SET FOR ORAL ARGUMENT ON MARCH 26, 2018

No. 17-7100

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RACHEL DEVORA SPRECHER FRAENKEL, et al.

Plaintiffs – Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, et al.

Defendants – Appellees.

Appeal from the United States District Court for the District of Columbia, No. 15-1080 (RMC) (Hon. Rosemary M. Collyer)

BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae Erica Hashimoto, appointed in support of appellee, hereby submits the following certificate as to parties, rulings, and related cases.

A. Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the District Court and in this Court are listed in the Brief for Plaintiffs-Appellants: amicus curiae appointed in support of appellee is Erica Hashimoto from the Appellate Litigation Clinic at Georgetown University Law Center.

B. Rulings Under Review. The rulings under review are:

(1) The district court's Order dated March 31, 2017, at A333-334, and its opinion issued on the same date, at A302-332, and published as *Fraenkel v. Islamic Republic of Iran*, 248 F. Supp. 3d 21 (D.D.C. 2017); and

(2) The district court's Order dated June 28, 2017, at A761, and its opinion issued on the same date, at A749-760, and published as *Fraenkel v. Islamic Republic of Iran*, 258 F. Supp. 3d 77 (D.D.C. 2017).

C. Related Cases. Amicus is not aware of any related cases.

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TABLE OF AUTHORITIES

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

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Rules

GLOSSARY

Abbreviation	**Meaning**
FSIA	Foreign Sovereign Immunities Act
FTCA	Federal Tort Claims Act
MOIS	Iranian Ministry of Information and Security

STATEMENT OF ISSUES FOR REVIEW

I. Whether a district court's broad discretion when calculating solatium damages under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA) encompasses the discretion to eschew the baseline damages awards described in *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006).

II. Whether the district court adequately explained its award of $55.1 million in solatium, pain and suffering, and punitive damages, whether it relied on proper factors in arriving at its solatium award, and whether the award amounts are otherwise within reason.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the brief for Plaintiffs/Appellants. *See* Op. Br. a1-a11.

STATEMENT OF THE CASE[1]

A. Naftali Fraenkel's Kidnapping and Death

On June 12, 2014, after texting his parents to tell them he was coming home a day early from boarding school, sixteen-year-old Naftali Fraenkel waited with a school friend, Gilad Shaer, and another young man, Eyal Yifrach, to hitch a ride to his home forty miles away in Nof Ayalon, Israel. A304, A757. At around 10:00 p.m., a car picked them up from a hitchhiking post in Alon Shvut, near the Israeli settlement of Gush Etzion in the West Bank. A304.

Immediately after the three friends entered the car, one of its occupants brandished a gun and told them that they were kidnapped, but that they would not be hurt if they stayed calm. A304. At around 10:30 p.m., emergency services received a call from Gilad's cellphone. A305. On the call, a voice said the young men had been kidnapped; then another voice is heard, speaking Arabic and Hebrew, saying "put your head down"

[1] References to page numbers "A___" signify citations to the Appendix the Fraenkels filed in this Court. *See* ECF No. 16. Unless otherwise indicated, facts referenced in the Statement of the Case come from the district court's decisions of March 31, 2017 (*Fraenkel I*) (A302-332) and June 28, 2017 (*Fraenkel II*) (A749-760).

before sounds of muffled gunshots and a person moaning in pain. A305 (citing audio-recording of emergency call, at A652).

Awoken around 3:30 a.m. by police at their door looking for Gilad, Naftali's parents, Abraham and Rachelle Fraenkel,[2] realized Naftali was also missing. A305. Police traced Gilad's phone call to its last known location, in the Hebron region, an area "populated mostly by Arabs . . . some of which are very hostile to Israeli citizens." *Id.* (quoting R. Fraenkel Test., at A347). As soon as Mrs. Fraenkel heard that the boys' phones were traced to Hebron, she "'understood that it was an act of terrorism.'" A758 (quoting R. Fraenkel Decl. ¶ 21, at A103).

Before his kidnapping and murder, Naftali spent the week at boarding school in Gush Etzion, "about six miles from Hebron, a predominantly Palestinian city." *See* A304, A757. The high school is "40 miles further into the West Bank" from the Fraenkels' home in Nof Ayalon. A757. Nof Ayalon sits in central Israel on the Green Line, a territorial demarcation drawn by Israel, Jordan, and Egypt following an armistice agreement in 1949. *See* A756 n.2 & 3. According to the

[2] The caption of this case and the complaint both list Mrs. Fraenkel's first name as "Rachel." The Fraenkels' Opening Brief uses "Rachelle" so Amicus uses that spelling.

Fraenkels' expert, Gush Etzion junction,[3] near where Naftali and his friends were abducted, had been the site of "many terror attacks" since 2000, "especially during the latest wave of terror, which began in 2015." A757 (quoting Spitzen Decl. ¶ 20 n.3, at A45). It nonetheless was common for students and others to wait at the Alon Shvut junction, A304, and the three boys thought they were getting a ride from a spot where hitchhiking was "normal and usually safe." A758 (quoting R. Fraenkel Decl. ¶ 43, at A107).

Following the three boys' disappearance, 18 days of massive searching ensued. A305. On June 30, 2014, the boys' bodies were found on land belonging to Hussam Ali-Hasan al-Qawasmeh, the head of a Hamas cell. A305-306. During interrogation of Al-Qawasmeh by Israeli police, it emerged that his cell had funded, planned, and carried out the

[3] In the declaration quoted by the district court, the Fraenkels' expert stated that Naftali and his friends were abducted from Gush Etzion Junction. *See* Spitzen Decl. ¶¶ 20-21, at A45-46. In his oral testimony, Spitzen corrected that statement because the three were kidnapped from Alon Shvut Junction, an intersection located "three kilometers" to the west. *See* Spitzen Test., at A457; *see also* Spitzen Suppl. Decl. ¶ 3, at A641-642. The district court correctly found, as a matter of fact, that Naftali, Gilad, and Eyal got into their killers' car in Alon Shvut. *See* A304.

kidnapping of Naftali, Gilad, and Eyal. A306-307. The driver and passenger—Abu Aisha and Marwan al-Qawasmeh—originally intended to kidnap one person and use him to secure the release of Hamas sympathizers, but instead killed all three hostages when they resisted. A307. On August 20, 2014, Hamas officially took responsibility for the murders of Naftali, Gilad, and Eyal. A307. Defendants the Islamic Republic of Iran (Iran), the Iranian Ministry of Information and Security (MOIS), and the Syrian Arab Republic (Syria) supported Hamas by "facilitating recruitment, training, and safe haven" and by "providing financial assistance." A307-313.

As described by the district court, the deaths of Naftali and his friends were "tragic actions carried out by Hamas terrorists in an attempt to influence Israel" for which "[o]nly Hamas and its supporters are at fault." A760. By all accounts, Naftali was "a sterling young man on the cusp of his life." A330. Naftali is survived by his parents and six siblings,[4] all of whom, along with Naftali's estate, are plaintiffs. *Id.* All

[4] Tzvi (brother, 19 years old at the time of Naftali's killing), A.H. (sister, 14), A.L (sister, 11); N.E. (sister, 9); N.S. (sister, 6); S.R. (brother, 4). *See* Appellant's Op. Br. at 12-18.

but Naftali's father are U.S. citizens, *see* A318, and Naftali was also a U.S citizen. A317.

B. Proceedings Below

The Fraenkels filed this 28 U.S.C. § 1605A complaint against Iran, MOIS, and Syria, and filed a motion for default judgment after defendants failed to appear. *See* A12-32; A33-47. Pursuant to 28 U.S.C. § 1608(e), a district court may enter default judgment against a foreign state if plaintiffs establish their claim by evidence satisfactory to the court.

