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 SETIA OPATI, DECEASED, *et al.*,

Petitioners,

v.

REPUBLIC OF SUDAN, *et al.*,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

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 in 2008.

***

In the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Congress enacted comprehensive legislation which, among other purposes, defined the jurisdiction of U.S. courts in suits against foreign states, the law of foreign sovereign immunity, the extent of liability to which a foreign state may be held liable in the United States, and the circumstances and types of property subject to attachment and execution in suits against foreign states. *See* 28 U.S.C. 1330, 1332(a), 1391(f), 1441(d), 1602–1611. The FSIA provides that a foreign state, its political subdivisions, and its agencies or instrumentalities generally shall be immune from suit in "the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. 1604. The FSIA at §1606, "Extent of liability," also specifies that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607" of the FSIA, "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." 28 U.S.C. 1606. After an initial ninety-day delay in the FSIA's effective date immediately following enactment in 1976, Congress stated that courts

"should henceforth" decide all "[c]laims of foreign states to immunity" according to the FSIA. 28 U.S.C. 1602.

In 1996, Congress added a "terrorism exception" to the FSIA's list of general exceptions to foreign sovereign immunity. 28 U.S.C. 1605(a)(7). Under the terrorism exception at §1605(a)(7), a foreign state designated by the Secretary of State as a state sponsor of international terrorism was not immune from claims "in which money damages are sought against a foreign state 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." *Id.* In October 1998, Congress amended §1606 to remove any immunity from punitive damages for designated terrorism states in suits brought under the terrorism exception of §1605(a)(7). Treasury Department Appropriations Act of 1999, Pub. L. No. 105-277, §117(b), 112 Stat. 2681-491 (1998). Congress in October 2000 repealed that 1998 amendment and returned §1606 to its original language with regard to immunity from punitive damages for the foreign state itself. Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA of 2000"), Pub. L. No. 106-386, §2002(f)(2), 114 Stat. 1464, 1543 (2000).

In January 2008, Congress revised the terrorism exception through §1083 of the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"). In §1083, Congress struck the existing terrorism exception, §1605(a)(7), and replaced it with an expanded terrorism exception set forth at an entirely new section within the FSIA, §1605A. Pub. L. No. 110-181, 122 Stat. 3, 338–41 (2008). Congress included an express private right of action against a state sponsor of terrorism and listed

illustrative forms of recoverable damages—including punitive damages. 28 U.S.C. 1605A(c). Furthermore, by placing the terrorism exception outside §1605 of the FSIA, Congress removed the immunity from punitive damages previously available to designated state sponsors of terrorism through §1606, which controls the extent of liability in any claim for relief where "a foreign state is not entitled to immunity under section 1605 or 1607." 28 U.S.C. 1606.

PARTIES TO THE PROCEEDING BELOW

Petitioners in this proceeding (appellees in the proceeding below) are 159 U.S. Government employees killed or injured in the August 7, 1998 bombings of the U.S. Embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania, their family members, and the personal representatives of their estates. In total, petitioners in this proceeding are 567 individuals.

Respondents are the Republic of Sudan, its Ministry of External Affairs, and its Ministry of Interior (collectively, "Sudan" or "respondents").

The list of parties to the proceeding below is set forth in full in the appendix to the petition for a writ of certiorari at Pet.App.369a on account of the length of the list.

CORPORATE DISCLOSURE STATEMENT

None of petitioners is a nongovernmental corporation. None of petitioners has a parent corporation or shares held by a publicly traded company.

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The opinion of the D.C. Circuit under review is reported at 864 F.3d 751. Pet.App.1a. The opinions of the district court awarding punitive damages are reported at 61 F.Supp.3d 42, 60 F.Supp.3d 144, 60 F.Supp.3d 84, and 60 F.Supp.3d 68. Pet.App.249a–341a. The opinion of the district court denying respondents' motion to vacate the judgment in relation to punitive damages and other issues is reported at 174 F.Supp.3d 242. Pet.App.147a.

Other reported opinions in these consolidated matters include the following. The opinions of the district court denying respondents' motions to dismiss, which are reported at 374 F.Supp.2d 1 and 412 F.Supp.2d 99. The opinion of the D.C. Circuit in an interlocutory appeal regarding those motions to dismiss, which is reported at 531 F.3d 884.

The opinion of the district court finding liability against respondents following evidentiary proceedings conducted by the district court in October 2010, which is reported at 826 F.Supp.2d 128. J.A.79a. The District of Columbia Court of Appeals' opinion on a question of law certified to it by the D.C. Circuit, which is reported at 194 A.3d 38, 45 (D.C. 2018).

JURISDICTION

The D.C. Circuit entered judgment on July 28, 2017 and denied a petition for rehearing en banc on October 3, 2017. On December 27, 2017, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including March 2, 2018. The petition was filed on that date and was granted on June 28, 2019.

This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves: the Foreign Sovereign Immunities Act of 1976, as amended, at 28 U.S.C. 1602, 1604, 1605, 1605A, and 1606, and §1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 338–44 (2008). These provisions are reproduced at Pet.App.344a–367a and in the appendix to this brief at App.1a–14a.

STATEMENT

Petitioners are U.S. Government employees and contractors killed or injured as a result of the August 7, 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania. In those terrorist attacks, al-Qaeda, with knowing, material support from Sudan, engaged in the premeditated murder and injury of more than 150 United States Government employees and more than 4,000 persons in total. Petitioners filed four lawsuits in the U.S. District Court for the District of Columbia under the FSIA, seeking compensatory and punitive damages from Sudan for its critical support of al-Qaeda, without which the bombings could not have occurred.

After years of litigation following the filing of an initial complaint against Sudan in 2001, the district court in 2011 found that Sudan provided "critical" and "essential" support to al-Qaeda necessary for the 1998 Embassy bombings. Based on evidence received during a three-day bench trial, the district court concluded that Sudan "provided critical financial, military, and intelligence services" to al-Qaeda "without which [al-

Qaeda] could not have carried out the 1998 bombings." Joint Appendix ("J.A.") 103a; 121a. Then, following more than two additional years of proceedings to determine the damages suffered individually by the petitioners, the district court in July 2014 awarded compensatory and punitive damages. As set forth in detailed published opinions, the district court set punitive damages in an amount equal to petitioners' compensatory damages and in accordance with Congress' 2008 amendments to the FSIA allowing for punitive damages.

I. Congress enacts the original "terrorism exception" to the FSIA and the "Flatow Amendment" – 1996

1. In 1996, Congress enacted the "terrorism exception" to the FSIA to permit civil suits by U.S. victims of terrorism against designated state sponsors of terrorism for certain terrorist acts. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241–42 (1996). The terrorism exception was codified at 28 U.S.C. 1605(a)(7) and was intended to "give American citizens an important economic and financial weapon" in the fight against state sponsors of terrorism. H.R. Rep. No. 104-383, at 62 (1995) (Conf. Rep.).

Five months after the terrorism exception's enactment in 1996, Congress passed the "Flatow Amendment," which was named after an American student killed by a suicide bombing in the Gaza Strip. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §589(a), 110 Stat. 3009-172 (1996). The Flatow Amendment sought to allow victims of foreign terrorism like the Flatow family to seek "meaningful damages, such as punitive damages,

from state sponsors of terrorism for the horrific acts of terrorist murder and injury committed or supported by" those designated states. 154 Cong. Rec. S54 (daily ed. Jan. 22, 2008). The new provision therefore provided "for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the [underlying] acts were among those described in section 1605(a)(7)." Pet.App.368a.

2. In light of these amendments, terrorism victims brought actions under §1605(a)(7), which provided that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" in actions 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." App.1a; 5a. Any claim brought under §1605(a)(7) was subject to §1606 which set forth substantive rules governing the extent of liability available against foreign states and which provided in relevant part:

> ***"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***;"

Pet.App.351a (emphasis added).

Numerous trial courts interpreted the Flatow Amendment to mean that state sponsors of terrorism could be liable for punitive damages, invoking theories of *respondeat superior* and joint-and-several liability. *E.g., Flatow v. Islamic Republic of Iran*, 999 F.Supp.1, 26–27 (D.D.C. 1998); *Eisenfeld v. Islamic Republic of Iran*, 172 F.Supp.2d 1, 9 (D.D.C. 2000); *Jenco v. Islamic Republic of Iran*, 154 F.Supp.2d 27, 38–40 (D.D.C. 2001).

3. After the district court's March 1998 decision in *Flatow*, Congress in October 1998 confirmed that court's interpretation of the FSIA by amending §1606 to ensure that it expressly permitted victims to recover punitive damages against foreign states in actions brought pursuant to §1605(a)(7). §117(b), 112 Stat. 2681-491. To so permit punitive damages, Congress revised §1606 to provide that a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages, "**except [in] any action under section 1605(a)(7).**" App.13a (reflecting the addition of this clause).[1]

Two years later, Congress repealed that amendment and returned §1606 to its original text. VTVPA of 2000 at §2002(f)(2), 114 Stat. at 1543; App.14a. As part of that legislation enacted in 2000, Congress also acted to satisfy the outstanding compensatory damages and a portion of the punitive damages judgments obtained to date through the terrorism exception. Congress directed the Treasury Secretary to pay those judgment creditors, at

1. The 1998 legislation also included a provision empowering the President to waive the amendment to §1606 "in the interest of national security." §117(d), 112 Stat. 2681-492. President Clinton exercised that waiver. 63 Fed.Reg. 59201 (1998).

their election, (A) 110% of compensatory damages if they relinquished "all rights and claims to punitive damages awarded in connection with such claim or claims" or (B) 100% of compensatory damages without such waiver of rights and claims to their punitive damages awards. *Id.* at §2002(a)(1)(A) & (B), (a)(2)(C) & (D); *see* CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 9–13, 55–56 (Aug. 2008).

