IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

RACHEL DEVORA SPRECHER FRAENKEL, Individually, As Personal Representative of the Estate of YAAKOV NAFTALI FRAENKEL, and as the Natural Guardian of plaintiffs A.H.H.F., A.L.F., N.E.F., and S.R.F.; ABRAHAM RON FRAENKEL, Individually, As Personal Representative of the Estate of YAAKOV NAFTALI FRAENKEL, and as the Natural Guardian of Plaintiff A.H.H.F., A.L.F., N.E.F., and S.R.F.; TZVI AMITAY FRAENKEL; A.H.F.F., A Minor, by her Natural Guardians ABRAHAM RON FRAENKEL and RACHELLE DEVORA SPRECHER FRAENKEL; A.L.F., A Minor, by her Natural Guardians ABRAHAM RON FRAENKEL and RACHELLE DEVORA SPRECHER FRAENKEL; N.E.F, A Minor, by her Natural Guardians ABRAHAM RON FRAENKEL and RACHELLE DEVORA SPRECHER FRAENKEL; N.S.F., A Minor, by her Natural Guardians ABRAHAM RON FRAENKEL and RACHELLE DEVORA SPRECHER FRAENKEL; S.R.F., A Minor, by his Natural Guardians ABRAHAM RON FRAENKEL and RACHELLE DEVORA SPRECHER FRAENKEL,

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, MINISTRY OF FOREIGN AFFAIRS; IRANIAN MINISTRY OF INFORMATION AND SECURITY; SYRIAN ARAB REPUBLIC, c/o Foreign Minister WALID AL-MUALEM, MINISTRY OF FOREIGN AFFAIRS,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR PLAINTIFFS-APPELLANTS

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Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellants Fraenkel, *et al*., hereby submit the following certificate as to parties, rulings, and related cases:

(A) Parties and Amici. The following is a list of persons who are known to be parties to this case:

Plaintiffs-Appellants: Rachel Devora Sprecher Fraenkel ("Rachelle Fraenkel"), Abraham Ron Fraenkel, Tzvi Amitay Fraenkel, A.H.H.F., A.L.F., N.E.F., N.S.F., and S.R.F.

Defendants-Appellees: The Islamic Republic of Iran, the Iranian Ministry of Information and Security ("MOIS"), and the Syrian Arab Republic

Intervenors & Amici: There were no intervenors or amici before the district court and there are no known intervenors or amici planning to appear before this Court.

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

(1) The district court's Order (Collyer, *J*.) dated March 31, 2017 (DE 40), reproduced in the Appendix at A333-34, and the accompanying Opinion of the same date (DE 39), reproduced in the Appendix at A302-32 and published as *Fraenkel v. Iran*, 248 F.Supp.3d 21 (D.D.C. 2017)); and

(2) The district court's Order dated June 28, 2017 (DE 46), reproduced in the Appendix at A761, and the accompanying Opinion of the same date (DE 45),

reproduced in the Appendix at A749-60 and published as *Fraenkel v. Iran*, ___ F.Supp.3d ___, 2017 WL 2804872 (D.D.C. June 28, 2017).

(C) Related Cases. Counsel are aware of no related cases. However, the issues raised in this appeal re-occur in every Foreign Sovereign Immunities Act terrorism case that proceeds to judgment and a monetary award. There are numerous such cases currently pending before the District Court for the District of Columbia and, presumably, this Court.

Dated: Brooklyn, New York
November 8, 2017

Respectfully submitted,

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Glossary

Abbreviation	Meaning
FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. 1602-1611
JASTA	Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2, 130 Stat. 852, 852-53 (2016) (codified as a note to 18 U.S.C. § 2333)
MOIS	Defendant-Appellee, Iranian Ministry of Information and Security
PTSD	Post-Traumatic Stress Disorder
USVSSTA	United States Victims of State Sponsored Terrorism Act, Pub. L. No. 114-113, div. O, tit. IV, § 404, 129 Stat. 3007, 3007-17 (2015) (codified at 34 U.S.C. 20144) (originally codified at 42 U.S.C. 10609)
USVSSTF	United States Victims of State Sponsored Terrorism Fund, established by the USVSSTA

BRIEF FOR PLAINTIFFS-APPELLANTS

JURISDICTIONAL STATEMENT

Plaintiffs sued under 28 U.S.C. 1605A for damages resulting from state-sponsored terrorism. The district court had subject matter jurisdiction under 28 U.S.C. 1330-32, 1367, and 1605A. (315-18*). Defendants, all state actors, were properly served under 28 U.S.C. 1608(a). (4-6, 314-15). Accordingly, the district court had personal jurisdiction under 28 U.S.C. 1330(b).

This Court has jurisdiction under 28 U.S.C. 1291. On March 31, 2017, the district court entered a final appealable order and judgment, invoking FRAP 4 and disposing of all claims. (333-34). On April 27, 2017, plaintiffs timely moved to reopen that judgment pursuant to Rules 52(b), 59(a), and 59(e). (711-45). Their motion was denied on June 28, 2017. (761). Plaintiffs timely noticed their appeal the same day. (762); FRAP 4(a)(4)(A).

* Unless otherwise noted, parenthetical numerical references refer to the Appendix.

STATEMENT OF ISSUES PRESENTED

The district court held two foreign state sponsors of terrorism, Iran and Syria, liable under the Foreign Sovereign Immunities Act ("FSIA") for acts of terrorism.

Applying the strong consensus of precedent established by scores of cases in the D.C. District Court, plaintiffs collectively should have received a judgment exceeding $39,000,000 compensatory damages and $300,000,000 punitive damages. The district court deliberately deviated from that precedent, simultaneously asserting facts not supported by record evidence, and diminished plaintiffs' damages by applying general principals of tort law having no proper application in FSIA terrorism cases. It granted plaintiffs a collective award of just $5,100,000 compensatory damages and $50,000,000 punitive damages. The issues presented are:

1) Whether the district court's monetary award in this case is consistent with law and with awards made in similar cases.

2) Whether the district court properly relied on tort defenses such as contributory negligence or consent to reduce plaintiffs' damages award, notwithstanding that this is a terrorism case involving the kidnapping and murder of a teenager coming home from school.

3) Whether the record supports the district court's findings that plaintiffs consented to being victims of terrorism and were targeted *because* they are Israeli citizens.

STATUTORY AUTHORITY

The Statutory Addendum contains pertinent portions of the FSIA, JASTA, USVSSTA, and Rule 52(a).

INTRODUCTION

The court below reasoned that damages awards to terrorism victims ought to be seen "through the lens of civil tort liability" (755) and concluded that terrorism damages awards (intended to partially compensate family members of the deceased and injured) should be reduced whenever the victims 1) "accepted the risks" of terrorism by living in an apparently dangerous area, or 2) were targeted for reasons unrelated to their identity as U.S. citizens. (756-59).

This approach presents glaring problems, paramount among them being that Congress and essentially ***every*** judicial decision applying that legislation has *ignored* both factors, and for good reason. Moreover, essentially ***every*** judicial decision or jury verdict awarding solatium damages to the families of terror victims has followed a formula that does not make the downward adjustments imposed by the district court.

This action involves a Hamas kidnapping and murder of a beloved 16-year-old boy (a U.S. citizen) and the tremendous suffering of his family during the extended period in which his fate was unknown and for the remainder of their lives. Following the decisions of essentially ***every*** prior court to rule in this context, the family of this victim of international terrorism should have received a collective solatium damages award of $37,500,000. The court below, erroneously treating this as though it were a negligence action where the victim shared culpability for the attack, reduced the solatium award to $4,100,000 collectively, an 89% penalty. (730, 747-48, 750, 760).

The district court was not writing on *tabula rasa*. An enormous body of case law should have guided its calculation of damages. But it disregarded the received wisdom of hundreds of previous cases and Congress itself. In so disregarding precedent, the district court failed to fairly and justly apply the law, thus trampling the equitable maxim that like parties be treated alike. *Cf. Brayton v. U.S. Trade Rep.*, 641 F.3d 521, 526 (D.C. Cir. 2011) (holding that treating like cases alike is "a necessary condition" for avoiding *"arbitrary" use of judicial discretion*); *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602, 605 (2008) (holding that the essential requirement of the Equal Protection Clause is to ensure that people shall be "treated alike[] under like circumstances").

Moreover, the district court's approach was ill considered. It erroneously found culpability where there was none and injected irrelevant factors into the damages analysis. In so doing, the district court not only aspersed the plaintiffs but also deprived them of just compensation for the loss of their son and brother.

STATEMENT OF THE CASE

A. Background

The district court introduced its damages award with this description of the Fraenkel family and their relationship with their son and brother, Naftali Fraenkel, who had been kidnapped and murdered by terrorists:

> The Fraenkel family is obviously very close. Each member testified in detail about Naftali's role in the family (second oldest and second son) and what he meant in their lives specifically. The testimony provided a picture of a loving family, wherein Naftali played a central role in their spiritual and personal lives. Multiple family members testified about Naftali's musical ability and how [his singing] enriched their celebrations on the Sabbath and other holy days. Without question, the lives of *each member of the family will be* ***forever*** *altered* because Naftali is not with them.

(329) (emphasis added). Naftali, the court added, was "a sterling young man on the cusp of his life" who "committed no offense except to be Jewish and Israeli" and was "kidnapped and killed without regard to his individual personhood." (330-31).

Naftali was naturally gifted. (694). His musical skills were self-taught (101, 367), and starting as a young student and continuing through high school, he

participated in a weekly gifted enrichment program together with Jewish and Arab students of diverse backgrounds. (101, 366). Around January 2014, while in the eleventh grade (101), Naftali began in earnest to act as a responsible adult, making decisions that reflected a mature understanding that the path of his life was up to him. (439-40). He grew tremendously in his studies and interpersonal relationships and acted as though he knew that if he put his mind to achieving some goal, "the sky is the limit." (440).

On Thursday, June 12, 2014, Naftali was away at his high school, where he generally slept weeknights, returning home for the weekend. (88, 101-02). At about 9:30 p.m., he informed his parents via text message that was on his way home. (88). Plaintiff Rachelle Fraenkel, Naftali's mother, a teacher of Talmud and Jewish law (342),[1] first noticed the text message at 10:00 p.m. She responded lovingly. (102). She was exhausted after a long week and knew her mature and responsible son was able to let himself into the house and tend to his needs, so she went to bed expecting to see Naftali in the morning. (102, 345). Plaintiff Abraham Fraenkel, Naftali's father, a lawyer and the head of the disciplinary department of the Israeli National Police (425), had already gone to sleep. He awoke at about 10:30 p.m., promptly

[1] *See also* Wikipedia, Rachelle Fraenkel, https://en.wikipedia.org/wiki/Rachelle_Fraenkel.

responded, and went back to sleep. (89). Neither knew at the time that their responses were not seen by Naftali; he was already dead. (89, 102).

B. The Kidnapping

Naftali departed for home with two friends, Gilad Shaar and Eyal Yifrach. (89, 104, 692). They traveled initially by foot in an area where "hitchhiking is very normal and safe." (107); *see also* (180) (psychiatrist explaining that, in Israel, hitchhiking is "normal" for boys in their late teens and early 20's). While hitchhiking is uncommon and often considered dangerous in the U.S., for many in Israel, it is "the primary mode of transport."[2] Indeed, as the district court affirmatively found, "[i]t was common for students and other individuals to wait for rides at th[e] [particular] junction" Naftali and his friends used. (304). Naftali stood with his friends at that junction's hitchhiking spot for about 40 minutes. (642). Eventually, an Israeli car carrying people dressed as religious Jews, listening to a Hebrew language program on the radio, stopped. (107, 432-33, 642, 652). But the car's occupants were not religious Jews; they were Hamas terrorists (57-62, 492-95, 692) looking to kidnap the boys for use as bargaining chips in negotiations with the Israeli government for the release of terrorists from prison. (693).

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[2] Dina Pinner, Op-Ed, *Thoughts on Hitchhiking*, JERUSALEM POST, June 23, 2014, http://www.jpost.com/Opinion/Op-Ed-Contributors/Thoughts-on-hitchhiking-360314; *see also* Hitchwiki, Israel, http://hitchwiki.org/en/Israel ("Hitchhiking is very common in Israel.... Almost every junction has a hitchhiking spot[.]").

Naftali and his friends were fully aware for up to 20 minutes that they had been kidnapped by terrorists and were being held at gunpoint. (641-43). Just before they were executed, the boys were instructed to put their heads down. (644). Arieh Spitzen, plaintiffs' terrorism expert,[3] testified:

> Any person in this situation would experience extreme mental pressure and suffer severe terror and fear for his/her life. I have no doubt that the three boys experienced such extreme fear and terror during the entire course of their ordeal[,] from the moment they were informed they had been kidnapped until the moment they were shot dead.

(644-45). The terrorists aborted their original plan (487), shot the boys, hid their bodies in a ditch belonging to a relative of one of the terrorists, and covered the bodies with gravel and thorny shrubs, where they were partially eaten by animals. (46, 479, 677-81, 696).

The abduction was surprising to Israeli security officials. (692). An Israeli military court described it as an "earthquake" or "tsunami" (696), explaining: "[The abduction] took place during a period of relative calm," and was thus both unexpected and destabilizing. (692, 696). It "had a significant impact on the security situation in the [surrounding area]," leading to a series of arrests and extended military action in Gaza. (692). Indeed, it "was one of the most severe abduction and murder affairs to ever take place in the Judea and Samaria Area." (692).

[3] (454-55, 637-40).

Abraham and Rachelle were woken by police at about 3:30 a.m. (89, 102). Rachelle later noted that the moment immediately prior was her "last blissful moment on [E]arth." (102). Police were looking for Naftali's traveling companion, Gilad, who had not returned home. They came to Naftali's home, attempting to locate both of them. Abraham went to Naftali's bedroom and was shocked to find it empty. (89).

Police later informed Abraham that they had tracked Naftali's cell phone to Hebron, "an area [to which Naftali] would never venture...voluntarily." (89). Abraham and Rachelle immediately suspected terrorism and knew that Naftali was in "terrible danger." (89, 103).

