No. 17-1406

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF SUDAN,
Cross-Petitioners,

v.

MONICAH OKOBA OPATI, IN HER OWN RIGHT, AS EXECUTRIX OF THE ESTATE OF CAROLINE SETLA OPATI, DECEASED, ET AL.,
Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

LEGISLATIVE MATERIALS

FEDERAL RULES AND REGULATIONS

OTHER AUTHORITIES

SUPPLEMENTAL BRIEF FOR CROSS-PETITIONERS

The United States urges this Court to review the Petition's second Question Presented because it is important and "affects, in these cases alone, billions of dollars in punitive damages." U.S. Br. (No. 17-1268) 10. If this Court determines that those reasons are sufficient to justify review of that Question Presented, those same reasons justify review of each of the Questions Presented in the Cross-Petition. Each of the Questions Presented in the Cross-Petition is similarly important and each similarly implicates billions of dollars in damages — most implicating a significantly higher level of damages than those at issue in the Petition.

I. The United States Does Not Properly Consider The Text, Purpose, And History Of §1605A In Interpreting The Term "Extrajudicial Killing"

The United States' rejection of the international-law definition of "extrajudicial killing" is surprising given the rich legislative history memorializing the views of former State Department officials. Those officials advocated against a broad and politically charged "international terrorism" basis for jurisdiction, fearing that a broad definition would cause states not to appear in these actions and "undermine the broad participation [the United States] seek[s]." *See, e.g. Hr'g on S. 825*, 103d Cong. 14, 83, 85. This fear is precisely why the State Department selected predicate acts for §1605(a)(7) that were recognized under international law.

The United States is off-base in suggesting (at 12) that the FSIA's reliance on a domestic statute (the

TVPA), and not an international convention, in defining "extrajudicial killing" somehow renders its international-law definition inapplicable. The TVPA's explicit purpose was to incorporate international-law principles. Cross-Pet. 18-19.

The United States misinterprets the phrase "deliberated killing" as indicative of congressional intent that "extrajudicial killing" "reach[ed] a broader range of conduct." U.S. Br. 12-13. The legislative history explaining "deliberated killing" confirms instead that it was intended to have *a limiting effect* by "exclud[ing] killings that lack the requisite extrajudicial intent, such as those caused by a police officer's authorized use of deadly force." H.R. Rep. 102-367, pt. 1, at 5 (1991).

The United States likewise takes an overly myopic view of courts of appeals' decisions interpreting "extrajudicial killing." U.S. Br. 13. The state-actor requirement in "extrajudicial killing" is drawn from the international-law definition of the act. *See, e.g.*, *Kadić*, 70 F.3d at 243-44. Although §2 of the TVPA identifies state agents as proper defendants in claims brought under the TVPA, this inclusion does not mean that Congress intended to exclude the state-actor component of the international-law meaning of "extrajudicial killing" in the definition set forth in §3.

The state-actor requirement in "extrajudicial killing" does not "drain 'material support' of much of its practical effect," as the United States suggests. U.S. Br. 13. Significantly, two of the predicate acts in §1605A, aircraft sabotage and hostage taking, do not require state action. 28 U.S.C. §1605A(h)(1)

(referencing Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which applies to "any person"); 28 U.S.C. §1605A(h)(2) (referencing Article 1 of the International Convention Against the Taking of Hostages, which applies to "any person"). Moreover, even the hypothetical offered by the United States (at 13) involves a state actor in that the party contracting with the foreign state becomes an agent of the state in carrying out the killing. The incident giving rise to the *Flatow* case — which the United States curiously contends underscores their points on material support (at 14) — similarly involved a state actor. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 10 (D.D.C. 1998) (acknowledging that the perpetrator of the attack was "acting *under the direction of*" Iran (emphasis added)).

The United States misplaces reliance on a single reference to the U.S. Embassy bombing in Beirut in a House Report as indicative of congressional intent to include terrorist bombings in §1605(a)(7), §1605A's predecessor. U.S. Br. 14. But that reference was made in the context of discussing a much broader comprehensive antiterrorism bill and there is no way to know if the comment was made in connection with §1605(a)(7), which formed only a small part of the bill under discussion. Indeed, the comment appears only in the "Background and Need for the Legislation" section of the House Report, and any number of provisions in the comprehensive bill could have been intended to address the Beirut bombing. *See, e.g.*, H.R. Rep. No. 104-383 at 4 (1995) (criminalizing "acts of terrorism transcending international boundaries");

id. at 6 (criminalizing "Conspiracy to kill, maim, or injure persons or damage property in a foreign country").