II. The initial district court proceedings and Sudan's motions to dismiss and interlocutory appeal – 2001–2008

1. In October 2001, the first of seven groups of U.S. Government employees and their immediate family members (the *Owens* group) filed a civil action in the U.S. District Court for the District of Columbia against Sudan to recover for injuries suffered as a result of the 1998 Embassy bombings. J.A.6a. The Government of Sudan was then and remains today a designated state sponsor of international terrorism.[2] On February 4, 2003, Sudan was duly served with the complaint in the *Owens* action. Sudan failed to respond or appear, and the district court entered a Fed.R.Civ.P. 55(a) default in May 2003. J.A.6a.

In February 2004, Sudan retained U.S. counsel from an international law firm, who entered an appearance.

2. In August 1993, the U.S. Secretary of State designated Sudan as a state sponsor of international terrorism based on findings that Sudan "has repeatedly provided support for acts of international terrorism." 58 Fed.Reg. 52523 (1993). That designation followed public reports of Sudan's participation in a conspiracy to bomb the United Nations Headquarters, FBI offices, and public infrastructure in New York City. *United States v. Rahman*, 189 F.3d 88, 108–11 (2d Cir. 1999).

J.A.7a; Pet.App.157a. Sudan through counsel then filed a motion to vacate the default and to dismiss, relying, *inter alia*, upon arguments that it was immune from suit under the FSIA. J.A.7a–8a; Pet.App.157a. The district court in March 2005 vacated the entry of default and granted the *Owens* group leave to amend their complaint to satisfy the requirements of the §1605(a)(7) terrorism exception. 374 F.Supp.2d 1, 9, 24.

After the filing of an amended complaint in *Owens*, Sudan filed its second motion to dismiss, again arguing that the §1605(a)(7) terrorism exception was unavailable. J.A.9a; Pet.App.157a. In January 2006, the district court denied the motion. 412 F.Supp.2d 99, 118.

2. The D.C. Circuit permitted Sudan's interlocutory appeal to challenge the district court's denials of Sudan's motions to dismiss and reviewed those motions *de novo*. 531 F.3d 884. On July 11, 2008, the D.C. Circuit affirmed the district court and remanded the case for further proceedings. *Id.* at 895.

III. Congress enacts an expanded terrorism exception to foreign sovereign immunity and petitioners file their complaints – 2008

1. While Sudan's interlocutory appeal was pending, Congress amended the FSIA by striking the previous terrorism exception at §1605(a)(7) and replacing it with an expanded terrorism exception, 28 U.S.C. 1605A. The amendment was included at §1083 of the 2008 NDAA under the title "Terrorism Exception to Immunity." Pet. App.352a–367a.

Congress enacted the 2008 amendments in response to a D.C. Circuit decision 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." *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004). Noting that "Congress's original intent behind the 1996 legislation ha[d] been muddied" by decisions such as *Cicippio-Puleo*, Congress revised the terrorism exception to clarify and expand the exception initially enacted in 1996. *See* 153 Cong. Rec. S15598, at S15614 (daily ed. Dec. 14, 2007); 154 Cong. Rec. at S54–55 (statements of Sen. Lautenberg). Senator Lautenberg, the author of §1083, explained that, since the *Cicippio-Puleo* decision, "judges have 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." *Id.* Accordingly, the 2008 amendments to the FSIA sought greater consistency in application and "reaffirm[ed] the private right of action under the Flatow Amendment against the foreign state sponsors of terrorism themselves." *Id.*

§1083 contained four principal subsections:

> (1) §1083(a), which inserted the text of a new section, §1605A—the "Terrorism exception to the jurisdictional immunity of a foreign state"—as part of the FSIA, Pet.App.352a–358a;
>
> (2) §1083(b), which made, among other revisions, conforming amendments "striking" references to §1605(a)(7) and inserting references to §1605A in §§1605, 1607, and 1610 of the FSIA, Pet.App.359a–362a;

> (3) §1083(c), titled "Application to Pending Cases," which set forth specific congressional direction that the amendments enacted by §1083 "shall apply to any claim arising under §1605A" of the FSIA, Pet.App.362a–365a; and
>
> (4) §1083(d), which granted the President authority to waive application of §1605A to Iraq "with respect to any conduct or event occurring before or on the date of the enactment of this Act," Pet.App.365a–366a.

§1083(c) of the 2008 NDAA explicitly stated that the provisions of §1605A were to apply to civil actions already filed, as well as future "related actions" seeking redress for conduct pre-dating the January 28, 2008 enactment date of the NDAA. Specifically, in §1083(c), under the title "Application to Pending Cases," Congress provided detailed instructions concerning the retroactive application of §1605A to prior acts of terrorism and alternative processes by which terrorism victims could bring such an action under §1605A. Pet.App.362a–364a. Congress began by stating the general rule broadly and unambiguously in §1083(c)(1):

> "The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code." Pet.App.362a.

Next, Congress provided further direction with regard to claims based on terrorist acts before January 2008 in then-pending claims and in future claims to be brought. In §1083(c)(2) titled "Prior Actions," Congress stated that certain actions that had been "brought under

section 1605(a)(7) … before the date of the enactment of this Act" and that remained pending "before the courts in any form" shall "be given effect as if the action had originally been filed under section 1605A(c)" and that the "defenses of res judicata, collateral estoppel, and limitation period are waived." Pet.App.362a–363a.

Then, in §1083(c)(3) titled "Related Actions," Congress provided instructions regarding future claims based on terrorist acts before January 2008. Congress stated that new claims "arising out of the same act or incident" as existing claims commenced under §1605(a)(7) "may be brought under section 1605A." Pet.App.364a.

Through the new §1605A(a), Congress carried over and expanded the provisions of the former terrorism exception to sovereign immunity at §1605(a)(7) to establish an exception to immunity where at the time of the terrorist act "the claimant or the victim was" a U.S. national, a member of U.S. armed forces, or an employee or contractor of the U.S. Government acting within the scope of that employment. §1605A(a)(2)(A)(ii). Under §1605A(a), victims of terrorism who were U.S. Government employees (including both U.S. and foreign national employees) and their family members as claimants were allowed to invoke the terrorism exception of §1605A(a). Pet.App.100a.

In enacting §1605A, Congress also made clear its purpose that punitive damages were again recoverable for personal injury or death arising from terrorist acts described in §1605A(a). §1605A(c) added a "Private Right of Action" against a designated state sponsor of terrorism. In the very next sentence, Congress set forth a non-exhaustive list of damages available in "any such action,"

expressly including punitive damages among others: "In ***any such action***, damages may include economic damages, solatium, pain and suffering, and ***punitive damages***." §1605A(c) (emphasis added). In doing so, Congress adopted the language which had been used in the 1996 Flatow Amendment and utilized by many district courts to award punitive damages against state sponsors of terrorism, but which the D.C. Circuit in *Cicippio-Puleo* found applicable only to individual agents of state sponsors of terrorism and not to the designated states themselves. Pet.App.368a (allowing "money damages which may include economic damages, solatium, pain, and suffering, and punitive damages").

Although Congress in §1083(b) made several conforming amendments throughout the FSIA to strike §1605(a)(7) from various provisions and to insert §1605A, Congress made no such conforming amendment to §1606, which bars the imposition of punitive damages "[a]s to any claim … under section 1605 or 1607" of the FSIA. Given that the terrorism exception was now established by §1605A and no longer §1605, Congress thereby removed designated state sponsors of terrorism, such as Sudan, from §1606's protective shield against punitive damages awarded as a result of federal and state claims brought under the new terrorism exception. At the same time, Congress maintained immunity from punitive damages awards for all foreign states facing liability in federal and state courts through the general exceptions to foreign sovereign immunity at §1605 or the counterclaim exceptions at §1607.

2. In 2008, four additional groups of U.S. Government employees killed or injured in the 1998 Embassy bombings and their families—including three of the four groups

of petitioners here (the *Amduso*, *Onsongo*, and *Wamai* groups)—filed civil actions under §1605A. J.A.24a; 31a; 64a. Those complaints relied upon the 2008 NDAA's federal right of action and state common law claims.[3]

Sudan was duly served in 2009 under §1608(a) of the FSIA in each of those four actions. J.A.81a–83a. Following the July 2008 remand by the D.C. Circuit in *Owens*, Sudan faced a merits proceedings and full-blown discovery. Rather than face justice directly, Sudan knowingly and intentionally ceased participating during the subsequent five years of litigation that led to the entry of final judgments awarded to petitioners in July 2014. J.A.12a.

IV. The district court conducts a bench trial to determine Sudan's liability and undertakes an extensive evaluation of compensatory and punitive damages – 2010–2014

1. Following the D.C. Circuit's remand, the district court in 2010 entered defaults against Sudan in petitioners' lawsuits in light of Sudan's failure to appear. J.A.25a; 31a; 65a. The district court then consolidated those actions with the *Owens* action for purposes of a consolidated evidentiary hearing on liability as provided by 28 U.S.C. 1608(e). J.A.32a; 64a. The Court also bifurcated the liability and damages portions of the cases.

In October 2010, the district court presided over a three-day bench trial which included live and recorded

3. The fourth group of petitioners, the *Opati* group, filed their initial complaint in July 2012, which was timely filed under §1083(c)(3)(A) of the NDAA and duly served. J.A.72a.

witness testimony, expert witness testimony, U.S. intelligence reports, and other documentary evidence to establish Sudan's responsibility for the 1998 mass murder and injury of U.S. Government employees at the Embassies. The district court applied the Federal Rules of Evidence throughout. J.A.84a.

Based on admissible trial evidence, the district court found and set forth in its November 2011 published opinion a detailed account of Sudan's support and protection for Usama Bin Laden and al-Qaeda through financial, military, and intelligence services. J.A.95a–112a. In summary, the district court concluded that Sudan "provided critical financial, military, and intelligence services" to al-Qaeda "without which [al-Qaeda] ***could not have carried out*** the 1998 bombings." J.A.103a; 121a (emphasis added).