That morning, Rachelle, extraordinarily anxious, sent her other children off to school. (103). She realized that doing so was a mistake when she learned that news that the boys had been kidnapped by Hamas had already spread across Israel; Naftali's name and photograph were being broadcast nationally. (103, 349-50). Rachelle rushed to her daughters' school to pick them up before someone else broke the news. She was too late. (103-04). Upon seeing Rachelle, her second youngest child, N.S., immediately expressed her fears that Naftali would never be found alive. (104).

C. The Search and Rescue Effort

The situation quickly became a national tragedy. (105-06, 477) ("[T]he whole country was involved[.]"). Rachelle recalls: "Everyone in the country was holding their collective breath and reached out to us in any way that they could.... It's hard to explain[,] but we knew this was about much more than us[.]" (105-06). Public officials of great prominence were involved in the effort, including Israel's prime minister, defense minister, and army chief of staff, and the head of Israel's investigative unit. (90, 131).

The Fraenkel family and the police converted a portion of the Fraenkel home into a situation room in which meetings were held with dignitaries (including the prime minister) and numerous investigators (90-91, 105), all working tirelessly to bring the boys home. The Fraenkels did everything they could to find their son, including arranging meetings in Geneva and with the Pope. (91). The days during the search effort were very long and "intense." Rachelle hardly saw her children: "We ate dinner with the kids and put them to bed and that was the only time I saw them, and I only had that time because neighbors helped me make it happen." (106).

After several days, Israeli police revealed the recording of a call that Gilad had placed to Israel's "911" shortly after being kidnapped. (90, 433, 474). The Appendix contains a digital copy of that recording with English subtitles. (652); (648) (certified translation). It begins with Gilad whispering "they kidnapped me."

A man with an Arabic accent then repeatedly shouts in Hebrew: "[H]ead down." Then ten "clicks" are heard, followed immediately by cries of pain. (648). A much louder cry or moan is heard later, at approximately 1:42 of the audio clip. (648, 652). In retrospect, those "clicks" were shots fired from a gun with a silencer (107) and the cries of pain were from Naftali and his friends dying. *See* (46). But neither the police nor Naftali's family knew that the boys were dead when they first heard this recording. *See* (107-08, 130, 351) ("I still had hope. Everybody was looking for the boys to be found alive."). Hearing the recording but not knowing what had happened increased the family's "suffering and sense of foreboding." (90).

The search and extended period of uncertainty took a huge toll on the family. Abraham described it as a series of "brutal and quick shifts from hope to despair, frustration, anxiety, and concern." (90). The stress caused him chest pain, which required medical attention; he began seeing a psychologist during that period as he was "in constant distress" and "did not possess the tools to care for [his] family." (91, 130-31). For the first two weeks of the search, he could not sleep without sleeping medication and could not eat. (91, 130). Rachelle likewise could not sleep or eat; she lost 22 pounds during their 18-day ordeal. (106). Their oldest son, Tzvi, closed himself off, having "no energy" for social interactions. (120).

Finally, on June 30, after 18 excruciating days, the Fraenkel family was informed that police had recovered three bodies, including Naftali's. (91-92, 109).

D. The Aftermath

The end of the long and painful search was, in many ways, just the beginning of the ordeal for the Fraenkel family. Perhaps their greatest challenge was the one they faced immediately: informing their children. Abraham and Rachelle were advised to tell each child individually in the manner most appropriate for that child. (92, 109). That was no easy task for grieving parents who were themselves in "shock" and "barely had...strength[.]" (92). Each successive meeting broke the parents down further; they were "emotionally devastating." (131). Rachelle described it as the "hardest thing that she has ever had to do in her life." (163). So too Abraham. (435-36) ("It...takes like everything out of you when you [already] don't...have so much strength...."). They forced themselves, understanding that the way each child learned of their brother's fate would be "critical" in helping them cope with the tragedy for the remainder of their lives. (92). The Fraenkels' greatest concern was not for their own emotional state, but that they lacked the skills to deliver the tragic news to each child in the most effective way possible. (92). Such is their dedication to their children.

The impact on each of the children was dramatic:

Tzvi (19-year-old boy): Tzvi and Naftali were close in age and, given their place in the family (their next four siblings are all girls), were often paired. (117). They played basketball together and much enjoyed singing with each other at

holiday meals. (117-18). Tzvi and Naftali were very different and had different interests, but nonetheless were very close and rarely argued. (113, 117). Tzvi had great difficulty reacting to the news of Naftali's murder. He was initially unable to cry or express emotion. (109, 353-54). At the funeral, however, Tzvi was extremely emotional. He attempted to write a letter to Naftali but was able to put together just four sentences. Instead, he cried for 40 minutes. (384-85). Dealing with the tragedy was particularly difficult for him in part because he felt "tremendous guilt" for not having been closer to his brother and spending more time with him. (113, 385). He keeps many of his emotions bottled up, but appears to his parents to be tormented by the loss of his brother. *See* (113). He continues to suffer from anxiety when a family member does not answer the phone, immediately assuming the worst. (121). Tzvi no longer participates in activities that he regularly did with Naftali, such as playing basketball. (121). The loss of his brother has made Tzvi a chronic underachiever in his social and academic life. (183). On his own unsolicited admission, he "has changed drastically." (121).

A.H. (14-year old girl): A.H. and Naftali were just two years apart and were extremely close; "A.H. saw Naftali as her best friend." (113). Rachelle reports that A.H. "absolutely freaked out when we told her" of Naftali's death. (109). Of all of Naftali's siblings, she was most severely impacted. (97). She worries constantly, "need[ing] to know where everyone is at every moment. If someone doesn't answer

the phone, she loses her ability to concentrate and deal with her everyday activities. She can't sleep until everyone has returned home." (97, 114). Tzvi reports that he is deeply concerned about A.H. (180-81) and that her severe anxiety has a negative impact on the entire family. (121). It has also impacted her academically as she is unable to concentrate and study while in an anxiety attack. (196).

A.H. states that her memory of her brother is always present. (196). She dreams of him frequently. (196). She has expressed a desire to die in order to again be together with Naftali. (196).

A.L. (11-year-old girl): Like Tzvi, A.L. is an introvert. (114). A.L. was at a friend's house when the family learned the news. Her parents called her to come home; she sat outside the house by herself, not ready to hear the news. (110). When her parents finally broke the news to her, she simply screamed. (408). For a long time thereafter, she kept a picture of Naftali next to her pillow but refused to talk about it with anyone. (114). A.L., previously a "happy go lucky" child, has closed up. (210). She rarely speaks about her feelings, but clearly experiences them more intensely now than she did previously (she cries over things that would not have so upset her before). (96, 114). "She tends to remain stoic," her father explained. (96). "It is often almost impossible to discern her mental and emotional state." (96). For a long time, her parents were "very worried" about her. (363).

N.E. (9-year-old girl): N.E. was very close with Naftali. (211). When N.E.'s parents sat to speak with her, she quickly and anxiously yelled "[I]s he alive[?] [I]s he alive[?]" (110, 356). Her insistence on immediately knowing what had happened prevented her parents from breaking the news slowly and gradually, as was intended. They answered in the negative and N.E. "started shivering" like a "wounded animal." (110, 356). N.E. is withdrawn; like A.L., she shut herself off from the world. (211). She is restless, argumentative, and is struggling in her academic and social lives. (211). She no longer speaks of Naftali. Abraham describes her as "'trampled' by her understanding and internalization of what had occurred." (96).

N.S.: (6-year-old girl): N.S. is now (but was not before) afraid of Arabs, continually fears future terror attacks, and is in "constant" need of attention. (96, 212). She regularly speaks of Naftali at "great length" and is preoccupied by him and his passing "all the time." (96, 114, 212). She often looks at a picture of him when she feels the need to "talk" to him. (422). Her mother reports that "[s]he never makes a wish without mentioning Naftali" and signs his name to greeting cards "as if he is still here." (114). When she writes a journal or diary entry, it is about Naftali. When she gets upset, "she cries [also] for Naftali. When she makes a nice drawing[,] she dedicates it to Naftali." (364). She regularly writes him letters as well, recalling one instance in particular in which she attached her letter to a helium balloon, attempting to send it to Naftali. (422-23). Naftali plays a "defining" role her life,

long after his murder. (364); *see* (422). "She's almost haunted by [Naftali]." (364). Like A.H., she suffers from anxiety. (96).

S.R. (4-year-old boy): Naftali and S.R. were "very close." (115). Naftali was "crazy over" S.R. while S.R. "idolized Naftali and was with him every moment he could be." (97, 115). When he learned of Naftali's murder, "[h]is world fell apart." (97). He speaks about Naftali "all the time." (115). About 19 months after the murder, S.R. awoke one day very happy because he had dreamt the night before about speaking with Naftali on the telephone. (115). Even 19 months later, merely dreaming of talking with Naftali made S.R. happy.

After breaking the terrible news of Naftali's death, the Fraenkels turned to planning their son's funeral. They wanted a quiet and private affair. But they understood that Naftali and his friends had become "children of Israel" and that the entire country was in mourning. (92, 429-30); *see* (355, 400). They acquiesced, ceding control not just over the number of people in attendance (it would be more than 100,000), but also who would speak at the funeral and where their son would be buried. The prime minister and president of Israel would be among those to eulogize Naftali. (92-93, 110).

The four youngest children (A.L., N.E., N.S., and S.R.) did not attend the funeral, but rather remained with neighbors and conducted their own private service.

(110). At that service, Naftali was eulogized by his loving 6-year-old sister, N.S. (110).

After the eulogies began the traditional Jewish mourning period, known as *shiva*. Mourners sit on (or close to) the floor of their home for seven days while others come to pay their respects.[4] Throughout the *shiva*, the Fraenkel family had "no privacy" as literally "[t]housands of people" came to their home. (93, 110, 131). So large were the crowds that some had to wait outside in line for *hours*. (110). Some family friends were not even able to enter. (110). It was an extremely emotional period; Rachelle was "hysterical" at times. (164).

The tragedy was a huge story throughout Israel and Jewish communities around the world. "[E]verybody knew" what had happened and many strangers responded as if Naftali had been their own son or brother. (400-01). As a result, the entire family lost its anonymity. (429). While the search ensued, the Fraenkels could not "leave the house without being accosted by journalists asking...questions and photographing [them]." (90, 120). Long after, strangers still frequently offer favors. (111). Rachelle, like the rest of the family, finds this embarrassing: "I know they mean well and...—we all experienced this together—but it makes me feel embarrassed. I just want to be normal." (111, 113-14, 120).

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[4] *See* Rabbi Maurice Lamm, *"Sitting" Shiva*, http://www.chabad.org/library/article_cdo/aid/281602/jewish/Sitting-Shiva.htm.

After *shiva*, Abraham returned to work, but could only muster enough strength to work part time for the first several months. (93). The loss of his son remains constantly on his mind. (132).

E. The Family's Continued Suffering

It is difficult to overstate the extent to which Naftali's murder impacted the Fraenkel family. Abraham reflects:

> Naftali constantly remains in our thoughts. As a family, we speak of him and share memories of him together.... [W]e know we will never forget Naftali and the pain we feel over his loss will stay with us forever.... I am constantly reminded of the loss of our son. When we sit around the Sabbath table and sing songs to celebrate the Sabbath, I remember how much Naftali loved to sing and celebrate the Sabbath with us. I remember him during my daily prayers and while the family celebrates holidays together.

(94-95). The entire family continues to suffer from Naftali's loss, each in their own way. "Some of the children cope by speaking about and sharing memories of Naftali, but others cope in silence." (95); *see* (210).

To this day, Rachelle finds it difficult to be happy. (111). Six months after Naftali's funeral, N.S. (just six years old) noticed that Rachelle stopped putting on her makeup before leaving for work. N.S. asked her mother if she did so because she cries in the car. Rachelle answered: "I don't cry every day the whole way, but I reserve the right to cry." (111, 374). She often spends time alone weeping. (111, 164).

Dr. Rael Strous, an expert psychiatrist with considerable credentials both in the U.S. and Israel (123-24, 138-55, 496-501), offered his professional assessment of the impact Naftali's murder had on the mental health of the plaintiffs:

Abraham: Abraham has Persistent Complex Bereavement Disorder (the inability to let go of grief following death[5]), Post-Traumatic Stress Disorder ("PTSD") (a disorder caused by a traumatic event that subjects the victim to negative alterations in mood and/or cognition[6]), and Persistent Depressive Disorder (a persistent chronic depression[7]). (128, 136). Dr. Strous noted that Abraham ventures out of the house much less than he did previously; participates in markedly fewer social activities; has flashbacks to "to the terrible and agonizing time when we waited to hear news of Naftali's fate," particularly when interacting with his surviving children during religious holidays or when there is a new terror attack; and has an "[o]vertly stressed" affect when discussing the loss of Naftali. (95, 132-34). He sometimes has debilitating recollections of Naftali at seemingly random times, without any trigger, that move him to tears. (95). He seemingly has no energy and thus is unable to do things that he did before Naftali's murder. (95, 445). Abraham recognized immediately that he needed psychological help; he began seeking a

[5] Dr. Strous explains Persistent Complex Bereavement Disorder at (125-26).

[6] Dr. Strous explains PTSD at (126-27).

[7] Dr. Strous explains Persistent Depressive Disorder at (127).

psychologist once a week as soon as Naftali went missing and continues to see that psychologist. (112, 133, 434). Despite that help, Abraham's "close interpersonal interactions have been [negatively] affected" and his mood and behavior have gone through a "marked" transformation. (136). Dr. Strous opined that Abraham's symptoms will likely persist "for a significant time to come" and "may…be permanent." (128, 521); *see also* (517-21).

Rachelle: Rachelle has severe Persistent Complex Bereavement Disorder and PTSD. (161, 169-70). Rachelle references Naftali as her "special son" with whom she was "extremely close." (163-64). Rachelle's emotional pain and stress caused physical pain; she initially suffered from intense pain similar to contractions during child birth (504) and continues to suffer from chronic physical pain. (505). Her anguish over Naftali's death never abated. (165). For about six months after the murder, she had recurring nightmares in which she arrives at the scene of a car accident to pull Naftali out of the car and hold him as he dies in her arms. (506). She continues to cry extensively, particularly when alone and at family gatherings, and continues to feel *physical* pain when speaking about Naftali. (165-66). She was previously naturally happy—not any longer. (165). She believes that she will never again experience true happiness and has a depressed affect when discussing Naftali. (167). Dr. Strous opined that Rachelle's symptoms "will continue to affect her

indefinitely," likely "for a long time," and "may…be permanent." (161, 169, 517); *see also* (503-10, 513-17).

