No. 18-295

In the Supreme Court of the United States

ALEXANDER ALIMANESTIANU, 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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QUESTION PRESENTED

Whether the government's restoration of Libya's sovereign immunity in U.S. courts and settlement of petitioners' claims for more than $10 million in damages effected a taking of petitioners' property without just compensation under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 888 F.3d 1374. The opinions of the Court of Federal Claims (Pet. App. 20a-41a, 43a-61a) are reported at 130 Fed. Cl. 137 and 124 Fed. Cl. 126.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2018. On July 31, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 5, 2018, and the petition was filed on September 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are family members of Mihai Alimanestianu, one of seven United States citizens killed in the 1989 terrorist attack on United Trans Aeriens (UTA) Flight 772 over Niger. Pet. App. 2a, 21a-22a. In 2002,

petitioners sued the government of Libya and related entities and officials (collectively Libya) for damages based on its alleged sponsorship of the attack. *Id.* at 3a, 22a. The district court entered a judgment in favor of petitioners, but their claims were dismissed on appeal pursuant to an agreement between the United States and Libya that required Libya to pay money into a settlement fund to compensate American victims of terrorism and the United States to restore Libya's sovereign immunity to suit in U.S. courts. *Id.* at 4a-6a. Petitioners received more than $10 million in compensation from that fund. *Id.* at 6a-7a. Petitioners then sued the United States in the Court of Federal Claims (CFC), alleging that the government had taken their claims against Libya without just compensation. *Id.* at 7a. The court granted judgment to the United States, concluding that there had been no taking. *Id.* at 20a-41a. The court of appeals affirmed. *Id.* at 1a-19a.

1. On September 19, 1989, UTA Flight 772 took off from N'Djamena, Chad, bound for Paris, France. See *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216, 219 (D.D.C. 2008). While the plane was over Niger, a "suitcase bomb in the cargo hold exploded, killing all 170 passengers and crew on board." *Ibid.* Seven of the passengers were United States citizens. *Ibid.* Among them were Bonnie Barnes Pugh, the wife of the United States Ambassador to Chad, and Mihai Alimanestianu, a family member of petitioners who was working in Chad as an engineer. *Id.* at 221-222, 226-233; see Pet. App. 20a-22a. The State Department "determined that the Libyan government sponsored the bombing by providing considerable support to" the terrorists who executed it, "including providing

a safe haven, training, logistical assistance, and monetary support." Pet. App. 2a.

At the time of the bombing, the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, provided Libya, like other foreign states, with sovereign immunity from suit in U.S. courts for such conduct abroad. See 28 U.S.C. 1604. Petitioners accordingly could not sue Libya in the United States for damages resulting from the attack. In 1996, however, 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). Because the State Department had designated Libya a state sponsor of terrorism, Libya was no longer immune to suit in the United States for claims arising from the UTA Flight 772 attack. See Pet. App. 3a.

Petitioners, along with family members of other American victims of the UTA Flight 772 attack, sued Libya in the United States District Court for the District of Columbia in 2002. Pet. App. 3a. The district court granted summary judgment for the plaintiffs and awarded petitioners almost $1.3 billion in damages. *Ibid.*; see *Pugh*, 530 F. Supp. 2d at 220, 267-268. Libya appealed on August 14, 2008. See Pet. App. 4a.

2. Beginning in 2003, when Libya decided to "relinquish its weapons of mass destruction and ballistic missile programs," the United States and Libya worked to reestablish normal diplomatic relations. C.A. App. 74. In August 2008, Congress passed and President George W. Bush signed the Libyan Claims Resolution Act (LCRA), Pub. L. No. 110-301, 122 Stat. 2999. The LCRA stated that "Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims

against Libya through a comprehensive settlement of claims by such nationals against Libya * * * as a part of the process of restoring normal relations between Libya and the United States." § 3, 122 Stat. 2999. The LCRA further provided that, once a claims settlement agreement had been entered and Libya had deposited funds to ensure the "fair compensation of claims of nationals of the United States for wrongful death or physical injury" resulting from terrorist attacks, Libya's sovereign immunity to suit in U.S. courts would be restored. § 5(a)(2)(B)(ii), 122 Stat. 3001; see Pet. App. 4a, 75a-76a.