In the end, the term "extrajudicial killing" cannot blindly be divorced from its international-law meaning of a summary execution by state actor. If this Court grants the Petition, it should review the D.C. Circuit's erroneous interpretation of this critical predicate act that produced almost $10.3 billion in default judgments.

II. The United States Fails To Apply A Principled Approach To Statutory Interpretation In Addressing The Meaning Of "Claimant Or Victim"

The United States offers no principled textual analysis to explain the distinction Congress intended between the jurisdictional words "claimant or victim." The "plain meaning" the D.C. Circuit afforded the term "claimant" renders "victim" superfluous, because under that interpretation anyone asserting a claim would qualify as a "claimant," including a "victim." Pet. App. 100a-101a. The United States fails to acknowledge much less account for this problem with the D.C. Circuit's holding, even though it led to an award of $8.4 billion in damages. Because a "claimant" logically cannot be a "victim," *Rubin* — decided after *Owens* — counsels that courts must ascertain the meaning of "claimant" from the other subsections of §1605A. 138 S. Ct. at 825.

Section 1605A(a)(2)(ii) specifies whose actions over which a court can exercise subject-matter

jurisdiction, while §1605A(c) specifies who may bring the federal claim. These provisions are interconnected, as §1605A(c)'s cross references to §1605A(a) make clear, and the only reasonable interpretation is that the plaintiffs listed in each subsection are the same. Although "claimant or victim" is not repeated in §1605A(c), the only sensible interpretation is that people who qualify as "claimants or victims" are present in the list of persons to whom a foreign state "shall be liable." The list of persons in §1605A(c)(1) through (4) is identical to those in §1605A(a)(2)(ii)(I) through (III) with one material difference: §1605A(c)(4) adds "the legal representative of" any of the individuals specified in §1605A(c)(1) through (3). The individuals identified in §1605A(c)(1) through (3) are most naturally understood to be the "victims." Only the legal representative, identified under (4), does not satisfy the ordinary meaning of "victim." Therefore, the legal representative must logically signify the "claimant."

The legislative history, stripped of the gloss applied by the United States (at 17) and read in its full context supports this conclusion. The House Report selectively quoted by the United States actually provides, "where the victim is not alive to bring suit, the victims's [sic] legal representative or another person who is a proper claimant in an action for wrongful death may bring suit. Courts may look to state law for guidance as to which parties would be the proper wrongful death claimants." H.R. Rep. No. 103-702, at 5. This demonstrates that Congress used "claimant" to describe the victim's representative,

recognizing that different phrases may describe that claimant under state law.

The legislative history inescapably establishes that Congress had in mind the victim as a plaintiff, on the one hand, and the victim's "surviving claimant," the "victim's estate," or the victim's "survivors," on the other hand, as plaintiffs whom Congress collectively referred to as "claimants" in the statutory text. *See* Cross-Pet. 23-24; *see also* 142 Cong. Rec. S3463 (Apr. 17, 1996) (statement of Sen. Brown) (terrorism exception "will now allow victims of terrorism, hostage taking or torture abroad, or their survivors to seek restitution"); H.R. Rep. No. 105-48, at 2 (1997) ("American nationals who are victims of such acts or their surviving claimants [to] bring an action.").

Lastly, the United States' assertion (at 16) that the Seventh Circuit's decision in *Leibovitch* is consistent with the D.C. Circuit is misleading. The Seventh Circuit glossed over the "claimant or victim" language and assumed — without discussion in a default context — that the foreign-national family members could assert their own emotional distress claims under Israeli law. *Leibovitch*, 697 F.3d at 570.

III. The United States Misconstrues §1605A In Addressing The Availability Of State-Law Claims For Foreign-National Family Members

The D.C. Circuit's decision on the third Question Presented implicates $7.4 billion dollars in default judgments (including punitive damages) for four

hundred sixty foreign-national family-member plaintiffs. The United States' view (at 17-19) is effectively that those plaintiffs, who do not qualify for §1605A(c)'s cause of action, instead have free-wheeling access to other sources of substantive law, absent any federal statutory limitation on the extent or scope of liability for such claims. This is a radical departure from both the current statutory scheme under §1605A and the former scheme under §1605(a)(7) and §1606.