Tzvi: Tzvi has Persistent Complex Bereavement Disorder and Persistent Depressive Disorder. (176, 183-84). Tzvi had a particularly difficult time dealing with the search efforts being coordinated in his home. He described his home as a revolving door through which people traveled, often for their own reasons and with no benefit to the family. (179). Dealing with all of the strangers, even as he was trying to cope with his own pain and worry, was exceptionally difficult. He moved out after just two or three days, returning to be with his family only at night. (179). He is a very private person who found the regular deprivation of privacy to be "traumatic." (179). Moreover, Tzvi experiences "[c]hronic guilt," both for not having been closer to Naftali while he was safe and for not doing more to try to save Naftali after he was captured. (180). Tzvi's life never returned to normal. He remains obviously anxious and shy, feels as though he has lost his identity, has a chronic "low mood," and refuses to take even normal and appropriate risks. (180, 182). Tzvi's social and academic lives are significantly negatively affected. (183). Many, including his school instructors, recommended that Tzvi seek professional psychological treatment, but Tzvi refused, feeling that "no one could help and bring back" Naftali or "help him with his intense feelings over the issue." (181). Tzvi has lost his identity and has no direction. (525-26). Dr. Strous opined that Tzvi's

symptoms will impact the "trajectory of his life in a significant manner." (525-26). They are likely to persist "for a long period of time" and "may…be permanent." (176-77, 184); *see also* (523-26).

A.H.: A.H. has Persistent Complex Bereavement Disorder, PTSD, and Anxiety Disorder (excessive apprehensive expectation out of proportion to any expected negative impact).[8] (191, 200). Her bond with Naftali was unusually strong and losing him has been "devastating." (194-95). In her own words:

> [Naftali and I were] like the couple in the family, best friends, [we] like[d] to be together, to play, to talk, to fight, like everything... together.... [He was m]y big brother and my best friend.... [I]t's a different life afterwards than [it was] before.

(393, 398). When A.H. first learned that Naftali had not returned home from school, she was in "shock," "froze," and "felt like she was going to faint." Her body was shaking and she experienced heart palpitations. (194, 527). She cried intensely throughout the 18 days of the search. (527). When her worst fears came true, she again started shivering. (194).

A.H., once a happy person, has changed markedly. (196, 529). She is now chronically anxious and becomes "hysterical" very easily. She needs to know the location of her parents at all times. To this day, she is unable to sleep unless everyone in the family is home, dreams of Naftali, and has occasional flashbacks to the time

[8] Dr. Strous explains Anxiety Disorder at (191).

of the kidnapping. (195-197). If she experiences any sort of stress, she stops functioning and "returns in her mind to the place and time where and when she first heard about Naftali's kidnapping." (195). Even mild stress causes her to freeze. (195). A.H.'s anxiety is debilitating. She needs to plan her life around avoiding anxiety attacks. Inevitably, her anxiety attacks grip hold of her and, in addition to the stress they cause inherently, A.H.'s pain in having failed to stave off the anxiety attack torments her. (114). When she thinks of Naftali, particularly at family gatherings, her pain remains "especially acute." (196). Like her father, she receives ongoing psychotherapy. (114, 210). Her social and academic lives are significantly negatively impacted. (195-96, 529-31). She sometimes wants to die in order to again be with Naftali. (196, 529). Dr. Strous opined that A.H.'s symptoms are likely to persist "for a significant time to come" and "may…be permanent." (191-92, 200); *see also* (527-32).

A.L.: A.L. likely has Anxiety Disorder. (207, 214). Once a "happy go lucky" child, A.L. has closed herself off from the world. (210, 534-35). She does not speak about Naftali and keeps her feelings and emotions bottled up. (210). She has become emotionally distant and has behavioral problems (especially when interacting with her parents) that did not exist before Naftali was murdered. (210). She receives ongoing counseling. (210-11). Dr. Strous opined that A.L.'s symptoms are likely to

persist "for a significant time to come" and will "contribute to the development of [her] personality," negatively altering the "trajectory of [her] life." (208, 214, 536).

N.E.: N.E. likely has Persistent Complex Bereavement Disorder and Anxiety Disorder. (207, 214). Like A.L., N.E. has largely closed herself off from the world. (211). She was especially close to Naftali and suffers his absence harshly. (537). She is extremely sensitive and is much more restless and impatient than previously. (211). She is not doing well in school as a result of her trauma. (211). She receives ongoing counseling. (211-12). Dr. Strous opined that N.E.'s symptoms are likely to persist "for a significant time to come" and that the challenges she faces and the "scar" from any recovery "will most definitely contribute to certain decisions or aspects of [the] trajectory of [her] life." (208, 214, 539).

N.S.: N.S. likely has Persistent Complex Bereavement Disorder and Anxiety Disorder. (207, 214). N.S.'s anxiety is virtually constant. She is regularly occupied by thoughts of Naftali and the tragedy and has developed a fear of Arabs. (212). She is unusually dependent on her parents, constantly needs attention, and needs to know where her family members are at all times. (212. 540). Afraid to be alone, she cannot sleep by herself. (212). She has also become unusually oppositional, a "significant change." (212). N.S. has been significantly negatively impacted both socially and academically. (212, 539). She is "intensely preoccupied with questions regarding existential content of loss and death" and "war and peace." (213). Her suffering is

intense. She receives ongoing counseling. (212-13). Dr. Strous opined that N.S.'s symptoms are likely to persist "for a significant time to come." (208, 214).

S.R.: As S.R. was Naftali's only little brother, Naftali used to "idolize" him. (213, 365). S.R. reciprocated: "Whenever Naftali was around, S.R. would gravitate to him and be with him as much as he could." (213). Given the nature of their relationship, the loss of Naftali and all of the stress that S.R. had to endure at a very young age likely had a negative effect on S.R. (213). However, given S.R.'s age, Dr. Strous found it difficult to assess the extent of S.R. psychological injury. (213).

F. Procedural History

Plaintiffs filed suit on July 9, 2015 (3), asserting various claims against the defendants authorized under the FSIA. (25-31); 28 U.S.C. 1605A. Plaintiffs effected service (*see* 28 U.S.C. 1608(a)) on November 29, 2015 (Syria) and January 13, 2016 (Iran and MOIS). (5-6, 314-15). Defendants defaulted and the Clerk entered default on February 8, 2016 (Syria) and March 23, 2016 (Iran and MOIS). (33-34).

On July 19, 2016, plaintiffs moved for entry of default judgment, requesting a hearing as required by 28 U.S.C. 1608(e) (35-37), and a total of $39,500,000 compensatory damages[9] and $600,000,000 punitive damages.[10] (296-97). The

[9] They requested $7,500,000 for each parent, $3,750,000 for each of six siblings, and $2,000,000 for Naftali's estate (296-97), justifying those requests. (286-95); *see also* (721-34).

[10] (295-96).

hearing was held on December 6-7, 2016, (9-10); (335-605) (transcript). Plaintiffs submitted substantial evidence (largely reproduced in the Appendix (36-215, 298-301, 606-711)).

On March 31, 2017, the district court granted plaintiffs' motion, found the defendants liable,[11] and entered default judgment against them. (302-34). Plaintiffs do not appeal from those determinations.

Turning to damages, the district court engaged in extensive legal and factual analyses, determining that the plaintiffs were entitled to substantial awards for pain and suffering, solatium, and punitive damages. (326-32). But when it assigned actual dollar figures in each instance, it implicitly told a different story, awarding the plaintiffs drastically less than they had requested (328-32), and radically less than essentially all previous plaintiffs who have brought similar claims in this District. The court below made no attempt to support its monetary awards. As an illustrative

[11] The district court correctly held that Hamas was responsible for the kidnapping and murder (306-07); defendants provided Hamas with material support for its terrorism (307-13, 321-23); defendants were properly served (314-15); defendants' sovereign immunity was abrogated (315-18); the U.S. citizen plaintiffs have claims under §1605A(c) (318); the U.S. citizen plaintiffs adequately demonstrated liability (320-23); non-citizen Abraham Fraenkel has a claim under state law (318); Israeli law governs Abraham's claim (323-24); and Abraham adequately demonstrated liability under Israeli law (324-26).

example, the district court's *entire* discussion on the U.S. citizens' solatium award is quoted here in full:

> The Court finds the evidence of the Plaintiffs' entitlement to solatium compensation fully satisfactory. As a result, the Court awards Rachel Fraenkel and her children $3,100,000 in solatium damages.

(329). The court below did not explain the calculations or thought processes utilized in reaching this number, which was not even differentiated as a discrete award for each of the plaintiffs.

Plaintiffs timely filed a motion to amend the judgment, requesting the court reconsider its awards (721-38) and explain them, as this Court's precedent demands. (738-42). On June 28, 2017, the district court denied the motion, but elaborated on its damages award as follows:

Compensatory damages	
to each parent:	$1,000,000
to the four older siblings:	$500,000
to the two younger siblings (N.S. and S.R.):	$50,000
to Naftali's estate:	$1,000,000
TOTAL:	**$5,100,000**
Punitive damages	
TOTAL:	**$50,000,000**[12]

(333, 760). It acknowledged that this award is drastically less than awards that terror victims typically receive (754-59), explaining that the plaintiffs' awards were reduced because 1) Naftali was not targeted for being an American, 2) plaintiffs consented to the terrorism or else "accepted the risks" of terrorism by living in an apparently dangerous area, and 3) N.S. and S.R.'s awards were further reduced to just $50,000 simply because they are young. (755-60).

The reduced award to N.S. is especially puzzling in light of her extensive suffering described *supra*. N.S.'s life seemingly continues to revolve around Naftali and she has been diagnosed with two debilitating psychological disorders likely to persist indefinitely. (207-08, 212-14, 364). S.R. also clearly suffers significantly

[12] Without explanation, and despite writing earlier that "[t]he Court will award Plaintiffs $50,000,000 in punitive damages," the district court granted punitive damages only to Naftali's estate, and not the other plaintiffs. (331-33).

from the loss of his brother and the impact the tragedy had on his life. (97, 115, 213-14). The district court offered no explanation why N.S. and S.R's relative youth mitigates their injuries or otherwise justifies this extreme downward adjustment.

Plaintiffs timely appealed. (333-34, 761-62); FRAP 4(a)(4)(A).

SUMMARY OF ARGUMENT

The D.C. District Court, uniquely expert in resolving FSIA terrorism claims, has developed extensive case law on damages in such cases. Until now, that case law spoke with a consistent voice, awarding damages in terrorism cases according to clearly articulated and easily understandable guidelines. Such consistency allowed for equitable damages awards, with similarly-situated plaintiffs receiving similar awards. The court below broke from that precedent, and from the clearly expressed intent of Congress, awarding damages dramatically lower than those received by thousands[13] of similarly-situated plaintiffs. In so doing, it relied on no case law, no analogy to comparable cases, and no consensus guideline regarding damages awards. Instead, it erroneously incorporated irrelevant purported facts into its analysis—facts unrelated to assessment of the plaintiffs' suffering—and used those facts harshly and wrongly to penalize the plaintiffs.

[13] USVSSTF, SUPPLEMENTAL CONGRESSIONAL REPORT 9 (2017), http://www.usvsst.com/docs/USVSST%20Fund%20Supplemental%20Congressional%20Report%208-2-2017.pdf (reporting nearly 3,000 USVSSTF claims in its first year).

The "facts" on which the district court relied were not derived from the record. For example, the district court oddly supposed that by residing in a safe area in Israel, the plaintiffs consented to, or shared in the culpability for, the kidnapping and murder of their son and brother. Yet the record evidence plainly demonstrates that the kidnapping and murder was shocking—not just to the plaintiffs, but to the Israeli public at large and its police and intelligence communities. Naftali was doing nothing usual or unsafe when he was kidnapped, nor was he encouraged by his family to do anything unusual or unsafe. The district court further supposed that Naftali was targeted for being an Israeli, ignoring Naftali's U.S. citizenship, notwithstanding that Naftali was attacked fortuitously, regardless of his citizenship.

In any event, the purported facts on which the district court relied are irrelevant. Congress guaranteed U.S. nationals the right to fully recover regardless of any inference of "consent" on their part to becoming victims of terrorism and without regard to the reason they were targeted. The FSIA does not blame the victim. The district court's inclusion of such factors in its analysis was erroneous.

Every aspect of the damages award was inadequate. The district court did not explain how it arrived at the numbers awarded, aside from referring to the aforementioned "facts." It certainly made no attempt to justify the *extent* of its modification. The district court's decision was arbitrary; a court must explain the basis for its decisions, not simply announce them.

STANDARD OF REVIEW

"This court regards damage awards as 'findings of fact' governed by [Rule] 52(a)" which must be vacated upon a showing of clear error. *Bucheit v. PLO*, 388 F.3d 346, 350 (D.C. Cir. 2004); *Miles v. D.C.*, 510 F.2d 188, 196 (D.C. Cir. 1975). Such error may be found in the district court's use of irrelevant and improperly considered factors in reaching its damages award. *Id.* at 196 n.6; *Grubb v. U.S.*, 887 F.2d 1230, 1236 (4th Cir. 1989) ("The district judge clearly erred as a matter of law in considering the McDermott telephone call as an aggravating circumstance justifying a solatium award."). It may also be satisfied if the district court abuses its discretion in reaching conclusions that lack adequate support in the record. *Owens v. Sudan*, 864 F.3d 751, 785 (D.C. Cir. 2017). Further, clear error can be found in a court's failure to comply with Rule 52(a) by not clearly explaining the basis for its monetary award or clearly identifying those cases it deems comparable. *Eureka Inv. v. Chicago Title Ins.*, 743 F.2d 932, 939 (D.C. Cir. 1984); *Arpin v. U.S.*, 521 F.3d 769, 776-77 (7th Cir. 2008) (Posner, *J.*).

The district court's legal conclusions, interpretations, and assumptions are reviewed *de novo*. *Owens*, 864 F.3d at 768.

