2017-1667

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALEXANDER ALIMANESTIANU, *ET AL.*,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in
case no. 14-704, Judge Williams

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of this Court's rules, counsel for defendant-appellee states that he is unaware of any other appeal from this civil action that previously has been before this Court or any other appellate court under the same or similar title. We are aware of one case in this Court that may be affected by this Court's decision in this appeal: *Aviation & Gen. Ins. Co., Ltd., et al. v. United States*, No. 2016-2389, -2402. We are aware of one case in the Court of Federal Claims that may be affected by this Court's decision in this appeal: *Benard v. United States*, No. 15-0926. The court has stayed *Benard* pending the resolution of the *Aviation* appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALIMANESTIANU, *ET. AL.*,	)	
	)	
Plaintiffs-Appellants,	)	No. 2017-1667
	)	
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant-Appellee.	)	

BRIEF OF DEFENDANT-APPELLEE

Plaintiffs-appellants (collectively, the Alimanestianu plaintiffs) are the estate and family of Mihai Alimanestianu, an American citizen killed during a terrorist attack undertaken or sponsored by Libya in 1989. At the time of the attack, Libya was treated like other foreign states for purposes of whether it would enjoy sovereign immunity from suit in United States courts for this type of conduct. In 1996, Congress passed a law giving individuals like the Alimanestianu plaintiffs the right to sue state sponsors of terrorism, including Libya, for certain terrorism-related conduct.

The Alimanestianu plaintiffs sued Libya in district court and obtained a judgment. The judgment was on appeal when, in 2008, Congress passed the Libyan Claims Resolution Act, which (upon a certification by the Secretary of State), reinstated Libya's sovereign immunity for certain terrorism-related acts. The district court then dismissed the lawsuit. The Alimanestianu plaintiffs then

collectively received nearly $11 million from the fund that was created as a result of the settlement of claims against Libya. They then brought this lawsuit alleging that the United States engaged in a Fifth Amendment taking of their non-final judgment. As demonstrated below, the Alimanestianu plaintiffs have failed to establish a violation of the Takings Clause.

STATEMENT OF THE ISSUES

1. Whether the Alimanestianu plaintiffs possess a vested property interest for Fifth Amendment takings purposes in a jurisdictional rule depriving Libya of sovereign immunity, and if they do, whether they possess a cognizable property interest in their legal claims against Libya.

2. Whether, if they possess a vested property interest, the trial court correctly held that the Government did not engage in a Fifth Amendment taking when it reinstated Libya's sovereign immunity for certain acts of state-sponsored terrorism.

3. Whether this case is justiciable given that the Alimanestianu plaintiffs challenge the terms and implementation of the claims settlement agreement between the United States and Libya.

STATEMENT OF THE CASE SETTING OUT THE RELEVANT FACTS

The Alimanestianu plaintiffs appeal from a decision of the United States Court of Federal Claims in *Alimanestianu v. United States*, 130 Fed. Cl. 137

(2016), Appx1-12, in which the court granted our motion for summary judgment and held that the Government did not engage in a Fifth Amendment taking when it reinstated Libya's sovereign immunity from claims in United States courts for certain acts of state-sponsored terrorism.

I. Statement Of Facts And Course Of Proceedings Below

The Alimanestianu plaintiffs are the estate and immediate family of Mihai Alimanestianu, a United States citizen who was a passenger aboard Union de Transports Aeriens (UTA) Flight 772, which Libya destroyed in an act of state-sponsored terrorism in 1989. Appx21, 22. At the time of the bombing, Libya was treated like other foreign states for purposes of whether it would enjoy sovereign immunity from suit in the United States under the Foreign Sovereign Immunities Act (FSIA). *See* 28 U.S.C. § 1604 (providing for the immunity of foreign states); *id.* §§ 1605–1607 (providing for exceptions to foreign sovereign immunity). In 1996, however, Congress amended the FSIA, stripping designated state sponsors of terrorism, including Libya, of sovereign immunity for certain acts of terrorism affecting United States victims. 28 U.S.C. § 1605(a)(7) (1996).

The Alimanestianu plaintiffs sued Libya for damages as a result of the bombing. Appx20-21 (citing *Pugh, et al. v. The Socialist People's Libyan Arab Jamahirya, et al.*, Civil Action No. 02-2026-HHK (D.D.C.)). That lawsuit was brought in Federal district court and asserted that the district court possessed

jurisdiction to hear plaintiffs' claims pursuant to the "State Sponsor of Terrorism" exception to the FSIA – section 1605(a)(7) of title 28, United States Code. Appx23.

In August 2008, while the lawsuit was pending, Congress enacted the Libyan Claims Resolution Act. Pub. L. No. 110-301, 122 Stat. 2999 (2008) (LCRA), Appx78-81. Section 5(a)(1)(A) of the LCRA provides that, upon certification by the Secretary of State, Libya shall no longer be subject to the exception to immunity from terrorism-related lawsuits provided in section 1605(a)(7). *Id.* The LCRA also provides that any private right of action in United States courts relating to state-sponsored terrorism shall not apply with respect to claims against Libya. *Id.* The LCRA conditioned the Secretary of State's certification on the receipt of sufficient funds under the Claims Settlement Agreement between the United States and Libya. *Id.*; *see also* Appx29-32.

Pursuant to the Claims Settlement Agreement, Libya transferred $1.5 billion to the United States. Appx32, Appx83-84. The Secretary made the required certification under the LCRA in October 2008. Appx82.

Also in October 2008, President Bush issued Executive Order Number 13477, providing that "[a]ny pending suit in any court, domestic or foreign, by United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of [the

settlement agreement with Libya] shall be terminated." 73 Fed. Reg. 65,965, 65,965-66 (Oct. 31, 2008), Appx122-123.

These actions restored Libya's sovereign immunity from lawsuits brought under the State Sponsor of Terrorism FSIA exception and, consequently, abrogated United States courts' jurisdiction over such lawsuits. *Cf. Republic of Iraq v. Beaty*, 556 U.S. 848, 866 (2009) (holding that courts lost jurisdiction when State Sponsor of Terrorism exception "became inoperative as against Iraq").

Meanwhile, the Alimanestianu plaintiffs had obtained a judgment in their lawsuit against Libya, which was entered by the district court on February 7, 2008, and re-entered in August 2008. Appx24. On August 14, 2008, the Libyan defendants filed a notice of appeal. Appx25. That appeal was pending when, in January 2009, the United States filed in the case a "motion to intervene, vacate judgment, and dismiss suit with prejudice," explaining that, pursuant to the LCRA, the Claims Settlement Agreement, and the Executive Order, the court did not possess jurisdiction to adjudicate the claims; plaintiffs' claims had been espoused[1] and settled; and the LCRA eliminated any private right of action against Libya for terrorism-related conduct. Appx26, Appx85-105. On February 27, 2009, in the

[1] "In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government." *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989).

absence of any objection from the plaintiffs, the Court of Appeals for the District of Columbia Circuit issued an order vacating the district court's judgment in *Pugh*, and directing the district court to dismiss the case with prejudice, which it did on March 6, 2009. Appx153-154, Appx155.

