NO. 14-770

In the

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CURRENT UNITED STATES SENATORS SHELDON WHITEHOUSE, LINDSEY O. GRAHAM, TED CRUZ, AND CHRISTOPHER A. COONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This brief *amicus curiae* is respectfully submitted by Senator Sheldon Whitehouse (D-RI), Senator Lindsey Graham (R-SC), Senator Ted Cruz (R-TX), and Senator Christopher A. Coons (D-DE).

Amici completely and enthusiastically support the brief submitted by the full Senate. They submit this additional *amicus curiae* brief as members of the Legislative Branch responsible, through specific Judiciary Committee responsibilities, for overseeing Congress's actions in this area. Specifically, *amici* have been an active part of the effort to seek justice for United States nationals against state sponsors of terrorism in providing both causes of action for these victims and procedures for collection of damages awards in federal courts. *Amici* have participated in hearings and briefings on threats posed by state sponsors of terrorism. To inform their deliberations on this challenging subject, they have elicited a wide range of views from academic experts, concerned citizens and organizations, and members of the executive branch, including officials from the Office of the

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party or any other person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' consents are on file or are being lodged herewith.

President of the United States and the Departments of Justice, State, Defense, Treasury, Commerce, and Homeland Security. *Amici* regard the legislation at issue here as a vital step in the ongoing struggle to hold state sponsors of terrorism accountable.

Members of the United States Senate are particularly well qualified to inform this Court about the exercise of Congress's Article I power to promote accountability for state sponsors of terrorism and the intent behind legislation enacted to promote such accountability. A ruling against the respondents in this case could call into question other important foreign affairs legislation, including other portions of Congress's carefully calibrated exceptions to the Foreign Sovereign Immunities Act. *Amici* believe that injecting additional uncertainty into the already turbulent atmosphere of foreign affairs would impede the United States' ability to protect its own nationals in countries around the globe.

SUMMARY OF ARGUMENT

Few matters that elicit legislators' attention are more important than coping with the threat of transnational terrorism. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (describing combating terrorism as "an urgent objective of the highest order"). The legislation at issue in this case

provides new tools to courts to hold state sponsors of terrorism accountable. Those tools change the law governing traditionally modifiable remedies such as attachment and execution on judgments. *See* 22 U.S.C. § 8772 (authorizing attachment and execution regarding U.S. assets in which Islamic Republic had beneficial interest). In enacting those changes, Congress did not interfere impermissibly with final judgments on the merits; rather, Congress sought only to ensure that victims of terrorism can recover on the judgments they obtain.

The legislation at issue here is not Congress's first attempt to hold state sponsors of terrorism accountable. Congress has over time constructed an elaborate latticework of legislation to accomplish this result. This legislation, like Congress's other enactments in this challenging arena, aims to achieve two results: bring transparency to opaque financial dealings of state sponsors of terrorism that such states use to hide their assets, and ensure that those assets are available to satisfy judgments obtained by victims of terrorism.

Congress should receive deference in addressing this complex, dynamic aspect of U.S. foreign affairs. As this Court has noted, "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to

obtain and the impact of certain conduct difficult to assess." *Humanitarian Law Project*, 561 U.S. at 34. Congress's efforts to navigate these tempestuous waters are "entitled to deference." *Id*. at 33.

Legislators recognize that "[c]utting off the financing of terrorist organizations is a critically important component of the war against terror." *See Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 445 (E.D.N.Y. 2008), citing Senator Evan Bayh, *The Role of Charities and NGOs in the Financing of Terrorist Activities*, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on International Trade and Finance, Aug. 1, 2003, at 1-2. Congress has faced particularly onerous challenges in holding state sponsors of terrorism accountable. The financial transactions used by state sponsors are often opaque. As a distinguished sponsor of legislation to promote accountability observed, "[C]urrent law permits … terrorist states to hide their assets from the victims who have successful judgments against them." 153 Cong. Rec. S10793 (Aug. 2, 2007) (Sen. Lautenberg).

Both terrorist groups and their state enablers often engage in deception to keep the United States and its allies off-balance. *See Humanitarian Law Project*, 561 U.S. at 31 (citing study finding that "terrorist groups systematically conceal their activities behind charitable, social, and political

fronts"). For over thirty years, Iran has endeavored to conceal its role in the 1983 Beirut Marine barracks bombing. *See Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 8 (D.D.C. 2005) (finding that Iran used its secret police as "vital conduit for Iran's provision of funds to Hezbollah, providing explosives … and … exercising near-complete operational control" in operations such as 1983 Beirut attack). Iran and other state sponsors of terrorism also play a shell game with their U.S. assets, attempting to conceal them by arranging for others to hold title while Iran retains a beneficial interest. *See* 153 Cong. Rec. S10793 (Aug. 2, 2007) (Sen. Lautenberg) (explaining that law changed by instant legislation allowed state sponsors to conceal ownership by delegating "day-to-day managerial control" to others while continuing to reap financial benefits).

