No. 17-1268

In the Supreme Court of the United States

MONICAH OKOBA OPATI, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE ESTATE OF CAROLINE SETLA OPATI, DECEASED, ET AL., PETITIONERS

v.

REPUBLIC OF SUDAN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions, subject to limited exceptions. The "[t]errorism exception" provides that a foreign state that has been designated a state sponsor of terrorism is not immune from jurisdiction in certain suits for damages arising out of personal injury or death "caused by an act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act" by a foreign state official, employee, or agent acting within the scope of his office, employment, or agency. 28 U.S.C. 1605A(a)(1) (emphasis omitted).

In 2008, Congress amended the FSIA to authorize certain plaintiffs to pursue a federal cause of action "for personal injury or death caused by" extrajudicial killing and to recover "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c); see National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Congress also provided that certain existing claims "shall * * * be given effect as if the action had originally been filed under section 1605A(c)," NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note), and that new claims "arising out of the same act or incident" as existing claims "may be brought under section 1605A," NDAA § 1083(c)(3), 122 Stat. 343 (28 U.S.C. 1605A note). The questions presented are:

1. Whether the court of appeals abused its discretion in considering, on respondents' appeal from the en-

try of a default judgment, the non-jurisdictional argument that punitive damages under 28 U.S.C. 1605A are not available against foreign state sponsors of terrorism for activities occurring prior to the passage of the current version of the statute.

2. Whether 28 U.S.C. 1605A permits recovery of punitive damages from foreign state sponsors of terrorism for activities occurring prior to the passage of the current version of the statute.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the second question presented.

STATEMENT

1. a. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions unless an exception to immunity applies. 28 U.S.C. 1604. This case concerns the "[t]errorism exception," which withdraws foreign sovereign immunity and establishes jurisdiction in U.S. courts for certain damages claims "for personal injury or death that was

caused by an act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act," if the "provision of material support or resources is engaged in by an official, employee, or agent" of the defendant foreign state "while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1) (emphasis omitted). The FSIA permits claims under the terrorism exception only if, among other criteria, the Secretary of State has formally designated the defendant foreign state a "state sponsor of terrorism." 28 U.S.C. 1605A(a)(2)(i).

b. Congress originally enacted the terrorism exception in 1996, in response to attacks perpetrated by state sponsors of terrorism or terrorist organizations affiliated with or materially supported by such foreign states. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241-1243; see, *e.g.*, H.R. Rep. No. 383, 104th Cong., 1st Sess. 41 (1995) (citing, among other "examples of terrorism[]," "the bombing of the U.S. Embassy in Beirut," "the hostage takings of Americans in the Middle East," and "the murder of American tourist Leon Klinghoffer" by the Palestine Liberation Front). In 2004, the Court of Appeals for the District of Columbia Circuit held that the terrorism exception—which was then codified at 28 U.S.C. 1605(a)(7) (2000)—did not provide a federal cause of action against a foreign state, but "merely waive[d] the [jurisdictional] immunity of a foreign state" in lawsuits seeking to recover damages under other sources of law for the enumerated acts of terrorism. *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (2004).[1]

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[1] The court of appeals acknowledged that the Flatow Amendment, 28 U.S.C. 1605 note, "undoubtedly does provide a cause of action

Congress responded in 2008, amending the FSIA to create a substantive federal cause of action for the same predicate acts as were included in the original terrorism exception to immunity. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338; see 154 Cong. Rec. 500 (2008) (Sen. Lautenberg) (amendment "fixes th[e] problem" of *Cicippio-Puleo* "by reaffirming the private right of action * * * against the foreign state sponsors of terrorism themselves" for "the horrific acts of terrorist murder and injury committed or supported by them"). The cause of action, codified at 28 U.S.C. 1605A(c), imposes liability on a foreign state sponsor of terrorism for certain claims by U.S. nationals, service-members, employees, or contractors, as well as their "legal representative[s]."

c. The FSIA generally prohibits plaintiffs from recovering punitive damages from foreign states. Section 1606, which was not amended in 2008, 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.

