ORAL ARGUMENT SCHEDULED FOR MARCH 26, 2018

Appeal No. 17-7100

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Robert J. Tolchin
Meir Katz
THE BERKMAN LAW OFFICE, LLC
Attorneys for Plaintiffs-Appellants
111 Livingston Street, Suite 1928
Brooklyn, New York 11201
718-855-3627

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Abbreviation	Meaning
DPRK	The Democratic People's Republic of Korea, a/k/a North Korea
FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. 1602-1611
FTCA	Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*
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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Amicus concedes the solatium damages awards are "admittedly very low" (Amicus-Br 49), that had she "been in a position to award solatium damages, the Fraenkels likely would have received more for their undoubted grief and suffering," (Amicus-Br 50), and that "[t]his Court may feel the same way." *Id.* Amicus, though, urges that the inadequate award should stand because the court is entitled to exceptional deference if it has "adequately explained" its award. (Amicus-Br 1, 13, 34-46, 52). Conspicuously, Amicus neither elucidates this concept of adequacy nor explains precisely what courts must do.

Amicus contends the court's explanation sufficed despite being unsupported by any case (Amicus' repeatedly citing cases involving prolonged torture defies explanation). Amicus thus posits a bizarrely low adequacy threshold that would be satisfied wherever a judge makes *some* attempt to explain an award; even a minimalistic passing statement would be adequate to require excessively deferential review.

Law, justice, and common sense require a much greater role for this Court.

SUMMARY OF ARGUMENT

The FSIA guarantees substantial damages to U.S. nationals victimized by terrorism. The court's holding—that victims of *expected* terrorism should receive

less—exacerbates their suffering, rewards terrorists for creating terror, and undermines the FSIA.

That holding is unsupported. While several prior cases have permitted damages to be *increased* when terrorism was particularly unexpected, no court had ever *decreased* damages when terrorism was expected. That is unsurprising because terrorism, by its nature, is unexpected. Its very purpose is to demoralize civilians with unpredictable danger.

There is nothing in the record remotely suggesting that the Fraenkels expected terrorism. Amicus and the district court rely on a passing background reference by one of plaintiffs' experts, which he later *retracted* as a factual error. Amicus also relies on several factually inaccurate statements by the court that it reached *sua sponte*, without permitting the plaintiffs to respond. Not only was terrorism unexpected here, the conditions facing Naftali Fraenkel were far more tranquil than those facing many other FSIA decedents, including the decedents in *Gates*, whose families received far more.

Like every other court in this district deciding damages in an FSIA terrorism death case, the court below should have started with the *Heiser* framework. Amicus' attempts to discredit *Heiser* only demonstrate the ubiquity with which *Heiser* has been followed: No case has heretofore departed from it. The court's unreasonable

rejection of the received wisdom of all previous cases was error—a terrible breach in equity and justice undermining federal statute and policy.

The court's awards were not adequately explained or supported by analogy to any prior case or with any valid rationale. This outlier must be vacated.

STANDARD OF REVIEW

Amicus incorrectly argues the district court's damages award is subject to an exceptionally deferential version of abuse of discretion review and may not be disturbed unless it "shock[s] the conscience." (Amicus-Br 15-16).

First, the applicable standard is clear error or, when reviewing legal conclusions (such the court's determination that a particular factor is relevant to assessing damages), *de novo*. (Opening-Br 31, 60-61 (citing Rule 52(a))). Amicus does not directly respond, despite citing Rule 52(a). (Amicus-Br 16).

Second, the "shock the conscience" language animating the amicus brief (Amicus-Br 13-14, 16, 47-52) is out of context. *Peyton v. DiMario*, 287 F.3d 1121, 1124-25 (D.C. Cir. 2002), reviewed a damages award to a wrongfully terminated employee. Observing that those damages sounded in equity, this Court reviewed for abuse of discretion and held it would reverse if "the decision maker failed to consider a relevant factor, …relied on an improper factor, [or failed to] *reasonably* support the conclusion." *Id.* at 1125-26 (internal quotation marks omitted) (emphasis added).

That—*not* a shocked conscience—is the focus of abuse of discretion review. *Hill v. Iraq*, 328 F.3d 680, 683-85 (D.C. Cir. 2003).

Later in *Peyton*, this Court separately added that it will require remittitur of a jury verdict *for excessiveness* only when the verdict is so large "as to shock the conscience" or when it exceeds the reasonable range of the jury's discretion. *Peyton*, 287 F.3d at 1126-27 (citing *Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87, 95-96 (D.C. Cir. 1987) ("The [D.C. Circuit] has stated two alternative tests for determining whether a jury verdict is excessive[.]")). Thus, the "shock the conscience" language is not tied to abuse of discretion review generally or even to reviews of bench trial damages awards. It is tied to reviews of 1) jury awards and 2) equitable damages awards that are so 3) large that remittitur may be necessary. It is thrice inapposite.[1]

Third, a "district court abuses its discretion if it did not apply the correct legal standard...or if it misapprehended the underlying substantive law." *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (internal quotation marks omitted).

Fourth, a court abuses its discretion when it departs from background legal presumptions and fails to "provide[] a justification that reasonably supports this departure." *Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995).