Congress has acted repeatedly to reckon with the deceptive tactics of the Iranian regime. In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress carved out an exception to sovereign immunity for designated state sponsors of terrorism who commit terrorist acts or provide material support and "resources" to an individual or entity that commits a terrorist act that "results in the death or personal injury of a United States citizen." *See* Pub. L. 104-132, Title II, § 221(a) (April 24, 1996), 110 Stat. 1214, codified at

28 U.S.C. § 1605 (West Supp. 1997). This statute was followed by other legislation that addressed new or lingering gaps in the fabric of accountability. *See, e.g.,* National Defense Authorization Act for Fiscal Year 2008 (2008 NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, adding new 28 U.S.C. § 1605A (providing express right of action against state sponsors of terrorism). The legislation at issue here adjusted the law governing available remedies such as attachment. In the statute, Congress identified certain lucrative properties held by others on Iran's behalf as subject to attachment or execution by victims of terrorism who had obtained judgments against Iran because of that country's track record of sponsorship of terrorism. *See* Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701 *et seq*.

In acting to provide transparency and accountability regarding state sponsors of terrorism, Congress has not only assisted terrorism's victims; it has also furthered international cooperation in the curbing of financial support for terrorism. *See Humanitarian Law Project*, 561 U.S. at 32 (noting U.S. interest in "cooperative efforts between nations to prevent terrorist attacks"); *cf. Strauss*, 249 F.R.D. at 452 (noting that U.S., along with France and other nations, is a signatory to the United Nations International Convention for the Suppression of the Financing of Terrorism, which requires cooperation

in criminal matters, and that civil actions to enhance financial transparency and compensate victims are "not inconsistent with … interests in international cooperation to detect and fight … the financing of global terror").

Congress's changes to law governing inherently modifiable remedies such as attachment and execution do not impermissibly interfere with final judgments on the merits. Courts have traditionally viewed remedies like attachment and execution as "collateral" to the merits, designed to ensure that adjudication on the merits was not an "empty rite." *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 688-89 (1950). Changes to the operation of such "continuing," "executory" remedies are permissible changes made by a "competent authority," not impermissible trenching on final judgments. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1856). That analysis applies even when legislation addresses a specific lawsuit. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 232 (1995) (explaining legislation at issue in *Pennsylvania & Wheeling*, which curbed ongoing equitable relief in specific litigation, as merely modifying "the prospective effect of injunctions"). The separation of powers does not preclude Congress's calibration of these remedies to promote the accountability of state sponsors of terrorism.

ARGUMENT

I. IN CONFERRING AUTHORITY ON COURTS TO ATTACH ASSETS OF A STATE SPONSOR OF TERRORISM, CONGRESS IS ENTITLED TO DEFERENCE.

This Court has repeatedly accorded deference to Congress's considered judgments in the fluid realm of foreign affairs. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court acknowledged Congress's need to act with imperfect information in the global arena. *Id*. at 34 (noting that "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess"). In this case as in the case law, Congress's evaluation of inherently imperfect information from overseas "is entitled to deference." *Id*. at 33.

Deference is particularly apt when Congress seeks to curb the threat posed by state sponsors of international terrorism. See *Farrakhan v. Reagan*, 669 F. Supp. 506, 510 (D.D.C. 1987), *aff'd without opinion*, 851 F.2d 1500 (D.C. Cir. 1988) (in decision upholding bar under International Emergency Economic Powers Act on provision of money to agent

of Libyan regime, recognizing "compelling interest in national security and the end of Libya's alleged participation in 'state-sponsored' terrorism"). A deferential posture helps Congress legislate confidently in this murky domain.

This deferential stance is rooted in the Framers' understanding of the political branches' responsibility and expertise in matters involving foreign affairs. The Preamble to the Constitution famously declares that the framework outlined therein was necessary to "provide for the common defence." In Federalist No. 41, Madison affirmed that "security against foreign danger is … an avowed and essential object" of American constitutional governance. *See Federalist No. 41*, at 256 (Clinton Rossiter ed., 1961); *see also Humanitarian Law Project*, 561 U.S. at 40 (citing these sources). Madison also noted the risks that arise because the U.S. cannot "chain the ambition or set bounds to the exertions of all other nations." *Federalist No. 41*, at 257.

Realization of the Framers' goals requires that the "powers requisite for attaining [national security] must be *effectually* confided" to the federal government. *Federalist No. 41*, at 256 (emphasis added). Without a measure of deference that ensured the agility of the political branches, the gravity and frequency of foreign challenges would

have overwhelmed the new republic. Acknowledging this practical reality, Hamilton observed that, "*it is impossible to foresee or to define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them*." *Federalist No. 23*, at 153 (emphasis in original); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962) (in analysis of precedent on Congress's power to establish non-Article III tribunals, Justice Harlan concluded that Chief Justice Marshall was "conscious . . . of his responsibility to see the Constitution *work*" and therefore read Article III to provide the "flexibility" necessary to deal with the special challenges posed by U.S. territories abroad) (emphasis added).

This Court has not hesitated to implement the Framers' vision. For the seventy years since the end of World War II, this Court has stressed the need for deference to Congress in meeting external threats. In upholding a ban on U.S. persons' travel to Communist Cuba, the Court observed that, "because of the changeable and explosive nature of contemporary international relations, Congress …

must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Courts are ill-suited to assessing the myriad factors that Congress considers in this sphere. As this Court has admitted, Congress has a significant institutional advantage over the courts in assessing the need for action. *Humanitarian Law Project*, 561 U.S. at 34 (explaining that, "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked'") (citation omitted).