I. The District Court's Damages Award Ignored, and is Inconsistent With, Essentially All Prior Precedent

A. Essentially Every Prior Court Determined Damages in FSIA Terrorism Cases According to a Standardized Baseline Formula

Family members of terror victims suffer terribly. As plaintiffs' expert psychiatrist explained, losing a loved one in a violent terror attack is far more traumatic than is losing a loved one in a natural disaster or a car accident. (544-45). Terror victims are killed deliberately, which is much more upsetting to survivors than when people die naturally or in random accidents. It is unsurprising, therefore, that federal courts have historically awarded surviving family members substantial damages for their mental anguish and loss of solatium. Some courts reference these awards as "pain and suffering" awards while others have termed them "solatium" awards. *See Haim v. Iran*, 425 F.Supp.2d 56, 71-76 (D.D.C. 2006); *Braun v. Iran*, 228 F.Supp.3d 64, 84-85 (D.D.C. 2017) (Howell, *C.J.*). The difference is without distinction; we refer to them throughout as "solatium" awards.

"Solatium damages, by their nature, are unquantifiable." *Braun*, 228 F.Supp.3d at 85 (internal quotation marks omitted). Accordingly, solatium awards in terrorism cases are to "be determined [primarily] by the nature of the relationship and the severity and duration of the pain suffered by the family member." *Brewer v. Iran*, 664 F.Supp.2d 43, 55 (D.D.C. 2009) (Huvelle, *J.*) (quoting *Haim*). "Spouses typically receive greater damage awards than parents, who, in turn, receive greater

awards than siblings." *Estate of Heiser v. Iran*, 466 F.Supp.2d 229, 269 (D.D.C. 2006) (Lamberth, *J.*). Surveying cases dating back to 1998 and written by several different judges, *e.g.*, *Cicippio v. Iran*, 18 F.Supp.2d 62 (D.D.C. 1998) (Jackson, *J.*), Judge Lamberth concluded:

> [C]ourts typically award between $8 million and $12 million for pain and suffering resulting from the death of a spouse approximately $5 million to a parent whose child was killed and approximately $2.5 million to a plaintiff whose sibling was killed.

Heiser, 466 F.Supp.2d at 269 & n.24 (footnotes omitted); *see Wultz v. Iran*, 864 F.Supp.2d 24, 39 (D.D.C. 2012) (Lamberth, *C.J.*). Courts award half these amounts to family members of persons who are injured rather than killed. *Id.* This formula, the foundation of the so-called "*Heiser* framework," *Braun*, 228 F.Supp.3d at 85; *In re Terrorist Attacks on Sept. 11, 2001*, 2012 WL 4711407 at *2 (S.D.N.Y. 2012) (Daniels, *J.*), merely supplies the baseline and may be subject to upward or downward adjustments as appropriate under the circumstances. *Id.* at *2 & n.2; *Braun*, 228 F.Supp.3d at 85; *Heiser*, 466 F.Supp.2d at 269 n.24. Upward adjustments from the *Heiser* baseline are appropriate given 1) "evidence establishing an especially close relationship between the plaintiff and decedent," 2) "medical proof of severe pain, grief or suffering," or 3) "circumstances surrounding the terrorist attack which made the suffering particularly more acute or agonizing." *Braun*, 228 F.Supp.3d at 85.

The *Heiser* framework invented nothing new. It merely restated the clear consensus that had developed regarding terrorism damages awards over the roughly ten years between the 1996 enactment of the FSIA's terrorism exception (*see infra*) and *Heiser*. *Heiser* has since become the gold standard and is followed nearly universally all over the country; it has been described it as a *necessity* in terrorism cases precisely because solatium awards do not lend themselves to easy calculations. *Braun*, 228 F.Supp.3d at 85.

The extent of the *Heiser* framework's acceptance is remarkable. So much so that the court below, in its Opinion of March 31, 2017 (302-32), even while becoming the ***only*** court to reject the *Heiser* framework, expressly relied on no fewer than 21 cases that either had relied on the *Heiser* framework or were decided before *Heiser* and influenced it. (724-26) (listing cases). Plaintiffs presented the court below with this list of 21 cases, asking the court to follow the broad consensus embodied in the *Heiser* framework. (721-28). But the district court declined, ignoring that the *Heiser* framework encapsulates all cases that had come before it and has been consistently followed by all that came after, and dismissing it as simply the single "opinion of a valued colleague [*i.e.*, Judge Lamberth], not a superior court." (754-55). Ironically, the court below proceeded to expressly rely on two more *Heiser* framework cases: *Rimkus v. Iran*, 750 F.Supp.2d 163, 184-85 (D.D.C. 2010) (Lamberth, *C.J.*) (citing *Heiser* in calculation of punitive damages), and *Salazar v.*

Iran, 370 F.Supp.2d 105, 116-17 (D.D.C. 2005) (Bates, *J.*) (pre-*Heiser*) (awarding $10,000,000 to the victim's widow and $5,000,000 to his daughter). (755-56).

In the General Addendum, plaintiffs present a detailed table summarizing 65 cases, all of the FSIA terrorism judgments rendered in this District in cases involving a death. The table reveals that just a handful of cases have diverged significantly from the *Heiser* framework's baseline award, but even those typically involve adjustments made in accord with the *Heiser* framework. The average solatium awards in death cases to parents and siblings, respectively, are $5,010,000 and $2,680,000. General Addendum, b9. The *Heiser* framework is thus not merely the work of Judge Lamberth but is the accepted consensus of many judges over many years.

The accepted consensus of this District is due considerable weight in FSIA terrorism cases. As the Seventh Circuit explained:

> The United States District Court for the District of Columbia has adjudicated the vast majority of suits under the FSIA's terrorism exception, many of which are reviewed in detail in *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d 31, 43 (D.D.C. 2009). Because this District has substantial experience interpreting these statutory provisions, we have reviewed its cases for guidance here.

Leibovitch v. Iran, 697 F.3d 561, 566 n.2 (7th Cir. 2012).

Courts granting solatium awards look to each other for guidance because solatium damages cannot be calculated with "mathematical certainty." *See Flatow*

v. Iran, 999 F.Supp. 1, 32 (D.D.C. 1998). They attempt to compensate a victim for severe emotional and mental anguish, something that does not lend itself to easy calculation. "This is the paradox of solatium; although no amount of money can alleviate the emotional impact of a child's or sibling's death, dollars are the only means available to do so." *Id.* At the same time, the "*primary consideration* is to ensure that individuals with similar injuries receive similar rewards." *Stansell v. Cuba*, 217 F.Supp.3d 320, 345 (D.D.C. 2016) (emphasis added). Accordingly, custom and consensus become extremely important.

The *Heiser* framework has been described as a "standardized approach for evaluating solatium claims." *Moradi v. Iran*, 77 F.Supp.3d 57, 72 (D.D.C. 2015) (Huvelle, *J.*) (adopting *Heiser*). Courts deviate from *Heiser* only where doing so is appropriate to properly compensate the victims for their injuries and deprivations and "while also bearing in mind the general precept that *similar awards should be given in similar cases*." *Oveissi v. Iran*, 768 F.Supp.2d 16, 26 (D.D.C. 2011) (emphasis added). As far as plaintiffs are aware, the decision below is the only decision of the D.C. District Court to deviate materially from the *Heiser* framework.

B. The *Gates* Decision, While Not Adopting the *Heiser* Framework, Reached a Substantially Similar Result

Citing its own decision in *Gates v. Syria*, 580 F.Supp.2d 53 (D.D.C. 2008), the court below noted that it had "previously declined to adopt *Heiser*," arguing that

"its position now should not be a surprise." (755). True, *Gates* departed from the rationale of the *Heiser* framework and its countless progeny. But *Gates* did not expressly reject *Heiser*—it did not even *cite Heiser* or its numerous progeny to justify its solatium award.[14] Moreover, in its bottom-line, it did not deviate materially from *Heiser*.

The *Gates* plaintiffs were the families of two U.S. citizens who were beheaded with a knife by al-Qaeda terrorists. *Id.* at 55-56. The surviving family members were a mother, sister, widow, and daughter. *Id.* at 71-72. Under the *Heiser* framework, one would expect the mother to receive a baseline award of $5,000,000, the sister $2,500,000, the widow $10,000,000, and the daughter $3,000,000, for a total baseline solatium award of $20,500,000. Given the heinous and public nature of the crime, which was recorded on video and widely disseminated, a 50% upward enhancement (*see infra*) is appropriate, increasing the total expected solatium award to approximately $31,000,000.

Though *Gates* issued a total solatium award of just $10,500,000, *id.* at 72, *Gates* adequately compensated the *Gates* plaintiffs with an unusually large award for pain and suffering—$100,000,000 for two victims. *Id.* at 74. While plaintiffs are aware of no case precisely like *Gates*, other terror victims who suffered extreme

[14] *Gates* did cite *Flatow*, 999 F.Supp. at 29-31, but made no attempt to square its solatium award with the one granted in *Flatow*. *See Gates*, 580 F.Supp.2d at 71-72.

conscious pain and suffering generally receive awards far smaller. The typical award for severe pain and suffering of a few hours or less is $1,000,000. *Baker v. Libyan Arab Jamahirya*, 775 F.Supp.2d 48, 81 (D.D.C. 2011); *Wultz*, 864 F.Supp.2d at 37-38. There do not appear to be many cases in which significantly larger pain and suffering awards were given to the estates of deceased victims who were *not* held captive and tortured over many days. Here are three: The estate of a victim of a Hamas kidnapping and murder, killed under circumstances remarkably similar to Naftali, received $2,000,000. *Wachsman v. Iran*, 603 F.Supp.2d 148, 161 (D.D.C. 2009). The estate of a victim of a bombing attack who suffered terribly for 27 days before dying received $8,000,000. *Wultz*, 864 F.Supp.2d at 38. And the estate of a victim who similarly suffered for 49 days received $10,000,000. *Weinstein v. Iran*, 184 F.Supp.2d 13, 22-23 (D.D.C. 2002). The *Weinstein* award appears to be the largest of its kind, which can be explained by the fact that the decedent in *Weinstein* languished in pain for seven weeks before dying, whereas most victims killed by terrorists die far more quickly.

To plaintiffs' knowledge, the largest pain and suffering award given to a deceased terrorism victim (other than the *Gates* victims) is a $30,000,000 award for someone held captive for 529 days "in primitive conditions" and subjected to "barbaric" treatment before he was finally hanged on videotape for his family to see. *Higgins v. Iran*, 2000 WL 33674311 at *2-3, *8 (D.D.C. 2000). Before he was killed,

various parts of the victim's body had been forcibly removed, including his penis and testicles, the floor of his mouth, skin from his face, and his tongue. *Id.* at *3.

The *Gates* plaintiffs suffered unimaginable pain and were certainly entitled to a large award for pain and suffering. But their terrible pain was over within "several minutes." *Gates*, 580 F.Supp.2d at 58, 73. Was their suffering five times greater than that of the *Weinstein* plaintiff during his seven-week ordeal? Was it nearly twice the suffering of the *Higgins* plaintiff throughout his 529 days of gruesome torture? *Gates* did not say; it cited no case justifying its $50,000,000 per victim pain and suffering award.

Thus, while the *Gates* plaintiffs' solatium award of $10,500,000 was too low under the *Heiser* framework, their $100,000,000 award for pain and suffering was probably too high. On balance, perhaps the *Gates* Court approximated the right result—albeit, without fidelity to precedent and without articulating a standard applicable to other cases.

C. Every Other Court to Consider the Issue has Rejected the District Court's Approach

The district court drastically reduced the plaintiffs' damages award upon finding that 1) the plaintiffs effectively consented to terrorism or were negligent in failing to protect themselves from it, and 2) Naftali had been targeted for being an Israeli, not for being an American. Indeed, it went so far as to suggest that U.S.

citizens born abroad are automatically entitled to less compensation under the FSIA. (757-59). No other court has ever found or suggested that either factor is remotely relevant to an FSIA terrorism damages award.

1. Unsurprisingly, this is not the first FSIA terrorism case involving a dual citizen or a decedent who was killed in a dangerous environment after having "accepted the risks" (757) inherent in living in such an environment. *Gates* provides an interesting example: The *Gates* decedents were employees of a civilian contractor operating in Iraq in September 2004.[15] *Gates*, 580 F.Supp.2d at 56. They lived in residential housing, "guarded by Iraqi militia." *Id.* at 57. For a small bribe paid by the terrorists, guards vacated their posts, enabling the terrorists to kidnap the *Gates* victims. *Id.* Despite that Iraq in September 2004 was an exceptionally dangerous place for American contractors and the victims had been correspondingly well paid, Judge Collyer did not reduce their award in the slightest on a consent, assumption of risk, or comparative negligence theory. *Id.* at 69-72. (This is the stuff that "assumption of risk" is made of. *See Jutzi-Johnson v. U.S.*, 263 F.3d 753, 758-59 (7th Cir. 2001) (Posner, *J.*).) Indeed, the court below somehow claimed to *distinguish* this case from *Gates* in part on the ground that the plaintiffs here

[15] As a frame of reference, the Iraq War began in March 2003. Four civilian contractors working for Blackwater USA were killed and their bodies were burned on camera in March 2004. Wikipedia, Iraq War, https://en.wikipedia.org/wiki/Iraq_War.

"accepted the risk[]" of terrorism, placing blame on them. (756-57). That distinction is remarkable given that the *Gates* plaintiffs were adult contractors for the military working in an active war zone while Naftali Fraenkel was a teenager coming home from high school.

The FSIA does not blame the victim. Numerous courts have issued large FSIA terrorism judgments resulting from terrorism in places known to be dangerous. For example, numerous large FSIA judgments have issued for victims of a 1983 suicide bombing at the U.S. Marines barracks in Beirut, in the midst of a bloody eight-year civil war. *E.g.*, *Davis v. Iran*, 882 F.Supp.2d 7 (D.D.C. 2012); *Kerr v. Iran*, 245 F.Supp.2d 59 (D.D.C. 2003). Not one of those decisions reduced an award on the theory that people living in Beirut during a civil war—in a Marines barracks, no less—knew that doing so was dangerous.