Following the LCRA and the Executive Order, the United States paid the estate of Mihai Alimanestianu $10 million, and a number of the other Alimanestianu plaintiffs $200,000 each. Appx27. The Department of State also included in one of its referrals to the Foreign Claims Settlement Commission (Commission) a category that allowed certain of the Alimanestianu plaintiffs to pursue claims for additional compensation. Appx127-129. The Commission, however, concluded that the circumstances did not warrant additional compensation. Appx156-211. In addition, three of the Alimanestianu plaintiffs were not entitled to compensation because they were not living at the time of the referral to the Commission. Appx4. And one of the Alimanestianu plaintiffs – Ioana Alimanestianu – was not entitled to payment because she was the beneficiary of the Estate of Mihai Alimanestianu. *Id.*[2]

[2] Ioana Alimanestianu, on her own behalf and on behalf of the Estate of Mihai Alimanestianu, executed a release, which states that, in exchange for payment of $10,000,000 and the opportunity to present claims to the Foreign Claims Settlement Commission, she promised to "release and forever discharge the United States of America . . . from any liability of any kind related to claims coming within the terms of the Claims Settlement Agreement and for the United States' settlement of those claims." Appx212-213. She also promised to "forever

The Alimanestianu plaintiffs then filed this action, alleging that the United States has taken their property in violation of the Takings Clause. The specific property that they allege was "taken" is the non-final judgment in the *Pugh* lawsuit. Appx24, Appx27.

We moved to dismiss the complaint, explaining that the Alimanestianu plaintiffs lack a cognizable property interest under the Takings Clause; that, even if they possess a cognizable interest, the United States did not take that interest; and that the case is not justiciable. Appx136.

The trial court denied our motion, holding that the Alimanestianu plaintiffs possess a cognizable property interest and that the case is justiciable, but deferring a decision on whether the Government engaged in a taking. Appx136-144.

The parties filed cross-motions for summary judgment. Appx2. We explained, again, that the Alimanestianu plaintiffs lack a cognizable property

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relinquish all claims, demands, rights of action, suits, judgments, that I have ever had or will have, or which my heirs, executors, administrators, or assigns ever may have, relating to the United States' settlement of my claims coming within the terms of the Claims Settlement Agreement." *Id.* We raised the release with the trial court but the court never reached the issue. Nevertheless, this Court, of course, "may affirm a judgment of the trial court on any ground supported by the record, whether or not that basis was given by the court or urged by a party." *El-Sheikh v. United States*, 177 F.3d 1321, 1326 (Fed. Cir. 1999); *see also Consolidated Aluminum Corp. v. Foseco Int'l Ltd.*, 910 F.2d 804, 814 (Fed. Cir. 1990) ("An appellate court need not close its eyes to the record where . . . there is a way clearly open to affirm the district court's action.").

interest and that, in any event, the Government has not engaged in a taking. Appx2-11.

The trial court again found a cognizable property interest. Appx1-7. The court indicated that a cause of action against a foreign government that the United States has espoused is a property interest for takings purposes. Appx7.

The trial court then held that no taking occurred. The court explained that this Court, in a prior case involving the espousal of legal claims, held that although the case did not fit neatly into the traditional regulatory taking analysis, the principal factors (the *Penn Central* factors) in that analysis are nonetheless relevant – that is, the character of the Government action, the extent to which the Government conduct has interfered with distinct investment-backed expectations, and the economic impact of the Government action on the plaintiffs. Appx7-10 (citing *Abrahim-Youri v. United States*, 139 F.3d 1462, 1465-68 (Fed. Cir. 1997)).

The court found that the Alimanestianu plaintiffs did not possess a reasonable investment-backed expectation for a number of reasons. Appx8-9. First, the court concluded that "Plaintiffs, at the time of Libya's terrorist act, had no reasonable expectation of any recovery at all. Because the jurisdictional rules abrogating Libya's sovereign immunity were enacted after Libya's terrorist act, Plaintiffs could not have sued Libya at the time or have had any expectation of monetary relief from Libya at that time." Appx8 (citing *Republic of Iraq v. Beaty*,

556 U.S. 848, 865 (2009)). And the court emphasized that "[t]he very real potential that the Government might have had to compromise individual nationals' claims against Libya diminishes any reasonable expectation that Plaintiffs would receive full compensation for their claims," particularly given the long history of these types of settlements. Appx9.

With respect to the character of the Government action, the court concluded that "Plaintiffs' property interests in their causes of action against foreign governments are necessarily constrained by their own Government's paramount right to conduct foreign affairs and concomitant right to compromise its nationals' claims in the process." Appx9.

Finally, with respect to the economic impact of the Government's action, "[t]he Government's conduct benefited Plaintiffs economically here" because "[t]he estate received $10 million and each child received $200,000." Appx9. And the court stressed that "[i]t is speculative whether Plaintiffs would have secured any recovery from Libya absent the Government's espousal and settlement of their claims." Appx10 (citing *Sperry v. United States*, 493 U.S. 52, 63 (1989)). Thus, "Plaintiffs' dissatisfaction with the settlement amount negotiated by the Government and the compensation awarded by the Commission do not establish a compensable taking." Appx10 (citing *Abrahim-Youri*, 139 F.3d at 1468).

This appeal followed.

SUMMARY OF THE ARGUMENT

The Alimanestianu plaintiffs have asserted that their non-final judgment and legal claims against Libya constitute a property interest that was taken by the United States. Those claims were dismissed by the district court because Libya enjoyed sovereign immunity and, therefore, the district court did not possess jurisdiction to entertain the claims. The Alimanestianu plaintiffs do not possess any property interest in jurisdictional rules, such as a rule of sovereign immunity. And regardless, their purported property interest does not fall within the exception to the general rule that legal claims and a non-final judgment are not cognizable property for takings purposes.

Further, even if the Alimanestianu plaintiffs were to possess a cognizable property interest, the United States has not taken that interest. Moreover, contrary to the Alimanestianu plaintiffs' argument, even assuming a *per se* taking has occurred, that does not mean that they are entitled to compensation. Indeed, this Court has held that, with respect to alleged takings involving the espousal of legal claims, additional considerations are relevant – namely, the fact that those claims come with the inherent limitation that they may be subject to settlement by the Government at any time.

As the trial court correctly held, pursuant to those additional considerations, the Alimanestianu plaintiffs had no reasonable expectation in recovering on their

claims because (1) at the time of the bombings, Libya enjoyed sovereign immunity in United States courts from claims of this nature; and (2) foreign sovereign immunity rules are inherently subject to current political realities and relationships, and the Alimanestianu plaintiffs could not have reasonably relied upon such rules remaining static with respect to Libya. This lack of a reasonable expectation alone defeats their takings claim.

Moreover, the conduct complained of – the dismissal of the Alimanestianu plaintiffs' district court lawsuit – occurred in furtherance of normalizing relations between Libya and the United States. Foreign affairs has always been an area in which the political branches have broad authority and discretion to act in the public's interest. Indeed, within that realm, the Government's power to define the scope of foreign sovereign immunity, taking into account principles of international law, and to establish and to promote amiable relations with other countries constitute core functions.

The trial court also rightly emphasized that the economic impact of the Government's actions is speculative. Whether the Alimanestianu plaintiffs could have pursued a claim against Libya to a final, non-appealable judgment and actually collected on the judgment is unknown. And the Alimanestianu plaintiffs collectively received a significant settlement – nearly $11 million dollars. "[T]hat plaintiffs are not satisfied with the settlement negotiated by the Government on

their behalf does not entitle them to compensation by the United States." *Abrahim-Youri*, 139 F.3d at 1468.

Finally, this case is not justiciable. This Court has made clear that a judicial inquiry into whether the President could have extracted a more favorable settlement with a foreign nation would seriously interfere with the President's ability to conduct foreign relations. As a result, this case presents issues not meant for judicial review.

ARGUMENT

I. Jurisdiction And Standard Of Review

This Court reviews *de novo* a grant of summary judgment by the Court of Federal Claims. *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001). This Court reapplies the same standard as the trial court. *Palahnuk v. United States*, 475 F.3d 1380, 1382 (Fed. Cir. 2007).

