No. 98-1449

In the Supreme Court of the United States

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, ET AL., PETITIONERS

v.

DENICE H. REIN, EXECUTRIX OF THE ESTATE OF MARK ALAN REIN, DECEASED, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The brief for the United States will address the following question:

Whether 28 U.S.C. 1605(a)(7) (Supp. III 1997), which provides that countries designated as state sponsors of terrorism shall not have sovereign immunity for acts such as aircraft sabotage, is constitutional as applied to this suit against Libya.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 162 F.3d 748. The opinion of the district court (Pet. App. 37a-50a) is reported at 995 F. Supp. 325.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1998. The petition for a writ of certiorari was filed on March 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Sovereign immunity for foreign states in federal courts is a privilege that under the Constitution may be restricted by Congress and the Executive Branch as they choose. "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes as a general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of" Title 28. See 28 U.S.C. 1604. The instant case involves the application of 28 U.S.C. 1605(a)(7) (Supp. III 1997), which was added to the FSIA by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. Section 1605(a)(7) provides that a foreign state is not immune in any case

> * * * in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act * * * engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> > (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50

> U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act[.]

28 U.S.C. 1605(a)(7) (Supp. III 1997). Section 1605(a)(7) divests the foreign state of immunity only if the claimant or the victim was a national of the United States when the act upon which the claim is based occurred. 28 U.S.C. 1605(a)(7)(B)(ii) (Supp. III 1997). Section 1605(a)(7) "appl[ies] to any cause of action arising before, on, or after the date of the enactment of" the AEDPA. AEDPA § 221(c), 110 Stat. 1243 (28 U.S.C. 1605 note (Supp. III 1997)).

2. For nearly 20 years, Libya has been designated by the Executive Branch as a state sponsor of terrorism pursuant to the Export Administration Act of 1979, Pub. L. No. 96-72, § 6(i), 93 Stat. 515 (currently codified as amended as Section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405(j)). See 15 C.F.R. 385.4(d) (1981) (describing Libya, Iraq, People's Democratic Republic of Yemen, and Syria as "countries that have repeatedly provided support for acts of international terrorism," and explaining that exports to those countries are subject to restrictions imposed by, *inter alia*, Section 6(i) of the Export Administration Act); 45 Fed. Reg. 1595-1599 (1980).[1] The 1996 legislation that added Section 1605(a)(7) to the FSIA contained explicit

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[1] The designation of Libya and other countries as state sponsors of terrorism under the Export Administration Act and other federal statutes has the effect, *inter alia*, of triggering restrictions on exports of arms and dual-use technology, as well as a variety of prohibitions on the provision of foreign assistance and trade benefits. See, *e.g.*, 50 U.S.C. App. 2405 (1994 & Supp. II 1996); 22 U.S.C. 2349aa-9, 2371.

congressional findings referring to the previous designation of Libya as a state sponsor of terrorism. See AEDPA § 324, 110 Stat. 1255 (finding, *inter alia*, that "the Congress deplores decisions to ease, evade, or end international sanctions on state sponsors of terrorism, including the recent decision by the United Nations Sanctions Committee to allow airline flights to and from Libya despite Libya's non-compliance with United Nations resolutions," and that "the President should continue to undertake efforts to increase the international isolation of state sponsors of international terrorism, including efforts to strengthen international sanctions, and should oppose any future initiatives to ease sanctions on Libya or other state sponsors of terrorism").[2]

3. On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, killing all 259 persons on board and 11 persons on the ground below. Pet. App. 10a. In the aftermath of the bombing, the families of some of the victims filed suit for damages against Libya, Libya's intelligence service, Libya's state-owned airline, and two Libyan citizens who were employees and agents of the Libyan government. That suit was dismissed for lack of subject-matter jurisdiction. *Smith*

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[2] Indeed, the legislative history suggests that Section 1605(a)(7) was intended at least in part to subject Libya and its agencies and instrumentalities to civil liability for the bombing of Pan Am Flight 103 in December 1988—the terrorist act that is at issue in this case. See 142 Cong. Rec. 4551, 4558 (1996) (remarks of Rep. Ros-Lehtinen) (introducing letter supporting the legislation from Victoria Diaz Cummock, president of the Families of Pan Am 103/Lockerbie); *id.* at 4568 (remarks of Rep. Fox); *id.* at 7790 (remarks of Sen. Brown); *id.* at 7801 (remarks of Sen. Dole) (introducing letter supporting the legislation from Victoria Diaz Cummock, president of the Families of Pan Am 103/Lockerbie).

v. *Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995), aff'd, 101 F.3d 239 (2d Cir. 1996), cert. denied, 520 U.S. 1204 (1997). Both the district court and the court of appeals rejected the plaintiffs' argument that, under the pre-1996 version of the FSIA, Libya had waived its sovereign immunity by violating "fundamental international norms" ("*jus cogens*"). See *id.* at 313-315; 101 F.3d at 242-245.

