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 Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

This Court granted the Petition limited to this question:

Whether, consistent with this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Foreign Sovereign Immunities Act applies retroactively, thereby permitting recovery of punitive damages under 28 U.S.C. §1605A(c) against foreign states for terrorist activities occurring prior to the passage of the current version of the statute.

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BRIEF FOR RESPONDENTS

On August 7, 1998, truck bombs exploded almost simultaneously outside two U.S. embassies in Africa, one in Dar es Salaam, Tanzania and the other in Nairobi, Kenya. Hundreds of innocent people were killed and thousands more were injured. The terrorist organization al Qaeda and its leader Osama Bin Laden claimed responsibility for the bombings.

The Republic of Sudan is a sovereign nation in northeastern Africa. Beginning in 2001, various plaintiffs brought actions in U.S. federal court seeking to hold Sudan liable for the deaths and personal injuries resulting from the embassy bombings. In particular, the plaintiffs alleged that Sudan provided "material support" to al Qaeda and Bin Laden thereby causing the embassy bombings and the resulting deaths and injuries.

Sudan categorically denies these allegations, condemns the bombings, and expresses sympathy to the victims. Sudan acknowledges that Bin Laden resided in Sudan as a private citizen from the early- to mid-1990s, until Sudan permanently expelled him from the country in May 1996, but Sudan denies providing "material support" to al Qaeda or Bin Laden or causing the 1998 bombings.

Petitioners here include (i) the estates of non-U.S. nationals who were employed at the embassies and who died in the embassy bombings, (ii) U.S. and non-U.S. nationals who were employed at the embassies and who were injured in the embassy bombings, (iii) U.S.-national family members of the U.S.-nationals who were injured, and (iv) hundreds of non-

U.S. family members of U.S. government employees who died or were injured. Pet. App. 250a, 268a, 295a, 316a. In the district court, Petitioners, along with other plaintiffs, asserted subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") and obtained default judgments against Sudan totaling over $10 billion, including approximately $4.3 billion in punitive damages. The D.C. Circuit vacated the punitive damages, concluding that the 2008 statutory authorization of punitive damages did not apply retroactively to claims based on preenactment conduct.

INTRODUCTION

As to the Question Presented, the D.C. Circuit was correct in holding that the 2008 statutory authorization of punitive damages against foreign states, codified in a new section of the FSIA (28 U.S.C. §1605A(c)), *cannot* be applied retroactively to claims based on preenactment conduct. In so holding, the D.C. Circuit was correct to apply the presumption against statutory retroactivity recognized by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Here, as in *Landgraf*, the statutory authorization of punitive damages introduced a new remedy that, if applied retroactively, would increase a party's liability for past conduct. Contrary to the contentions of the Petitioners, this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), does not mandate retroactivity; when *Altmann* held that the FSIA applied retroactively, the Court was assessing the retroactivity of the jurisdictional grant, not whether the FSIA created or modified any cause

of action as the case is here. The FSIA, as it existed at the time, did not "create or modify any causes of action." *Altmann*, 541 U.S. at 695 n.15. The 2008 amendment to the FSIA added a new cause of action authorizing punitive damages, thereby implicating *Landgraf*'s presumption.

The D.C. Circuit was also correct in holding that the 2008 amendment to the FSIA lacked a "clear statement" that punitive damages should be imposed retroactively. Petitioners (and the United States as amicus curiae) argue that a "clear statement" for retroactivity is found in §1083(c) of the 2008 National Defense Authorization Act, which enacted new §1605A(c). But §1083(c) does not even address punitive damages, let alone authorize their imposition retroactively. Petitioners (and the United States) are incorrect in assuming that retroactive application of the new cause of action in §1605A(c) in certain circumstances necessarily means that *punitive damages* may be imposed retroactively. Punitive damages were the only new form of damages made available under §1605A(c); compensatory damages and other types of damages were available before the enactment of §1605A(c), whereas punitive damages against foreign states were expressly prohibited under §1606 until the 2008 amendments. And *Landgraf* requires that each new remedy — and in particular, punitive damages — be supported by a clear statutory command of retroactivity.

Beyond the Question Presented, Petitioners (and the United States) also ask this Court to address whether the D.C. Circuit erred in holding that

retroactive punitive damages were also unavailable for those Petitioners who did not qualify for §1605A(c)'s new cause of action, but asserted state-law claims. There is no sound reason to address this additional question but, if this Court elects to do so, there is an antecedent jurisdictional question that must be addressed first: whether Petitioners asserting state-law claims may do so at all. These Petitioners are all foreign-national family members asserting claims on behalf of themselves for emotional distress; as such, they cannot satisfy the requirement under §1605A(a)(2)(A)(ii) of U.S. nationality or U.S.-Government employment. Furthermore, the new federal cause of action under §1605A(c) is exclusive, and was created to end the "patchwork" of inconsistent state-law rulings. And even if §1605A did permit state-law claims, retroactive punitive damages would be foreclosed for those claims under *Landgraf*.

Finally, beyond the Question Presented and the further question that Petitioners (and the United States) seek to introduce, this Court must consider whether the district court had subject-matter jurisdiction over this action. While the district court and the D.C. Circuit concluded that subject-matter jurisdiction existed, both of those courts misinterpreted §1605A. Because the district court lacked subject-matter jurisdiction, this Court should remand for dismissal of the action in its entirety.

STATUTORY HISTORY

From its initial enactment, the Foreign Sovereign Immunities Act of 1976 has provided generally that foreign states and their agencies and instrumentalities are immune from the jurisdiction of federal and state courts, subject to specified exceptions. *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). From that initial enactment, within Title 28 of the United States Code, §1604 has set forth the general immunity, while §1605 and §1607 have set forth exceptions to immunity.

At the time of enactment, §1606 provided — and today provides — that, as to any claim with respect to which a foreign state is *not* entitled to immunity under §1605 or §1607, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." The first clause of §1606 refers courts to existing sources of law (i.e., state law or foreign law) for the rules of decision in cases in which exceptions to immunity under §1605 or §1607 apply. That clause has been referred to as providing a "pass-through" to state or foreign law. *See, e.g.*, Pet. App. 122a; *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003) ("[W]e are bound to look to state law in an effort to fathom the 'like circumstances' to which 28 U.S.C. § 1606 refers."). The second clause of §1606 provides that foreign states are not subject to punitive damages even in cases where exceptions to

immunity under §1605 or §1607 apply. The legislative history of the 1976 enactment explained that the prohibition on punitive damages in §1606 was included in conformance with "current international practice." S. Rep. No. 94-1310, at 22, (1976).

As originally enacted, the FSIA did not contain any immunity exceptions related to international terrorism. Nor did the FSIA contain any private rights of action against any foreign states. H.R. Rep. No. 94-1487, at 12 (1976) (explaining that the FSIA was "not intended to affect the substantive law of liability").

In 1992, Congress enacted the Torture Victim Protection Act of 1991 ("TVPA"), for the express purpose of "carry[ing] out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights." Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 note). The TVPA created a private civil action against *officials* of foreign nations who subject an individual to "torture" or "extrajudicial killing." *Id.* §2(a)(1)-(2). In the case of "torture," the foreign official is liable for "damages" to the individual subjected to the torture; in the case of "extrajudicial killing," the foreign official is liable for "damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." *Id.* The TVPA, which is not codified as part of the FSIA, did not provide for any claim against a foreign state itself.

In 1996, the FSIA was amended to add to §1605 new paragraph (a)(7), an exception to immunity for cases 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 (as defined in section 2339A of title 18) for such an act." Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241. That exception stated that "the court shall decline to hear a claim under this paragraph . . . if the foreign state was not designated as a state sponsor of terrorism . . . at the time the act occurred [or] as a result of such act." *Id.* The exception also provided that the court shall decline to hear a claim if "the claimant or victim was not a national of the United States" at the time of the act (thus meaning that the absence of U.S. nationality of *either* the claimant or the victim would be disqualifying). *Id.* Because this new exception was placed within §1605, it was governed by §1606's provisions on the "manner" and "extent" of liability and on the unavailability of punitive damages.

In enacting §1605(a)(7), the AEDPA included a provision addressing §1605(a)(7)'s retroactive application: "The amendments made by this subtitle shall apply to any cause of action arising before, on, or after the date of the enactment of this Act." AEDPA §221(c).

Later in 1996, Congress enacted the so-called "Flatow Amendment," making an "official, employee,

or agent" of a foreign state designated as a state sponsor of terrorism liable to "a United States national or the national's legal representative" for "personal injury or death" caused by acts of that "official, employee, or agent," where those acts constituted one of the predicate acts identified in §1605(a)(7), i.e., torture, extrajudicial killing, aircraft sabotage, and hostage taking. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, div. A, tit. I, sec. 101(c), tit. V, §589, 110 Stat. 3009-121, 3009-172 (enacting the Foreign Operations Export, Financing, and Related Programs Appropriations Act, 1997) (codified at 28 U.S.C. §1605 note). Liability under the Flatow Amendment is "for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages." *Id.* The Flatow Amendment did not create a cause of action against a foreign state. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004) ("We now hold that neither 28 U.S.C. §1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government.").

In 1997, the nationality provision in §1605(a)(7) was amended to provide that a court shall decline to hear a claim if "neither the claimant nor the victim was a national of the United States" (thus, meaning only one of them, rather than both, needed U.S. nationality). H.R. Rep. No. 105-48, at 5 (1997). This "technical correction" made clear that a court would have jurisdiction under §1605(a)(7) if "either the victim of the act or the survivor who brings the claim is an American national." *Id.* at 2.