Following its findings on liability, the district court directed petitioners to serve the liability order on Sudan according to the process specified at §1608 of the FSIA. J.A.15a–16a. Petitioners served Sudan with the liability findings in May 2012. J.A.16a. Sudan nonetheless continued to disregard the ongoing litigation, and the district court turned to the assessment of damages.

2. In February 2012, the district court began a two-year process of individualized assessments of compensatory damages for the plaintiffs in the consolidated matters. To assist in that effort, the district court appointed seven special masters. J.A.33a. The district court directed the special masters to assess the compensatory damages claims pursuant to the Federal Rules of Evidence and the applicable federal or District of Columbia cause of action, and the court provided specific

direction to the special masters to ensure that the ultimate compensatory damages awarded were entirely supported by demonstrable facts, followed previously approved judicial precedent, and were set by record evidence rather than sympathy or passion. *Amduso*, No. 1:08-cv-01361, ECF No. 66, at 3–5. The district court also stated that it would assess punitive damages, if any, itself. *Id.* at 3. From 2012 through July 2014, the special masters conducted intensive individualized assessments of damages and prepared written reports of their findings. J.A.33a–58a.

3. The district court undertook a careful examination of the special masters' recommendations and, in a number of instances, significantly decreased recommended damages awards to ensure factual and legal fairness and consistency. *E.g.*, Pet.App.300a–308a; 321a–336a. On July 25, 2014, the district court issued extensive opinions in each of petitioners' consolidated actions and entered judgments, including individual awards of compensatory damages. Pet.App.249a–341a.

4. The district court evaluated the issue of punitive damages methodically and according to well-established precedent in analogous terrorism-related FSIA actions. *E.g.*, Pet.App.261–263a. The district court ultimately awarded punitive damages on a one-to-one ratio to compensatory damages, rejecting calculations used in other FSIA cases that would have resulted in substantially higher punitive damages. *Id.* In total, the court awarded petitioners approximately $4.3 billion in punitive damages.

V. Immediately following entry of judgment, Sudan returns to the litigation – 2015–2016

Sudan, which had been monitoring the litigation, waited for the entry of judgment and then immediately reappeared to file notices of appeal. Pet.App.151a; *e.g.*, J.A.58a–59a; 66a. After filing its appeal in 2014, Sudan waited until April 2015 before moving to vacate the judgments under Fed.R.Civ.P. 60(b). Pet.App.151a; *e.g.*, J.A.60a; 67a. In July 2015, the D.C. Circuit held in abeyance Sudan's direct appeal so the district court could address the Rule 60(b) motions.

In those motions, Sudan presented one argument regarding punitive damages, *i.e.*, foreign-national family members of victims could not state a claim under §1605A(c) and "1605A(c) is the sole means to obtain punitive damages against a foreign state." *Amduso*, No. 1:08-cv-01361, ECF No. 285-1, at 25. It was not until its reply brief that Sudan raised the argument that punitive damages were not available retroactively under the FSIA because the punitive damages "awards, based on an erroneous construction of §1605A(c), violate the Ex Post Facto Clause." *Id.*, ECF No. 291, at 20.

With the full record before it, the district court denied Sudan's motions to vacate and found that Sudan acted tactically and not in good faith and must therefore assume the consequences of its strategic choices. Pet. App.171a–172a. The court also noted that Sudan's tactics of delay "pose[d] a real risk of prejudice to the plaintiffs" and "a number of plaintiffs have in fact died during the course of this litigation." Pet.App.172a–173a.

VI. The D.C. Circuit's opinion – 2017

In its appeal, Sudan did not contest the district court's calculation of compensatory or punitive damages, but instead argued that (1) the FSIA does not provide for the retroactive application of punitive damages, and (2) foreign-national family members of victims were not entitled to punitive damages because they could not state a claim under §1605A(c) and §1605A(c) is the sole means to obtain punitive damages against a foreign state. *Owens*, No. 14-5105, Doc. 1631291, at 57–59. Sudan did not argue on appeal that the award of punitive damages violated any provision of the Constitution.

The D.C. Circuit affirmed the district court's final "judgments in most respects" but vacated all awards of punitive damages on retroactivity grounds and certified to the District of Columbia Court of Appeals the question under state law whether a plaintiff must be present at a terrorist bombing to recover for intentional infliction of emotional distress.[4] Pet.App.17a–18a. Rather than analyze the retroactive application of the 2008 NDAA and its amendment of the FSIA in light of this Court's ruling in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the D.C. Circuit structured its review of punitive damages under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and its "core concerns." Pet.App.123a.

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4. After full briefing and oral argument, the D.C. Court of Appeals ruled that a party bringing such a claim under state law need not have been present at the attack. 194 A.3d 38, 45 (D.C. 2018). The D.C. Circuit then in May 2019 affirmed the district court's judgments in all respects save the awards of punitive damages. J.A.5a.

Applying *Landgraf*, the D.C. Circuit determined that the general presumption against retroactive legislation barred the punitive damages awards. Pet.App.128a–129a. The D.C. Circuit found 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" and "goes to the heart of the concern in *Landgraf* about retroactively penalizing past conduct." Pet.App.122a; 125a. The D.C. Circuit explained that "the authorization of punitive damages 'adheres to the cause of action' under §1605A(c), making it 'essentially substantive,'" thereby, according to the D.C. Circuit, distinguishing it from "the grant of jurisdiction held retroactive in *Altmann*." Pet.App.123a.

Faced with the plain language of §1083 of the NDAA providing for application of §1605A to conduct occurring before its 2008 enactment, the D.C. Circuit found that Congress clearly authorized the §1605A(c) private right of action to be brought retroactively to recover for acts of terrorism occurring before January 2008. However, the D.C. Circuit determined Congress did not sufficiently authorize the recovery of punitive damages in a §1605A(c) action arising from pre-January 2008 conduct. Pet. App.126a–127a. The D.C. Circuit did not question the retroactive award of the other forms of damages Congress set forth alongside "punitive damages" in §1605A(c).

Regarding punitive damages awarded by the district court on state law claims brought by non-U.S. national family members of the U.S. Government employees killed or injured, the D.C. Circuit rejected Sudan's argument that punitive damages are only available through a private right of action under §1605A(c) and that §1606 immunizes

foreign sovereigns from punitive damages in connection with state law claims. The D.C. Circuit emphasized that §1606 only applies where the underlying claim for relief is allowed pursuant to the immunity exceptions at §1605 or §1607, not the terrorism exception at §1605A. Pet. App.128a–129a.

Describing Congress' amendment of the FSIA to place the terrorism exception outside §1605's "general exceptions" to sovereign immunity and within its own standalone exception of §1605A as an "implicit, backdoor lifting of the prohibition against punitive damages," the D.C. Circuit nonetheless rejected Congress' effort, stating that the 2008 NDAA "lacks a clear statement of retroactive effect." Pet.App.129a. The D.C. Circuit therefore concluded, "a plaintiff proceeding under either state or federal law cannot recover punitive damages for conduct occurring prior to the enactment of § 1605A." Pet.App.129a.

The D.C. Circuit rejected petitioners' argument that, in the context of the FSIA, this Court's decision in *Altmann* renders inapplicable the presumption against retroactivity. The D.C. Circuit attempted to distinguish *Altmann* by holding that it stands only for the narrow proposition that "jurisdiction under the FSIA applies retroactively" and "has no bearing upon the question whether the authorization of punitive damages does as well." Pet.App.122a–123a. In effect, the D.C. Circuit concluded that some provisions of the FSIA may be presumed to apply retroactively under *Altmann* and other provisions of the FSIA may be presumed not to apply retroactively under *Landgraf*.

In light of these holdings, the D.C. Circuit vacated the punitive damages awards. Pet.App.145a–146a. Petitioners requested rehearing by the panel and rehearing *en banc*, but the request was denied.

SUMMARY OF THE ARGUMENT

The D.C. Circuit erred by disregarding this Court's rule in *Altmann* and Congress' express language directing retroactive application of claims under §1605A of the FSIA. The D.C. Circuit departed from the long-established precedent of this Court to rely upon the political branches' current statement of the scope of foreign sovereign immunity as the rule of decision. That precedent establishes that foreign sovereign immunity is a matter of political comity and grace rather than a right held by a foreign government and that the application of the current statement minimizes the risk of frustrating the political branches' determinations in matters of foreign relations.

Based on a 200-year foundation of precedent, *Altmann* articulated a rule that controls the FSIA's interpretation in all contexts. The Court held that the FSIA, as it exists at the time of decision, governs the resolution of matters before a court "absent contraindications" by Congress that the FSIA should be applied otherwise. The existing version of the FSIA embodies the political branches' current foreign relations judgments and should be applied as written to reflect the judiciary's long tradition of deference to the political branches in matters concerning foreign sovereign immunity. To do otherwise risks interference by the judiciary in the timing and execution of foreign policy choices as established by the political branches in the FSIA.

Because the current text of the FSIA controls, the *Altmann* Court held that the FSIA is not subject to *Landgraf*'s anti-retroactivity presumption. Rather, the Court explained that *Landgraf* is "most helpful" in "cases involving private rights," but it is inapplicable in the context of the FSIA, as "foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement." It is beyond argument that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights ... are sacrificed for national purposes," the statute or treaty "ought always receive a construction conforming to its manifest import." This rule applies when the political branches revise a rule of decision, as a matter of foreign policy, disadvantaging or terminating an individual's pending claim against a foreign sovereign. Likewise, this rule applies when the political branches revise a rule of decision, as a matter of foreign policy, strengthening an individual's claim against a foreign sovereign.