Similarly, numerous FSIA awards have issued following terror attacks in Israel, not one of which (until now) was reduced for "accept[ance]" (757) of risk. One decision even noted that the family of the victim, killed in a Jerusalem bus bombing, "was well aware of the frequency of terrorist attacks in Israel." *Beer v. Iran*, 574 F.Supp.2d 1, 6 (D.D.C. 2008). But it did not reduce the award; it adopted the *Heiser* framework, awarding $5,000,000 to the decedent's mother and $2,500,000 to each of his siblings. *Id.* at 13-14. Many other cases such as *Haim*, 425 F.Supp.2d at 59, *Flatow*, 999 F.Supp. at 7-8, and *Bluth v. Iran*, 203 F.Supp.3d 1, 9-

12 (D.D.C. 2016), involved attacks within the Gaza strip (an area far more dangerous than where Naftali was kidnapped). None of those awards was reduced.

The district court is a lone outlier.

2. Likewise, no court has ever inquired *why* a victim was targeted or reduced a damages award when it appeared that the targeting had nothing to do with the victim's U.S. citizenship. Indeed, the geopolitical calculations of Hamas in deciding whom to target are irrelevant for FSIA purposes since the only pertinent statutory criterion is U.S. nationality. *See* 28 U.S.C. 1605A. Further, no court has drawn the district court's strange distinction between U.S citizens born in the U.S. and U.S. citizens who are born or reside abroad. *See* (758).[16]

Countless cases have held otherwise, completely disregarding such factors. For example, the victim in *Bluth* was "was born in Jerusalem, Israel and lived in Israel for most of his life." *Id.* at 9. But he was also a U.S. citizen and thus entitled to the full measure of damages guaranteed by the FSIA. *Id.* (adopting the *Heiser* framework). *Wachsman*, 603 F.Supp.2d at 155, and *Gill v. Iran*, 249 F.Supp.3d 88, 93 (D.D.C. 2017), go a significant step further. The decedents in those cases were not merely living in Israel, they were attacked while *serving* Israel; *Gill* involves an

[16] The State Department estimates that 9 million U.S. citizens reside abroad. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, CA BY THE NUMBERS (2016). Surely, they are the most likely to impacted by terrorism against Americans and are therefore the clearest intended beneficiaries of the FSIA's terrorism exception.

aide to Israel's Minister of Public Security, *id.*, and *Wachsman* involves a corporal in the Israeli army. *Wachsman*, 603 F.Supp.2d at 155. The fact that both were attacked for being Israelis, not for being Americans, was simply irrelevant.

One need look no further than §1605A to understand the extent of the district court's error. It abrogates immunity whenever "the claimant or the victim" is a U.S. national and grants a private right of action to any U.S. national, without regard to the status of the decedent. §1605A(a)(2)(A)(ii) and (c). Thus, the decedent need not have any U.S. ties at all. Indeed, those are the facts of *Oveissi*. The victim, loyal to the Shah of Iran, had no substantial U.S. ties. But his grandson, who was born in the U.S. by mere happenstance, was entitled to his full damages under the *Heiser* framework with a 50% enhancement, $7,500,000. *Oveissi*, 768 F.Supp.2d at 17, 30; *see also Leibovitch*, 697 F.3d at 569-70 ("The claimant and victim need not both be American citizens."). It follows that a U.S. citizen who was purportedly "kidnapped and murdered...because of his Israeli citizenship" does not get less than "a U.S. citizen inadvertently caught up in the Israeli-Palestinian conflict." *Contra* (758).

D. The Plaintiffs Are Collectively Entitled to $37.5 Million for Solatium Damages

The district court granted each of Naftali's parents $1,000,000, four of his siblings $500,000 each, and two of his siblings a demeaning $50,000 each, for a total solatium award of $4,100,000. (750, 760). Using the *Heiser* framework's baseline

award, the parents should have each[17] received $5,000,000 and the siblings $2,500,000 for a total award of $25,000,000. If Naftali had just been *injured*, not killed, plaintiffs' baseline award should have been half that, $12,500,000—still more than *three times* the award that the district court actually granted.

But, given the circumstances, even $25,000,000 would have been inadequate. Upward adjustments to the baseline award are appropriate given 1) "evidence establishing an especially close relationship between the plaintiff and decedent," 2) "medical proof of severe pain, grief or suffering," or 3) "circumstances surrounding the terrorist attack which made the suffering particularly more acute or agonizing." *Braun*, 228 F.Supp.3d at 85. All three factors are met here.

First, considerable evidence, credited by the district court (*e.g.* (329)), shows that the Fraenkel family is and was extremely close.

Second, except for S.R. (due only to his young age), plaintiffs' expert psychiatrist opined that each plaintiff suffers from one or more psychological disorders severely impacting their function and that will likely continue to do so indefinitely, possibly for the rest of their lives. *E.g.* (503-43). While no formal

[17] While Abraham is not a U.S. citizen, damages awards for §1605A claims by non-citizen plaintiffs proceeding under foreign law are generally identical to those under domestic law unless the court is given evidence demonstrating that applicable foreign law requires a different measure of damages. *Thuneibat v. Syria*, 167 F.Supp.3d 22, 47 (D.D.C. 2016). Israeli law provides no different measure of damages. (291).

prognosis could be stated regarding S.R., it is certain that his life was "irreversibly or significantly" negatively altered by the kidnapping and murder of Naftali. (213, 543). Plaintiffs presented robust medical proof of severe suffering.

Third, when a death is "sudden and unexpected," in the sense that the victim was not in an unusual situation inherently exposing him to significant risk, the shock and grief is more intense, justifying an upward adjustment. *Oveissi*, 768 F.Supp.2d at 28. Naftali's murder certainly qualifies. Moreover, the 18-day period of horrifying uncertainty in which the family was left to agonize over what the terrorists were doing to their beloved son and brother made their suffering particularly acute and agonizing. The life of each individual family member was dominated by fear and uncertainty for those 18 days, and was left largely in shambles thereafter. Further, the terrorists' awful treatment of Naftali's body—failing to bury it reasonably and allowing it to be eaten by animals before his family could recover it—is a tort in its own right,[18] a cause of further grief and suffering, and grounds for an upward adjustment (to both Naftali's estate and his family members).

[18] The ancient right of sepulcher, restated in RESTATEMENT (SECOND) OF TORTS §868 (1979) and adopted by many jurisdictions, grants next of kin a cause of action for any negligent or intentionally wrongful act that prevents or delays burial. *Id.*; *D.C. v. Smith*, 436 A.2d 1294, 1296-97 & n.1-2 (D.C. 1981); *Shipley v. City of New York*, 25 N.Y.3d 645, 653-55 (N.Y. 2015).

Under these circumstances, a 50% upward adjustment from the *Heiser* framework is warranted. *See id.* at 29-30 (granting a 50% enhancement because the plaintiff, a "young child," "changed significantly" and suffers from psychological disorders). Accordingly, under the *Heiser* framework, and the reasoned decisions of every court preceding the decision of the court below, the plaintiffs should have received a total solatium damages award of $37,500,000.

II. The District Court's Damages Award is Arbitrary and Completely Unsupported

A. The District Court Improperly Interjected Two Irrelevant Factors into its Damages Calculation

The district court initially did not even try to justify its damages award. *See*, *e.g.* (329). Upon receiving plaintiffs' motion for reconsideration, explaining that damages awards must be explained (738-42), the district court attempted to rehabilitate its award by relying on *Rimkus*, 750 F.Supp.2d at 176, and *Salazar*, 370 F.Supp.2d at 115-16, for the proposition that damages awards in FSIA terrorism actions must be viewed "through the lens of civil tort liability." (755-56, 759). But neither case justifies the awards here. *Salazar*, a pre-*Heiser* case, made an award consistent with the *Heiser* framework. *Id.* at 116-17 (awarding $10,000,000 to a widow and $5,000,000 to a child). *Rimkus* expressly adopted the *Heiser* framework. *Rimkus v. Iran*, 575 F.Supp.2d 181, 198 (D.D.C. 2008); *Rimkus*, 750 F.Supp.2d at 184-85. *Rimkus* analogizes to "civil tort liability" not to define rules governing

damages calculations but rather to explain that causation and injury are not presumed but must be demonstrated both as a matter of fact and of law. *Id.* at 175-76. The district court's reliance on *Rimkus* is plainly erroneous; no part of that decision suggests that damages must be reduced as the plaintiffs' damages were reduced. *Salazar* does not even come close. All it does is invoke "the American rule on damages." 370 F.Supp.2d at 115-16. That "American rule" pertains only to the *initial* calculation of damages, stating that where, due to the nature of the tort itself, damages cannot be determined with certainty, they must be determined by "just and reasonable inference." *Hill v. Iraq*, 328 F.3d 680, 684 (D.C. Cir. 2003). It does not mandate *reductions* in damages awards for reasons that do not mitigate the plaintiff's injury. *Id.*

The district court's invocation of "civil tort liability" truly has nothing to do with precedent. The district court unilaterally altered the parameters of FSIA terrorism litigation and the scope of its protections, reducing the damages awards of terror victims who "accepted the risks" of living in a dangerous area. (755-57). It further limited the power of the FSIA's terrorism exception when it reaches beyond its supposed principal objective: to protect Americans who are injured for being Americans. (758). These unprecedented ideas, which have absolutely no basis in statute or case law, animate this entire appeal.

Both factors are entirely irrelevant to the calculation or modification of solatium damages because neither has anything to do with the extent of the family's mental anguish and loss of solatium. As the district court correctly held, the purpose of solatium damages is to compensate the victims for severe emotional anguish. (328); *see also Flatow*, 999 F.Supp. at 29-30. Facts pertinent to solatium damages calculations in FSIA terrorism cases include facts getting to the nature of the relationship between decedents and their relatives and the nature of the plaintiffs' suffering.[19] The location where a plaintiff lives or works is simply not relevant. Nor is the plaintiff's status as a dual citizen of some other country. The district court itself recognized this fact, stating that the "facts" on which it relied "do nothing to lessen the Plaintiffs' grief or loss." (759). In other words, the district court recognized that these factors *have nothing to do with the plaintiffs' damages*, but relied on them to reduce the plaintiffs' awards nonetheless. (759).

[19] Some examples include 1) whether the death was "sudden and unexpected," *Oveissi*, 768 F.Supp.2d at 26, 28; 2) or due to malice, *Stethem v. Iran*, 201 F.Supp.2d 78, 90 (D.D.C. 2002); 3) whether the victim's family was subject to extensive uncertainty over the victim's fate, *Acree v. Iraq*, 271 F.Supp.2d 179, 222 (D.D.C. 2003); 4) the "severity of the pain immediately following the injury" and 5) the extent to which a family relationship has been altered, *Blais v. Iran*, 459 F.Supp.2d 40, 59-60 (D.D.C. 2006); 6) significant resulting changes in lifestyle or employment, *Brewer*, 664 F.Supp.2d at 58; 7) closeness in age between siblings, *Elahi v. Iran*, 124 F.Supp.2d 97, 110 (D.D.C. 2000); and 8) the existence of resulting psychological injury or academic impairment, *Wultz*, 864 F.Supp.2d at 40.

Inquiries into why any particular terror victim was targeted should be emphatically rejected:

> Any distinction [between victims of terrorism] is both fortuitous and illusory; the anguish of the survivors is none the less by reason of it, and the level of malevolence of [the terrorist] conduct is the same[.]

Wagner v. Iran, 172 F.Supp.2d 128, 137 (D.D.C. 2001) (Jackson, *J.*). A rape victim does not suffer less because she wore a short skirt. The parents of a lynching victim do not suffer less if they knew beforehand that the KKK was active in their area. So too, the Fraenkels do not suffer any less simply because they (other than Abraham) were dual U.S.-Israeli citizens or because they knew their very presence exposed them to a risk of terrorism.

B. The District Court had No Authority to Interject its Factors into its Damages Award

A district court awarding damages certainly operates with a great deal of discretion. But there are significant limits on that discretion.

First, the use of irrelevant factors in reaching a damages award is reversible error. *Grubb*, 887 F.2d at 1236; *Miles*, 510 F.2d at 196 n.6. Such irrelevant factors "should never be considered" in rendering a damages award. *Id.* As explained in the preceding section, the two factors relied on by the district court are irrelevant. The district court's reliance on them was improper.

Second, the district court conspicuously does not explain its reliance on the plaintiffs' having "accepted the risks" of terrorism (757). Plaintiffs posit that this is because there is no valid explanation for such reliance. The district court could not have meant to say that the plaintiffs *assumed* the risks because assumption of risk in a tort context is ordinarily thought of as a "complete bar to liability." *Novak v. Capital Mgmt.*, 570 F.3d 305, 313 (D.C. Cir. 2009). Perhaps, the district court meant to apply the doctrine of comparative negligence, reducing the plaintiffs' award "in proportion to [their] fault." *CSX Transp. v. McBride*, 564 U.S. 685, 713-14 (2011) (Roberts, *C.J.*, dissenting). But that too is impossible because comparative *negligence* applies only in negligence actions. It is no defense to intentional terrorism. *See Blachy v. Butcher*, 221 F.3d 896, 904 (6th Cir. 2000). To hold otherwise would be to improperly blame the victim. *See id.*

Third, nothing in the text of the FSIA suggests that the reason why terrorists targeted a particular victim or a victim's contributory negligence is relevant. Indeed, a victim does not even need to be a U.S. national for his American relatives to sue under the FSIA. *See* 28 U.S.C. 1605A(a)(2)(A)(ii) and (c); *Oveissi*, 768 F.Supp.2d at 17, 30; *see Leibovitch*, 697 F.3d at 569-70.

Fourth, it is doubtful that the district court even had authority to raise affirmative defenses such as contributory negligence or assumption of risk. An affirmative defense is waived if not raised by the defendant. Rule 8(c), 12(b); *Wood*

v. Milyard, 566 U.S. 463, 470 (2012). The defendants defaulted (33-34), thus waiving any affirmative defenses they had. Courts may not rehabilitate deliberately waived defenses. *Id.* at 472-73. The district court erroneously did so.