Congress has a particular advantage over courts in crafting curbs to financial support for regimes that foster terrorism and other unlawful violence. In *Regan v. Wald*, 468 U.S. 222, 243 (1984), the Court concluded that Congress could limit travel to Cuba to "curtail the flow of hard currency" that fueled the regime's campaign of violence and subversion abroad. In *Humanitarian Law Project*, this Court expressly noted that tracing the serpentine movements of terrorist funding is an accountant's nightmare. *See Humanitarian Law Project*, 561 U.S. at 29 (voicing doubt that "foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism"); *see also Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) ("terrorist organizations can hardly be

counted on to keep careful bookkeeping records"); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) ("terrorist organizations do not maintain open books"); *cf. United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (citing opaque terrorist accounting methods in holding that proof of specific intent to aid violence is not required for criminal conviction based on defendant's financial contribution to Hezbollah).

The concealment of Bank Markazi's assets in the United States was illuminated by the sanctions issued by the Office of Foreign Assets Control against Clearstream Banking, S.A. In the Clearstream Banking, S.A. case, Bank Markazi manipulated the American banking system using Clearstream as an intermediary to maintain nearly $3 billion in securities for the ultimate beneficial ownership of Bank Markazi in violation of the sanctions regime initiated against Iran and Bank Markazi. *See* "Enforcement Information for January 23, 2014," U.S. Dep't of Treasury, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf (last accessed Dec. 17, 2015). Through various transactions, Clearstream enabled Bank Markazi's interest in the securities to be "buried one layer deeper in the custodial chain." *Id.* The accounts maintained by Clearstream for the ultimate benefit

of Bank Markazi in part drove the enactment of the legislation at issue in this case.

Because of the difficulty of monitoring financial and in-kind services to terrorist groups, this Court has wisely deferred to Congress's judgment that, "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." See AEDPA § 301(a)(7).[2]

The same calculus should apply here. Congress has repeatedly noted that state sponsors of terrorism seek to hide both the money trail that leads to violence and the assets that fuel this aid. *See* 153 Cong. Rec. S10793 (Aug. 2, 2007) (Sen. Lautenberg) (noting that bill that ultimately became law providing right of action for U.S. victims suing state sponsors of terrorism authorized the "seizure

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[2] Financial assistance to terrorist groups has also elicited international concern. *See* U.N. Security Council Resolution 1373, U.N. Doc. S/RES/1373, p. 1(d) (Sept. 28, 2001) (declaring that, "states are required to prohibit anyone within their personal or territorial jurisdiction from making any funds, resources or financial services available to persons who commit terrorist acts or to entities controlled by them"); Financial Action Task Force on Money Laundering, Special Recommendations on Terrorist Financing 2 (2008), http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf (last visited Dec. 22, 2015) (noting importance of international cooperation).

of hidden commercial assets belonging to the terrorist state"). Facilitating accountability in the face of such subterfuge requires vigilance and constant upgrades in the tools for the job. A measure of deference is necessary for Congress to continue this crucial work.

II. CONGRESS, THE EXECUTIVE, AND THE COURTS HAVE ALL DETERMINED THAT IRAN WAS RESPONSIBLE FOR THE TERRORIST ATTACKS THAT RESULTED IN LIABILITY IN THIS CASE.

In addition to providing deference to Congress in its attempts to facilitate state-sponsor accountability through legislation, this Court must also take note of the fact that Congress speaks on behalf of its stakeholders – the American people. The victims of the state-sponsored terrorist acts at issue in this case are United States nationals who were killed or injured in terrorist attacks ranging from the 1983 bombing of the U.S. Marine Barracks in Beirut, Lebanon to the 1996 Khobar Towers bombing in Dhahran, Saudi Arabia to the August 2001 suicide bombing of a Sbarro Pizzeria in Jerusalem, Israel and beyond. In each of these instances, the federal courts have determined that Iran was responsible for these attacks which led to

death or injury to literally hundreds of United States nationals.

In a case arising out of the bombing of the 1983 Marine Barracks bombing, the district court described the attack:

> This action arises from the most deadly state-sponsored terrorist attack against American citizens prior to September 11, 2001 – the October 23, 1983 Marine barracks bombing in Beirut, Lebanon, during which 241 American servicemen[3] acting as part of a multinational U.N.-authorized peacekeeping force were murdered in their sleep by a suicide bomber. Twenty-eight year-old Petty Officer Robert S. Holland, son of Charles and Rosemary Holland, brother of Patrick Holland, husband of Donna Marie Holland, and father of James Robert and Chad Phillip Holland …, was one of these unfortunate victims, killed while serving his country and

[3] The 241 killed servicemen were residents of 34 different states and Puerto Rico including residents of Rhode Island, South Carolina, and Texas. *See* "Find Beirut Barracks Bombing Military Casualties (U.S.)," http://peacetime-casualties.mooseroots.com/d/a/Beirut-Barracks-Bombing (last visited Dec. 4, 2015).

> upholding the greater cause of regional peace and stability. Due to the nature and force of the explosion, the Holland family suffered through two more agonizing weeks of waiting until Robert Holland was conclusively identified as "killed in action."