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[1] This appeal is from a bench trial and the judgment is certainly not excessively large. Additionally, particularly considering that they are expressly authorized by statute, 28 U.S.C. 1605A(c)(4), the awards here for solatium, pain and suffering, and punitive damages provide legal, not equitable, relief.

Fifth, regardless of the applicable standard, a court's "findings of damages [must] be made with sufficient particularity so that they may be reviewed." *Hatahley v. U.S.*, 351 U.S. 173, 182 (1956) (discussing, *inter alia*, consequential and pain and suffering damages under the FTCA). The court below failed to explain how it arrived at its awards, hampering meaningful review. (Opening-Br 51-54).

ARGUMENT

I. Expectedness of Terrorism Does Not Explain the Damages Award

A. Expectedness of Terrorism Provides No Basis to Reduce Damages Awards

Terrorism is not rendered less heinous, less shocking, or less painful because it is expected. The district court's rule trivializes and exacerbates the plaintiffs' suffering, suggesting that they are partially responsible. It has the effect of rewarding terrorists for successfully demoralizing the civilian population, compelling them to live in a constant fear of death—to live in *terror*. In the district court's world, terrorists who successfully create terror are subject to reduced liability as a result of that terror. This is exactly the opposite of Congress' intent when it enacted the terrorism exception to the FSIA, 28 U.S.C. 1605A, proving a remedy for nationals of the United States, no matter where they reside or attend school, to recover solatium damages. § 1605A(c).

B. Terrorism is Generally Unexpected

Amicus cites four cases for the proposition that the expectedness of terrorism is relevant to determining damages. (Amicus-Br 39-42). One states in dicta that damages may be *increased* when "the decedent's death was sudden and unexpected," but never returns to that point. *Stethem v. Iran*, 201 F.Supp.2d 78, 90 (D.D.C. 2002). The remaining three all held that damages should be *increased* when an attack was unexpected. *Oveissi v. Iran*, 768 F.Supp.2d 16, 28-29 (D.D.C. 2011) (awarding more than *Heiser* baseline because plaintiff anticipated no danger); *Kerr v. Iran*, 245 F.Supp.2d 59, 64 (D.D.C. 2003) (awarding heightened damages because death was "was unforeseen[and] sudden"); *Eisenfeld v. Iran*, 172 F.Supp.2d 1, 9 (D.D.C. 2000) (awarding heightened damages because "there was no reason to expect" terror attack). None of these cases suggests that damages should be *decreased* when a terror attack is expected. Plaintiffs (and, apparently, Amicus) are aware of no such case, other than our case—an outlier on so many levels. Perhaps that is because "*[a]ll* acts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror, in their targeted audience." *Stethem*, 201 F.Supp.2d at 89 (emphasis added).

Amicus' reliance on *Eisenfeld* is remarkable. *Eisenfeld* involved the 1996 murder of a student riding a public bus from Israel to an archaeological dig in Petra, Jordan. *Eisenfeld*, 172 F.Supp.2d at 4. Granting heightened damages, *Eisnefeld* held:

> The unexpected quality of a death may be taken into consideration in gauging the emotional impact to those left behind.... There was no reason to expect violence to come on these students' trip to visit an archeological dig.... [O]ne of the aspects of terrorism is its targeting of the innocent with the intent to create maximum emotional impact. This type of action deserves a reply in damages that will fully compensate for the truly terrible emotional suffering of the surviving parents and siblings.

Id. at 8-9. But in 1994 and 1995, Israel (the size of New Jersey) saw at least six bus bombings. Wikipedia, List of Palestinian Suicide Attacks, https://en.wikipedia.org/wiki/List_of_Palestinian_suicide_attacks. In Israel 1996, there was certainly reason to fear bus bombings. *Eisenfeld* held only that the decedent's family had no particular reason to assume or expect that their son and brother was *personally* in significant risk of severe injury or death.

Amicus' reliance on *Kerr* is more surprising. The deceased, President of the American University in Beirut, was assassinated by Hezbollah terrorists on campus in 1984. *Kerr*, 245 F.Supp.2 at 60-62. The court described the campus as an "enclave of serenity" and found the murder "unforeseen" and "sudden," despite that Beirut was enmeshed a decade in civil war and riddled with terrorism. *Id.* at 61, 64. *Kerr* reports that in 1982, "acts of terrorism became nearly as commonplace in Beirut as

the pervasive conventional combat between factions"; terrorists destroyed the U.S. embassy in April 1983 and two U.S. Marine barracks in October 1983. *Id.* at 61. The *Kerr* decedent was shot a few months later, in January 1984. *Id.* Although Beirut 1984 was an exceptionally dangerous and volatile place, *Kerr* awarded heightened damages because no one reasonably expected *this decedent* to be harmed. *Id.* at 64.

Terrorism certainly occurs too often in Israel. But that does not mean that 8,500,000 Israelis, including those who live in and near the West Bank, live their daily lives in fear. Israelis living in and near the West Bank are not presumptively irrational and do not live each day expecting to be murdered by terrorists. Alon Shvut 2014 was not Beirut 1984.