The court held a two-day evidentiary hearing at which Mr. and Mrs. Fraenkel, along with five of Naftali's siblings, testified about their relationship with him and the circumstances of his death. *See* A338-447. In their testimony, Naftali's family members provided "a picture of a loving family" in which "Naftali played a central role in their spiritual and personal lives." A329. In particular, they told how Naftali's musical talent enriched their celebration of the Sabbath and religious holidays. *Id*. The Fraenkels also called five expert witnesses who testified to the details of the murder and its psychological effects on the Fraenkels, as well as the relationship between Hamas, Iran, and Syria. A447-602.

In its March 31, 2017 opinion (*Fraenkel I*), the district court held defendants liable under Section 1605A. *See* A302-332. It found, based on the evidence presented, that Hamas intentionally kidnapped and killed Naftali as part of its plan to abduct Israeli citizens, and that Iran's and Syria's material support to Hamas contributed to his killing. A321-323.

The district court awarded the Fraenkels pain and suffering, solatium, and punitive damages. A326-332. Reasoning that the 30 minutes between Naftali's capture and death "would be an eternity" for a sixteen-year-old facing death, the court ordered $1 million to Naftali's estate for his pain and suffering. A328. It further awarded Naftali's mother and six sibling—all U.S. citizens—$3.1 million in solatium damages for their pain and suffering, grief, and loss of society following Naftali's murder, A328-329; A754 n.1, and awarded Mr. Fraenkel another $1 million in solatium under Israeli law. A331-332.

Finally, the court found punitive damages justified because Iran and Syria's material support for Hamas' terrorism is "horrific," Iran and Syria intended to cause harm by supporting Hamas, and punitive damages had been previously awarded to deter these two countries.

A330. The Fraenkels presented expert evidence that Iran provides between $3 million and $300 million in aid to Hamas annually. A330-331. After considering three different methods for calculating punitive damages, the court awarded a fixed amount of $50 million jointly and severally between Iran and Syria. A330-331.

The Fraenkels moved to reconsider the district court's final order, *see* A711-745, taking particular issue with the solatium damages award. They argued that the court should have awarded solatium damages in line with *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), which established a standardized formula for assessing solatium damages under the FSIA that has been followed in many subsequent cases.[5] *See* A721-734. The Fraenkels also faulted the district court for failing to explain its rationale for calculating damages and for not itemizing solatium awards for each plaintiff. A738-742.

[5] *Heiser*'s standardized framework awards $8 million to spouses of deceased terrorism victims, $5 million to their parents, and $2.5 million to their siblings. A755; *see Heiser*, 466 F. Supp. 2d at 269.

After untangling a few procedural knots related to the proper rule to invoke,[6] the court denied reconsideration. *See Fraenkel II*, at A749-760. It explained its decision to eschew *Heiser*'s standardized framework for solatium damages:

> Despite its common acceptance, *Heiser* is not binding; it is an opinion of a valued colleague, not a superior court. This jurist believes that awards made through the "lens of civil tort liability" require all FSIA plaintiffs to justify their damages, which means that damages must be reasonably tied to a plaintiff's facts. *Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 176 (D.D.C. 2010). Thus, different plaintiffs (even under FSIA) will prove different facts that may well (and should) result in different damage awards.

A755.

The court noted that it had previously declined to adopt *Heiser* in *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53 (D.D.C. 2008), *aff'd* 646 F.3d 1 (D.C. Cir. 2011), and instead "view[ed] the Fraenkels' claims

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[6] The Fraenkels filed their motion under Federal Rules of Civil Procedure 52(b), 59(a), and 59(e). *See* A711. The district court held Rule 59(a) inapplicable but entertained the motion under Rules 52(b) and 59(e). A750-754. Because the Fraenkels in their opening brief do not challenge as improper the court's failure to grant the motion or its consideration of this motion under Rule 52(b) and 59(e), amicus does not address these rules in this brief.

in contrast to the claims of the plaintiffs in" that case. A755. The court concluded that the facts of this case warranted a damages award less than *Gates*. *Id.*[7] It explained that the victims in *Gates* were "abducted because they were U.S. citizens living abroad engaged to work at the behest of the United States government," who were "brutally murdered in slow beheadings with a knife, broadcast around the world on the Internet." A756. By contrast, the court explained, the Fraenkels are natives of Israel living in a town half of which is in contested territory. A756 & n.3. The court noted that a "full truce between some of the warring parties" over this territory "has never been reached"; therefore, "[p]laintiffs accepted the risks of living in a community built across the Green Line in Israel and sending Naftali Fraenkel 40 miles further into the West Bank for high school in Gush Etzion," which is six miles from predominantly Palestinian Hebron. A757. The court further noted that Naftali was hitchhiking home at night from the "site of many terror attacks" and that, at that time, "the kidnapping of Jews" was a preferred

[7] In *Gates*, the district court awarded a victim's spouse, mother, and daughter $3 million each, and his sister $1.5 million. *See* 580 F. Supp. 2d at 72.

tactic of Hamas. A757-758 (citations and quotations omitted). Thus, the court concluded:

> Naftali Fraenkel and the two other young men were kidnapped and murdered because they were Jewish-Israeli teenagers. Naftali was not targeted because he was a U.S. citizen . . . and he was not a U.S. citizen inadvertently caught up in the Israeli-Palestinian conflict . . . To the contrary, Naftali Fraenkel was an Hamas target because of his Israeli citizenship. These facts do nothing to lessen the Plaintiffs' grief or loss or U.S. citizenship, but they do affect their remedies when viewed through the lens of civil tort liability. Aside from Rachelle Fraenkel's single statement about the safety of hitchhiking from Gush Etzion, the record is bereft of information to counter Plaintiffs' own experts' statements that the location was the site of many terror attacks aimed at Jewish-Israeli citizens.

A758-759.

The court then itemized its $3.1 million solatium award to the U.S. citizen family members.[8] In light of the above facts, the court determined that $1 million in solatium damages was warranted for Mrs. Fraenkel. A759. Because under *Heiser* and *Gates*, "siblings of victims

[8] Responding to the Fraenkels' argument that it failed to itemize each plaintiff's damages, the district court explained that it had previously "chose[n] to award a single amount to prevent the Fraenkel children from thinking any testimony was more or less useful." A759.

generally receive less than spouses or parents," the court awarded four of Naftali's siblings $500,000 each. *Id.* Finally, given the age of Naftali's two youngest siblings at the time of his death (six and four), the court determined that a "lower award was appropriate" and granted them $50,000 each. A759-760.

The Fraenkels timely appealed.

SUMMARY OF THE ARGUMENT

The Fraenkels' chief complaint on appeal is that in awarding over $4 million in solatium damages, the district court refused to follow another judge's approach to damages that may have secured them many millions more. *See* Op. Br. at 29-30. They contend that essentially every district court judge to award solatium damages under the FSIA has followed *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), and *no* other court except the court below has failed to adopt its guidelines. *See* Op. Br. at 32-43. The Fraenkels argue that any divergence from this line of cases must be carefully explained, *see id.* at 51-52, to avoid damages awards that are "arbitrary" and "unsupported." *Id.* at 46. To rectify the district court's supposed break with precedent, the Fraenkels ask this Court not only to vacate but also to mandate

solatium damages nine times the district court's judgment. *See* Op. Br. at 64.

This Court should do neither. The foundational premise of the Fraenkels' appeal—that all FSIA cases until now have spoken with one voice about solatium damages—is an inaccurate description of the law. Cases awarding solatium damages under FSIA speak with many voices; the district court below enjoyed the discretion either to echo prior decisions or to add its own voice into the mix. *Heiser*, as the district court rightly noted, is the "opinion of a valued colleague, not a superior court," *Fraenkel II*, at A755; the district court was obligated neither to adopt *Heiser*'s framework nor to justify its rejection of *Heiser*'s baseline amounts.