Under this standard, summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a).

This Court also reviews *de novo* a decision whether to dismiss a case under Rule 12(b)(6), taking the facts alleged in the complaint as true. *Adair v. United States,* 497 F.3d 1244, 1250 (Fed. Cir. 2007).

II. The Alimanestianu Plaintiffs Lack A Cognizable Property Interest

In determining whether governmental action constitutes a taking for Fifth Amendment purposes, the Court applies a two-part test. "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Acceptance Insurance Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). When the claimant fails to establish the existence of a protected property interest, "the court's task is at an end" and the action must be dismissed. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

As demonstrated below, the Alimanestianu plaintiffs have failed to establish the existence of a cognizable property interest under settled law.

A. The Alimanestianu Plaintiffs Lack Any Cognizable Property Interest In The FSIA's Jurisdictional Rule

The Alimanestianu plaintiffs' alleged property interests – their non-final tort claims against Libya – were dismissed because the district court no longer possessed jurisdiction to hear them under the provision of United States law permitting courts to hear terrorism claims against certain designated state sponsors of terrorism. In other words, all that was "taken" was the power of United States courts to adjudicate their pending claims. The Alimanestianu plaintiffs had no

vested property right in the jurisdiction of United States courts over their claims in the face of Congress's modification of that jurisdiction through legislation. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("Application of a new jurisdictional rule usually takes away no substantive right . . . .").[3] To hold otherwise would run contrary to the well-settled proposition that no person has a vested right in any rule of law. *Branch v. United States*, 69 F.3d 1571, 1577-879 (Fed. Cir. 1995) ("As a general matter, a legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property.").

B. The Alimanestianu Plaintiffs' Non-Final Tort Claims Are Not Vested Property Interests

In any event, to the extent that the Alimanestianu plaintiffs assert that their tort claims were taken through some action other than the reinstatement of Libya's sovereign immunity, the Supreme Court has explained that property rights must be

[3]Although the Supreme Court has described the FSIA as "not simply a jurisdictional statute" insofar as it codifies standards of foreign sovereign immunity, the statute is procedural to the extent that its jurisdictional rules "merely open[] United States courts to plaintiffs with pre-existing claims against foreign states" without increasing liability or imposing new duties on foreign states. *Republic of Austria v. Altmann*, 541 U.S. 677, 694-95 (2004) (citation omitted); *see also Creighton Ltd. v. Gov. of the State of Qatar*, 181 F.3d 118, 124 (D.C. Cir. 1999) (holding that the arbitration exception to the FSIA, 28 U.S.C. § 1605(a)(6), "does not affect the contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning the enforcement of an arbitral award").

"vested" to be protected by the Takings Clause. *See Landgraf*, 511 U.S. at 266 ("The Fifth Amendment's Takings Clause prevents the Legislature . . . from depriving private persons of *vested* property rights [without just compensation]." (emphasis added)); *see also Hodges v. Snyder*, 261 U.S. 600, 603 (1923). As this Court has held, a "plaintiff has no vested rights in a lawsuit. . . ." *Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1321 (Fed. Cir. 2014) (citation omitted).

In *Rogers v. Tristar Prods., Inc.*, 559 Fed. App'x. 1042 (Fed. Cir. 2012) (non-precedential), this Court rejected the argument that, "by initiating a lawsuit it has become property" for purposes of the Takings Clause, and explained that because "no 'vested' right attaches" to legal claims, "it is of no moment that [the plaintiff] expended effort and resources in filing and pursuing the complaint." *Id.* at 1045. The *Rogers* Court recognized that, "under most circumstances, Congress can change the rules in the middle of the suit . . . , or even eliminate the cause of action entirely after the case has been filed." *Id.* (citations omitted).

Numerous other circuits have likewise recognized that causes of action or non-final judgments do not constitute cognizable or "vested" property for constitutional purposes. *See*, *e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009) (holding no property interest in a cause of action); *Hines v. Anderson*, 547 F.3d 915, 919 (8th Cir. 2008) (finding no property right in a consent decree); *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996) (same); *Axel Johnson, Inc. v.*

Arthur Andersen & Co., 6 F.3d 78, 84 (2d Cir. 1993) ("[N]ot all judgments . . . are final for Fifth Amendment . . . purposes. Rather, a case remains 'pending' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse." (citations omitted)); *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345-47 (7th Cir. 1992) (same); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) ("Congress abridged no vested rights . . . by . . . retroactively abolishing [plaintiff's] cause of action in tort;" *dicta* that valid taking claim therefore "very unlikely"); *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1137-38 (11th Cir. 1983) (no enforceable property right in non-final judgment); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008) (no vested property interest in cause of action), *cert. denied*, 556 U.S. 1104 (2009). Because the Alimanestianu plaintiffs had only non-final legal claims against Libya, they did not have any "vested" property, and thus cannot prevail on their takings claim.[4]

The trial court found that the "lack of finality" of the Alimanestianu plaintiffs' claims was not dispositive of whether a taking had occurred, because the

[4] Courts have held that even a final unreviewable judgment may not create cognizable property rights for takings purposes. *See Marks v. United States*, 15 Cl. Ct. 609, 612 (1988) (holding that, because plaintiffs had not completed domestic recognition of a foreign judgment, they "did not have a property interest in the Iranian judgment in itself that entitled it to fifth amendment protection").

Government's "conduct prevented Plaintiffs' judgment from becoming final" and because "what was taken was Plaintiffs' right to complete the appellate process to attain a final judgment." Appx141. This reasoning is flawed in two respects. First, it incorrectly conflates the threshold question of whether a property interest exists with whether it has been taken. *Acceptance*, 583 F.3d at 854. That the Alimanestianu plaintiffs' tort claims against Libya were terminated upon the United States' restoration of Libya's sovereign immunity has no bearing on whether those claims constituted cognizable property protected by the Takings Clause.

Second, the purported "right to complete the appellate process," Appx141, is not among the vested property rights protected by the Takings Clause. *Landgraf*, 511 U.S. at 266. Also, procedural rights protected under the Due Process Clause are not the same as the property protected by the Takings Clause. *See Adams v. United States*, 391 F.3d 1212, 1220 n.4 (Fed. Cir. 2004) (noting that "entitlements are often referred to as 'property interests' within the meaning of the Due Process Clause . . . but such references have no relevance to whether they are 'property' under the Takings Clause."). Thus, it "is of no moment that [the Alimanestianu

plaintiffs] expended effort and resources in filing and pursuing" their claims against Libya before a vested right attached. *Rogers*, 559 Fed. App'x at 1045.

By the trial court's logic, a prospective home buyer could sue under the Takings Clause if the Government seized the property before the time of closing, and thus before the buyer acquired any rights in the property. That cannot be the rule. *See CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010) (holding that "plaintiffs did not own the property at the time of the alleged regulatory taking and therefore lacked standing"); *see also Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.").

This conclusion is reinforced by case law in other jurisdictions rejecting claims similar to the Alimanestianu plaintiffs'. *See Ileto*, 565 F.3d at 1141; *Beretta*, 940 A.2d at 180-82; *Hammond*, 786 F.2d at 12-13, 15; *see also, e.g., Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (a cause of action "affords no definite or enforceable property right until reduced to a final judgment." (citations and internal quotation marks omitted)); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) ("a pending tort claim does not constitute a vested right"); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (a tort claim affords no definite or enforceable property right until reduced to final judgment).

C. The Alimanestianu Plaintiffs Misread This Court's Case Law, Which Does Not Establish That Their Claims Are Property Interests

Contrary to the Alimanestianu plaintiffs' arguments, this Court's precedent does not establish that "an espoused claim (or judgment) is property under the just compensation clause of the Fifth Amendment." App. Br. at 21.