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against '[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism' 'for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7).'" *Cicippio-Puleo*, 353 F.3d at 1032 (quoting 28 U.S.C. 1605 note) (brackets in original). The FSIA's cause of action against foreign state employees, officials, and agents is not at issue here.

The 2008 amendments altered the application of that general rule to foreign state sponsors of terrorism in two ways. First, the cause of action in Section 1605A(c) expressly authorizes plaintiffs to recover "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c). Second, while the 2008 amendments retained the former exception to sovereign immunity in substantially similar form, Congress moved that exception from Section 1605(a)(7), where it fell within the plain text of Section 1606's prohibition on punitive-damages liability, to Section 1605A(a), where it does not.

d. The 2008 amendments also addressed two classes of actions seeking relief for prior events. First, in a provision entitled "[p]rior actions," Congress provided that "any action" that (1) had been "brought under section 1605(a)(7)"; (2) "ha[d] been adversely affected on the ground[] that" the prior law "fail[ed] to create a cause of action against" a foreign state sponsor of terrorism; and (3) remained pending "before the courts in any form," should be treated "as if the action had originally been filed under section 1605A(c) of title 28." NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note) (capitalization altered). Second, in a provision entitled "[r]elated actions," Congress provided that any action "arising out of the same act or incident" as a timely filed existing claim, "may be brought under section 1605A of title 28" within certain periods of time. NDAA § 1083(c)(3), 122 Stat. 343 (28 U.S.C. 1605A note) (capitalization altered).

2. In 1993, the Secretary of State designated respondent Republic of Sudan a state sponsor of terrorism based on the Secretary's assessment that Sudan

"has repeatedly provided support for acts of international terrorism." 58 Fed. Reg. 52,523 (Oct. 8, 1993). Sudan remains so designated today, along with Iran, North Korea, and Syria. U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm.

On August 7, 1998, members of al Qaeda detonated truck bombs at the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. Pet. App. 5a.[2] The attacks killed more than 200 people and injured more than 1000 others, including U.S. nationals and foreign-national U.S. government employees and contractors. *Ibid.*

3. a. In October 2001, a group of U.S.-national plaintiffs (the *Owens* plaintiffs) sued respondents under the then-existing terrorism exception, 28 U.S.C. 1605(a)(7) (2000). The complaint alleged that respondents caused the embassy bombings by providing material support to al Qaeda, including "shelter and protection from interference," while the group was "carrying out planning and training" for the attacks. Third Am. Compl. ¶ 8, *Owens* v. *Republic of Sudan*, 412 F. Supp. 2d 99 (D.D.C. 2006), aff'd and remanded, 531 F.3d 884 (D.C. Cir. 2008); see generally *id.* ¶¶ 8-11. The *Owens* plaintiffs relied on substantive causes of action arising under state law. *Id.* ¶¶ 12-68.

As relevant here, respondents moved to dismiss, the district court denied the motion, and the court of appeals affirmed. Pet. App. 151a-178a; see *id.* at 13a-16a.

b. Before the court of appeals issued its decision, Congress enacted the 2008 amendments to the FSIA,

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[2] Unless otherwise noted, all references to the "Pet. App." are to the appendix to the petition for a writ of certiorari in *Sudan* v. *Owens*, No. 17-1236.

replacing the former terrorism exception to immunity in 28 U.S.C. 1605(a)(7) (2000) with the current, materially similar exception in Section 1605A(a), and creating the substantive cause of action in Section 1605A(c). Following the court's decision, the *Owens* plaintiffs amended their complaint to assert jurisdiction under the new immunity exception, as well as substantive claims under the new federal cause of action. See NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note) (permitting plaintiffs to convert existing claims under former Section 1605(a)(7) to claims under new Section 1605A(c)). The *Owens* plaintiffs did not seek punitive damages. Pet. App. 420a n.9.