Instead, so long as the district court explained its award, considered legally permissible factors, and awarded damages that are not "beyond all reason, so as to shock the conscience," *Peyton v. DiMario*, 287 F.3d 1121, 1126-27 (D.C. Cir. 2002), the judgment must be affirmed. All three portions of the district court's $55.1 million award were the product of reasoned analysis that considered appropriate factors. The district court calculated the Fraenkels' solatium damages by carefully considering the

facts of this case—including the relative expectedness of the Gush Etzion attacks—and comparing them to those in *Gates*. It awarded pain and suffering damages that the Fraenkels themselves admit are typical of past awards. And it assessed punitive damages according to established methodology. Finally, as tragic as this case is, the damages do not shock the conscience. The judgment must be upheld.

STATUTORY FRAMEWORK AND STANDARD OF REVIEW

The only issue before this Court is the district court's discretionary award of damages. Before setting forth that standard, it is helpful to understand the statutory framework within which the district court operated. The FSIA, as amended, creates a federal cause of action against foreign states for personal injury or death caused by "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking" or by the "provision of material support or resources" by a foreign state. 28 U.S.C. § 1605A(a)(1); *see Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 840 (D.C. Cir. 2009). Terrorism victims may recover damages for pain and suffering and their relatives may recover "solatium," 28 U.S.C. § 1605A(c), to compensate for "anguish, bereavement, and grief" as well as for the loss of the victim's society and comfort. *E.g.*, *Belkin v. Islamic*

Republic of Iran, 667 F. Supp. 2d 8, 22 (D.D.C. 2009) (citations omitted); *see generally Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 29-32 (D.D.C. 1998) (discussing origins and contours of solatium damages).[9] The statute further permits recovery of "punitive damages." 28 U.S.C. § 1605A(c). Under the FSIA, the district court acts as factfinder. 28 U.S.C. § 1330(a) (authorizing federal jurisdiction over "any nonjury civil action against a foreign state").

This Court has not set forth a standard of review for assessing non-economic damages awarded under the FSIA, but courts review analogous awards under the Federal Tort Claims Act (FTCA) for abuse of discretion. *See*, *e.g.*, *Limone v. United States*, 579 F.3d 79, 103 (1st Cir. 2009) (noting that monetizing non-economic harm is "a classic example of a judgment call" reviewed for abuse of discretion). This Court therefore should

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[9] Many pre-2008 district court opinions awarding FSIA damages include lengthy discussions of state law damages schemes. *See, e.g.*, *Heiser*, 466 F. Supp. 2d at 271-357. Those state damages schemes now are largely irrelevant to FSIA claims because although district courts pre-2008 had to rely on state law to provide an FSIA cause of action, *see Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004) (holding that FSIA waived sovereign immunity but did not provide a cause of action), Congress amended the FSIA in 2008 to "create a federal right of action against foreign states" for U.S. citizens. *Oveissi,* 573 F.3d at 840 (citation omitted); *see* 28 U.S.C. § 1605A.

review the amount of damages awarded to the Fraenkels for abuse of discretion. *See Hill v. Republic of Iraq*, 328 F.3d 680, 683 (D.C. Cir. 2003) (reviewing for abuse of discretion whether sufficient evidence supports awarding particular types of damages).

A district court abuses its discretion if it fails to explain its reasoning or considers an improper factor. *See* Fed. R. Civ. P. 52(a); *Hill*, 328 F.3d at 683. Otherwise, an award of damages may only be disturbed if it is so grossly disproportionate as to shock the conscience. *Peyton*, 287 F.3d at 1126-27 (holding that district court abuses discretion in denying remittitur only where "the verdict is beyond all reason, so as to shock the conscience").

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO CALCULATE SOLATIUM DAMAGES ACCORDING TO THE *HEISER* FRAMEWORK

The broad discretion a trial court enjoys in calculating non-pecuniary damages includes the discretion to reject *Heiser*'s use of presumptive baselines to guide solatium awards. Monetary awards for mental and emotional harm are "inherently speculative" as there is "no objective way to assign any particular dollar value to distress." *Turley v. ISG Lackawanna*, 774 F.3d 140, 162 (2d Cir. 2014). This Court has "firmly established that the trier of fact has broad discretion in calculating damages for pain and suffering." *Flatow*, 999 F. Supp. at 28 (citing *Taylor v. Wash. Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969)); *see also Gonzalez v. United States*, 681 F.3d 949, 953 (8th Cir. 2012) (noting trial courts' "enormous range of discretion" when awarding pain and suffering damages).

The Fraenkels' argument—that the district court's judgment should be reversed because it did not base its damages calculation on the *Heiser* framework—should thus be rejected since it would essentially deprive the factfinder of that very discretion. The solatium damages

framework outlined by the district court in *Heiser*, and adopted by others since, is one method of quantifying harms that are, "by their very nature, unquantifiable." *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57, 72 (D.D.C. 2015). But while *Heiser* may be one acceptable method of attempting to quantify such damages,[10] it is not the only way. Several FSIA opinions involving solatium damages, both before and after *Heiser*, fail to apply the baselines established in that case. And even cases purporting to apply *Heiser* speak inconsistently about applicable baselines.

Accordingly, the Fraenkels' argument fails because its central premise—that essentially every FSIA solatium damages case uses *Heiser* as its starting point—is incorrect. And even were that premise true, the district court would still enjoy the discretion to ignore *Heiser*'s baselines. *Heiser*, of course, is not binding. As a baseline for measuring harm, the *Heiser* figures are no better or worse than the amounts awarded by the district court here. Provided, then, that solatium damages awards are "reasonably tied to a plaintiff's facts," *Fraenkel II*, at A755, they should

[10] This Court has not had an opportunity to consider the validity of the *Heiser* framework as damages awards under the FSIA are rarely appealed.

be upheld. *See Hill*, 328 F.3d at 681, 684 (requiring that damages under FSIA be proved by a "reasonable estimate").

A. *Heiser* Purports to Quantify Inherently Unquantifiable Damage Awards

The framework the district court established in *Heiser* is an imperfect solution to an impossible problem: How can one place monetary value on the loss of a family member's life? Solatium damages—like other damages purporting to measure distress and mental suffering—are, "by their very nature, unquantifiable." *See Moradi*, 77 F. Supp. 3d at 72. Courts therefore find it "undeniably difficult" to arrive at a dollar value. *E.g.*, *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 59 (D.D.C. 2006). As one district court put it, the "paradox of solatium" is that although "no amount of money can alleviate the emotional impact" of a close relative's death, "dollars are the only means available to do so." *Flatow*, 999 F. Supp. 1 at 32 (citation omitted).

The framework established in *Heiser*, then, is a heuristic—a decision-making shortcut—for calculating these inherently incalculable awards. *Cf. Braun v. Islamic Republic of Iran*, 228 F. Supp. 3d 64, 85 (D.D.C. 2017). Under *Heiser*, the spouse of a deceased terror victim typically receives $8 million in solatium damages, parents $5 million, and

siblings $2.5 million. *E.g.*, *Heiser*, 466 F. Supp. 2d at 269.[11] Later cases—most notably *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007)—explained that where the terror victim is injured but not killed, plaintiffs should receive half what they would have received had the victim died. *See, e.g.*, *id.* at 52 (establishing framework awarding spouses of injured victims $4 million, parents and children $2.5 million, and siblings $1.5 million).[12] The award amounts rely on the premise that "'spouses typically receive greater awards than parents,' who in their own right are entitled to greater sums than siblings." *Worley v. Islamic Republic of Iran*, 177 F. Supp. 3d 283, 287 (D.D.C. 2016) (citing and quoting *Heiser*, 466 F. Supp. 2d at 269).

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[11] Courts are not always consistent in *Heiser*'s baseline defaults for children of terrorism victims. *Compare, e.g.*, *Owens v. Republic of Sudan*, 71 F. Supp. 3d 252, 261 (children should receive $5 million when victim died) *and Peterson*, 515 F. Supp. 2d at 52 (same), *with Worley v. Islamic Republic of Iran*, 177 F. Supp. 3d 283, 287 (D.D.C. 2016) ("Children of a deceased victim are typically awarded $3 million.") *and Spencer v. Islamic Republic of Iran*, 71 F. Supp. 3d 23, 27 (D.D.C. 2014) (same).