In rejecting *Altmann*, the D.C. Circuit erred by failing to apply the FSIA's current text in deference to the political branches' exercise of their authority and responsibility to structure and administer foreign relations in the context of foreign sovereign immunity. To be sure, Congress and the President through the 2008 NDAA effected an important (albeit not unprecedented) change by permitting the re-imposition of punitive damages against designated state sponsors of terrorism in claims arising "under section 1605A," including in claims brought after enactment of the 2008 NDAA based on pre-enactment terrorist acts. The D.C. Circuit, however, undermined the political branches'

authority to determine, in the *sui generis* context of foreign sovereign immunity, the wisdom and fairness of that change. Such judicial action undercuts the political branches' ability to determine and implement—based on a multitude of competing interests, policy goals, and information—whether allowing or sacrificing private civil actions and remedies at a particular time is in the best interests of U.S. foreign relations.

Even if the presumption in *Landgraf*, rather than the rule of *Altmann*, applies to this matter, the FSIA's statutory text provides a "clear statement" that punitive damages, among other damages, are available for conduct that occurred prior to 2008. Congress made clear at §1083(c)(1) that the "amendments made by" the 2008 NDAA "shall apply to any claim arising **under section 1605A**." Congress then provided at §1083(c)(3) that if an action were already pending based on prior terrorist acts, then a new, "related action" based on the same terrorist acts "may be brought **under section 1605A**." In the amendments made by the 2008 NDAA, Congress expressly included punitive damages as recoverable in a right of action under §1605A(c). Furthermore, for both federal and state claims for relief, Congress inserted the terrorism exception to immunity at §1605A(a) of the FSIA apart from the general exceptions to foreign sovereign immunity at §1605, thereby making inapplicable the restriction upon punitive damages set forth in §1606.

The circumstances surrounding the NDAA's enactment and the resulting textual revisions to §1083 further illustrate beyond doubt that Congress made a "clear statement" in the 2008 NDAA allowing punitive damages to be recovered based on terrorist acts occurring

before 2008. President Bush vetoed the initial version of the 2008 NDAA based on his publicly stated objection that §1083 would have imposed liability, including punitive damages, on Iraq for conduct that had occurred during Saddam Hussein's reign from approximately 1979 to 2003. Congress responded by amending §1083 to authorize the President to avoid retroactive application of the 2008 amendments to Iraq by waiving "any provision of [§1083] with respect to Iraq." The President then signed the revised 2008 NDAA into law. No similar waiver was provided for Sudan or any other designated state sponsor of terrorism.

ARGUMENT

I. Following 200 years of precedent, the Court in *Altmann* held that *Landgraf*'s presumption against retroactivity does not apply to the FSIA.

Altmann involved an action under the FSIA to recover paintings stolen from the plaintiff's family by the Nazis in the 1930s and allegedly expropriated and converted by the Republic of Austria in 1948. 541 U.S. at 682–83. Upon learning that the paintings had been transferred to Austria, the plaintiff sued in 2000 seeking recovery of those paintings and money damages under state, federal, and international law. Austria resisted the lawsuit, contending that the FSIA, which was passed in 1976, did not apply retroactively to conduct which had occurred more than 50 years earlier. *Id.* at 686.

The dispute eventually reached this Court, which building upon a long line of precedent, held that the FSIA is not subject to the anti-retroactivity

presumption enunciated in *Landgraf*. The Court found that the "*sui generis* context" of the FSIA is "freed from *Landgraf*'s anti-retroactivity presumption." *Id.* at 696, 700. Specifically, this Court held that, instead of applying the *Landgraf* presumption, courts should defer to the judgment of the political branches, as embodied in the current statutory text, when construing the FSIA "absent contraindications." *Id.* at 696. Here, if the D.C. Circuit properly had applied the FSIA's text, it should have concluded that the FSIA permitted the recovery of punitive damages for the 1998 Embassy bombings.

A. Foreign sovereign immunity is a matter of comity and grace, as determined by the political branches, and not a right held by a foreign nation.

"[F]oreign sovereigns have no right to immunity in our courts." *Altmann*, 541 U.S. at 688. Rather, immunity is a revocable privilege extended to foreign nations by the political branches as a matter of grace and comity. *Id.* at 689; *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 821 (2018) ("This Court consistently has recognized that foreign sovereign immunity is a matter of grace and comity on the part of the United States." (citations omitted)). Consequently, "[t]hroughout history, courts have resolved questions of foreign sovereign immunity by deferring to the decisions of the political branches … on whether to take jurisdiction." *Altmann*, 541 U.S. at 696 (citation omitted).

The command that courts defer to the political branches in matters of foreign policy, as well as the principle that foreign sovereign immunity is a matter of grace and comity consigned to the political branches, has indeed been articulated by this Court throughout our

nation's history. In *United States v. Schooner Peggy*, Chief Justice Marshall explained that the courts should defer to the decisions of the political branches embodied by a treaty between the United States and France, which is "to be regarded by the court as an act of congress," and should apply the treaty retroactively to judicial proceedings that already were in progress when the treaty became effective. 5 U.S. (1 Cranch) 103, 110 (1801).

In an opinion foretelling the tension between the rule of *Altmann* and the general anti-retroactivity presumption of *Landgraf*, the Chief Justice in *Schooner Peggy* reasoned:

> "It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; …. ***In such a case the court must decide according to existing laws***, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of [a new, retroactive] law, the judgment must be set aside."

Id. (emphasis added).

Chief Justice Marshall's subsequent opinion in *Schooner Exchange v. McFaddon* further demonstrated the importance of judicial deference to the political

branches regarding questions of foreign relations and foreign sovereign immunity. Chief Justice Marshall explained that the United States' recognition of foreign sovereign immunity is not required by any outside force, but is a restriction the United States imposes on its own courts:

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

11 U.S. (7 Cranch) 116, 136 (1812); *see Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1497 (2019) (quoting this passage). As *Altmann* recognized, *Schooner Exchange* found that foreign sovereign immunity is merely a matter of "comity" and "foreign sovereigns have no right to immunity in our courts." 541 U.S. at 688. As a matter of comity and foreign relations, the issue of whether to extend or revoke foreign sovereign immunity is a question of policy properly left to the political branches rather than a matter of legal rights held by the foreign nation. Chief Justice Marshall, accordingly, "[a]ccept[ed] a suggestion advanced by the Executive Branch" in evaluating whether to exempt the Schooner Exchange vessel from the jurisdiction of U.S. courts. *Id.*

The Court recently reiterated these long-established principles in *Bank Markazi v. Peterson,* 136 S.Ct. 1310

(2016). There, the Court explained that an amendment to the Iran Threat Reduction and Syria Human Rights Act was "an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." *Id.* at 1328. The Court noted that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* Rather, "it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress." *Id.* at 1329.

Indeed, "exercise by Congress and the President of control over claims against foreign governments … is hardly a novelty." *Id.* at 1317. Thus, as the United States explained in its brief to this Court in *Acree v. Republic of Iraq*, in the context of foreign relations, there is a "long line of cases holding that statutes ousting the courts' jurisdiction are to be given immediate effect in pending cases." *See* 2005 WL 682164, at *14–15 (Mar. 21, 2005) (collecting cases). This principle of immediacy makes good sense, as any other rule increases the risk of the judiciary impeding inadvertently the path of Congress and the President in their implementation of policies and actions regarding foreign sovereign immunity.

The FSIA is a codification of the political branches' control over lawsuits that may be brought against a foreign sovereign. Because "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution," "this Court consistently has deferred to the decisions of the political branches ... on whether to take jurisdiction

over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). But such deference, as explained by the unanimous Court in *Verlinden*, was not always without difficulty. Prior to the passage of the FSIA:

> "[I]nitial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department. As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory. …
>
> Not surprisingly, the governing standards were neither clear nor uniformly applied."

Id. at 487–88 (citation omitted).

Congress passed the FSIA to clarify and make uniform the standards governing the circumstances in which sovereign immunity should be extended to, or withdrawn from, foreign states "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that … decisions are made on purely legal grounds and under procedures that insure due process." *Id.* at 488. The statute was intended to encourage "uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse

foreign relations consequences." H.R. Rep. No. 94-1487, at 13 (1976). The FSIA is a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. … Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014) (citation omitted). The FSIA thus freed the political branches from having to make case-by-case decisions and, instead, required the courts to apply the current statutory text, which is the codification of the political branches' judgment. *Altmann*, 541 U.S. at 696.

B. *Altmann* held that the FSIA's current text controls in all matters and applies retroactively absent contraindications.

Recognizing the long line of precedent establishing that foreign sovereign immunity is an issue of comity and grace, not Constitutional edict, and the political branches' authority and responsibility to determine when such immunity should be given, *Altmann* held that the FSIA applies retroactively to resolve claims arising from events occurring before enactment of the relevant statutory text.

As *Altmann* explained:

> "The aim of the [anti-retroactivity] presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct. But the 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 (emphasis in original). The Court reasoned:

> "In this *sui generis* context, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision *inapplicable* merely because it postdates the conduct in question."

Id. The Court thus concluded that it is appropriate for courts to address questions of foreign sovereign immunity by deferring to the decisions of the political branches, as embodied in current statutory text of the FSIA, not by applying *Landgraf*. *Id.*

The Court explained that the *Landgraf* presumption is "most helpful" in "cases involving private rights," not the FSIA. *Id.* "[T]he great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties." *Id*. And, even in those cases, the *Landgraf* anti-retroactivity presumption is "just that—a presumption, rather than a constitutional command." *Id.* at 692–93.