By this time, respondents' prior counsel had withdrawn and respondents had ceased participating in the litigation. See Pet. App. 16a.

c. Additional plaintiffs subsequently filed or amended similar complaints or moved to intervene in *Owens*. See Pet. App. 15a-16a, 91a. Petitioners here (in No. 17-1268) —the *Opati*, *Wamai*, *Amduso*, and *Onsongo* plaintiffs —relied on the related-action provision, NDAA § 1083(c)(3), 122 Stat. 343 (28 U.S.C. 1605A note), and sought relief including punitive damages. See Pet. App. 91a-92a, 330a, 388a, 419a. The vast majority of petitioners here are foreign-national employees and contractors of the U.S. government who were victims of the attacks, as well as their foreign-national family members. *Id.* at 316a, 343a, 377a, 399a. The foreign-national family members are ineligible to invoke the federal cause of action, see 28 U.S.C. 1605A(c); they therefore asserted jurisdiction under Section 1605A(a) and alleged emotional-distress claims under state and foreign law. See Pet. App. 100a, 231a.

4. Following a consolidated evidentiary hearing in which respondents did not participate, the district court entered default judgments for all plaintiffs. Pet. App. 179a-240a. The court ultimately awarded a total of approximately $10.2 billion in damages, including approximately $4.3 billion in punitive damages. *Id.* at 17a-18a; see *id.* at 245a-455a.[3]

b. Respondents reappeared, appealed, and sought an indicative ruling on motions for vacatur under Federal Rule of Civil Procedure 60(b). See Fed. R. Civ. P. 62.1. The court of appeals held the appeals in abeyance pending the district court's resolution of the motions to vacate. Pet. App. 460a.

The district court denied the motions. Pet. App. 456a-556a. As relevant here, the court declined to vacate the punitive damages awards as impermissibly retroactive. While the court expressed "significant doubt about whether any of the punitive damages awards in these cases involving conduct predating the 2008 [statutory changes] were proper," the court observed that respondents had "provided no authority suggesting that such error alone is a proper basis for vacating the judgments." *Id.* at 555a; see *id.* at 548a-556a.

5. As relevant here, the court of appeals affirmed the district court's judgment as to respondents' liability, but vacated the punitive damages awards on the

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[3] Although the district court recognized that foreign-national family members of victims may proceed only under state law, Pet. App. 227a-239a, it awarded punitive damages "under section 1605A(c)," *id.* at 227a, without differentiating between those individuals and plaintiffs eligible to invoke the federal cause of action, or considering the availability of punitive damages under state law. See *id.* at 330a-333a, 361a-366a, 388a-391a, 419a-421a. Respondents have not challenged that aspect of the court's decision.

ground that Section 1605A does not authorize punitive damages for pre-enactment conduct. Pet. App. 1a-147a.

a. The court of appeals determined that "sound reasons" existed to "exercise [its] discretion" to reach the merits of the non-jurisdictional punitive-damages issue. Pet. App. 118a. The court noted, *inter alia*, the "criminal" nature of punitive damages; the size of the awards; the fact that the "novel" issue presents a "pure question of law"; the "potential effect on U.S. diplomacy and foreign relations"; the strength of Sudan's arguments; and the likelihood that the question would recur within the circuit. *Id.* at 118a-122a &n.8.

b. The court of appeals determined that punitive damages are not available against a foreign state sponsor of terrorism for activities predating the 2008 amendments to the terrorism exception. Applying the "presumption against retroactive legislation" in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994), the court found it "obvious that the imposition of punitive damages under the new federal cause of action in § 1605A(c) operates retroactively because it increases Sudan's liability for past conduct." Pet. App. 122a-123a. The court distinguished *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), which held that certain provisions of the FSIA apply to pre-enactment conduct notwithstanding the absence of a clear statement in the statute. The court explained that *Altmann* addressed jurisdictional provisions, whereas this case concerns punitive damages, which "adhere[] to the cause of action" and are "essentially substantive." Pet. App. 124a (quoting *Altmann*, 541 U.S. at 695 n.15).