In 1998, Congress enacted a short-lived amendment to §1606. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, div. A, sec. 101(h), tit. I, §117(b), (d), 112 Stat. 2681-480, 2681-491 (enacting the Treasury Department Appropriations Act, 1999 ("1999 TDAA")) (codified at 28 U.S.C. §1610 note). Section 117 of the 1999 TDAA added an exception to the bar on punitive damages for actions brought under §1605(a)(7), and included a provision authorizing the president to waive that exception in the interest of national security. 1999 TDAA, §117(b), (d). The same day the 1999 TDAA was enacted, President William J. Clinton exercised his authority and waived §117. Memorandum on Blocked Property of Terrorist-List States, 34 Weekly Comp. Pres. Doc. 2088 (Oct. 21, 1998); Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 Weekly Comp. Pres. Doc. 2113 (Oct. 23, 1998). President Clinton's waiver had the practical effect of preventing the amendment to §1606 from becoming operative. *See* Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 36 Weekly Comp. Press. Doc. 2664 (Oct. 28, 2000).

In 2000, Congress repealed the amendment to §1606 and restored §1606 to its original form as enacted in 1976. Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, §2002(f)(2), 114 Stat. 1464, 1543.

In 2008, Congress amended the FSIA, repealing the exception to immunity in §1605(a)(7) and

replacing it with the new §1605A, which not only includes the same exception to immunity (now codified in §1605A(a)) but also, for the first time ever in the FSIA, creates a private right of action against a foreign state for certain categories of plaintiffs (codified in §1605A(c)). National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"), Pub. L. No. 110-181, §1083, 122 Stat. 3, 338-41 (codified at 28 U.S.C. §1605A). As §1605(a)(7) had, §1605A(a) creates an exception to foreign sovereign immunity for cases 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 the act or provision of support or resources "is engaged in by an official, employee, or agent." New §1605A(a) adds that "[t]he court shall hear a claim under this section" if "the claimant or the victim" was at the time of the act a U.S. national, a member of the U.S. armed forces, or employed by the U.S. government. *Id.* §1605A(a)(2)(A)(ii).

The new private right of action in §1605A(c) allows for the possibility of punitive damages against a foreign state: "In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages." Section 1605A(c) applies to an individual who had the requisite U.S. nationality or employment or "the legal representative" of such a person. Congress made extensive conforming amendments to select FSIA provisions to account for §1605A. *See, e.g.*, 2008

NDAA, §1083(b) (conforming amendments to §§1607, 1610). Because Congress made no such conforming edits to §1606 that would have it apply to §1605A, §1606 does not apply to §1605A. *See* 28 U.S.C. §1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under *section 1605 or 1607* of this chapter . . . ." (emphasis added)). Thus, §1606's provision on the "manner" and "extent" of liability and its prohibition on punitive damages do not apply to §1605A.

Section 1083(c) of the 2008 NDAA includes a number of provisions addressing the transition from former §1605(a)(7) to new §1605A, including for "Prior Actions" and "Related Actions." Section 1083(c) does not expressly refer to the new authorization of punitive damages under §1605A(c).

LITIGATION HISTORY

I. The District Court Proceedings

A. The *Owens* Action

In late 2001, plaintiff James Owens filed his initial complaint seeking to hold Sudan liable for providing material support for al Qaeda's 1998 bombings of the U.S. embassies in Kenya and Tanzania. In September 2002, an amended complaint in the *Owens* action added additional plaintiffs. None of the *Owens* plaintiffs is a Petitioner here.

As Petitioners state (Pet. Br. 6), Sudan was served with the amended *Owens* complaint on February 4, 2003. In the midst of a devastating civil war, Sudan

did not immediately respond or appear. *See* Mem. in Support of Agreed Mot. at 1, *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128 (D.D.C. June 18, 2004) (No. 01-cv-02244), ECF No. 78. Nevertheless, in early 2004, Sudan retained U.S. counsel to defend itself in the *Owens* case. Sudan's counsel contested the entry of default and moved to dismiss the case. Pet. App. 11a.

On January 5, 2005, while Sudan's motion to dismiss was still pending and during a period of protracted political turmoil in Sudan, Sudan's initial counsel moved to withdraw from the case, citing a "lack of effective communication from the client" making it impossible for counsel "to render effective legal representation." C.A. App. 128-129.

The district court denied counsel's motion to withdraw in January 2005, but it did not deny Sudan's motion to dismiss until March 29, 2005 (C.A. App. 67; J.A. 8a) — several months after Sudan's counsel had lost contact with its client. (Thus, Petitioners are inaccurate in suggesting (at Pet. Br. 12) that Sudan's withdrawal from defending the action was in response to the denial of its motion to dismiss.)

Prohibited from withdrawing from the case, Sudan's counsel then (unsuccessfully) appealed the *Owens* district court decision denying Sudan's motion to dismiss. J.A. 10a. Sudan's counsel was finally permitted to withdraw from *Owens* on January 26, 2009. J.A. 12a.

B. Petitioners' Actions (*Opati*, *Wamai*, *Amduso*, and *Onsongo*) and the Default Judgments

While *Owens* was pending in the D.C. Circuit, Congress enacted the 2008 NDAA, replacing §1605(a)(7) with §1605A. The *Owens* plaintiffs amended their complaint to assert claims under §1605A(c) (*see* C.A. App. 192), and several new groups of plaintiffs, some of them Petitioners here, filed separate actions in the district court against Sudan for claims under §1605A(c) and state tort law, seeking punitive damages. *See* J.A. 24a (*Wamai* Complaint); J.A. 31a (*Amduso* Complaint); J.A. 64a (*Onsongo* Complaint).

Sudan was served in the new actions in 2009 but, still facing profound domestic turmoil, did not appear. *See* Declaration of Ambassador Maowia O. Khalid, Charge d'Affaires of the Embassy of the Republic of the Sudan in Washington, D.C. (C.A. App. 648), ¶ 4.

In March 2010, the district court issued an entry of default as to Sudan. J.A. 13a. Later that year, the district court held a consolidated evidentiary hearing on jurisdiction and liability, but Sudan was not represented at the hearing. J.A. 13a-14a. The plaintiffs submitted evidence at the hearing that consisted largely of inadmissible hearsay funneled through the testimony of plaintiffs' expert witnesses. In 2011, the district court issued an opinion and order, finding it had subject-matter jurisdiction under §1605A and finding Sudan (and Iran) liable for plaintiffs' injuries. J.A. 79a, 115a, 135a. The district court relied upon the inadmissible hearsay evidence

that plaintiffs presented at the hearing. J.A. 97a-110a. As to U.S.-national and U.S.-government-employee plaintiffs, the district court imposed liability against Sudan under §1605A(c). J.A. 127a. The district court found that foreign-national plaintiffs who were family members of the bombing victims could not bring claims in their own right under §1605A(c), but imposed liability under D.C.-law for intentional infliction of emotional distress. J.A. 128a, 135a.

In 2012, the *Opati* Petitioners filed and served their complaint (also including demands for punitive damages) (J.A. 72a (*Opati* Complaint)), and Sudan, still confronting serious political turmoil and natural disasters, did not appear. Petitioners assert that the *Opati* group "timely filed" their complaint (Pet. Br. 12 n.3), but, as Sudan set forth in its Conditional Cross-Petition (at 29-35, No. 17-1406), still pending before this Court, there is a serious question as to the timeliness of the *Opati* complaint.

In 2014, the district court entered default judgments against Sudan in each of Petitioners' actions (Pet. App. 294a-314a (*Amduso*), 315a-341a (*Wamai*), 249a-266a (*Onsongo*), 267a-293a (*Opati*)), as well as in the other actions. The district court awarded over $10.2 billion in total damages in the consolidated cases, including over $8.6 billion for Petitioners, $4.3 billion of which was for punitive damages alone.

C. Sudan's Appearance and Motions to Vacate

Sudan, finally emerging from a decade of unrelenting turmoil, began engaging new U.S. counsel in 2014 and timely appealed the default judgments below, including in Petitioners' cases. Sudan retained the undersigned counsel in April 2015 and began entering appearances and contesting virtually all pending U.S. litigation against it, regardless of the stage of the case. Sudan filed motions to vacate the default judgments in each of Petitioners' cases in the district court (*see* J.A. 27a-28a (*Wamai*); J.A. 59a-60a (*Amduso*); J.A. 67a (*Onsongo*); J.A. 75a-76a (*Opati*)), as well as in numerous other cases against Sudan, including many cases unrelated to the *Owens* action. The D.C. Circuit stayed Sudan's direct appeal pending the outcome of the motions to vacate. Pet. App. 15a.

In its motions to vacate, Sudan argued that the district court lacked jurisdiction to enter the default judgments and that the default judgments were, therefore, void under Rule 60(b)(4) of the Federal Rules of Civil Procedure. Sudan also argued that the default judgments should be vacated due to Sudan's excusable neglect under Rule 60(b)(1), and that extraordinary circumstances warranted vacatur under Rule 60(b)(6).

The district court rejected Sudan's arguments and denied Sudan's motions to vacate. Pet. App. 151a-152a. In its opinion, however, the district court acknowledged that "the sheer magnitude of the punitive damages" may present an "extraordinary circumstance" warranting relief under Rule 60(b)(6)

of the Federal Rules of Civil Procedure. Pet. App. 241a. The district court further acknowledged "the apparent strength of Sudan's underlying arguments about the unavailability of punitive damages" and noted that the presumption against retroactivity "leaves the Court with serious doubt about whether § 1605A(c) should be read as authorizing punitive damages for preenactment conduct." Pet. App. 242a, 245a. Nonetheless, the district court declined to vacate the award of punitive damages because it did not find that the issue constituted an "extraordinary circumstance" for vacatur under Rule 60(b)(6). Pet. App. 248a.

Sudan then appealed the denial of its motions to vacate, and that appeal was consolidated with Sudan's direct appeal of the default judgments.