[12] The Fraenkels' appendix, Op. Br. at b1-b13, lists only cases awarding solatium that involved a death. But cases involving surviving victims—some of which apply *Peterson*, and some of which do not—are highly relevant in assessing both the wisdom of a standardized-baseline approach and the degree of lower court acceptance of *Heiser*'s and *Peterson*'s baseline amounts. *See infra* Part I.B.

District courts have consistently emphasized that, despite these baselines, solatium damages are not "set in stone." *See, e.g.*, *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 26 (D.D.C. 2011) (quoting *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 79 (D.D.C. 2010)). On the contrary, valuation of a claimant's non-economic harm is "committed to the discretion of the particular court." *See, e.g.*, *Braun*, 228 F. Supp. 3d at 85 (quoting *Oveissi*, 768 F. Supp. 2d at 26. Accordingly, courts applying *Heiser* sometimes depart upward from the baselines depending on the closeness of the relationship, the severity of the relative's pain and suffering, or the shocking nature of a terrorist act. *See Braun*, 228 F. Supp. 3d at 85. Likewise, courts have departed downward—or denied solatium altogether—where, for instance, the plaintiffs were not close with the victim, *see, e.g.*, *Worley*, 177 F. Supp. 3d at 287, a survivor suffered no physical injuries, *see, e.g.*, *Kaplan v. Hezbollah*, 213 F. Supp. 3d 27, 38-39 (D.D.C. 2016), or a plaintiff was too young at the time of the attack to remember the deceased relative, *see Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27, 37 (D.D.C. 2008). In each instance, however, the ultimate decision—how to translate "a tragic event for which money can never compensate" into

dollars and cents, *see Fraenkel I*, at A332—is committed to the discretion of the individual trial judge.

B. FSIA Cases Do Not Speak with a "Consistent Voice" About Solatium

The main thrust of the Fraenkels' argument on appeal is that FSIA cases in this district uniformly follow *Heiser*, and any decision calculating solatium damages without using its baselines as a starting point therefore constitutes abuse of discretion. But that argument suffers a serious flaw. The claim that *Heiser* "encapsulated all cases that had come before it" and that it has "been consistently followed by all that came after," *see* Op. Br. at 34, is wrong.

1. *Heiser* provides only general estimates based on a selected survey of cases

The Fraenkels overstate the extent to which *Heiser*'s baselines reflected a consensus among FSIA solatium damages awards when that case was decided. *See* Op. Br. at 34 (asserting that *Heiser* "restated the clear consensus" in terrorism-exception damages awards). In reality, no such consensus existed, and *Heiser* made no claim that it did. Far from attempting an in-depth survey of the thirty-odd district court decisions that came before it, *Heiser* provided general estimations of the awards in

cases it viewed as relatively comparable. *See Heiser*, 466 F. Supp. 2d at 269 (describing what courts "*typically* award" in FSIA solatium damages) (emphasis added). These estimations accurately described the summarized cases. But they masked significant variation in the solatium damages awards that came before.

For instance, two cases before *Heiser* awarded the children of deceased terrorism victims $12 million—or as much as four times the amount that children typically receive under the *Heiser* framework. *See Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 35 (D.D.C. 2005); *Higgins v. Islamic Republic of Iran*, 2000 WL 33674311, at *8-9 (D.D.C. 2000). And the court awarding those damages, like *Heiser*, found them to be "relatively in-line with previous FSIA precedents." *See Holland*, 496 F. Supp. 2d at 35 (citing *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 116-17 (D.D.C. 2005)); *see also Heiser*, 466 F. Supp. at 269 n.24. Even the cases that *Heiser* cited to support its ballpark figures vary in their awards. *Compare Salazar* 370 F. Supp. 2d at 116 (D.D.C. 2005) (awarding $5 million to child of deceased victim), *and Flatow*, 999 F. Supp. at 32 (awarding $2.5 million to siblings of deceased victim), *with Kerr v. Islamic Republic of Iran*, 245 F. Supp. 2d 59, 64 (D.D.C. 2003)

(awarding $3 million to children and $1.5 million to siblings of deceased victim).

Moreover, *Heiser* drew its baselines partly by relying on cases that involved long-term hostages who survived. *See Heiser*, 466 F. Supp. 2d at 269 & n.24.[13] But in doing so, it overlooked considerable disparities in solatium damages prior courts had awarded victims' families. *Compare, e.g.*, *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998) ($10 million for wife of 3.6-year hostage), *and Acree v. Republic of Iraq*, 271 F. Supp. 2d 179, 222-23 (D.D.C. 2004) ($10 million for spouses and $5 million for parents, children, and siblings of former POWs held for 3 months) *vacated on other grounds*, 370 F.3d 41 (D.C. Cir. 2004), *with, e.g.*, *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 26 (D.D.C. 2001) ($1.5 million for wife of 7-month hostage), *and Stethem v. Islamic*

[13] *Heiser*'s reliance on these cases further undermines the Fraenkels' assertion that *Heiser* represents a "gold standard." *See* Op. Br. at 34. In *Heiser*, the court equated non-death hostage cases with deceased-victim cases for the purpose of establishing baselines. But later courts departed from this approach and awarded survivors' relatives *half* what the relative of a deceased victim would receive. *See, e.g.*, *Peterson*, 515 F. Supp. 2d at 51-53. In hindsight, then, *Heiser*'s use of these cases fails to support the baseline numbers it established.

Republic of Iran, 201 F. Supp. 2d 78, 92 (D.D.C. 2002) ($200,000 for wives of hostages held for 2 weeks).

In short, *Heiser*'s baselines did not "restate[] . . . clear consensus that had developed regarding terrorism damages." *See* Op. Br. at 34. Instead, they provided an approximate synthesis of a prior subset of cases that masked considerable inconsistency in solatium damages more generally.

2. *Heiser* has neither been uniformly followed nor consistently applied

The Fraenkels' characterization of the *Heiser* framework is also flawed because the district court is far from "the only court to reject the *Heiser* framework" since the baselines were established. *See* Op. Br. at 34. Although the opinion in this case appears to be the first *explicitly* rejecting *Heiser*, numerous post-*Heiser* solatium awards do not apply the framework.[14] Courts have awarded plaintiffs less in solatium damages than would be available under *Heiser* without taking that case's baselines

[14] Other courts, like the district court below in *Fraenkel I*, have not mentioned or considered *Heiser*'s framework in awarding solatium damages. Because the Fraenkels sought reconsideration in part on the ground that the district court was required to follow that framework, the district court of necessity had to address it.

as a starting point. In *Massie v. Democratic People's Republic of Korea*, 592 F. Supp. 2d 57 (D.D.C. 2008), for example, the district court awarded the wife of a U.S. Navy commander abducted and tortured by North Korea a total of $1.25 million, which is almost 70% less than the $4 million she would have received had that court applied *Heiser*. *See id.* at 77. And in *Gates*, the district court ordered $3 million each in solatium damages for the wives of two military contractors killed "in the most terrible and public way possible"—or around 63% less than what they would have received from a court applying the $8 million *Heiser* baseline for the spouses of deceased terror victims. *See* 580 F. Supp. 2d at 72.

Conversely, courts have granted awards well above what plaintiffs would otherwise have received under *Heiser* without referring to the standardized baselines. *See Kim v. Democratic People's Republic of Korea*, 87 F. Supp. 3d 286, 290 (D.D.C. 2015) (awarding $15 million each to the son and brother of a disappeared missionary—$1 million for each year since his abduction by North Korea—citing only non-*Heiser* cases);[15]

[15] Despite asserting that, to their knowledge, "the decision below is the only decision of the D.C. District Court to deviate materially from the *Heiser* framework," Op. Br. at 36, Fraenkels' counsel previously represented the plaintiffs in *Kim*, a case in which the district court neither mentioned *Heiser* nor followed its framework.

