No. 17-1268

IN THE

Supreme Court of the United States

MONICAH OKOBA OPATI, IN HER OWN RIGHT, AS EXECUTRIX OF THE ESTATE OF CAROLINE SETLA OPATI, DECEASED, *et al.*,

Petitioners,

v.

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF SUDAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

Sudan's opposition repeats the error made by the D.C. Circuit in disregarding this Court's precedent in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The court of appeals' decision in this case conflicts with that precedent and undermines Congress' express language allowing for retroactive application of a claim for relief pursuant to Section 1605A of the Foreign Sovereign Immunities Act ("FSIA"). In doing so, the court of appeals reversed the district court's award of punitive damages, thereby wrongly depriving more than 150 United States Government employees killed or injured in the 1998 bombings of the U.S. embassies in Kenya and Tanzania of their ability to recover punitive damages for murderous acts of international terrorism.

Sudan ignores the explicit language of the National Defense Authorization Act of 2008 ("NDAA"), as did the court of appeals. The NDAA amended the FSIA in January 2008 to make clear that the FSIA provides a claim for relief against designated foreign state sponsors of international terrorism and accompanying damages, including punitive damages among several other types of damages. Sudan also ignores in its Opposition the legislative history of the NDAA which supports the text of the statute in allowing for retroactive claims and damages pursuant to the FSIA.

Rather than confront the rule of *Altmann*, the plain language of the FSIA, and the legislative history of the NDAA, Sudan parrots the court of appeals' flawed arguments, which adopt the reasoning of contentions expressly rejected in *Altmann*. In *Altmann*, this Court

held that the otherwise standard presumption against retroactive application of legislation was inapplicable in the "*sui generis* context" of the FSIA. 541 U.S. at 696.

Sudan also contends, without support, that its multiple defaults and failures to participate at the trial court level (until substantial judgments were entered against it) were not intentional or otherwise in bad faith, but the district court and court of appeals already have rejected Sudan's arguments that its defaults were unintentional. More importantly, Sudan's arguments ignore the reasons why this Court should grant certiorari: to prevent the D.C. Circuit's opinion from displacing the rule of *Altmann* in numerous pending and future civil actions under the FSIA against designated state sponsors of international terrorism such as Sudan, Iran, and Syria. The national importance of the issue is such that Congress frequently passes legislation to modify or clarify the relevant legal regime. Although Sudan's opposition attempts to minimize the importance of the petition and claims that the court of appeals' erroneous decision could affect only "a very small subset" of cases, Sudan's opposition is undermined by its own separate petition to this Court, which acknowledges the potential significance and widespread effects of the court of appeals' decision.

I. SUPREME COURT PRECEDENT AND CLEAR STATUTORY LANGUAGE PERMIT THE RECOVERY OF PUNITIVE DAMAGES

As the petition explains, the court of appeals wrongly rejected this Court's decision in *Altmann* and ignored clear statements in the NDAA and FSIA which confirm that Congress authorized retroactive application of certain

damages, such as punitive damages, pursuant to 28 U.S.C. § 1605A(c). Pet. 21–35.

Sudan wrongly contends that *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), rather than *Altmann*, is the "controlling precedent" for this matter. Br. in Opp. 21–26. This Court, however, expressly held in *Altmann* that *Landgraf* is inapplicable to the FSIA. *Altmann* explained that, rather than applying the *Landgraf* presumption, courts should defer to the judgment of Congress, as embodied in the statutory text, when construing the FSIA "absent contraindications." *Altmann*, 541 U.S. at 696. The "sui generis context" of the FSIA is "freed from *Landgraf*'s anti-retroactivity presumption." *Id.* at 696, 700. As the Court explained further:

> "Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the decisions of the political branches on whether to take jurisdiction. In this *sui generis context*, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision inapplicable merely because it postdates the conduct in question."