This Court held in *Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004), that no cognizable property interest exists for takings purposes in a statutory-based claim. *Id.* at 1225-26. The Court explained that "sometimes a cause of action may fall within the definition of property recognized under the Takings Clause" provided that "the cause of action protects a legally-recognized property interest." *Id.* at 1226 (citation omitted). Such "legally-recognized property interests" are "real property, physical property, or intellectual property." *Id.* at 1225-26. Just as the *Adams* plaintiffs did not possess a cognizable property interest in the payment of underpaid overtime compensation under the Fair Labor Standards Act and in their administrative claim before the General Accounting Office seeking such payment, 391 F.3d at 1225-26, the Alimanestianu plaintiffs' lawsuit against Libya did not seek to protect real property, physical property, or intellectual property. *Adams*, 391 F.3d at 1225-26. Although the Alimanestianu plaintiffs insist that their tort claims are "not subject" to the limitation on takings claims recognized in *Adams*, App. Br. at 27, they cite no authority for the proposition that a non-final tort claim meets the test set forth in *Adams*. Indeed,

like the *Adams* plaintiffs, the Alimanestianu plaintiffs had "nothing more than an allegation that money [was] owed" them under a statute (the FSIA). 391 F.3d at 1225.

The Alimanestianu plaintiffs argue that our position would give the Government the "unrestrained right to seize and then prosecute (or settle) the tort claims or judgments of any U.S. citizen" without paying just compensation, which would be "extraordinary." App. Br. at 28. But the Alimanestianu plaintiffs cite no case in which the Government has been found liable under the Takings Clause for espousing claims of American citizens against foreign states, and we are aware of none. Indeed, as the trial court explained, the United States' power to settle claims of American nationals against foreign states has been well-established since the founding of the nation. Appx6 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). In other words, it is the Alimanestianu plaintiffs' theory of liability that is "extraordinary," not the Government's. App. Br. at 28.

The Alimanestianu plaintiffs' reliance upon this Court's decisions in *Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994), and *Abrahim-Youri*, 139 F.3d at 1468, is likewise misplaced. App. Br. at 21. *Alliance* is readily distinguishable because it concerned land. One need not stretch the common understanding of "property" to view the right to compensation for the loss of land as an incident to the ownership of the land itself.

Alliance stands for nothing more remarkable than that land falls within the *Adams* exception. *See Adams*, 391 F.3d at 1226 (distinguishing *Alliance* on grounds that it involved an action to recover an interest in land, which is "beyond question" a property interest under state and common law). Thus, the Court's statement in *Alliance* that a "legal cause of action is a property interest within the meaning of the Fifth Amendment," 37 F.3d at 1481, cannot fairly be read to mean that *any* cause of action is protected by the Takings Clause.

In *Abrahim-Youri*, this Court rejected a takings claim predicated upon the Government's espousal of claims against Iran. 139 F.3d at 1465-68. The Court stated: "We agree with plaintiffs that their property rights – their choses in action against Iran – were extinguished when the Government espoused and settled their claims." *Id.* at 1465. *Abrahim-Youri* did not discuss the nature of the underlying interests that were the subject of the claims involved, however, nor did it specifically address whether the referenced "choses in action" constituted property within the meaning of the Takings Clause. Nor is it clear whether the Court was agreeing with the plaintiffs' characterization of the choses in action as property, or merely agreeing that what the plaintiffs had identified as property rights had been extinguished. In any event, because the Court held that the Government's actions

did not constitute a taking, the quoted statement appears to be at most only dictum.[5]

The Alimanestianu plaintiffs' reliance upon *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 241 (Ct. Cl. 1983), is likewise misplaced. *Shanghai Power* concerned a legal claim seeking to protect a power plant owned by the plaintiff, *i.e.*, real property, unlike the tort claims here. *Id.* at 239. Moreover, in that case, the court held that no taking occurred when the United States espoused and settled the claims of United States nationals against China, emphasizing that the plaintiffs in that case, like the Alimanestianu plaintiffs here, could not have had a reasonable expectation of recovery given the foreign relations aspects of the case and the inherent authority of the President to espouse and to settle claims. *Id.* at 239-45. The Court also concluded that the case was not justiciable, because a "judicial inquiry into whether the President could have extracted a more generous settlement from another country would seriously interfere with his ability to carry on diplomatic relations." *Id*. at 248.

The Alimanestianu plaintiffs acknowledge the case law standing for the proposition that "the [G]overnment need not pay compensation whenever a law impacts the viability or value of an accrued claim." App. Br. at 32. They argue,

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[5] In *Belk*, this Court "[a]ssume[d] without deciding" that appellants' claims against Iran constituted property for takings purposes. *Belk v. United States*, 858 F.2d 706, 708 (Fed. Cir. 1988).

however, that such cases are distinguishable because they deal with regulatory takings, as opposed to an "outright seizure" like the United States' espousal of their claims. *Id.* at 32-33. But by focusing on the Government's conduct, the Alimanestianu plaintiffs incorrectly jump to the second part of the takings analysis – whether a taking occurred – without first demonstrating, as they must, the existence of a cognizable property interest. The Alimanestianu plaintiffs also fail to articulate any meaningful distinction between the Government's espousing a claim (which they argue triggers a duty to compensate) and the Government's acting to "impact[] the viability or value of an accrued claim" (which they acknowledge does not trigger a duty to compensate). *Id*. And they fail to recognize that their claims, like those in *Adams*, could only be brought in the first place because of a federal statute – the FSIA.

Accordingly, because the Alimanestianu plaintiffs do not possess a cognizable property interest, the Court should affirm on that basis, and need not reach the question of whether a taking has occurred.

III. No Taking Occurred

A. There Is No Categorical Duty To Pay Just Compensation Here

1. This Court's Precedent Holds That Additional Considerations Are Relevant With Respect To Takings Claims Based On Espousal

Even if the Court were to find that the Alimanestianu plaintiffs possess a cognizable property interest, that interest was not "taken" by the United States. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The Alimanestianu plaintiffs contend that the Government has engaged in a *per se* taking of their property. As a result, they assert, the Court must find that a taking occurred without any further analysis.

The Alimanestianu plaintiffs are incorrect. Their extreme position is based upon a misunderstanding of Supreme Court case law and fails to recognize this Court's binding precedent.

As an initial matter, this Court has, on two occasions, addressed takings claims in the context of the Government's espousal of legal claims. *See Belk*, 858 F. 2d at 709; *Abrahim-Youri*, 139 F.3d at 1465; *cf. Chang v. United States*, 859 F. 2d 893, 894-98 (Fed. Cir. 1988) (applying *Penn Central* factors to claim that United States engaged in taking of plaintiffs' contracts when it imposed sanctions on Libya). In *Abrahim-Youri*, this Court expressly rejected the argument that a *per se* takings claim is automatically compensable and that the Court may not consider

other factors in its analysis. *Abrahim-Youri*, 139 F. 3d at 1465-66. In other words, *per se* takings do not automatically require compensation, even when the property at issue is allegedly seized, destroyed, or entirely extinguished. *See, e.g., id.* (no *per se* taking even when property rights were "not simply regulated in some manner, but were terminated"); *Paradissiotis v. United States*, 304 F.3d 1271, 1274-75 (Fed. Cir. 2002) (no taking when value of stock options was completely "destroyed").