The court of appeals determined that "by allowing a plaintiff to convert an action brought under [the prior] § 1605(a)(7)" into one under Section 1605A(c), the 2008

amendments "clearly authorize[] the federal cause of action to apply" to the pre-enactment conduct. Pet. App. 127a-128a. But the court concluded that the statute lacks "a clear statement" authorizing plaintiffs proceeding under the federal cause of action to recover punitive damages for activities occurring before 2008. *Id.* at 126a-129a. The court stated that "nothing in the text of § 1605A(c) speaks to whether punitive damages are available under the federal cause of action for pre-enactment conduct." *Id.* at 127a. And the court determined that the prior- and related-action provisions did not constitute "a clear statement" that Congress intended punitive damages to be retroactively available against foreign state sponsors of terrorism. *Id.* at 128a.

The court of appeals further held that punitive damages for pre-enactment conduct are not available to plaintiffs bringing state-law claims in reliance on Section 1605A(a)'s exception to foreign sovereign immunity. Pet. App. 129a-130a. The court acknowledged that Section 1606's prohibition on punitive damages "by its terms" applies only to claims under Section 1605 and Section 1607. *Id.* at 129a. But the court determined that Congress's placement of the new terrorism exception to immunity in Section 1605A did not constitute a clear statement of intent to allow state-law plaintiffs to recover punitive damages for pre-2008 conduct. *Id.* at 129a-130a. The court then concluded that "[i]f the express authorization of punitive damages under § 1605A(c) lacks a clear statement of retroactive effect" sufficient to satisfy *Landgraf*, "then the implicit, backdoor lifting of the prohibition against punitive damages in § 1606 for state law claims fares no better." *Id.* at 130a.

DISCUSSION

Petitioners contend (Pet. 14-21) that the court of appeals abused its discretion in considering, following the entry of a default judgment, the non-jurisdictional question whether punitive damages are available under 28 U.S.C. 1605A for actions occurring prior to the enactment of that provision. The court of appeals' decision on that point does not conflict with any decision of this Court or another court of appeals, and its fact-bound analysis does not warrant this Court's review.

This Court's review is warranted, however, on the second question presented. The court of appeals erred in concluding that the current version of the terrorism exception, 28 U.S.C. 1605A, does not permit recovery of punitive damages from foreign state sponsors of terrorism for events occurring prior to the enactment of that provision. The question is important. It affects, in these cases alone, billions of dollars in punitive damages judgments awarded to approximately 150 U.S. government employees and contractors who were murdered or injured in the line of duty because of their service to the United States, as well as hundreds of their family members.

I. THE COURT OF APPEALS' DISCRETIONARY DECISION TO EVALUATE THE MERITS OF A NON-JURISDICTIONAL ARGUMENT DOES NOT WARRANT REVIEW

Citing several considerations, the court of appeals exercised its discretion to decide the non-jurisdictional question whether plaintiffs may recover punitive damages in a suit brought pursuant to Section 1605A for actions occurring before the enactment of the current version of the terrorism exception. See Pet. App. 118a-122a & n.8. Contrary to petitioners' suggestion (Pet. 14-18), the court's fact-bound exercise of its discretion does

not conflict with any decision of this Court or of another court of appeals.

A. Petitioners contend (Pet. 14-16) that the decision below conflicts with *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). There, this Court held that "excusable neglect" justifying a late filing under the Bankruptcy Code is not limited to intervening circumstances beyond the party's control. *Id.* at 388-392. In support of that determination, the Court contrasted Fed. R. Civ. P. 60(b)(1), which permits a court to reopen a judgment within one year based on a party's "excusable neglect," with Fed. R. Civ. P. 60(b)(6), which the Court stated requires "a party [to] show 'extraordinary circumstances' suggesting that [it was] faultless in the delay," *Pioneer*, 507 U.S. at 393.

The decision below does not conflict with that statement. The court of appeals considered *both* respondents' direct appeal from the default judgment and their appeal from the denial of Rule 60(b) motions, see Pet. App. 118a-122a; *Pioneer* addresses only the latter. Nor does *Pioneer* foreclose courts from granting relief under Rule 60(b)(6) for reasons independent of the defendant's conduct. As this Court has explained before and after *Pioneer*, "other reason[s]" may justify review even where a defendant has acted neglectfully. *Klapprott* v. *United States*, 335 U.S. 601, 613-615 (1949) (opinion of Black, J.); see *Gonzalez* v. *Crosby*, 545 U.S. 524, 537 (2005) (considering as one factor in the "extraordinary circumstances" analysis the petitioner's "lack of diligence in pursuing review").

