No. 21-5250
ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHANA RACHEL MARK, *et al.*,

Plaintiffs-Appellants,

v.

REPUBLIC OF THE SUDAN,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia (No. 1:20-cv-3022-TNM)

CORRECTED OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a)(1), plaintiffs-appellants certify as follows:

(A) Parties and *Amici*. The following is a list of all parties, intervenors, and *amici* who appeared in the District Court in this case and all persons who are parties, intervenors, or *amici* in this Court:

Plaintiffs-Appellants. The following persons were Plaintiffs in the District court and are Appellants in this Court: Chava Mark, Netanel Mark, Yisca Mark, Shira Mark Harif, Yehoshua Mark, Mir Mark, (f/k/a Miryam Mark), Orit Mark Ettinger, Pdaya Mark, Tehila Bracha Mark, Ayelet Batt, Aryeh Batt, Avi Batt, Elisheva Hirshfeld, RLM, minor by her mother and natural guardian, Chava Rachel Mark, EBM, minor by her mother and natural guardian, Chava Rachel Mark.

Respondent-Appellee. The only Defendant in the District court and Appellee in this Court is Republic of the Sudan.

Intervenors and Amici. The United States intervened in the District Court and has filed an appearance in this Court. No amici have appeared before this Court or below.

(B) Rulings Under Review. The rulings under review are the Order and Memorandum Opinion, both entered by United States District Judge Trevor N.

McFadden on October 7, 2021 (JA 26 and 37), which granted the Defendant's motion to dismiss and dismissed the Plaintiffs' complaint with prejudice.

(C) Related Cases. This case has not previously been before this court or any other court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

JURISDICTION

The District Court had jurisdiction over this action under 28 U.S.C. §§ 1330, 1331, 1367, and § 1605A. On October 7, 2021, the District Court dismissed the action in its entirety with prejudice finding that it lacked personal and subject matter jurisdiction. A notice of appeal was filed on November 3, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

The issues presented for review include:

Whether either of the Sudan Claims Resolution Act, enacted as part of the Consolidated Appropriations Act of 2021. Pub. L. No. 116-260 (2020), §§ 1701 et seq., ***or*** the U.S.-Sudan Claims Settlement Agreement, Oct. 30, 2020, T.I.A.S. No. 21-209 are invalid, facially, or as applied to the Appellants, on the grounds that they violate the Appellants' right to equal protection of the laws or their right to access to the courts.

PERTINENT STATUTE AND AGREEMENT

This case involves the Sudan Claims Resolution Act (the "Act"), enacted as part of the Consolidated Appropriations Act of 2021. Pub. L. No. 116-260 (2020), §§ 1701 and the U.S.-Sudan Claims Settlement Agreement, Oct. 30, 2020, T.I.A.S. No. 21-209 (the "Settlement Agreement"). Both documents are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

I. Facts.

This is a civil action brought pursuant to the "Terrorism Exception" to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (the "FSIA"). The Plaintiffs-Appellants are United States nationals who seek to hold Defendant-Appellee, Republic of the Sudan ("Sudan"), liable for wrongful death, severe and continuing personal injuries, and related torts, that resulted from a terrorist drive-by shooting attack (the "Terrorist Attack" or the "Attack") carried out by Hamas – The Islamic Resistance Movement (a/k/a "Harakat al-Muqawamah al-Islamiyya") ("Hamas"). Sudan provided substantial material support to Hamas for nearly thirty years including the time leading up to and beyond the date of the Terrorist Attack.

A. The Hamas Terrorist Attack.

On Friday, July 1, 2016, Rabbi Michael "Miki" Mark was driving with his wife, Chava, and two of their ten children on a quiet country highway in Israel when two Hamas terrorists overtook their car and opened fire with a Kalashnikov assault rifle. Complaint, JA 10. The terrorists fired approximately 25 bullets into the Marks' car. *Id*. Five bullets struck Miki Mark's body including one that penetrated his head. *Id*. Miki lost control of the car, which flipped on its top before coming to a crashing halt. *Id*.

When the car stopped moving, both Miki and Chava Mark were unconscious, still strapped into their seats, upside-down. Complaint, JA 11. The two children, Pdaya (then 14-years old) and Tehila (then 13-years old) were both injured, but remained conscious. *Id*. Tehila had been shot in the stomach; Pdaya was injured in the crash. *Id*. The children saw their parents unresponsive and believed that they had both been killed in the shooting. *Id*. The children could not extricate themselves from the car. *Id*. They remained in the car, helpless; both injured, knowing their parents could not save them. *Id*.