The instant suit was filed after the enactment of Section 1605(a)(7) in 1996. The plaintiffs (respondents in this Court) are survivors and representatives of persons killed aboard Pan Am Flight 103. Pet. App. 9a. Libya, its intelligence service, and its national airline—the petitioners in this Court—were named as defendants. *Id.* at 8a-9a, 10a, 12a-13a, 39a-40a. Respondents alleged that petitioners were responsible for the destruction of Pam Am Flight 103. *Id.* at 39a-40a.

Petitioners moved to dismiss the suit for lack of subject-matter and personal jurisdiction, and for failure to state claims upon which relief can be granted. Pet. App. 39a. Petitioners contended, *inter alia*, that Section 1605(a)(7) empowers the Secretary of State to determine the jurisdiction of the federal courts and is therefore unconstitutional. See *id.* at 41a. The district court denied the motion to dismiss. *Id.* at 37a-50a. The court held that Section 1605(a)(7) is constitutional, *id.* at 40a-45a, 48a; that the court had personal jurisdiction over the petitioners, *id.* at 45a-46a; that the designation of Libya as a state sponsor of terrorism did not deny the petitioners due process of law with respect to the adjudication of the underlying claims, *id.* at 46a-48a; and that no portion of the action should be dismissed for failure to state a claim, *id.* at 48a-49a.

4. Petitioners filed an interlocutory appeal from the district court's decision denying the motion to dismiss.

The United States intervened in the case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 1605(a)(7). The court of appeals affirmed the district court's determination that it possessed subject-matter jurisdiction over the suit, and it dismissed the remainder of the appeal for lack of appellate jurisdiction. Pet. App. 1a-36a.

a. The court of appeals held that as applied to Libya, Section 1605(a)(7) does not constitute an improper delegation of legislative authority. The court explained that

> [a]t the time that § 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103. That jurisdiction existed the moment the AEDPA amendment became law.

Pet. App. 35a. Because Libya had been designated as a state sponsor of terrorism before the passage of the 1996 FSIA amendments, the court stated, "[t]he decision to subject Libya to jurisdiction under § 1605(a)(7) was manifestly made by Congress itself rather than by the State Department." *Ibid.* Since Section 1605(a)(7), as applied to Libya, "creates jurisdiction directly at the behest of Congress and without any intervening decision by another body," the court of appeals found "no delegation of legislative power and, necessarily, no unconstitutional delegation either." *Id.* at 36a.[3]

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[3] The court of appeals observed that an "issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that

b. The court of appeals concluded that it lacked appellate jurisdiction to consider petitioners' other challenges to the district court's ruling. Pet. App. 14a-30a. The court explained that although "[t]he denial of Libya's motion to dismiss on the grounds of sovereign immunity is appealable as a collateral order," *id.* at 14a, the other claims raised in petitioners' appeal were not independently subject to interlocutory review, *id.* at 16a. The court construed this Court's decision in *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), as generally directing the courts of appeals "not to take 'pendent appellate jurisdiction' on interlocutory appeals of issues not themselves immediately appealable." Pet. App. 16a. Under *Swint*, the court of appeals stated, the exercise of pendent appellate jurisdiction is appropriate only "(a) where an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal, or (b) where review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of a jurisdictionally sufficient one." *Id.* at 19a. The court of appeals concluded that none of petitioners' other claims satisfied those requirements, see *id.* at 22a-30a, and it accordingly dismissed the appeal with respect to those claims, *id.* at 36a.

ARGUMENT

The court of appeals correctly held that 28 U.S.C. 1605(a)(7) (Supp. III 1997) is constitutional as applied to

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Libya now raises." Pet. App. 35a. The court declined to resolve the question whether Section 1605(a)(7) would be constitutional as applied to such a case. See *id.* at 35a-36a. The court noted, however, that this Court in *Jones* v. *United States*, 137 U.S. 202 (1890), "upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State." Pet. App. 33a.

this suit against Libya. That holding does not conflict with any decision of this Court or of another court of appeals, and it does not warrant further review.