B. The decision below also does not conflict with decisions of other courts of appeals. See Pet. 18-21. The

decisions petitioners cite either did not involve considerations in addition to the defendant's conduct or the presence of legal error, see *Amado* v. *Microsoft Corp.*, 517 F.3d 1353, 1363 (Fed. Cir. 2008); *Venegas-Hernandez* v. *Sonolux Records*, 370 F.3d 183, 187-188 (1st Cir. 2004); *Martinez-McBeam* v. *Government of the Virgin Islands*, 562 F.2d 908, 911-913 (3d Cir. 1977), or did not address an argument raised both on direct appeal and in a motion under Rule 60(b)(6), see *Robb Evans & Assocs., LLC* v. *United States*, 850 F.3d 24, 36-37 (1st Cir. 2017); *Richison* v. *Ernest Grp., Inc.*, 634 F.3d 1123, 1128-1129 (10th Cir. 2011); *Meadows* v. *Dominican Republic*, 817 F.2d 517, 521 (9th Cir.), cert. denied, 484 U.S. 976 (1987).[4]

C. Petitioners further contend (Pet. 17, 19-21) that the court of appeals inappropriately gave respondents preferential treatment that non-sovereign litigants do not enjoy. But the court rested its decision on all of the factors described above, not simply Sudan's sovereign status. There is thus no conflict with this Court's observation in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 140 (2014), that the FSIA does not "specif[y] a different rule" for post-judgment discovery "when the judgment debtor is a foreign state." Nor does the court of appeals' reasoning allow a foreign state "to intentionally disregard court proceedings in bad faith and still obtain review of forfeited nonjurisdictional issues," as petitioners suggest. Pet. 17. The

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[4] For the reasons stated in *Ungar* v. *Palestine Liberation Organization*, 599 F.3d 79, 85-86 (2010), the First Circuit has not applied Rule 60(b)(6) inconsistently. But see Pet. 18. In any event, any intra-circuit disagreement would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

court exercised its discretion *not* to address whether petitioners had provided adequate admissible evidence to show respondents' liability on the merits, Pet. App. 55a, see *id.* at 60a, and refused to consider respondents' argument that Section 1605A(b)'s limitations period barred some plaintiffs' claims. *Id.* at 92a-93a, 100a. Given all of the circumstances, the court's discretionary decision to consider the availability of retroactive punitive damages does not warrant review.

II. THE COURT OF APPEALS' ERRONEOUS VACATUR OF THE PUNITIVE DAMAGES AWARDS WARRANTS THIS COURT'S REVIEW

Prior to 2008, the FSIA neither provided a federal cause of action against foreign state sponsors of terrorism, nor permitted plaintiffs to recover punitive damages against such defendants. See pp. 2-3, *supra*. The 2008 NDAA altered the statute in both respects. First, it created a federal cause of action that permits specified plaintiffs to recover "damages" that "may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c). Second, the 2008 amendments—while generally maintaining the bar to liability for punitive damages in Section 1606—transferred the terrorism exception to immunity to Section 1605A, without amending Section 1606 to make punitive damages unavailable in actions under Section 1605A.

The court of appeals did not question that in light of those changes, plaintiffs suing under Section 1605A for post-enactment conduct may recover punitive damages, regardless of whether they rely on the federal cause of action in Section 1605A(c), or the exception to immunity in Section 1605A(a) and a state-law cause of action. See Pet. App. 109a-111a. Applying the "presumption against

retroactive legislation" articulated in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994), the court also recognized that the 2008 amendments "plainly appl[y] the new cause of action in § 1605A(c) to the pre-enactment conduct of a foreign sovereign." Pet. App. 123a.