Meanwhile, the terrorists performed a U-turn, drove back to the Marks' overturned car, and, again, opened fire at their helpless victims. *Id*. at 11. One of the terrorists would later confess that they wanted to ensure all of the car's occupants, including the children, were dead. *Id*. They almost succeeded. Miki Mark died from his gunshot wounds at the scene. Chava Mark sustained a bullet wound to her head, which took out one of her eyes and left her permanently and severely brain damaged. *Id*. Pdaya and Tehila survived the Attack. But they, their mother, siblings, and Chava Mark's mother and siblings all continue to suffer severe emotional harm caused by the Attack.

The Plaintiffs-Appellants in this action are Chava Mark, Miki and Chava Marks' nine surviving children, the estate of the Marks' oldest son, who died in a traffic accident in 2019, and Chava Mark's mother, brothers, and sister[1].

B. Hamas Carried Out the Terrorist Attack.

Following the Attack, Israeli security bodies discovered Hamas infrastructure that led the investigators to the two Hamas terrorists. Complaint, JA 12. One of the terrorists was captured alive, confessed to his role in the Attack, and was convicted of premeditated murder, several counts of attempted murder, dealing in military equipment, and illegal possession of weapons. *Id*. at 12-13. He had previously been convicted of other terrorist activity, but was released from prison pursuant to a prisoner exchange deal between Israel and Hamas. *Id*. at 7. The second Hamas terrorist was tracked down three weeks after the Attack. *Id*. at 13. Security officials surrounded the house in which he was hiding and called for the terrorist's surrender. *Id*. The Hamas operative responded with gunfire and explosives. *Id*. At the end of a 7-hour stand-off the terrorist's death was confirmed. *Id*.

Co-conspirators of the terrorist operatives confirmed that leaders of the Hamas military wing, the *Izz ad-Din al-Qassam* Brigades had planned and ordered

[1] While some of the Appellants have different last names, they will be referred to collectively, as "the Marks."

the Attack. *Id*. at 6-10, 12-13. Hamas itself also praised the "heroes" and "martyrs," and claimed "credit" for the Attack. *Id*. at 13.

C. **Sudan Provided Material Support and Resources to Hamas**

Throughout the more-than-30-year rule of Colonel Omar al-Bashir, which began with a military *coup d'état* in 1989, Sudan provided training, material support, safe haven, and other logistical and strategic support for Hamas. Complaint at 13. On August 12, 1993, the United States Department of State designated Sudan as a state sponsor of terrorism pursuant to Section 6(j) of the Export Administration Act of 1979 (50 U.S.C. § 2405(j)). Complaint, JA 14. Official State Department records explicitly indicate that Sudan's designation as a state sponsor of terrorism was occasioned by its support for international terrorist groups, including the Abu Nidal Organization, Palestine Islamic Jihad, Hamas, and Hizballah. *Id*. This designation remained in place as of the date the Complaint was filed. *Id*.

Sudan provided Hamas with material support and resources within the meaning of 28 U.S.C. § 1605A(a)(1) with the specific intention of causing and facilitating the commission of acts of extrajudicial killing, including the Terrorist Attack. This support was provided continuously, routinely and in furtherance and as implementation of a specific policy and practice established and maintained by Sudan to assist Hamas achieve goals shared by Sudan. *Id*.

The Complaint identified several forms and examples of the material support and resources that Sudan provided to Hamas in the years immediately prior to the Terrorist Attack. Complaint, JA 15. These included: provision of financial support to Hamas; provision of specialized and professional military training for the planning and execution of terrorist attacks to Hamas; providing use of training bases and military facilities in which terrorist training was provided to Hamas and its operatives; providing Hamas and its leaders and operatives safe haven and refuge from capture; providing Hamas means of electronic communication; providing Hamas with financial services, including banking and wire transfer services; and providing Hamas with means of transportation. *Id*.

Sudan provided training bases for Hamas, where its operatives studied bomb-making and received military training. Complaint, JA 16. Sudan also enabled Hamas to stockpile weapons in its territory; and significantly, Sudan provided Hamas with a critical weapons-supply route for the transfer of arms from Libya and Iran. *Id*. at 16-17. As recently as 2015, the State Department reported that members of Hamas were allowed to raise funds, travel, and live in Sudan. *Id*. at 17. Indeed, through at least 2019, Sudan continued to provide safe haven, local offices, and other forms of support for Hamas. *Id*. at 18.

