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 District of Columbia Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The view of the United States, that the Petition's second Question Presented warrants review, is irreconcilable with its view, at the same time, that the Questions Presented in Sudan's Petition (No. 17-1268) and Cross-Petition (No. 17-1406) do not warrant review. The United States does not identify any conflict between the D.C. Circuit's decision and any decision by another Circuit or by this Court. Instead, the United States asks this Court merely to correct the D.C. Circuit's purported misapplication of the *Landgraf* presumption against retroactive punitive damages to Petitioners' §1605A(c) claims — a presumption the United States recognizes as the correct legal standard. U.S. Br. 14. As such, the United States appears to concede that the Petition here falls squarely within the type of cases in which a writ of certiorari is "rarely granted." S. Ct. R. 10.

Absent a circuit split or conflict with this Court's prior precedents, the United States proposes a new, expanded second question presented addressing retroactive punitive damages to Petitioners' §1605A(c) claims and their state-law claims. U.S. Br. 19. The United States asserts that this reformulated question "presents an important question of federal law," the answer to which "affects, in these cases alone, billions of dollars" in damages. *Id.* at 21. This position is unprincipled because the United States recommends against a writ of certiorari on the equally important questions of federal law presented in Sudan's Cross-Petition, for which the quantum of damages at issue is even greater.

If the Court is inclined to grant Petitioners a writ of certiorari, it should extend that writ to include the important questions of federal law presented in Sudan's Cross-Petition. In particular, any writ granted with respect to the United States' second question presented — covering Petitioners' state-law claims — should extend to the threshold question whether §1605A authorizes state-law claims at all. *See* Cross-Pet., Question 3.

I. Contrary To The View Of The United States, The D.C. Circuit's Purported Misapplication Of The Correct Legal Standard Does Not Warrant A Writ Of Certiorari

The United States acknowledges that the D.C. Circuit "correctly recognized that the *Landgraf* presumption applies" to §1605A(c). U.S. Br. 14 ("The creation of a new cause of action is the paradigmatic circumstance implicating the presumption against retroactivity."). But the United States contends that the D.C. Circuit "erred" in concluding that "Section 1605A(c) does not clearly authorize punitive damages for pre-2008 conduct." *Id.* at 16.

The United States thus would have this Court grant a writ of certiorari for the sole purpose of correcting a purported misapplication of a properly stated rule of law. Rule 10 is clear that such error correction does not warrant this Court's review.

In any event, the D.C. Circuit's decision prohibiting the retroactive application of punitive damages under §1605A(c) is sound. The *Landgraf* presumption, as recognized by the United States, requires that "'a statute * * * explicitly authorize[]

punitive damages' for pre-enactment conduct," U.S. Br. 17 (quoting 511 U.S. at 281).

The United States nevertheless maintains that Congress' intent to apply punitive damages retroactively here can be inferred from a combination of provisions in §1605A and NDAA §1083(c). U.S. Br. 16. The United States ignores *Landgraf*'s requirement that the "statutory text" must contain an "explicit command" authorizing retroactive effect, and contradicts the prior views of the United States on this point. 511 U.S. at 257, 281; Brief for the United States as Amicus Curiae at 15, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (No. 03-13) ("This Court has made clear that it will not infer that Congress intended retroactive application of a substantive provision in the absence of a 'clear indication' of congressional intent. . . . Rather, a law will be given a 'truly 'retroactive' effect' only where the 'statutory language * * * is so clear that it could sustain only one interpretation.'" (citations omitted)).

This Court held in *Landgraf* that a statute that "attaches new legal consequences to events completed before its enactment" presumptively does not apply retroactively unless Congress has otherwise "made clear its intent." 511 U.S. at 270. When Congress has not "expressly prescribed the statute's proper reach" and the statute contains "no such express command" authorizing the statute's retroactive effect, a court must determine whether the statute would "operate retroactively" to, inter alia, "impair rights a party possessed when he acted [or] increase a party's liability for past conduct." *Id.* at 280.