Amicus' cases (cited above) actually hold that where a victim is not "inherently exposed" to heightened risk, such as a victim deployed as a member of the U.S. military, a sudden act of terror is "unforeseen" and "the shock and grief suffered" is "all the more intense." *Oveissi*, 768 F.Supp.2d at 28-29. Since the purpose of solatium damages is to compensate for intense emotional suffering, *Brewer v. Iran*, 664 F.Supp.2d 43, 55 (D.D.C. 2009), the families of most terror victims should get heightened damages given the inherently unexpected nature of terrorism. Thus, all four of Amicus' cases mean that the plaintiffs here should have received heightened damages. They provide the court below no cover.

C. The Fraenkels Did Not Expect Terrorism

Amicus reads the court's opinion to mean that the Fraenkels either recklessly chose to live in an excessively dangerous area or were oblivious to that danger. (Amicus-Br 10-11, 40-42). If that is indeed what the court held, it is the very embodiment of "clear error." The family pictures (606-31*) and videos (632) reproduced in the Appendix show a normal, happy, well-adjusted family doing ordinary family activities in no apparent fear. Mr. Fraenkel is a lawyer and the head of the disciplinary department of the Israeli National Police (425) and Mrs. Fraenkel is a highly respected teacher and administrator in post-secondary schools. (162).[2] ***Not one word*** in the roughly 270 pages of hearing testimony, 30 declaration pages by three of the plaintiffs, and 70 declaration pages by plaintiffs' expert psychiatrist supports characterization of the plaintiffs as reckless or oblivious. (88-121, 123-37, 157-214, 335-604).

This characterization apparently grows out of three statements by the court that lack evidentiary support. (Amicus-Br 10). *First*, the court asserts that Naftali's route home took him through a "site of many terror attacks since 2000." (757) (internal quotation marks omitted). It relies on a footnote in one of the plaintiffs'

* Unless otherwise noted, parenthetical numerical citations reference the Appendix.

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

expert reports, which so identifies the Gush Etzion Junction and attributes the frequency of terrorism there "to its central location." (757). This footnote was intended only to provide background and provides no citation or further development. (45). The court reads this passing line to say much more than its author intended. The author later clarified in a supplemental report and during live testimony that Naftali was actually kidnapped from Alon Shvut Junction, *not* Gush Etzion Junction, and that his prior mention of Gush Etzion Junction was erroneous. (457-58, 641-42). At the hearing, Judge Collyer asked how to spell "Alon Shvut," inquiring what it means in Hebrew, and later acknowledged in her initial opinion that the kidnapping occurred there (302, 457-58), but nevertheless referenced "Gush Etzion Junction" in her opinion on reconsideration. (757). While Gush Etzion Junction, a major junction along a main road, was indeed a site of previous terrorism, no evidence supports any history of terrorism at Alon Shvut Junction, the far less-traveled entrance to the small town of Alon Shvut. The distinction between these two junctions is significant and the court's reliance on the prior erroneous reference to Gush Etzion Junction is clear error.[3]

[3] Citing only the district court's opinion and—conspicuously—no record evidence, Amicus asserts there is a "history of terrorism against Israelis in Alon Shvut." (Amicus-Br 41). But the court relied only on the mistaken reference to Gush Etzion Junction. (757-59). No evidence suggests a history of terrorism at Alon Shvut Junction.

Second, the court asserts *sua sponte*, with no support other than a link to a Google map,[4] that "half" the plaintiffs' home town is "officially" "in contested territory." (756, n.3). Yet the map the court cites shows two separate armistice lines and part of Nof Ayalon sitting between those lines, in a gap "no-man's-land" area of unclear status (whether within or without the West Bank).[5] To call this "contested territory" ignores that Hamas, the terrorist organization involved, contests *all* of Israel, as the court found. (306); *see also* Hamas Covenant, art. VI, http://avalon.law.yale.edu/20th_century/hamas.asp, (seeking to "raise the banner of Allah over every inch of Palestine[.]").

Third, the court asserts without evidence that the Fraenkels sent their son "40 miles further into the West Bank for high school in Gush Etzion" (757), suggesting that Naftali departed for school while already within the West Bank (incorrect) and then traveled 40 miles deeper into the West Bank.

Muddling things is the fact that "Gush Etzion" is simultaneously a region containing several towns, a town, and a highway junction. This geography was not explored at the hearing but can be easily verified. *E.g.*, Wikitravel, Gush Etzion,

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[4] Plaintiffs submitted a copy of this map to the Court by motion dated February 22, 2018.

[5] Shakked Auerbach, *No One Actually Knows Where Israel Ends and the Palestinian Territories Begin*, HAARETZ, Jul. 8, 2017, https://www.haaretz.com/israel-news/.premium.MAGAZINE-no-one-knows-where-israel-ends-and-the-palestinian-territories-begin-1.5491999.

https://wikitravel.org/en/Gush_Etzion. The court found that Naftali "attended boarding school at Makor Chaim in Gush Etzion." (304). Makor Chaim, located in the area called "Gush Etzion," is in the town called Kfar Etzion. While this was not addressed at the hearing, it can be verified on the school's website: http:// makorchaim.org/contact/.