At the same time, however, the court of appeals concluded that the FSIA does *not* authorize plaintiffs suing a foreign sovereign under Section 1605A(a) for pre-2008 conduct to recover punitive damages. Pet. App. 122a-130a. That holding was in error. Although the *Landgraf* presumption applies to the question whether punitive damages are available under the federal cause of action for pre-2008 conduct, the statute clearly demonstrates congressional intent to permit recovery of such damages. The court of appeals also erred in holding that punitive damages are unavailable on the state-law claims. Because the court erroneously decided an important question of federal law, this Court's review is warranted.

A. The court of appeals erred in determining that punitive damages are not available to plaintiffs suing under the federal cause of action, 28 U.S.C. 1605A(c), for pre-2008 conduct.

1. The court of appeals correctly recognized that the *Landgraf* presumption applies to the federal cause of action. Pet. App. 123a-126a. The creation of a new cause of action is the paradigmatic circumstance implicating the presumption against retroactivity. See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 695 n.15 (2004) (Where a statute "create[s] or modif[ies] a[] cause[] of action," it is properly viewed as "substantive" and subject to *Landgraf*.); *Landgraf*, 511 U.S. at 283 (Where a statute "can be seen as creating a new cause of action, * * * its impact on parties' rights is especially

pronounced."); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (presumption applied to provision that "change[d] the substance of the existing cause of action").

Petitioners contend (Pet. 21-29), that the court of appeals should have applied this Court's decision in *Altmann*, *supra*, on the theory that *Altmann* deemed the *Landgraf* presumption categorically inapplicable to the FSIA. To be sure, *Altmann* held that the *Landgraf* presumption did not apply in the "*sui generis*" context of provisions withdrawing foreign sovereign immunity. 541 U.S. at 696. But *Altmann* had no occasion to consider a provision creating a substantive cause of action against a foreign state, because at the time that case was decided, the FSIA included no such provision. See *id.* at 695 n.15.[5] *Altmann* accordingly addressed only provisions that "merely open[ed] United States courts to plaintiffs with pre-existing claims against foreign states," without "'increas[ing those states'] liability for past conduct.'" *Id.* at 695. See *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 864-865 (2009) (distinguishing "[l]aws that merely alter the rules of foreign sovereign immunity" from those that "modify substantive rights," to which the "presumption against retroactivity" applies).[6]

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[5] It is therefore not determinative that *Altmann* rejected the United States' suggestion that the retroactivity analysis should proceed on a provision-by-provision basis. See Pet. 23-24.

[6] Petitioners suggest (Pet. 22 n.9) that the decision below conflicts with *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (2016), cert. denied, 138 S. Ct. 1260 (2018), in which the Ninth Circuit stated that "when it comes to [foreign] sovereign immunity * * * , there is a presumption in *favor* of retroactivity 'absent contraindications' from Congress." *Id.* at 963 (quoting *Altmann*, 541 U.S. at 696). Because *Bennett* primarily determined that the provisions at issue there

2. a. The court of appeals erred, however, in concluding that Section 1605A(c) does not clearly authorize punitive damages for pre-2008 conduct. As the court recognized, and respondents do not dispute, the text of Section 1605A(c) and the accompanying note provide a clear statement that the 2008 amendments allow plaintiffs to invoke that express federal cause of action and recover "economic damages, solatium, [and] pain and suffering," 28 U.S.C. 1605A(c), for conduct predating the enactment of Section 1605A. Pet. App. 123a. In particular, the 2008 amendments provide that (1) qualifying "prior actions" should be "given effect as if [they] had originally been filed under section 1605A(c)," and (2) plaintiffs may file new actions "under section 1605A" that are "related" to "timely commenced" actions under Section 1605(a)(7). NDAA § 1083(c)(2) and (3), 122 Stat. 342-343 (28 U.S.C. 1605A note) (capitalization altered); see NDAA § 1083(c)(1), 122 Stat. 342 (28 U.S.C. 1605A note) ("The amendments made by this section shall apply to any claim arising under section 1605A of title 28."). As the court acknowledged, the actions permitted by these provisions "necessarily are based upon the sovereign defendant's conduct before enactment of § 1605A." Pet. App. 123a.