Estate of Bayani v. Islamic Republic of Iran, 530 F. Supp. 2d 40, 46 (D.D.C. 2007) (awarding wife and children of former Iranian air-force officer $30 million and $7 million respectively after his arrest, torture, and execution by Iranian security services); *Levin v. Islamic Republic of Iran*, 529 F. Supp. 2d 1, 21 (D.D.C. 2007) (awarding $10 million to wife of 343-day hostage).

Further undermining the Fraenkels' suggestion that *Heiser* is a "gold standard . . . followed nearly universally," Op Br. at 34, courts purporting to apply *Heiser* have done so inconsistently. As mentioned earlier, *see supra* note 11, *Heiser* courts have applied different baselines when awarding solatium damages to the children of terror victims. *See Mwila v. Islamic Republic of Iran*, 33 F. Supp. 3d 36, 44-45 (D.D.C. 2014) ("Courts in this district have differed somewhat on the proper amount awarded to children of victims."); *see also supra* note 11. Even individual judges in this district have varied their practice, awarding different amounts to children while purporting to apply *Heiser*'s baselines. *Compare Fain v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 83 (D.D.C. 2012) (Lamberth, J.) (describing $1.5 million as baseline for child of surviving victim and rejecting $2.5 million recommended by special

master) *with Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 232 (D.D.C. 2012) (Lamberth J.) (describing $2.5 million as baseline). Contrary to the Fraenkels' assertion, even those cases that actually apply *Heiser* speak with many voices. *But see* Op. Br. at 29.

3. Just two judges have decided the majority of FSIA terrorism-exception cases

Although *Heiser* is often used as a baseline for solatium damages in FSIA cases, *see Frankel II*, at A755, its popularity may in part be attributable to the fact that Judge Lamberth, *Heiser*'s author, wrote 31 of the 65 solatium damages opinions cited in the Fraenkels' appendix. *See* Op. Br. at b1-b13.[16] Judge Bates decided another 10 cases listed in the appendix—meaning that two judges have decided almost two-thirds of the cases upon which the Fraenkels rely.

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[16] The disproportionate division of FSIA terrorism-exception cases among judges in this district is at least partly explained by the fact that FSIA plaintiffs file many of these cases under Local Rule 40.5 as related to cases involving different terrorist events and groups. *See*, *e.g.*, Notice of Related Case, *Oveissi v. Islamic Republic of Iran*, No. 03-1197-RCL (D.D.C. June 2, 2003), ECF No. 4 (filing suit about 1984 assassination of Iranian in Paris as related to cases about 1995 Gaza bus bombing, 1996 Jerusalem bus bombing, and 2001 Jerusalem restaurant bombing). Indeed, the Fraenkels filed the present action as related to three cases Judge Lamberth previously decided. *See* Order Reassigning Case, *Fraenkel v. Islamic Republic of Iran*, No. 15-1080 (July 21, 2015), ECF No. 4 (Lamberth, J.).

Because Judge Lamberth and Judge Bates repeatedly apply *Heiser*, it is not surprising that FSIA terrorism-exception cases frequently award solatium using its framework. *See, e.g.*, *Peterson*, 515 F. Supp. 2d at 51-52 (Lamberth, J.); *Amduso v. Republic of Sudan*, 61 F. Supp. 3d 42, 49-50 (D.D.C. 2014) (Bates, J) (citing *Peterson*, which itself follows *Heiser*). To be sure, other district court judges have followed *Heiser*. *See, e.g.*, *Braun*, 228 F. Supp. 3d at 85-86 (Howell, C.J.); *Flanagan v. Islamic Republic of Iran*, 87 F. Supp. 3d 93, 117 (D.D.C. 2015) (Contreras, J.); *Moradi*, 77 F. Supp. 3d at 72-73 (Huvelle, J.). But not all. A number of other judges have awarded solatium damages to the families of terror victims without considering the *Heiser* framework. *See, e.g.*, *Bayani v. Islamic Republic of Iran*, 530 F. Supp. 2d 40, 46 (D.D.C. 2007) (Kennedy, J.); *Kim*, 87 F. Supp. 3d at 290 (Roberts, C.J.); *Gates*, 580 F. Supp. 2d at 71-72 (Collyer, J.).

In short, while *Heiser* has undoubtedly achieved "common acceptance," *see Fraenkel II*, at A755, a not-insubstantial number of decisions both before and after *Heiser* have diverged (at times dramatically) from this approach. The Fraenkels' argument that the district court abused the discretion it enjoys in quantifying non-economic

damages by breaking with a body of precedent that "until now . . . spoke with a consistent voice," Op. Br. at 29, relies on an incorrect premise. In reality, the voices are disparate.

C. *Heiser* Provides Neither a Binding Nor an Objective Baseline for Solatium Damages

Even if FSIA cases uniformly have used *Heiser* as a starting point for calculating solatium damages—which they have not—the district court would still have the discretion to decline to do so. Provided that solatium awards are tied to the individual facts of the present case, *see infra* Part II.A, they should not be disturbed for failure to apply *Heiser*'s baselines.

1. Prior damages awards do not create binding precedent

As an initial matter, the district court was not obliged to follow *Heiser*. District court opinions "do not establish binding precedent on other courts." *Labow v. U.S. Dep't of Justice*, 831 F.3d 523, 533 (D.C. Cir. 2016). This is no less the case when it comes to awarding damages. Where federal district courts award non-pecuniary damages, prior damage awards in similar cases are merely informative; they are not binding. *See*, *e.g.*, *Wheat v. United States*, 860 F.2d 1256, 1259-60 (5th Cir. 1988) (reviewing pain and suffering damages under FTCA). Indeed,

this Court has previously rejected the argument that a trial court's damages award must conform to prior comparable awards. *See Peyton*, 287 F.3d at 1127. As this Court explained:

> There is no way of obtaining uniformity in the amount juries and trial judges may award for damages in personal-injury cases. Because of the unique circumstances of each case . . . it is awkward to discuss the size of an award through comparison with past decisions.

Id. (quoting *Mariner v. Marsden*, 610 P.2d 6, 16 (Wyo. 1980) (internal quotation omitted)). The Fraenkels' chief issue on appeal—"[w]hether the district court's monetary award in this case is consistent . . . with awards made in similar cases," Op. Br. at 2 (stating issues presented)—provides no grounds for reversal.

2. *Heiser* represents one court's "judgment call," not an objective measure of pain and suffering

The main difference between this case and a *Heiser* case is that the district court here used as a starting point for its analysis not a preset monetary baseline, as in *Heiser*, but the specific facts of the Fraenkels' case. That is not reversible error. Indeed, there are sound reasons to reject a baseline approach. As measures of non-economic harm, the damages awards in *Heiser* represent the "classic example of a judgment

call." *Limone*, 579 F.3d at 103. In other words, the *Heiser* baselines are no more objective a measure of pain and suffering than any other number a district court might pick. *See Gonzalez*, 681 F.3d at 952 ("Awards for pain and suffering are highly subjective."). The court below therefore had discretion to reject this mode of analysis and instead require that the Fraenkels justify their damages as "reasonably tied" to their particular facts. *See Fraenkel II*, at A755.