II. The D.C. Circuit Opinion

In its decision on Sudan's consolidated appeal, the D.C. Circuit affirmed the district court's decision in all respects, except that it vacated the punitive damages awards and certified a question of state law to the District of Columbia Court of Appeals concerning whether the foreign-national family-member plaintiffs may recover on D.C.-law emotional distress claims. Pet. App. 145a-146a.

The D.C. Circuit affirmed the district court's jurisdictional finding that terrorist bombings by non-state actors constituted "extrajudicial killings" under §1605A(a)(1). Pet. App. 38a. The D.C. Circuit rejected Sudan's argument that, properly construed, §3 of the TVPA and §1605A reflect Congress's intent

to adopt the international-law definition of the term "extrajudicial killing," a summary execution or targeted assassination by state actors. Pet. App. 19a-38a.

The D.C. Circuit also rejected Sudan's arguments on jurisdictional causation, holding that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits." Pet. App. 39a.

The D.C. Circuit also rejected Sudan's argument that the statute of limitations in §1605A(b) is jurisdictional, (Pet. App. 98a). Finding §1605A(b) non-jurisdictional, the D.C. Circuit declined to address Sudan's substantive argument that the *Opati* Petitioners' claims were time-barred by four years. Pet. App. 98a.

The D.C. Circuit held that foreign-national family-member plaintiffs may bring state-law claims against a designated state sponsor of terrorism, even though they do not qualify for the federal claim in §1605A(c), and §1606, which provides the "pass-through" to state-law causes of action, by its terms does not apply to §1605A. Pet. App. 109a-110a.

Finally, applying "the presumption against retroactive legislation" under *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), the D.C. Circuit held that Congress made no clear statement authorizing punitive damages for preenactment conduct in §1605A(c). Pet. App. 125a-126a. The D.C. Circuit further rejected Petitioners' argument that the combination of §1605A(c) and its enacting

legislation, §1083 of the 2008 NDAA, provides the requisite clear statement, finding that Petitioners' argument required "one too many a logical leap." Pet. App. 126a. Lacking a clear statement from Congress of an intent to permit retroactive imposition of punitive damages, the D.C. Circuit accordingly vacated the punitive damages awarded under §1605A(c). Pet. App. 128a.

The D.C. Circuit applied the same reasoning to vacate the punitive damages awarded against Sudan for Petitioners' state-law claims. Pet. App. 128a-129a. The court held: "If the express authorization of punitive damages under §1605A(c) lacks a clear statement of retroactive effect, then the implicit, backdoor lifting of the prohibition against punitive damages in §1606 for state law claims fares no better." Pet. App. 129a (citing *Landgraf*, 511 U.S. at 259-60).

SUMMARY OF THE ARGUMENT

Petitioners ask this Court to permit the retroactive application of a statutory authorization of punitive damages. This Court apparently has never done so before in any context, let alone in an action against a foreign state under the FSIA.

As a threshold matter, the district court lacked subject-matter jurisdiction under the FSIA's terrorism exception, §1605A(a). First, the embassy bombings were not acts of "extrajudicial killing" as that term is defined in the FSIA or under international law; an "extrajudicial killing" is a summary execution of an individual by state actors,

not a terrorist bombing by private actors. Second, in direct contravention of *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312 (2017), the D.C. Circuit held that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits"; applying this "lightero burden" led to affirmance of a default judgment in which the district court found that "*some* evidence," even if "meager," was sufficient to establish liability over Sudan. Pet. App. 39a, 214a. Third, over 250 of the Petitioners before the Court did not comply with the FSIA's jurisdictional statute of limitations for §1605A actions.

As to the retroactivity of punitive damages under §1605A(c), the D.C. Circuit correctly applied the presumption against retroactivity recognized in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), as the punitive-damages provision in §1605A(c) would operate retrospectively to "increase a party's liability for past conduct." *Id.* at 280; Pet. App. 121a-129a. The D.C. Circuit properly distinguished *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), on the basis that, at the time of that decision, the FSIA did not "create or modify any causes of action" (*id.* at 695 n.15) — a circumstance that changed in 2008 upon the enactment of §1605A(c) and its authorization of punitive damages. Pet. App. 154a.

The D.C. Circuit also correctly held that there is no "clear statement" from Congress authorizing the retroactive application of punitive damages under §1605A(c). Pet. App. 125a-128a. In the context of

punitive damages, *Landgraf* requires statutory language "that explicitly authorized punitive damages for preenactment conduct." 511 U.S. at 281. Petitioners attempt to divine a "clear statement" from a disparate group of transition provisions, but those provisions — which do not refer directly or indirectly to punitive damages — do not even approach the clarity required.

Petitioners inappropriately ask this Court to expand the Question Presented to include the distinct question of the retroactivity of punitive damages under state-law claims. But Petitioners do not even have cognizable state-law claims and, if they did, they could not obtain retroactive punitive damages for the same reasons they cannot do so under §1605A(c): *Landgraf*'s presumption against retroactivity applies, and Congress has not made a "clear statement" to overcome the presumption.

ARGUMENT

I. The District Court Lacked Subject-Matter Jurisdiction

Sudan challenged subject-matter jurisdiction in the proceedings below and has raised its jurisdictional challenges in this Court in Sudan's pending Petition for a Writ of Certiorari in *Republic of Sudan v. Owens*, No. 17-1236, and pending Conditional Cross-Petition for a Writ of Certiorari in *Republic of Sudan v. Opati*, No. 17-1406.

Sudan raises its jurisdictional challenges here because the question of whether the district court had

subject-matter jurisdiction over Petitioners' claims and the power to hear this action is a threshold question that must be decided before this Court addresses the Question Presented (and any further question over which Petitioners and the United States seek review). *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979) ("We do not normally address any issues other than those fairly comprised within the questions presented by the petition for certiorari and any cross petitions. An exception to this rule is the question of jurisdiction: even if not raised by the parties, we cannot ignore the absence of federal jurisdiction."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) ("We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." (citations omitted)).

Sudan challenges subject-matter jurisdiction in the following respects:

1. The district court lacked subject-matter jurisdiction because the embassy bombings do not constitute "an act of . . . extrajudicial killing," or any other predicate act, under §1605A(a)(1).

Section 1605A(h)(7) provides that the "the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the [TVPA]." The TVPA defines an act of extrajudicial killing as follows:

> For the purposes of this Act, . . . a deliberated killing not authorized by

> previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. §1350 note.

This Court recently recognized that the meaning of §3 of the TVPA should be informed by international law: "The TVPA — which is codified as a note following the [Alien Tort Statute] — creates an express cause of action for victims of torture and extrajudicial killing *in violation of international law*." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) (emphasis added). Indeed, the text, context, and history of §1605A and the TVPA all make clear that an act of "extrajudicial killing," as defined in the TVPA and incorporated into §1605A, is a unique term of art derived from international law. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018) (interpreting 28 U.S.C. §1610(g) to be "consistent with the history and structure of the FSIA"); *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (reviewing the "text, purpose, and history of the FSIA" in determining whether the term "foreign state" includes government officials); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (stating that statutory interpretation requires consideration of the "whole statutory text, . . . purpose, and context of the statute").

Under international law, an act of "extrajudicial killing" means a summary execution by a state actor. *See, e.g.*, *Kadic v. Karadžić*, 70 F.3d 232, 243-44 (2d Cir. 1995) ("[T]orture and summary execution . . . are proscribed by international law only when committed by state officials or under color of law." (citations omitted)). Because Congress chose this term of art under international law, the term should be given its ordinary meaning. *See Bond v. United States*, 572 U.S. 844, 861-62 (2014) (holding ordinary meaning of defined term should inform interpretation of that term, "particularly when there is dissonance between that ordinary meaning and the reach of the definition").

Under the D.C. Circuit's interpretation of "an act . . . of extrajudicial killing," *any* deliberated killing that was not authorized by a previous judgment, including common-law murder, could provide the basis for an exception to foreign sovereign immunity. *See* Pet. App. 20a. Such an expansive interpretation is entirely inconsistent with the ordinary meaning of the term. *See Bond*, 572 U.S. at 862, 866 (reversing conviction that rested on overly broad interpretation of "chemical weapons" inconsistent with statute's intent). If Congress had intended "an act of . . . extrajudicial killing" to encompass a terrorist bombing, Congress could have stated so plainly without resort to a term of art that has special meaning under international law.

Congress's intent to limit "extrajudicial killing" to the narrow international-law definition of a summary execution by a state actor is evident from the express

incorporation of the TVPA's definition of the term. In the TVPA's title, Congress expressly stated its intent to incorporate international-law principles in the TVPA: "An Act [t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights . . . ." 106 Stat. at 73. That intent is also readily apparent from the statutory text, which adopts verbatim language from Common Article 3 of the Geneva Conventions of 1949, which proscribes "the carrying out of executions *without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples*." *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 85 (emphasis added).

The legislative history of the TVPA underscores Congress's intent to limit the definition of an act of extrajudicial killing to its special meaning under international law. *See, e.g.*, S. Rep. No. 102-279, at 6 (1991) ("The TVPA *incorporates into U.S. law the definition of extrajudicial killing found in customary international law*." (emphasis added)); *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary,* 103d Cong. 7 (1994) (statement of Rep. Romano L. Mazzoli) ("[E]xtrajudicial killing is defined in accordance with the TVPA and the Geneva Conventions of 1949.").

Contrary to this Court's statutory interpretation principles, the D.C. Circuit found that the TVPA's express intent to "carry out obligations of the United States under the United Nations Charter and other international agreements" is somehow "reflected in the TVPA as a whole, *not* in each individual provision viewed in isolation." Pet. App. 33a (emphasis added) (quoting 106 Stat. at 73). But Congress's intent to incorporate the international obligations of the United States in the TVPA as a whole cannot be so easily divorced from definitional provisions contained in that statute, particularly when the terms being defined are terms of art under international law.