II. Procedural History.

A. The Marks Filed the Action and Properly Served Sudan.

On October 20, 2020, the Marks filed this civil action in the United States District Court for the District of Columbia. JA 1. The Complaint asserted a cause of action seeking damages under 28 U.S.C. § 1605A(c) for Sudan's provision of material support and resources to, and conspiracy with, Hamas. Complaint, JA 18. The Complaint alleged that the district court had subject matter jurisdiction under 28 U.S.C. §§ 1330, 1331, 1367, and under the jurisdictional provision of the FSIA's Terrorism Exception to foreign sovereign immunity, § 1605A(a). Complaint, JA 2. On March 10, 2021, service was properly effected upon Sudan pursuant to 28 U.S.C. § 1608(a)(3). ECF No. 12.

B. Sudan Moved to Dismiss Under a Settlement Agreement and Legislation that were Concluded and Enacted After the Marks Filed their Complaint.

Sudan filed its Motion to Dismiss on May 10, 2021. ECF No. 16. Sudan did not deny any of the factual allegations of the Complaint regarding the Attack, Hamas's responsibility for the Attack, or Sudan's provision of material support and resources to Hamas. Rather, the Motion to Dismiss was based exclusively upon developments that materialized after the Complaint was filed: Sudan asserted that the Marks' claims failed under (1) an agreement entered into between the U.S. government and the Transitional Government of Sudan that purported to espouse, settle, and/or cancel some, but not all, terrorism cases and claims against Sudan

pursuant to the Terrorism Exception to the FSIA (U.S.-Sudan Claims Settlement Agreement, Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021) (the "Settlement Agreement") (Addendum 9)); and (2) legislation enacted pursuant to the Settlement Agreement that restored Sudan's sovereign immunity for its well-documented support of terrorism. Sudan Claims Resolution Act, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020) (Addendum 1); *See* Motion to Dismiss, ECF No. 16. Like the Settlement Agreement, the Act applied to some, but not all, claims brought by victims of Sudan-sponsored terrorism.

1. **The Claims Settlement Agreement.**

On October 30, 2020, the United States and Sudan signed a Claims Settlement Agreement. U.S.-Sudan Claims Settlement Agreement, Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021), Addendum 9. The preamble to the Settlement Agreement recognizes the 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania (the "Embassy Bombings") and the 2000 attack on the U.S.S. Cole (the "Cole Attack"). Addendum 11. And without assigning responsibility for those attacks to Sudan, the Settlement Agreement recognizes Sudan's willingness to address claims arising out of those attack. Addendum 12. The preamble does not mention any other terrorist attacks that have been attributed to Sudan.

Article II of the Settlement Agreement specifies the following objectives of the government's action: (a) settling claims of the United States and of U.S. nationals, through espousal; (b) providing meaningful compensation to foreign national terrorism victims who were employed, or performed contracts awarded, by the United States; and (c) barring all terrorism lawsuits by U.S and foreign nationals. Addendum 13. Article III requires the United States to confirm that the necessary legislation has been enacted that restores foreign sovereign immunity to Sudan for terrorism cases. Addendum 14. It also requires Sudan to pay to the United States $335 million to be distributed by the U.S. government as provided in the Annex to the Settlement Agreement. *Id*.

The Annex to the Settlement Agreement specifies certain claimants that are to receive shares in the distribution. Addendum 18-19. These claimants include U.S. nationals who are parties to certain identified lawsuits against Sudan that arose out of the Embassy Bombings and the Cole Attack. Addendum 18. They also include the Plaintiffs in a separate action against Sudan brought by the survivors of an employee of United States Agency for International Development (USAID) who was assassinated in Sudan in 2008. *Id*. The Annex also provides for the payment of a private settlement in favor of the foreign national plaintiffs in *Mwila v. The Islamic Republic of Iran*, case no. 08-cv-1377. *Id*. Finally, the Annex provides for the establishment of a commission to hear and pay claims of certain specified foreign

national claimants whose claims arose out of the Embassy Bombings. Addendum 19. The Annex does not provide for payment of the Marks' claims, and it does not provide an alternate forum in which they can have their claims heard.

Notably, the means by which the U.S. Government settled the claims of the U.S. national claimants was through espousal. Settlement Agreement Articles II(1), IV(1), (2)(d), Addendum 13, 16. "A claim is espoused by the United States ... when the government of the United States, usually through diplomatic channels, makes it the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." *Abrahim-Youri v. United States*, 139 F.3d 1462, 1463 n. 2 (Fed. Cir. 1997), *quoting* Restatement (Second) of Foreign Relations Law of the United States § 211 cmt. b (1965); see also, *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (noting that Government espouses claims of U.S. nationals against foreign governments in exchange for lump-sum payments or the establishment of arbitration procedures.). However, the United States did not make the Marks' claims the subject of a formal claim for reparation.