Per Yahoo Maps,[6] the route from Nof Ayalon to Kfar Etzion is 27.82 miles, *only the last few miles of which are in the West Bank*. The route does not pass through Gush Etzion Junction.

The court's independent factual research on the location of events relative to the "Green Line" (the 1949 armistice line between Israel and Jordan) was improper and itself grounds for reversal. *Pickett v. Sheridan Health Care*, 664 F.3d 632, 648 (7th Cir. 2011) (before a court may take judicial notice *sua sponte*, parties must receive notice and the opportunity to respond); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 478 (Dec. 8, 2017) ("Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice."). Its interest in the subject matter is equally perplexing as the status of land as "contested" is irrelevant. The political status of a location has nothing to do with FSIA damages. To the extent the court uses the Green Line as a

[6] *See* motion dated February 22, 2018.

proxy for identifying places with a heightened expectation of terror attacks, that is unsupported.

An older decision of Judge Collyer involving a terror attack on an elementary school bus in the Gaza Strip, *Biton v. PLO*, 412 F.Supp.2d 1 (D.D.C. 2005), is illuminating: "It is not immediately obvious that an attack on a settler, who intentionally went into Palestinian territory to claim it for Israel, would automatically and necessarily be a 'terrorist' attack." *Id.* at 10. Perhaps this reference to Jewish "settler[s]" is intended to evoke the "stereotype...of radical religious, gun-toting extremists" and the "dehumanization of Israelis living [peacefully] in Jewish communities in Judea and Samaria." *See* Simon Plosker, *Three Young Jewish Settlers*, TIMES OF ISRAEL, June 25, 2014, http://blogs.timesofisrael.com/three-young-jewish-settlers/ (commentary on The Economist's coverage of Naftali's kidnapping and murder) (noting Naftali did *not* live in the West Bank).[7] Judge Collyer continued, noting that, politics aside, attacks on children are indefensible:

> [I]t is clear that children are not the proper targets of war..... [An Israeli] *settlement itself* might...be an object for attack by Palestinians and defense by Israeli military, during which children might be hurt. But

[7] Judge Collyer's statement that an attack on a "settler" might not be "terrorism," coupled with her apparent conclusion here that Israelis in the West Bank are essentially "asking for it," gives an appearance of personal bias. If this case is remanded, plaintiffs respectfully request it be assigned to another judge.

> the *children of the settlement* cannot be direct targets of Palestinian force without liability as terrorists.

Id. at 10 (emphasis in original). Naftali was a 16-year-old child living in Israel. No matter where he was living relative to the Green Line, he was not a legitimate target. The tragedy of his abduction and murder cannot be diminished by politics. The court erred in using political considerations to infer—without evidence—a heightened expectancy of terrorism and to reduce the plaintiff's damages.

Whatever the court intended with its political and geographic assertions, Amicus extends them, incorrectly asserting that the plaintiffs 1) "*lived* in contested territory" (Amicus-Br 36) (emphasis added), 2) "sent Naftali to school 40 miles further into the West Bank in Gush Etzion—six miles from Hebron, a predominantly Palestinian city," (Amicus-Br 36), and 3) expected terrorism, as evidenced by Rachelle's assumption of terrorism upon learning that Naftali's phone was discovered in Hebron (Amicus-Br 36-37, 41). These assertions lack merit. Naftali's route to school did not take him 40 miles into the West Bank. Amicus' reference to the proximity of Hebron is perplexing—Naftali's phone was found somewhere that he would not have taken it. How far it traveled to get there is irrelevant. And her conclusion that Rachelle expected terrorism *before*, simply because she intuited it after, makes no sense.

At least 239 school shootings have occurred in the U.S. between Sandy Hook and Parkland.[8] Yet American parents do not withdraw their children from school. A parent might fear the worst upon hearing preliminary reports of a shooting at one's child's school, but parents have no prior expectation of their children being shot.

Rachelle's assumption of terrorism was simply an educated inference based on the circumstances and the fact that Naftali's expected route did not take him to Hebron. Her declaration and testimony reveal a person in shock and grief who would never have endangered her son. (100-15, 341-75). She became intensely anxious from the moment she heard of her son's disappearance and remains in great emotional distress, which sometimes expresses itself as physical pain. (163-65). Dr. Strous observes that much of Rachelle's pain was caused by the "sudden" and unexpected nature of Naftali's disappearance and murder. (169).

Finally, Amicus, like the district court, ignores Naftali's father, a lawyer employed by the national police. It is inconceivable that he would have allowed his son to travel to and from school unguarded if terrorism were expected. It was not: The Israeli court that convicted one of the terrorists wrote that this abduction and murder "took place during a period of relative calm." (692).

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[8] Jugal K. Patel, *After Sandy Hook*, N.Y. TIMES, Feb. 15, 2018, https://www.nytimes.com/interactive/2018/02/15/us/school-shootings-sandy-hook-parkland.html.

D. Terrorism Here was Far Less Expected than in *Gates*

Amicus, like the district court, relies extensively on *Gates v. Syria*, 580 F.Supp.2d 53 (D.D.C. 2008), using *Gates* as the paradigm through which other FSIA terrorism cases ought to be viewed. (Amicus-Br 9-14, 26, 36-38, 42, 46-48). Indeed, Amicus tries to justify the solatium awards almost exclusively with reference to *Gates*. (Amicus-Br 36-38).