Those same statutory provisions demonstrate that punitive damages are available under Section 1605A(c) for pre-enactment conduct. The cause of action does not distinguish between punitive damages and other forms of relief. See 28 U.S.C. 1605A(c) (providing that "damages" under the federal cause of action "may include economic damages, solatium, pain and suffering, and punitive damages"). Nor do the prior- and related-

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"d[id] not impose new liability," but "simply permit[ted] additional methods of collection," *ibid.*, no square disagreement exists.

action provisions, which provide, without qualification, for such actions to be treated as actions "under section 1605A." NDAA § 1083(c)(1)-(3), 122 Stat. 342-343 (28 U.S.C. 1605A note).

The court of appeals' contrary determination rests on its view that "*Landgraf* demands" that Section 1605A(c) contain an additional, punitive-damages-specific clear statement. Pet. App. 128a. But *Landgraf* does not impose such a requirement. There, this Court considered whether Section 102 of the Civil Rights Act of 1991 (Civil Rights Act), 42 U.S.C. 1981a(a)—which permits recovery of "compensatory and punitive damages"—applied to cases arising before the provision's enactment. 511 U.S. at 248. Although the Court acknowledged particular concerns associated with punitive damages, *id.* at 281, it did not establish a higher standard for evaluating Congress's intent with respect to their retroactive application. Instead, the Court required that "a statute * * * explicitly authorize[] punitive damages" for pre-enactment conduct, *ibid.*, just as it determined that the compensatory damages remedy would "not apply" retroactively "in the absence of clear congressional intent," *id.* at 283. And the Court concluded that it "found no clear evidence of congressional intent that § 102" as a whole "should apply to cases arising before its enactment." *Id.* at 286.

The FSIA's provisions governing prior and related cases are similar to a provision in an earlier civil rights bill that *Landgraf* stated would have "unambiguous[ly]" satisfied its clear-statement rule. 511 U.S. at 264. That provision stated that the Civil Right Act's new damages provision "shall apply to all proceedings pending on or commenced after" enactment. *Id.* at 255 n.8 (citation omitted). Here, Congress provided that "[t]he [2008]

amendments * * * shall apply to any claim arising under section 1605A"; authorized plaintiffs with qualifying claims "before the courts in any form" to request that "that action, and any judgment in the action * * * , be given effect as if the action had originally been filed under section 1605A(c)"; and empowered plaintiffs to file new claims "[r]elated" to existing actions "under section 1605A." NDAA § 1083(c)(1)-(3), 122 Stat. 342-343 (28 U.S.C. 1605A note).[7]

b. The legislative history confirms that Congress and the Executive understood that Section 1605A would authorize punitive damages for pre-enactment conduct. After the fall of Saddam Hussein's regime in Iraq, President George W. Bush vetoed an initial version of the 2008 amendments that contained a materially identical punitive-damages provision, on the ground that "creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed" would undermine U.S. foreign policy and burden efforts to rebuild Iraq. Office of Commc'ns, The White House, *Memorandum of Disapproval* (Dec. 28, 2008), 2007 WL 4556779. As ultimately enacted, Section 1605A authorized the President to waive the application of any provision of the 2008 amendments to Iraq, NDAA § 1083(d)(1), 122 Stat. 343 (28 U.S.C. 1605A note), and the President did so,

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[7] As petitioners observe (Pet. 27-28), respondents have not argued that any constitutional provision bears on the analysis here. Thus, because the text of the FSIA "makes clear" that the punitive damages remedy applies retroactively, any "arguable unfairness" of such application "is not a sufficient reason for a court to fail to give that law its intended scope." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1325 (2016) (brackets, citation, and internal quotation marks omitted).

73 Fed. Reg. 6571 (Feb. 5, 2008); see *Beaty*, 556 U.S. at 853-854. The author of the terrorism-exception amendment believed that this compromise would address the President's concerns while preserving other plaintiffs' ability to recover for prior acts of terrorism. See 154 Cong. Rec. at 501 (Sen. Lautenberg) ("By insisting on being given the power to waive application of this new law to Iraq, the President seeks to prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims from other countries. Fortunately, the President will not have authority to waive the provision's application to terrorist acts committed by Iran and Libya, among others.").