C. The District Court Failed to Adequately Explain its Awards

Even upon concluding that the plaintiffs' damages awards needed to be adjusted downward, the district court was obligated, under Rule 52(a), to arrive at the proper amount of the reduction through "reasoned, articulate adjudication." *Aprin*, 521 F.3d at 776-77. Its figures may not be simply "plucked out of the air" or determined "on the basis of mere speculation or guesswork." *Id.*; *Eureka*, 743 F.2d 932 at 939. Rather, "it is essential that the trial court give sufficient indication of how it computed the amount so that the reviewing court can determine whether it is supported by the record." *Id.* at 940. Failure to do so is grounds for vacatur. *Id.* at 939-40; *Safer v. Perper*, 569 F.2d 87, 100 (D.C. Cir. 1977).

The district court's solatium, pain and suffering, and punitive damages awards are all inadequately supported

1. Solatium Damages. Notwithstanding that the parent of a terror victim who was killed typically receives a solatium award of $5,000,000, subject to upward or downward adjustment as appropriate (*supra*), and the parent of a terror victim who was merely injured typically receives a solatium award of $2,500,000, the district court decided that Naftali's parents would receive just $1,000,000. (759).

The district court gave no justification for that number and nothing in the decision explains why they did not receive $4,000,000 (or any other number) instead.

Upon deciding that $1,000,000 was proper, the court reasoned that the children all had to receive less, so it chose $500,000. (759). Again, the specific dollar figure was unsupported. The district court further opined, without any support at all, that Naftali's two youngest siblings deserved less still, so they received $50,000 (759-60), despite the clear evidence, discussed *supra*, that both children suffered and continue to suffer tremendously from the loss of their brother. Once again, no explanation is offered. These awards are arbitrary and must be rejected.

2. Pain and Suffering Damages. Plaintiffs requested that Naftali's estate be awarded $2,000,000 for his conscious pain and suffering. (297). They provided substantial evidence that Naftali was held at gunpoint, aware that he would likely be tortured or killed, for up to 20 minutes before finally being shot. (276, 294, 641-45). They demonstrated that Naftali likely experienced immense distress during that time. (644-45). The district court credited that testimony and described the length of Naftali's suffering as "an eternity." (326-28). In addition, the plaintiffs presented incontrovertible evidence, which the district court acknowledged (327), that at least one of the victims suffered extreme physical pain after being shot. (648, 652). Nonetheless, without explanation, the district court awarded the estate just

$1,000,000. That award was unsubstantiated, apparently "plucked out of the air." *Aprin*, 521 F.3d at 776.

This is not the first case involving a Hamas kidnapping and murder of a U.S. citizen in Israel. These are the essential facts of *Wachsman*, 603 F.Supp.2d at 151-53, in which the estate was awarded $2,000,000 for conscious pain and suffering. *Id.* at 161. Naftali's estate should receive a corresponding award. The district court was aware of *Wachsman* (294, 319-20, 573, 726) but did not even consider it in determining the pain and suffering award or explain why it granted an inconsistent award. *See* (326-28). That failure was erroneous.

3. Punitive Damages. The district court noted:

> Different courts calculate punitive damages using a variety of methods. One approach is to multiply a defendant's annual contributions to terrorism by a factor of between three and five. Other courts award punitive damages based on a ratio between punitive and compensatory damages, while others simply award a fixed amount per victim. *See*, *e.g.*, *Gates*..., 580 F. Supp. 2d 53, 75 (D.D.C. 2008) (awarding $150 million each to the estates of two victims).

(330) (some citations omitted). That is correct, but incomplete. Chief Judge Howell recently offered a helpful discussion on punitive damages awards in FSIA terrorism cases, *Braun*, 228 F.Supp.3d at 86-87, which would have aided the district court's

analysis.[20] Inexplicably, the district court ignored what it had just written and what it wrote previously in *Gates*, simply awarding Naftali's estate, but none of the other plaintiffs, just $50,000,000 punitive damages against all defendants. (331). Again, no reason was given.

Because the district court did not explain or justify its award or its decision to deny an award to the other plaintiffs, while apparently acknowledging that its award is significantly smaller than other punitive awards given in similar cases, the award must be vacated and an award consistent with those given in similar cases—$150,000,000 *per* defendant (740)—should be granted to all plaintiffs.

III. The District Court's Factual Conclusions are Contradicted by the Record

1. The court below wrote that the Fraenkel family "accepted the risks of living in a community built across the Green Line in Israel and sending Naftali 40 miles further into the West Bank for high school in Gush Etzion." (757). It apparently believed that by living near the Green Line[21] and sending Naftali to school in an area of the West Bank heavily populated by Israelis, the Fraenkel family

[20] *Braun* was submitted to the court below as supplemental authority just three days after *Braun* was decided. (8) (Document # 38).

[21] The "Green Line" is the demarcation line established in the multilateral 1949 Armistice Agreements after the 1948 Arab-Israeli War. Wikipedia, Green Line, https://en.wikipedia.org/wiki/Green_Line_(Israel). Territory east of the Green Line is referred to by some as the West Bank.

consented to or were somehow culpable for their son being kidnapped and shot by terrorists.

The Fraenkel family obviously never so consented. Nor did they assume any risk of terrorism simply by living peacefully in Israel.[22] Nothing in the record supports either conclusion. To the contrary, the record establishes that the abduction and murder of three teenagers on their way home from school was utterly shocking to everyone, including Israel's intelligence establishment. *E.g.* (692, 696) (Israeli military court describing the kidnapping and murder as a "tsunami" that was unexpected because it "occurred during a period of relative calm" and led directly to extended Israeli military action in Gaza). Naftali and his classmates traveled to and from his school on a *weekly* basis without prior incident. *See* (102). Naftali, like many of his classmates and the rest of the Israeli public, regularly hitchhiked from designated hitchhiking locations. (304) (district court's findings of fact). Hitchhiking is "very normal and safe" for boys Naftali's age. (107, 180). Indeed, Naftali's parents were so unconcerned that they both went to sleep despite knowing that their son was on his way home. (89, 102, 345).

When it was discovered that Naftali had been kidnapped by terrorists, the entire *country* was distraught. (90, 105-06, 400-01, 477). The Fraenkels quickly

[22] Their home is in a town called Nof Ayalon (88), which is located less than 20 miles southeast of Tel Aviv.

became unwilling celebrities in Israel, gaining the close attention of the general public, along with President Peres and Prime Minister Netanyahu. (90-93, 103, 131, 349-50). The outpouring of public concern was such that thousands of people came to the Fraenkel home for the *shiva*, many waiting in line outside for hours. (110). That would be a very strange reaction for people who lived with and expected terrorism on a regular basis. If school children were regularly kidnapped and murdered on their way home from school, the national reaction would have been far more blasé. The national reaction was extreme because the circumstances were extreme, unprecedented, and shocking.

The Fraenkels did not anticipate becoming victims of terrorism. Nor did they consent to any of the shocking and life-altering events at issue here. Their only 'offense' was living—legally—in a residential suburban community in Israel. For that, the district court punished the Fraenkels.

2. The district court relied heavily on its conclusion that Naftali was "kidnapped and murdered *because* [he was a] Jewish-Israeli teenager[]." (758) (emphasis added). The boys certainly were targeted because they were Jewish (48-49, 482,487-88), but not because they were Israeli. The kidnappers knew nothing about Naftali before he entered their vehicle, other than what they thought they could surmise by dress, appearance and context. They had no idea whether the boys were citizens of Israel, America, or any other country. Naftali was not targeted *because*

he was an Israeli or *despite* the fact that he was an American. He was chosen, as opposed to any other person in Israel, simply by happenstance. Thus, the district court's assertion that he was not "a U.S. citizen inadvertently caught up" in an act of terrorism (758) is simply wrong. The plaintiffs are entitled to their full measure of damages.[23]

* * * *

The district court reduced Fraenkels' award on the theory that they somehow knowingly consented to their injuries and that Naftali was kidnapped due to his status as an Israeli. Both conclusions are directly contradicted by the record. The district court's damages award is clearly erroneous and must be vacated.

IV. The District Court's Damages Award is Inconsistent with the Clearly Expressed Intent of Congress

Congress did not enact 28 U.S.C. 1605A and its predecessor *despite* the fact that U.S. nationals live and work in dangerous places, it did so *because* of that fact.

Our story begins in 1995: 20-year-old U.S. citizen Alisa Flatow was living in Israel for a year on a foreign study program. *Flatow*, 999 F.Supp. at 6-7. Desiring to spend time with friends on the Mediterranean, but knowing that the bus to the beach travelled through Gaza, she called her father, Stephen Flatow. Stephen told her that the Israeli government would not permit civilian transit service through Gaza unless

[23] *See* JASTA §2(a)(6) (18 U.S.C. 2333, note) (Statutory Addendum, a3).

it were safe. *Id.* at 7. Accepting his advice and whatever level of risk their presence in Gaza may pose, Alisa and her friends left for the beach. *Id.*

As the bus traveled through Gaza, it was rammed by a van filled with explosives, tragically killing and severely injuring many of the bus's passengers, including Alisa. *Id.* at 7-8. Upon hearing the dreadful news, Stephen rushed from his New Jersey home to Israel to be with his daughter one last time before she succumbed to her injuries. *Id.*

Stephen wanted to hold accountable those responsible but found no vehicle to do so. He intensely lobbied Congress to create a private right of action and was successful, giving rise to what would be known as the Flatow Amendment, codified as a note to 28 USC 1605(a)(7).[24] *In re Iran Terrorism Litig.*, 659 F.Supp.2d at 43.

Congress enacted the Flatow Amendment intending to enable Stephen Flatow to recover from those responsible for his daughter's murder, notwithstanding that Alisa had not been targeted because she was a U.S. citizen and notwithstanding that she knew she would be traversing a potentially dangerous location. *See id.* at 43; *Flatow*, 999 F.Supp. at 12-13. Nowhere did Congress state or suggest that because of the inherent danger of Alisa's actions, her loved ones should be entitled to less

[24] Section 1605(a)(7) is the predecessor to §1605A and was repealed and replaced with §1605A. *In re Iran Terrorism Litig.*, 659 F.Supp.2d at 58 (noting that the abrogation of immunity in §1605A is identical to the repealed §1605(a)(7)).

compensation, or that her father should not be able to recover because he encouraged her to take a civilian bus through Gaza. Congress understood that the world is dangerous. It enacted the Flatow Amendment because American victims of international terrorism deserve justice when killed or injured by terrorists, even when it happens in a dangerous place.

Since enacting the Flatow Amendment, Congress has consistently expanded the remedies available to victims of terrorism, both at the liability stage and at the enforcement stage. *See*, *e.g.*, *In re Iran Terrorism Litig.*, 659 F.Supp.2d at 54-59. Its "principal objective" has consistently been to "*permit[] massive judgments* of civil liability against nations that sponsor terrorism." *Leibovitch*, 697 F.3d at 571 (emphasis added). In enacting the provision in question, 28 U.S.C. 1605A, Congress created a statutory federal private right of action for terror victims against foreign states. *In re Iran Terrorism Litig.*, 659 F.Supp.2d at 58-59. It simultaneously made punitive damages available and subjected foreign states to liability for material support of terrorism, regardless of knowledge of or involvement in any particular act of terrorism. *Id.*; 28 U.S.C. 1605A(a) and (c). Similarly, it authorized claims by non-citizen employees and contractors of the U.S. and their legal representatives. *Id.* Congress likewise expanded the reach of the FSIA's judgment enforcement provisions to reach all "property of a foreign state" that is a judgment debtor in a terrorism action. 28 U.S.C. 1610(g); *Bennett v. Iran*, 825 F.3d 949, 959 (9th Cir.

2016). Recently, in JASTA, Congress made findings expressing a federal policy of expanding protections for victims of terrorism, calling it "necessary" and "vital" (*see* Statutory Addendum, a3), and indeed expanded the FSIA's terrorism exception to cover claims arising from personal injury or death within the U.S., regardless of the foreign state's knowledge, intent, or designation as a state sponsor of terrorism. 28 U.S.C. 1605B.

Congress' trajectory is clear: It has consistently expanded access to legal remedies for victims of terrorism, with complete disregard for the issues that apparently troubled the district court. *Leibovitch*, 697 F.3d at 571. It entered this field in earnest due to the death of an American student killed at random on an Israeli bus in Gaza. It wrote §1605A in a manner that makes the victim's ties to the U.S. *irrelevant* (it is sufficient that the claimant-relative be a U.S. national). §1605A(a)(2)(A)(ii) and (c). The district court's reduction of the plaintiffs' awards for those same reasons is thus contrary to the clear intent of Congress, and therefore erroneous.

V. If the District Court's Reduction of the Award Was Motivated by Legal Conclusions, Those Conclusions Must be Reviewed *De Novo* and Rejected

To the extent that the district court held, as a rule and as a matter of law, terror victims who are targeted for reasons other than their U.S. citizenship or who might have had reason to suspect danger are subject to a reduced damages award, those

unsupported conclusions of law must be reviewed *de novo*. Because such legal conclusions have no basis in the FSIA (*supra*), are inconsistent with congressional intent (*supra*), and are inconsistent with the enormous weight of precedent (*supra*), they must be reversed.

Similarly, to the extent that the district court intended to read into 28 U.S.C. 1605A(c) a delineation of different classes of plaintiffs, some of whom are entitled to more and some less, that holding must be reviewed *de novo* and rejected. It is clearly inconsistent with the language of §1605A and the clearly expressed intent of Congress. It is likely also a violation of the Fifth Amendment's guarantees of equal protection and due process. No person or class of people may be treated unfavorably under the law without a rational basis for the differential treatment. *USDA v. Moreno*, 413 U.S. 528, 534, 536 (1973); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985). Similarly, government may deprive no person of property without a rational basis. *See generally St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). The district court's conclusions—interpreting a statute intended to financially compensate victims of terrorism and to deter terrorist acts to apply with less force for reasons that have *nothing* to do with compensation or deterrence—are irrational.

VI. The District Court's Errors Have Immediate Practical Impact

The district court's award of compensatory damages is no mere symbolic act devoid of practical import. Compensatory damages awards, in contrast to punitive damages awards, have been and will almost certainly continue to be collectible to a significant extent by plaintiffs in FSIA cases.

Historically, plaintiffs holding FSIA judgments have had to vie with each other in a "cruel race" to execute against meager assets of the defendants within the reach of U.S. courts, *Gates v. Syria*, 755 F.3d 568, 571 (7th Cir. 2014), and have had to await the fortuitous discovery of a forgotten foreign asset amenable to jurisdiction in the U.S. 28 U.S.C. 1610(g); *e.g.*, *Weinstein v. Iran*, 609 F.3d 43 (2d Cir. 2010) (allowing execution against house owned by Iranian bank).