Holland v. Islamic Republic of Iran, 496 F. Supp.2d 1, 4 (D.D.C. 2005). The district court's findings of fact in *Holland* included findings that: "the government of Iran framed the primary objective of Hezbollah: to engage in terrorist activities in furtherance of the transformation of Lebanon into an Islamic theocracy modeled after Iran" (496 F. Supp.2d at 8); "the formation and emergence of Hezbollah as a major terrorist organization was due to the government of Iran" (*Id.*); "almost since its founding, the Iranian government has provided Hezbollah with roughly $100 million per annum in financing, and has also provided it with arms, training, and strategic planning in its operations against the United States and Israel" (*Id.*); the Iranian Ministry of Information and Security "was a vital conduit for Iran's provision of funds to Hezbollah, providing explosives to Hezbollah, and – at all times relevant to these proceedings – exercising near-complete operational control over Hezbollah" (*Id.*); "the government of Iran actually purchased the explosive materials used in the

operation from the government of Bulgaria and then provided the explosives to Hezbollah" (*Id.* at 9); the Iranian government and its agencies "provided complete financial support for the operation, going so far as to use the Iranian embassy in Damascus to cash various checks to provide funding for Hezbollah" (*Id.*); and "Iran provided Hezbollah with virtually all of its operational training" (*Id.*).[4]

In short, the Iranian role in the 1983 Marine Barracks bombing was undeniable and unmistakable. Congressional action on behalf of the 241 U.S. servicemen killed in the bombing to obtain accountability against Iran for its decisive role in the bombing was within its constitutional mandate. The victims of the 1983 Marine Barracks bombing who have obtained judgments against Iran are among the Respondents before the Court in this case.

Other Respondents before this Court are the victims of the June 25, 1996 bombing of the Khobar Towers complex in Dhahran, Saudi Arabia. The explosion resulted in the death of 19 U.S. Air Force

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[4] *Accord Peterson v. Islamic Republic of Iran*, 264 F. Supp.2d 46, 58 (D.D.C. 2003) ("Hezbollah and its agents received massive material and technical support from the Iranian government. The sophistication demonstrated [in the attack on the Marine Barracks] and the devastating effect of the detonation … [indicate] that it is highly unlikely that this attack could have resulted in such loss of life without the assistance of regular military forces, such as those of Iran.").

personnel and injury to hundreds more. *See Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp.2d 229, 252 (D.D.C. 2006). The findings of fact issued by the district judge in *Heiser* included the following:

- Iranian Revolutionary Guard Corps ("IRGC") Brigadier General Ahmed Sharifi "planned the operation and recruited individuals for the operation at the Iranian embassy in Damascus, Syria." 466 F. Supp.2d at 252.

- The bomb used in the attack was assembled at a terrorist base in the Bekaa Valley in Lebanon that was jointly operated by the IRGS and Hezbollah. *Id.*

- "The terrorist attack on the Khobar Towers was approved by Ayatollah Khamenei, the Supreme leader of Iran at the time. It was also approved and supported by the Iranian Minister of Intelligence and Security … at the time, Ali Fallahian, who was involved in providing intelligence security support for the operation. Fallahian's representative in Damascus, a man named Nurani, also provided support for the operation." *Id.*

- Individuals arrested following the bombing who admitted complicity in the attack "stated that IRGC directed, assisted, and oversaw the

> surveillance of the Khobar Towers site, and that these surveillance reports were sent to IRGC officials for their review." *Id.*

The Respondents in this case also include the family of Judith Greenbaum who was killed when a Hamas suicide bomber entered a Sbarro Pizzeria in Jerusalem, Israel on August 9, 2001 and detonated the bomb that was enclosed in the guitar that he was carrying. The findings of fact in *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp.2d 90 (D.D.C. 2006), include reference to the 15 deaths and over 130 injuries caused in this bombing. 451 F. Supp.2d at 96. The findings also stated that "Iran actively provided material support to Hamas during the period immediately preceding the attack." *Id.* at 97. Mrs. Greenbaum was a resident of New Jersey who was planning to return home only days after the bombing. *Id.* at 96.

The examples of the 1983 Marine Barracks bombing, the 1996 Khobar Towers bombing, and the 2001 Sbarro Pizzeria bombing demonstrate the level of complicity of Iran in these acts of terrorism against United States nationals – both military personnel and American civilians – which prompted action by the United States Congress to (1) create a cause of action against state sponsors of terrorism in 1996; and (2) continue to amend those causes of action to allow the victims to obtain compensation –

both compensatory and punitive – against the actual state sponsors and to create mechanisms for the victims to attach assets of the state sponsors that might be used to pay these damages awards.

III. AT THE FOREFRONT OF COMBATTING TERRORIST FINANCING, CONGRESS HAS ABROGATED SOVEREIGN IMMUNITY FOR STATE SPONSORS OF TERRORISM AND CREATED EXPRESS CAUSES OF ACTION AND REMEDIES AGAINST THEM.