The origins of the *Heiser* baselines illustrate their subjectivity. The early cases underlying the baselines make little attempt to justify the amount of the multi-million-dollar awards that subsequent courts would use as the starting point. For instance, in *Flatow*—the D.C. district court's first opinion discussing FSIA solatium damages—the court reasoned that the increased magnitude of injury in terrorism case compared even with extreme negligence "demands a corresponding increase in compensation for increased injury." 999 F. Supp. at 30. But in awarding the parents and siblings of a suicide-bombing victim $5 million and $2.5 million respectively, the *Flatow* court merely noted that "substantial amounts" are necessary "in recognition of [the plaintiffs'] profound loss." *Id.* at 32. Substantial could have been $1 million and

$500,000 respectively. Or $50 million and $25 million. There was no identifiable basis for the award other than that it needed to be "substantial."[17] By themselves, then, *Heiser*'s baselines are neither "tied to a plaintiff's facts," *see Fraenkel II*, at A755, nor "tailored" to any "specific circumstances." *Rhodes v. United States*, 967 F. Supp. 2d 246, 325 (D.D.C. 2013) (explaining standard for non-economic damages under FTCA). An individual trial court therefore must have discretion to ignore them.

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In sum, the Fraenkels' foremost criticism of the district court's opinion—that it did not use *Heiser*'s baselines as a starting point in its award of solatium damages—provides no reason to disturb the judgment. Those baselines are not binding law, they are not universally followed,

[17] Likewise, in *Cicippio*, the first FSIA case in this district to award spousal solatium damages, the court noted that the mental distress of spouses denied their husband's society for years "may have exceeded the grief normally experienced as a result of the death of a loved one." 18 F. Supp. 2d at 70. But when it came to quantifying the harm, the court offered little to explain its $10 million award beyond citing the $8 million awarded to a victim's spouse in *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997)—the first decision of any court awarding solatium damages under FSIA—which itself offered no explanation for the amount of awarded damages. *See Cicippio*, 18 F. Supp. 2d at 69-70 & n. 11.

and they are not an objective measure of harm. Instead, they are imperfect proxies for inherently unquantifiable harm from which many courts over the years have diverged. The court below enjoyed the discretion to do so also.

II. THE DISTRICT COURT ADEQUATELY EXPLAINED ITS DAMAGES AWARDS AND RELIED ON PROPER FACTORS.

The Fraenkels argue that the district court "plucked [its awards] out of the air" and that it abused its discretion by considering impermissible factors in awarding solatium. Op. Br. at 46-49, 51. It did not. Explaining its $5.1 million in solatium and pain and suffering damages, the district court carefully considered the facts of this case compared to prior cases. *See Fraenkel II*, at A755-759 (explaining solatium damages); *Fraenkel I*, at A326-328 (explaining pain and suffering damages). In awarding $50 million in punitive damages, the district court noted that the record lacked Iran's and Syria's specific annual expenditures on Hamas, so it awarded a fixed amount. *See Fraenkel I*, at A329-331. Particularly given the difficulty of assessing these immeasurable damages, the district court more than adequately explained each award.

A. Solatium Damages

Because the district court conducted a fact-specific inquiry to determine solatium damages and fully explained its decision, its award should stand. When reviewing other damages awarded under the FSIA, this Court has held that plaintiffs "must prove the amount of damages by a 'reasonable estimate'" consistent with the American rule on damages. *Hill*, 328 F.3d at 681 (reviewing denial of economic damages). Solatium damages are no different. Solatium awards are "extremely fact-dependent," and so "claims require careful analysis on a case-by-case basis." *Flatow*, 999 F. Supp. at 30.

The district court recognized that under *Hill*, FSIA plaintiffs must justify their damages and that "different plaintiffs (even under FSIA) will prove different facts that may well (and should) result in different damage awards." *Fraenkel II*, at A755-756. Quantifying solatium damages for losses suffered in terrorist attacks is difficult, *Heiser*, 466 F. Supp. 2d at 269, and district courts awarding such damages need flexibility to respond to the unique facts of these cases. *See supra* Part I. Despite the challenges of quantifying solatium damages, the district court considered permissible factors in its reasoned analysis.

1. The District Court Explained Its Solatium Damages Award by Considering the Specific Facts in This Case

In setting solatium awards, the district court considered both that the Fraenkels knew their family might be at risk from terrorism in the region and that, while heartbreakingly tragic, these facts did not display the same horrific cruelty of other cases. Comparing these facts to those in *Gates*, the district court justified the awards in this case. *See Belkin*, 667 F. Supp. 2d at 23 ("[T]his Court is guided by remedial approaches and formulas utilized in similar cases.").[18]

The awards to the Fraenkel parents, the district court explained, rested partly on the fact that the Fraenkels lived in contested territory and sent Naftali to school 40 miles further into the West Bank in Gush Etzion—six miles from Hebron, a predominantly Palestinian city. *Fraenkel II*, at A757. Recognizing the volatility of that area, Naftali's mother said that as soon as she learned that the boys' cell phones were traced to Hebron, she knew it was an act of terrorism. *Id.* at A758. The

[18] The district court's comparison of the facts here to those in *Gates* makes sense because it heard live testimony and saw exhibits in both cases. Comparing the facts heard in a particular terrorism case with the sterile words of another court's opinion presents challenges because those words may not capture the impact and depth of the testimony.

district court further noted that Naftali was kidnapped at night from a "site of many terror attacks aimed at Jewish-Israeli citizens." *Id.* at A757-759 (citing Spitzen Decl. ¶ 20 n.3, at A45).[19] This attack therefore was not as unexpected—a factor considered in awarding solatium damages—as the abductions and deaths in *Gates*. *See infra* Part II.A.2.

By contrast, the district court explained, the victims in *Gates* were temporarily living in Iraq in non-combat environments who were "brutally murdered in slow beheadings with a knife, broadcast across the world on the Internet." *Fraenkel II*, at A756. Considering the differences between the facts of this case and those in *Gates*, the district court concluded that solatium awards of $1 million to each of Naftali's parents

[19] These observations are supported by evidence in the record, including expert testimony about the location of the junction where Naftali was kidnapped and its past terrorist activity, *see* Spitzen Decl. ¶ 20 n.3, at A45, Hamas' motives in kidnapping Naftali and his friends, *id.* ¶ 24 & n.13, at A48, the history of Hamas terrorism against Israelis in the West Bank, *see* Levitt Decl. at ¶¶ 19-30, Mot. Default Judgment, *Fraenkel v. Islamic Republic of Iran*, No. 15-1080 (D.D.C. July 19, 2016), ECF No. 31-5, and Mrs. Fraenkel's association of Hebron with terrorist activity, *see* R. Fraenkel Decl. ¶ 21, at A103. The Fraenkels' assertions to the contrary, *see* Op. Br. at 54-57, should therefore be rejected. *Cf.* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous.").

(as compared to the $3 million awarded in *Gates*) were appropriate. *See Fraenkel II*, at A755, A759.

To be sure, there is some randomness in calculating non-economic solatium awards. *See supra* at 17. The district court would not have abused its discretion had it awarded $2 million in solatium to the parents instead of $1 million. But given the difficulty of quantifying these damages, a judge need not explain the precise quantity so long as the award does not constitute an abuse of discretion. *See Gonzalez*, 681 F.3d at 953 (explaining that there is "no precise or exact measuring stick for calculating general damages for pain and suffering" so a trial court has an "enormous range of discretion") (quotations omitted); *see also infra* Part III.A.

The district court also explained its $500,000 award to each of the four older Fraenkel siblings. Citing *Gates* and *Heiser*, the district court noted that victim's siblings usually receive less than their parents. *See Fraenkel II*, at A759; *see also, e.g.*, *Gates*, 580 F. Supp. 2d at 72 (awarding victim's sibling half of her parent's award); *Heiser*, 466 F. Supp. 2d at 269 (same).

Likewise, the district court explained its decision to award lower solatium damages to the two youngest siblings. After hearing the testimony of the second-youngest child and reviewing psychiatric evaluations of the two youngest siblings, the district court awarded $50,000 to each.[20] *See Fraenkel I*, at A328-329; *Fraenkel II*, at A759-760. Given these siblings' ages at the time of Naftali's death, the district court justified its lower award. *See Fraenkel II*, at A759; *cf. Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27, 37 (D.D.C. 2008) (refusing to award solatium damages to a victim's child because he was young when his father died and had no memory of his father).