In exchange for having their claims extinguished, the Settlement Agreement provides for compensation to ***almost all*** of Sudan's victims whose claims were extinguished – even to those who are not U.S. nationals. The ***only*** Sudan terrorism victims who receive no compensation for the extinguishment of the claims are U.S. national claimants like the Plaintiffs whose claims arise out of Sudan-sponsored

terrorist attacks carried out by the Hamas terrorist organization (the "Hamas Victims") [2].

2. **The Sudan Claims Resolution Act**.

As contemplated under the Settlement Agreement, Congress enacted the Sudan Claims Resolution Act as part of the Consolidated Appropriations Act of 2021. Pub. L. No. 116-260 (2020). Addendum 1. Among other things, the Act restores Sudan's foreign sovereign immunity as to (almost) all claims arising out of Sudan's involvement in international terrorism and makes inapplicable to Sudan (almost) any private right of action relating to state sponsors of terrorism. Act § 1704, Addendum 2-3.

The Act recognizes one group of victims of Sudan-sponsored terrorism that is not addressed in the Settlement Agreement – the victims and family members of the 9/11 Attacks. Addendum at 1, 5. The Act provides that "the terrorism-related claims of victims and family members of the September 11, 2001, terrorist attacks must be preserved and protected." Act § 1702(3), Addendum 1. The Act further provides that

[2] In addition to the instant case, Plaintiffs are aware of the following civil actions against the Sudan currently pending in the district court: *Steinberg v. Republic of the Sudan*, civ. case no. 20-cv-2296; *Weinstock v. Republic of the Sudan*, civ. case no. 20-cv-3021; *Force v. Republic of the Sudan*, civ. case no. 20-cv-3027; and *Hirshfeld v. Republic of the Sudan,* civ. case no. 20-cv-3029. All of these cases arise out of terrorist attacks carried out by the Hamas terrorist organization in Israel. Accordingly, these plaintiffs will be referred to collectively as the "Hamas Victims."

the terrorism claims against Sudan of the victims and family members of the 9/11 Attacks are not extinguished; they ***remain pending*** in the multidistrict proceeding in the Southern District of New York (Case No. 03-MCL-1570). Act § 1706; Addendum 4-5.

The September 11 claimant carve-out is based upon the following Congressional finding:

> It is the long-standing policy of the United States that civil lawsuits against those who support, aid and abet, and provide material support for ***international terrorism*** serve the national security interest of the United States by deterring the sponsorship of terrorism and by advancing interests of ***justice, transparency, and accountability***.

Act § 1706(a)(1), Addendum 4 (emphasis added). Despite this longstanding policy to allow civil actions against those who support ***international*** terrorism, the Settlement Agreement and the Act together nullify ***only*** the Plaintiffs' claims (and those of other Hamas Victims) against Sudan for its undeniable provision of material support to Hamas. Meanwhile, purports to allow only the 9/11 claimants' ***domestic*** terrorism lawsuits to proceed, and the Settlement Agreement and the Act compensate all victims of Sudan-sponsored terrorism ***except*** the Hamas Victims.

The Act also provides for "lump sum" payments to 9/11 Victims, spouses, and dependents. Act § 1705, Addendum 4. And the Act appropriates an additional $150 million (over and above the $335 million paid by Sudan) for increased payments to Embassy Bombings victims and their family members who, subsequent to the

Embassy Bombings, became naturalized American citizens. Act § 1707(a), Addendum 6. This appropriation is claimed to be intended to achieve parity between the ***naturalized*** American citizen claimants and the claimants who were, at the time of the Embassy Bombings, U.S. nationals. *Id*. No appropriation has been made to achieve parity between Plaintiffs and the other victims of Sudan-sponsored terrorism or to otherwise compensate the Marks for the termination of their claims. Instead, the Settlement Agreement and Act terminated the Hamas Victims' claims in exchange for the compensation of ***all other*** alleged victims of Sudan-sponsored terrorism.