On August 14, 2008—the same day Libya appealed the district court judgment in the *Pugh* litigation brought by family members of victims of the UTA Flight 772 attack, including petitioners—the United States and Libya entered into the claims settlement agreement contemplated by the LCRA. Pet. App. 4a, 62a-67a. Under the agreement, Libya promised to provide $1.5 billion to the United States to distribute to U.S. nationals as a means to, *inter alia*, ensure "fair compensation for" U.S. nationals' terrorism claims against Libya. *Id.* at 4a (citation omitted). Each nation "accept[ed] the resources for distribution as a full and final settlement of its claims and suits and those of its nationals," and agreed to, *inter alia*, secure the "termination of [such] suits pending in its courts." *Id.* at 64a.

In October 2008, the Secretary of State certified receipt of the settlement funds from Libya, triggering the restoration of Libya's sovereign immunity under the LCRA. Pet. App. 5a. President Bush then issued an Executive Order stating that the United States had "espoused" and "settled" the terrorism-related claims of

U.S. nationals against Libya pursuant to the claims settlement agreement. Executive Order No. 13,477, § 1(a), 73 Fed. Reg. 65,965 (Nov. 5, 2008); see *Antolok* v. *United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) (explaining that "the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government"). The Executive Order directed the State Department to "provide for procedures governing applications by United States nationals with claims [covered by the claims settlement agreement] for compensation for those claims." § 1(a)(iii). The Executive Order further directed that any pending suit settled by the agreement "shall be terminated," including by the Justice Department "seeking the dismissal" of the claims. *Id.* § 1(a)(ii) and (iv).

3. In keeping with the claims settlement agreement and related directives, the Justice Department filed a "motion to intervene, vacate judgment, and dismiss" the litigation brought by petitioners and other family members of victims of the UTA Flight 772 attack, which was then pending before the D.C. Circuit. Pet. App. 6a (citation omitted). The motion explained that, given the intervening changes in the law, "U.S. courts no longer had jurisdiction over terrorism-related claims against Libya." *Ibid.* The court of appeals issued a summary order vacating the judgment and directed the district court to dismiss the case, which it did in March 2009. *Ibid.*; see *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, No. 08-5387, 2009 WL 10461206, at *1 (D.C. Cir. Feb. 27, 2009) (per curiam).

Also in keeping with the claims settlement agreement and related directives, the State Department referred U.S. nationals with terrorism claims against

Libya that were covered by the claims settlement agreement to the Foreign Claims Settlement Commission (Commission), a "quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments pursuant to international claims settlement agreements or at the request of the Secretary of State." Pet. App. 5a n.1; see *id.* at 6a-7a, 78a-88a; see also 22 U.S.C. 1621 *et seq.* The Estate of Mihai Alimanestianu received $10 million from the settlement fund, and the Commission awarded $200,000 to each of his children, but denied recovery to his wife, who was the beneficiary of his estate, and to the estates of his brothers, because they were deceased. Pet. App. 6a-7a.

4. "Dissatisfied with the relief granted by the Commission, [petitioners] initiated a Fifth Amendment takings case against the Government in the" CFC. Pet. App. 7a. Petitioners alleged that "the Government effected a *per se* taking by espousing their district court claims and vacating their judgment against Libya." *Ibid.* Petitioners' "claim demanded the Government pay over $1.286 billion—the difference between their district court judgment and the Commission's award—in just compensation." *Ibid.*

The CFC denied the government's motion to dismiss, concluding that petitioners had identified a cognizable property interest and that their takings claims were justiciable. Pet. App. 43a-61a. The CFC then granted the government's motion for summary judgment, finding no taking of property for which compensation would be due. *Id.* at 20a-41a. The court rejected petitioners' contention that the government "effected a *per se* taking of their property, which they characterize[d] as their District Court judgment, when it settled their

claims against Libya pursuant to the Claims Settlement Agreement for substantially less than their judgment and transferred their property to the Government." *Id.* at 32a. Rather, the CFC explained, the Federal Circuit in similar cases involving "claim espousal in the foreign claims settlement context" had applied the test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), for determining whether compensation is due. Pet. App. 33a (citing *Abrahim-Youri* v. *United States*, 139 F.3d 1462, 1465 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998)).