Amicus only briefly mentions the circumstances leading to the capture of the *Gates* victims, blandly stating that they were "temporarily living in Iraq in non-combat environments." (Amicus-Br 37). Yet Plaintiffs' opening brief noted that the *Gates* decedents were civilian contractors operating in an Iraqi war zone, captured only a few months after civilian contractors for Blackwater USA were burned and hanged in Iraq on camera for the world to see. (Opening-Br 40-41). Amicus nonetheless suggests that the *Gates* decedents were living a bucolic life in Iraq 2004 (!!) when captured, while simultaneously asserting that Naftali's weekly trips home from high school were so dangerous that his kidnapping and murder was reasonably expected.

The State Department proves Amicus wrong with its travel warnings for Iraq in July 2004, U.S. DEP'T OF STATE, TRAVEL WARNING, July 20, 2004 ("Iraq

Warning"),[9] and for Israel in February 2014, U.S. DEP'T OF STATE, ISRAEL, THE WEST BANK AND GAZA TRAVEL WARNING, Feb. 3, 2014 ("Israel Warning").[10] The Iraq Warning states: "The security threat to all American citizens in Iraq remains extremely high, *with a high risk of attacks on civilians*." Iraq Warning (emphasis added). It specifically warns that locations with "expatriate personnel," such as foreign civilian contractors, are "[t]argets" for "random killings," "extortions" and "kidnappings." *Id.* It expressly warns U.S. citizens to stay away from Iraq generally and directs those who go to Iraq despite the warnings to "pay close attention to their personal security." *Id.* The Israel Warning "strongly warns U.S. citizens against travel to the Gaza Strip" but strikes a different tone about the West Bank, where it merely urges visiting U.S. citizens to "exercise caution" because "violent incidents can occur without warning." *Id*. It never mentions kidnapping and identifies specific risks regarding only political demonstrations and planned military-type attacks by groups of individuals against a village, *id.*, risks that Naftali did not face while traveling home from school. Naftali, unlike the decedents in *Gates* (and many other FSIA terrorism cases), faced *no* significant risk of terrorism.

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[9] *Available at* https://web.archive.org/web/20040831081316/http://travel.state.gov:80/travel/iraq_warning.html.

[10] *Available at* https://web.archive.org/web/20140704184230/http://travel.state.gov/content/passports/english/alertswarnings/israel-travel-warning.html.

If FSIA terrorism awards vary based on the expectedness of terrorism, the Fraenkels should have received vastly more than the *Gates* plaintiffs. Yet the *Gates* plaintiffs $27.63 *million* compensatory damages per person,[11] while the Fraenkels received just $637.5 *thousand* compensatory damages per person.[12] That difference is indefensible. Claims that *Gates* justifies the awards here are incredible.

No prior decision has reduced FSIA terrorism damages because terrorism was expected. But, like *Kerr* (*supra*), *Haim*, 425 F.Supp.2d 56, 59, 75-76 (D.D.C. 2006), *Flatow v. Iran*, 999 F.Supp. 1, 7-8, 32 (D.D.C. 1998), and *Bluth v. Iran*, 203 F.Supp.3d 1, 9-12, 24 (D.D.C. 2016), many courts have increased or refused to decrease damages despite conditions far worse and more foreseeable than those Naftali faced. (Opening-Br 41-43, 57-58).

II. The District Court Erred by Ignoring the *Heiser* Baseline

A. *Heiser* is Universally Accepted in this District

Amicus acknowledges that "*Heiser* has undoubtedly achieved 'common acceptance.'" (Amicus-Br 29) (quoting district court). Indeed. The decision below is the only decision in the district to deviate materially from the *Heiser* framework.

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[11] There were four individual plaintiffs. Solatium damages totaled $10,500,000 and pain and suffering was $100,000,000. *Gates*, 580 F.Supp.2d at 72-74. *See also* (Opening-Br 37-39).

[12] There are eight individual plaintiffs. Solatium damages total $4,100,000 and pain and suffering $1,000,000. (333).

1. Amicus contends six cases purportedly implicitly reject *Heiser*. (Amicus-Br 26-27, 29, 47-48). Not one actually does so:

i. Plaintiffs previously discussed *Gates* at length, without response from Amicus. (Opening-Br 36-39).

ii. *Levin v. Iran*, 529 F.Supp.2d 1 (D.D.C. 2007), involved captivity and torture, but not a death. *Id.* at 5-9, 13. Like many other cases involving captivity and torture, it calculated damages using a formula applicable only in such cases, essentially using an irrelevant exception to *Heiser*.[13] It does so for the obvious reason that the family's emotional suffering is tied to the length of the period of prolonged captivity and the extent of the victim's extreme physical pain during that period.[14] *Levin* explained that surviving victims in prolonged captivity cases receive "a per diem calculation of $10,000 per day of captivity" and, when the victim suffered extended torture, another "lump sum." *Id.* at 20. The *Levin* victim's total non-economic recovery was $18,430,000. *Id.* at 20-21. The court awarded the victim's

[13] Applying an exception to the *Heiser* framework differs from rejecting it. Just as *Heiser* does not apply in most non-terrorism cases, *see* (Amicus-Br 49-50), it might not apply when damages mainly arise from torture rather than a single act of terror.