To hold state sponsors of terrorism accountable and combat the threat that these states posed to United States nationals abroad, Congress abrogated the sovereign immunity of state sponsors such as Iran. That legislative abrogation entailed a cause of action for terrorist attacks in which United States nationals were killed or injured. The victims of these attacks or their survivors could seek redress in federal court against specific foreign states previously designated by the Executive Branch as sponsors of terrorism. The "terrorism exception" to foreign sovereign immunity has since been expanded by Congress to fully effectuate the congressional goal of holding such state sponsors of terrorism responsible *financially* for the casualties they have directly and indirectly inflicted upon United States nationals such as those in the 1983

Marine Barracks bombing, the 1996 Khobar Towers bombing, and the 2001 Jerusalem Sbarro bombing. The ability to attach assets and collect upon judgments against these state sponsors of terrorism led to the passage of the statute at issue in this case in an effort to permit actual recovery of damages for United States national victims of state-sponsored terrorism committed by the Islamic Republic of Iran.

A. The "Terrorism Exception" to Foreign Sovereign Immunity Opened Litigation Against State Sponsors of Terrorism and Their Agencies and Instrumentalities.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. *See* AEDPA, Pub. L. 104-132 (Apr. 24, 1996), 110 Stat. 1214. Section 221 of the AEDPA enacted 28 U.S.C. § 1605(a)(7) which abrogated foreign sovereign immunity for states designated as state sponsors 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" in cases "in which money damages are sought against a foreign state of 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 (as defined in section 2339A of title 18) for such an act if such act of provision of material support is 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." AEDPA § 221(a)(1)(C), 110 Stat. at 1241.

AEDPA was enacted, in part, to "deter terrorism." 110 Stat. at 1214. The "terrorism exception," as 28 U.S.C. § 1605(a)(7) came to be known, was enacted under the heading of "Jurisdiction for Lawsuits Against Terrorist States." 110 Stat. at 1241. The congressional purpose for this legislation was set forth in the conference committee report issued on April 15, 1996 which stated that Section 1605(a)(7) "permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals…." "Terrorism Prevention Act," 104 H. Rpt. 518 (Apr. 15, 1996). A prior House report on the legislation stated that Section 1605(a)(7) would "amend the Foreign Sovereign Immunities Act so as to grant federal court jurisdiction over cases brought by U.S. citizens seeking damages against a foreign state for certain acts." "Comprehensive Antiterrorism Act of 1995," 104 H. Rpt. 383 (Dec. 5, 1995).

The legislative history demonstrated the congressional intent to create federal jurisdiction for suits against the actual state sponsors of terrorism; however, the courts determined that it was unclear whether Section 1605(a)(7) created a federal cause of action against foreign state sponsors of terrorism. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002); *see also Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 564 (7th Cir. 2012). Nevertheless, not long after the enactment of AEDPA, a second statutory provision was enacted.

B. The Flatow Amendment Tries, But Fails, to Create a Federal Cause of Action Against State Sponsors of Terrorism.

On September 30, 1996, a provision subsequently known as the "Flatow Amendment" was enacted as part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. 104-208, § 589, 110 Stat. 3009-172 (Sept. 30, 1996). The Flatow Amendment states:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 while

> acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

The congressional report on the legislation makes clear that the language of the Flatow Amendment was meant to "expand[] the scope of monetary damage awards available to American victims of international terrorism." *See* 104 H. Rpt. 863, 987 (1996). While Congress enacted the Flatow Amendment to create a federal cause of action against foreign state sponsors of terrorism, the D.C. Circuit nevertheless held that, based on strict statutory interpretation, the Flatow Amendment "does not authorize a cause of action against *foreign states*." *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004) (emphasis added); *see also Kilburn v. Socialist People's Libyan*

Arab Jamahiriya, 376 F.3d 1123, 1133 (D.C. Cir. 2004); *Acree v. Republic of Iraq*, 370 F.3d 41, 43 (D.C. Cir. 2004).

While it took nearly eight years for the Flatow Amendment to be interpreted as not having provided a cause of action against the actual foreign state sponsors of terrorism, Congress passed additional legislation in the intervening time period to permit recovery on judgments obtained against these state sponsors.

C. Congress Provided a Payment Mechanism for Judgments Against Iran as Far Back as 2000.

On October 28, 2000, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000). Section 2002 of this law provided for "Payment of Certain Anti-Terrorism Judgments" and specifically judgments against Iran under the terrorism exception. In the House Report on the "Justice of Victims of Terrorism Act" – which was subsequently included in part within Section 2002 – issued on July 13, 2000, Congress set forth numerous examples of Iranian state-supported terrorism against United States nationals resulting in large damages awards in federal courts. *See* "Justice of Victims of Terrorism Act," 106 H. Rpt. 733 (July 13, 2000). The

report found that "[t]he President's continued use of his waiver power has frustrated the legitimate rights of victims of terrorism, and thus this legislation is required. While still allowing the President to block the attachment of embassies and necessary operating assets, H.R. 3485 would amend the law to specifically deny blockage of attachment of proceeds from any property which has been used for any non-diplomatic purpose or of proceeds from any asset which is sold or transferred for value to a third party." *Id.* An attachment to the report further explicitly stated, "H.R. 3485 would enable victims of Iranian terrorism who have won judgments against Iran in U.S. courts to collect monetary damages from that country primarily by obtaining certain funds currently held by the U.S. government." *Id.*