Thus, this Court has made clear that, when claims are espoused, that does not mean that a taking has occurred. In *Belk*, the Court concluded that, even though plaintiffs' claims were "extinguished," pursuant to the *Penn Central* factors, no taking occurred. *Id.* at 708. And in *Abrahim-Youri*, this Court concluded that an espousal of claims meant that the parties' "choses in action were not simply regulated in some manner, but were terminated." 139 F3d at 1465. The Court nonetheless emphasized that "[t]o say that, however does not say . . . that the considerations identified by the trial court [under *Penn Central*] are not relevant to the proper outcome of the case." *Id.* at 1466. The Court proceeded to focus on the unique circumstances present when the Government espouses claims of its citizens: "Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights. As the

trial court correctly observed, those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." *Id.* at 1468; *see also id.* at 1468 (Clevenger, J. concurring) ("This case is significant in that it affords us the opportunity to recognize that the familiar per se taking and regulatory taking categories are not rigid and that certain "per se" takings . . . do not automatically result under the Fifth Amendment in compensation to the ousted property owner.").

Indeed, the Supreme Court has recognized the particular circumstances that surround the espousal of claims: "[a]t least since the case of the 'Wilmington Packet' in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. In fact, during the period of 1817-1917, 'no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens." *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981) (citations omitted). And more recently, the Supreme Court found that, "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts." *Republic of Iraq v. Beaty*, 556 U.S. 848, 865 (2009) (emphasis in original); *see also Abrahim-Youri*, 139 F. 3d at 1469 (Clevenger, J. concurring) ("One who

obtains, in the pursuit of international commerce, a claim against a foreign government knows that our government may deem it necessary to espouse that claim."); *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs' claims, because "[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs' claims cannot constitute a drastic or novel interference with any investment-backed expectation." (internal quotation and citations omitted)).

2. *Horne* Is Inapposite

In response to this precedent, the Alimanestianu plaintiffs rely on the Supreme Court's decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), which they assert stands for the proposition that whenever private property is transferred to the Government, a *per se* taking has occurred and the Government must pay just compensation. App. Br. at 34-48.

In *Horne*, the Supreme Court held that a Government requirement that raisin growers set aside a certain percentage of their crop for the Government, free of charge, was a *per se* taking. The Court explained that in that context, personal property is subject to the same rules that apply to real property. *Id.* at 2426. The

Court concluded that, as a result, the Government must compensate the raisin growers for the market value of the raisins.

Horne is easily distinguishable and the Alimanestianu plaintiffs' reliance on this case is based on a misunderstanding of property (assuming that the claims and non-final judgment here are vested property). In particular, as explained, the Alimanestianu plaintiffs fail to understand that their claims (and subsequent non-final judgment) were claims against a foreign government which, by their very nature, come with limitations that preclude a takings claim.

As explained above, the Supreme Court held in *Beaty*, 556 U.S. at 865, that the subsequent elimination of a country's subjection to suit cannot be said to have deprived a party of any expectation that they held at the time of their injury that they would be able to sue in United States courts. *Beaty* makes clear that the statement in *Horne* that, "[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away," 135 S. Ct. 2427, has no application in the context of claims against a foreign country, especially when the foreign country enjoyed immunity from suit at the time of the injury at issue. *Beaty*, 556 U.S. at 865.

Put another way, regardless of the type of property or the type of government action, "[e]xisting rules and understandings and background principles

derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Acceptance*, 583 F.3d at 857; *see also California Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992) (no conceivable expectation by the plaintiffs that their property would not be occupied in the event circumstances compelled the regulators to close the facility because the license to engage in domestic banking was subject to the condition of potential occupation of the private property by the Government.). As this Court has held, in this context, those background rules include the fact that international relations may become strained and that the United States Government at times espouses the claims of its nationals against a foreign government. *Abrahim-Youri*, 139 F3d at 1468. And, pursuant to the Supreme Court's decision in *Beaty*, they also include the fact that no party could have any reasonable expectation in pursuing their terrorism-related claims against Libya when, at the time the injury arose, Libya enjoyed sovereign immunity with respect to those claims. 556 U.S. at 865.

Thus, the holding in *Horne* that "[r]aisin growers subject to the reserve requirement lose the entire 'bundle' of property rights in the appropriated raisins," 135 S. Ct. at 2428, is not applicable to international claims. Instead, as this Court held in *Abrahim-Youri*, the sticks in the bundle of rights that make up a claim

against a foreign nation come with an important and inherent limitation: that the claim may be espoused by the United States. *Abrahim-Youri*, 139 F. 3d at 1468.

Moreover, a hypothetical demonstrates that even when a *per se* taking has occurred, property may nonetheless be subject to certain constraints: The Government gives a citizen an item of property while reserving the right to take back the property at any time without payment. Under the Alimanestianu plaintiffs' view, when the Government does take back the property, it has engaged in a *per se* taking – the entire property has been taken by the Government. In other words, under their view of *Horne*, notwithstanding that the property came with certain conditions, a *per se* taking occurred and the Government would need to compensate the owner for the property. That view is plainly incorrect. The bundle of rights that came with the property was "subject to constraint by government as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights." *Abrahim-Youri*, 135 F. 3d at 1468. Thus, under this hypothetical, no taking occurred because, even though the entire property was taken, the use of that property was always subject to certain constraints – the right of the Government to take it back at some future date. Put differently, the property-holder's interest was contingent, not absolute. As this Court held in *Abrahim-Youri*, the same is true with respect to claims against foreign governments. 139 F. 3d at 1468.

Indeed, the Supreme Court has made clear that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). And again, this Court has held that these rules apply in this very context – espousal. *Abrahim-Youri*, 135 F 3d at 1468. Put another way, property subject to pervasive regulation and Government control, such as claims against foreign states, is not protected by the Takings Clause under these circumstances. *See, e.g., Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) ("Where a citizen voluntarily enters into an area which from the start is subject to pervasive Government control, a property interest is likely lacking."); *cf. Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner's attachment of foreign state's assets was not property under Takings Clause because it was subordinate to presidential power over the assets). Thus, even assuming that the Alimanestianu plaintiffs' legal claims could constitute cognizable property interests, inherent within those claims is the limitation that they could be espoused and that statutory rules of sovereign immunity might change.[6]

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[6] *Horne* also dealt with tangible personal property – the claims (and non-final judgment) at issue in this case are intangible property. We are unaware of any court that has applied the *per se* takings rule discussed in *Horne* to intangible

Finally, the Alimanestianu plaintiffs make two additional arguments in support of their assertion that compensation must be paid because a *per se* taking has occurred. First, they contend that the fact that many of them received compensation from the settlement fund may not be considered. App. Br. at 45. As explained above, however, this Court has rejected the argument that a *per se* taking automatically entitles one to compensation. And in so holding, the Court in *Abrahim-Youri* emphasized that "the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." 139 F.3d at 1468. In any event, this Court has held that one proper consideration is the economic impact of the Government's action on the claimants. *Id.* at 1465, 1468. The Government's action in this case resulted in the Alimanestianu plaintiffs collectively receiving nearly $11 million.

Second, the Alimanestianu plaintiffs cite to a case from 1886 – *Gray v. United States*, 21 Ct. Cl. 340 (1888) – which, they assert, supports their theory that a taking occurred. But this Court was faced with the same argument in *Abrahim-Youri*. The Court concluded that *Gray* was an "advisory opinion to Congress," that the language cited is *dicta*, and that even if *Gray* correctly stated propositions of

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property. *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151-52 (Fed. Cir. 2014) (declining to address the question of whether the categorical takings test applied to takings of intangible property such as contract rights.).

law applicable to the circumstances of that case at that time, "the evolution of takings law in the last 100 years brings additional considerations to light." *Abrahim-Youri*, 139 F.3d at 1467; *see also Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970) ("All that really needs to be said about the *Gray* case is that the opinion . . . was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts. However, it is worth mentioning that, in referring to the 'French Spoliation' claims which were later granted by Congress following the *Gray* opinion, the Supreme Court remarked: 'We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.'" (*quoting Blagge v. Balch*, 162 U.S. 439, 457 (1896)).