C. **The Marks Challenged the Constitutionality of the Settlement Agreement and Act, and the Government Intervened**.

The Marks responded to Sudan's Motion to Dismiss arguing that the President's power to settle claims and Congress's power to alter rules of jurisdiction cannot be exercised in violation of individual claimants' constitutional rights. Memorandum of Points and Authorities in Opposition to Motion to Dismiss, ECF No. 20 at 1-2. Specifically, the Marks contended that the Settlement Agreement and Act, individually and together, impinged on their equal protection rights under the Fifth Amendment and their right of access to the courts. *Id*. at 2. Pursuant to Fed. R. Civ. P. 5.1(a), the Marks filed and served upon the Attorney General of the United States a Notice of Constitutional Challenge. Notice of Constitutional Challenge, JA

22; Certificate of Service, JA 23. Sudan filed a reply memorandum supporting its Motion to Dismiss. ECF No. 24.

On July 9, 2021, the district court filed a Certification pursuant to Rule 5.1 and 28 U.S.C. § 2403(a) certifying to the Attorney General that the case involves a constitutional challenge to a federal statute. JA 24. The court's Certification authorized the Government to intervene by filing a brief as provided under Fed. R. Civ. P. 5.1(c). *Id*.

On August 30, 2021, the Government responded to the constitutional challenge by moving to intervene and filing a memorandum of law in support of the constitutionality of the Settlement Agreement and Act. ECF Nos. 28, 28-1. On August 31, 2021, the district court entered a minute order granting the Motion to Intervene. The Government then re-filed its memorandum of law. ECF No. 30. The Marks filed a response in opposition to the Government's memorandum of law (ECF No. 31), and the Government filed a reply supporting the constitutionality of the Settlement Agreement and Act. ECF No. 32.

D. The District Court Dismissed the Complaint with Prejudice.

On October 7, 2021, the district court entered a Memorandum Opinion upholding the constitutionality of both the Settlement Agreement and the Act. JA 26. The Memorandum Opinion misconstrued the Marks' opposition to the Motion to Dismiss as an attempt to amend their Complaint through briefing. Mem. Op., JA

28 n. 4. In fact, the Plaintiffs' Memorandum of Points and Authorities in Opposition to the Motion to Dismiss was not an attempt to amend the Complaint. It merely offered a response to the Motion to Dismiss based upon the record before the Court while citing the Act and Settlement Agreement, neither of which existed when the case was filed. Without viewing an amended complaint, and apparently surmising what an amended complaint might have alleged, the Court held that no amendment to the Complaint could possibly alter the result. *Id*. The district court granted the Motion to Dismiss. *Id*.

On the same date, the court entered a final order of dismissal with prejudice. JA 37. The Marks timely filed their Notice of Appeal on November 3, 2021. JA 38.

STANDARD OF REVIEW

A district court's dismissal for lack of subject matter jurisdiction is subject to *de novo* review. *American Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

SUMMARY OF THE ARGUMENT

The Settlement Agreement and Act espouse, settle, and terminate nearly all claims of Sudan-sponsored terrorism. The Settlement Agreement and Act compensate all known victims of Sudan-sponsored terrorism other than the Marks and the other Hamas Victims. The disparate treatment of the Hamas Victims does not bear any reasonable relationship to the purposes of the Settlement Agreement

and Act, and therefore these provisions must be invalidated under the equal protection clause of the Fifth Amendment.

The Settlement Agreement's and Act's disparate treatment of the Marks must be subjected to heightened scrutiny because it impinges upon their fundamental right of access to the courts.

Even if, on the basis of the Complaint, the Settlement Agreement and the Act are not found to violate the Marks' Constitutional rights, the district court's dismissal with prejudice should be reversed to allow the Marks to file an Amended Complaint.

ARGUMENT

Plaintiffs do not deny that the President enjoys broad authority to espouse and settle claims of U.S. nationals. *See e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) [3]. Neither do Plaintiffs deny that Congress may enact laws altering the rules of foreign sovereign immunity or jurisdiction, even as they apply to pending cases. *See e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016); *see also*, *Republic of Iraq v. Beaty*, 556 U.S. 848, 864-865 (2009); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004). However, both executive agreements and congressional enactments are subject to constitutional limitations on the exercise of governmental

[3] However, the President's authority to espouse claims is limited by the obligation to provide a claimant with compensation or an alternative forum in which to present his or her claim. *Dames & Moore*, 453 U.S. at 679. Failure to do so could give rise to a takings claim.

power. *Reid v. Covert,* 354 U.S. 1, 14, 17 (1957); *Made in the USA Foundation v. United States,* 242 F.3d 1300, 1314 (11th Cir. 2001) (federal courts must invalidate international agreements that violate the Constitution).