2. The District Court Considered Permissible Factors When Calculating Solatium Damages

The Fraenkels assert that the district court erred in considering the violence around Alon Shvut and Hamas' motivation in carrying out this horrific act of terrorism because such facts are not "remotely relevant to an FSIA terrorism damages award." Op. Br. at 40. But these considerations relate to the unexpectedness of the terrorist attack—a

[20] *See also Fraenkel II*, at A759 ("[T]he Court specifically chose to award a single amount to prevent the Fraenkel children from thinking any testimony was more or less useful or significant.").

factor often evaluated in solatium analysis. *See Oveissi*, 768 F. Supp. 2d at 28; *Kerr*, 245 F. Supp. 2d at 64; *Stethem*, 201 F. Supp. 2d at 90. As one court explained, "the unexpected quality of a death may be taken into consideration in gauging the emotional impact to those left behind." *Eisenfield v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 8 (D.D.C. 2000). Consideration of these facts therefore was within the district court's broad discretion.

Considering violence against Israelis near Alon Shvut does not equate to "blam[ing] the victim." Op. Br. at 41.[21] Instead, the prevalence of terrorism against Israelis properly informs an oft-considered solatium factor—the particular attack's unexpectedness. *See*, *e.g.*, *Kerr*, 245 F. Supp. 2d at 61-62, 64 (emphasizing the unexpectedness of a murder on a university campus in Beirut long considered an "enclave of serenity");

[21] The Fraenkels also assert that the district court erroneously "relied on tort defenses such as contributory negligence [and] consent to reduce plaintiffs' damages award." *See* Op. Br. at 2; *see also id.* at 46-49. But when the district court said FSIA awards must be viewed "through the lens of civil tort liability," *Fraenkel II*, at A755 (quotation marks omitted) it was stating the obvious: plaintiffs seeking tort damages must justify their request with reference to their specific facts. *See id.*; *see also* Restatement (Second) of Torts § 912. Nor did the district court "reduce plaintiffs' damages award" as the Fraenkels suggest. Instead, the district court assessed their solatium damages with regard to the specific facts of their case rather than a preset baseline. *See supra* Part I.C.

Eisenfield, 172 F. Supp. 2d at 8 (describing terrorist bus bombing as unexpected because "there was no reason to expect violence to come on these students' trip to visit an archeological dig"); *Oveissi*, 768 F. Supp. 2d at 28-29 (finding the assassination of claimant's grandfather in Paris—somewhere the claimant believed completely safe—magnified claimant's trauma).

Many terrorist attacks have occurred in the Alon Shvut area since 2000. *See* Spitzen Decl. ¶ 20 n. 3, at A45. Specifically, since 2011, Hamas has targeted Israeli citizens to instill fear in the Israeli population at large. *Frankel II*, at A758 (citing Levitt Decl. ¶ 20). Mrs. Fraenkel said she believed the young men were hitchhiking in a "usually safe" spot. *See* R. Fraenkel Decl. ¶ 43, at A107. But as the district court noted, as soon as Mrs. Fraenkel heard that the boys' phones were in Hebron—just six miles from where they were kidnapped—she understood "'that it was an act of terrorism.'" *Fraenkel II*, at A758 (quoting R. Fraenkel Decl. ¶ 21, at A103).

To be sure, the history of terrorism against Israelis in Alon Shvut makes Naftali Fraenkel's death no less tragic. *See Fraenkel II*, at A759. But because losing a loved one for reasons a family could not have

anticipated may magnify the loss, *see*, *e.g.*, *Kerr*, 245 F. Supp. 2d at 64, the district court permissibly considered the history and the Fraenkel's knowledge of violence in the area against Israelis in awarding solatium damages.[22] *Cf. Gates*, 580 F. Supp. 2d at 71-72 (considering shocking and brutal nature of terrorist attack in awarding parent $3 million solatium).

B. Pain and Suffering Damages

Explaining its pain and suffering damages award, the district court recognized that Naftali, knowing he had been kidnapped and fearing for his life, suffered greatly during the 30-minute ordeal. *Fraenkel I*, at A328. The court then relied on *Braun* and *Stern* to support its $1 million award because the victims in those cases suffered for similar periods of time. *Fraenkel I*, at A327; *see Braun*, 228 F. Supp. 3d at 83 (awarding $1 million for pain and suffering lasting two hours); *Stern v. Islamic*

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[22] The damages awards in this case are perfectly consistent with the *Flatow* Amendment. *But see* Op. Br. at 57-60. Congress intended the Amendment to provide terrorism victims with damages awards against state sponsors of terrorism. *See id.* at 58. If, as the Fraenkels suggest, Congress's "principal objective" in its expansion of anti-terrorism remedies has been to "permit massive judgments of civil liability against nations that sponsor terrorism," *see id.* at 59 (quoting *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 571 (7th Cir. 2012)), the district court's $55.1 million damages award for the Fraenkels plainly realizes that intent.

Republic of Iran, 271 F. Supp. 2d 286, 300 (D.D.C. 2003) (citing authorities awarding $1 million for pain and suffering lasting between thirty seconds and several hours).

Indeed, the Fraenkels recognize that "[t]he typical award for severe pain and suffering of a few hours or less is $1,000,000." Op. Br. 38. But citing *Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 161 (D.D.C. 2009), they assert that the award here was unsubstantiated because the district court in *Wachsman* awarded $2 million. *See* Op. Br. at 51-53. *Wachsman*, however, awarded $2 million for *six days*—rather than 30 minutes—of pain and suffering. *See* 603 F. Supp. 2d at 161. Not only did the district court explain its award, but that award was also consistent with other pain and suffering awards.

C. Punitive Damages

Because the record lacked sufficient evidence of defendants' annual expenditures to Hamas, the district court awarded the Fraenkels a fixed $50 million in punitive damages.[23] As the district court recognized,

[23] The Fraenkels challenge the district court's punitive damages award on the grounds that it was awarded only to Naftali's estate rather than to all plaintiffs. Op. Br. at 54. The basis for this challenge is unclear, and previous cases award punitive damages to different beneficiaries. *See Baker*, 775 F. Supp. 2d at 86 (awarding punitive damages to victims

courts use different methods for calculating punitive damages. *Fraenkel I*, at A330. One method multiplies a state's financial support to the relevant terrorist organization by a factor of three to five. *See, e.g.*, *Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379, 406 (D.D.C. 2015) (awarding $112.5 million in punitive damages, an amount three times Iran's annual material support to Hamas). A second method—used when multiple cases arise from the same incident—multiplies plaintiffs' compensatory damages by a ratio of punitive-to-compensatory damages awarded in past cases. *See, e.g.*, *Spencer v. Islamic Republic of Iran*, 71 F. Supp. 3d 23, 31 (D.D.C. 2014) (calculating damages using a $3.44 punitive-to-compensatory damage ratio). The final method awards a fixed amount per decedent. *See, e.g.*, *Gates*, 580 F. Supp. 2d at 75 (awarding $150 million to each of the estates of the two deceased victims).

The district court could not use either of the first two methods. As it observed, the Fraenkels provided no evidence of Syria's financial support of Hamas, only vaguely explaining that it gave some support before 2012. *Fraenkel I*, at A312-313, A330. Iran's financial support to

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and their families); *but see Gates*, 580 F. Supp. 2d at 75 (awarding punitive damages to victims' estates).

Hamas was also uncertain, ranging from a low of $3 million per year to $300 million per year. *Fraenkel I*, at A330. Lacking a principled way to choose an amount between these two extremes, the district court did not award punitive damages based upon defendants' terrorism budgets. Nor could the district court use the second method: this is the only case arising out of the 2014 Gush Etzion kidnappings, so no punitive-to-compensatory ratio has been, or could be, established.