Shortly after this Court's decision in *Altmann*, the United States in its brief to this Court in *Acree*

succinctly summarized *Altmann* and its import to other FSIA cases: "[T]his Court held in *Republic of Austria v. Altmann* … that application of changes in the United States' policy respecting foreign sovereign immunity ***to causes of action*** that arose before the policy change ***do not implicate retroactivity concerns***." 2005 WL 682164, at *14 (emphasis added). No subsequent precedent has altered this analysis. The FSIA applies retroactively and permits claims, whether based on federal or state rights of action, and appropriate damages premised upon events occurring before enactment of the relevant statutory text.

II. The D.C. Circuit failed to apply *Altmann* and the judgment of the political branches as embodied in the text of the FSIA.

Relying on *Landgraf*, the D.C. Circuit found that Congress' withdrawal of Sudan's immunity from punitive damages was only effective prospectively in relation to conduct after January 28, 2008 and that this Court's ruling in *Altmann* "has no bearing upon the question." Pet.App.122a. The D.C. Circuit sought to distinguish *Altmann* on two grounds. Neither withstands scrutiny.

A. Congress was not required to provide Sudan advance notice before its withdrawal of immunity from punitive damages.

The D.C. Circuit dismissed *Altmann*'s core holding that a reviewing court should defer to the judgment of political branches with respect to the FSIA absent explicit contraindications, characterizing that holding as "a policy argument," Pet.App.123a, rather than a rule based upon 200 years of jurisprudence and the allotment of Constitutional power over foreign policy to the political

branches. According to the D.C. Circuit, because inclusion of punitive damages among the damages recoverable in a private right of action under §1605A was purportedly targeted toward deterring state sponsorship of terror, it was intended "to influence foreign sovereigns in shaping their primary conduct." Pet.App.124a. Thus, "[e]lementary considerations of fairness dictate" that these state sponsors of terrorism "should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.*

But this Court explicitly rejected that argument in *Altmann*, explaining that "the principal purpose of foreign sovereign immunity has never been to permit foreign states … to shape their conduct in reliance on the promise of future immunity from suit in United States courts." 541 U.S. at 696. Thus, "fairness" and notice concerns applicable to private litigants simply do not apply to displace the established judgment of the political branches with respect to matters involving foreign sovereign immunity.[5] Instead, *Altmann* commands courts to defer to the political branches' judgments in this arena. *Id.* As the Court reiterated, "foreign sovereign immunity is a

5. Even if such concerns applied, Sudan was on notice that it may be held liable for punitive damages arising from material support for mass murder. Sudan had been designated as a state sponsor of terrorism since 1993; Congress passed the Flatow Amendment two years before the Embassy bombings, which resulted in punitive damages awards against state sponsors of terrorism prior to the bombings, *see Flatow*, 999 F.Supp.1; Congress in October 1998 amended §1606 to allow punitive damages against state sponsors of terrorism themselves; and this Court has long authorized the award of punitive damages against governmental actors, *e.g., Scott v. Donald*, 165 U.S. 58, 77–90 (1897).

matter of grace and comity ***rather than a constitutional requirement***." *Id.* at 689 (emphasis added). Furthermore, the FSIA terrorism exception itself "was intended [by Congress] as a sanction, to punish and deter undesirable conduct," and the political branches should be allowed to shape and administer that sanction as they see fit. *Republic of Iraq v. Beaty*, 556 U.S. 848, 859–60 (2009).

For example, in *Beaty*, the Court considered whether Congress in 2003 legislation authorized the President to terminate pending actions under the FSIA terrorism exception against Iraq, thereby retroactively denying U.S. citizens the right to bring such actions. The legislation authorized the President to make inapplicable any "provision of law that applies to countries that have supported terrorism." *Id.* at 856. U.S. citizens who had been tortured by Iraq in connection with the 1991 Gulf War and brought suit against Iraq under the FSIA argued—and the D.C. Circuit agreed—that the President was not authorized under the legislation to make inapplicable the terrorism exception. *Id.* at 859. This Court rejected that argument and determined that, because of the unique nature of laws concerning foreign relations, the President as authorized by Congress could waive U.S. citizens' ability to obtain relief under the FSIA:

> "To a layperson, the notion of the President's suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs."

Id. at 856–57*; see also Dames & Moore v. Regan*, 453 U.S. 654, 684–85 (1981). Similarly, it may seem strange

for a statute to fall outside *Landgraf*'s presumption or for Congress to direct that a different punitive damages rule of law apply at the time of trial than the rule in place at the time of the underlying conduct. But the practice is well established with respect to the FSIA.

By dismissing the *Altmann* rule as simply "a policy argument," the D.C. Circuit interjected itself into the implementation and execution of foreign policy, which is often controlled as much by determinations of timing as substance. Congress may elect to change a rule of law and withdraw the ability to recover damages from, or to execute against certain property of, a foreign nation. Likewise, absent the limited, specific restrictions that "the Constitution places on retroactive legislation," *Bank Markazi*, 136 S.Ct. at 1324, none of which were claimed by Sudan on appeal here, Congress may do the reverse and expand the ability to recover damages or to execute against certain property from foreign nations for their past conduct.

To substitute the judgment of the courts in the timing of the implementation of foreign policy determinations is not only error, it raises the risk of interference with the intended and effective implementation of foreign policy actions by the politically accountable branches of government. To minimize such risks, the Court in *Altmann* concluded that the FSIA—as currently written at the time of application by a court—best describes the policy judgments and choices of the political branches and should be deferred to by the courts "absent contraindications."

B. The FSIA defies categorization as a substantive or procedural Act and intertwines matters of substantive federal law and procedure as part of a comprehensive approach to matters of foreign sovereign immunity.

The D.C. Circuit further sought to distinguish *Altmann* by maintaining that "[u]nlike the grant of jurisdiction held retroactive in *Altmann*, the authorization of punitive damages 'adheres to the cause of action' under §1605A(c), making it 'essentially substantive' and thereby triggering retroactive operation." Pet.App.123a (citing *Altmann*, 541 U.S. at 695 n.15). The D.C. Circuit premised its conclusion on the fact that "the new terrorism exception authorizes a quantum of liability—punitive damages—to which foreign sovereigns were previously immune." Pet.App.123a. In a related fashion, the D.C. Circuit distinguished *Altmann* as concerning "the original FSIA" which, according to the D.C. Circuit, only codified *immunity* rules and left "the scope of a sovereign's potential liability unchanged." Pet. App.123a.

These points misconstrue the issue before the *Altmann* Court, the Court's assessment that the FSIA defied categorization as a "substantive" or "procedural" Act, and its explicit rejection of a provision-by-provision assessment of the application to prior conduct.

1. *Altmann* expressly addressed the "general applicability" of the FSIA to pre-enactment conduct.

The Court in *Altmann* specifically considered "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." 541 U.S. at 692 (emphasis added). In assessing the retroactive application of the FSIA's "expropriation exception" to plaintiff's claim for monetary damages arising from Austria's alleged conduct 50 years prior, both the district court and the court of appeals in *Altmann* (i) relied upon the presumption against statutory retroactivity set forth in *Landgraf* in interpreting whether the FSIA should apply to the matter but (ii) concluded, for different reasons, that the FSIA could be applied to the case.

Applying *Landgraf*'s analytical framework, the district court in *Altmann* "deemed the FSIA a jurisdictional statute that does not alter substantive legal rights," thereby concluding that the provisions of the FSIA were fully applicable to a cause of action arising before the FSIA's enactment. *Altmann*, 541 U.S. at 687. "Rather than endorsing the District Court's reliance on the Act's jurisdictional nature," the court of appeals found that application of "the FSIA to Austria's alleged wrongdoing was not impermissibly retroactive because Austria could not legitimately have expected to receive immunity" for its wrongdoing "even in 1948 when it occurred." *Id.*

Assuming that the FSIA's expropriation exception covered Austria's alleged wrongdoing, this Court evaluated and rejected *Landgraf* as the model by which to determine the issue of the FSIA's applicability to conduct that occurred prior to the Act's 1976 enactment. The Court began its "analysis of that issue by explaining why, contrary to the assumption of the District Court and Court of Appeals, the default rule announced in [its]

opinion in *Landgraf* does not control the outcome in this case." *Id.* at 692 (citations omitted). Given the district court and court of appeals' reasonings in *Altmann*, this Court readily could have limited its ruling to the fact that a grant of jurisdiction was at issue or that, as applied in *Altmann*, the FSIA did not "operate retroactively." This Court, however, did not do so and instead rejected reasoning by the district court and court of appeals and any argument based on *Landgraf*.

2. *Altmann* rejected efforts to parse the FSIA on a provision-by-provision basis and identify some provisions as procedural and others as substantive.

The Court in *Altmann* explicitly rejected attempts to distinguish, as required under *Landgraf*, between provisions of the FSIA that affected "substantive rights" or "matters of procedure." *Id.* at 694. Instead, the Court held that the FSIA's provisions affect *both* jurisdictional *and* "*substantive* federal law." *Id.* at 695.

In its amicus brief in *Altmann*, the United States argued that:

> "Federal statutes are frequently an amalgam of procedural and substantive provisions. As a result, retroactivity principles must be applied in light of the content of the particular provisions at issue. ...
>
> In the case of the FSIA, some provisions—such as the service-of-process and removal provisions—are readily identifiable as procedural and presumptively apply to all

> litigation filed after the FSIA's effective date. ... Other provisions of the FSIA, however, require a different result. Most significantly, new exceptions to the general rule of foreign sovereign immunity that abrogate past protections from suit are properly viewed under *Hughes* as abridging substantive rights."

2003 WL 22811828, at *11–12 (Nov. 14, 2003). But the *Altmann* Court disagreed with efforts to parse the FSIA into procedural and substantive sections to assess its applicability through the *Landgraf* lens, noting that "the FSIA defies such categorization." *Altmann*, 541 U.S. at 694. The Court held that the Act as a whole applies to pre-enactment conduct, explaining: "[W]e find clear evidence that Congress intended the Act to apply to preenactment conduct." *Id.* at 697. The Court further stated:

> "The FSIA's overall structure strongly supports this conclusion. Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. … In this context, ***it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect.***"

Id. at 698 (emphasis added).