Id. at 696 (citation omitted). Indeed, the Court explained that the *Landgraf* presumption is "most helpful" in "cases involving private rights," not the FSIA. *Id.*

Sudan does not point to any "contraindications" that would justify ignoring the explicit language of the NDAA or prevent the FSIA from being applied retroactively,

nor did the court of appeals. Instead, Sudan attempts to distinguish *Altmann* by arguing that, at the time it was decided, the FSIA "was a purely jurisdictional and procedural statute," so *Altmann* does not apply to cases involving substantive issues, such as the imposition of punitive damages. Br. in Opp. 23–24. But *Altmann* already contemplated and rejected that very same argument. As the Court explained:

> "Under *Landgraf*, therefore, it is appropriate to ask whether the Act affects substantive rights … or addresses only matters of procedure…. ***But the FSIA defies such categorization.***"

Altmann, 541 U.S. at 694 (emphasis added). Rather, the FSIA's provisions affect *both* jurisdictional *and* "*substantive* federal law." *Id.* at 695 (internal quotation marks omitted) (emphasis added). The court of appeals erroneously adopted Sudan's similar attempt to avoid the impact of the FSIA here by characterizing the Act as involving substantive law.

The *Altmann* Court similarly rejected efforts to evaluate the retroactivity of the FSIA on a provision-by-provision basis, despite the Solicitor General's request that it do so. *See* 2003 U.S. S.Ct. Briefs LEXIS 933. As the Court held: "we find clear evidence that Congress intended the Act to apply to preenactment conduct" and "it would be anomalous to presume that an isolated provision . . . is of purely prospective application absent any statutory language to that effect." 541 U.S. at 697–98. There are no "contraindications" in the 2008 NDAA suggesting that Congress intended the 2008 revisions to the FSIA to apply differently.

To the contrary, the plain language of the NDAA expressly states that the revisions apply retroactively. In the portion of the NDAA entitled "**APPLICATION TO PENDING CASES**," Congress expressly stated that the new provisions, including the availability of punitive damages, "shall apply to any claim arising under section 1605A," and that "actions" that already had been "brought under section 1605(a)(7) . . . before the date of the enactment of this Act . . . shall . . . be given effect as if the action had originally been filed under section 1605A(c)." § 1083(c), 122 Stat. at 342–43. That is, the damages provision codified at 28 U.S.C. § 1605A(c), which permits recovery of damages "includ[ing] economic damages, solatium, pain and suffering, and punitive damages" expressly applies to claims arising "before the date of the Act."[1] Even under *Landgraf*'s inapposite standard, no more is needed to demonstrate the statute's retroactivity.

Recognizing the importance of the express language from the NDAA, Sudan studiously avoids addressing it. *See* Br. in Opp. 21–26. Sudan similarly recognizes that the legislative history of the NDAA is not in its favor, so

1. Despite Sudan's contentions to the contrary (Br. in Opp at 4), courts found that the FSIA provided a cause of action against foreign states for acts of international terrorism prior the passage of the NDAA in numerous cases. *See, e.g.*, *Cronin v. Islamic Republic of Iran*, 238 F.Supp.2d 222, 229 (D.D.C. 2002). Indeed, prior to the August 1998 bombings, federal courts already had awarded punitive damages against foreign states to victims of terrorism in numerous cases under the FSIA. *See, e.g., Flatow v. Islamic Republic of Iran*, 999 F.Supp.1 (D.D.C. Mar. 11, 1998). This is of little surprise, as this Court has authorized the award of punitive damages against governmental actors for well over a hundred years. *See, e.g., Scott v. Donald*, 165 U.S. 58 (1897).

it claims that such material is "simply irrelevant" and urges the Court not to consider it. *See* Br. in Opp. 25–26. However, this Court historically has reviewed legislative history in assessing the availability of punitive damages, and there is no reason to depart from that practice here. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984); *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964).[2]

Here, the legislative history clearly shows that Congress and the President intended and recognized that the 2008 amendments would have retroactive effect. Pet. 32–35. The language of the proposed Act so clearly permitted retroactive application of the state-sponsored terrorism exception and its accompanying punitive damages provision that the President vetoed the initial version of the Act, fearing that it would hamper U.S. efforts to rebuild Iraq because it would permit victims of Sadaam Hussein's regime to bring retroactive claims against the current Iraqi government. As Senator Frank Lautenberg explained: "The President contended that this provision would hinder Iraqi reconstruction by exposing the current Iraqi government to liability for terrorist acts committed by Saddam Hussein's government and vetoed the entire Defense Authorization bill on that basis." 154 Cong. Rec. S55 (Jan. 22, 2008). To address the President's concerns, Congress created a narrow carve-out for Iraq and passed the NDAA. *See* Pub. L. No. 110-181, § 1083(d), 122 Stat. 3, 343–44. The President signed it into law shortly thereafter.