Accordingly, *Horne* has no application to this case. The Court must follow *Belk* and consider the constraints on any identifiable property interest, as in *Abrahim-Youri*.

B. The Lack Of Any Reasonable Investment-Backed Expectation Alone Defeats The Alimanestianu Plaintiffs' Takings Claim

Penn Central identified three factors to be considered: (1) the extent to which the Government's action interferes with investment-backed expectations; (2) the character of the Government's action; and (3) the economic impact of that action on the claimants. 438 U.S. at 124-25; *Abrahim-Youri*, 139 F.3d at 1465.

As explained below, under these factors, no taking occurred when Congress reinstated Libya's sovereign immunity for certain terrorism claims.

First and foremost, the United States' espousal of claims and restoration of Libya's sovereign immunity for certain terrorism-related conduct did not interfere with the Alimanestianu plaintiffs' investment-backed expectations. By providing that the State Sponsor of Terrorism exception no longer applies with respect to Libya, the United States simply restored the default rules of sovereign immunity that typically apply under the FSIA in lawsuits against foreign states for actions taken outside of the United States, like those at issue in the Alimanestianu plaintiffs' district court case. The Alimanestianu plaintiffs could not have had an expectation to be able to sue Libya in the United States at the time their claims against Libya accrued because the State Sponsor of Terrorism exception did not exist in the FSIA then. *Beaty*, 556 U.S. at 864-65.

Nor, as the trial court correctly held, Appx9, can the Alimanestianu plaintiffs have had an investment-backed expectation in a jurisdictional rule stripping state sponsors of terrorism of sovereign immunity; these rules are inherently subject to "current political realities and relationships," and are generally not rules upon which parties can rely in shaping their conduct. *Id.* (quoting *Altmann*, 541 U.S. at 696). *Cf. Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (possibility of changing world circumstances and a corresponding response by the United

States Government "can never be completely discounted" in foreign affairs); *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995) (investment-backed expectations are greatly reduced in a highly regulated field). That is particularly so in the case of the State Sponsor of Terrorism exception, which requires that the Executive Branch have designated the state as a state sponsor of terrorism and presumes a non-friendly relationship between the United States and a foreign state at a given time.

Not surprisingly, the Supreme Court has recognized that the availability of foreign sovereign immunity or an exception to sovereign immunity generally is not something upon which parties can rely in shaping their conduct. *Beaty*, 556 U.S. at 864-65 ("Foreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" (*quoting Altmann*, 541 U.S. at 696)). The Supreme Court's reasoning is especially apt here: (1) both the jurisdictional rules abrogating and restoring Libya's sovereign immunity were enacted after the conduct giving rise to the Alimanestianu plaintiffs' legal claims; and (2) the rule in question (the State Sponsor of Terrorism exception) was aimed specifically at rogue nations whose orientation toward the United States might change.

As the Supreme Court explained, "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts." *Beaty*, 556 U.S. at 865 (emphasis in original); *see also Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs' claims, because "[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs' claims cannot constitute a drastic or novel interference with any investment-backed expectation." (internal quotation and citations omitted)); Appx8 ("Because the jurisdictional rules abrogating Libya's sovereign immunity were enacted after Libya's terrorist act, Plaintiffs could not have sued Libya at the time of the injury or have had any expectation of monetary relief from Libya at that time."). The Alimanestianu plaintiffs thus could not have reasonably relied upon the rules of foreign sovereign immunity remaining static with respect to Libya. *Beaty*, 556 U.S. at 857 (observing that it was "entirely unremarkable" that Congress would give the President some flexibility in unique circumstances such as those pertaining to post-war Iraq); *cf. Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner's attachment of foreign state's assets was not

property under Takings Clause because it was subordinate to presidential power over the assets).

In addition, the Alimanestianu plaintiffs cannot have had reasonable investment-backed expectations in still-pending causes of action. *See District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 181 (D.C. 2008), *cert. denied*, 556 U.S. 1104 (2009) ("Since even 'settled expectations' may be disturbed by Congress without effecting a taking . . . the expectancy the plaintiffs have of a successful outcome to their suit is not an interest the government is obliged to pay for as the price of eliminating it." (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)); *cf. Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215-16 (Fed. Cir. 2005) (frustration of business expectations does not constitute a compensable taking).

Accordingly, the Alimanestianu plaintiffs lacked any investment-backed expectation in being able to pursue claims against Libya. The Supreme Court has held that the lack of any such expectation, by itself, is cause for rejecting a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) ("It is to the last of these three factors that we now direct our attention, for we find that the force of this [reasonable expectations factor] is so overwhelming . . . that it disposes of the taking question," when the plaintiff "could not have had a reasonable investment-

backed expectation."); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (quoting *Monsanto*).

C. The Character Of The Government's Action Supports That No Taking Occurred

With respect to the character of the Government's action, courts have repeatedly recognized that the President has indisputable power to settle or to extinguish claims against foreign states and nationals without effecting a taking. *See, e.g., Chang*, 859 F.2d at 896-98. *Cf. United States v. Pink*, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Dames & Moore*, 453 U.S. at 679-80 (same).

Indeed, it is difficult to imagine an area in which the political branches of the United States have broader authority and discretion to act in the public's interest than the realm of foreign relations. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[T]he federal power over external affairs [is] in origin and essential character different from that over internal affairs."); Appx9 (holding that plaintiffs' interest in pursuing action against foreign government is "necessarily constrained by their own Government's paramount right to conduct foreign affairs and concomitant right to compromise its nationals' claims in the process."). Within that realm, the Government's power to define the scope of foreign sovereign

immunity, taking into account principles of international law, and to establish and to promote amiable relations between two countries (here, the United States and Libya) constitute core functions. Given that, in this case, Congress and the President exercised those core functions in connection with the United States' efforts to normalize relations with Libya, it is self-evident that the Government acted in furtherance of a legitimate governmental interest. *See Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (observing that *Lingle* did not diminish the importance of the *Penn Central* character prong with respect to public health and safety regulations and that those regulations afford the government the "greatest leeway to act" without paying compensation).[7]

The foreign relations context of this case further illustrates why the character of the Government's actions supports that no taking occurred. Courts recognize that the Constitution soundly commits foreign relations matters, including rules governing sovereign immunity, to the Government's political branches. *See Oetjen*, 246 U.S. at 302; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

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[7] In *Lingle*, the Supreme Court disapproved of courts inquiring into whether governmental actions "substantially advanced" a legitimate interest. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540-45 (2005). But *Lingle* "leaves unchanged a substantial body of case law concerning the character prong." *Rose Acre*, 559 F. at 1279. Thus, "[t]here is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis." *Id.* at 1281.

579, 635 (1952) (Jackson, J., concurring) (presidential power is at its maximum when exerted pursuant to authorization of Congress). The FSIA itself is widely regarded as a statute that "directly addresses sensitive matters of foreign relations, which . . . are inherently subject to 'current political realities and relationships.'"[8] *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 80-81 (D.D.C. 2009) (quoting *Altmann*, 541 U.S. at 696). *See also Dames & Moore*, 453 U.S. at 679 ("[N]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." (quoting *Pink*, 315 U.S. at 225)); *cf. Abrahim-Youri*, 139 F.3d at 1468 (recognizing that those who "engage in international commerce" do so pursuant to a type of implied license and that certain "sticks in the bundle of rights" are subject to "constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights."). The calculation of whether, and under what terms, to resolve claims and to normalize relations with Libya cannot be disentangled from the President's claims settlement authority. Thus, the

[8] Prior to the FSIA's 1976 enactment, for example, courts faced with questions of foreign sovereign immunity routinely deferred to the decisions of the Executive Branch about whether to take jurisdiction over claims against foreign states. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983); *Beaty*, 556 U.S. at 857 ("[T]he granting or denial of [foreign sovereign] immunity was historically the case-by-case prerogative of the Executive Branch.").

foreign-relations context supports the conclusion that the Government's actions did not result in a taking.