As explained in *Altmann* and *Verlinden*, "the FSIA is not simply a jurisdictional statute 'concern[ing] access to the federal courts' but a codification of 'the standards governing foreign sovereign immunity as an aspect

of *substantive* federal law.'" *Altmann*, 541 U.S. at 695 (quoting 461 U.S. at 496–97). The Court further explained that the jurisdictional provisions of the FSIA (*i.e.*, 28 U.S.C. 1330(a), 1330(b), 1332(a)(4)) operate in tandem with, and are dependent upon, the substantive foreign sovereign immunity rules (*i.e.*, 28 U.S.C. 1604 through 1607):

> "Moreover, we noted in *Verlinden* that in any suit against a foreign sovereign, 'the plaintiff will be barred from raising his claim in *any* court in the United States' unless one of the FSIA's [immunity] exceptions applies, and we have stated elsewhere that statutes that '*creat[e]* jurisdiction' where none otherwise exists 'spea[k] not just to the power of a particular court but to the substantive rights of the parties as well.' Such statutes, we continued, 'even though phrased in 'jurisdictional' terms, [are] as much subject to our presumption against retroactivity as any other[s].'"

Altmann, 541 U.S. at 695 (quoting 461 U.S. at 496–97 and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)) (emphasis in original).

The D.C. Circuit's opinion mirrors the arguments considered and rejected in *Altmann*. The D.C. Circuit mistakenly sought to distinguish *Altmann* as concerning only procedural issues involving "jurisdiction under the FSIA," not the sort of "essentially substantive" issues that the D.C. Circuit believed to be at play in this matter. Pet.App.122a–123a. But this Court rejected the application of *Landgraf* to the FSIA, which "defies such categorization." *Altmann*, 541 U.S. at 694; *Fernandez-*

Vargas v. Gonzales, 548 U.S. 30, 38 n.6 (2006) ("The Court's conclusion in [*Altmann*], that *Landgraf* was to be avoided, turned on the peculiarities of" the FSIA.). Instead, the FSIA's provisions, by congressional design, affect *both* jurisdictional *and* "*substantive* federal law." *Altmann*, 541 U.S. at 695 (emphasis in original).

Even without this Court's guidance in *Altmann*, it is clear that the substantive aspects of the FSIA were interwoven with the statute's procedural aspects long before the enactment of the 2008 NDAA. From the beginning, the FSIA included substantive provisions, principally the substantive rules governing the scope of, and exceptions to, sovereign immunity from claims, certain damages, and counterclaims (§§1604–1607) and from attachments and execution of property (§§1609–1611). For instance, §1606 deals expressly with the extent of liability and the availability of punitive damages in cases where jurisdiction is established under the FSIA. In recommending the enactment of the proposed legislation which became the FSIA, the American Bar Association highlighted the Act's dual nature: "This legislation would establish significant reforms, ***procedural and substantive***, in the law of sovereign immunity." ABA Section of International Law, Vol. 101, Rep. No. 3, at 1091 (1976) (emphasis added).

Not only has the FSIA always contained substantive aspects, those substantive provisions always have been inextricably intertwined with its procedural provisions. Congress designed the FSIA's jurisdictional provisions to be essentially substantive by defining and intertwining them with the FSIA's substantive immunity provisions. In its section-by-section analysis of the FSIA, the House Judiciary Committee in September 1976 explained the

effect on the substantive rights of the parties through the interconnected and tandem operation of the jurisdictional provisions with the substantive immunity provisions:

> "A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity."

H.R. Rep. No. 94-1487, at 13 (1976). Although the FSIA did not include an express private right of action such as §1605A(c) until the 2008 NDAA, the jurisdictional limitations have adhered since 1976 to the substantive immunity provisions regardless of where a claim is brought, thereby making the jurisdictional limitations "essentially substantive." *Altmann*, 541 U.S. at 695 n.15; *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (noting that the immunity and jurisdictional provisions "work in tandem"); ABA Section of International Law, Rep. to the House of Delegates, 36 Int'l L. 1261, 1264 (2002) ("The FSIA is structured so that the issues of personal jurisdiction, subject matter jurisdiction, and immunity from suit are intertwined. … Under this structure, a court must determine whether the foreign state defendant is immune from suit to determine whether the court has personal and subject matter jurisdiction.").

The unanimous Court in *Verlinden* observed:

> "[T]he primary purpose of the Act was to 'se[t] forth comprehensive rules governing sovereign immunity,' ***the jurisdictional provisions of the Act are simply one part of this comprehensive scheme***. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state."

461 U.S. at 496–97 (citation omitted).

In this very case, the district judge remarked upon the interwoven nature of procedure and substance in the FSIA. Collecting cases from the D.C. and First Circuits, the district court observed: "Some courts have found jurisdiction and a cause of action under § 1605A and, in so doing, have noted that because § 1605A(c) incorporates the elements required to waive the foreign state's immunity and vest the court with subject matter jurisdiction under section 1605A, liability under section 1605A(c) will exist whenever the jurisdictional requirements of section 1605A are met." J.A.126a–127a. Thus, where a claimant falls within the categories of individuals as to which a claim under Section 1605A(c) is available, "[t]he elements for a waiver of immunity and for liability … may indeed be the same." *Id.* Such circumstances where questions of immunity and liability are one and the same underscore the *Altmann* Court's sage observation that "the FSIA defies … categorization" as substantive or procedural. 541 U.S. at 694.

The D.C. Circuit was therefore misguided in its efforts to distinguish the pre-2008 FSIA as jurisdictional but the 2008 FSIA as involving substantive provisions. *Altmann* does not support that assessment, nor does the FSIA itself.

Moreover, the enactment of the FSIA in 1976 exposed most sovereigns to a host of new liabilities for which they previously were immune, and every past and future amendment to the FSIA has done or may do the same. That unremarkable fact was not a proper basis for the D.C. Circuit to depart from *Altmann*. From the beginning, Congress intended the FSIA to control and extend liability in all appropriate pending cases without regard to the dates of the underlying conduct. Congress specifically included an initial 90-day period of delay after enactment before the FSIA became effective "in order to give adequate notice of the act and its detailed provisions to all foreign states." H.R. Rep. No. 94-1487, at 33 (1976). Following that initial period of delay, Congress was clear that courts "should henceforth" consider and decide all claims to immunity by foreign states according to the FSIA. 28 U.S.C. 1602. "Henceforth," which means "from this point on," leaves no doubt of the congressional meaning and purpose. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985). "From this point on," the FSIA, both its procedural and substantive provisions, were to apply to resolve all claims to immunity.

Not only has the FSIA exposed foreign sovereigns to new liability since 1976, the FSIA has set and controlled the "quantum" of civil liability which a foreign state and its political subdivisions and agencies or instrumentalities have faced in federal and state courts in the United States. For instance, §1606, including its bar on punitive damages that Congress has abrogated for terrorism cases twice

(once in 1998 and again in 2008 with §1605A), has dealt expressly with the extent of liability faced in all U.S. courts since 1976.

In proposing an initial draft of the legislation leading to the FSIA, the Departments of Justice and State proposed that immunity from punitive damages be limited to the foreign state itself and not include political subdivisions and agencies or instrumentalities. *Immunities of Foreign States, Hearing on H.R. 3493 Before the H. Comm. on the Judiciary*, 93rd Cong. 6–7 (1973). In the final version of §1606, Congress elected to broaden that immunity by allowing political subdivisions as well as the foreign state itself to assert immunity from punitive damages. H.R. Rep. No. 94-1487, at 10, 22 (1976).

After the district court's March 1998 decision in *Flatow,* 999 F.Supp.1, Congress confirmed that court's interpretation by amending §1606 to ensure that it permitted victims to recover punitive damages against foreign states in actions brought pursuant to §1605(a)(7). To permit awards of punitive damages, Congress in October 1998 revised §1606 to read that a foreign state except an agency or instrumentality thereof shall not be liable for punitive damages, "**except any action under section 1605(a)(7)**." App.13a (emphasis added). Two years later, Congress repealed that amendment and returned §1606 to its original text. App.14a.

Thus, although Congress in 2008 narrowed the immunity from punitive damages enjoyed by state sponsors of terrorism in relation to federal and state claims brought under §1605A(a), that amendment in no way altered or transformed the nature of the FSIA in a manner undercutting the reasoning or rationale of the

Court in *Altmann*. Indeed, Congress generally mirrored the 1998 congressional amendment allowing punitive damages against state sponsors of terrorism under the terrorism exception.

III. Even if the *Landgraf* presumption were applicable, the 2008 amendments to the FSIA clearly state that punitive damages are available for conduct occurring before 2008.

A. The 2008 NDAA provides clear statements that punitive damages may be recovered for pre-2008 conduct.

In clear statements, Congress made the 2008 amendments to the FSIA applicable to conduct which was the subject of then-pending cases. As then-Judge Kavanaugh recognized, when the 2008 amendments were enacted, Congress authorized retroactive punitive damages and "set forth three options for plaintiffs with pending cases to seek punitive damages against foreign nations." *Bakhtiar v. Islamic Republic of Iran*, 668 F.3d 773, 774 (D.C. Cir. 2012) (affirming denial of punitive damages where plaintiffs with a pending §1605(a)(7) case at the time of the 2008 amendments "did not pursue any of those statutorily provided options," thereby compelling the court to "respect the balance that Congress struck in allowing punitive damages against foreign nations but simultaneously imposing procedures and time limits for plaintiffs with pending cases to obtain such damages").