Under *Penn Central*, a court considers "the extent to which the regulation has interfered with distinct investment-backed expectations," "the character of the governmental action," and "[t]he economic impact of the regulation on the claimant." 438 U.S. at 124. Applying that test, the CFC determined that no compensation was due to petitioners. The court first found that petitioners had "no reasonable expectation for recovery greater than what they received" from the Commission—more than $10 million—given that they "had no reasonable expectation of any recovery at all" at the time of terrorist attack, when Libya was shielded by sovereign immunity in U.S. courts. Pet. App. 35a-36a. Moreover, the court added, even after Congress abrogated the sovereign immunity of state sponsors of terrorism, petitioners still "had no reasonable expectation to secure monetary payment from Libya for their claims," because petitioners had no realistic way to make the Libyan government pay. *Id.* at 36a.

As to the "character of the Government actions," the CFC observed that petitioners' "interests in their causes of action against foreign governments are necessarily constrained by their own Government's paramount right to

conduct foreign affairs and concomitant right to compromise its nationals' claims in the process." Pet. App. 37a. The court observed that the espousal of claims against foreign governments occurred "[n]ot infrequently in affairs between nations," *id.* at 38a (quoting *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981)) (brackets in original), and that the "very real potential that the Government might have had to compromise individual nationals' claims against Libya diminishes any reasonable expectation that [petitioners] would receive full compensation for their claims," *ibid.*

Finally, in assessing the economic impact of the government action on petitioners, the CFC emphasized that petitioners "benefited * * * economically here." Pet. App. 39a. The court explained that it was "speculative whether [petitioners] would have secured any recovery from Libya absent the Government's espousal and settlement of their claims," given that the judgment was on appeal and that any effort at collection would have been impractical, at best. *Ibid.* Accordingly, the court concluded that the "alternative forum provided to" petitioners by the government adequately protected their interest in their claims, and any "dissatisfaction with the settlement amount negotiated by the Government and the compensation awarded by the Commission d[id] not establish a compensable taking." *Id.* at 41a.

5. The court of appeals affirmed. Pet. App. 1a-19a. For purposes of its analysis, the court assumed without deciding that petitioners had a cognizable property interest in their lawsuits against Libya. *Id.* at 10a. The court did not need to resolve that question because it concluded that "even if [petitioners] have a property interest in their claims and non-final judgment, no compensable taking occurred under the Fifth Amendment"

when the government reinstated Libya's sovereign immunity and espoused petitioners' claims. *Ibid.*

The court of appeals first rejected petitioners' argument that the government's actions constituted a per se taking. Pet. App. 10a-16a. The court explained that "[s]ince at least 1799, the President has exercised his constitutional authority to espouse and settle claims of U.S. citizens against foreign governments," *id.* at 11a; (citing *Dames & Moore*, 453 U.S. at 679 n.8), and that it had never applied a per se analysis to taking claims arising in that context. To the contrary, the court explained, it had "consistently held that prohibiting or espousing a litigant's claims by restoring a foreign sovereign's legal immunity is *not* a physical invasion of property," and therefore had assessed such takings claims under the *Penn Central* framework. *Id.* at 15a (emphasis added); see, *e.g.*, *Aviation & Gen. Ins. Co.* v. *United States*, 882 F.3d 1088, 1097 (Fed. Cir.), cert. denied, 139 S. Ct. 412 (2018); *Belk* v. *United States*, 858 F.2d 706, 709 (Fed. Cir. 1988).

The court of appeals likewise rejected petitioners' contention that this Court's decision in *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419 (2015), "mandates the Government pay just compensation, without any consideration of the *Penn Central* factors." Pet. App. 15a. The court of appeals reiterated that prohibiting a claimant from asserting a claim in U.S. courts did not amount to a "physical invasion of property." *Ibid.* The court added that *Horne*, a case about "the physical invasion and categorical appropriation of entirely domestic, tangible property"—namely, raisins—did not involve "the Government's plenary authority over foreign policy, or property entangled with international considerations." *Ibid.* The court accordingly concluded

that *Horne* did not undermine its longstanding position that "the *Penn Central* factors remain relevant to the takings inquiry in cases where the Government espouses its citizens' claims against foreign sovereigns." *Id.* at 16a.