The D.C. Circuit conducted the analysis required under *Landgraf* and aptly observed that the 2008 amendments authorized for the first time "a quantum of liability — punitive damages — to which foreign sovereigns were previously immune" under 28 U.S.C. §1606. Pet. App. 123a. The D.C. Circuit correctly concluded that, "[u]nlike the grant of jurisdiction held retroactive in *Altmann*," these changes to the FSIA were "essentially substantive." *Id.* The D.C. Circuit further concluded that "no clear textual command" existed in either §1605A or §1083(c). Pet. App. 127a. On that basis, the D.C. Circuit properly applied the *Landgraf* presumption against retroactivity to vacate the punitive damages awards for Petitioners' §1605A(c) claims. Pet. App. 121a-122a, 125a-128a.

In asserting that the D.C. Circuit erred in its application of the *Landgraf* presumption, the United States notably does not address §1605A(c)'s use of plainly equivocal language — "damages *may* include . . . punitive damages" (emphasis added) — or the striking resemblance between that language and the language in the damages provision at issue in *Landgraf*, which this Court concluded lacked the clear statement necessary to apply punitive damages retroactively. *See* 511 U.S. at 252 ("the complaining party may recover . . . punitive damages" (quoting The Civil Rights Act of 1991, §102)).

Instead, the United States points to the absence of language in either §1605A(c) or §1083(c) distinguishing "between punitive damages and other forms of relief," arguing that if Congress clearly made its new federal cause of action for terrorism claims retroactive, it did so for all forms of damages

(including punitive) as well. U.S. Br. 16. This argument is not persuasive because, as the United States recognizes (at 13, 20), until the 2008 enactment of §1605A(c), §1606 expressly prohibited punitive damages awards against foreign states in all FSIA cases, and this was the settled expectation among foreign states, consistent with international law. In contrast, before 2008, plaintiffs had access to other non-punitive forms of damages through their state-law claims. *See Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1036 (D.C. Cir. 2004) (noting that absent a federal cause of action under §1605(a)(7), plaintiffs could still assert "a cause of action under some other source of law, including state law").

The D.C. Circuit, therefore, did not impose any "additional, punitive-damages-specific clear statement" requirement or "higher standard" for assessing retroactivity specific to punitive damages. U.S. Br. 17. Instead, the D.C. Circuit rightly recognized the "essentially substantive" nature of the new legal consequences that would improperly attach to a foreign state's past conduct through the retroactive application of punitive damages. Pet. App. 123a.

Contrary to the view of the United States, §1083(c) does not "demonstrate that punitive damages are available under" §1605A(c) "for pre-enactment conduct." U.S. Br. 16. That assertion requires "one too many a logical leap," which the D.C. Circuit found impermissible under *Landgraf*. Pet. App. 126a-127a. Nothing in §1083(c) discusses the damages available for §1605A(c) claims at all.

Rather, §1083(c) focuses on the application of the new cause of action to prior and related actions in which a federal cause of action was previously unavailable under §1605(a)(7). *See* NDAA §1083(c)(2) (referencing any "action" that "relied upon" §1605(a)(7) "as creating a cause of action" or "has been adversely affected on the grounds" that §1605(a)(7) "fail[ed] to create a cause of action"); §1083(c)(3) (allowing an "action" to be commenced under §1605A if "timely commenced" under §1605(a)(7)).

Although §1083(c) could have supplied an explicit command authorizing the punitive damages in §1605A(c) to apply retroactively, §1083(c) instead merely "operates as a conduit for a plaintiff to access the cause of action under §1605A(c)," as the D.C. Circuit correctly concluded. Pet. App. 127a. Patching together §1083(c)'s language extending the §1605A(c) cause of action to prior and related actions, on the one hand, with §1605A(c)'s statement that damages "may" include punitive damages, on the other, does not create the "explicit command" authorizing punitive damages for pre-enactment conduct required under *Landgraf*. 511 U.S. at 281; *see also* Pet. App. 127a (finding "no clear statement emerges from the union of §1083(c) and §1605A(c)").