Sudan's argument that §1605A(c) provides the exclusive remedy is sound and avoids the virtually limitless increase in potential liability for foreign states advocated by the United States. In contrast to the position of the United States, Sudan's position advances Congress's intent, recognized by the D.C. Circuit, to eliminate the "patchwork" of inconsistent remedies produced under the prior framework. Cross-Pet. 27; Pet. App. 128a-129a.

Review of this question is exceptionally important as U.S. courts continue to be the clearinghouse for these types of foreign-cubed claims — claims which are disfavored in this Court's recent jurisprudence. *See Jesner*, 138 S. Ct. at 1412 (Gorsuch, J., concurring) ("A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand.").

Review of this question is particularly warranted if this Court grants review of Petitioners' punitive

damages question. Under the United States' view, in enacting §1605A, Congress apparently intended to lift the punitive damages provision in §1606 in order to benefit foreign-national family members who did not qualify for §1605A and to allow those plaintiffs to obtain such damages for pre-enactment conduct. U.S. Br. (No. 17-1268) 19-21. If this Court reviews the retroactive application of punitive damages for Petitioners' state-law claims, as suggested by the United States (*id.* at 19 n.8), this Court would first need to determine whether Congress intended foreign-national family-member plaintiffs to have recourse to other sources of substantive law or whether Congress instead intended to eliminate §1606's longstanding "pass-through" to other sources of substantive law, foreclosing Petitioners' state-law claims and the "patchwork" of inconsistent results. Cross-Pet. 25-28.

IV. The United States Takes Conflicting Views On The Limitations Provision Of The Terrorism Exception Versus Similar Jurisdictional Limitations Provisions

Hundreds of plaintiffs (mostly foreign-national family members) inexplicably filed their actions against Sudan *years* after the ten-year limitations period expired, resulting in default judgments at issue here totaling nearly $3.9 billion. Meanwhile, plaintiffs continue to flood U.S. courts — principally in the District of Columbia — with stale actions against state sponsors of terrorism.

Because §1605A actions are typically decided in the default context, the Cross-Petition provides this Court with a rare and unique opportunity to clarify the temporal limits to haling a foreign state into U.S. courts.

The United States' view on the statute of limitations in §1605A(b) stands in stark contrast to its consistent position that limitations on its own waivers of sovereign immunity are jurisdictional. Indeed, in *Wong*, the United States urged this Court (successfully) to grant its petition to "enforce the jurisdictional limitations and mandatory deadlines Congress prescribed, to provide clarity in an area that has been mired in uncertainty, and to relieve the attendant burdens on the United States and the courts." Petition for Writ of Certiorari at 10-11, *Wong*, 135 S. Ct. 1625 (2015) (No. 13-1074).

Those same concerns animate Sudan's Cross-Petition and are heightened by the proliferation of facially time-barred §1605A actions in U.S. courts. In the D.C. district court alone, there are at least thirty such actions pending today — nineteen of which were filed in the short period following the D.C. Circuit's erroneous decision in *Owens*. *See* Suppl. App. 1a-3a. The recent decision in *Maalouf v. Islamic Republic of Iran* has exacerbated the proliferation of such stale actions by barring district courts from raising the §1605(b) limitations defense *sua sponte* regardless of international comity concerns. No. 18-7052, slip op. at 7, 29-31 (D.C. Cir. May 10, 2019).

The United States' broad reliance on *Wong* is highly suspect. In *Wong*, this Court held that §2401(b), which speaks only to a *claim*'s timeliness, is non-jurisdictional. Section 1605A(b), like §2401(a), speaks to a court's authority to hear an *action*, and *Wong* did not disrupt the long line of cases holding that §2401(a) is jurisdictional. *See, e.g.*, *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (holding that §2401(a) is a jurisdictional condition). This conclusion endures after *Wong*. *See, e.g.*, *Wash. Alliance of Tech Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 342 n.4 (D.C. Cir. 2018) (stating §2401(a) is jurisdictional).