The court of appeals then turned to the *Penn Central* factors. Like the CFC, the court of appeals concluded that petitioners had "provided no evidence that they had an investment-backed expectation in their claims and nonfinal judgment," Pet. App. 17a, both because foreign sovereign immunity depended on an "ever-evolving relationship between" nations that could change at any time, *ibid.* (citing *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 864-865 (2009)), and because collecting the non-final judgment entered by the district court would depend on unlikely events such as "a cooperative Libyan court ordering its government to pay the judgment" or "a coercive act against Libya by some other governmental body to compel Libyan satisfaction of the judgment," *id.* at 17a-18a. The court of appeals likewise agreed with the CFC that the character of the governmental action counseled against finding a taking, given the long history of claim espousal and the Executive's "overwhelming interest in conducting foreign affairs." *Id.* at 16a. Finally, the court of appeals determined that petitioners likely "received more than they would have without the Government's action," because "'the Government provided an alternative [adjudicatory forum] tailored to the circumstances.'" *Id.* at 18a (quoting *Abrahim-Youri*, 139 F.3d at 1468) (brackets in original).

ARGUMENT

Petitioners renew their argument (Pet. 10-20) that this Court's decision in *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419 (2015), requires a finding that a

per se taking occurred and that the court of appeals therefore should not have applied the factors set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), for determining whether compensation is due. As an initial matter, petitioners lack a cognizable property right in their tort claims and nonfinal judgment against Libya, and their takings claim fails on that basis alone. Moreover, even assuming (as the court of appeals did) that petitioners had a cognizable property right, the court correctly concluded that the actions of the Executive and Legislative Branches in espousing petitioners' claims and compensating their injuries through a settlement do not amount to a per se taking. That reasoning, based on longstanding precedent and historical practice, does not conflict with any decision of this Court or another court of appeals. And this case would be a poor vehicle for addressing the question presented because petitioners ultimately dispute the amount of compensation they received from the settlement fund—a nonjusticiable question. Further review is unwarranted.

1. The Fifth Amendment prohibits the taking of "private property * * * for public use, without just compensation." U.S. Const. Amend. V. "To state a claim for a taking," therefore, petitioners must first establish "that they had a cognizable property interest." Pet. App. 9a-10a; see, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 674 n.6 (1981). The government argued in the court of appeals that petitioners had not adequately alleged a taking because they had not asserted a cognizable property interest. Gov't C.A. Br. 13-23. The court of appeals declined to resolve that issue, instead "assum[ing], without deciding, that [petitioners] had a cognizable property interest in their district court claims and non-

final judgment." Pet. App. 10a. Although that decision is fully correct for the reasons explained below, petitioners' claim fails for the independent and antecedent reason that they "did not acquire any 'property' interest" in their tort claims and non-final district court judgment and therefore cannot "support a constitutional claim for compensation." *Dames & Moore*, 453 U.S. at 674 n.6.

Petitioners identify no authority suggesting that a tort claim of the sort they seek to pursue against Libya is a form of "vested" property right that gives rise to a Fifth Amendment takings claim. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). 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, *e.g.*, *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."); *Memorial Hosp.* v. *Heckler*, 706 F.2d 1130, 1137-1138 (11th Cir. 1983) (no enforceable property right in non-final judgment); see also *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009), cert. denied, 560 U.S. 924 (2010).

The absence of a cognizable property interest is especially clear here, where petitioners assert a taking arising from changes in the law—namely Congress's restoration of Libya's sovereign immunity. As this Court explained more than a century ago, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R.* v. *White*, 243 U.S. 188, 198 (1917).

The Court has stated expressly that "[l]aws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases," and therefore do not create a due process violation, because "[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.'" *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 864-865 (2009) (quoting *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004)). Likewise, espousal of claims in conjunction with the restoration of sovereign immunity does not affect any cognizable property interest. Indeed, in *Dames & Moore*, this Court explained that the plaintiffs "did not acquire any 'property' interest in" the attachments of frozen assets that were later nullified by the President as part of a claims settlement. 453 U.S. at 674 n.6; accord *United States* v. *Sperry Corp.*, 493 U.S. 52, 59 (1989).* Petitioners accordingly fail to make the threshold showing required for a taking.