Finally, contrary to the suggestion of the United States (U.S. Br. 2), Congress's original enactment of the FSIA's terrorism exception in 1996 cannot be linked to the "the bombing of the U.S. Embassy in Beirut." Section 1605(a)(7) was originally enacted as only one small part of comprehensive reforms to existing antiterrorism legislation (mainly reforming criminal and immigration matters), and the reference to the Beirut bombing in the House Report was contained in a general statement prefacing *all* of the proposed reforms. *See* H.R. Rep. 104-383, at 41 (1995). There is no basis for inferring that the reference to the Beirut bombing was related specifically to §1605(a)(7), especially when other provisions of the comprehensive legislation dealt with penalties for bombing federal properties, including overseas embassies. *See, e.g.*, *id.* at 4, 38, 86, 114, 129, 130 (amending criminal statutes relating to terrorism). Indeed, in the section of the House report that specifically addresses §1605(a)(7), only one

terrorist attack is mentioned, an act of "aircraft sabotage." *See id.* at 62 (recognizing that FSIA amendment "respond[s] to the tragedy of the Pan Am 103 bombing").

Each of the four predicate acts in §1605(a)(7) — torture, extrajudicial killing, aircraft sabotage, and hostage taking — reflects a well established, if not universal, violation of international law. And Congress considered and rejected a singular predicate "act of international terrorism" after the State Department expressed concerns over exceeding accepted international practice. *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 14 (1994) (prepared statement of Jamison S. Borek, Deputy Legal Adviser, U.S. Dep't of State) ("Consistency of the FSIA with established international practice is important. If we deviate from that practice and assert jurisdiction over foreign states for acts that are generally perceived by the international community as falling within the scope of immunity, this would tend to erode the credibility of the FSIA."); *see also id.* at 83 (prepared statement of Abraham D. Sofaer, former Legal Adviser, U.S. Dep't of State) ("In view of the absence of consensus in this area, international law provides no support for asserting the jurisdiction of U.S. courts against a foreign state in cases involving allegations of an offense so vague and politically charged as 'international terrorism.'"); *id.* at 83 ("The acts that are the subject of H.R. 934 — torture, extrajudicial killing and [in that bill] genocide — are clearly defined and condemned in

several international instruments that have nearly universal support among states.").

Terrorist bombings like the embassy bombings here are categorically heinous and despicable acts, but they do not constitute "an act of . . . extrajudicial killing" within the meaning of §1605(a)(7).

2. The district court lacked subject-matter jurisdiction because Petitioners have not established jurisdictional causation according to the standard set forth by this Court in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312 (2017). The D.C. Circuit's ruling that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits," Pet. App. 39a, cannot be squared with *Helmerich*'s holding that jurisdictional facts must be conclusively established before a U.S. court may assert subject-matter jurisdiction over a foreign sovereign. *See* 137 S. Ct. at 1319.

In *Helmerich*, this Court rejected the notion that a plaintiff may establish FSIA jurisdiction on an arguable or "non-frivolous" showing of the legal and factual grounds for jurisdiction. *Id.* at 1318-19. Instead, a plaintiff is required to "prove" and "show (and not just arguably show)" the actual existence of jurisdiction, and a court is required to resolve factual disputes and reach a decision finding that jurisdiction exists. *Compare id.* at 1316, 1318-19, 1324 (overruling low "non-frivolous" standard articulated in *Agudas Chasidei Chabad of U.S. v. Russian*

Federation, 528 F.3d 934 (D.C. Cir. 2008)) *with* Pet. App. 39a (relying on *Chabad* for "lighter burden").

Despite *Helmerich*, the D.C. Circuit upheld the "relatively low" bar set by the district court, which required plaintiffs to submit only "*some* evidence," even if only a "meager showing," to establish jurisdictional causation. Pet. App. 40a (citing *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242, 276 (D.D.C. 2016) (found at Pet. App. 214a)). Applying this "lighter burden" (Pet. App. 39a), the D.C. Circuit affirmed the district court's improper reliance on only the "ultimate conclusions" of purported "terrorism experts" (Pet. App. 221a-224a (denying vacatur); 65a-66a (affirming same)) to establish the jurisdictional facts. On this "meager showing," the D.C. Circuit affirmed over $10 billion dollars in default judgments and reached the following extraordinary (and untenable) legal conclusion: "In sum, that the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings is irrelevant to proximate cause and jurisdictional causation." Pet. App. 86a.

3. The district court lacked subject-matter jurisdiction over the *Opati* Petitioners' action because their action was filed, inexplicably, in 2012 — four years after the ten-year statute of limitations under §1605A(b) had expired. Contrary to the D.C. Circuit's decision (Pet. App. 87a-98a), this time bar is jurisdictional and cannot be forfeited; the D.C. Circuit erred in declining to reach the merits of Sudan's timeliness argument. In *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), and *United States v.*

Wong, 135 S. Ct. 1625 (2015), this Court reiterated that Congress need not "incant magic words" to identify a jurisdictional time bar. 139 S. Ct. at 1850; 135 S. Ct. at 1632. Instead, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." 135 S. Ct. at 1632. Applying those tools to §1605A(b) demonstrates that its limitation is jurisdictional.

Section 1605A(b), by its terms, speaks to a court's authority to hear an action, not to a "claim's timeliness," as the case was with 28 U.S.C. §2401(b), at issue in *Wong*, 135 S. Ct. at 1632. Specifically, §1605A(b) is a limitation on when "[a]n action may be brought or maintained under this section." *See Fort Bend Cty.*, 139 S. Ct. at 1848 (explaining that "the word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain"). Further, the language "under this section" refers to §1605A, the "[t]errorism exception to the jurisdictional immunity of a foreign state," indicating that the time bar limits the court's jurisdiction. *See id.* at 1849 (stating that "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision"). Section 1605A(b)'s placement in §1605A's structure is also telling; it is placed above §1605A(c)'s right-of-action provision, leaving no doubt that §1605A(b) is not a mere claim-processing rule.

Section 1605A(b) is akin to 28 U.S.C. §2401(a), which bars "every civil action commenced against the United States" outside of the six-year limitation

period and has been held jurisdictional by a long line of courts. *See, e.g.*, *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (holding that §2401(a) is jurisdictional). This conclusion survives *Wong*'s holding as to §2401(b). *See, e.g.*, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 342 n.4 (D.C. Cir. 2018) (stating §2401(a) is jurisdictional).

* * *

Sudan has raised its jurisdictional challenges in this Court more fully in Sudan's pending Petition for a Writ of Certiorari and supporting briefs in *Republic of Sudan v. Owens*, No. 17-1236, and Sudan's pending Conditional Cross-Petition for a Writ of Certiorari and supporting briefs in *Republic of Sudan v. Opati*, No. 17-1406.

II. Punitive Damages May Not Be Awarded Retroactively Under §1605A(c)

The D.C. Circuit vacated the district court's award of punitive damages under §1605A(c), holding that the 2008 authorization of punitive damages under §1605A(c) did not apply retroactively to the claims against Sudan for allegedly providing "material support" for the 1998 embassy bombings. *See* Pet. App. 18a, 121a-129a. In so holding, the D.C. Circuit applied the presumption against statutory retroactivity recognized in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The D.C. Circuit rejected Petitioners' reliance upon *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), concluding that the retroactivity of the FSIA's jurisdictional

provisions had "no bearing" on whether the 2008 authorization of punitive damages applies retroactively as well. Pet. App. 122a-123a. Finding that the 2008 authorization of punitive damages, if applied, would operate retroactively, but that Congress did not provide a clear statement of an intention to apply the authorization retroactively, the D.C. Circuit held that retroactive punitive damages were precluded under §1605A(c). Pet. App. 127a-128a.

In this Court, Petitioners challenge the D.C. Circuit's holding, both by reprising their arguments based on *Altmann* and by disputing the lack of a clear statement of retroactive intent by Congress. Neither challenge has merit.

A. The *Landgraf* Presumption Applies to Punitive Damages Under §1605A(c)

1. *Landgraf*. In *Landgraf*, this Court declined to give retroactive effect to statutory provisions authorizing compensatory and punitive damages for certain types of intentional employment discrimination (and allowing any party to demand a trial by jury if such damages are sought). 511 U.S. at 247. In denying retroactivity, this Court reaffirmed and explained the longstanding presumption against retroactive application of statutes:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If

> Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

The Court applied these principles to the provisions before it, contained in the Civil Rights Act of 1991. The Court concluded that the Act lacked an "express command" as to whether the provisions at issue should be given retroactive effect. *Id.* at 257-63. Vague statutory language, such as a provision that the Act in general "shall take effect upon enactment," was not sufficient. *Id.* at 257. The Court expressed that it was "highly probable" that Congress left retroactivity as an "open issue" to be resolved by the courts on a provision-by-provision basis. *See id.* at 261 ("[S]ome provisions might apply to cases arising before enactment while others might not.").

As to the Act's introduction of a right to a jury trial, the Court observed that it was a "procedural

change" "that would ordinarily govern in trials conducted after [the statute's] effective date." *Id.* at 280. But because the Act provided a right to a jury trial only if the plaintiff was seeking compensatory or punitive damages, the Court concluded that its retroactive effect "must stand or fall with the attached damages provisions." *Id.* at 281.

Turning to punitive damages next, the Court held that such damages "clearly" could not be applied retroactively in the absence of congressional direction. *Id.* Equating punitive damages to criminal sanctions, the Court stated: "Retroactive imposition of punitive damages would raise a serious constitutional question. Before we entertained that question, we would have to be confronted with a statute that explicitly authorized punitive damages for preenactment conduct. The Civil Rights Act of 1991 contains no such explicit command." *Id.* (citations omitted).