Further, the Government's actions affected the Alimanestianu plaintiffs' claims against Libya through alteration of a rule of sovereign immunity. *See Lingle*, 544 U.S. at 539 (contrasting a "physical invasion" of property with a program "adjusting the benefits and burdens of economic life to promote the common good"). Similar to *Belk*, "[h]ere there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims against Iran." *Belk*, 858 F.2d at 709. It thus would be odd if the President were able to extinguish claims altogether consistent with the Takings Clause, but unable to exercise the power of restoring sovereign immunity with respect to a foreign state without subjecting the United States to liability under the Takings Clause.

The type of governmental actions about which the Alimanestianu plaintiffs complain only altered a jurisdictional rule of sovereign immunity, rather than any substantive rights. *Beaty*, 556 U.S. at 864-65. As explained above, they can have no property right in such rules because they "speak to the power of the court rather than to the rights or obligations of the parties," *Landgraf*, 511 U.S. at 274 (citation and quotation marks omitted), and because recognizing such a right would violate the settled principle that no person has a vested interest in any particular rule of

law. *Branch*, 69 F.3d at 1578 ("[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." (quoting *New York Central R. R. Co. v. White*, 243 U.S. 188, 198 (1917)).

For all of these reasons, the "character" factor weighs strongly against finding a taking.

D. The Economic Impact Of the Government's Actions Is Speculative

With respect to the economic impact of the Government's actions, the claims themselves do not have any definite value. Thus, any economic value the Alimanestianu plaintiffs allegedly lost in their legal claims and non-final judgment is speculative. *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) ("[A]ny economic impact based on the loss of causes of action is somewhat speculative . . . [and thus] the projected economic impact on [the plaintiff] is not sufficiently concrete to establish a taking.").

The trial court rightly emphasized that "[i]t is speculative whether Plaintiffs would have secured any recovery from Libya absent the Government's espousal and settlement of their claims." Appx10. The court also explained that any final judgment "'was not readily collectible.'" *Id.* (quoting *Sperry v. United States*, 493 U.S. 52, 63 (1989)).

The trial court is correct. Whether the Alimanestianu plaintiffs could have pursued a claim against Libya to a final, non-appealable, judgment and actually

collected on the judgment is purely speculative. *See Sperry*, 493 U.S. at 63 ("Had the President not agreed to the establishment of the [Iran-U.S. Claims] Tribunal and the Security Account, Sperry would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible."); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 49 ("[a] number of practical, legal and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments . . . ."); *Shanghai Power*, 4 Cl. Ct. at 244 ("It is frequently very difficult to obtain justice from foreign nations, even when the claim is a strong one.").

Finally, policy considerations and equity and justice weigh heavily in favor of the conclusion that no taking occurred. A contrary ruling would effectively mean that, to settle claims against a foreign country, the United States would be required to pay for any claim brought in United States courts against that country. "The American government should not be held as a surrogate for [another country's] unjustifiable actions." *Belk v. United States*, 12 Cl. Ct. 732, 735 (1987); *see also Abrahim-Youri v. United States*, 36 Fed. Cl. 482, 487 (1996) ("The property losses that plaintiffs suffered were occasioned by Iran, not the United States."). And holding that a taking occurred might significantly constrain the judgment of the President in reinstituting relations with a foreign country.

Accordingly, the United States did not "take" the Alimanestianu plaintiffs' purported property interest.

E. The Alimanestianu Plaintiffs' Arguments Are Unavailing

The Alimanestianu plaintiffs do not dispute most of the foregoing. Rather, they contend that the Commission did not provide them with sufficient compensation and that it was "not a true alternative forum." Pet. Br. at 49-55. They also contend that the trial court erred in valuing their claims. *Id.* at 55-56.

The Alimanestianu plaintiffs are incorrect. With respect to their challenge to the amount that they received under the settlement, "the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." *Abrahim-Youri*, 139 F.3d at 1468.

Moreover, parties may not challenge in court the award provided by the Commission because decisions of the Commission are not subject to judicial review. 22 U.S.C. § 1623(h).

Even though the Government was not required to provide an alternative forum, the Commission is an alternative forum. Section 1623(a)(1)(C) of Title 22, United States Code, provides, "The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States . . .

included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State." The International Claims Settlement Act of 1949 (ICSA), 22 U.S.C. § 1621 *et seq.*, established the International Claims Commission, which in 1954 merged with the War Claims Commission to become the Foreign Claims Settlement Commission, and provided the Commission with jurisdiction to "make final and binding decisions with respect to claims by United States nationals against settlement funds." *Dames & Moore* 453 U.S. at 680 (citing 22 U.S.C. § 1623(a)). And in rendering decisions upon claims, the Commission does not, as the Alimanestianu plaintiffs contend, mechanically implement the will of third parties (such as the State Department) but, rather, is required to make independent decisions. *See* 22 U.S.C. § 1622g ("Nothing in this Act shall be construed to diminish the independence of the Commission in making its determinations on claims in programs that it is authorized to administer pursuant to [the ICSA and the War Claims Act]. The decisions of the Commission with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any court by mandamus or otherwise.").

With respect to the Alimanestianu plaintiffs' claims against Libya, by letter dated January 15, 2009, the State Department's Legal Adviser referred certain categories of claims for "adjudication and certification" by the Commission.

Appx127-133. The referral letter did not predetermine award amounts, and instead simply declared that the State Department "believe[d] and recommend[ed]" certain amounts for different categories of claimants. *Id.* On July 7, 2009, the Commission published a notice announcing the commencement of adjudication of claims under this portion of the Libya Claims Program. *See* Notice of Commencement of Claims Adjudication Program, 74 Fed. Reg. 32,193 (July 7, 2009). The Commission adjudicated and issued a number of decisions on these claims. *See* Index of Claims under the January 2009 Referral from the Department of State Ordered by Decision Number, available at http://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/claims-january-referral_by_decision.pdf. These decisions make clear that, in fact, the Commission fulfilled its obligations and adjudicated these claims independently. *See* Appx156-211 (proposed and final decisions from the Commission).

Thus, the Government did provide an alternative forum for many of the Alimanestianu plaintiffs' claims – and, in fact, the majority of the Alimanestianu plaintiffs received considerable compensation from the settlement proceeds. In any event, even if the Government had not provided an alternative forum, "that fact is not sufficient to establish a taking." *Belk,* 858 F.2d at 709.

Moreover, in *Shanghai Power*, the United States settled the claims of plaintiff, a United States corporation, against China. *Shanghai*, 4 Cl. Ct. at 239.

Plaintiff was referred to the Commission but received only a fraction of the value of its claim. The court held that no taking occurred, focusing on the fact that the claims of United States nationals may be extinguished, "'usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.'" *Id.* at 244 (quoting *Dames & Moore*, 453 U.S. at 680).