2. Even if petitioners could identify a cognizable property interest (as the court of appeals assumed *arguendo* that they could), the court correctly determined that the government actions at issue did not effect a per se taking and that, under the *Penn Central* factors, no taking occurred. See Pet. App. 10a-19a.

a. The Executive has espoused claims against foreign sovereigns dating back "[a]t least" to 1799. *Dames & Moore*, 453 U.S. at 679 n.8; see *Shanghai Power Co.*

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* *Dames & Moore* did not address whether a potential "suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment." 453 U.S. at 688.

v. *United States*, 4 Cl. Ct. 237, 246 (1983) ("[T]he President's power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well established aspect of international law."), aff'd, 765 F.2d 159 (Fed. Cir.), cert. denied, 474 U.S. 909 (1985). Throughout those centuries, "the Supreme Court has never found an executive settlement of private claims to constitute a compensable taking." *American Int'l Grp., Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 446 (D.C. Cir. 1981). The Federal Circuit, moreover, has repeatedly held that espousal of claims against foreign sovereigns does not constitute a compensable taking, and this Court has declined to review those decisions. See *Abrahim-Youri* v. *United States*, 139 F.3d 1462, 1465 (1997), cert. denied, 524 U.S. 951 (1998); *Belk* v. *United States*, 858 F.2d 706, 708 (1988); see also *Aviation & Gen. Ins. Co.* v. *United States*, 882 F.3d 1088, 1097 (Fed. Cir.), cert. denied, 139 S. Ct. 412 (2018). That "'established'" and "longstanding practice" strongly supports the conclusion that the government's actions here did not give rise to a taking. *Dames & Moore*, 453 U.S. at 679 (citation omitted).

Nothing in *Horne* requires a different result. *Horne* involved a Department of Agriculture program that required raisin growers to physically turn over a portion of their crops to the government. 135 S. Ct. at 2428. The Court explained that such a "physical *appropriation* of property g[ives] rise to a *per se* taking, without regard to other factors." *Id.* at 2427. The Federal Circuit, however, "ha[s] consistently held that prohibiting or espousing a litigant's claims by restoring a foreign sovereign's legal immunity is not a physical invasion of property," and it therefore is not subject to the per se taking analysis applied in *Horne*. Pet. App. 15a; see,

e.g., *Abrahim-Youri*, 139 F.3d at 1468 (declining to apply per se takings analysis to espousal of claims); *Belk*, 858 F.2d at 709 (explaining that "there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claim"). Indeed, the Federal Circuit recently reiterated that position after *Horne* and with respect to the restoration of Libyan sovereign immunity under the LCRA and claims settlement agreement at issue here. The court acknowledged that the plaintiffs' ability to maintain their lawsuits was significantly impaired, but explained that "the Government's action nonetheless was not a physical invasion of [their] property rights." *Aviation & Gen. Ins. Co.*, 882 F.3d at 1097. This Court denied review.

The Federal Circuit is correct. Unlike the seizure of raisins at issue in *Horne*, the espousal of a plaintiff's pending claims against a foreign sovereign as part of broader change in the legal and diplomatic landscape cannot reasonably be described as a "physical appropriation of property." 135 S. Ct. at 2427 (emphasis omitted); cf. *Landgraf*, 511 U.S. at 274 ("Application of a new jurisdictional rule usually 'takes away no substantive right.'") (citation omitted). To the extent that a claim against a foreign sovereign is a property interest at all, it is one "subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights." *Abrahim-Youri*, 139 F.3d at 1468. By entering into an agreement with Libya to normalize relations and settle existing claims, "[t]he President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests. This is a classic[] adjustment of 'the benefits and

burdens of economic life to promote the common good,'" *Shanghai Power Co.*, 4 Cl. Ct. at 246 (quoting *Penn Central*, 438 U.S. at 124), not a per se taking.