[14] Some courts have applied *Heiser* in torture cases. *E.g.*, *Moradi v. Iran*, 77 F.Supp.3d 57, 72-73 (D.D.C. 2015) (pertaining to a six-month captive). But that means only that there might be no consensus about whether *Hesier* ought to apply in such situations, an issue irrelevant here.

spouse a separate lump sum of $10,000,000 in solatium damages, explaining that this is how spouses of victims of prolonged torture have been traditionally compensated. *Id.* at 21.

iii. *Massie v. DPRK*, 592 F.Supp.2d 57 (D.D.C. 2008), like *Levin*, is a hostage case not involving a death and follows the formula used in hostage cases, $10,000 per day for the period of prolonged captivity. *Id.* at 77. It awarded each of the victims $3,350,000 and separately awarded the spouse of one of the victims $1,250,000 for "pain and suffering" for the nearly one year her husband was captive. *Id. Massie* does not explain how it arrived at that latter figure, which is admittedly difficult to reconcile with *Levin*. But, like *Levin*, it is irrelevant to this case.

Massie was written by Judge Kennedy, which further disproves Amicus' thesis that *Massie* rejected *Heiser*. Five months before writing *Massie*, Judge Kennedy authored another opinion expressly adopting the *Heiser* framework. *Bakhtiar v. Iran*, 571 F.Supp.2d 27, 37 (D.D.C. 2008), *aff'd*, 668 F.3d 773 (D.C. Cir. 2012).

iv. *Kim v. DPRK*, 87 F.Supp.3d 286 (D.D.C. 2015), was likewise a torture case (or at least was treated like one[15]). *Kim* followed a formula applicable

[15] Reverend Kim was "disappeared" to a North Korean labor colony for political prisoners and was likely tortured to death, although no "first-hand" evidence of his torture or death is available. *Kim v. DPRK*, 774 F.3d 1044, 1045-46 (D.C. Cir. 2014).

only in cases like it, granting the surviving plaintiffs solatium damages of $1,000,000 per year since the date of Reverend Kim's abduction for a total of $15,000,000 each. *Id.* at 290 (citing *Massie*). *Kim*, like *Levin* and *Massie*, has nothing to do with this case.

Moreover, *Kim's* author, Judge Roberts, is also the author of an early *Heiser* framework case (written long before *Heiser*). *Acree v. Iraq*, 271 F.Supp.2d 179, 221-23 (D.D.C. 2003), *vacated on other grounds*, 370 F.3d 41 (D.C. Cir. 2004).

v. *Estate of Bayani v. Iran*, admittedly an unusual decision, awards $30,000,000 to the decedent's wife and $7,000,000 to each child without explaining how those awards derived. 530 F.Supp.2d 40, 46 (D.D.C. 2007). Amicus' deduction that *Bayani* rejects *Heiser* is baseless. *Bayani* involved the abduction, 2.5 years of torture, and execution by the Iranian government of someone with close ties to the Shah. *Id.* at 42-43. Aware of his captivity and torture, the decedent's family spent their life savings vainly attempting to secure his release. *Id.* The family was entitled to considerable damages for their enormous economic loss and emotional suffering both while the decedent was still alive and after his murder. The court awarded

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The court calculated damages based on his abduction and torture, but not his death. *Kim*, 87 F.Supp.3d at 290.

damages in lump sums, without itemization. *Id.* at 46. Though not itemized, the awards are consistent with *Heiser*;[16] not a word in *Bayani* is inconsistent with it.

vi. *Stethem v. Iran* involved a commercial airliner hijacking, execution of a passenger, and subsequent brief captivity and torture of some other passengers. 201 F.Supp.2d at 80. *Stethem* correctly apportioned solatium damages to the families of the surviving plaintiffs differently than to the family of the deceased. It awarded the deceased's parents $5,000,000 each and his siblings $3,000,000 each, consistent with *Heiser*, while granting the spouses of the survivors, who were detained for "a period of days," not months, $200,000 each (apart from the $1,000,000 or $1,500,000 granted to each detainee). *Id.* at 91-92. Thus, *Stethem* actually provides plaintiffs substantial support, demonstrating the ubiquity of the *Heiser* framework while also showing that a different approach is often followed for families of surviving torture victims.

2. Amicus incorrectly suggests that the *Heiser* framework is really just the work of Judges Lamberth and Bates, with the minimal acquiescence of a few other judges. (Amicus-Br 28-29). But the table in the Addendum to plaintiff's brief identifies 65 separate cases presided over by 15 separate judges who all adopted the

[16] The *Heiser* framework pertains only to solatium damages for the period after the decedent's murder.

Heiser framework. (Opening-Br b1-b13). Some of those, such as *Peterson*, involved hundreds of plaintiffs and decisions of multiple special masters.