Following the terrorist attacks of September 11, 2001, Congress passed the Terrorism Risk Insurance Act of 2002. Pub. L. 107-297, 116 Stat. 2322 (Nov. 26, 2002). Section 201 of the law – titled "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism" – amended the Victims of Trafficking and Violence Protection Act of 2000 provisions vis-à-vis Iran. The law states:

> Notwithstanding any other provision of law, and except as provided in

> subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

116 Stat. at 2337 (§ 201(a)). In enacting this legislation, Congress made clear that its goal was to permit the enforcement of judgments against, *inter alia*, Iran. *See* "Terrorism Risk Insurance Act of 2002," 107 H. Rpt. 779 (Nov. 13, 2002) ("The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced.")

Based on the pattern of legislation, it is clear that the intent of Congress has been to permit United States national victims of state-sponsored terrorism to bring suit against those state sponsors in federal courts and to permit judgments awarded in those cases to be enforced against the state sponsors.

D. To Clarify the Right to a Cause of Action Against State Sponsors of Terrorism, Congress Voiced this Intention in 2008.

Following the D.C. Circuit's decisions in *Cicippio-Puleo* and other cases determining that neither the terrorism exception nor the Flatow Amendment provided a private cause of action against foreign state sponsors of terrorism, Congress acted in January 2008 to clarify its intention that foreign state sponsors of terrorism *are* subject to a specific cause of action in federal courts with punitive damages available for engaging in acts resulting in injury to United States nationals. Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3 (Jan. 28, 2008), created an entirely new statutory provision, 28 U.S.C. § 1605A. *See* 122 Stat. at 338. As the Seventh Circuit concluded, "the *Cicippio-Puleo* decision frustrated the goal of deterring state sponsorship of terrorism through massive damages

awards in civil suits." *Leibovitch*, 697 F.3d at 567. Section 1605A both created an explicit cause of action against the foreign states themselves while also providing for punitive damages to be awarded against the state sponsors – something that was previously prohibited by statute. *See* 28 U.S.C. § 1605A.

New Jersey Senator Frank Lautenberg shone a light on these provisions by stating that the new legislation would "allow victims of state sponsored terrorism to have their day in court" and deprive state sponsors of terrorism of "the funds that they use to strike at innocent victims." 153 Cong. Rec. S10793 (daily ed. Aug. 2, 2007). He added that the legislation would "allow for the seizure of hidden commercial assets belonging to the terrorist state." *Id.* Upon the passage of the bill in Congress, Senator Lautenberg made clear the original intent of Congress in 1996 when the AEDPA was passed by saying, "Congress's original intent behind the 1996 legislation has been muddied by numerous court decisions…. [Based on these decisions], judges have been prevented from applying a uniform damages standard to all victims in a single case because a victim's right to pursue an action against a foreign government depends upon State law. My provision [§ 1605A] in this bill fixes this problem by reaffirming the private right of action under the Flatow Amendment against the foreign state

sponsors of terrorism themselves." 154 Cong. Rec. S54 (daily ed. Jan. 22, 2008).

The intent of Congress is clear: state sponsors should be held accountable for terrorist acts against United States nationals and should be deterred from this action by having to pay sizeable damages awards based on litigation arising out of those terrorist acts.

E. Congress Has Been Active in Seeking Ways to Permit Damages Recovery for the Victims of State-Sponsored Terrorism.

Congressional intent to punish and deter state-sponsored terrorism has taken many forms over the past 20 years in terms of permitting causes of action and establishing procedures for collecting on monetary awards against state sponsors of terrorism, including Iran. The Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214 (Aug. 10, 2012), simply furthered the intent of Congress to deter Iran from engaging in state sponsorship of terrorism.

This legislation permitted the attachment of Iranian assets held by the Central Bank of Iran (Bank Markazi) with the conditions that the assets must be: (a) held in the United States for a foreign securities intermediary doing business in the United

States; (b) blocked by the Executive Branch pursuant to executive powers and "identified in and the subject of proceedings in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order"; and (c) "equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. § 8772(a)(1)(A)-(C). To permit such attachment, the court must determine that "Iran holds equitable title to, or the beneficial interest in, the assets" related to the Peterson restraining notices and that "no other person possesses a constitutionally protected interest in" these assets "under the Fifth Amendment to the Constitution of the United States." 22 U.S.C. § 8772(a)(2).

IV. CONGRESS'S IDENTIFICATION OF PROPERTY OF A STATE SPONSOR OF TERRORISM AS SUITABLE FOR ATTACHMENT AND EXECUTION DID NOT INTERFERE WITH A FINAL JUDGMENT, BUT MERELY CHANGED THE LAW GOVERNING A COLLATERAL PROCEEDING.

To effectively promote accountability for state sponsors of terrorism, Congress must ensure that property in the U.S. owned by state sponsors is available to satisfy judgments obtained by the victims of terrorist attacks. The legislation here furthered this goal with guidance to federal courts on the collateral remedies of attachment and execution, which ensure that judgment debtors do not frustrate justice. *See Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 688-89 (1950) (attachment is "collateral" remedy to ensure that subsequent adjudication is not an "empty rite"). Congress's change in the contours of these collateral remedies was a permissible change in governing law, *see Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438-39 (1992), not an impermissible interference with a final judgment.