B. The court of appeals further erred in determining that plaintiffs relying on state-law causes of action may not recover punitive damages for pre-enactment conduct. Pet. App. 129a-130a.[8] As discussed above, since 2008, Section 1605A(a) has eliminated foreign sovereign immunity for damages claims arising out of a state sponsor of terrorism's material support for extrajudicial killing. Unlike the former Section 1605(a)(7), however, Section 1605A is not limited by the prohibition on punitive damages in Section 1606, which applies only to

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[8] Although petitioners' second question presented asks only whether the federal cause of action, 28 U.S.C. 1605A(c), authorizes plaintiffs to recover punitive damages for pre-enactment conduct, Pet. i, the list of parties includes as petitioners plaintiffs with state-law claims, see *Opati* Pet. App. 369a-375a, and both petitioners and respondents address the court of appeals' analysis with respect to whether such punitive damages are available to plaintiffs proceeding under state law, Pet. 28-29; Br. in Opp. 24-25. This Court therefore may wish to rephrase the second question presented to encompass the availability of punitive damages under both federal and state causes of action, as the government has done.

claims "under section 1605 or 1607." 28 U.S.C. 1606. Thus, the court did not question that plaintiffs may rely on Section 1605A(a)'s waiver of immunity, invoke state-law causes of action, and (in cases involving post-enactment conduct) seek punitive damages.

Nonetheless, applying the *Landgraf* presumption, the court of appeals determined that "[t]he authorization of § 1605A, read together with § 1606, lacks a clear statement of retroactive effect" with respect to punitive damages. Pet. App. 130a. Because Section 1605A(a) is jurisdictional in nature, however, it does not implicate *Landgraf*'s presumption against retroactive legislation. Like the provisions at issue in *Altmann*, Section 1605A(a) "merely opens United States courts to plaintiffs with pre-existing claims against foreign states." 541 U.S. at 695. To be sure, Congress's decision to codify the immunity exception in the new Section 1605A, rather than in Section 1605 (where it had previously resided), has the consequence of exempting claims under Section 1605A from the prohibition on punitive damages awards against foreign sovereigns in Section 1606. But *Altmann* recognized that by creating jurisdiction, the FSIA would in some instances affect the foreign state's substantive rights, and it nevertheless found the *Landgraf* presumption inapplicable. *Id.* at 695-696.

Thus, under *Altmann*, the question is simply whether "anything in" Section 1605A "or the circumstances surrounding its enactment suggests" that it "should not apply" to petitioners' claims. 541 U.S. at 697. The answer is no. Congress specifically permitted new claims to be filed "under Section 1605A" if they "ar[ose] out of an act or incident" that was *already* the subject of a suit under section 1605(a)(7)—*i.e.*, "an act or incident" that

predated the 2008 amendments. NDAA § 1083(c)(3), 122 Stat. 343 (28 U.S.C. 1605A note).

The court of appeals' concern that a holding that retroactive punitive damages are available for state-law claims arising under the terrorism exception, but not for claims under Section 1605A(c), would perpetuate a "patchwork" of inconsistent recoveries among plaintiffs that Congress sought to eliminate by enacting the federal cause of action, was misplaced. Pet. App. 129a-130a. That problem largely flows from the court's incorrect determination that Section 1605A(c) does not authorize punitive damages for pre-enactment conduct. Moreover, because the FSIA permits punitive damages for both federal and state causes of actions arising under the terrorism exception based on post-2008 conduct, any such inconsistency would be short-lived.

C. The question whether 28 U.S.C. 1605A permits recovery of punitive damages for pre-2008 conduct presents an important issue of federal law warranting this Court's review. The answer to that question affects, in these cases alone, billions of dollars in punitive damages judgments awarded to approximately 150 U.S. government employees and contractors murdered or injured in the line of duty who were targeted because of their service to the United States, as well as hundreds of their family members. This case is an appropriate vehicle for resolving the question: despite respondents' default, both the district court and the court of appeals addressed the retroactivity issue. See Pet. App. 122a-130a, 550a-556a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, limited to the second question presented.

Respectfully submitted.

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