The Court found that the new authorization of compensatory damages presented a closer question but nonetheless concluded that the provision would operate retrospectively and therefore could not be applied retroactively in the absence of clear congressional intent. *Id.* at 281-83. The Court recognized that compensatory damages are intended to provide redress to victims rather than punishment to wrongdoers, and — in contrast to punitive damages — do not come within "a category in which objections to retroactive application on grounds of fairness have their greatest force." *Id.* at 282. But, the Court reasoned, compensatory damages

unavoidably affect the liabilities of defendants and would have an impact on planning, including the supervision of agents. *Id.* at 282-83. The introduction of compensatory damages, in short, would "attach an important new legal burden" to the conduct in question. *Id.* at 283.

The Court denied retroactivity of punitive damages and compensatory damages even though the claims were based on *intentional* employment discrimination — i.e., sexual harassment — which even in the early 1990s "ha[d] been unlawful for more than a generation." *Id.* at 282 n.35. Indeed, the Act authorized punitive damages only against a defendant who acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* at 281 (quoting §102(b)(1) of the Act). The Court explained: "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 282 n.35 (citations omitted). The Court added that retroactive application of the new damages provisions would not support the purpose of incentivizing employers to take preventive measures to ward off discriminatory conduct before it occurs. *Id.*

The Court in *Landgraf* recognized that the new compensatory and punitive damages would, if applied retroactively, affect different cases somewhat differently. *Id.* at 283. In cases in which prior law afforded plaintiffs no relief, the new damages provisions could "be seen as creating a new cause of

action." *Id.* In cases in which prior law afforded plaintiffs recovery of backpay, the new damages provisions could be seen as "increasing the amount of damages available under a preestablished cause of action." *Id.* Under either scenario, the Court concluded, application of the new damages provisions would "undoubtedly impose on employers found liable a 'new disability' in respect to past events." *Id.* (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D. N.H. 1814) (No. 13,156) (Story, J., on Circuit)).

The Court added: "The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84 (emphasis in original). The Court emphasized that, in the absence of clear direction from Congress, it had *never* "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Id.* at 284.

2. *Altmann*. In *Republic of Austria v. Altmann*, 541 U.S. 677, this Court held that the FSIA — as it existed then — should be applied retroactively to claims based on preenactment conduct, even though the FSIA lacked a clear command to that effect. The Court summarized *Landgraf*, emphasizing the difference between new statutes that affect substantive rights and those that affect jurisdiction or procedure: "Under *Landgraf*, therefore, it is appropriate to ask whether the [FSIA] affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or

addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred)." *Altmann*, 541 U.S. at 694.

Addressing this question, the Court then observed that the FSIA did not appear to affect substantive rights: "[T]he FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither 'increase[s those states'] liability for past conduct' nor 'impose[s] new duties with respect to transactions already completed.'" *Id.* at 695 (alteration in original) (quoting *Landgraf*, 511 U.S. at 280). On the other hand, the Court observed, it had previously characterized the FSIA as a codification of "the standards governing foreign sovereign immunity as an aspect of *substantive* federal law." *Altmann*, 541 U.S. at 695 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496-97 (1983)) (emphasis added in *Altmann*). The Court further observed that it had previously stated that statutes creating jurisdiction where none otherwise exists implicate "the substantive rights of the parties as well." *Altmann*, 541 U.S. at 695 (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)).

Ultimately, the Court in *Altmann* concluded that the FSIA — again, as it existed at the time — defied characterization as either jurisdictional or substantive but was "sui generis." 541 U.S. at 696. The Court held that *Landgraf*'s default rule did not definitively resolve the issue. *Id.* Instead, the Court

concluded that foreign sovereign immunity, historically based on "current political realities and relationships," should be based on the most recent guidance from the political branches, such that the FSIA should govern current claims even if they are based on preenactment conduct. *Id.*

3. The D.C. Circuit's opinion. In vacating the punitive damages award in the default judgments, the D.C. Circuit first stated that it is "obvious" that an imposition of punitive damages on Sudan under §1605A(c) would operate retroactively. Pet. App. 122a. The D.C. Circuit observed that §1606 barred punitive damages until the 2008 enactment, while §1605A(c) now permits them, thus "increas[ing] Sudan's liability for past conduct." Pet. App. 122a (paraphrasing *Landgraf*).

The D.C. Circuit then rejected Petitioners' argument that *Altmann* required retroactive application. The D.C. Circuit observed that *Altmann* addressed the retroactivity of the jurisdictional provisions of the FSIA (codifying only the preexisting "restrictive theory" of foreign sovereign immunity), an issue having "no bearing" on the retroactivity of punitive damages under §1605A(c)'s new cause of action. Pet. App. 122a-123a. The D.C. Circuit concluded that a new imposition of punitive damages ("a quantum of liability") was "'essentially substantive'" and, as opposed to foreign sovereign immunity, necessarily designed to deter and thereby shape conduct. Pet. App. 123a-124a (quoting *Altmann*, 541 U.S. at 695 n.15).

4. Petitioners' arguments. In this Court, Petitioners reprise their argument that *Altmann*, decided in 2004, requires the retroactive application of any provision in the FSIA, including the 2008 authorization of punitive damages under the new federal cause of action in §1605A(c). This argument cannot withstand analysis.

Petitioners premise their argument on a vast overstatement of *Altmann*'s holding. They assert that *Altmann* requires retroactivity of the FSIA "in all contexts." Pet. Br. 19. They insist that *Altmann* always requires application of "the political branches' current foreign relations judgments." Pet. Br. 19; *see also* Pet. Br. 23-30. But at the time *Altmann* was decided the FSIA did not contain any causes of action against foreign states. *Altmann* necessarily and expressly was addressing a statute concerned only with *foreign sovereign immunity*.

Altmann's concern with foreign sovereign immunity is apparent on the face of this Court's decision in the case. *Altmann* traces the history of foreign sovereign immunity from Chief Justice Marshall's opinion in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), through the 1952 "Tate Letter," up until the 1976 enactment of the FSIA (and this Court's ensuing interpretation of the FSIA). 541 U.S. at 688-91. This Court in *Altmann* described the FSIA as a "comprehensive statute" governing claims of immunity and codifying the "restrictive theory of sovereign immunity." *Id.* at 691. The Court stated that it had confined its grant of certiorari "to the issue of the FSIA's general

applicability to conduct that occurred prior to the Act's 1976 enactment, and more specifically, prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity." *Id.* at 692.

Furthermore, this Court in *Altmann* distinguished *Landgraf* precisely on the basis that *Altmann* dealt with foreign sovereign immunity while *Landgraf* dealt with substantive rights. The Court explained in *Altmann* that *Landgraf*'s presumption against retroactivity is aimed "to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Id.* at 696. In contrast, the Court stated: "[T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id.* at 696 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)) (emphasis in original).

Most critically, *Altmann* distinguished *Landgraf* (and *Hughes Aircraft*, 520 U.S. 939) on the express basis that the FSIA "does not create or modify any causes of action." 541 U.S. at 695 n.15. That point of distinction vanished in 2008 with the enactment of §1605A(c), which bears the title "Private Right of Action." Petitioners themselves acknowledge this fundamental change in the FSIA after *Altmann*:

"[T]he FSIA did not include an express private right of action such as §1605A(c) until the 2008 NDAA." Pet. Br. 40.

While the views of the United States are not entitled to any "special deference," *Altmann*, 541 U.S. at 701, the amicus brief of the United States is correct in recognizing that §1605A(c) introduced a cause of action to the FSIA and that "the creation of a new cause of action is the paradigmatic circumstance implicating the *Landgraf* framework." U.S. Br. 18. On this basis, the United States concludes that *Landgraf*, rather than *Altmann*, applies to determining whether §1605A(c) applies retroactively. U.S. Br. at 17-18.

Contrary to Petitioners' suggestion (Pet. Br. 30-33), application of the *Landgraf* presumption to §1605A(c) is not inconsistent with deference to the political branches in the sphere of foreign affairs. The political branches can always dictate, by explicit legislative command, whether any new statutory provision, including one touching on foreign affairs, should be applied retroactively. *Landgraf*'s presumption was well established in 2008 when §1605A(c) was adopted, so the political branches were legislating against that background default rule.

Petitioners state repeatedly that *Altmann* is based on 200 years of precedent. Pet. Br. 19, 22, 30. In fact, *Landgraf* is based on even older precedent. *See* 511 U.S. at 265 (stating that the presumption against retroactive legislation "embodies a legal doctrine centuries older than our Republic"). But these cases do not present a challenge to *Altmann* (or a

confrontation between *Altmann* and *Landgraf*). Instead, the FSIA was fundamentally altered by the enactment of §1605A(c), with its new cause of action authorizing punitive damages. *Altmann* still controls as to the retroactivity of the FSIA's immunity provisions, but *Landgraf* controls as to §1605A(c).

B. Neither §1605A(c) nor §1083 of the 2008 NDAA Provides a Clear Statement of Retroactive Intent for Punitive Damages

The D.C. Circuit held that Congress did not make a clear statement in 2008 authorizing punitive damages for preenactment conduct. Pet. App. 125a-128a. In looking for a clear statement, the court acknowledged that such a statement needed to be "so clear that it could sustain only one interpretation." Pet. App. 125a (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that clear statement of retroactivity is present only when statutory language "requires this result" (citations omitted)).