The President's power to settle claims and Congress's power to alter rules of jurisdiction cannot be exercised in violation of individual claimants' Constitutional rights. The President's power to espouse or settle claims of U.S. nationals "is subordinate to the applicable provisions of the Constitution." *Dames & Moore,* 453 U.S. at 661, citing, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–320 (1936). The Constitution limits the President's power to settle claims of U.S. nationals, "even as to foreign government entities," which implicate the executive power over foreign affairs. *Dames & Moore,* 453 U.S. at 688

Similarly, "it is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos v. Barry*, 485 U.S. 312, 324 (1988), *quoting Reid v. Covert,* 354 U.S. 1, 16, (1957). "Rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them." *Id*., quoting 1 Restatement of Foreign Relations Law of the United States § 131, Comment *a,* p. 53 (Tent. Draft No. 6, Apr. 12, 1985). As discussed below, the Settlement Agreement and Act violate the

Plaintiffs' Fifth Amendment rights to equal protection and their right to access to the courts and must be invalidated. Alternatively, the Court should vacate the final order of dismissal and allow the Plaintiffs to file an amended complaint.

A. Both the Settlement Agreement and the Act, and the Two Together, Violate the Marks' Right to Equal Protection of the Laws.

The Supreme Court has long held that the Due Process Clause of the Fifth Amendment includes a guaranty of equal protection of the laws that binds the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) ("The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law...'"). Under both the Fourteenth and Fifth Amendments, the Constitution's equal protection guaranty requires the government to treat similarly situated persons similarly. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). However, the right to "equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). In recognition of this necessary balance, where governmental action "neither burdens a fundamental right nor targets a suspect class," it will be upheld "so long as it bears a rational relation to some legitimate end." *Id.* 631 (1996). But even under this most deferential standard of review, there

must be a reasonable "relation between the classification adopted and the object to be attained." *Id*. at 632.

In the instant case, the Settlement Agreement articulated the goals of (a) restoring ties with Sudan by settling claims of the United States and of U.S. nationals; (b) providing meaningful compensation to ***foreign*** nationals who were victims of the Embassy Attacks; and (c) barring ***all*** terrorism lawsuits by U.S and foreign nationals. Settlement Agreement Art. II, Addendum 13. These purposes were legitimate. However, the ***classifications*** established by the Settlement Agreement and Act in no way further those legitimate purposes.

To achieve these articulated goals, the Government espoused, settled, barred and precluded ***all*** terrorism claims. Settlement Agreement Art. II(1), (3), Addendum 13. But when Congress enacted the Act, it carved out an enormous ***exception*** for thousands of of 9/11 claimants who had claims pending in the September 11 Multi-District Litigation in the Southern District of New York[4]. Thus, the so-called comprehensive settlement produced a bizarre result in which the ***exception*** allowing the 9/11 multidistrict claims to proceed against Sudan includes several times more claimants than the ***rule*** that terminated and barred terrorism cases against Sudan.

[4] According to statistics available on the website for the Judicial Panel on Multidistrict Litigation, MDL-1570 includes 342 actions that are currently pending. See https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-January-19-2022.pdf. Many of these actions involve multiple plaintiffs.

Additionally, to achieve the stated goal of settling all terrorism claims and providing meaningful compensation for ***foreign national*** claimants, the Settlement Agreement earmarked a $335 million in fund for certain identified claimants. Settlement Agreement Art. III, Annex, Addendum 14, 18-19. Some of those funds are to be used to compensate the foreign national claimants. But the Settlement Agreement also provided for payment to several U.S. national claimants as well, including many who were not victims of the Embassy Bombing or the Cole Attack. Meanwhile the Settlement Agreement completely denies any compensation to the Marks and the other Hamas Victims.

The Settlement Agreement provides no standards that determine which claimants receive payment under the Settlement Agreement and which claimants do not. But the allocation of hundreds of millions of dollars to ***all but a few U.S. claimants*** does not square with the stated purpose of providing meaningful compensation for ***foreign national*** claimants. Similarly, terminating without compensation only the claims of the few Hamas Victims while allowing thousands of other claimants to continue to pursue their claims belies the articulated purpose of terminating ***all*** terrorism claims against Sudan.

Like the Settlement Agreement, the Act distributes benefits and burdens of the settlement in an arbitrary and capricious manner. As discussed above, the Act purports to restore Sudan's foreign sovereign immunity as to ***all*** terrorism claims

and abrogates ***all*** private causes of action for claims arising out of Sudan's terrorist activities. Act § 1704, Addendum 2-3. However, the Act legislates the rule-swallowing exception that allows the 9/11 multidistrict claims to proceed. Act § 1706, Addendum 4-5.