The United States glosses over these details, relying on *Wong*'s broad-brush language that Congress must do "'something special'" to "'tag a statute of limitations'" as jurisdictional. U.S. Br. 19-20 (quoting 135 S. Ct. at 1632). But *Wong* made clear: "That does not mean 'Congress must incant magic words.'" 135 S. Ct. at 1632 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). Courts still consider context, including previous interpretations of similar provisions, as probative of congressional intent to make a provision jurisdictional. *Sebelius*, 568 U.S. at 153-54.

The United States also fails to appreciate that the text of §1605A(b)'s predecessor, §1605(f), demonstrates that Congress intended the provision to limit the jurisdictional waiver of immunity. U.S. Br. 20. Section 1605(f)'s statement that "[a]ll principles of equitable tolling . . . shall apply," would have been

unnecessary were the provision non-jurisdictional, because such principles always apply to non-jurisdictional limitations unless otherwise prohibited. The equitable tolling principles in §1605(f) were carried forward to §1605A(b)(1) to the extent that Congress intended plaintiffs with claims that arose before the terrorism exception's enactment date to have ten years from that date to file an action. *See Simon v. Republic of Iraq*, 529 F.3d 1187, 1194 (D.C. Cir. 2008) (*rev'd on other grounds, sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009)). Moreover, the D.C. Circuit has previously characterized §1605(f) as jurisdictional, and nothing suggests that §1605A(b) should be viewed any differently. *Id.* at 1194, 1196.

Lastly, the United States ignores the pronounced circuit split in which the majority holds that a defaulting party has the *right* to challenge a default judgment based on the sufficiency of the complaint. Cross-Pet. 29-30. The *Opati, Aliganga,* and *Khaliq* complaints were time-barred when filed and thus facially insufficient. Sudan timely appealed those default judgments and had a right to be heard. The D.C. Circuit erred — not principally by refusing to exercise its discretion as the United States asserts (at 21) — but by failing to afford Sudan the very right to which it was entitled. Thus, even if this Court were to decline to consider the jurisdictional question, the D.C. Circuit's decision denying Sudan's right to be heard — in conflict with five circuits — is certainly worthy of review.

V. The United States Approves A Liberal Policy Favoring Adjudication On The Merits But Nevertheless Agrees With The D.C. Circuit's Denial of Vacatur

In finding that the D.C. Circuit properly faulted Sudan's "litigation-related conduct" in denying Sudan's request for vacatur (U.S. Br. 22), the United States repeats the D.C. Circuit's same critical error: treating Sudan as a "double-defaulter" in all of the cases on review. In fact, Sudan briefly appeared only in *Owens*, and the remaining six actions were filed years later. The United States is thus incorrect that the D.C. Circuit's analysis of Sudan's vacatur challenge was "thorough and fact-bound." *Id.* It was neither.

The date of Sudan's appearance in each action cannot be disputed or so easily glossed over. Nor is the unrebutted evidence in the Ambassador's declaration, though the district court rejected it out of hand. All told, the United States overlooks the question for which Sudan seeks this Court's review: whether, given these undisputed facts, Sudan has shown excusable neglect or extraordinary circumstances justifying vacatur of over $10.3 billion in default judgments.

Notably, this Court has not provided guidance on Rule 60(b)(1) and (6) in decades. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993). The United States' brief makes evident that the proper application of the *Pioneer* factors, particularly in a case involving a foreign sovereign, requires this

Court's guidance. For example, the United States approvingly cited the D.C. Circuit's disregard of the "general policy" favoring adjudicating on the merits, but it simultaneously cited cases emphasizing a policy of granting vacatur, even where the defendant defaulted intentionally. *See* U.S. Br. 22-23 (citing, e.g., *Gregorian v. Izbestia*, 871 F.2d 1515 (9th Cir. 1988)). And citing *FG Hemisphere*, the United States emphasized that the Congo "acted expeditiously to protect its interests once it was aware" of an execution order (U.S. Br. 23 (citing 447 F.3d 835 (D.C. Cir. 2006)), but at the same time discredited Sudan's appearance — which occurred well before the execution stage (indeed, in time for a direct appeal of the judgment).

In any event, the strong policy favoring adjudication on the merits would be eviscerated if this question is unworthy of review in the face of a grant of the Petition. To consider the imposition of billions of dollars of liability without giving Sudan — which has now been litigating this action and newly filed actions for over four years — a chance to defend on the merits would render Rule 60(b) essentially meaningless.