In §1083(c) of the 2008 NDAA, under the title "Application to Pending Cases," Congress gave instructions concerning how the 2008 amendments would apply retroactively. Pet.App.362a–365a. First, Congress

at §1083(c)(1) stated the general rule broadly and unambiguously: "The amendments made by this section shall apply to any claim ***arising under section 1605A*** of title 28, United States Code." Pet.App.362a (emphasis added). Undeniably, the actions brought by petitioners arose "under section 1605A." Whether relying upon the federal right of action at §1605A(c) or a state cause of action, petitioners' actions arose under the terrorism exception to immunity set forth at 1605A(a).

Second, Congress provided further direction regarding claims based on terrorist acts before January 2008, both for then-pending claims and for claims yet to be brought. In subsection §1083(c)(2) titled "Prior Actions," Congress stated that certain actions that had been "brought under section 1605(a)(7) … before the date of the enactment of this Act" and that remained pending "before the courts in any form" shall "be given effect as if the action had originally been filed under section 1605A(c)." Pet.App.362a–363a. Congress further made clear that the retroactive application to those pending cases was not limited by the "defenses of res judicata, collateral estoppel, and limitation period," defenses which were "waived" by statute. Pet.App.363a. This category of prior §1605(a)(7) actions included plaintiffs who had already received *final* judgments. The reason to allow plaintiffs to convert their final §1605(a)(7) judgments to §1605A judgments was to allow plaintiffs who had obtained compensatory damages against terrorist-defendants to seek punitive damages against those same defendants. *See Rimkus v. Islamic Republic of Iran*, 750 F.Supp.2d 163, 179 (D.D.C. 2010) (making this point). Those punitive damages were, of course, all to be awarded retroactively based on pre-2008 conduct.

Congress thus transformed pending claims arising under §1605(a)(7) into claims arising under §1605A, thereby authorizing a wide range of damages, including "punitive damages," for "any claim arising under section 1605A."[6] Because pending §1605(a)(7) claims must "be given effect as if" they arose under §1605A, punitive damages as well as any other damages for which terrorist states were not immune would be applicable to these pending cases retroactively.

Third, in subsection §1083(c)(3) titled "Related Actions," Congress provided instructions regarding claims brought following enactment of the 2008 NDAA based on terrorist acts before January 2008. The petitioners here so brought their federal and state law causes of action. Congress stated that such new claims "arising out of the same act or incident" as existing claims commenced under §1605(a)(7) "may be brought ***under section 1605A***." Pet. App.364a (emphasis added). In light of the language of §1083(c)(1), therefore, Congress plainly stated without limitation or qualification that the "amendments made by" §1083 "shall apply" to such new claims, including the recovery of punitive damages for which designated state sponsors were no longer immune.

Aware of these clear statements in §1083(c), the D.C. Circuit recognized, "[t]he 2008 NDAA plainly applies the new cause of action in §1605A(c) to the pre-enactment conduct of a foreign sovereign." Pet.App.122a; *see also* Pet.

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6. The underlying FSIA judgment in *Rubin v. Islamic Republic of Iran*, which this Court did not disturb, involved claims for conduct occurring in 1997 that initially were brought under §1605(a)(7) but were converted to §1605A claims after the passage of the NDAA. 138 S.Ct. at 820 n.1.

App.126a. But the D.C. Circuit supplied no textual reason to distinguish punitive damages from the retroactive application of 1605A, the private right of action at 1605A(c), or other illustrative damages set forth at §1605A(c). That is because the language and structure of 1605A do not permit such a reading.

At §1605A(c), Congress created a federal private right of action for victims of state sponsors of terrorism and expressly authorized a wide range of damages, including "punitive damages," without temporal limitation. Congress defined the action in the first sentence of 1605A(c). Then, in the immediately following second sentence, Congress provided: "***In any such action***, damages may include economic damages, solatium, pain and suffering, and punitive damages." (emphasis added). Given that Congress has plainly provided that the right of action shall apply retroactively, as the D.C. Circuit recognized, punitive damages thus are recoverable in "any such action." *See SAS Institute Inc. v. Iancu,* 138 S.Ct. 1348, 1353–54 (2018) (noting that "'any' means 'every'" and "the word 'any' naturally carries 'an expansive meaning").

As this Court has acknowledged, when Congress establishes a private right of action, it need not specifically enumerate the types or forms of damages available. *Franklin v. Gwinnett Cnty. Public Schools*, 503 U.S. 60, 66–69 (1992). Here, by expressly legislating that a party can recover "economic damages, solatium, pain and suffering, and punitive damages" under §1605A(c), Congress sought to ensure that there would be no ambiguity in that regard. But by barring punitive damages here, the D.C. Circuit effectively deleted "punitive damages" from §1605A and inserted §1605A within the restriction upon punitive

damages contained at §1606. Such a judicial interpretation not only cuts against a plain reading of the statute, it contradicts *Altmann*'s guidance that, in the context of the FSIA, it would "be anomalous to presume that an isolated provision … is of purely prospective application absent any statutory language to that effect." 541 U.S. at 698. There is no such statutory language to that effect here.

Altmann also stressed that "[t]he FSIA's overall structure strongly supports" the conclusion that Congress intended the Act to apply "regardless of when the underlying conduct occurred" because "[m]any of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976." 541 U.S. at 698.

The structure of the 2008 amendments similarly illustrates that §1605A is intended to apply regardless of when the underlying conduct occurred. For example, §1605A(a)(2)(A)(i)(II) expressly contemplates that a party may refile an already-pending suit, which necessarily arose from pre-enactment conduct, under §1605A pursuant to §1083(c)(2)(A).

Further, §1605A(b) permits that an action may be brought under §1605A if "a related action ***was*** commenced under section 1605(a)(7) (***before the date of the enactment of this section***)" within "10 years after April 24, 1996." (emphasis added). The statute thus expressly contemplates that the "related action," which arose from the same underlying conduct as a claim brought after the 2008 NDAA, may have been commenced well before 2008. In such instances, the conduct underlying both claims would have occurred prior to the NDAA's enactment.

B. The language in §1083(c) mirrors the language that *Landgraf* identified as an example of a clear statement that overcomes the presumption against retroactivity.

Even if *Landgraf* were relevant to this matter, its presumption against retroactivity does not apply because Congress included "clear statements" of its intention to permit retroactive application of the 2008 amendments to the FSIA. The relevant text of the NDAA mirrors the model language that the *Landgraf* Court offered as an example of an "unambiguous" and "determinate" "clear statement" that would overcome the anti-retroactivity presumption.

Landgraf explained that a statement that the new provision "shall apply to all proceedings pending on or commenced after the date of enactment of this Act" would satisfy the clear-statement rule. 511 U.S. at 260. Under *Landgraf*, such an "unambiguous directive" would overcome the anti-retroactivity presumption. *Id.* at 260–63.

Here, in the portion of §1083 of the 2008 NDAA titled "Application to Pending Cases," Congress stated that the new provisions, including the availability of punitive damages, "shall apply to any claim arising ***under section 1605A***." Pet.App.362a (emphasis added). And, in §1083(c)(3), Congress specifically allowed for new federal and state claims to be "brought under section 1605A," as petitioners did, based on terrorist acts before the enactment of the 2008 NDAA. Accordingly, the 2008 amendments, including the rescission of immunity from punitive damages, "shall

apply" to such new claims. Congress thus closely followed *Landraf*'s model statement.

Landgraf also pointed to the treaty in *Schooner Peggy* as a law which "unambiguously" permitted retroactive application. 511 U.S. at 273. In *Schooner Peggy*, the language of the treaty cited by the Court merely provided: "Property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications, (contraband goods destined to an enemy's port excepted) shall be mutually restored." 5 U.S. (1 Cranch) at 107. If such language "unambiguously" permitted retroactive application, then the 2008 NDAA, which includes explicit references and direction regarding its application to prior terrorist acts, certainly permits retroactive application.

C. Congress clearly provided that punitive damages were retroactively available by striking the terrorism exception from §1605 and inserting the terrorism exception into §1605A.

By its removal of the terrorism exception from Section 1605 of the FSIA and thus from the scope of Section 1606, Congress acted to ensure that punitive damages were available to injured U.S. government employees and their immediate family members on federal and state law claims brought under the terrorism exception of Section 1605A(a). No longer are state sponsors of international terrorism immune from punitive damages through Section 1606 of the FSIA because that provision is simply inapplicable to claims for relief brought under the terrorism exception. Through §1083 of the 2008 NDAA, Congress purposefully removed the terrorism exception from §1606's limitation

on punitive damages by striking §1605(a)(7) and adding §1605A(a). As the D.C. Circuit acknowledged below, §1606 only applies to §1605 and §1607, not §1605A. Pet. App.108a–109a. Therefore, §1605A is not affected by §1606's limitation of punitive damages. By removing the terrorism exception from §1605, which falls within the scope of §1606, Congress ensured that designated state sponsors of terrorism no longer enjoy immunity from punitive damages awarded under the terrorism exception, regardless of whether the claims were brought under federal or state law. *See also* Section IV *infra*. The express reference to the availability of "punitive damages" in §1605A(c) therefore was not required to allow victims of terrorism to recover punitive damages. But Congress included that language to remove any doubt as to their availability.

Furthermore, Congress enacted §1605A in the context of the plain command of the FSIA that claims by foreign states to immunity, "regardless of when the underlying conduct occurred," should be resolved according to the then-current rules of decision set forth in the FSIA. *Altmann*, 541 U.S. at 698. In §1602 of the FSIA, Congress provided that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. In short, henceforth or from this point on, the claims by foreign states to "exemption from a … liability" should be decided according to the FSIA's current provisions. Black's Law Dictionary (11th ed. 2019) (defining "immunity").

Congress also enacted §1605A in January 2008 after the *Altmann* opinion and must be understood to have

relied upon its rule that "the Act, freed from *Landgraf*'s antiretroactivity presumption, clearly applies to conduct … that occurred prior to" January 2008. *Altmann*, 541 U.S. at 700; *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents … and that it expect[s] its enactment[s] to be interpreted in conformity with them.").