This carve-out is claimed to be based upon the Congressional finding, quoted above, that private civil lawsuits against supporters of terrorism "serve the national security interest of the United States by deterring the sponsorship of terrorism and by advancing interests of justice, transparency, and accountability." Act § 1706(a)(1), Addendum 4. But there is no basis for an argument that the inequitable disparity between the treatment of the 9/11 Victims and that of the Hamas Victims will serve the legislative goal of deterring sponsorship of terrorism. And, in this context, there could be no greater irony than a suggestion that the disparate treatment of Hamas Victims "advance[es the] interests of justice, transparency, and accountability." On the contrary, the Settlement Agreement's and Act's disparate treatment of the Hamas Victims subverts the interests of justice, transparency, and accountability.

Despite this longstanding policy to allow civil actions against those who support international terrorism, the Settlement Agreement and Act together would arbitrarily or discriminatorily nullify ***only*** the Hamas Victims' claims against Sudan. Meanwhile the Settlement Agreement and Act together compensate all known

victims of Sudan-sponsored terrorism ***except*** the Hamas Victims. Contrary to the "interests of justice, transparency, and accountability," the Settlement Agreement and Act were negotiated secretly and exclusively in consultation with private lawyers for the favored claimants and for the benefit of their clients alone. As a result, the Settlement Agreement divides the settlement proceeds among only certain specified victims and the Act expressly provides lump sum payments for others. Act § 1705, Addendum 3-4. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, *supra*, 517 U.S. at 633.

The classifications made by the Settlement Agreement and the Act cannot be reconciled with their articulated purposes. And for this reason alone, the Settlement Agreement and Act violate the Equal Protection Clause. See e.g., *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448-449 (1985); *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-536 (1973). In *Moreno*, the Court rejected, on equal protection grounds a provision in the Food Stamp Act that denied food stamps to households that included one or more unrelated persons. 413 U.S. 528. The stated purpose of the Food Stamp Act was "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households." *Id*. at 533. The Court held: "The challenged statutory classification (households of

related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act." *Id*. Similarly, here, the Settlement Agreement and Act include articulated purposes. And the classifications (treating the Hamas Victims differently than victims of other Sudan-sponsored terrorist attacks) are clearly irrelevant to the articulated purposes.

The district court allowed Sudan and the government to offer various *ad hoc* rationalizations, each purporting to distinguish the Plaintiffs from different individual groups of claimant-beneficiaries of the Settlement Agreement. But none of those rationalizations appears in the text of the Settlement Agreement or Act. For example, the district court found that some of the claimant-beneficiaries were pursuing their claims for years. Mem. Op, JA 33. The district court contrasted those claims with the Marks' action, which the district court characterized as being filed at the "eleventh-hour." *Id*. But the Marks could not have filed their lawsuit decades earlier because the Attack for which they seek relief was carried out in 2016. Contrast the Plaintiffs in *Taitt v. Islamic Republic of Iran*, 20-cv-1557 (D.D.C.) who filed their claims in 2020 seeking compensation for injuries arising out of the Cole Attack 20 years earlier. The *Taitt* plaintiffs were compensated for the espousal of their claims without being criticized for appearing at the eleventh-hour. See Addendum 18. Unlike the *Taitt* plaintiffs who ***waited decades*** before filing their claim, the Marks timely filed their action against Sudan. Thus, the timing of the

claims cannot justify the Government's claimed distinctions between the claimants who received compensation and those who did not.

The district court found that some of the claimant-beneficiaries already held default judgments. But it acknowledged that others did not. The district court found that still other claimant-beneficiaries reached private settlements with Sudan. But the court did not address the circumstances or timing of those settlements and did not inquire as to the extent to which the government itself may have facilitated some of those private settlements in the run up to the execution of the Settlement Agreement.

The Government's after-the-fact rationalizations do not square with the stated purposes or the Settlement Agreement and Act. And the Equal Protection clause requires that "a classification must be reasonable, not arbitrary, ***and*** must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76, (1971) (emphasis added).