While Congress cannot alter a final judgment on the merits, *Plaut v. Spendthrift Farm*, 514 U.S.

211, 228 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), Congress is free to change the applicable law that governs a dispute. *See Robertson*, 503 U.S. at 438-39. The case law provides clear examples of the distinction between alteration of a final judgment and mere change in applicable law. In *Plaut*, the Court struck down a law that both changed the statute of limitations for certain securities actions and directed the federal courts to reinstate actions that the courts had already dismissed as time-barred. The Court viewed the second provision as an echo of wholesale state legislative attempts to undermine final judicial judgments during the Articles of Confederation period. *Plaut*, 514 U.S. at 221-22. Justice Scalia, writing for the Court, noted that the Framers had drafted Article III to ward off such encroachments on judicial independence. *See id.* at 221.

In contrast, the *Robertson* Court upheld a law providing that agency management of certain federal lands known to contain spotted owls automatically met federal statutory requirements, even if earlier legislation had imposed a more demanding test for compliance. *See Robertson*, 503 U.S. at 432-33. The Court found that the new statute merely "compelled changes in law, not findings or results under old law." *Id.* at 438. The new statute thus did not undermine judicial independence.

Moreover, to exercise its Article I powers precisely, Congress can tailor statutory text to particular litigation. *Id*. at 440. The statute upheld by the Court in *Robertson* referred to specific lawsuits. The *Robertson* Court found that Congress was fully within its authority in "modifying the provisions at issue" in those pending cases. *Id.*

This Court has placed Congress's modification of the contours of ongoing remedies squarely in the category of permissible changes in governing law. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), this Court found that the separation of powers did not bar a statute finding that a bridge at issue in litigation did not obstruct navigation. The legislation enacted by Congress was specifically directed at a court order to abate the bridge and changed the law applicable to this ongoing remedy. *Id*. at 431. Rather than view the statute as an interference with a final judgment, the Court found that the legislation merely entailed the modification of a right by a "competent authority." *Id*. at 431-32. The *Wheeling & Belmont* Court classified the abatement as a decree that was purely "executory" in nature and "continuing," i.e., inherently subject to modification due to findings by the court or other changed circumstances. *Id*. at 431. Based on this analysis, the Court in *Plaut* distinguished the legislation at issue in *Wheeling & Belmont* as a

statute that merely "altered the prospective effect of injunctions," much as Congress modified the environmental law provisions that governed pending cases in *Robertson*. *Plaut*, 514 U.S. at 232.

Just as an injunction is a modifiable decree separable from a final judgment on the merits, attachment and post-judgment execution are collateral remedies that courts modify as needed to ensure that judgment debtors do not move assets to defeat a pending or final judgment. *See 13 Moore's Federal Practice* § 64.13(2)(b) (2015) (describing attachment as "the seizure of defendant's property before judgment … designed to provide plaintiff with security that the judgment will ultimately be collectible"); Fed. R. Civ. P. 69(a)(1) (2015) ("money judgment is enforced by a writ of execution"); *Ross v. Peck Iron & Metal Co.*, 264 F.2d 262, 268 (4th Cir. 1959) ("the chief purpose of attachment proceedings is to secure a contingent lien on the defendant's property until the plaintiff can … obtain a judgment and have such property applied to [the judgment's] satisfaction").

The remedies of attachment and execution at issue here are inherently subject to modification due to changed circumstances. Consider Rule 69(a)(2) of the Federal Rules of Civil Procedure, which provides that, "In aid of the judgment or execution, the judgment creditor … may obtain discovery from any

person, including the judgment debtor." Fed. R. Civ. P. 69(a)(2) (2015). Under the rule, a judgment creditor's recourse is not limited to property of the judgment debtor that is known to the creditor at the time of the final judgment. The judgment creditor may use discovery to identify other property for attachment or execution. *Cf. Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 230-34 (4th Cir. 2004) (discussing typical process under state law governing execution of judgments). Armed with the fruits of discovery, the judgment creditor can seek modification of either attachment or execution. Indeed, plaintiffs suing sovereign states under the Foreign Sovereign Immunities Act have regularly obtained modification of attachment decrees upon a showing of "an intervening change in circumstances." *See NML Capital, Ltd. v. Banco Cent. De La Republica Argentina*, 652 F.3d 172, 185 (2d Cir. 2011) (citation omitted).

However, adjudication of that request for modification requires additional steps, whether a creditor identifies the property through discovery or Congress designates certain property as subject to attachment or execution. *See Hegna*, 376 F.3d at 234 (observing that, even once property is identified, the "eventual sale of property in satisfaction of the judgment is by no means assured"). A judgment creditor must make further showings to the court, including demonstrating that his or her interest is

superior to that of other creditors. *Id.* In sum, Congress's *authorization* of attachment or execution on particular property is but a step in the process, which requires further showings by the judgment creditor and findings by the court. The further steps required for the actual satisfaction of a judgment demonstrate that Congress's authorization does not interfere with final judgments, but merely changes the law governing such judgments' execution.

