petitioners "ma[d]e no * * * showing" that any court had ever recognized a similar access-to-court claim. Pet. App. 11a; see *id.* at 10a-12a.

court that considered both the SCRA and the Claims Settlement Agreement would have reached a different outcome in this case. To the contrary, as the court of appeals correctly observed, petitioners "raised the same constitutional arguments against the Act and the Agreement." Pet. App. 8a n.3. Their "equal protection arguments do not distinguish between the disparate treatment with respect to jurisdiction-stripping and the disparate treatment with respect to the substantive claims espoused by the United States." *Ibid.* As to both, petitioners contend that they were denied equal protection because they are no longer among the claimants who may seek to be compensated for injuries sustained in terrorism attacks that occurred while Sudan was designated as a state sponsor of terrorism. Petitioners do not identify any material difference in how that argument applies in the context of the Claims Settlement Agreement, under which some claimants, but not petitioners, can seek compensation for their claims pursuant to the Agreement, and how it applies in the context of the SCRA, under which the September 11 claimants, but not petitioners, can seek compensation for their claims in federal court. Petitioners thus cannot demonstrate any difference that the court of appeals' method of analysis made in this case.[4]

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[4] Petitioners cannot fill these gaps with unsupported accusations of "material misrepresentations regarding the [United States] government's substantial role in negotiating with Sudan." Pet. 19. In the court of appeals, petitioners argued that Sudan had agreed to settle certain plaintiffs' claims in order to further negotiations over the restoration of Sudan's sovereign immunity, such that those settlements should not be considered "private" for purposes of analyzing whether the Claims Settlement Agreement rationally provided for compensation to those plaintiffs, but not petitioners. See Pet. C.A. Reply Br. 11. But as the United States explained, even putting

For similar reasons, petitioners' reliance on *Webster* and similar cases lacks merit. *Webster* held that, "to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," 486 U.S. at 603 (internal quotation marks omitted), courts should not construe a jurisdiction-stripping statute to preclude judicial review of constitutional claims unless Congress's intent to do so is "clear," *ibid.* But here, the lower courts considered whether the SCRA violates the equal protection component of the Due Process Clause because it forecloses petitioners from litigating their FSIA claims. The court of appeals declined to separately decide whether the distinctions drawn in the Claims Settlement Agreement violate equal protection, on the ground that they affect petitioners' "substantive claims," rather than the court's jurisdiction. Pet. App. 8a n.3. To the extent petitioners now claim that the court of appeals was required to separately consider their arguments based on the Claims Settlement Agreement, they (again) do not explain how the analysis or outcome would be different. And petitioners' arguments regarding the Claims Settlement Agreement were not "colorable," *Webster*, 486 U.S. at 603, for all the reasons already discussed. *Webster* thus has no application here.

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the fact of settlement aside, the claims subject to compensation all concerned attacks targeting "U.S. Government institutions, U.S. Government personnel, or both," which plainly provides a sufficient and rational basis for distinguishing them from petitioners' claims. Gov't C.A. Intervenor Br. 25; see *id.* at 22.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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