Here, the distinctions accepted by the district court lack any unifying theme other than that they purport to show that each group of favored claimants is "different" in some way from the Marks. More importantly, these various distinctions lack "a fair and substantial relation to the object of the legislation." *Reed*, 404 U.S. at 76. Neither the Settlement Agreement nor the Act articulate any rational

relationship between their stated purposes and the grossly disparate treatment of the Hamas Victims as compared to other similarly situated victims of Sudan-sponsored terrorism. *See Romer*, 517 U.S. at 631. No such rational relationship exists.

The Settlement Agreement and Act placed all the burdens of the settlement upon the Marks and the other Hamas Victims, whose claims were espoused and settled without recompense while the Settlement Agreement and Act distributed all the benefits among the other victims groups. The Embassy and Cole Victims, and other victims provided for under the Settlement Agreement enjoy an exclusive share in the $335 million of settlement proceeds; the 9/11 Victims enjoy the exclusive right to maintain their multidistrict lawsuits ***and*** they are provided a lump sum payment by the United States government. In the words of the Supreme Court in *Romer*, the Settlement Agreement and Act have "the peculiar property of imposing a broad and undifferentiated disability on a single ... group" and are therefore "an exceptional and ... invalid form of legislation" and executive action. 517 U.S. at 632.

In *Dames and Moore*, the Supreme Court upheld the government's settlement, in part, because Congress had enacted legislation that created a procedure for allocating settlement proceeds among the plaintiffs whose claims were espoused. 453 U.S. at 680, 686-87. Here, however, the Settlement Agreement and Act terminated the Marks' claims in exchange for compensation of ***other*** alleged victims.

This is not the procedure for allocating settlement proceeds that the Supreme Court approved in *Dames and Moore*.

B. The Settlement Agreement's and Act's Treatment of the Plaintiffs Interfered with Their Fundamental Right to Access to the Courts and is Subject to Heightened Scrutiny.

Equal protection claims are ordinarily subject to the rational basis review discussed above. However, where the disparate treatment imposes burdens upon protected classes of plaintiffs ***or*** impinge upon fundamental rights, the governmental action is subject to heightened scrutiny. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *see also*, *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982). The Supreme Court has recognized a constitutional right to access to the courts in several constitutional provisions, including, but not limited to, the Article IV privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection Clause. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (citations omitted). Thus, any governmental interference with the constitutional right of access to the courts that treats similarly situated individuals differently implicates the equal protection clause as well, and

subjects the governmental action to strict scrutiny. *See e.g.*, *Zablocki*, 434 U.S. at 388; *Griffin v. Illinois*, 351 U.S. 12 (1956).

Here, the Settlement Agreement and the Act interfere with the Plaintiffs' exercise of their fundamental right of access to the courts, while leaving that right intact for the similarly situated 9/11 Victims. Therefore, the government must demonstrate that Settlement Agreement and Act's classification has been precisely tailored to serve a compelling governmental interest. *Plyler*, 457 U.S. at 217. Because the unequal treatment of the Plaintiffs' claims under the Act is not closely tailored to effectuate only the government's articulated interests, the Act must be invalidated. Moreover, even if the right of access to the courts were not constitutionally guaranteed under these circumstances, the government could not grant the right to some litigants and capriciously or arbitrarily deny it to others without violating the Equal Protection Clause. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); c.f., *Dames & Moore v. Regan*, 453 U.S. at 691, (Powell, J., concurring) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.").

C. The District Court Should Not Have Dismissed the Case With Prejudice.

The district court noted that the Marks had not alleged in their Complaint facts supporting their Constitutional arguments and dismissed the case with prejudice.

Mem. Op., JA 28 n. 4. However, at the time the Complaint was filed, there was no reason to allege such facts; neither the Settlement Agreement nor the Act existed. To the extent the Complaint may have lacked allegations supporting the Marks' claims, the Appellants should have been afforded the opportunity to re-plead and/or to take discovery to enable the case to be decided on a proper record. *Brandon v. District of Columbia Board of Parole*, 734 F.2d 56, 60–61 (D.C. Cir. 1984). The district court erred in dismissing the case with prejudice where the Marks did not have an opportunity or a reason to plead facts supporting their Constitutional challenge to the Settlement Agreement and Act.

CONCLUSION

The Act and Settlement Agreement violate the Marks' Fifth Amendment rights to equal protection and their right to access to the courts and must be invalidated. Alternatively, the Court should reverse the final order of dismissal and allow the Plaintiffs to file an amended complaint. For each of the foregoing reasons, the final order of dismissal should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(A), (B), and (C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionately spaced font and contains 6,388 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

June 21, 2022 /s/ Asher Perlin

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on June 21, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

June 21, 2022 /s/Asher Perlin