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2. Although Sudan asks the Court to refrain from reviewing the legislative history of the NDAA in connection with this petition, Sudan relies extensively upon legislative history in its own cross-petition. *See* Cross-Pet. 18, 20, 23–24, Case No. 17-1406.

Sudan attempts to minimize the impact of the court of appeals' erroneous decision by claiming that it will only affect "a very small subset" of cases, "specifically cases against Sudan, Syria, Iran, and North Korea arising from attacks that occurred prior to January 2008." Br. in Opp. 27. Yet, Sudan took the opposite position in its own petition for certiorari:

> "Under § 1605A, only foreign states designated by the U.S. Department of State as state sponsors of terrorism (i.e., currently Iran, North Korea, Sudan and Syria) may be sued for terrorism. Nonetheless, a review of the dockets shows that thirty-nine cases are currently pending in the United States District Court of the District of Columbia; since the beginning of 2017, seventeen new cases have been filed in that court alone."

See Pet. 33, Case No. 17-1236. Sudan plainly wants it both ways: it wishes to minimize the impact of the court of appeals' opinion in the context of its opposition brief, but it seeks to emphasize the effects of the opinion in its own petition. Truth be told, we have identified more than 75 cases filed under the FSIA against a state sponsor of terrorism for acts occurring prior to January 28, 2008 which have led to awards of punitive damages or which are still pending and seek punitive damages.

Furthermore, the court of appeals' rejection of *Altmann* and erroneous evaluation of the retroactivity of the FSIA on a provision-by-provision basis could be extended beyond the terrorism context to any FSIA case, including those involving "commercial activity carried on

in the United States" or "property taken in violation of international law." *See* 28 U.S.C. § 1605(a)(2)–(3). Following the court of appeals' rejection of *Altmann*, lower courts may wrongly evaluate the retroactivity of such portions of the FSIA in isolation on a provision-by-provision basis.

Finally, cases arising from acts of terrorism supported by "Sudan, Syria, Iran, and North Korea" are precisely the sort of cases as to which Congress intended the 2008 FSIA amendments to apply retroactively. After Congress was compelled by the President to create a carve-out for Iraq, Senator Lautenberg bemoaned the fact that "victims of *past* Iraqi terrorism" would not be able to recover under the NDAA but noted with approval that other state sponsors of terrorism would remain liable for their past acts:

> "By insisting on being given the power to waive application of this new law to Iraq, the President seeks to prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims of other countries. Fortunately, the President will not have authority to waive the provision's application to terrorist acts committed by Iran and Libya, among others."

154 Cong. Rec. S55 (Jan. 22, 2008). Congressman Rob Andrews echoed this sentiment:

> "It is the wisdom of the compromise here that *that provision remains in effect for all of the other states that are involved in state-sponsored terrorism*, with the exception of

> Iraq, which was under the regime of Saddam Hussein."

154 Cong. Rec. H258 (Jan. 16, 2008) (emphasis added). The court of appeals has substituted erroneously its judgment for Congress and the President in allowing civil actions for damages under Section 1605A(c) for murderous acts of terrorism occurring before January 2008.

Due to the conflict between the court of appeals' decision and this Court's decision in *Altmann*, the language of the NDAA, and Congress' intent in crafting that legislation, the Court should consider summary reversal of the D.C. Circuit's holding with respect to punitive damages. *See* 18 U.S.C. § 2106; *American Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (summarily reversing the judgment below where there was "no serious doubt" that it conflicted with Supreme Court precedent).