1. Petitioner challenges Section 1605(a)(7) as an unconstitutional delegation of power to the Executive Branch to determine which foreign states constitute "state sponsors of terrorism" and are therefore subject to suit in the federal courts. See Pet. 13-17. The instant case does not present that question, however, because the decision to subject Libya to suit for the acts at issue in this case was as a historical matter made by Congress and not by the Executive Branch.

As the court of appeals correctly held, Section 1605(a)(7) as applied to this suit involves "no delegation of legislative power and, necessarily, no unconstitutional delegation either." Pet. App. 36a. Under Section 1605(a)(7), a foreign state's susceptibility to suit for acts such as aircraft sabotage generally turns on whether that state was "designated as a state sponsor of terrorism * * * at the time the act occurred." 28 U.S.C. 1605(a)(7)(A) (Supp. III 1997). Libya had been designated by the Executive Branch as a state sponsor of terrorism well before the bombing of Pan Am Flight 103, and before the enactment of Section 1605(a)(7). See p. 3, *supra*. Thus, when Congress enacted Section 1605(a)(7), it thereby divested Libya of sovereign immunity for the acts alleged in this case. See Pet. App. 35a ("No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103."); *id.* at 36a (Section 1605(a)(7) "creates jurisdiction directly at the behest of Congress and without any intervening decision by another body."). Moreover, the legislative history suggests that enactment of Section 1605(a)(7) was intended, at least in part, to divest Libya of sover-

eign immunity in suits concerning Pan Am Flight 103. See note 2, *supra*. The statute divested Libya of immunity for the acts at issue in this case by incorporating an action *previously* taken by the Executive Branch; because of this particular sequence of events, no subsequent exercise of delegated authority under Section 1605(a)(7) could either remove or restore Libya's immunity for those acts. Indeed, even if Executive Branch officials had removed Libya from the list of state sponsors of terrorism after AEDPA was enacted, Libya could not assert sovereign immunity in the instant suit, since a subsequent delisting would not alter the fact that the country was "designated as a state sponsor of terrorism * * * at the time the act occurred." 28 U.S.C. 1605(a)(7)(A) (Supp. III 1997).

As the court of appeals observed, an "issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that Libya now raises." Pet. App. 35a. As set forth below, Section 1605(a)(7) would be constitutional as applied in that setting as well. But regardless of the proper disposition of that hypothetical case, application of Section 1605(a)(7) to this suit raises no significant constitutional concern.[4]

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[4] Petitioners also argue (Pet. 14) that Section 1605(a)(7) violates principles of separation of powers. Assuming that a foreign state may raise a separation-of-powers argument, but see, *e.g.*, *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed."), that argument provides no basis for this Court's review. Petitioners do not articulate an independent

2. Although the question is not presented in this case, Section 1605(a)(7) would be constitutional even as applied to a country designated as a "state sponsor of terrorism" after the enactment of AEDPA. Section 1605(a) establishes precise and detailed rules

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basis for their separation-of-powers claim, but simply contend that Congress violated separation-of-powers principles by impermissibly delegating legislative power to the Executive Branch. See Pet. 14-17. That claim lacks merit for the reasons stated in the text.

Petitioners suggest without significant elaboration (see Pet. 17) that Section 1605(a)(7) violates the equal protection component of the Due Process Clause by treating states designated as state sponsors of terrorism differently from states not so designated, and that use of the term "state sponsor of terrorism" as a nonreviewable prerequisite for liability under Section 1605(a)(7) violates their right to a fair trial under the Fifth Amendment. Those claims are not fairly included within the questions presented in the petition, and in any event they are without merit. Equal protection principles cannot plausibly be thought to preclude Legislative and Executive Branch officials from drawing distinctions between different foreign states, or to require (see Pet. 17) that such distinctions be subjected to heightened judicial scrutiny. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 211 (1962) ("resolution of [foreign relations] issues frequently turn[s] on standards that defy judicial application, or involve[s] the exercise of a discretion demonstrably committed to the executive or legislature"); note 7, *infra* (explaining that foreign states' access to United States courts has traditionally been committed to the unreviewable discretion of Executive Branch officials). And because Section 1605(a)(7) addresses only the question of foreign states' susceptibility to suit, rather than establishing substantive or procedural rules for adjudicating those suits that are found to be cognizable, it cannot have the effect of "depriving Libya of a fair trial on the merits." Pet. 17; see Pet. App. 46a (district court explains that designation of particular countries as state sponsors of terrorism "in no way affects the merits of the underlying claims or the liability of foreign states against whom actions may be maintained").

concerning the circumstances under which foreign states will be subject to suit in the federal courts. The fact that application of those rules depends in part on Executive Branch determinations creates no constitutional infirmity. To the contrary, Congress's approach is fully consistent with the significant constitutional role and expertise of the Executive Branch in the area of foreign relations. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-680 (1981) (explaining the "longstanding practice" by which the President has undertaken to settle claims of United States nationals against foreign countries); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936) (observing that "the President alone has the power to speak or listen as a representative of the nation," and that "he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries").