The absence of a per se taking is especially clear where, as here, the government does not eliminate a plaintiff's claim entirely, but rather provides "an alternative forum * * * which is capable of providing meaningful relief." *Dames & Moore*, 453 U.S. at 687; accord *Sperry Corp.*, 493 U.S. at 59 & n.6. Just as the agreement in *Dames & Moore* allowed nationals holding settled claims to apply to an international tribunal to receive possible compensation, the agreement at issue here expressly provided for the creation of a fund for "fair compensation" of the claims administered by the State Department and the Foreign Claims Settlement Commission. Pet. App. 4a (citation omitted). Indeed, as a result of the government's actions here, petitioners received more than $10 million from that fund for claims that may never have been satisfied by Libya—hardly the equivalent of having their property physically appropriated by the government. *Id.* at 6a.

Petitioners contend (Pet. 17-28) that the Takings Clause was originally understood to require compensation in connection with appropriations arising out of foreign affairs and, more specifically, upon the espousal of a claim. But as explained above, neither this Court nor any court of appeals has ever adopted such a holding. See *American Int'l Grp.*, 657 F.2d at 446. The historical sources petitioners cite emphasize the "equitable principles embodied by the just compensation clause," Pet. 24, an approach that foreshadows the *Penn Central* factors rather than per se takings analysis. And the primary opinion on which petitioners rely, *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), is a nonbinding "advisory

opinion to Congress" that does not establish any rule of constitutional law. *Abrahim-Youri*, 139 F.3d at 1467; see *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1393 (Ct. Cl. 1970) (en banc) ("All that really needs to be said about the *Gray* case is that the opinion * * * was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts. However, it is worth mentioning that, in referring to the 'French Spoliation' claims which were later granted by Congress following the *Gray* opinion, the Supreme Court remarked: 'We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.'") (quoting *Blagge* v. *Balch*, 162 U.S. 439, 457 (1896)). Moreover, petitioners had the opportunity to "pursue [their] claim * * * in another forum," which "distinguishes this case from *Gray*," where "the United States canceled American claims against France altogether." *Sperry Corp.*, 493 U.S. at 59 n.6.

b. Petitioners do not contest the court of appeals' application of the *Penn Central* factors, and that question would not justify review in any event because the court's application of those factors was correct.

The court of appeals first properly concluded that the reinstatement of Libya's sovereign immunity and espousal of petitioners' claims did not interfere with their "distinct investment-backed expectations." Pet. App. 17a. As explained above, there is a long history of the Executive's espousal of U.S. nationals' claims. Moreover, 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. A legislature "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 (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 *Altmann*, 541 U.S. at 696). That reasoning is particularly apt here, because petitioners' claims accrued when "Libya enjoyed sovereign immunity from suit in the United States," and petitioners understood that Congress could always restore the sovereign immunity that it had revoked. Pet. App. 2a.

The court of appeals also correctly determined that "the character of the governmental action" further demonstrates that no taking occurred. Pet. App. 16a. Indeed, petitioners "provided no evidence that this factor should weigh in their favor," and it is unclear what evidence could tip this factor in favor of petitioners given both the long history of claim espousal and the Executive's "overwhelming interest in conducting foreign affairs." *Ibid.*

Finally, with respect to the economic impact on petitioners, the court of appeals correctly concluded that petitioners' receipt of more than $10 million from the claims settlement fund likely represented "more than

they would have without the Government's action." Pet. App. 18a. As the CFC explained, it was at best "speculative whether [petitioners] would have secured any recovery from Libya absent the Government's espousal and settlement of their claims," given that the judgment was on appeal and that any effort at collection from Libya without governmental action would have been highly impractical. *Id.* at 39a; accord *Sperry Corp.*, 493 U.S. at 63 (rejecting takings claim when 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").

3. In any event, this case would be a poor vehicle to consider whether the espousal of a plaintiff's claims against a foreign sovereign can give rise to a taking. Ultimately, petitioners' principal complaint is they are "not satisfied with the settlement negotiated by the Government on their behalf," Pet. App. 19a (citation omitted), because it pays them only "pennies on the dollar" compared to their non-final district court judgment, Pet. 9. That challenge to the particular distribution of the claims settlement fund in this case is highly factbound and unlikely to recur. It is also a nonjusticiable attempt to second guess the substance of the settlement agreement itself—namely the amount of money secured from Libya and the Executive's judgments about which claims merit compensation. As the Federal Circuit has explained, a "determination whether and upon what terms to settle the dispute with" a foreign country is "necessarily * * * for the President to make in his foreign relations role." *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" and would present a nonjusticiable political question. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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