The Alimanestianu plaintiffs also contend that the compensation that they received from the settlement "cannot be characterized as reasonable." App. Br. at 51. But "it is frequently entirely fortuitous who will benefit and who will suffer" from the President's decision to settle claims. *Shanghai*, 4 Cl. Ct. at 244-45. Indeed, in *Belk*, this Court held that no taking occurred when United States nationals who were held hostage were precluded entirely from bringing suit against their captor, Iran, and were not afforded any alternative forum to pursue their claims. *Belk*, 858 F. 2d 706. And in *Abrahim-Youri*, this Court held that "the fact that plaintiffs are not satisfied with the settlement negotiated on their behalf does not entitle them to compensation by the United States." 139 F.3d at 1468. More generally, "governments have traditionally espoused and settled claims without the consent of the individuals holding the claims and 'usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.'" *Shanghai*, 4 Cl. at 244 (quoting *Dames & Moore*, 453 U.S. at 680).

Similarly, the Alimanestianu plaintiffs contend that there was no basis for the trial court to conclude that the value of their non-final judgment "was essentially zero." App. Br. at 55-56. But that is not what the trial court held. Rather, the court concluded that it was speculative whether they could have collected on any judgment (assuming that they were successful and the judgment became final and non-appealable). A number of other courts, including the Supreme Court, have likewise expressed skepticism with respect to similar claims. Appx10 (citing *Sperry*, 493 U.S. at 63; *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 49). In any event, the Alimanestianu plaintiffs bear the burden to proffer evidence in support of the value of their legal claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). That they now believe they could potentially do so, through an expert, is not something the Court should consider on appeal – they never presented this to the trial court, nor did they provide argument (or the required affidavit, *see* Rule 56.2(d) of the Court of Federal Claims) as to why any discovery was necessary in response to our motion for summary judgment. App. Br. at 56.

IV. <u>This Case Is Not Justiciable</u>

"Even if a court possesses jurisdiction to hear a claim, when that claim presents a nonjusticiable controversy, the court may nevertheless be prevented from asserting its jurisdiction." *Roth v. United States*, 378 F.3d 1371, 1385 (Fed.

Cir. 2004). The Alimanestianu plaintiffs' attempt to second-guess the President's exercise of his authority to settle their claims and to restore relations with Libya invokes non-justiciable political questions. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

The President's authority to enter into the claims settlement agreement with Libya is beyond question and is a quintessential example of the exercise of the President's broad constitutional powers in foreign affairs. *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Dames & Moore*, 453 U.S. at 679-80 (same). Indeed, the Supreme Court has long acknowledged the President's authority specifically with respect to espousal of the claims of United States' nationals against foreign states. *Dames & Moore*, 453 U.S. at 679-80 ("the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries . . . . [T]here has also been a longstanding practice of settling such claims by executive agreement. . . ."); *see also Shanghai Power*, 4 Cl. Ct. at 244 ("Our Presidents have exercised the power to settle international claims of U.S. nationals at least since 1799.").

This Court's decision in *Belk* – that cases like this are not justiciable – parallels this case. In *Belk*, former hostages held by Iran sued the United States for a taking of their claims against Iran. Plaintiffs' complaint in that case involved the

"implement[ation] of the Algiers Accords" – that is, the implementation of the settlement of plaintiffs' claims with Iran. *Belk*, 858 F. 2d at 710. This Court concluded that the case was not justiciable because "[t]he determination whether and upon what terms to settle the dispute with [another country] . . . necessarily was for the President to make in his foreign relations role." *Belk*, 858 F.2d at 710.

The same is true in this case – the Alimanestianu plaintiffs challenge the Executive Branch's espousal of their claims pursuant to Congress's enactment of the LCRA, which premised the restoration of Libya's sovereign immunity on the settlement of terrorism-related claims of United States nationals against Libya. Shortly after the enactment of the LCRA, the Executive Branch espoused the claims of the Alimanestianu plaintiffs in accordance with that legislation and entered into the claims settlement agreement with Libya. The settlement agreement required the Secretary of State to certify that the funds received were sufficient to compensate the victims of Libya's state-sponsored terror. *See* Appx78-82. The funds were then distributed to claimants by the State Department and the Commission, in amounts that the Alimanestianu plaintiffs now challenge. By challenging the amounts they received under the settlement agreement, they are challenging the merits of that agreement. This situation parallels the *Belk* plaintiff's challenge to the implementation of the Algiers Accords and, like that challenge, is nonjusticiable.

The trial court disagreed with us with respect to justiciability. In denying our motion to dismiss, it held that the Alimanestianu plaintiffs are not challenging the merits of the settlement agreement or the President's settlement authority. Appx144.

We continue to respectfully disagree. The Alimanestianu plaintiffs allege that the Government compromised their claims "for pennies on the dollar," and that they received either "nothing in exchange for the espoused Judgment or a fraction of the value of the Judgment." Appx21. In describing "the taking" that they allege occurred, they assert that the settlement agreement resulted in the establishment of a fund of 1.5 billion dollars but that "[t]he amount of the Fund was a small fraction of the value of the claims that U.S. citizens held against Libya." Appx25. They assert that "the Executive branch espoused the valuable claims and judgments of its citizens against Libya and used them as a bargaining chip in its efforts to restore diplomatic relations with the state of Libya." Appx25. And they again emphasize that, because the fund was not sufficient to cover the amount of their non-final judgment, they believe that a taking occurred. Appx27. Indeed, in their brief to this Court, they repeatedly challenge the amount they received from the settlement. App. Br. at 50-56 ("The Commission did not provide reasonable compensation for the plaintiffs"). Moreover, before the trial court, they even asserted that the property interest that they allege was taken is "the

proceeds from the settlement of the claims." Appx220. These statements reveal that the core of the Alimanestianu plaintiffs' argument relates to the President's exercise of his authority to espouse and to settle claims, in the context of conducting the United States' foreign relations with Libya.

The reasons that the President's exercise of claims settlement authority is insulated from judicial review become evident if one imagines what would happen if this Court were to adopt the Alimanestianu plaintiffs' theory. A determination that the United States engaged in a taking in this case could have the effect of requiring the United States, in any future claims settlement agreement with a foreign sovereign, to pay compensation to persons who were engaged in litigation against that sovereign in an amount determined by a trial court or simply by the plaintiff's claimed damages. Those damages amounts can be significant and are not always tested in the courts through adversarial proceedings; indeed, in many terrorism cases, plaintiffs have obtained substantial default judgments against foreign states who do not appear. *See, e.g., Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1121 (9th Cir. 2010) (resolving issues related to enforcement of plaintiffs' $2.6 billion default judgment against Iran arising out of the 1983 bombing of United States Marine barracks in Lebanon); *Volloldo v. Ruz*, 2016 WL 84192, at *1 (N.D.N.Y. Jan. 1, 2016) (citing state-court $2.79 billion default judgment against Cuba arising out of alleged acts of torture).

This prospect might inhibit the United States from making future settlements, even when they are in its foreign policy interests, or may effectively require the United States to negotiate larger settlements, which could prove impossible or politically costly. Such a determination would also, as courts have suggested, have the effect of making the United States indirectly responsible for Libya's conduct. "The American government should not be held as a surrogate for [another country's] unjustifiable actions." *Belk*, 12 Cl. Ct. at 735; *see also Abrahim-Youri*, 36 Fed. Cl. at 487 ("The property losses that plaintiffs suffered were occasioned by Iran, not the United States."). In other words, the rule that the Alimanestianu plaintiffs seek could have serious unintended consequences in matters of foreign policy that are committed to the political branches.

Accordingly, this case is not justiciable.

CONCLUSION

For these reasons, the Court should affirm the trial court's judgment.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Defendant-Appellee's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This Brief was printed in Times New Roman font at 14 points. According to the word-count calculated by Microsoft Word, this brief contains a total of 12,089 words, which is within the 14,000 word limit.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 10th day of August, 2017, a copy of the foregoing Brief

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