However, Congress recently enacted USVSSTA, 34 U.S.C. 20144 (formerly 42 U.S.C. 10609), which allows holders of FSIA judgments to file claims against the USVSSTF ("Fund"), a fund created by the U.S. Government for distribution of certain collected fines, sanctions, and forfeited assets. §20144(e). The Fund pays a percentage of outstanding *compensatory*, but not punitive, judgment awards. §20144(c)(2)(A). FSIA judgment holders who filed a qualifying claim by December 1, 2016 (the deadline for the first distribution), received prorated distributions of 13.66% of their compensatory damages judgments. USVSSTF, *supra* note 13 at 4.

The Fraenkels hope to be able to participate in the next distribution, scheduled for early 2019. To participate, they will need a final judgment, no longer subject to appeal, that has been translated and transmitted via diplomatic channels to Iran, a process that often takes over four months. *See* §20144(j)(4); 28 U.S.C. 1608(a)(4) and (e). The deadline for the prior distribution was December 1. Assuming that deadline remains constant, the Fraenkels will likely require their judgment no later than June 2018 in order to participate in the 2019 distribution.

The percentage paid in the 2019 distribution will depend on the amount of money available in the Fund and the total amount of outstanding judgments. §20144(d)(3). Because payments are prorated, the size of each judgment is not independently significant. Rather, what matters is the size of each judgment *relative to every other judgment* and the funds available. To illustrate, someone holding a $10,000,000 judgment will get twice the payout (whatever the actual number) of someone holding a $5,000,000 judgment, subject to certain adjustments. *See* §20144(d)(3)(A)(ii) & (d)(3)(B).

The existence of the Fund thus renders equitable considerations all the more significant. Previously, if two similarly situated people received very different judgments, it was simply unfair and unequitable (which is reason enough to vacate an award). Now, this is a zero-sum game. Unfairly low awards will yield proportionally unfairly low payouts from the Fund. Because essentially all the other

Fund participants received judgments under the *Heiser* framework, those other participants, including similarly situated participants, will receive vastly more than the Fraenkels, and the Fraenkels will receive vastly less.

CONCLUSION

The district court's damages award should be vacated and this case should be remanded with instructions to expeditiously grant an award of $2,000,000 for pain and suffering to the estate, $7,500,000 to each of the parents and $3,750,000 to each of the siblings (a total award of $37,500,000) for loss of solatium, and $300,000,000 punitive damages.

Dated: Brooklyn, New York
November 8, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g), I hereby certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B), as modified by this Court's Order of October 31, 2017, because, excluding the portions of this brief exempted by FRAP 32(f) and Circuit Rule 32(e)(1), this brief contains 14,879 words. This word count was made by use of the word count feature of Microsoft Word, which is the word processor used to prepare this brief.

I further certify that this document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: Brooklyn, New York
November 8, 2017

/s/ Robert J. Tolchin
Robert J. Tolchin
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2017, I filed the foregoing using the ECF system, which is expected to electronically serve all counsel of record.

/s/ Robert J. Tolchin
Robert J. Tolchin

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18 U.S.C. 2333 note, § 2 ("JASTA")

(a) Findings.— Congress finds the following:

(1) International terrorism is a serious and deadly problem that threatens the vital interests of the United States. * * *

(3) Some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States.

(4) It is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code.

(5) The decision of the United States Court of Appeals for the District of Columbia in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code.

(6) Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

(7) The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.

28 U.S.C. 1604 – Immunity of a Foreign State from Jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1605A – Terrorism Exception to the Jurisdictional Immunity of a Foreign State

(a) In General

(1) No Immunity.— A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim Heard.— The court shall hear a claim under this section if—

(A)(i)

(II) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or * * *

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by

the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; * * *

(c) Private Right of Action.— A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional Damages.— After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based. * * *

(h) Definitions.— For the purposes of this section— * * *

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18; * * *

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)),1 section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; * * *

28 U.S.C. 1608 – Service; Time to Answer; Default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.
* * *

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

34 U.S.C. 20144 – Justice for United States Victims of State Sponsored Terrorism

(a) Short Title.— This section may be cited as the "Justice for United States Victims of State Sponsored Terrorism Act." * * *

(c) Eligible claims

(1) In General.— For the purposes of this section, a claim is an eligible claim if the Special Master determines that—
(A) the judgment holder, or claimant, is a United States person;
(B) the claim is described in paragraph (2); and
(C) the requirements of paragraph (3) are met.

(2) Certain Claims.— The claims referred to in paragraph (1) are claims for—

(A) compensatory damages awarded to a United States person in a final judgment—

(i) issued by a United States district court under State or Federal law against a state sponsor of terrorism; and

(ii) arising from acts of international terrorism, for which the foreign state was determined not to be immune from the jurisdiction of the courts of the United States under section 1605A, or section 1605(a)(7) (as such section was in effect on January 27, 2008), of title 28; * * *

(d) Payments

(1) To Whom Made.— The Special Master shall order payment from the Fund for each eligible claim of a United States person to that person or, if that person is deceased, to the personal representative of the estate of that person. * * *

(3) Payments to be Made Pro Rata

(A) In General

(i) Pro Rata Basis.— Except as provided in subparagraph (B) and subject to the limitations described in clause (ii), the Special Master shall carry out paragraph (1), by dividing all available funds on a pro rata basis, based on the amounts outstanding and unpaid on eligible claims, until all such amounts have been paid in full.

(ii) Limitations.— The limitations described in this clause are as follows:

(I) In the event that a United States person has an eligible claim that exceeds $20,000,000, the Special Master shall treat that claim as if it were for $20,000,000 for purposes of this section.

(II) In the event that a United States person and the immediate family members of such person, have claims that if aggregated would exceed $35,000,000, the Special Master shall, for purposes of this section, reduce such claims on a pro rata basis such that in the aggregate such claims do not exceed $35,000,000. * * *

(B) Minimum Payments

(i) Any applicant with an eligible claim described in subsection (c)(2) who has received, or is entitled or scheduled to receive, any payment that is equal to, or in excess of, 30 percent of the total compensatory damages owed to such applicant on the applicant's claim from any source other than this Fund shall not receive any payment from the Fund until such time as all other eligible applicants have received from the Fund an amount equal to 30 percent of the compensatory damages awarded to those applicants pursuant to their final judgments or to claims under subsection (c)(2)(B) or (c)(2)(C)....

(ii) To the extent that an applicant with an eligible claim has received less than 30 percent of the compensatory damages owed that

applicant under a final judgment or claim described in subsection (c)(2) from any source other than this Fund, such applicant may apply to the Special Master for the difference between the percentage of compensatory damages the applicant has received from other sources and the percentage of compensatory damages to be awarded other eligible applicants from the Fund.

(4) Additional Payments.— On January 1 of the second calendar year that begins after the date of the initial payments described in paragraph (1) if funds are available in the Fund, the Special Master shall authorize additional payments on a pro rata basis to those claimants with eligible claims under subsection (c)(2) and shall authorize additional payments for eligible claims annually thereafter if funds are available in the Fund. * * *

(j) Definitions. In this section the following definitions apply:

(1) Act of International Terrorism. The term "act of international terrorism" includes—

(A) an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking as those terms are defined in section 1605A(h) of title 28; and

(B) providing material support or resources, as defined in section 2339A of title 18, for an act described in subparagraph (A). * * *

(3) Compensatory Damages. The term "compensatory damages" does not include pre-judgment or post-judgment interest or punitive damages.

(4) Final judgment. The term "final judgment" means an enforceable final judgment, decree or order on liability and damages entered by a United States district court that is not subject to further appellate review, but does not include a judgment, decree, or order that has been waived, relinquished, satisfied, espoused by the United States, or subject to a bilateral claims settlement agreement between the United States and a foreign state. In the case of a default judgment, such judgment shall not be considered a final judgment until such time as service of process has been completed pursuant to section 1608(e) of title 28.

Fed. R. Civ. P. 52 – Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) In General.— In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58. * * *

(3) For a Motion.— The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. * * *

(5) Questioning the Evidentiary Support.— A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings.— Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

GENERAL ADDENDUM

Table of FSIA Terrorism Cases Involving a Death and Yielding a Monetary Judgment in the District Court for the District of Columbia

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
	Fraenkel	**15-cv-1080 RMC**	**1**	**0.35**	**25**[25]
1	Acosta	06-cv-745 RCL	5	2.5	300
2	Acree[26]	02-cv-632 RWR	5	5	306
3	Amduso[27]	08-cv-1361 JDB	5	2.5	439[28]
4	Arnold	06-cv-516 RCL	5	2.5	250[29]
5	Baker	03-cv-749 JMF	5	2.8	150
6	Bakhtiar[30]	02-cv-92 HHK	N/A	N/A[31]	0
7	Bayani	04-cv-1712 HHK	N/A	N/A	400

* "0" indicates that punitive damages were requested and denied. "N/A" indicates that punitive damages were not considered.

[25] Punitive damages were awarded only to the estate of Naftali Fraenkel, not the other plaintiffs.

[26] Vacated on other grounds by *Acree v. Iraq*, 370 F.3d 41 (D.C. Cir. 2004).

[27] Affirmed in part, vacated as to punitive damages by *Owens v. Sudan*, 864 F.3d 751 (D.C. Cir. 2017).

[28] Document # 254. $877.9 million award was entered against two sovereigns.

[29] A $1 billion award was shared by plaintiffs in four consolidated cases.

[30] Affirmed by *Bakhtiar v. Iran*, 668 F.3d 773 (D.C. Cir. 2012).

[31] There was no plaintiff parent or sibling. The victim's widow received $12 million.

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
8	Beer	06-cv-473 RCL	5	2.5	0
*	Beer	08-cv-1807 RCL	N/A	N/A	300
9	Belkin	06-cv-711 PLF	N/A	N/A[32]	N/A
10	Ben-Rafael	06-cv-721 ESH	5	2.5	N/A
11	Bennett	03-cv-1486 RCL	5	2.5	0
12	Bland	05-cv-2124 RCL	5	2.5	955.7
13	Bodoff	08-cv-547 RCL[33]	5	2.5	300
14	Bonk	08-cv-1273 RCL	5	2.5[34]	250[35]
15	Botvin[36]	05-cv-220 RCL	0	0	0
16	Boulos	01-cv-2684 RCL	5	2.5	0
17	Braun	15-cv-1136 BAH	6.3	N/A	150
18	Brown	08-cv-531 RCL	4.4	2.5	630.5

[32] There was no plaintiff parent or sibling. The victim's widower received $10 million.

[33] *See also* No. 02-cv-1991 (RCL) (judgment superseded by *Bodoff v. Iran*, 907 F.Supp.2d 93, 105 (D.D.C. 2012)).

[34] 29 siblings were awarded $2.5 million while one was awarded $1.25 million. *See Valore v. Iran*, 700 F. Supp. 2d 52, 87 (D.D.C. 2010).

[35] A $1 billion award was shared by plaintiffs in four consolidated cases.

[36] Damages for other than economic loss were disallowed due to "[p]laintiffs' deficient briefing." *Estate of Botvin v. Iran*, 873 F. Supp. 2d 232, 245 (D.D.C. 2012).

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
19	Buonocore	06-cv-727 JMF	5	2.5	1,500[37]
20	Campbell	01-cv-2104 RCL	5	2.5	150[38]
21	Dammarell	01-cv-2224 JDB	3.5[39]	2.6	0
22	Davis	07-cv-1302 RCL	5	2.5	1,675
23	Doe	08-cv-540 JDB	5[40]	2.5[41]	300
24	Eisenfeld	98-cv-1945 RCL	5	2.5	300
25	Elahi	99-cv-2802 JHG	N/A	5	300
26	Flanagan	10-cv-1643 RC	6.3	3.1	N/A[42]
27	Flatow	97-cv-396 RCL	5	2.5	225
28	Gates[43]	06-cv-1500 RMC	3	1.5	300

[37] A $3 billion award was shared by plaintiffs in two consolidated cases.

[38] A $300 million award was shared by plaintiffs in two consolidated cases.

[39] Given the age of this case, many of the filings are not on ECF. Plaintiffs were unable to determine whether the parents asked for a larger award. Each spouse initially received $10 million, each child $3 million, and each sibling $2.5 million (except for one who received $3 million). *See Dammarell v. Iran*, 281 F. Supp. 2d 105, 198 (D.D.C. 2003) (modified on other grounds in 2005).

[40] Document # 107-1. With prejudgment interest, each award was $38.2 million. *Id.*

[41] *Id.* With prejudgment interest, each award was $19.1 million. *Id.*

[42] *See Flanagan v. Iran*, 190 F. Supp. 3d 138, 179-83 (D.D.C. 2016).

[43] Upheld on other grounds by *Gates v. Syria*, 646 F.3d 1 (D.C. Cir. 2011).

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
29	Goldberg-Botvin	12-cv-1292 RCL	5	2.5	30.9[44]
30	Greenbaum	02-cv-2148 RCL	5	N/A	0
31	Hegna	00-cv-716 HHK	N/A	4[45]	333
32	Heiser	00-cv-2329 RCL	5	2.5	150[46]
33	Higgins	99-cv-377 CKK	N/A	N/A[47]	300
34	Holland	01-cv-1924 CKK	N/A	N/A[48]	0
35	Kerr	01-cv-1994 TPJ	N/A	1.5[49]	N/A
36	Kilburn	01-cv-1301 RMU	N/A	5	N/A

[44] Using formula unique to this case. *See Goldberg-Botvin v. Iran*, 938 F.Supp.2d 1, 11-12 (D.D.C. 2013).

[45] Document # 24.

[46] A $300 million award was shared by plaintiffs in two consolidated cases.

[47] There was no plaintiff parent or sibling. The victim's widow and daughter each received $12 million.

[48] There was no plaintiff parent or sibling. The victim's young children each received $12 million.

[49] Given the age of this case, many of the filings are not on ECF. Plaintiffs were unable to determine whether the siblings asked for a larger award. The victim's spouse received $10 million and each of his children received $3 million. *Kerr v. Iran*, 245 F. Supp. 2d 59, 60, 64 (D.D.C. 2003).