The D.C. Circuit found nothing in the text of §1605A(c) speaking to whether punitive damages are available for preenactment conduct. Pet. App. 125a-126a. The D.C. Circuit also found that §1083(c) of the 2008 NDAA, considered in conjunction with §1605A(c), lacked any clear statement that punitive damages were authorized for preenactment conduct. Pet. App. 126a-127a. The court stated that §1083(c) clearly authorizes §1605A(c)'s new federal cause of action to apply retroactively in certain circumstances, but held that §1083(c) lacked a clear statement

authorizing punitive damages to apply retroactively. Pet. App. 126a-127a. The D.C. Circuit reasoned that §1083(c) gave certain categories of plaintiffs the right to access the new federal cause of action, but that §1083(c) does not speak to whether punitive damages are available retroactively under that cause of action. Pet. App. 127a.

Petitioners and the United States seem to concede that §1605A(c) does not itself provide any clear statement requiring retroactive application of punitive damages. Indeed, by its terms, §1605A(c), with its permissive language ("damages may include"), does not *require* imposition of any type of damages under any circumstances. But Petitioners and the United States purport to find the requisite clear statement in the provisions of §1083(c) of the 2008 NDAA. *See* Pet. Br. 47 (describing §1605A(c) as "without temporal limitation"); U.S. Br. 19. They are mistaken.

Section 1083(c) of the 2008 NDAA, entitled "Application to Pending Cases," sets forth provisions addressing the transition from former §1605(a)(7) to new §1605A. Section 1083(c) has three relevant subparts, enumerated as (1), (2), and (3). None provides a clear statement that punitive damages are available retroactively, either individually or collectively with the other subparts and §1605A(c). In fact, none even mentions punitive damages at all.

Subpart 1083(c)(1) provides: "The amendments made by this section [i.e., §1083 as a whole] shall apply to any claim arising under section 1605A of title 28, United States Code." Section 1083 (i.e., "this

section") includes the enactment of §1605A as well as a host of conforming amendments (including the striking of §1605(a)(7) and the addition of new attachment and execution provisions), transition provisions, and a presidential waiver as to Iraq. Section 1083(c)(1) simply provides that all the amendments in §1083 apply to a claim arising under §1605A; §1083(c)(1) says nothing at all about retroactivity.

Section 1083(c)(2), entitled "Prior Actions," provides that certain existing actions (and judgments therein) "shall . . . be given effect as if the action had originally been filed under section 1605A(c)." Although drafted awkwardly, with the stilted "be given effect as" locution and a misplaced comma, the meaning of §1083(c)(2) is apparent by virtue of the "prior actions" eligible to invoke the private cause of action under §1605A(c). Specifically, eligible "prior actions" are limited to those (i) previously brought under §1605(a)(7) or the Flatow Amendment, (ii) relying upon either of those provisions "as creating a cause of action," (iii) "adversely affected" on the grounds that those provisions fail to create a cause of action against the foreign state, and (iv) still before the courts in any form.

Section 1083(c)(2) is plainly a legislative response to *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), which held that "neither 28 U.S.C. §1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1033. The plaintiffs in *Cicippio-Puleo* had invoked

only §1605(a)(7) and the Flatow Amendment as purported causes of action, so the D.C. Circuit affirmed the dismissal of their action (albeit with leave to amend the complaint to possibly add state- or foreign-law causes of action). 353 F.3d at 1027.

Section 1083(c)(2) provides no indication, let alone a clear statement, that Congress intended the plaintiffs in eligible "prior actions" to be able to obtain punitive damages. That would have been a peculiar intention, as plaintiffs in other "prior actions" who appropriately invoked state or foreign law for their cause of action, and therefore were ineligible to invoke §1083(c)(2), would not be able to obtain punitive damages.

Section 1083(c)(3), entitled "Related Actions," likewise contains no hint that punitive damages should be available retroactively. It merely provides that if a timely action has been commenced under §1605(a)(7) or the Flatow Amendment, another action arising out of the same act or incident may be brought under §1605A within a specified period. Section 1083(c)(3) says nothing about whether punitive damages would be available in such a newly filed "related action."

The D.C. Circuit was thus correct in viewing §1083(c) "as a conduit for a plaintiff to access the cause of action under §1605A(c)" and nothing more. Pet. App. 127a. Furthermore, the D.C. Circuit was correct that providing a conduit to §1605A(c)'s new cause of action does not cut one way or the other on the question of retroactivity of punitive damages. Pet. App. 127a.

Petitioners and the United States maintain that the retroactivity of §1605A(c)'s cause of action (in certain circumstances) must mean that punitive damages are available retroactively (Pet. Br. 46-47; U.S. Br. 18-19), but this position ignores *Landgraf*. Prior to the 2008 enactment of §1605A(c), plaintiffs relying upon the §1605(a)(7) exception to immunity had a cause of action under state law or foreign law via §1606. That included access to compensatory damages. But punitive damages were prohibited under §1606 against a foreign state. The new "disability" under the 2008 enactment of §1605A(c) was the new exposure to punitive damages — a new "quantum of liability" that "increase[d] Sudan's liability for past conduct." Pet. App. 122a, 123a. Under *Landgraf*'s provision-by-provision approach (511 U.S. at 261), punitive damages — unlike a cause of action or compensatory damages, both of which were previously available under state law — was the element that required a clear statement of retroactivity.

Indeed, *Landgraf* was insistent that the specter of retroactive punitive damages, in particular, would raise such a serious constitutional question that the Court would not even entertain the question without an "explicit command" in the pertinent statute. 511 U.S. at 281. This Court has apparently never found such an "explicit command," as it has never held a statutory authorization of punitive damages to apply retroactively. In contrast, *Landgraf* stated that the possibility of retroactive compensatory damages was "not in a category in which objections to retroactive

application on grounds of fairness have their greatest force." *Id.* at 282.

Petitioners and the United States are also misguided in relying upon *Landgraf*'s reference to the retroactivity provision in a prior civil rights bill (Civil Rights Act of 1990, S. 2104, 101st Cong. §15(a)(4) (1990)). Pet. Br. 49-50; U.S. Br. 20. First, the retroactivity provision in that bill was quite different from any provision here. It specifically cross-referenced the statutory section introducing compensatory and punitive damages (both for the first time), and provided that such section "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." S. 2104 §15(a)(4). That provision is much more specific than any provision here, such as §1083(c)(1)'s statement that all amendments "shall apply to any claim arising under section 1605A."

Furthermore, this Court has since questioned whether the language in that 1990 civil rights bill was sufficiently clear to overcome *Landgraf*'s presumption. While in *Landgraf* itself this Court seemed to suggest in dictum that the 1990 bill's language *would be* sufficient (511 U.S. at 263), three years later this Court (with largely the same Justices in the majority) appeared to backtrack, stating that "*Landgraf* suggested that the [1990 bill's language] *might possibly* have qualified as a clear statement for retroactive effect." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (emphasis added) (holding that, "even if that language did qualify," it was distinguishable); *see also Martin v. Hadix*, 527 U.S. 343, 354 (1999)

(stating that the 1990 civil rights bill discussed in *Landgraf* "might qualify" as a clear statement). As the D.C. Circuit observed (Pet. App. 125a), *Lindh* emphasized: "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation." 521 U.S. at 328 n.4 (citing cases).

That observation has held true since *Lindh*. *See, e.g.*, *AT&T Corp. v. Hulteen*, 556 U.S. 701, 712-13 (2009) (finding no clear statement authorizing retroactive application of statute at issue); *INS v. St. Cyr*, 533 U.S. 289, 315-18 (2001); (same); *Martin*, 527 U.S. at 353-54 (same). Indeed, in the rare circumstances where the Court found statutory language sufficient to overcome the presumption against retroactivity, that language unmistakably expresses retroactive intent. *See, e.g.*, *St. Cyr*, 533 U.S. at 318-19 (observing the "IIRIRA's amendment of the definition of 'aggravated felony,' for example, clearly states that it applies with respect to 'convictions . . . entered before, on, or after' the statute's enactment date" (citation omitted)); *Graham & Foster v. Goodcell*, 282 U.S. 409, 418-19 (1931) (finding §611 of the Revenue Act of 1928 was "manifestly intended to operate retroactively according to its terms" where it applied only to taxes assessed prior to a specific date — identified expressly in §611 — before the Revenue Act's enactment).

At bottom, Congress was enacting a new federal private right of action against foreign states that

included punitive damages for the first time ever; if Congress had wanted punitive damages to apply retroactively, it could have commanded as such directly and clearly, as *Landgraf* requires. Far from that, the "highly reticulated" (U.S. Br. 26) transition provisions of §1083(c) do not even refer to punitive damages directly or indirectly.

And, contrary to the contention of the United States (U.S. Br. 22-23), that Congress encouraged plaintiffs to *relinquish* punitive-damage awards from defaulting foreign states hardly suggests a clear intent that punitive damages should be imposed retroactively.

Petitioners and the United States extend their quest for the elusive "clear statement" to the legislative history of the 2008 NDAA. Pet. Br. 52-54; U.S. Br. 21-22. This is a pointless effort, because a "clear statement" (or "explicit command") *in a statute*, as required by *Landgraf*, can by definition never be found in legislative history. 511 U.S. at 281 (requiring "a statute that explicitly authorized punitive damages for preenactment conduct"); *see also id.* at 287 (Scalia, J., concurring) ("If it is a 'clear statement' we are seeking, surely it is not enough to insist that the statement can 'plausibly be read as reflecting general agreement'; the statement must *clearly* reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself." (quoting *id.* at 262 (majority opinion))).

Furthermore, President George W. Bush's memorandum vetoing a prior version of the 2008 NDAA does not indicate that the statute would have

authorized retroactive imposition of punitive damages. Among a host of concerns over §1083 — the foremost of which was the attachment of Iraqi assets needed for reconstruction — the memorandum identified "the prospect of punitive damages." 154 Cong. Rec. 11-12 (2008). The reference to this "prospect," along with references to "entanglement in lawsuits" and "a provision that might be misconstrued," strongly suggests that the President was unwilling to take any risk that §1083 would imperil Iraqi assets: "Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions." *Id.* at 12.