D. The legislative history and text resulting from the President's veto of the initial version of the 2008 NDAA demonstrate that Congress and the President understood that §1605A, including the allowance for punitive damages, would apply retroactively.

President Bush vetoed the initial version of the 2008 NDAA on December 28, 2007 as a result of the retroactive application of §1605A, including punitive damages, to Iraq and the President's concern that Iraq would face increased liability based on conduct by its former dictator, Saddam Hussein. The President explained:

> "Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action ***backed by the prospect of punitive damages*** to support claims that may previously have been foreclosed. … The aggregate financial impact of these provisions on Iraq would be devastating."

App.15a (emphasis added).

In response, Congress revised §1083 to add §1083(d), which provided the President with authority to waive "any provision" of §1083 with respect to Iraq if, *inter alia*, the President found the waiver of the provision would "promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq." Pet.App.365a. In §1083(d)(2), which is titled "TEMPORAL SCOPE," Congress explained that the President's authority to waive provisions of §1083 "***shall apply – (A) with respect to any conduct or event occurring before or on the date of the enactment of this Act***." Pet.App.365a–366a (emphasis added).

That is, as also exhibited through the clear language of §1083(d), Congress intended for the provisions of §1083, including the availability of punitive damages, to apply retroactively and so provided the President with the authority to waive that result in relation to Iraq's liability for conduct "occurring before" enactment of the 2008 NDAA. Congress accompanied that authority with guidance in the 2008 NDAA at §1083(d)(4), further underscoring the 2008 amendments' retroactive nature:

> "It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime … [which] cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1)."

Pet.App.366a.

In addition to the plain statutory text, members of Congress highlighted that the waiver authority granted to the President to avoid the retroactive application of §1083 was limited to Iraq and no other terrorist state. As Senator Lautenberg explained, the modifications to the proposed act would deprive victims of "past Iraqi terrorism" from achieving "the same justice" as victims of past terrorism by other state sponsors of terrorism:

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

154 Cong. Rec. at S55 (emphasis added). Other members of Congress echoed these sentiments that the revised provisions of the NDAA still reached other state sponsors of terrorism. *E.g.*, 154 Cong. Rec. H75, H258 (daily ed. Jan. 16, 2008) (statement of Rep. Andrews) ("It is the wisdom of the compromise here that that provision remains in effect for all of the other states that are involved in state-sponsored terrorism, with the exception of Iraq, which was under the regime of Saddam Hussein.").

The President accepted that compromise and on January 28, 2008 signed into law the NDAA, which "was identical in all material respects but for the addition of Presidential waiver authority." *Beaty*, 556 U.S. at 853–54, 862 n.2.

IV. A state law cause of action under §1605A(a) is not subject to the restriction upon punitive damages set forth at §1606.

The D.C. Circuit also erred in concluding that plaintiffs relying on state law causes of action brought under §1605A(a) may not recover punitive damages for pre-enactment conduct.[7] Congress struck the terrorism exception from the general exceptions to immunity at §1605(a)(7) and added the terrorism exception to the new §1605A(a). By its plain terms, §1606 only applies "to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of" the FSIA. Pet.App.351a. Thus, the immunity from punitive damages available through §1606 for foreign states is not available to designated state sponsors of terrorism facing liability pursuant to the terrorism exception of §1605A(a).

Furthermore, §1605A(a) does not implicate *Landgraf*'s presumption against retroactive legislation because §1605A(a) is indisputably jurisdictional in nature. As the D.C. Circuit acknowledged, §1605A(a) is a "grant of jurisdiction." Pet.App.126a. The D.C. Circuit similarly

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7. Although this issue may not be described precisely in the question presented, it is so inextricably linked to the question that it is appropriate for the Court to review it. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); *see also* S.Ct. Rule 24.1(a) ("[T]he Court may consider a plain error not among the questions presented."). Moreover, it is a "purely legal question" integral to the D.C. Circuit's punitive damages holding below and was addressed in Sudan's opposition to the petition for certiorari. *Lewis v. Clarke*, 137 S.Ct. 1285, 1292 n.3 (2017); Br. in Opp. by Sudan at 24–25. The United States also suggested that the Court review this issue. Br. of U.S. at 19 n.8.

noted that *Altmann* involved a "grant of jurisdiction," Pet.App.123a, and held "[t]hat jurisdiction under the FSIA applies retroactively." Pet.App.122a. Thus, even under the D.C. Circuit's restrictive reading of *Altmann*, the rule of *Altmann*, not *Landgraf*, applies to state law claims brought under §1605A(a)'s "grant of jurisdiction"—including state law claims brought by non-U.S. national family members of murdered or injured U.S. Government employees—and permits the retroactive recovery of punitive damages.

CONCLUSION

The Court should reverse the portion of the D.C. Circuit's judgment vacating the district court's award of punitive damages and direct that the district court's award of punitive damages be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — STATUTES

28 U.S.C. § 1602

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Appendix A

28 U.S.C. § 1604

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Appendix A

28 U.S.C. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(Version Effective Immediately Before the Passage of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 on January 28, 2008)

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial

activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

> **(A)** any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> **(B)** any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or

any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607 , or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), 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 if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

> **(A)** if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App.

2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his

agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value

shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)--

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the

granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

Appendix A

28 U.S.C. § 1606

§ 1606. Extent of liability

(Original Version as Enacted in the
Foreign Sovereign Immunities Act of 1976)

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; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Appendix A

28 U.S.C. § 1606

§ 1606. Extent of liability

(Effective Oct. 21, 1998 through Oct. 28, 2000)*

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, except any action under section 1605(a)(7) or 1610(f); if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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* Amended on Oct. 21, 1998 by Treasury Department Appropriations Act of 1999, Pub. L. No. 105-277, § 117(b), 112 Stat. 2681-491. Amendment repealed on Oct. 28, 2000 by Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1543.

Appendix A

28 U.S.C. § 1606

§ 1606. Extent of liability

(Effective Oct. 28, 2000 through present)**

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; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

** Amended by Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1453 (2000) (repealing language added by Pub. L. No. 105-277, § 117(b), 112 Stat. 2681-491 (1998)).

APPENDIX B — PRESIDENTIAL MEMORANDUM OF DISAPPROVAL DATED DECEMBER 28, 2007

MEMORANDUM OF DISAPPROVAL

I am withholding my approval of H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," because it would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States.

The economic security and successful reconstruction of Iraq have been top priorities of the United States. Section 1083 of H.R. 1585 threatens those key objectives. Immediately upon enactment, section 1083 would risk the freezing of substantial Iraqi assets in the United States --including those of the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. This new liability, in turn, will only increase the potential for immediate entanglement of Iraqi assets in the United States. The aggregate financial impact of these provisions on Iraq would be devastating.

Appendix B

While my Administration objected to an earlier version of this provision in previous communications about the bill, its full impact on Iraq and on our relationship with Iraq has become apparent only in recent days. Members of my Administration are working with Members of Congress to fix this flawed provision as soon as possible after the Congress returns.

Section 1083 would establish unprecedented legal burdens on the allocation of Iraq's funds to where they are most needed. Since the fall of Saddam Hussein, I have issued Executive Orders to shield from entanglement in lawsuits the assets of the DFI and the CBI. I have taken these steps both to uphold international legal obligations of the United States and to remove obstacles to the orderly reconstruction of Iraq. Section 1083 potentially would place these crucial protections of Iraq's core assets in immediate peril, by including a provision that might be misconstrued to supersede the protections I have put in place and to permit the judicial attachment of these funds. Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions.

Moreover, section 1083 would permit plaintiffs to obtain liens on certain Iraqi property simply by filing a notice of pending action. Liens under section 1083 would be automatic upon filing a notice of a pending claim in a judicial district where Iraq's property is located, and they would reach property up to the amount of the judgment plaintiffs choose to demand in their complaints. Such pre-judgment liens, entered before claims are tested and cases are heard, are extraordinary and have never

previously been available in suits in U.S. courts against foreign sovereigns. If permitted to become law, even for a short time, section 1083's attachment and lien provisions would impose grave -- indeed, intolerable -- consequences on Iraq.

Section 1083 also includes provisions that would expose Iraq to increased liability in lawsuits. 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. Section 1083 removes defenses common for defendants in the United States -- including *res judicata*, collateral estoppel, and statutes of limitation --upon which the Iraqi government has relied. And section 1083 would attempt to revive a $959 million judgment against the new democratic Government of Iraq based on the misdeeds of the Saddam Hussein regime.

Exposing Iraq to such significant financial burdens would weaken the close partnership between the United States and Iraq during this critical period in Iraq's history. If Iraq's assets are frozen, even temporarily, that could reduce confidence in the Iraqi dinar and undermine the success of Iraq's monetary policy. By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits. Section 1083 would be viewed with alarm by the international community and would invite reciprocal action against United States assets abroad.

Appendix B

The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. *The Pocket Veto Case*, 279 U.S. 655 (1929). In addition to withholding my signature and thereby invoking my constitutional power to "pocket veto" bills during an adjournment of the Congress, I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed.

This legislation contains important authorities for the Department of Defense, including authority to provide certain additional pay and bonuses to servicemembers. Although I continue to have serious objections to other provisions of this bill, including section 1079 relating to intelligence matters, I urge the Congress to address the flaw in section 1083 as quickly as possible so I may sign into law the National Defense Authorization Act for Fiscal Year 2008, as modified. I also urge the Congress to ensure that any provisions affecting servicemember pay and bonuses, as well as provisions extending expiring authorities, are retroactive to January 1, 2008.

GEORGE W. BUSH

THE WHITE HOUSE,

December 28, 2007.