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
37	Murphy	06-cv-596 RCL	5	2.5	N/A[50]
38	Mwila	08-cv-1377 JDB	5	2.9[51]	N/A
39	Onsongo[52]	08-cv-1380 JDB	5	2.5	49.8[53]
40	Opati[54]	12-cv-1224 JDB	5	2.5	790.9[55]
41	Oveissi	03-cv-1197 RCL	N/A	N/A[56]	N/A
*	Oveissi	11-cv-849 RCL	N/A	N/A	300
42	Owens	01-cv-2244 JDB	5	2.5	N/A
43	Peterson	01-cv-2094 RCL	5	2.5	0
44	Prevatt	02-cv-1775 RCL	N/A	2.5	0

[50] Only two plaintiffs—both relatives of surviving victims—requested punitive damages. They received an award of $61.3 million. For reasons unclear, the relatives of murdered victims did not request punitive damages. *See* Document # 66; *Murphy v. Iran*, 740 F. Supp. 2d 51, 79-80 (D.D.C. 2010).

[51] Document # 88. With prejudgment interest, award averaged $6.5 million.

[52] Affirmed in part, vacated as to punitive damages by *Owens*, *supra.*

[53] $99.6 million award was entered against two sovereigns.

[54] Affirmed in part, vacated as to punitive damages by *Owens*, *supra.*

[55] Document # 44. $1.582 billion award was entered against two sovereigns.

[56] There was no plaintiff parent or sibling. The victim's grandchild, who was like his son, received $7.5 million.

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
45	Rimkus	06-cv-1116 RCL	5	N/A	0
*	Rimkus	08-cv-1615 RCL	N/A	N/A	5.2[57]
46	Roth	11-cv-1377 RCL	5	2.5	112.5
47	Salazar	02-cv-558 JDB	N/A	N/A[58]	0
48	Simpson	08-cv-529 JMF	5	2.5	1,500[59]
49	Sisso	05-cv-394 JDB	N/A	N/A[60]	N/A
50	Spencer, K.	12-cv-42 RCL	5	2.5	453.6
51	Spencer, L.	06-cv-750 RCL	5	2.5	250[61]
52	Stansell	15-cv-1519 APM	N/A	N/A[62]	N/A
53	Stern	00-cv-2602 RCL	N/A	N/A[63]	300

[57] Using formula unique to this case. *See Rimkus v. Iran*, 750 F.Supp.2d 163, 185 (D.D.C. 2010).

[58] There was no plaintiff parent or sibling. The victim's widow received $10 million and his daughter $5 million.

[59] A $3 billion award was shared by plaintiffs in two consolidated cases.

[60] There was no plaintiff parent or sibling. The victim's son received $5 million.

[61] A $1 billion award was shared by plaintiffs in four consolidated cases.

[62] There was no plaintiff parent or sibling. The victim's widow received $12 million and each of his children received $5 million.

[63] There was no plaintiff parent or sibling. The victim's children each received $3 million.

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
54	Stethem	00-cv-159 TPJ	5	3	150[64]
55	Surette	01-cv-570 PLF	N/A	2.5	300
56	Taylor	10-cv-844 RCL	5	2.5	509.1
57	Thuneibat	12-cv-20 BAH	6.25	2.75	300
58	Valore	03-cv-1959 RCL	5	2.5	250[65]
59	Wachsman	06-cv-351 RMU	5	2.5	N/A
60	Wagner	00-cv-1799 TPJ	4	2.5	300
61	Wamai[66]	08-cv-1349 JDB	5	2.5	891.5[67]
62	Weinstein	00-cv-2601 RCL	N/A	N/A[68]	150
63	Welch	01-cv-863 CKK	5	2.5	N/A
64	Worley	12-cv-2069 RCL	5	1.5[69]	196.4
65	Wultz	08-cv-1460 RCL	6.5	3.5	300

[64] A $300 million award was shared by plaintiffs in two consolidated cases.

[65] A $1 billion award was shared by plaintiffs in four consolidated cases.

[66] Affirmed in part, vacated as to punitive damages by *Owens*, *supra.*

[67] Document # 245. $1.78 billion award was entered against two sovereigns.

[68] There was no plaintiff parent or sibling. The victim's wife received $8 million and his children each received $5 million.

[69] Document # 74. Six siblings' awards were reduced for having minimal contact with the deceased. *Worley v. Iran*, 177 F.Supp.3d 283, 287 (D.D.C. 2016).

	Name of First Plaintiff	D.D.C. Docket Number	Solatium Damages Per Parent of Deceased (in millions of dollars)	Solatium Damages Per Sibling of Deceased (in millions of dollars)	Punitive Damages Per Sovereign Defendant (in millions of dollars)*
	MEAN[70]		**5.01**	**2.68**	**397.78**
	MEDIAN[71]		**5**	**2.5**	**300**

Citations for the Cases Referenced in the Table

1) *Acosta v. Iran*, 574 F.Supp.2d 15 (D.D.C. 2008) (DE 33-34).

2) *Acree v. Iraq*, 271 F.Supp.2d 179 (D.D.C. 2003) (DE 31-32).

3) *Amduso v. Sudan*, 61 F.Supp.3d 42 (D.D.C 2014) (DE 254-55).

4) *Arnold v. Iran*, No. 06-cv-516 RCL (DE 34); *see Valore v. Iran*, 700 F.Supp.2d 52 (D.D.C. 2010).

5) *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F.Supp.2d 48 (D.D.C. 2011) (DE 126).

6) *Bakhtiar v. Iran*, 571 F.Supp.2d 27 (D.D.C. 2008) (DE 46).

[70] The awards in this action (*Fraenkel*) and any instance in which no award was granted, for whatever reason, are excluded from these averages. No attempt was made to account for the number of plaintiffs sharing an award in any single action.

[71] The awards in this action (*Fraenkel*) and any instance in which no award was granted, for whatever reason, are excluded from these averages. No attempt was made to account for the number of plaintiffs sharing an award in any single action.

7) *Estate of Bayani v. Iran*, 530 F.Supp.2d 40 (D.D.C. 2007) (DE 56).

8) *Beer v. Iran*, 574 F.Supp.2d 1 (D.D.C. 2008) (DE 28-29).

Beer v. Iran, 789 F.Supp.2d 14 (D.D.C. 2011) (DE 33).

9) *Belkin v. Iran*, 667 F.Supp.2d 8 (D.D.C. 2009) (DE 26-27).

10) *Ben-Rafael v. Iran*, 540 F.Supp.2d 39 (D.D.C. 2008) (DE 14-15).

11) *Bennett v. Iran*, 507 F.Supp.2d 117 (D.C. Cir. 2007) (DE 20-21).

12) *Estate of Bland v. Iran*, 831 F.Supp.2d 150 (D.D.C. 2011) (DE 69-70).

13) *Bodoff v. Iran*, No. 02-cv-1991 (RCL), 424 F.Supp.2d 74 (D.D.C. 2006) (DE 37-38); No. 08-cv-547 (RCL), 907 F.Supp.2d 74 (D.D.C. 2012) (DE 30-31).

14) *Bonk v. Iran*, No. 08-cv-1273 RCL (DE 22-23); *see Valore v. Iran*, 700 F.Supp.2d 52 (D.D.C. 2010).

15) *Estate of Botvin v. Iran*, 873 F.Supp.2d 232 (D.D.C. 2012) (DE 31-32).

16) *Boulos v. Iran*, No. 01-cv-2684 (RCL) (DE 46-47); *see Peterson v. Iran*, 515 F.Supp.2d 25 (D.D.C. 2007).

17) *Braun v. Iran*, 228 F.Supp.3d 64 (D.D.C. 2017) (DE 38).

18) *Estate of Brown v. Iran*, 872 F.Supp.2d 37 (D.D.C. 2012) (DE 57-58).

19) *Estate of John Buonocore III v. Great Socialist People's Libyan Arab Jamahiriya*, No. 06-cv-727 (JMF), 2013 WL 351546 (D.D.C 2013); 2013 WL 653921 (D.D.C. 2013) (DE 109-12, 115-16).

20) *Campbell v. Iran*, No. 01-cv-2104 (RCL) (DE 119); *see Heiser*, 466 F.Supp.2d 229 (D.D.C. 2006).

21) *Dammarell v. Iran*, 281 F.Supp.2d 105 (D.D.C. 2003); 404 F.Supp.2d 261 (D.D.C. 2005); 2006 WL 2583043 (D.D.C. Sept. 7, 2006) (DE 65-66, 69, 71-72).

22) *Davis v. Iran*, 882 F.Supp.2d 7 (D.D.C. 2012) (DE 123-24).

23) *Estate of Doe v. Iran*, 808 F.Supp.2d 1 (D.D.C. 2011) (DE 106, 107, 107-1).

24) *Eisenfeld v. Iran*, 172 F.Supp.2d 1 (D.D.C. 2000) (DE 16-17).

25) *Elahi v. Iran*, 124 F.Supp.2d 97 (D.D.C. 2000) (DE 22-23).

26) *Flanagan v. Iran*, 87 F.Supp.3d 93 (D.D.C. 2015) (DE 48, 50).

27) *Flatow v. Iran*, 999 F.Supp. 1 (D.D.C. 1998) (DE 19-20).

28) *Gates v. Syria*, 580 F.Supp.2d 53 (D.D.C. 2008) (DE 42-43).

29) *Goldberg-Botvin v. Iran*, 938 F.Supp.2d 1 (D.D.C. 2013) (DE 14-15).

30) *Greenbaum v. Iran*, 451 F.Supp.2d 90 (D.D.C. 2006) (DE 30-31).

31) *Hegna v. Iran*, No. 00-cv-716 (HHK) (DE 21-22, 24); *see Hegna v. Iran*, 380 F.3d 1000 (7th Cir. 2004).

32) *Estate of Heiser v. Iran*, 466 F.Supp.2d 229 (D.D.C. 2006); 659 F. Supp. 2d 20 (D.D.C. 2009) (DE 133-34, 146-47).

33) *Higgins v. Iran*, 2000 WL 33674311 (D.D.C. 2000) (DE 17); *see also* 545 F. Supp. 2d 122 (D.D.C. 2008).

34) *Holland v. Iran*, 496 F.Supp.2d 1 (D.D.C. 2005) (DE 36-37, 40).

35) *Kerr v. Iran*, 245 F.Supp.2d 59 (D.D.C. 2003) (DE 13, 20-21).

36) *Kilburn v. Iran*, 699 F.Supp.2d 136 (D.D.C. 2010) (DE 119-20).

37) *Murphy v. Iran*, 740 F.Supp.2d 51 (D.D.C. 2010) (DE 65-66).

38) *Mwila v. Iran*, 33 F.Supp.3d 36 (D.D.C. 2014) (DE 88-89).

39) *Onsongo v. Sudan*, 60 F.Supp.3d 144 (D.D.C. 2014) (DE 231-33).

40) *Opati v. Sudan*, 60 F.Supp.3d 68 (D.D.C. 2014) (DE 44-45).

41) *Oveissi v. Iran*, 768 F.Supp.2d 16 (D.C.C. 2011) (DE 54-55).

Oveissi v. Iran, 879 F.Supp.2d 44 (D.D.C. 2012) (DE 15-16).

42) *Owens v. Sudan*, 71 F.Supp.3d 252 (D.D.C. 2014) (DE 348-49).

43) *Peterson v. Iran*, 515 F.Supp.2d 25 (D.D.C. 2007) (DE 228).

44) *Prevatt v. Iran*, 421 F.Supp.2d 152 (D.D.C. 2006) (DE 26-27).

45) *Rimkus v. Iran*, 575 F.Supp.2d 181 (D.D.C. 2008) (DE 23).

Rimkus v. Iran, 750 F.Supp.2d 163 (D.D.C. 2010) (DE 18).

46) *Roth v. Iran*, 78 F.Supp.3d 379 (D.D.C. 2015) (DE 43-44).

47) *Salazar v. Iran*, 370 F.Supp.2d 105 (D.D.C. 2005) (DE 25).

48) *Simpson v. Great Socialist People's Libyan Arab Jamahiriya*, No. 08-cv-529 (JMF) (DE 41-42, 49); *see Buonocore*, 2013 WL 351546 (D.D.C 2013); 2013 WL 653921 (D.D.C. 2013).

49) *Sisso v. Iran*, 05-cv-394 (JDB), 2007 WL 2007582 (D.D.C. 2007) (DE 34).

50) *Spencer v. Iran*, 71 F.Supp.3d 23 (D.D.C. 2014) (DE 51-52).

51) *Spencer v. Iran*, No. 06-cv-750 (RCL) (DE 31-32).

52) *Stansell v. Cuba*, 217 F.Supp.3d 320 (D.D.C. 2016) (DE 35).

53) *Stern v. Iran*, 271 F.Supp.2d 286 (D.D.C. 2003) (DE 21).

54) *Stethem v. Iran*, 201 F.Supp.2d 78 (D.D.C. 2002) (DE 33-40).

55) *Surette v. Iran*, 231 F.Supp.2d 260 (D.D.C. 2002) (DE 20).

56) *Taylor v. Iran*, 881 F. Supp. 2d 19 (D.D.C. 2012) (DE 26).

57) *Thuneibat v. Syria*, 167 F.Supp.3d 22 (D.D.C. 2016) (DE 29).

58) *Valore v. Iran*, 700 F.Supp.2d 52 (D.D.C. 2010) (DE 60).

59) *Wachsman v. Iran*, 603 F.Supp.2d 148 (D.D.C. 2012) (DE 22).

60) *Wagner v. Iran*, 172 F.Supp.2d 128 (D.D.C. 2001) (DE 13-19).

61) *Wamai v. Sudan*, 60 F.Supp.3d 84 (D.D.C. 2014) (DE 245-46).

62) *Weinstein v. Iran*, 184 F.Supp.2d 13 (D.D.C. 2002) (DE 23).

63) *Welch v. Iran*, No. 01-cv-863 (CKK), 2007 WL 7688043 (D.D.C. 2007) (DE 70).

64) *Worley v. Iran*, 177 F.Supp.3d 283 (D.D.C. 2016) (DE 71, 74).

65) *Wultz v. Iran*, 864 F.Supp.2d 24 (D.D.C. 2012) (DE 137).