This Court, citing the need for deference to the political branches in foreign affairs, has upheld far more sweeping relief than the collateral changes at issue here. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld the President's unilateral settlement of state law claims against the Islamic Republic of Iran. In upholding the President's action, the Court indicated that through long-standing practice, Congress had acquiesced in the practice of executive claims settlement. *Id.* at 678-82. Under accepted separation of powers principles, *see Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), actions authorized by Congress elicit even greater deference than executive actions taken with legislative acquiescence. Here, Congress and the President have spoken with one voice on a weighty foreign affairs issue. If Congress could provide for the settlement of claims against another sovereign state, it can surely change the law

governing ancillary remedies available to claims-holders. Far from threatening judicial authority, Congress has merely strengthened the courts' ability to provide justice.

V. THIS COURT CAN CONSTRUE SECTION 8772 TO AVOID ANY CONSTITUTIONAL ISSUES.

Courts interpret statutes to avoid serious constitutional questions. *See Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); *cf. Jones v. United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," this Court has a "duty … to adopt the latter"). The Petitioner maintains that the "rules of construction" in Section 8772(c)(1) limiting Section 8772's availability in "any other action" mean that only parties to this case can benefit from the statute's substantive terms. This reading could raise constitutional questions. However, read in context, the statute potentially benefits other parties. Under the avoidance doctrine, this Court should reject Petitioner's narrow reading and interpret Section 8772 as having broader applicability.

Section 8772(c)(1) is expressly labeled a "rule of construction" directing only how the statute is to be construed. While Petitioner argues that the "rules of construction" in Section 8772(c)(1) limit the statute to this case only, "rules of construction" apply only where there is some ambiguity. When a statute is "unambiguous," the "judicial inquiry is complete" and no other "canon or interpretative tool"—that is, no rule of construction—is required. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

That is the case here. Rather than providing that Section 8772 applies only to a single case, Section 8772(c)(1) simply states that the statute should not be "construed" to "affect" the "availability, or lack thereof," of attachment in any other litigation. Another subsection of the statute plainly permits relief for parties besides those in this case, thereby obviating the need to apply Section 8772(c)(1)'s "rules of construction." That saving subsection is Section 8772(b), which allows execution and attachment of assets "identified" in a particular lawsuit. This subsection unambiguously benefits parties with *separate* judgments against Iran based on that country's sponsorship of terrorism. These parties, in addition to parties in the instant case, are free to seek execution and attachment of the identified assets. In fact, the plaintiffs in another such case, *Wultz v. Islamic*

Republic of Iran, 864 F. Supp. 2d 24 (D.D.C. 2012), intervened in this case after enactment of Section 8772 to seek execution on a judgment against Iran arising out of a suicide bombing in Israel in 2006. *See* D.C. Dkt. 329, 330 & Ex. A; D.C. Dkt. 398, at 5-13; Pet. App. 18a-19a. This reading avoids any constitutional problem posed by a statute that only benefits parties to a single case.

Moreover, reading the statute to benefit other parties coincides with congressional intent that Iran's assets be attachable so that "Iran is held accountable for paying the judgments" related to acts of terror. 22 U.S.C. § 8772(a)(2). It makes sense that Congress would draft the statute to be generally applicable to all victims of Iran-sponsored terrorism and not solely to the Respondents in this case. In contrast, reading Subsection 8772(c)(1) to apply only to this case would have the perverse effect of *limiting* the availability of "identified" assets to satisfy judgments obtained against Iran.

Congress's manifest intent to *enhance* relief for state-sponsored terrorism's victims demonstrates the poor fit of Petitioner's reading with the statutory scheme. In contrast, reading the statute to potentially benefit other parties besides those in this case would be entirely consistent with Congress's intent. Under the avoidance doctrine,

this Court could take the latter path in its interpretation of Section 8772.

VI. SHOULD THE COURT DETERMINE IT IS UNCONSTITUTIONAL, SUBSECTION 8772(C)(1) IS SEVERABLE.

If the Court concludes that Subsection 8772(c)(1) must be read to limit the effect of this statute to this case, and concludes that this limitation is unconstitutional, the proper remedy is to sever Subsection 8772(c)(1) and leave the remainder of the statute intact. The doctrine of severability counsels that the Court should "maintain [an] act in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *Id.* Here, there is no indication that Congress intended for the entire statute to fail should a single limiting provision be struck down. The "balance of the legislation is []capable of functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). And Congress intended for Iran to be "held accountable," suggesting that Congress intended for this amendment to be available to any aggrieved plaintiffs. Severing Subsection 8772(c)(1) would not undo this goal. Accordingly, even if the

Court is inclined to reject Congress's ability to narrow its own laws to a single case, the decision below should be affirmed.

CONCLUSION

Amici herein believe that the Second Circuit's decision below was correct and provides the appropriate level of deference to actions taken by the Legislative Branch of which *amici* are members. Congress has the power to legislate in a manner that permits United States nationals to seek accountability from state sponsors of terrorism and to permit these same United States national victims to collect on judgments they properly obtain in federal court. Therefore, *amici* respectfully submit that the Court should affirm the Second Circuit's decision in favor of Respondents in this case.

Respectfully submitted,

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The *amici curiae* joining this brief include:

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