Petitioners observe that, after the veto, Congress amended the 2008 NDAA to give the President authority to waive the application of §1083 as to Iraq, including as to "any conduct or event occurring before or on the date of the enactment of this Act." Pet. Br. 53. That the waiver covers past conduct is hardly surprising, because the President's primary concern, expressed in his veto memorandum, was disruptive attachments based on conduct by the Saddam Hussein regime. Indeed, the title of the post-veto 2008 NDAA specifically stated that the modifications were "to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq." 122 Stat. at 3. The post-veto waiver authority in no way suggests that punitive damages would apply retroactively. Indeed, if any inference can be drawn from the post-veto amendments to the 2008 NDAA, it is that Congress

purposefully declined to provide a "clear statement" (or "explicit command") on retroactivity even after the veto memorandum mentioned that the statute's inclusion of punitive damages was new and unprecedented. *See* 154 Cong. Rec. 12 ("Contrary 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.").

III. Punitive Damages May Not Be Awarded Retroactively Under Petitioners' State-Law Claims

In a two-paragraph afterthought, Petitioners argue that the D.C. Circuit also erred in denying retroactive punitive damages to those Petitioners asserting claims under state law. Pet. Br. 55-56. The United States elaborates. U.S. Br. 27-33. These arguments suffer from a plethora of flaws.

A. The Question Presented Does Not Fairly Include the Retroactivity of Punitive Damages Under Petitioners' State-Law Claims

Petitioners' Question Presented on retroactivity was limited to punitive damages under the federal right of action, §1605A(c), and did not extend to punitive damages under state law. Pet. Br. i. The United States observed as much at the petition stage, and this Court did not accept the suggestion of the United States to expand the Question Presented to include punitive damages under state law. *See* U.S. Br. on Pet. 19 n.8 (requesting expansion of QP to include state-law issue); Miscellaneous Order at 5

(June 28, 2019) (granting petition limited to the second QP in the petition).

The United States now renews its invitation (U.S. Br. 28 n.7), and Petitioners join in, asserting that the federal- and state-law issues are "inextricably linked" (Pet. Br. 55 n.7). In fact, retroactivity under §1605A(c) and retroactivity under state or foreign law are separate and distinct issues affecting different sets of plaintiffs, as reflected in the D.C. Circuit's opinion (*see, e.g.*, Pet. App. 99a ("two different types of claims under various sources of law")) and in the briefing before this Court (*see, e.g.*, U.S. Br. 27-33 (presenting discrete argument on state-law issue)). *See Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (stressing the importance of abiding by the QP and declining to consider additional question where the questions were related but "exist side by side, neither encompassing the other"); Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

Petitioners and the United States assert that Sudan addressed retroactivity for state-law punitive damages in its Brief in Opposition to the Petition (Pet. Br. 55 n.7; U.S. Br. 28 n.7), but that brief shows that Sudan merely included two sentences reciting the D.C. Circuit's treatment of the issue. Sudan Opp'n to Cert. 24-25. Grasping at straws, the United States adds that *the district court* — not the D.C. Circuit — did not distinguish between the two issues in particular passages of its default judgments (U.S. Br. 28 n.7), and that the Petition's list of parties includes as Petitioners those relying on state law (*see*

Pet. App. 369a-375a (listing hundreds of petitioners indiscriminately without indicating that any are pursuing state-law claims)). These are wholly insubstantial reasons to expand the Question Presented to include another issue at this stage. Furthermore, entertaining the expanded Question Presented would without doubt "fairly include" antecedent questions involving whether the Petitioners asserting state-law claims have any cognizable claims at all.

B. Foreign-National Family-Member Petitioners Do Not Meet the Jurisdictional Requirements Within §1605A(a)'s Exception to Immunity or the Elements of §1605A(c)'s Exclusive Private Right of Action

The Petitioners asserting claims under state law are not persons physically injured or killed by the embassy bombings, but foreign-national family members asserting claims of emotional distress on their own behalf. Pet. App. 99a. These Petitioners — numbering in the hundreds and accounting for billions of dollars in damages — are almost entirely nationals and residents of Kenya and Tanzania who allege to be related to direct victims employed locally at one of the embassies. Pet. App. 250a, 268a, 295a, 316a. The claims of these Petitioners do not come within the exception to immunity under §1605A(a) or within the federal private right of action under §1605A(c).

1. Exception to immunity under §1605A(a). As already explained, §1605A(a)(1) provides an exception to immunity — and therefore subject-

matter jurisdiction — in a case in which money damages are sought for "personal injury or death" caused by one of four specified predicate acts (e.g., an act of "extrajudicial killing") or the "material support" for such an act. Section 1605A(a)(2)(A)(ii) provides that the court shall hear a claim if "the claimant or the victim" was a U.S. national or U.S. government employee at the time of the act. The most natural reading of these provisions is that the exception to immunity applies in a case brought by (i) a "victim" who was injured and had the requisite U.S. nationality or employment at the time of the act or (ii) a "claimant" acting on behalf of (i.e., as a legal representative) a person who was killed or incapacitated (i.e., a "victim") if either the claimant or the victim had the requisite U.S. nationality or employment at the time of the act.

Permitting suit by a "claimant" is necessary because, in the case of a killing or incapacitation, the "victim" will not be the one asserting the claim. (The eligibility of a qualifying claimant to invoke jurisdiction even when the "victim" did not have the qualifying U.S. nexus allows, for example, a U.S.-national surviving spouse to invoke jurisdiction to assert claims on behalf of a foreign-national decedent.)

The legislative history supports this natural reading of §1605A(a). An early version of §1605A's predecessor, §1605(a)(7), introduced the term "claimant," and the House Report explained: "[W]here the victim is not alive to bring suit, the victims's [sic] legal representative or another person

who is a proper claimant in an action for wrongful death may bring suit." H.R. Rep. No. 103-702, at 5 (1994); *see also* H.R. Rep. No. 104-383, at 62 (1995) ("It is expected that a lawsuit proceeding under [§1605(a)(7)] will be brought either by the victim, or on behalf of the victim's estate in the case of death or mental incapacity."). The legislative history of the 1997 technical amendment to this part of §1605(a)(7) confirms this reading as well, explaining that the change was made to allow individuals to bring a claim under §1605(a)(7) "if either the victim of the act or the survivor who brings the claim is an American national." H.R. Rep. No. 105-48, at 2 (1997).

The use of the term "claimant" in §1605A (and its predecessor §1605(a)(7)) finds a parallel in the TVPA. For subjecting an individual to "torture," §2(a)(1) provides a claim to the individual. For subjecting an individual to an "extrajudicial killing," §2(a)(2) provides a claim to "the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." This parallel is instructive because Congress considered the TVPA in drafting §1605(a)(7). *See The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 7 (1994) ("H.R. 934 is modeled after the Torture Victim Protection Act (TVPA), which was signed into law last Congress."). Indeed, Congress expressly incorporated the TVPA's definitions of "torture" and "extrajudicial killing" in §1605(e) in 1996 and then in §1605A(h)(7) in 2008.

The claims of the foreign-national family-member Petitioners do not come within §1605A(a)'s exception to immunity because those Petitioners were neither U.S. nationals nor employees of the U.S. government at the time of the embassy bombings. This conclusion holds whether those Petitioners are considered "claimants" or "victims," for in either case the U.S. nexus is required. That these Petitioners are related to U.S.-employee victims is irrelevant because these Petitioners are suing for their own injuries and not for the injuries to their relatives.

2. Exclusive private right of action under §1605A(c). Before §1605A's enactment, courts applying §1605(a)(7)'s terrorism exception to immunity invoked substantive law through §1606 of the FSIA. Section 1606, entitled "Extent of Liability," provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; . . . .

28 U.S.C. §1606 (omitting special provision for certain wrongful death claims). From the original enactment of the FSIA, courts have applied §1606 as a gateway or pass-through to substantive sources of law (i.e., state or foreign law) upon which claims against a

foreign state may be based where the foreign state does not have immunity under §1605 or §1607. *See, e.g.*, *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003) (looking to state law through §1606).

As the D.C. Circuit recognized in this case, however, the "pass-through approach" led to difficulties in cases under §1605(a)(7) due to the multiple choice-of-law analyses and "[d]ifferences in substantive law among the states [that] caused recoveries to vary among otherwise similarly situated claimants, denying some any recovery whatsoever." Pet. App. 8a (citing *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44-45 (D.D.C. 2007) (denying recovery for intentional infliction of emotional distress to plaintiffs domiciled in Pennsylvania and Louisiana while permitting recovery for plaintiffs from other states)). Accordingly, in 2008, Congress created a private right of action in §1605A(c) and, as the D.C. Circuit acknowledged, "provided a uniform source of federal law through which plaintiffs could seek recovery against a foreign sovereign." Pet. App. 9a.

Congress's stated intent in enacting §1605A(c) was to create an express cause of action for plaintiffs with claims arising under §1605A, and to eliminate the "pass-through approach [that] created a patch-work of inconsistent recovery for victims of terrorism and their families." *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 567-69 (7th Cir. 2012) (quoting floor statements). Indeed, the D.C. Circuit here readily acknowledged this intent. Pet. App. 128a ("[I]n

creating a federal cause of action, the Congress sought to end the inconsistencies in the 'patchwork' pass-through approach . . . ." (citations omitted)). Consistent with this intent, Congress did not make conforming amendments to §1606 to have it apply to §1605A. *See* 28 U.S.C. §1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under *section 1605 or 1607* of this chapter . . . .") (emphasis added). As already shown, Congress did make extensive conforming amendments to other FSIA provisions to account for §1605A. *See, e.g.*, 2008 NDAA, §1083(b) (conforming amendments to §§1607, 1610). Indeed, the D.C. Circuit agreed with Sudan that §1606 "references only § 1605 and § 1607, [and] does not apply to the current FSIA terrorism exception." Pet. App. 106a-107a; *see also* Pet. App. 128a ("[Section] 1606, by its terms, applies only to claims brought under §1605 and §1607 of the FSIA.").