3. Amicus protests that the *Heiser* opinion (as opposed to the broader *Heiser* framework) is incoherent because it cites *Kerr* (*supra*) despite that *Kerr* issued an award much smaller than the baseline *Heiser* award. (Amicus-Br 22-24). But *Heiser* does not imagine absolute unanimity in FSIA awards. It merely sought—and found—a consensus. *Estate of Heiser v. Iran*, 466 F.Supp.2d 229, 269 & nn.24-26 (D.D.C. 2006). Regardless of any problems with the *Heiser* opinion itself, now 12 years old, the framework that grew out of it is where the present consensus lies.

Kerr's awards for siblings ($1,500,000) are indeed unusually small. But *Kerr* was a very early case; Iran was designated a state sponsor of terrorism the day after Mr. Kerr was murdered. *Kerr*, 245 F.Supp.2d at 63, n.11. *Kerr* does not reveal the basis for its awards. It adopted "as its own" the plaintiffs' proposed findings of fact, appending them to the opinion. *Id.* at 60 n.2. That appendix is missing from both the published version of the opinion and the version on the docket. The filings are unavailable on ECF and the paper file is now archived. The Kerrs' attorneys have advised they do not have it either. The plaintiffs' filings might explain their reduced award. Regardless, even considering *Kerr*, the mean award for siblings of deceased terror victims in this district is $2,680,000, above the *Heiser* baseline award of $2,500,000. *Id.*; (Opening-Br b5, b9). *Kerr* is thus a single statistical anomaly.

4. Amicus also asserts that courts—all following the *Heiser* framework—have used differing baseline awards for children of deceased terror victims. (Amicus-Br 20, 23-24, 27-28). That is irrelevant because Naftali had no children. Courts are in nearly unanimous agreement as to the baseline awards to parents and siblings.

B. The *Heiser* Framework Does Not Mandate Results Divorced from the Facts of Each Case

Amicus asserts that the *Heiser* framework "essentially deprive[s]" the district court of its discretion. (Amicus-Br 17, 31-33). The *Heiser* framework does indeed put parameters on discretion, but does so in the interest of compelling objectives: fairness and consistency. *See infra*.

The *Heiser* framework provides baseline solatium awards for particular plaintiffs based on relationships to the injured or deceased. The baseline awards provide just that—a baseline from which deviations are expected where the facts warrant deviation. Thus, even operating fully within *Heiser*, courts have broad discretion to give equitable awards tailored to relevant facts and circumstances.

Additionally, while it has never happened, a judge could determine in an extreme case that the baseline awards, even with adjustments, would work injustice and adopt a different approach. But this hypothetical judge would still be operating

within the *Heiser* framework, starting with its baseline and determining that significant deviation is necessary.

The court below did not do that. Without reason, it rejected *Heiser* outright and charted a completely new course, divorced from the received wisdom of every other preceding judge. If it had been writing on a clean slate, charting its own course would have indeed been its obligation. *See* (Amicus-Br 31-33). But:

> Because there have been so many [similar] cases in this District..., this Court is by no means writing on a proverbial 'clean slate'.... To the contrary, this Court is guided by remedial approaches and formulas[] utilized in similar cases.

Belkin v. Iran, 667 F.Supp.2d 8, 23 (D.D.C. 2009) (Friedman, *J.*).

C. The Need for Consistency Renders the *Heiser* Framework Binding on District Courts

Amicus correctly states that the *Heiser* framework "is not the only way" courts could reasonably apportion damages. (Amicus-Br 18). But, correctly noting that it is "one acceptable method" of doing so, she wrongly assumes that plaintiffs argue that *Heiser* is the *only* or the *best* method to apportion solatium damages in FSIA terrorism cases. *Id.* Rather, what makes the *Heiser* framework important here is the fact of its universal acceptance (a mere consensus would have been enough).

Amicus ignores the argument that equity demands "like parties be treated alike," (Opening-Br 4) (quoting *Brayton v. U.S. Trade Rep.*, 641 F.3d 521, 526 (D.C. Cir. 2011)), and the observation that the "*primary consideration*" in issuing non-

economic monetary damages "is to ensure that individuals with similar injuries receive similar rewards." (Opening-Br 36); *Oveissi*, 768 F.Supp.2d at 26 (prioritizing consistency over discretion). To the contrary, Amicus even appears to acknowledge *sotto voce* that damages awards ought to be consistent with those in prior cases. (Amicus-Br 23, 47-48).

D. The USVSSTA Renders it Unfair and Unjust to Deviate from the *Heiser* Framework

Congress' enactment of the USVSSTA, which Amicus completely ignores, creates a compelling need for consistency and equity in the compensatory damages of FSIA judgment creditors. (Opening-Br 62-64). Congress enacted the USVSSTA expecting that courts would continue to decide FSIA cases as they have always been decided—under the *Heiser* framework—thus obtaining consistency in USVSSTF distributions. That is what exactly happened, until now. The steeply lower award here will mean plaintiffs will unfairly receive very little from USVSSTF, as compared with over 2,000 similarly-situated USVSSTA claimants. (Opening-Br 62-64).