As the court of appeals recognized, this Court in *Jones* v. *United States*, 137 U.S. 202 (1890), "upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State." Pet. App. 33a. The Court in *Jones* rejected a constitutional challenge to provisions of the Guano Islands Act of August 18, 1856, Rev. Stat. §§ 5570-5578 (1878 ed.). The Act provided that "any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, * * * may, at the discretion of the President, be considered as appertaining to the United States." § 5570. It further stated that crimes committed in such areas "shall be deemed committed on the high seas, on board a merchant-ship or vessel belonging to the

United States." § 5576.[5] The Court in *Jones* sustained the defendant's conviction for a murder committed on Navassa Island, an area that had been designated pursuant to the Act as "appertaining to the United States." The Court rejected the defendant's constitutional challenge to the Act's jurisdictional provisions, explaining that "[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges." 137 U.S. at 212; see also *id.* at 224 (concluding that the Act was "constitutional and valid" and affirming the defendant's conviction).[6]

The application of other jurisdictional rules also depends in part on determinations made by the Executive Branch. Diversity jurisdiction under 28 U.S.C. 1332(a)(2) and (4)—the statutory provisions that vest the federal district courts with jurisdiction in cases involving citizens of foreign states, and cases in which foreign states are plaintiffs—is predicated upon Executive Branch recognition of the relevant foreign state. See, *e.g.*, *Matimak Trading Co.* v. *Khalily*, 118 F.3d 76, 79-85 (2d Cir. 1997) (Hong Kong corporation held not to be a citizen of a foreign state for purposes of

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[5] Federal law currently defines the term "special maritime and territorial jurisdiction of the United States" to include "[a]ny island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States." 18 U.S.C. 7(4).

[6] The Court also held that the President's authority under the Act to identify islands "appertaining to the United States" was "a strictly executive power, affecting foreign relations," that could be exercised by the Department of State on the President's behalf in the absence of a contrary statutory directive. 137 U.S. at 217.

diversity jurisdiction because the United States did not recognize Hong Kong as a sovereign state when the suit was filed), cert. denied, 522 U.S. 1091 (1998). This Court's original jurisdiction in cases involving ambassadors and consuls, see U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(1), extends only to diplomatic representatives who are accredited in the sole and absolute discretion of the Executive Branch. See *In re Baiz*, 135 U.S. 403, 417-418, 428-432 (1890). Diplomatic immunity from suits in United States courts is determined by the State Department's accreditation of a diplomat. See *Abdulaziz* v. *Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984). Head-of-state immunity turns on an Executive Branch determination that a particular individual should be treated as the official head of state. See, *e.g.*, *Lafontant* v. *Aristide*, 844 F. Supp. 128, 131-134 (E.D.N.Y. 1994); see also *Kadic* v. *Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996).[7]

Petitioners' constitutional claim is particularly misconceived given the manner in which issues of foreign sovereign immunity were resolved before the FSIA was enacted in 1976. Until the enactment of the FSIA, "initial responsibility for deciding questions of [foreign] sovereign immunity fell primarily upon the Executive

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[7] The Court has also held that a foreign state can have access to United States courts only if it has been recognized by the Executive Branch. See *Pfizer Inc.* v *Government of India*, 434 U.S. 308, 319-320 (1978) ("It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136-138 (1938); see also *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942).

acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983); see also *id.* at 486 ("this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"); *National City Bank* v. *Republic of China*, 348 U.S. 356, 360 (1955) ("[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit"). Although the FSIA reflects Congress's determination that the prior case-by-case approach created unnecessary diplomatic and practical difficulties, see *Verlinden*, 461 U.S. at 488, nothing in this Court's decisions suggests that the pre-FSIA regime was inconsistent with the Constitution.

3. Petitioners also contend (Pet. 18-23) that the court of appeals erred in holding that it lacked pendent appellate jurisdiction over their other constitutional and statutory challenges to the district court's decision. The United States intervened in this case pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 1605(a)(7). Although the United States argued in the court of appeals that petitioners' additional constitutional claims failed on the merits, we took no position regarding the scope of that court's appellate jurisdiction. Accordingly, the United States will not address that question at the current stage of the proceedings unless requested to do so by this Court.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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