The United States also incorrectly asserts that the language in §1083(c) resembles "a provision in an earlier civil rights bill that *Landgraf* stated would have 'unambiguous[ly]' satisfied its clear-statement rule." U.S. Br. 17-18 (citing 511 U.S. at 264). That bill, however, contained a specific provision exclusively governing the availability of

compensatory and punitive damages, which the bill subsequently cross-referenced to indicate that the damages provision "shall apply to all proceedings pending or commenced after" enactment. *See* The Civil Rights Act of 1990, S. 2104, 101st Cong. §§8, 15(4) (1990). Section 1083(a)(1) sets out the availability of punitive damages as part of the amendments to §1605A, but it does not contain any comparable cross-reference to that provision in §1083(c).

Finally, the reliance by the United States on "legislative history" (at 18-19) has no bearing on *Landgraf*'s text-based "explicit command" requirement. 511 U.S. at 281. Even if President Bush sought to take extra precautions regarding U.S. foreign-policy sensitivities and interests in Iraq, any such efforts do not create, or even help create, by implication the requisite "explicit command" in the statutory text, and cannot "confirm" *congressional* intent. Indeed, President Bush appeared to recognize the substantive nature of the amendments: "[c]ontrary to international legal norms and for the first time in U.S. history, a foreign sovereign would be liable for punitive damages under section 1083." *See* Office of Commc'ns, The White House, *Memorandum of Disapproval* (Dec. 28, 2007), 2007 WL 4556779. And nothing in the quote from Senator Lautenberg (at 19) refers to punitive damages for terrorism claims, much less the retroactive application of punitive damages.

II. The United States Proposes An Expanded Question Presented But Misreads The D.C. Circuit Decision, Which Is Correct And Consistent With *Altmann*

The United States urges review of a question that Petitioners have all but conceded. U.S. Br. 19 n.8. Petitioners, whose second Question Presented focuses only on available punitive damages under §1605A(c), offer minimal argument as to why the question of punitive damages for their state-law claims warrants review. *See* Pet. 28-29. Indeed, the D.C. Circuit found the availability of retroactive punitive damages on the state-law claims to be so obviously improper that Petitioners seemed to pay the issue little attention.

The United States recommends that this Court broaden Petitioners' second Question Presented to include review of "the availability of punitive damages under . . . state causes of action, as the government has done." U.S. Br. 19 n.8; *see also id.* at II ("Whether 28 U.S.C. §1605A permits recovery of punitive damages from foreign state sponsors of terrorism for activities occurring prior to the passage of the current version of the state."). Yet the United States still does not offer any compelling reason other than mere error correction to warrant a writ of certiorari. U.S. Br. 19 ("The court of appeals further erred . . . .").

Review of this expanded question is unwarranted as the United States is incorrect that the D.C. Circuit erred under *Altmann.* The question for the D.C. Circuit was not whether the FSIA's jurisdictional

grant under §1605A applied retroactively, as in *Altmann*, but rather whether the 2008 statutory amendments authorizing punitive damages ("for the first time in U.S. history," *see Memorandum of Disapproval*) against foreign states, including with respect to state-law claims, apply retroactively. Pet. App. 123a. The D.C. Circuit correctly held that "[t]he authorization of §1605A, read together with §1606" — in particular, "the implicit, backdoor lifting of the prohibition against punitive damages in §1606 for state law claims" — "lacks a clear statement of retroactive effect." Pet. App. 129a (citing *Landgraf*, 511 U.S. at 259-60).

The United States asserts that *Landgraf*'s presumption against retroactive punitive damages does not apply to Petitioners' state-law claims, because §1605A(a) is "jurisdictional in nature" under *Altmann*. U.S. Br. 20. But the United States cannot avoid the "essentially substantive" nature of the 2008 amendments authorizing for the first time punitive damages against foreign states under the FSIA. Indeed, the United States is forced to acknowledge that, "[t]o be sure," "Congress's decision to codify" the amended terrorism exception in the new §1605A "has the consequence of exempting claims under Section 1605A from the prohibition on punitive damages awards against foreign sovereigns in Section 1606." U.S. Br. 20.

This "consequence" directly affects a foreign state's substantive rights and settled expectations and increases a foreign state's liability for past conduct, whether for federal or state-law claims. Indeed, this "consequence" is precisely the type of

legal consequence that the *Landgraf* presumption against retroactive punitive damages is intended to guard against. *Altmann*, 541 U.S. at 694 (quoting *Landgraf*, 511 U.S. at 280); *see also Landgraf*, 511 U.S. at 270.