"It is not appropriate for this Court to expand its scarce resources crafting [per curiam] opinions that correct technical errors in cases of only local importance where the correction in the way promotes the development of the law." *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting). Here, in contrast, the substantive errors of the court of appeals affect the application of federal legislation involving foreign policy and national security determinations by Congress and the President. The political branches have elected to allow civil actions seeking punitive damages to be imposed for extrajudicial killings committed by the few nations designated as state sponsors of international terrorism. The plain text of the NDAA, not to mention the rule of *Altmann*, dictates

application of Section 1605A and its damages provision to pre-2008 terrorist attacks supported by state sponsors of terrorism.

II. THE COURT OF APPEALS ERRED IN REVIEWING SUDAN'S FORFEITED ARGUMENTS ABOUT PUNITIVE DAMAGES WHERE SUDAN INTENTIONALLY DID NOT ACT IN GOOD FAITH

As the petition explains, the court of appeals further erred in finding "extraordinary circumstances" and "exceptional circumstances" warranting review under Rule 60(b)(6) and on direct appeal of a forfeited, nonjurisdictional legal issue—the retroactive application of punitive damages—where it is beyond dispute that Sudan knowingly and intentionally forfeited the issue and was found not to have acted in good faith or with excusable neglect. Pet. 14–21.

Sudan devotes a substantial portion of its brief to arguing that, as a factual matter, it acted in good faith but was distracted from participating in the litigation by domestic turmoil. Br. in Opp. 3–6. But the district court, which witnessed firsthand Sudan's gamesmanship and defaults, already rejected such arguments:

> "Sudan was not merely a haphazard, inconsistent, or sluggish litigant during the years in question—it was a complete and utter non-litigant.... The idea that the relevant Sudanese officials could not find the opportunity over a period of *years* to send so much as a single letter or email communicating Sudan's

> desire but inability to participate in these cases is, quite literally, incredible. Sudan's single, vague paragraph of explanation simply does not convince the Court."

Pet. App. 169a. The court of appeals made a similar finding:

> "But the one conclusory paragraph in the three-page declaration of its Ambassador to the United States that Sudan cites as evidence for this proposition does not show it was incapable of maintaining any communication with the district court. Indeed, Sudan participated in the litigation during its civil war and while negotiating a peace treaty bringing that war to a close.... This shows Sudan could participate in legal proceedings despite difficult domestic circumstances."

Pet. App. 140a. Sudan's suggestions to the contrary should be rejected. Sudan should not have been permitted to raise forfeited, nonjurisdictional arguments about the availability of punitive damages before the court of appeals.

Sudan's efforts to distinguish *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993) also are unavailing. In *Pioneer*, this Court held that: "To justify relief under [Rule 60(b)(6)], a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." 507 U.S. at 393. Thus, Sudan should not have been permitted to seek relief under Rule 60(b)(6) given its intentional defaults.

Sudan attempts to twist the language of *Pioneer* and advocates a "more flexible" standard than the one articulated by this Court. Br. in Opp. 13. Sudan claims the quoted language "merely suggests that Rule 60(b)(6)'s 'extraordinary circumstances' must be based on factors other than the fault of the movant." *Id.* But that cuts against the clear language of *Pioneer*. *Pioneer* requires that the "party is faultless in the delay," not that a court should restrict its review of extraordinary circumstances to factors other than the movant's fault.

Despite Sudan's characterization of *Gonzalez v. Crosby*, 545 U.S. 524 (2005), that case reiterates the rule of *Pioneer*. In *Gonzalez*, the Court held that the district court properly denied relief under Rule 60(b)(6) due to the movant's "lack of diligence in pursuing review of the statute-of-limitations issue." *Id.* at 537. As the Court explained: "This lack of diligence confirms that [the intervening decision in] *Artuz* is not an extraordinary circumstance justifying relief from the judgment in petitioner's case." *Id.*

The lower court opinions Sudan cites in an effort to advocate a "more flexible" interpretation of *Pioneer* (Br. in Opp. 14) merely underscore the appropriateness of this petition. The Court should grant certiorari, or summarily reverse, to provide guidance to those lower courts about the proper scope of *Pioneer*.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. In view of the conflict of the decision below with

the past decision of this Court, *Altmann*, 541 U.S. at 696–98, the Court may wish to consider summary reversal.

Respectfully submitted,

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