No Iranian assets are known in the United States and the *Gates* plaintiffs collected the last $76,000,000 of Syrian assets known in the United States. *See Gates v. Syria*, 2013 WL 6009491 (N.D. Ill. Nov. 13, 2013). The Fraenkels likely have no recourse beyond the USVSSTF.

III. The District Court's Awards Must be Vacated

Relying largely on *Hill*, 328 F.3d at 684, Amicus posits that the district court was free to ignore all prior cases (Amicus-Br 30-31) as "the *Heiser* figures are no better or worse than the amounts awarded...here" (Amicus-Br 18-19), and did not need to "explain the precise" awards granted (Amicus-Br 38) as long as they are not so deviant as to "shock the conscience." (Amicus-Br 47). The law is not so formless.

Plaintiff explained *supra* that consistency in awards as between similar parties and similar injuries is a compelling objective, important to the just application of law, and that Amicus' "shock the conscience" test is taken entirely out of context.

Amicus similarly quotes *Hill* out of context. (Amicus-Br 18-19). *Hill* held only that a *plaintiff's evidentiary burden* to prove damages may be satisfied with a "reasonable estimate" of future damages and, to the extent a defendant's default makes this necessary, certain past damages. *Hill*, 328 F.3d at 684-85. *Hill* does *not* hold that courts may take a reasonable guess at its damages award or that a court's reasonable guess must be upheld on appeal.

Amicus' assertion, relying on *Gonzalez v. U.S.*, 681 F.3d 949, 953 (8th Cir. 2012), that courts need not "explain the precise quantity" of damages awarded is similarly meritless. *See* (Amicus-Br 38). *Gonzalez* does not discuss solatium or punitive awards. It does say that the calculation of a *pain and suffering* award to the victim cannot always be calculated precisely and that district courts therefore have

some discretion. *Gonzalez*, 681 F.3d at 953. But Amicus ignores the aspect of *Gonzales* that also says that awards significantly "outside the mainstream" demand the appellate court "substitute" its own evaluation of the plaintiff's pain and suffering for that of the district court. *Id.*

The decision below is parsecs outside the mainstream.

1. Amicus claims the district court "explained" the $500,000 solatium award to the four older siblings by noting that "siblings usually receive less than their parents." (Amicus-Br 38). But why did the parents get just $1,000,000? The court could have analogized to an enormous body of case law on solatium awards in similar cases. Instead, it "plucked [numbers] out of the air." (Opening-Br 51). This is hardly an "explanation."

2. Amicus claims that awards to two younger siblings of just $50,000 were likewise "explained" by the fact that they were young and younger plaintiffs tend to get less. (Amicus-Br 39, 48-49). This argument misstates the law and ignores the facts.

Young children typically get substantial solatium awards at or above the *Heiser* baseline. For example, one of the plaintiffs in *Thuneibat v. Syria*, a six-year-old sister of the deceased, received a $3,125,000 solatium award. 167 F.Supp.3d 22, 52-53 (D.D.C. 2016). Part of the reason for *Thuneibat's* upward adjustment from *Heiser* was "the tender age at which the traumatic event occurred." *Id.* Similarly,

Oveissi awarded $7,500,000 to the five-year-old grandson of the deceased, listing his young age at the time of the tragedy among the reasons for the upward adjustment from *Heiser*. 768 F.Supp.2d at 17, 29. Finally, *Cohen v. Iran* granted $4,500,000 solatium damages *each* to children aged 7, 6, 4, 1, and 1-month. 268 F.Supp.3d 19, 26 (D.D.C. 2017) (Cooper, *J.*); *Cohen v. Iran*, 238 F.Supp.3d 71, 76 (D.D.C. 2017).

The case Amicus relies on, *Bakhtiar* (Amicus-Br 39, 49), turns not on the young age of the plaintiff but the fact that the plaintiff failed to prove emotional distress, in part because he tragically "has no memory of his father." 571 F.Supp.2d at 37. Here, plaintiffs N.S. and S.R. remember their brother extremely well—N.S. eulogized Naftali—and are severely pained by his murder. (Opening-Br 15-17, 24-25, 28-29). The comparison between this case and *Bakhtiar* mocks their pain.

CONCLUSION

The damages award should be vacated and this case remanded with instructions to grant expeditiously an award of $2,000,000 for pain and suffering to the estate, $7,500,000 to each parent and $3,750,000 to each sibling ($37,500,000 in total) solatium damages, and $300,000,000 punitive damages.

Dated: Brooklyn, New York
February 22, 2018

Respectfully submitted,

THE BERKMAN LAW OFFICE, LLC
Attorneys for Plaintiffs-Appellants

by: /s/ Robert J. Tolchin
Robert J. Tolchin

Robert J. Tolchin, Esq.
Meir Katz, Esq.
111 Livingston Street, Suite 1928
Brooklyn, New York 11201
(718) 855-3627
RTolchin@berkmanlaw.com
MKatz@berkmanlaw.com

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) because, excluding the portions of this brief exempted by FRAP 32(f) and Circuit Rule 32(e)(1), this brief contains 6,497 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
February 22, 2018

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

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2018, I filed the foregoing using the ECF system, which is expected to serve electronically all counsel of record.

/s/ Robert J. Tolchin
Robert J. Tolchin