The district court therefore awarded a fixed amount of punitive damages. *See, e.g.*, *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 86 (D.D.C. 2011) (awarding $150 million punitive damages per decedent); *Gates*, 580 F. Supp. 2d at 75 (same); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 42 (D.D.C. 2012) (awarding $300 million for one decedent).

In awarding $50 million, the district court explained that four factors are relevant in deciding punitive damages: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Fraenkel I*, at A329

(quoting *Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93, 105 (D.D.C. 2012)).

Considering these factors, the district court deemed $50 million an appropriate punitive damages award. As discussed above, the significant differences between these facts and those in *Gates* justified punitive damages lower than *Gates*' $150 million. The district court cited *Gates*, which awarded $150 million in punitive damages,. In considering the first two factors, *Gates* used graphic language to describe how the terrorists gruesomely videotaped and broadcasted the slow beheadings of the victims: "They were then decapitated by a technique not fit for the slaughter of animals because of its clumsiness and abject viciousness. . . . The videos glorified cruelty and fanned the flames of hatred, in a fundamental offense to human dignity." *Gates*, 580 F. Supp. 2d at 75. Naftali's murder at the hands of terrorists was tragic, and his family has suffered immeasurably. But Hamas' conduct (and by extension defendants' support of that conduct) did not rise to the level of cruelty and brutality in *Gates*. The district court thus adequately explained its award.

III. THE FRAENKELS' $55 MILLION DAMAGES AWARD IS NOT BEYOND ALL REASON

Because the district court fully explained its decision and relied on no impermissible factors, this Court may disturb its damages judgment only if "the verdict is beyond all reason, so as to shock the conscience." *Peyton*, 287 F.3d at 1126-27. Regarding non-economic damages, this is an exceedingly high bar as "the range between an inadequate award . . . and an excessive award can be enormous." *Gonzalez*, 681 F.3d at 953. No portion of the Fraenkels' $55.1 million damages judgment is vulnerable under this standard of review.

A. Solatium Damages

The Fraenkels challenge the size of the $4.1 million in solatium damages that the district court awarded Naftali's surviving family members. *See* Op. Br. at 43-46, 51-52. While admittedly at the low end of the FSIA damages scale, these awards do not shock the conscience because they are not entirely disproportionate to prior awards. Expressed as a percentage reduction from the *Heiser* baselines, the $1 million awards to Mr. and Mrs. Fraenkel—80% less than *Heiser*'s $5 million for the parents of a deceased victim—find precedent in FSIA cases. *See, e.g.*, *Massie*, 592 F. Supp. 2d at 77 (awarding spouse of

surviving hostage almost 70% less than *Heiser* default); *Gates*, 580 F. Supp. 2d at 72 (awarding spouse of murder victim about 63% less than *Heiser* default); *Stethem*, 201 F. Supp. 2d at 92 (awarding spouses of surviving hostages 95% less than *Heiser* default).

Given that FSIA courts routinely award siblings half of what parents receive, *see, e.g., Heiser*, 466 F. Supp. 2d at 269, it follows that the $500,000 awards to Naftali's four oldest siblings are likewise not grossly disproportionate. The $50,000 awards to Naftali's two youngest siblings, N.S. and S.R., are also not beyond all reason. When awarding solatium damages to siblings, courts consider (among other factors) the nature of their relationship with the victim, whether the sibling sought treatment for emotional or mental disorders after the victim's death, and the extent of a sibling's mental anguish as compared to if the victim died naturally. *See Stethem*, 201 F. Supp. 2d at 90. Given the young ages of N.S. and S.R. (six and four) at the time of Naftali's death, N.S.'s brief testimony and S.R.'s lack of testimony, *see* N.S. Fraenkel Test., at A419-423, and psychiatric evidence that provides no diagnosis for S.R., *see*

Strous Decl., at A213-214,[24] the solatium awards—though admittedly very low compared with prior FSIA cases—are not so low as to shock the conscience. *Cf. Bakhtiar*, 571 F. Supp. 2d at 37 (denying damages to plaintiff who was a very young child because no evidence of emotional distress at the time of father's death).

Moreover, the Fraenkels' solatium damages are unextraordinary when compared with analogous damages awarded by federal and state courts in similar contexts. *See, e.g.*, *Litif v. United States*, 682 F. Supp. 2d 60, 82-85 (D. Mass. 2010) (awarding mother and children of men murdered by FBI informants $1 million and $250,000-$500,000 respectively for loss of consortium, and listing awards in related cases of between $50,000 and $3 million); *Davis v. Puryear*, 673 So. 2d 1298, 1309-10 (La. Ct. App. 1996) (upholding $250,000 award to husband whose wife was raped and killed in front of their children); *Plasencia v. Burton*, 440 S.W.3d 139, 147-49 (Tex. Ct. App. 2013) (upholding $100,000 award to

[24] In determining the Fraenkel siblings' solatium damages, the district court may also have found significant that the psychiatrist's diagnoses of the four youngest children were based only on interviews with adults, and not on direct examination. *See* Strous Decl., at A209.

father for mental anguish and loss of companionship after two-year-old accidentally killed himself with acquaintance's loaded shotgun).

And so the solatium damages are not beyond all reason. To be sure, had undersigned amicus been in a position to award solatium damages, the Fraenkels likely would have received more for their undoubted grief and suffering. This Court may feel the same way. But this Court may not substitute its judgment for that of the district court, especially given that it "heard all of the evidence and saw all of the witnesses" and hence is "in the best position to determine damages." *Peyton*, 287 F.3d at 1126.

B. Pain and Suffering Damages

The district court's $1 million award to Naftali's estate for his pain and suffering during the 30 minutes he spent in the terrorists' car likewise was well within reason. *See* Op. Br. at 52-53. As the Fraenkels acknowledge, $1 million is "[t]he typical award for severe pain and suffering of a few hours or less." Op. Br. at 38; *see Owens v. Republic of Sudan*, 71 F. Supp. 3d 252, 260 (D.D.C. 2014) (explaining that where victims have "endured extreme pain and suffering for a period of several hours or less," trial courts "rather uniformly award $1 million in damages" (emphasis omitted)); *see also, e.g.*, *Flatow*, 999 F. Supp. at 29

(awarding $1 million when "conscious pain and suffering continued for at least three to five hours").

C. Punitive Damages

Finally, contrary to the Fraenkels' assertion that the district court's $50 million punitive damages award is "significantly smaller than other punitive awards given in similar cases," *see* Op. Br. at 54, several past FSIA cases have awarded similar punitive damages. *See, e.g.*, *Bluth v. Islamic Republic of Iran*, 203 F. Supp. 3d 1, 25 (D.D.C. 2016) (awarding $25 million punitive damages to victim of Hamas school shooting); *Goldberg-Botvin v. Islamic Republic of Iran*, 938 F. Supp. 2d 1, 11-12 (D.D.C. 2013) (awarding $30.89 million in total punitive damages to family of 14-year-old killed in Hamas bombing); *Flanagan*, 87 F. Supp. 3d at 126-27 (awarding $56.25 million in total punitive damages to family members of serviceman killed in Al-Qaeda bombing). That the Fraenkels' requested award of $300 million also would have been consistent with past cases, *see Flanagan*, 87 F. Supp. 3d at 123 (noting that "some courts impose a fixed $300 million award"), does not make the district court's award in this case "beyond all reason, so as to shock the conscience." *Peyton*, 287 F.3d at 1126-27.

CONCLUSION

This Court should affirm the district court's damages award because the district court had discretion to reject *Heiser*'s framework. Although non-economic harm is inherently unquantifiable, the district court adequately explained each of its damages awards and relied on proper factors. Therefore, this Court can only disturb the damages award if it is beyond all reason or conscience-shocking—which it is not. Finally, even if this Court finds error either in the district court's failure to follow *Heiser* or in its explanation of the awards, the appropriate remedy is remand to the district court for it to reconsider its award.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,846 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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