CONCLUSION

For the foregoing reasons, if this Court grants the *Opati* Petition, it should grant the Conditional Cross-Petition.

Respectfully submitted,

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June 4, 2019

APPENDIX

APPENDIX A

Cases Pending in the U.S. District Court for the District of Columbia Under 28 U.S.C. §1605A as of June 2, 2019, That Are Facially Barred in Whole, or in Part, by the Ten-Year Statute of Limitations		
No.	**Case**	**Filing Date**
1.	*Wise v. Bank Markazi Jomhouri Islami Iran*, No. 19-cv-995-TJK	Apr. 9, 2019
2.	*Estate of John McCarty v. Islamic Republic of Iran*, No. 19-cv-853-RJL	Mar. 26, 2019
3.	*Lee v. Islamic Republic of Iran*, No. 19-cv-830-APM	Mar. 25, 2019
4.	*Pennington v. Islamic Republic of Iran*, No. 19-cv-796-JEB	Mar. 21, 2019
5.	*Aceto v. Islamic Republic of Iran*, No. 19-cv-464-BAH	Feb. 25, 2019
6.	*Encinas v. Islamic Republic of Iran*, No. 18-cv-2568-RMC	Nov. 7, 2018
7.	*Williams v. Islamic Republic of Iran*, No. 18-cv-2425-RDM	Oct. 23, 2018
8.	*Estate of Christopher Brook Fishbeck v. Islamic Republic of Iran*, No. 18-cv-2248-CRC	Sept. 27, 2018
9.	*Zambon v. Islamic Republic of Iran, Ministry of Foreign Affairs*, No. 18-cv-2065-JDB	Aug. 31, 2018

No.	Case	Filing Date
10.	*W.A. v. Islamic Republic of Iran*, No. 18-cv-1883-CKK	Aug. 10, 2018
11.	*Estate of Robert P. Hartwick v. Islamic Republic of Iran*, No. 18-cv-1612-CKK	July 7, 2018
12.	*Jakubowicz v. Islamic Republic of Iran*, No. 18-cv-1450-RDM	June 19, 2018
13.	*Ayers v. Islamic Republic of Iran*, No. 18-cv-265-RCL	Feb. 5, 2018
14.	*John Doe v. Democratic People's Republic of Korea*, No. 18-cv-252-DLF	Feb. 1, 2018
15.	*Salzman v. Islamic Republic of Iran*, No. 17-cv-2475-RDM	Nov. 16, 2017
16.	*Field v. Bank Markazi Jomhouri Islami Iran*, No. 17-cv-2126-TJK	Oct. 13, 2017
17.	*Tollefson v. Islamic Republic of Iran*, No. 17-cv-1726-EGS	Aug. 24, 2017
18.	*Ewan v. Islamic Republic of Iran*, No. 17-cv-1628-JDB	Aug. 11, 2017
19.	*Schooley v. Islamic Republic of Iran*, No. 17-cv-1376-BAH	July 13, 2017
20.	*Schertzman Cohen v. Islamic Republic of Iran*, No. 17-cv-1214-JEB	June 20, 2017
21.	*Donaldson v. Islamic Republic of Iran*, No. 17-cv-1206-EGS	June 19, 2017

No.	Case	Filing Date
22.	*Holladay v. Islamic Republic of Iran*, No. 17-cv-915-RDM	May 15, 2017
23.	*Brooks v. Bank Markazi Jomhouri Islami Iran*, No. 17-cv-737-TJK	Apr. 20, 2017
24.	*Hake v. Bank Markazi Jomhouri Islami Iran*, No. 17-cv-114-TJK	Jan. 17, 2017
25.	*Dibenedetto v. Iranian Ministry of Information and Security*, No. 16-cv-2429-TSC	Dec. 10, 2016
26.	*Martinez v. Islamic Republic of Iran*, No. 16-cv-2193-EGS	Nov. 2, 2016
27.	*Burks v. Islamic Republic of Iran*, No. 16-cv-1102-CRC	June 13, 2016
28.	*Karcher v. Islamic Republic of Iran*, No. 16-cv-232-CKK	Feb. 12, 2016
29.	*Barry v. Islamic Republic of Iran*, No. 16-cv-1625-RC	Aug. 10, 2016
30.	*Bova v. Islamic Republic of Iran*, No. 15-cv-1074-RCL	July 8, 2015