Thus, the enactment of §1605A created a federal private right of action and terminated the access to §1606's gateway to state law. This creation of an *exclusive* federal private right of action is consistent with the purpose of eliminating inconsistent results arising from the patchwork of state law.

Understandably, the private right of action under §1605A(c) is coextensive with the exception to immunity under §1605A(a). It would not make sense for §1605A(a)'s exception to immunity to be broader, because, with the inapplicability of §1606, the broadening would be unused. It would not make sense for §1605A(c)'s private right of action to be

broader because the right of action would be useless to the extent it exceeded the scope of the exception to immunity. Thus, the symmetry between §1605A(a) and §1605A(c) is sensible and consistent with the text, purpose, and overall structure of §1605A. *See Rubin*, 138 S. Ct. at 825 (interpreting §1610(g) of FSIA "consistent with the history and structure of the FSIA"); *Samantar*, 560 U.S. at 325 (reviewing the "text, purpose, and history of the FSIA").

3. The D.C. Circuit's erroneous interpretation. Notwithstanding the text of §1605A(a) and §1605A(c), the inapplicability of §1606, and the recognized Congressional intent to eliminate the patchwork of state law, the D.C. Circuit permitted the foreign-national family-member Petitioners to maintain their state-law claims against Sudan. In this respect, the D.C. Circuit's reasoning is erroneous.

The D.C. Circuit read the term "claimant" in §1605A(a)(2)(A)(ii) as "different from and broader than" the term "legal representative" in §1605A(c), and on that basis concluded that the exception to immunity is broader than the federal private right of action. Pet. App. 101a. As shown above, the term "claimant" appears to have been intended to be synonymous with "legal representative" (perhaps describing the same person after he or she has brought a claim). There is little reason to suppose that §1605A(a) should be read to provide an exception to immunity — and therefore the ability to hale a foreign state into court — to merely "someone who brings a claim," as the D.C. Circuit suggests. Pet. App. 101a. But, even if the D.C. Circuit were correct

that "claimant" is broader than "legal representative," the "claimants" at issue here — all foreign-national family-members asserting emotional-distress claims on their own behalves — cannot satisfy the U.S. nexus requirements of §1605A(a)(2)(A)(ii). This forecloses them from accessing this exception to immunity.

The D.C. Circuit also found that §1605A(c) is not an exclusive cause of action and that plaintiffs may still resort to state causes of action, notwithstanding the inapplicability of §1606 to §1605A. Pet. App. 105a-110a. The court speculated that §1606 was made inapplicable to §1605A simply to avoid a conflict as to whether punitive damages are available. Pet. App. 109a. But Congress could easily have resolved that conflict without completely withdrawing §1606's applicability. The D.C. Circuit expressly recognized that §1606 is the provision that "requires [a court] to apply state law to suits under the FSIA." Pet. App. 109a. The withdrawal of that requirement, while simultaneously enacting a federal private right of action, inescapably signals that the federal claim is exclusive. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("As we have said in a different setting, '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" (quoting *Alexander v. Sandoval*, 552 U.S. 275, 290 (2001))); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or

remedies, courts should not expand the coverage of the statute to subsume other remedies.").

This conclusion is reinforced by the indisputable fact — recognized elsewhere in the D.C. Circuit's opinion (Pet. App. 8a-9a, 128a) — that a primary purpose of the 2008 legislation was to eliminate the patchwork of state law in the context of the terrorism exception. *See, e.g.*, 153 Cong. Rec. 34,436 (Dec. 14, 2007) (statement of Sen. Frank R. Lautenberg) (explaining that "judges [had] been prevented from applying a uniform damages standard to all victims in a single case because a victim's right to pursue an action against a foreign government depends upon state law" and §1605A(c) was intended to "fix[] this problem"). Under the D.C. Circuit's view, §1606's gateway to state law was superfluous, as courts could invoke state law even without statutory authorization.

C. Foreign-National Family-Member Petitioners Asserting State-Law Claims May Not Recover Punitive Damages for Preenactment Conduct

Even if the Question Presented were expanded and even if the foreign-national family-member Petitioners had cognizable state-law claims against Sudan, retroactive imposition of state-law punitive damages would be foreclosed by *Landgraf*'s presumption. As the D.C. Circuit correctly held (Pet. App. 129a), the placement of new §1605A outside of §1605, and therefore outside of §1606's prohibition on punitive damages, would have operated to impose punitive damages retroactively, but was

unaccompanied by a clear statement of congressional intent.

Seeking to shoehorn the 2008 amendments into *Altmann*, Petitioners attempt to cast §1606 as providing "immunity from punitive damages," as though it is a jurisdictional provision. Pet. Br. 55. But §1606, by its terms, does not provide immunity, but instead provides certain substantive rules applicable to "[a]ny claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter." One of those rules is the prohibition on punitive damages. When the 2008 NDAA moved the terrorism exception from §1605 to §1605A, the effect was a lifting of the prohibition on punitive damages. That lifting surely constitutes a "retroactive effect" under *Landgraf*, for it "increase[s] a party's liability for past conduct." 511 U.S. at 280.

Petitioners' effort to characterize the retroactive imposition of punitive damages as one of "immunity" or "jurisdiction" is particularly cynical here. In their Petition, Petitioners sought review of the D.C. Circuit's decision to entertain what they consistently called the "nonjurisdictional" issue of the retroactive application of punitive damages. Pet. i, 14-21.

Section 1605A(a), of course, *does* address foreign sovereign immunity, so it applies retroactively under *Altmann*. Pet. Br. 55-56; U.S. Br. 29-30. But the enactment of §1605A(a) is not what authorizes punitive damages. Instead, the removal of the terrorism exception from §1606's prohibition is what authorizes punitive damages. The D.C. Circuit aptly

coined this "the implicit, backdoor lifting of the prohibition against punitive damages in §1606." Pet. App. 129a. Unlike the expropriation exception at issue in *Altmann* — a provision that affected foreign sovereign immunity but not substantive rights — the abrogation of §1606's protection from punitive damages affected substantive rights.

The United States asserts that the D.C. Circuit "assumed" that *Landgraf*, rather than *Altmann*, applied to the retroactivity question under state law. U.S. Br. 27. But the D.C. Circuit had just finished its discussion of the retroactivity of punitive damages under §1605A(c), and had distinguished *Altmann* there. Pet. App. 122a-125a. Then, when discussing the retroactivity of punitive damages under state-law claims, the D.C. Circuit concluded that retroactivity "fails for the same reason it does under the federal cause of action." Pet. App. 129a. And the court reiterated the "obvious" point (Pet. App. 122a) that imposing punitive damages for preenactment conduct under state law would have retroactive effect. Pet. App. 128a-129a.

The United States asks this Court to view §1605A(a) solely as a new sovereign-immunity provision, serving as a gateway for state- and federal-law claims, with whatever remedies they provide. U.S. Br. 30. But §1605A(a) was essentially a re-enactment of §1605(a)(7), in a different section, outside of §1605 and thus outside the scope of §1606. The practical effect was an authorization of punitive damages. Such an increase in potential liability is

substantive and squarely within *Landgraf*'s presumption.

The United States ignores reality when it asserts that an authorization of punitive damages under state and foreign law "neither create[s] nor modif[ies] any cause of action." U.S. Br. 31. By making punitive damages available where they were previously barred, the 2008 amendments most definitely modified causes of action.

Finally, the United States can find no support in Justice Scalia's concurrence in *Altmann*. U.S. Br. 30, 31-32. Justice Scalia observed that the exception to immunity at issue in *Altmann* was fundamentally jurisdictional even if it allowed claims that "no foreign court would entertain." 541 U.S. at 703-04 (Scalia, J., concurring). Here, in contrast, the 2008 amendment repositioned a preexisting exception to authorize punitive damages; far from having an "accidental effect" on substantive rights, the amendment quite purposefully modified substantive rights to increase the exposure of foreign states (and to deter "primary conduct"). *Id.*

CONCLUSION

For the foregoing reasons, this Court should vacate the default judgments in these cases in their entirety for lack of subject-matter jurisdiction. At a minimum, the Court should affirm the D.C. Circuit's vacatur of punitive damages.

Respectfully submitted,

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November 22, 2019

ADDENDUM

ADDENDUM OF ADDITIONAL STATUTES AND LAWS INVOLVED IN THE CASE

TABLE OF CONTENTS

28 U.S.C. § 1350 note. Torture Victim Protection Act of 1991

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Torture Victim Protection Act of 1991'.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are

recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the

administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Public Law 102-256, 106 STAT. 73 (1992)

Public Law 102-256
102d Congress

An Act

Mar. 12, 1992
[H.R. 2092]

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

Torture Victim Protection Act of 1991.

28 USC 1350 note.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

28 USC 1350 note.

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(b) EXHAUSTION OF REMEDIES.–A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

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(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

LEGISLATIVE HISTORY—H.R. 2092 (S. 313):

HOUSE REPORTS: No. 102-367, Pt. 1 (Comm. on the Judiciary).
SENATE REPORTS: No. 102-249 accompanying S. 313 (Comm. on the Judiciary).
CONGRESSIONAL RECORD:
Vol. 137 (1991): Nov. 25, considered and passed House.
Vol. 138 (1992): Mar. 3, considered and passed Senate.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 28 (1992):
Mar. 12, Presidential statement.