Further, the United States misapplies *Altmann*. U.S. Br. 20. The "circumstances surrounding" §1605A's enactment — in particular, the authorization of punitive damages against a foreign state for the first time ever — *do* strongly "suggest[]" that punitive damages should not apply retroactively to state-law claims brought under §1605A(a)'s exception to immunity. 541 U.S. at 697.

And contrary to the suggestion by the United States (at 20), the authorization of punitive damages in the 2008 amendments is not like the "codification of 'the standards governing foreign sovereign immunity as an aspect of *substantive* federal law'" that this Court acknowledged in *Altmann*. 541 U.S. at 695 (quoting *Verlinden*, 461 U.S. at 496-97). Rather, the statutory removal of §1606's prohibition against punitive damages is exactly the type of "increase[]" of a foreign state's "liability for past conduct" that this Court distinguished from the type of statutory change that "merely opens United States courts to plaintiffs with pre-existing claims against foreign states." 541 U.S. at 695. The retroactive application of punitive damages against a foreign state does not concern the jurisdictional scope of the foreign state's sovereign immunity, but instead increases the foreign state's substantive liability for pre-enactment conduct — whether under federal or state law.

III. Any Review Of The Availability Of Punitive Damages For State-Law Claims Under §1605A Necessarily Implicates The Question Whether State-Law Claims Are Available Under §1605A At All

In proposing the expanded question presented, the United States overlooks that review by this Court of the retroactive application of punitive damages to Petitioners' state-law claims necessarily would implicate resolution of the third Question Presented by Sudan in its Cross-Petition: whether "§1605A forecloses state substantive causes of action previously asserted through the 'pass-through' provision of 28 U.S.C. §1606." Cross-Pet. i.

The United States contends that those Petitioners relying on §1605A(a)'s grant of jurisdiction to advance state-law claims may "recover punitive damages for pre-enactment conduct" because §1605A "is not limited by the prohibition on punitive damages in Section 1606, which applies only to claims 'under section 1605 or 1607.'" U.S. Br. 19-20. Before reaching that argument, however, the Court would necessarily have to consider the threshold question whether Congress' removal of §1605A from the purview of §1606 eliminated §1606's longstanding "pass-through" to other sources of substantive law, thereby foreclosing Petitioners' state-law claims. *See* Cross-Pet. 25-28.

IV. The United States Overstates The Importance Of The D.C. Circuit's Decision On Punitive Damages

Repeatedly emphasizing the "important" question of retroactive punitive damages under §1605A (U.S. Br. 10, 14, 21), the United States glosses over the lack of any circuit split or decision in conflict with this Court's precedents on this issue. Both Parties agree (Pet. 29 n.10; Opp'n 26), and the United States does not dispute, that no conflict exists among the Circuits on the retroactivity of §1605A's authorization of punitive damages. The D.C. Circuit applies *Landgraf* consistently with other Circuits when facing similar questions on the retroactive application of punitive damages (*see* Opp'n 22-23 (citing *Ditullio*, 662 F.3d at 1100; *Gross*, 186 F.3d at 1091)), thereby rendering additional guidance on the issue from this Court unnecessary. The United States also acknowledges that the D.C. Circuit applied the correct legal standard (U.S. Br. 14 (citing Pet. App. 123a-126a)), rendering any review of the District Court's application of the *Landgraf* presumption to Petitioner's §1605A(c) claims an unwarranted exercise in error correction.

The assertion by the United States that the question whether §1605A permits recovery for pre-enactment conduct "affects, in these cases alone, billions of dollars in punitive damages" (approximately $4.3 billion), only highlights the importance of the issues raised in Sudan's Cross-Petition, which likewise "affect, in these cases alone, billions of dollars in" damages (approximately $10.3 billion).

As the United States acknowledges, the "vast majority of petitioners here are foreign-national[s]." U.S. Br. 6. If indeed the vacatur of these foreign nationals' punitive damages awards (approximately $3.5 billion) constitutes an "important" issue deserving this Court's review (U.S. Br. 10), then, to be sure, the ability of the majority of these foreign nationals to actually pursue these claims is equally important. *See* Cross-Pet. 4.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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